REPORT OF THE COMMISSION ON GOVERNMENT PROCUREMENT

VOLUME 4

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HOLIFIELD

SENATOR EDWARD J. GURNEY
RICHARD E. HORNER
CONGRESSMAN FRANK HORTON
PETER D. JOERS
ARTHUR F. SAMPSON
FRANK SANDERS
ELMER B. STAATS
JAMES E. WEBB

The Honorable Spiro T. Agnew
President of the Senate
Washington, D. C.

and

The Honorable Carl B. Albert
Speaker of the House of
Representatives
Washington, D. C.

Gentlemen:

In accordance with the requirements of Public Law No. 129, Ninety-first Congress, as amended by Public Law No. 47, Ninety-second Congress, the Commission on Government Procurement submits herewith its report.

Respectfully yours,

E. Perkins McGuire

E. Perkins McGuire
Chairman

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JAMES E. WEBB[3]
Attorney at Law
Washington, D. C.

[1] Appointed April 10, 1972 to replace Senator Henry M. Jackson who resigned.
[2] Appointed June 12, 1972 to replace Robert L. Kunzig who resigned.
[3] Appointed March 6, 1972 to replace Joseph W. Barr who resigned.

REPORT OF

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the Government to a third party, the existence and extent of contractor liability remains unresolved. The net effect of these omissions is to pressure the contractor to procure additional insurance coverage or to maintain a reserve fund for self-insurance. Such a result is inconsistent with the rationale for having a general policy of self-insurance.

We thus recommend that a Government-wide policy of self-insurance, subject to certain exceptions, be established for the risk of loss of or damage to Government property resulting from any defect in items supplied by a contractor and finally accepted by the Government. This general policy should apply equally to prime contractors and their subcontractors and suppliers. In addition, where items delivered by a contractor to the Government are sold or otherwise transferred by the Government to a third party, we recommend that the third party have no greater rights against the prime contractor or its subcontractors or suppliers than the Government would have had, had it retained the items.

LIABILITY FOR CATASTROPHIC ACCIDENTS

The Government increasingly has engaged in procurement of items containing or giving rise to physical and chemical forces of tremendous power. The unintentional explosion of a nuclear device aboard an aircraft, the misfiring of a missile or rocket, and the accidental release of poisonous or otherwise hazardous substances are examples of catastrophes that might arise from Government procurement activities. The safety record of the Government and its contractors has thus far been excellent, with only one recent catastrophic accident, the 1947 Texas City explosion, arising in connection with a Government program. However, human and mechanical error cannot be completely eliminated, and the risk of such a disaster is real and must be faced. Thousands of lives could be lost and millions of dollars in property damage sustained as a result of a single calamitous accident.

We found the existing laws and insurance programs inadequate to cope with two basic needs that would exist in the event of a catastrophic accident arising from a Government program: (1) the need to provide prompt and complete financial assistance to the victims of a catastrophic accident, and (2) the need to shield contractors and subcontractors from unrealistic and uninsurable risks in connection with such an accident. As in the case of natural disasters, which occur with some regularity and even predictability, providing relief from the damage caused by a catastrophe arising from a Government program has not been the subject of careful advance legislative planning and preparation, except in certain special cases.

At present, there are two primary means of providing relief through the private sector in connection with Government-connected catastrophic accidents: private insurance and civil suit against a negligent Government contractor. Due primarily to the magnitude of the damage that would be involved in a catastrophic accident, we found that neither can provide adequate relief to victims nor protect contractors against the risk of such an accident.

First, private insurance carried by individuals is inadequate because only a small percentage of individuals carry such insurance and, even when it is carried, it only affords protection up to a certain dollar limit. Second, although contractors engaged in hazardous Government programs ordinarily carry insurance, including product liability insurance, the liability for a catastrophic accident would exceed the limits of commercial insurance coverage and, in many cases, the total assets of the contractor. Thus, a successful suit against a contractor as a result of a catastrophic accident would likely result in the liquidation of the contractor without fully compensating the victims. Moreover, the problems of proving liability for a catastrophic accident can be difficult or impossible. The program might be highly technical and highly classified, with only the Government and involved contractors capable of identifying the facts; or the faulty equipment could be destroyed in the accident. It would be difficult to trace the cause of the accident, to identify the responsible contractor and prove its liability in a lawsuit.

Apart from the contractor, the Government also may be liable. Government liability at present may be based on one or more of several existing statutes and programs providing for

FOREWORD

Volume 4 consists of four parts:

- Part G—Legal and Administrative Remedies
- Part H—Selected Issues of Liability: Government Property and Catastrophic Accidents
- Part I—Patents, Technical Data, and Copyrights
- Part J—Other Statutory Considerations.

Part G analyzes existing systems for resolving disputes in connection with the award and performance of contracts. Recommendations are made to achieve the fair resolution of these disputes. This part also covers the applicability and administration of Public Law 85–804, which concerns extraordinary contractual authorities, and contractor debarment procedures.

Part H includes a consideration of two selected areas of important concerns: liability for loss of or damage to Government property; and possible effects of catastrophic accidents arising from Government programs.

In Part I, the Commission's extensive reviews of the specialized areas of patent, technical data, and copyright policies are summarized. Improvements are recommended in each area with regard to both the relations between the Government and its contractors and the rights of third parties.

Part J discusses other statutory problems identified in our review of procurement-related statutes. In addition to recommending consolidation and simplification of the statutory framework, it makes recommendations with respect to the Truth in Negotiations and Renegotiation acts and identifies statutes which are obsolete.

While each Commissioner does not necessarily agree with every aspect of this report, the Commission as a whole is in agreement with the general thrust of the discussion and recommendations, except where noted.

Part G—Legal and Administrative Remedies

> property of the purchaser or third persons, loss of use or rental value, and loss of business, production or profits by the purchaser.[6]

After 1967, the Air Force began seeking warranty coverage in its contracts. The question of liability for damage to Government property (other than in construction contracts) remained vague and uncertain. The matter was aired in 1967 by the Commander of the Air Force Logistics Command who observed that the Air Force did not intend to hold contractors liable for "secondary or tertiary damages."[7] On his suggestions, DOD chartered a working group to study problems involved in Government contract warranties.[8] Specific review and recommendations were requested on five questions, one of which was, "What should DOD policy be with respect to liability for consequential damages when warranties are involved?"[9] The 1969 *Report of the Working Group on Contract Warranties* stated that "DOD's current policy on recovery for consequential damages under contract warranty provisions is not clearly established" and recommended that ASPR guidelines be established for inclusion or exclusion in each procurement.[10]

In view of this background, the possibility that Menasco might be held liable for damages in excess of the cost of repair or replacement of the defective landing gear stunned industry. Defense contractors understood that the general practice of Government in military contracting was to accept risk for loss or damage except for the warranted item that was defective.[11] The industry concept of the Government's policy of self-insuring Government property against loss or damage arising from defective products apparently was so universally accepted that industry, as a rule, did not request increased contract prices even when the new ASPR warranty clauses came into use.

The history of the Government's pursuit of claims for lost or damaged property supports the industry understanding of the unwritten policy of self-insurance. Except for nominal repairs and replacements, there is little precedent in the courts, boards of contract appeals, or the General Accounting Office on claims against contractors or subcontractors for recovery of such damages.[12] This is not to say that the Government has never asserted claims of this nature against contractors. However, they have apparently been settled on broader bases usually involving forward or long-term commitments.[13]

Acting on the *Report of the Working Group on Contract Warranties*,[14] and in the wake of the Menasco incident, the ASPR Committee undertook a special case study to revise and clarify DOD's policy on warranties and consequential damages.[15] The committee held discussions with member company representatives of the Council of Defense and Space Industries Associations (CODSIA), with stock and mutual property companies, and with casualty and aviation insurers. In October 1970, the committee proposed new ASPR coverage on contractor liability for defective supplies including limitations on liability for defects. The letter of transmittal stated that:

> The proposed coverage would establish a policy that the Department of Defense should, in the interests of economy, generally be a self-insurer with regard to casualty losses or damages which result from defective supplies furnished by a contractor.[16]

It stated that the policy, however, would not exempt contractors from liability for loss or damage to the contract end items themselves or when an express warranty provision otherwise included in the contract made the contractor liable for such loss or damage.

In February 1971, DOD issued Defense Pro

[6] Industry Advisory Council, *Report of the Working Group on Contract Warranties*, June 12, 1969, at 7. See also note 8 *infra*.

[7] Address by Gen. Thomas P. Gerrity before the Dayton, Ohio, Chapter of the National Security Industrial Association, Jan. 25, 1967.

[8] The Working Group was established on May 1, 1968, by the then Deputy Secretary of Defense, Paul H. Nitze. Seven members were from the Dep't of Defense and seven from industry. Gen. James O. Lindberg, USAF, served as chairman. The Group's final report, *Report of the Working Group on Contract Warranties*, was submitted in June 1969.

[9] Industry Advisory Council, *supra* note 6, at 1.

[10] *Ibid.*, at 7.

[11] See Payne, *supra* note 2, at 49. See also Spriggs, "Implied Warranties Under Government Contracts," 4 *Pub. Contract* L.J. 80, 88–89 (1971).

[12] *Australia* v. *Lockheed Aircraft Corp.*, *supra* note 1, affidavit b Barry J. Shillito, Assistant Secretary of Defense, Apr. 27, 1971.

[13] *Ibid.*, supplemental affidavit by Barry J. Shillito, July 26, 197

[14] Industry Advisory Council, *supra* note 6.

[15] U.S. Dep't of Defense, Office of the Assistant Secretary fo Installations and Logistics, *Warranties—Consequential Damage* ASPR Case 69–131, initiated in June 1969.

[16] Letter from E. C. Chapman, Chairman, ASPR Committee, Theodore Haetel, Executive Secretary, CODSIA, Oct. 19, 1970.

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fraud, or gross mistakes discovered in the end item after its inspection and acceptance by the Government, such acceptance is binding and conclusive upon the Government.

The rights and obligations created by loss of or damage to Government property caused by defective supplies are subject to a number of variables. These include the type of contract used by the parties, the Government agency involved, and the contract end item.

The extent of a supplier's liability for damage to Government property caused by defective supplies generally has not been specifically stated in the clauses. One exception is found in construction. The "Warranty of Construction" clause obligates the contractor to:

> . . . remedy at his own expense any damage to Government owned or controlled real or personal property, when that damage is the result of the contractor's failure to conform to contract requirements or any such defect of equipment, material, workmanship, or design.[20]

The uncertainty and confusion over the rights and obligations arising out of current contract clauses are compounded by differences in interpretation and application by the executive agencies and their purchasing activities. The agency boards of contract appeals, courts, or other tribunals that rule on questions of contract language may be confronted with difficulties because of inconsistent and conflicting positions.

Defense Procurement Circular No. 86, incorporated in ASPR by Revision No. 9 in April 1971, established a policy with respect to contractor liability for loss of or damage to Government property occurring after final acceptance of supplies delivered to the Government and resulting from any defects or deficiencies in such supplies. While the policy provides that DOD generally will act as a self-insurer for loss of or damage to property of the Government occurring after final acceptance, there are a significant number of exceptions and exclusions.

- First, in procurement of high dollar value (major) items, the DOD policy relieves the contractor from liability from loss or damage to Government property, including the contract end item, occurring after final acceptance. Where a low dollar value (minor) item is purchased, the contractor is relieved of liability, *excluding* the contract end item.
- Second, when it is the contractor's practice to obtain insurance or maintain a reserve for self-insurance for the liability for loss or damage to Government property, including major end items, the DOD policy does not afford it relief unless it can be ascertained that the contract price includes no part of the cost of the insurance or reserve for insurance.
- Third, no relief from liability is given where the defects in the items furnished are the result of fraud or gross negligence of any personnel of the contractor.
- Finally, no relief is afforded from liability where the defects are the result of willful misconduct or lack of good faith on the part of the contractor's directors, officers, or other designated managerial personnel.

[20] ASPR 1-324.10. See *supra* note 18.

MOTIVATIONAL CONSIDERATIONS

There is much disagreement as to whether there is any significant relationship between safety, quality, and reliability of products procured by the Government and assignment of the risk of liability for loss of or damage to Government property. Many do not believe that warranties actually motivate a contractor to be more careful in the performance of its contract.

Since the Government normally maintains an extensive inspection system during the manufacture and testing of the products it buys, it does not rely exclusively on warranty provisions to remedy defective or deficient products. Primary reliance is placed on the inspection system rather than on the normal type of commercial warranty. Concern for a contractor's exposure to risk of liability for defective products and any resulting motivational impact on employees actually involved in the physical aspects of manufacturing and testing of the product is doubtful. We believe the underlying issue with regard to the Government self-insurance is simply the assignment of risk for defective workmanship and performance

of postacceptance rights makes it difficult for the Government and its contractors to determine the adequacy or reasonableness of product liability insurance coverage or its costs.

The present structure of product liability insurance premiums reflects a loss experience with the Government acting as a self-insurer for loss of or damage to Government property occurring after final acceptance of supplies delivered to the Government. Any Government action that alters or tends to reverse this self-insurance policy will increase the premium costs reflected in the contract prices paid by the Government to its suppliers. The extent of such increases would relate directly to the loss experience on Government property, and any substantial increase in loss experience and the amount of recoveries for loss of or damage to Government property would tend to limit the available insurance coverage.

Further, because premium costs for insurance are based on loss experience (that may or may not include projected risk exposure) plus the administrative costs and profit for the insurer, the total actual cost of providing private insurance for Government property would exceed the amounts received by the Government for its loss and damage or the available insurance market would be withdrawn. Such a conclusion derives from the simple fact that capital funds will flow from an unprofitable to a profitable market.

From a purely cost-effective standpoint, it is cheaper for the Government to act as a self-insurer than it is to shift the risk of loss or damage to private contractors. The contractors simply would pass on to the Government the cost of private product liability insurance premiums, including the addition of applicable indirect expenses and profit.

Our recommended general policy of Government self-insurance could include the following elements:

- First, such policy would not cover claims and losses caused by the willful misconduct or lack of good faith on the part of the directors, officers, or principal officials of contractors, subcontractors, and suppliers.

- Second, such policy would not apply to standard commercial items, such as automobiles, generators, etc., where it is the custom of the trade not to relieve the manufacturers from liability as may arise out of products of defective manufacture.

- Third, the Government would retain its rights from contract warranties that provide postacceptance remedies, such as repair or replacement of defective supplies or equitable adjustments in contract prices when defects or deficiencies are discovered prior to the loss or damage.

- Fourth, all such postacceptance remedies would be expressly set forth in one provision or clause in each Government contract. Such remedies should be exclusive (both in contract and tort) to, and not cumulative with, any other express or implied warranty or action for negligence. Contract prices should not include any costs or allowances for warranty contingencies, or product liability or insurance premiums which are not consistent with the postacceptance obligations expressly imposed by contract.

- Fifth, the Government's policy of self-insurance for defects would not include assumption of responsibility for, or liability for injury to, or wrongful death of, third parties, including military and civilian employees, nor loss of or damage to property of third parties, except as may be provided by indemnification legislation applicable to catastrophic accidents arising out of Government programs (discussed in Chapter 3).

These elements include exceptions to the general policy, such as those under Defense Procurement Circular No. 86. We support such appropriate exceptions, but we recognize that fragmentation of a policy of Government self-insurance by numerous exclusions, limitations, or qualifications is self-defeating because it necessitates some continuation of product liability insurance protection for the risk exposure that the Government has not assumed. Adoption of a policy that holds contractors expressly liable for loss or damage in those circumstances stated in exclusions, limitations, or qualifications will eventually increase costs to the Government. We therefore recommend that a central office, such as the Office of Federal Procurement Policy, be designated to screen and approve requested exceptions to the policy.

CHAPTER 1

Introduction and Summary of Recommendations

SCOPE OF THE PART

This part covers legal and administrative remedies involving resolution of disputes arising in connection with the performance of Government contracts, and resolution of disputes occurring during the process leading to the award of Government contracts. It also analyzes the authority granted by Public Law 85–804 to facilitate procurement for the national defense, and the authority and procedures for debarment and suspension of Government contractors. Each of these areas is summarized in this chapter and discussed in greater detail in later chapters. Appendix A contains data, assembled by Study Group 4 (Legal Remedies) and the Commission staff, concerning the institutions and procedures discussed here.

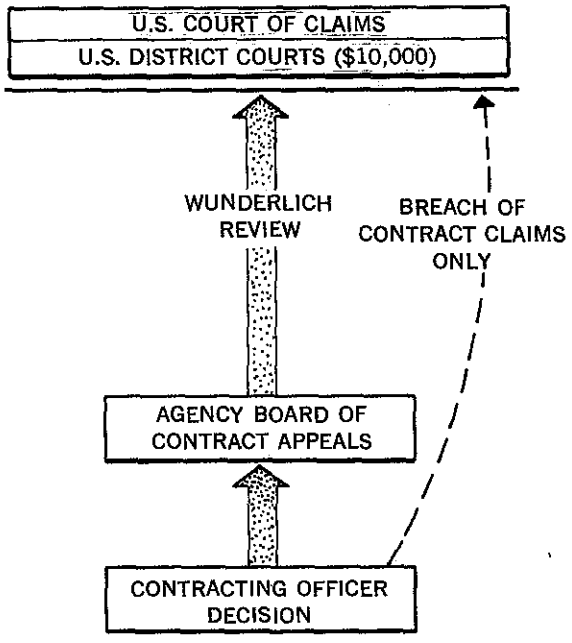
DISPUTES ARISING IN CONNECTION WITH CONTRACT PERFORMANCE

The Present System

Most Government contract disputes arise in connection with contract performance or nonperformance. The present system for resolving such disputes, the major elements of which are shown in figure 1, operates at three primary levels: the contracting officer level, an administrative level other than the contracting officer, and the judicial level. Most contract disputes potentially may be processed through all three levels, although in practice the majority are settled or otherwise disposed of at the contracting officer level.

DISPUTES ARISING IN CONNECTION WITH CONTRACT PERFORMANCE

THE PRESENT REMEDIAL SYSTEM



Source: Commission Studies Program.

Figure 1

THE CONTRACTING OFFICER

The contracting officer is the Government official designated to administer day-to-day performance under Government contracts, and all disputes arising in connection with the contract are initially considered by him or his authorized representative. Under authority vested by the disputes clause in most Govern-

will be compensated, and the greater the damage, the less the chances for compensation through insurance or otherwise. In a catastrophe, one or more contractors might face liability far in excess of their total financial capability.

Before evaluating statutes, policies, and procedures governing indemnification for catastrophic accidents, which are manmade rather than natural disasters, two terms must be defined:

A catastrophe is a disaster of such magnitude that the resulting claims for personal injury and property damage would exceed the monetary level for which there is reasonably available insurance coverage. Since "reasonably available insurance coverage" is subject to varying definitions, depending on circumstances, any legislative efforts in this area should provide for reducing the term to a numerical value or designate an official to determine the value after a catastrophe has occurred.

Indemnification is an assurance wherein one party frees another from an anticipated loss, or risk of loss, or prevents him from suffering loss or damage due to the legal consequences of an act or forebearance on the part of one of the parties to a contract or some third person. A legislative act is called "indemnification" when it provides a procedure for the Government either to reimburse contractors for payments made in satisfaction of judgments rendered against them or to anticipate adverse judgments and assume the obligation to pay such judgments when rendered.

PRIVATE MEANS TO DEAL WITH CATASTROPHIC ACCIDENTS

There are now two primary means of providing relief through the private sector in connection with catastrophic accidents arising from Government programs: private insurance and, for the victims of an accident, civil suit against a negligent Government contractor.

When contractors are exposed to risks so large that they cannot safely assume them themselves, they usually spread such risks by purchasing insurance. Contractors engaged in hazardous Government programs ordinarily carry policies insuring them against liability to third parties, including product liability, arising out of their activities. The Government permits liability insurance costs to be included directly or indirectly in contract costs passed on to the Government.[7]

Private insurance performs important functions in covering contractors against third-party liability up to a given dollar level. Insurance companies have demonstrated their ability to send large numbers of claims investigators and adjusters quickly to the scene of a major accident. With such expertise, they can process claims quite rapidly and are frequently able to settle many of the resulting claims quickly and out of court. Finally, to an increasing degree, casualty and liability insurance companies have been helping their assured to improve their safety procedures.

If liability insurance is adequate to satisfy judgments against contractors, industry is not only protected, but injured members of the public are assured that their judgments will be paid, provided they establish the liability of the contractor who carries such insurance. Similarly, individuals may carry insurance to protect them individually against loss. To the extent of such coverage, individual victims can obtain relief for injuries and damage caused by catastrophic accidents.

GOVERNMENT PROGRAMS TO DEAL WITH CATASTROPHIC ACCIDENTS

Apart from civil suits and private insurance, a number of statutes authorize Government indemnification of contractors engaged in ultrahazardous or nuclear activities.

Public Law 85–804 [8] and Defense Procurement Circular No. 103 of August 24, 1972, apply to contracts of the Department of Defense and several other agencies. Under this law, any agency whose activities are connected with national defense can enter into indemnification contracts without regard to existing law. This law is effective during a national emergency declared by Congress or the President and for six months after the termination thereof or until such earlier time as Congress by concurrent resolution may designate.

[7] ASPR 15–205.16.

[8] 50 U.S.C. §§ 1431–35 (1970). For further discussion and recommendations concerning this law, see Part G, Chapter 4.

may seek judicial review of a board decision adverse to the Government.

If the dispute is not administratively redressable under the terms of the contract, the contractor's remedy is to file suit directly in either the Court of Claims or a U.S. district court, thus bypassing the boards of contract appeals.

Certiorari to the Supreme Court may be requested by either party directly from decisions of the Court of Claims or the U.S. courts of appeals.

Summary of Findings

LACK OF SPEED AND DUE PROCESS

We have concluded that the present system for resolving contract disputes needs significant institutional and substantive change if it is to provide effective justice to the contractors and the Government.

On the one side, the system is often too expensive and time-consuming for efficient and fair resolution of claims. Small businesses, or any business with a relatively small claim, often find that the money required to pursue a claim equals or exceeds the amount of the claim. The result is that contractors with enough money to finance litigation under the system may recover; contractors without enough money cannot. Even if recovery of a small claim is made, the relative cost of that recovery represents a waste of resources.

On the other side, the present system often fails to provide the procedural safeguards and other elements of due process that should be the right of litigants. Contractors are now forced to process most disputes through a system of agency boards of contract appeals that, while essentially independent and objective forums, do not possess the procedural authority or machinery to ensure that all the relevant facts and issues in complicated cases are brought before the boards and given adequate consideration. The boards lack adequate discovery and subpoena powers. The procedural safeguards in the boards and the quality and independence of the board members are uneven. Yet, because of the Wunderlich Act and judicial interpretation of it, the findings of fact by the boards are essentially final on subsequent judicial review. While most if not all boards appear to be independent of control by their agencies, the board members are appointed by the agencies and must depend on them for career advancement.

CONTRACTOR FRUSTRATION

The present disputes-resolving procedures are leading to increased contractor frustration and disillusionment. This widespread view has been clear in every type of input received by the Commission, including open hearings, answers to questionnaires, and individual letters and recommendations. Government procurement is based primarily on open competition, but without sufficient incentive to compete, competition cannot be achieved. It is essential to the competitive system that there be a sufficient number of prospective or actual competitors in the procurement process. If the concerns about inequities and inefficiencies in disputes-resolving procedures cause potential contractors to avoid Government work, the procurement process will suffer.

LACK OF PLANNING

We found no evidence of an overall plan or program to improve the method of handling contract disputes. The present system appears to be more evolutionary in nature following the enactment of the Wunderlich Act and a series of later court decisions that have tended to judicialize the administrative procedures by placing more emphasis on due process, independence of boards, judicial review of board decisions, and remand practice. This has led the boards to adopt more judicial-like procedures, and to demands for other procedures such as discovery and subpoena powers. At the same time most of the boards have attempted to maintain a degree of flexibility and informality not usually found in court procedures.

problems which would arise from a domestic catastrophic accident resulting from a Government program: (1) the need for a means to provide prompt financial assistance to victims of the accident and (2) the need to shield contractors and subcontractors from uninsurable risks.

In the 1966 Price-Anderson Amendment to the Atomic Energy Act of 1954, Congress has recognized these problems but only with respect to certain activities of the Atomic Energy Commission.[14] No other congressional policy so clearly encourages broad use of indemnification protection as does the Price-Anderson Amendment.

Unlike the Price-Anderson Amendment, neither 10 U.S.C. 2354 nor Public Law 85–804 [15] provide for interim relief to the injured public or provide for a waiver of defenses.

Both 10 U.S.C. 2354 and Public Law 85–804 are silent on the subject of financial protection. These important policy determinations are left to the individual agencies rather than established by the Congress. Such a situation invites inconsistent treatment; for example, for a given contract or program, an agency could decide that no insurance should be carried by the contractor, thereby substituting the Government as the insurer starting with the first dollar of damages.

Unlike the Price-Anderson Amendment, neither 10 U.S.C. 2354 nor Public Law 85–804 provides for a ceiling on total recoveries in a particular catastrophe, or for scaling down claims.

Neither 10 U.S.C. 2354 nor Public Law 85–804 provides for consolidation of suits. A large-scale incident might injure persons in more than one state. In the same catastrophe, victims residing in different states may be subject to different laws. The Price-Anderson Amendment authorizes, but does not require, all claimants to sue in the same Federal district court. This is useful in that victims can obtain more nearly uniform treatment.

The use of indemnity authority under 10 U.S.C. 2354, Public Law 85–804, and Price-Anderson is a matter of contract-by-contract bargaining as to whether specifically defined risks in a Government program are within the scope of the appropriate statute. As a result of this prerequisite of negotiation to obtain indemnity protection, it is difficult for subcontractors and suppliers to obtain like coverage, except under Price-Anderson which automatically extends the coverage of prime contract indemnities to all subcontractors and suppliers.

Specifically, 10 U.S.C. 2354 embraces only the military departments and has no application to hazardous research and development programs of other agencies. Even in this regard, inconsistent treatment has resulted between different agencies and even within the same agency. Some of the inconsistencies are due to the ambiguity of the statute's provision that claims must "arise out of the direct performance of the contract." [16]

Public Law 85–804 contains no declaration of congressional policy that protection should be provided to the public and to Government contractors from catastrophes arising out of Government programs; however, its legislative history and the promulgation of Executive Orders 10789 [17] and 11610 [18] make it clear that the law was intended to provide indemnity in certain procurements and that the ultimate burden should be borne by the Government. Although the Executive orders extended the application of Public Law 85–804 to 11 agencies, including NASA, it may be that significant programs under the aegis of other agencies have been omitted. Further, NASA adopted a policy against utilizing Public Law 85–804 for indemnification purposes because of the uncertain remedy it provides a contractor.[19] Although these Executive orders extend use of Public Law 85–804 to production programs involving nuclear risks, they are not clear with respect to possible overlap with the Price-Anderson Amendment.

The basic framework of the Price-Anderson Amendment is sound, and it forms a model for the broad indemnification authority that is necessary. However, Price-Anderson is limited to nuclear accidents arising out of or connected with AEC contractual activities or joint programs in which the AEC is a participant. An

[14] 42 U.S.C. § 2210 (1970).
[15] 50 U.S.C. §§ 1431–35 (1970), *supra* note 8.
[16] W. Sohier, "Protection Against the Risk of Catastrophic Accidents in Government Programs," in *Hearings on H.R. 474, supra* note 1, appendix 21, at 2341, 2343–2344.
[17] 3 CFR, 1954–1958 Comp., at 426, 50 U.S.C. § 1431 (1970).
[18] 3 CFR, 1971 Comp., at 190, 50 U.S.C. § 1431 (Supp. I, 1971).
[19] NASA PR 10.350.

We further recommend that the authority of the contracting officer and other officials to act in connection with each contract be made clear to the contractor; the present distinction between "breach of contract" disputes and disputes arising "under the contract" be abolished; the time periods for seeking review of adverse administrative decisions be uniform and relatively short; interest be paid on all claims awarded by administrative and judicial forums; and court judgments on contract claims adverse to the Government be paid from agency appropriations.

These recommendations are presented as a "package" approach to achieving our objectives. Some of the recommendations serve more than one objective. For example, the recommendation to pay interest when a contractor obtains a favorable board or court decision is intended to make it whole for the expense of obtaining what was rightfully due it. But it also represents a cost to the agency that should make the agency more management conscious about disputes, and thus cause the agency to improve its contract administration, as well as consider the possibilities of a fair and equitable settlement through negotiation.

We do not say that every recommendation is necessary in order to achieve the objectives described above, or that some adjustments in the recommendations would be fatal to the objectives. It will be important, however, to consider the individual recommendations in context with each other and the stated objectives, and to balance the effect of excising one or more of the recommendations. Should some recommendations be adopted and others not, the balance designed in the recommended system could be disturbed to the detriment of its efficient and fair operation.

Our recommendations dealing with the resolution of disputes arising in connection with contract performance are discussed in detail in Chapter 2.

DISPUTES RELATED TO THE AWARD OF CONTRACTS

The Present System

Disputes also occur during the process that leads to the award of a Government contract. These disputes are called "award protests" [1] and may be defined as complaints lodged by interested parties against any part of the contract award process. Protests are usually initiated by a company that has made an offer for a Government contract or would like to make an offer. Typical protests have included allegations that (1) the technical evaluation of a proposal was not properly conducted, (2) the type of solicitation used was not in accordance with statutes or regulations, (3) the low bidder was not qualified to perform the work, or (4) the bidder who was awarded the contract was not responsive to the terms of the solicitation.

Unlike disputes occurring under a contract, no clause in the solicitation gives the offeror a right to protest. Nor is such right found in any statutory language. The basic executive procurement regulations and procedures promulgated by the General Accounting Office (GAO) permit protests against the award of a contract to be lodged with the agency that solicited the award and with GAO. Protests also may be filed with U.S. district courts or the Court of Claims. This "award protest system" for resolution of disputes related to the award of a Government contract is outlined in figure 3.

PROCURING AGENCY

The executive procurement regulations do not provide detailed procedures on how a protest may be lodged with a procuring agency. They do require contracting officers to consider all protests involving the award of a contract, whether submitted before or after award. Unlike the requirements of the disputes clause, agency internal regulations govern whether contracting officers will decide protests submitted to a particular agency. Some agency regulations require most protests to be decided at a senior level within the agency, while the policy of other agencies is for the contracting officer to decide all protests unless special considerations require the forwarding of particular protests to higher headquarters.

[1] Historically they have been called "bid protests." Since many protests today involve negotiated procurements, we have chosen "award protests" as a more accurate term.

APPENDIX A

List of Recommendations

1. That the Government, with appropriate exceptions, generally act as a self-insurer for the loss of or damage to Government property resulting from any defect in items supplied by a contractor and finally accepted by the Government.

2. Apply the Government policy of self-insurance to subcontractors on the same basis as to prime contractors.

3. Ensure that, where items delivered by a contractor to the Government are transferred by the Government to a third party, the third party has no greater rights against the contractor or its subcontractors than the Government would have if it retained the item.

4. Enact legislation to assure prompt and adequate compensation for victims of catastrophic accidents occurring in connection with Government programs.

5. Enact legislation to provide Government indemnification, above the limit of available insurance, of contractors for liability for damage arising from a catastrophic accident occurring in connection with a Government program.

United States ruled in 1940 that protestors have no right (standing) to have their protests heard in a court of law, because the Federal procurement statutes confer no judicially enforceable rights on offerors for Government contracts. Later Supreme Court opinions broadening the concept of standing to sue the Government in other areas not related to Government contracts have led certain Federal courts to conclude that protestors also should have the opportunity to be heard.

In contrast to the procedure normally required under the disputes clause, no administrative remedy need be exhausted before a protest can be lodged in a court of law. The court may conduct a fresh trial of the evidence even if the protest has been previously considered by administrative forums. The Federal district courts can enjoin agency action, including stopping the award or performance of a contract, or direct the award of a contract to a particular party. The Court of Claims does not possess injunctive powers, but it may award damages to a successful protestor.

Summary of Findings

The award protest system, a necessary and beneficial aspect of the procurement process, needs improvement in the interest of greater fairness and effectiveness. The major problems confronting the system are (1) an absence of procedures and remedies that will assure fairness in the treatment of protestors; (2) delay in processing protests through the administrative forums; and (3) the lack of an effective plan for reducing the number of protests. At the heart of these problems lies the absence of a comprehensive, coordinated, and integrated regulatory scheme for administrative resolution and avoidance of protests.

FAIRNESS TO PROTESTORS

The value of the award protest system is that it provides a means of subjecting administrative decisionmaking to review and thereby acts to assure that Government officers follow the procedures that have been established in the statutes and regulations governing the procurement process. It also serves to protect the contractor's right to be bargained with fairly and, in turn, to be provided a remedy when its rights are infringed. A system that will not assure a damaged protestor an adequate remedy unnecessarily creates a lack of confidence in the integrity of the methods by which Government contracts are awarded.

We have found that the system sometimes operates in that undesirable manner. Procedures that adequately inform the contractor how, when, and where to lodge protests have not been established in all cases. The best means are not always used to assure objective consideration of the merits of a protest. At times the protestor is not provided with a compensating remedy although he deserves one.

Public interests require the efficient, economical, and timely acquisition of goods and services. This strong public interest, it is contended, often overrides the personal interests of the protestor when to dispense a remedy would unduly delay or increase the cost of a procurement. Overlooked, however, is the greater overall benefit that can be gained by dealing fairly with contractors and encouraging them to deal with the Government in the future.

UNDUE DELAY IN PROCESSING PROTESTS

The award protest, while serving several valuable functions in Government procurement, can also disrupt the normal flow of events. For example, in order not to prejudice the position of a protestor before the dispute is resolved, the award process or the performance of a contract should be halted when a protest is lodged. Yet, lengthy delay in the adjudication of a protest while the procurement is suspended can seriously impair Government programs and economically damage contractors as well.

Although GAO has taken significant steps that have achieved some reduction in the time needed to adjudicate protests, it is obvious that the problem cannot be solved by one agency alone. At present no Government-wide coordi-

PROFESSIONAL STAFF

Office of the Director of Commission Studies

Donald E. Sowle, Director of Commission Studies
Robert R. Judson, Deputy Director of Commission Studies

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Lawrence Falick
Lester Fettig
Thomas R. Freeman
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Robert B. Hall
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Nancy L. Weaver

Office of the General Counsel

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C. Normand Poirier, Deputy General Counsel

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Robert G. Lauck
Jay W. Maynard
Edgar G. Merson
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Richard R. Pierson
Joseph P. Ramsey
Gloria M. Rosenblum
Paul R. Shlemon
Matthew S. Watson
Gerard S. Welch
Thomas F. Williamson

[1] Appointed April 4, 1971 to succeed Paul A. Barron who became Special Assistant to the Chairman.

vents its use for other equally important national objectives.

Thirty years of experience with the act and its antecedent legislation have shown that the authority to enter into or modify contracts "without regard to other provisions of law" has been used prudently to compensate for gaps in the procurement statutes. The act has been used mainly to include indemnification clauses in contracts, correct mistakes, and formalize informal commitments. We have no evidence of improper or excessive use of this authority.

While recognizing the limited purposes of the act, we believe that it should be removed from an emergency context and exclusive national defense orientation. The procurement process, in civilian as well as in defense agencies, in war as well as in peace, requires contractual adjustments of the kind authorized by Public Law 85–804. Without this authority the procurement process will be impaired or needed adjustments will be sought under strained interpretations of other statutes.

The equitable remedial powers contained in the act are designed to provide fair treatment of contractors. However, the primary regulations implementing the act do not provide adequate procedures for handling fairness cases.

Summary of Recommendations

We recommend that the contractual authority provided for in Public Law 85–804 be made permanent and not conditional upon the existence of a declared national emergency. We favor elimination of the restriction on exercise of the authority to actions that facilitate the national defense, and propose that the President be empowered to authorize the use of the act by all executive agencies subject to (a) the statutory controls now contained in the act and (b) the controls and criteria specified in regulations established by the President. We also recommend that the existing reporting requirements in the act be changed to provide for notification of Congress prior to any exercise of the special management powers that would obligate the Government in an amount exceeding one million dollars.

These recommendations are discussed in detail in Chapter 4.

DEBARMENT AND SUSPENSION

The Present Setting

Debarment and suspension are actions taken by the Government against contractors or prospective contractors that either terminate or prevent a business relationship with the Government.[2] Debarment of a contractor is authorized by certain Federal statutes, Executive orders, and regulations such as the Federal Procurement Regulations (FPR) and the Armed Services Procurement Regulation (ASPR). Suspension is provided for only in the regulations.

Most of the Federal statutes serving as a basis for debarment actions concern wage and labor standards and are administered by the Department of Labor. Final debarment determination for violation of the Davis-Bacon Act is made by the Comptroller General. Debarment determinations for violation of other wage and labor statutes administered by the Department of Labor, including Davis-Bacon's related statutes, are made by the Secretary of Labor or by an agency head subject to Department of Labor approval. Under the Buy American Act, debarment determinations are made by the contracting agencies.

The procurement regulations generally authorize debarment for conviction of certain offenses, including those involving business honesty; for clear and convincing violation of contract provisions; and for other causes "of such serious and compelling nature, affecting responsibility as a Government contractor . . ."

Suspension of a contractor, which has the same effect as a debarment, is authorized by the procurement regulations rather than specifically by statute. A contractor may be sus-

[2] Another term, "ineligibility," is used interchangeably with debarment in some regulations. The result sought to be achieved is the same. The term is also applied to lack of qualification to participate in the procurement process because of failure to meet certain statutory criteria. See, for example, the "manufacturer" or "regular dealer" definitions of the Walsh-Healey Act.

CHAPTER 2

Disputes Arising in Connection With Contract Performance

This chapter covers our findings, conclusions, and recommendations concerning the resolution of disputes arising in connection with the performance of a contract. The chapter is divided into four major sections: The first deals with the contracting officer's role in the disputes-resolving process; the second with administrative disputes-resolving institutions and procedures other than the contracting officer; the third with the role of the courts; and the final section covers other topics not uniquely related to any one of the other three areas, but that constitute important elements of the process. Included in the latter section are subcontracts, payment of interest, payment of awards and judgments, and the contractor's current obligation to continue work pending resolution of most disputes.

THE CONTRACTING OFFICER [1]

The contracting officer is a representative of the Government in the administration of the contract. Unless the contract provides otherwise, he is the official spokesman of the Government for the purpose of interpreting the contract, directing action to be taken under the contract, and, in connection with the foregoing, resolving disputes.[2] There may be one contracting officer for the entire contract performance or there may be a number of individuals representing the Government as contracting officer for particular contractual functions. These may include a procurement contracting officer (PCO) who awards the contract or directs changes and additions; an administrative contracting officer (ACO) who monitors performance of the contract; and a termination contracting officer (TCO), who represents the Government in the event of contract termination.[3]

The contracting officer's role is crucial in the disputes-resolving process because it is his duty to administer the contract so as to avoid disputes whenever possible; to attempt to settle disputes by negotiation after they have arisen; and, if negotiation should fail, make the initial decision for the Government on the dispute.[4] Under the present remedial system

[1] For additional discussion and recommendations concerning the role of the contracting officer, see Part A, Chapter 5.

[2] *See* Spector, *Anatomy of a Dispute*, 20 Fed. B.J. 398 (1960).

[3] *See, e.g.*, ASPR 1-201.3.

[4] The contracting officer derives this power from the disputes clause appearing in most Government contracts. *E.g.*, the standard ASPR disputes clause for supply and construction contracts (ASPR 7-602.6(a)) provides:

> (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 its 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.
>
> (b) This "Disputes" clause does not preclude consideration of law questions in connection with decisions provided for in paragraph (a) above: Provided, that nothing in this contract shall be construed as making final the decision of any administrative official, representative, or board on a question of law.

ities, the contracting officer's role in disposing of disputes will vary according to the facts and circumstances of a particular case.

For these reasons, it is not possible to define an "ideal" contracting officer in dealing with contract disputes or to describe in detail his function, authority, and degree of independence. The definition will vary from agency to agency and even from contract to contract, according to the differing circumstances. Efforts should be made by each procuring agency to define the roles of its contracting officers and other Government officials in various situations and make these roles clear to the contractors who must deal with the Government contract personnel.

To avoid misunderstandings, promote confidence in the procurement process, and improve the climate for the negotiated settlement of disputes, the disputes authority of the contracting officer, and of every other Government agent the contractor must deal with, should be made clear to each contractor. If the contracting officer is in fact not empowered to make an "independent and personal" disputes decision in connection with a contract, but must consult his superiors, he should tell the contractor who will make or influence the decision. If a contracting officer has for all practical purposes delegated authority to make purely technical decisions to the project engineer, the contractor should be told this. The contractor should be made to understand, as clearly as possible, just where and how the decisions for the Government under a contract are made. If this area of confusion and misunderstanding were eliminated, we believe disputes settlement at the contracting officer level would be easier to achieve.

Informal Review Conference

Recommendation 2. Provide for an informal conference to review contracting officer decisions adverse to the contractor.

Although an effort to clarify the role and authority of the contracting officer will reduce the number of misunderstandings ripening into full-blown disputes requiring a contracting officer's decision, such disputes inevitably will continue to arise. Therefore, we recommend that a mechanism be established to provide an improved means for review and settlement of contract disputes prior to the initiation of relatively expensive and time-consuming litigation.

This review should be informal and take place within 30 days following the contractor's receipt of the contracting officer's final decision. The reviewing officials should include an agency official or officials at a level above the contracting officer. The contractor's attendance at a review conference should be mandatory if the contractor intends to proceed directly to court in accordance with Recommendation 6, or if the amount in dispute exceeds $25,000.

Many procuring agencies now subject proposed contracting officer final decisions to substantive and procedural review prior to issuance, and almost all agencies provide for a formal or informal review of the contracting officer's findings prior to a board or court proceeding. However, the contractor does not normally participate in such review.

The recommended informal review conference has several goals. First, the conference is designed to promote settlements before litigation by bringing in Government officials who have not been closely associated with the dispute to hear both sides of the question. We believe that many disputes go to litigation simply because the disputing parties have become too personally involved in the dispute to see that settlement is possible and desirable. Second, if contracting officers are, as many contractors apparently believe, often reluctant to issue decisions that may be controversial or unpopular with their superiors, the knowledge that a final review prior to litigation can be invoked may give them additional confidence to make decisions. This factor alone could be instrumental in improving the contracting officer role in the disputes-resolving process. Third, giving the contractor an opportunity to have disputes considered in such a review conference should increase its confidence in the procurement process. The contracting officer will no longer be the contractor's only recourse before relatively expensive and time-consuming appeals procedures. Finally, the procuring agencies should benefit from the conference. It will en-

a contractor subsequent to a contracting officer decision on a Government contract.[12]

Characteristics and Problems

The boards derive their jurisdiction from contract clauses. Under the present disputes-resolving system, the boards have jurisdiction over all claims arising under the contract; that is, claims covered by a contract clause covering the particular act or failure to act.[13] Acts or failures to act not covered by such a clause generate claims for breach of contract that can only be resolved in the courts.[14]

Although many disputes involving large sums of money are adjudicated by the agency boards of contract appeals, an analysis of some 2,800 disputes made by our Study Group 4 (Legal Remedies) showed that 63 percent of disputes appealed to the boards involved $25,000 or less.[15] Thus, most board appeals involve relatively small amounts of money.

Actual claim figures for certain boards were as follows:

TABLE 2. AMOUNT INVOLVED IN BOARD APPEALS

Board	*$25,000 or under*	*$10,000 or under*	*$1,000 or under*
Armed Services	61%	48%	16%
AEC	73%	56%	13%
Commerce	38%	30%	15%
Corps of Engineers	49%	34%	11%
GSA	81%	65%	23%
Interior	61%	48%	17%
NASA	56%	37%	6%
Transportation	54%	36%	0
VA	96%	92%	83%
Overall	63%	51%	22%

Source: Study Group 4, *Final Report*, Feb. 1972, vol. II, pp. A–57, A–58.

Although the boards can and do decide complex issues of law when required to do so, the same analysis showed that disputes brought before the boards were essentially factual. Specifications were involved in 30 percent of the disputes; contract changes in 26 percent; while default terminations accounted for 16 percent of the appeals.[16] All of these are primarily factual disputes.

In 36 percent of the board appeals that were analyzed, no hearings were held, while in 29 percent hearings were held. Hearing data on the remainder of the appeals analyzed were unavailable. Approximately 40 percent of appeals analyzed resulted in decisions on the merits, while 38 percent were settled prior to board decision. The contractor enjoyed some success in 57 percent of appeals resulting in settlements or decisions on the merits.[17]

THE JURISDICTIONAL SPLIT BETWEEN ADMINISTRATIVE FORUMS AND COURTS

There are at present two general categories of disputes. The first, and by far the most common, is a dispute for which there exists a contract clause granting the procuring agency jurisdiction over the dispute. This means the contracting officer and, if necessary, the boards adjudicate the dispute. There may then be limited judicial review of the board decision if the contractor seeks such review. These disputes are said to arise "under the contract." [18]

The second category, which is relatively rare under the present system, involves disputes for which no contract clause grants jurisdiction to the procuring agency. Contracting officers generally issue decisions on these disputes, but since agency boards derive their jurisdiction from contract clauses, they refuse to hear such disputes. The contractor must instead file a suit directly in the Court of Claims or in a U.S. district court after an adverse contracting officer decision. These disputes are said to be in "breach of contract." [19]

Several problems result from this distinction. First, the Court of Claims and the Comptroller General differ with regard to the authority of procuring agencies to settle and pay claims for breach of contract. The Court apparently has endorsed the conclusion that the

[12] There are, however, some less formal boards designed to review contracting officer decisions in some agencies.

[13] *See* Sachter, *Resolution of Disputes Under Government Contracts*, 2 Pub. Contract L.J. 363, 365 (1969).

[14] *United States* v. *Utah Constr. & Mining Co.*, 384 U.S. 394 (1966) (hereinafter *Utah*).

[15] *See* Appendix A, p. 74.

[16] *See* Appendix A, pp. 72–73. Other problem areas included changed conditions, liquidated damages, and time extensions.

[17] *Ibid.*, p. 75.

[18] Sachter, *supra* note 13.

[19] *Utah*, *supra* note 14.

olution of disputes and the amount of due process available at the board level.

While the present boards began after World War II as expeditious, economical forums with relatively little due process, Supreme Court decisions and pressure from the bar have forced the boards in the past 20 years to make more due process available in their proceedings. In consequence, board proceedings have become more expensive and more time-consuming. In the first of the decisions, *United States* v. *Carlo Bianchi & Co.*,[27] the Supreme Court concluded that by virtue of the terms of the Wunderlich Act,[28] which prescribes standards for judicial review, all U.S. district courts and the Court of Claims were precluded from conducting a trial de novo on issues of fact relevant to a dispute cognizable by a board of contract appeals. These courts, according to the Supreme Court, were limited, aside from any question of fraud, to consideration only of that evidence contained in the record made before the board of contract appeals. The rule was further refined in *United States* v. *Utah Construction & Mining Co.*,[29] which involved a claim for breach of contract that the boards had no jurisdiction to decide. In that case the Supreme Court said that the Federal courts were also precluded from conducting a trial de novo on any issues of fact common to both the breach action and matters relevant to any dispute arising under the contract. Finally, in *United States* v. *Anthony Grace & Sons, Inc.*,[30] the Supreme Court held, in a case where the Court of Claims had reversed the action of a board that dismissed a dispute for lack of a timely appeal, that the appeal had to be remanded to the board of contract appeals for a trial of the factual issues on the merits.

The effect of these decisions is to require that the parties before a board be given maximum due process under the system, since the board findings on the facts are virtually conclusive. On review, the court will only set aside those findings if they are fraudulent, capricious, arbitrary, so grossly erroneous that they imply bad faith, or are not supported by substantial evidence.[31] Such requirements on the boards to increase their due process safeguards led to increased formalization of board proceedings. The boards have been criticized for not providing adequate due process in spite of the increased formalization.

However, the boards have been criticized also for being "overjudicialized": too formal, time-consuming, and expensive. The requirement for formal pleadings, the increased use of discovery procedures, and the extensive preparation of a record required by the Wunderlich Act court decisions not only generate increased costs, but, as a practical matter, require the contractor to obtain an attorney to make an adequate presentation. This is particularly true since the Government is always represented by an attorney before the boards. Although board members generally will travel when requested by the contractor, the extent of travel is subject to budgetary limitations. Thus, a small businessman might have to spend several days or more in Washington with his witnesses in order to get a hearing. Moreover, even if unlimited travel funds were available to the boards, the cost of such travel to the Government in relation to the size of the dispute may represent a misuse of resources.

It is clear that the present agency boards have become formalized and judicialized to the extent that they are generally too time-consuming, costly, and complicated to handle relatively small claims efficiently. This problem affects prime contractors as well as subcontractors, large businesses as well as small businesses.

After a contract is awarded, the operation of the disputes-resolving system is in general institutionally and substantively no different for a small claimant than for a large claimant,

[27] 373 U.S. 709 (1962) (hereinafter *Bianchi*).

[28] 41 U.S.C. §§ 321–22 (1970). Enacted in 1954, the Wunderlich Act provides:

§ 321 LIMITATION ON PLEADING CONTRACT-PROVISIONS RELATING TO FINALITY: STANDARDS OF REVIEW

No provision of any contract entered into by the United States, relating to the finality or conclusiveness of any decision of the head of any department or agency or his duly authorized representative or board in a dispute involving a question arising under such contract, shall be pleaded in any suit now filed or to be filed as limiting judicial review of any such decision to cases where fraud by such official or his said representative or board is alleged: *Provided, however,* that any such decision shall be final and conclusive unless the same is fraudulent or capricious or arbitrary or so grossly erroneous as necessarily to imply bad faith or is not supported by substantial evidence.

§ 322 CONTRACT-PROVISIONS MAKING DECISIONS FINAL ON QUESTION OF LAW

No Government contract shall contain a provision making final on a question of law the decision of any administrative official, representative, or board.

[29] *Utah, supra* note 14.

[30] 384 U.S. 424 (1966) (hereinafter *Grace*).

[31] 41 U.S.C. § § 321–22 (1970). *See supra* note 28 for text.

board work suffers. Finally, the lack of uniformity in rules and procedures among agency boards and the use of non-lawyer board members who are not sufficiently familiar with the adjudication process have been frequent subjects of criticism.

These criticisms are all aimed at the general standards of individual agency boards, rather than the institutional criticism of the sort discussed in the previous two paragraphs. The fact that there are numerous boards presently in operation invites comparison, and although some degree of individuality between boards quite likely is valuable, many believe that some minimum standards for the general operation of boards should be adopted.

Fundamental Approaches to the Boards

After considering a wide range of proposals, we concentrated our study and analysis on what appeared to be the two best alternative approaches to meeting the problems concerning the present agency boards of contract appeals. Both approaches recognize the fact that the agency boards are presently the centerpieces of the disputes-resolving system. Thus, the ultimate organization of those boards—their method of operation, jurisdiction, independence, and degree of formality and due process—has a decisive impact on the remaining elements of the system.

The first approach essentially would treat the agency boards of contract appeals as tools of management designed more to produce negotiated settlements of disputes rather than to adjudicate the disputes in a court-like proceeding. The boards would act truly as an alter ego of the head of the procuring agency, and would provide a forum where contracting officer decisions could be reviewed objectively. The boards would issue a recommended decision that would be adopted, modified, or rejected by the agency head. A contractor receiving an adverse decision would have a right to a de novo trial in court, but the Government would be bound by a decision adverse to it, as an accord and satisfaction. Both parties before the board would be permitted to submit evidence, examine and cross-examine witnesses, and submit written arguments, but the proceedings would be characterized by informality, speed, and low cost. No elaborate opinion would be issued by the board, just a statement of the decision. The boards, in effect, would be restored to something close to the role envisioned for them when the present boards were first established after World War II.

The second approach would treat the agency boards as essentially independent, quasi-judicial tribunals and would strengthen their operation by adding procedural safeguards to ensure the independence and objectivity of the board members and improve the quality of the board record.

The Need for a Flexible System

The boards of contract appeals originally were designed to provide a swift, inexpensive method of resolving contract disputes. Their operations and procedures have, however, been changed over the years by the demand and requirement for due process. Because of Supreme Court decisions and the Wunderlich Act, contractors and their counsel have become increasingly aware that a hearing before an agency board was often their only opportunity fully to develop and present their case. As a consequence, the parties pressed for adoption and implementation at the board level of all procedures associated with due process: full discovery, filing of responsive pleadings and briefs, and thorough adversary hearings with witness cross-examination. The dictates of justice in these disputes have emphasized thoroughness and due process at the expense of both speed and cost, and the procedures of the boards have thus become increasingly formalized through demands by contractors and their counsel that further safeguards be afforded them.

But the present procedures neither provide full due process for the large, important claims, nor a speedy, economical administrative remedy for resolution of small claims. By compromising these inherent contradictions in the agency board system, neither has been met adequately.

would be a return to that system, after providing maximum incentive for the parties to reach a resolution through negotiation within the agency.

Our recommendation adopts the advantages of both proposals and avoids the disadvantages.

The major advantages of board consolidation—more uniformity, consistency, economy, and efficiency—are achieved by a moderate consolidation that would be realized under our recommendation through the application of minimum size standards. At the same time, there are several disadvantages in total consolidation that would be minimized under our recommendation. The existing agency boards, being a part of the procuring agencies, are familiar with the procurement mission and operating procedures of the agencies. It is argued that such familiarity assists the boards in performing their functions; does not make the operation of the boards any less fair to contractors; and removal of the boards from the agencies would be counterproductive to the operation of the agencies and their boards. We believe that the expertise in agency peculiarities attributed to agency boards does not outweigh the advantages of some consolidation; contract disputes do not vary so widely from agency to agency that each agency needs to have its own board. However, under our recommendation, boards will still remain in the major procuring agencies to use to advantage whatever expertise may exist.

Similarly, the major advantage of the proposal to eliminate the boards also would be realized under our recommendation to provide a contractor option of direct access to court after a mandatory informal review conference. The disadvantage of removing the boards as a review layer prior to court is that if appeals now being handled by the boards were sent directly to the Court of Claims commissioners, many new commissioners would have to be added. This would obviously work a fundamental change in the operation of the Court, and its effect is difficult to predict. Under our recommendation, this problem would be eliminated since it is probable that the option of direct access would be exercised only for cases involving large money amounts, new legal questions, interpretation of new statutes or regulations, or fraud or corruption.

In order to assure uniformly high quality decisions and to ensure that the agency boards continue to perform the functions for which they are designed, uniform minimum standards should be applied to each board. The standards, which affect appointment of personnel and caseload requirements, are discussed in the following subsections.

MINIMUM CASELOAD

The establishment or maintenance of an agency board of contract appeals should be prohibited unless the agency can justify the maintenance of a full-time board with no other duties but to hear and decide contract appeals. For example, if the number of appeals sufficient to justify a full-time board were 100, then only three of the existing boards would be continued. If the number were 75, four would remain. If 35, seven would remain. Agencies that lack sufficient appeals to justify economically the maintenance of an affiliated board of contract appeals should be required to delegate their appeals to one of the other boards.

PERSONNEL

Agency boards would be more objective if all members of the boards were selected in a manner that minimized their ties to the agency head. This would be achieved if they were chosen in the same manner as hearing examiners under the Administrative Procedure Act.[33]

DISCOVERY AND SUBPOENA POWERS

The quality of the board records would improve if the boards were given discovery and subpoena powers. This would ensure that the tools to make complete and accurate findings are available, and would minimize the need for a court to supplement the board record on review. See Recommendation 9.

[33] 5 U.S.C § 551 (1970).

ment contracts, the contracting officer is required to consider each dispute concerning a question of fact presented by the contractor and render a decision as to what contract adjustment (time or money), if any, should be made.

The disputes clause is not required by statute, but is a creation of the executive branch. Its purpose is to provide and initially require the use of administrative disputes-resolving procedures and institutions in an effort to avoid the delays and expense of judicial litigation. Contractors are usually required by its terms to continue work pending resolution of a dispute.

If a mutually agreeable resolution of the dispute cannot be achieved through negotiations, the contracting officer is required to make a unilateral decision. Then, under the disputes clause, the contractor is usually required to proceed with contract performance in accordance with that decision.

The contracting officer's unilateral decision on a contract dispute for which the contract provides an administrative remedy may be appealed by the contractor to the head of the agency or to a designated agency board of contract appeals. An appeal must be made within a stated time (usually 30 days), or the contracting officer's decision generally becomes final on the contractor.

If the dispute involves an alleged Government breach of contract for which the contract provides no administrative remedy, the Court of Claims or a U.S. district court (for claims of $10,000 or less), not a board of contract appeals or other agency representative, has jurisdiction over the appeal.

BOARDS OF CONTRACT APPEALS

If the contractor's claim is one for which an administrative remedy is available, the first level of appeal from a contracting officer's decision is the agency head, or, more often, his designated board of contract appeals. The contracting agencies originally established such boards to review disputes, as representatives of agency heads, at a level above the contracting officer. The present agency boards of contract appeals have their legal basis in the contract disputes clause and in agency regulations rather than in congressional enabling acts. Most of these boards now function, under delegated authority to act for the head of the agency, as independent, quasi-judicial tribunals.

At present, there are 11 boards of contract appeals in the executive branch, a drop from 19 boards in July 1966. The reduction to the present number is attributable to consolidation of boards within some agencies, abolition of boards by some agencies with assignment of appeals to boards in other agencies, and reorganization of some agencies. The boards of contract appeals in the executive branch had nearly 2,000 appeals on their dockets as of July 1972.

When a contractor appeals an adverse contracting officer's decision to a board of contract appeals, the board rules generally require that the contracting officer transmit to the board and to the assigned Government attorney all information that relates to the dispute. This information constitutes the appeal file. The board usually assigns one or more members to hold hearings and examine witnesses if determined by the board to be necessary or if requested by at least one party. In addition to the material submitted by the contracting officer, the board considers the pleadings, records of prehearing conferences, evidence presented in open hearings by both parties, pre- and post-hearing briefs, and such depositions and interrogatories that are permitted.

THE COURTS

If a contractor's claim is denied by a board of contract appeals, the contractor may file a suit in the Court of Claims or, if the claim is less than $10,000, in a U.S. district court. The scope of judicial review is set forth in the Wunderlich Act. Approximately five percent of the board cases decided in recent years have been sent to the Court of Claims by contractors for judicial review.

If the board sustains the contractor's appeal, either in whole or in part, the procuring agencies have, as a rule, complied with the decision, although it is not entirely clear whether the Government, under the present statutes,

technically correct but, in practice, erroneous assumption that the authority to settle contract disputes is derived from the contract itself, whereas the authority of a Government official to settle breach of contract disputes must have as its ultimate source the Constitution and acts of Congress.

This recommendation does not present a drastic innovation. The procuring agencies have steadily added clauses to bring more and more types of disputes under board jurisdiction, and it is generally conceded that the executive branch has the power to promulgate an "all disputes" clause bringing every type of dispute under the jurisdiction of the boards.[37] Indeed, an "all disputes" clause was used by the War Department during World War II, under which some 3,061 cases were disposed of by the War Department Board of Contract Adjustment during its 2 1/2 year existence.[38] The legality of such a clause was suggested by the Supreme Court when it endorsed the practice of converting breach of contract claims into claims for relief under the contract by adding remedial clauses to the standard contract form.[39]

Although this recommendation standing alone would further curtail the access of the contractor to judicial relief, it must be considered in conjunction with the recommendation for optional direct access to judicial forums. See Recommendation 6. Under the recommended system, the contractor may elect the forum within which to present its dispute. The elimination of the distinction between disputes under the contract and those in breach of contract ensures that the choice of forums available to the contractor will not be defeated by an artificial classification of disputes.

THE COURTS

There are two judicial forums for the resolution of contract claims against the Government—the Court of Claims and the U.S. district courts. Actions may be brought in these courts either through judicial review of an administrative decision, usually that of a board of contract appeals, or by an original suit for breach of contract. The jurisdiction of the Court of Claims and the U.S. district courts is based on the Tucker Act.[40] An action that is initiated in one of these courts is handled in accordance with normal court procedures; appeals to higher courts are subject to the same appellate review standards and procedures as other cases. However, the scope of judicial review of agency board decisions is set forth in the Wunderlich Act.[41] That act recognizes the finality of agency decisions on questions of fact except where the decision is "fraudulent or capricious or arbitrary or so grossly erroneous as necessarily to imply bad faith or is not supported by substantial evidence." With respect to questions of law, the act provides that no Government contract is to contain a clause "making final on a question of law the decision of any administrative official, representative, or board."

Direct Access to Court

Recommendation 6. Allow contractors direct access to the Court of Claims and district courts.

As a third alternative forum for the resolution of contract disputes, we recommend that contractors have the option of direct access to court, in addition to the SCBCA system and the agency boards of contract appeals. The recommendation would allow contractors, at their option, to bypass administrative disputes-resolving forums and seek review of adverse contracting officer decisions directly in either the Court of Claims or in a U.S. district court.

Because of judicial interpretation of the Wunderlich Act, the contractor presently is denied a full judicial consideration of most disputes. For the contractor to be entitled to a full trial in court, its dispute cannot be redressable under the contract. If it is redressable under the contract, the contractor must exhaust its administrative remedies before it

[37] *Ibid.* at 482, citing *Paragon Oil Co.*, ASBCA No. 3980, 58-2 BCA ¶ 1845.

[38] Shedd, *supra* note 10 at 46.

[39] *Utah*, *supra* note 14 at 418.

[40] 28 U.S.C. §§ 1346, 1491 (1970).

[41] 41 U.S.C. § § 321–22 (1970). *See supra* note 28 for text.

INCREASED COST

Our recommendations to improve procedures for the resolution of contract disputes may involve some increased administrative costs, since the contractors will have more incentive to use the procedures. Ultimately, both the Government and its contractors will benefit from less complicated and more economical means for resolving disputes. At present, a contractor either is deterred by the high cost of litigation or must undergo lengthy processing that is expensive to it as well as to the Government. Several of our recommendations are pointed toward procedures tailored to the complexity of the dispute, so that small claims or less important issues can be disposed of without the expense of protracted litigation.

Summary of Recommendations

We have concluded there is a need for improvements in the existing disputes-resolving procedures to accomplish the following objectives:

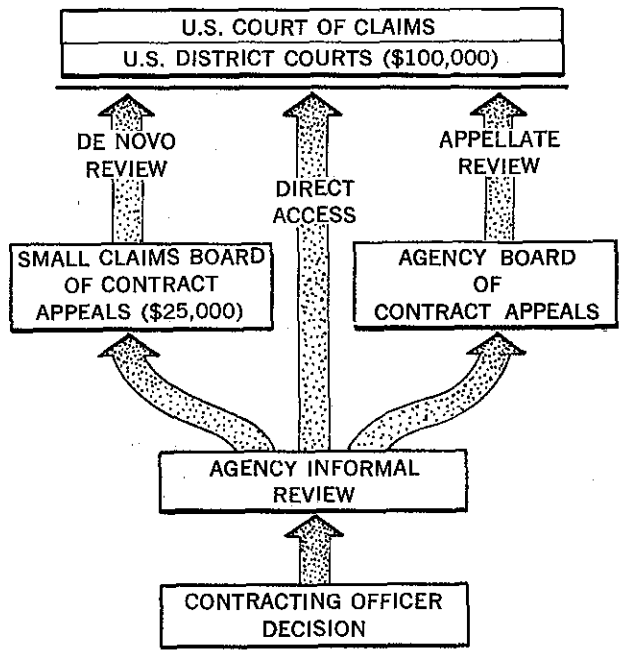
- Induce resolution of more contract disputes by negotiation prior to litigation
- Equalize the bargaining power of the parties when a dispute exists
- Provide alternative forums suited to handle the different types of disputes
- Ensure fair and equitable treatment of contractors.

We believe that these objectives are best met with a flexible disputes-resolving system that provides alternative forums for the resolution of disputes, with each forum designed to handle disputes of varying degrees of complexity, size, and importance. The claimant should, within certain parameters, be able to choose the forum best suited to his claim.

The major elements of our recommended system are shown in figure 2. Following a contracting officer decision adverse to the contractor, an informal review conference should be held by the agency to review that decision in an effort to seek resolution of the dispute

DISPUTES ARISING IN CONNECTION WITH CONTRACT PERFORMANCE

THE RECOMMENDED REMEDIAL SYSTEM



Source: Commission Studies Program.

Figure 2

prior to litigation. The claimant should be invited to attend the conference, and his attendance should be mandatory if he intends to take the dispute directly to court.

Should the informal review conference fail, we propose that the claimant be given a choice of three alternative forums: (1) an improved cognizant agency board of contract appeals, (2) a regional small claims board of contract appeals if the dispute involves less than $25,000, or (3) the Court of Claims, or a U.S. district court (up to $100,000).

The contractor, but not the Government, could obtain de novo review of a decision of the small claims board. We recommend, with five members dissenting, that both parties be granted appellate-type judicial review of adverse decisions of the agency boards of contract appeals. In addition, the present remand practice between the reviewing courts and the agency boards should be modified to allow the courts the discretion to take additional evidence necessary finally to dispose of the case.

ing presumably will consider the additional time and expense a reasonable cost for the increased due process available in the court. In addition, time and expense will actually be saved in many cases because direct access will permit questions that ultimately must go to court, because of their size or importance, to go there directly without delay.

Judicial Review

Recommendation 7. Grant both the Government and contractors judicial review of adverse agency boards of contract appeals decisions.*

Until recently, it has been assumed by most that the Government could force judicial review of adverse board decisions only by withholding payment of a board award. The present state of the law, including the interpretation of the Wunderlich Act and its legislative history, was recently examined by the Supreme Court in the *S&E Contractors, Inc.*[46] decision. The Court held that the General Accounting Office (GAO) had no authority to make an administrative review of a final agency decision in favor of the contractor. The Court also took the position that the role of the Department of Justice was to represent the Government agencies, not to challenge their actions. While deciding that no other Government agency could administratively review final agency decisions under the standard disputes clause, the Court's opinion does not expressly state if a contracting agency may seek judicial review of an adverse decision by a board of contract appeals. However, the tone and thrust of the Court's opinion is that a decision by a board of contract appeals acting on behalf of the agency head would be final and conclusive on the entire Government, at least under the regulations and charter governing the typical agency board of contract appeals.[47]

We recommend that the Government be granted a clear right to seek judicial review of adverse agency board decisions. The agency boards of contract appeals as they exist today, and as they would be strengthened by our other recommendations, function as quasi-judicial bodies. Their members serve as administrative judges in an adversary-type proceeding, make findings of fact, and interpret the law. Their decisions set the bulk of legal precedents in Government contract law, and often involve substantial sums of money. In performing this function, they do not act as a representative of the agency, since the agency is contesting the contractor's entitlement to relief. In this context, the Government should have an equal right of judicial review, since it would be an anomaly in the American judicial system for such formalized trial tribunals to have the final authority on decisions that set important precedents in procurement law.

Moreover, our recommendations give the contractor an option to go directly from a contracting officer decision to the Court of Claims or U.S. district court. If the contractor chooses direct access to court, the Government can appeal to a higher court as a matter of right. If the Government has no right to seek judicial review of a board decision, we create a situation where contractors may be prone to take controversial issues involving statutes or case law to the boards in order to obtain a tactical advantage over the Government. If the Government has no appeal rights, but the contractor does, the contractor has an unfair advantage since if it loses before the board, it can seek judicial review of the decision.

To minimize the possibility of personal bias by trial attorneys or program level officials, we believe that requests to appeal should be to the agency head, who would then determine whether the Department of Justice should be asked to appeal the decision. The final decision whether the Government should appeal or not should rest with the Attorney General, as decisions to initiate suits in court or appeal from lower court rulings now do.

The primary arguments made for denying the Government the right of judicial review are, first, that the procuring agency has prescribed the use of boards, appoints them, and therefore should be willing to abide by their

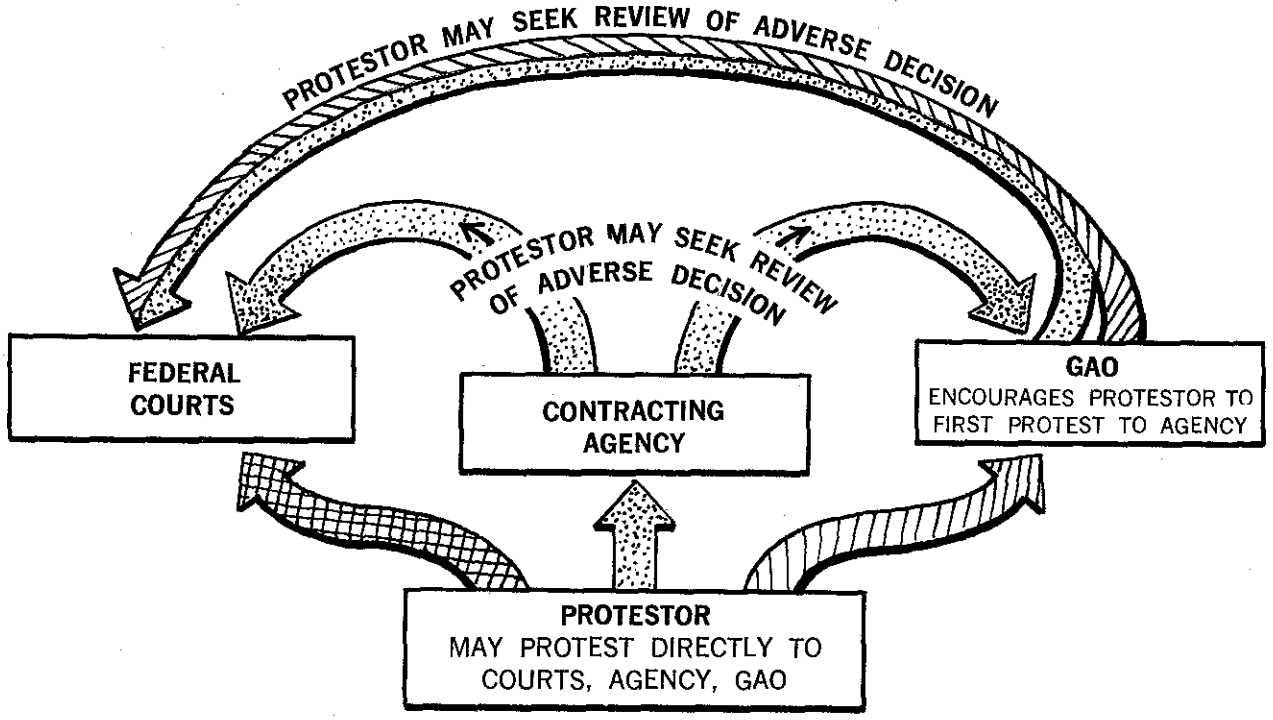
*See dissenting position, *infra*.

[46] *S&E Contractors, Inc.*, v. *United States*, 14 G.C. ¶ 182 (U.S. Sup. Ct., Apr. 24, 1972).

[47] In a recent case, *Dynalectron Corp.* v. *United States* (Ct Cl. order, Sept. 28, 1972), the Court of Claims has apparently taken this view by barring the Government from obtaining a Wunderlich Act review of a board decision on reprocurement costs. The action was brought originally by the contractor to overturn a default termination, and the Government action was in the form of a counterclaim.

DISPUTES RELATED TO AWARD OF CONTRACTS

THE PRESENT REMEDIAL SYSTEM



Source: Commission Studies Program.

Figure 3

Protests are considered informally within the agencies, and normally no hearings are held. The regulations do not provide for appeal of a protest decision within the agency to a judicialized forum such as a board of contract appeals.

Under certain conditions, the regulations also permit a contracting officer, subject to higher approval, to award a contract despite an active protest involving that contract. The procurement regulations generally leave it to agency discretion whether to halt performance of a contract if a protest is lodged after award.

GENERAL ACCOUNTING OFFICE

Any party who has an interest in a Government contract may lodge a protest against the award of that contract with GAO, provided that the accounts of the agency that solicited the protested procurement are subject to settlement by GAO. Protests are considered informally by an assigned attorney within the Office of General Counsel, and decisions are based on relevant documents submitted by the parties. Each decision is submitted to high-level review within GAO before it is issued as an opinion of the Comptroller General.

GAO has no power, when adjudicating a protest, to prevent the award of a contract or to have the contracting agency comply with the time requirements it has established for the processing of protests. GAO has never recommended money damages for a successful protestor, but it has recommended that the agency resolicit the procurement or terminate a previously awarded contract for the convenience of the Government.

FEDERAL COURTS

It is only since 1970 that the Federal courts have been available as a forum for resolving award protests. The Supreme Court of the

extremely few cases in which the Government has even seriously contemplated an appeal, much less taken action to appeal. The reason is because the administrative process for reviewing disputes has been successful as far as the Government is concerned. Changing this situation, for the one or two cases which might arise in the next 20 years, seems completely unjustified, without perspective, and could only result in adversely affecting the disputes process as a whole.

Judicial Review Time Limits

Recommendation 8. Establish uniform and relatively short time periods within which parties may seek judicial review of adverse decisions of administrative forums.

Whether or not the Government is granted a right to judicial review of adverse agency board decisions, we recommend that uniform and relatively short time periods be established within which parties may seek judicial review of the decisions of the agency boards, the SCBCA system, or the contracting officer.

At present, a contractor has six years following an adverse board decision to initiate legal action on its dispute in the courts.[48]

Since the boards as now constituted, and further strengthened by our recommendations, are essentially trial courts, there is no reason to treat the time period for "appeal" of their decisions any differently than an appeal from a U.S. district court or U.S. court of appeals. Moreover, the existing situation can result in the filing of lawsuits many years after the knowledgeable personnel are gone and important records destroyed.

Accordingly, we favor a fairly short time period, perhaps ninety days, to initiate judicial review by either a contractor or the Government. If no appeal is taken within the prescribed time period, the decision of the board should be final and binding on both the contractor and the Government. For the sake of uniformity and simplification, we further recommend that the same time limit apply to the contractor seeking judicial review of adverse SCBCA decisions and for the contractor seeking to appeal an adverse contracting officer decision in an agency board, the courts, or in the SCBCA system.

[48] 28 U.S.C. § 2401 (1970).

Remand Practice

Recommendation 9. Modify the present court remand practice to allow the reviewing court to take additional evidence and make a final disposition of the case.

The standards of review established by the Wunderlich Act as interpreted by the Supreme Court in the *Grace* [49] decision foreclose the courts from making any findings of fact consequent to a board of contract appeals decision. The court must remand a case to the board for any further findings of fact the court deems necessary before it can render a decision, and when the court makes a finding on the question of entitlement, it must refer the case back to the board for findings as to "quantum" or damages. The latter is the most common cause of remands. For the three-year period, 1968 through 1970, only 51 cases were remanded. This is a small number when compared to the total number of board cases, although it is approximately 30 percent of the total number of contract cases filed in the court during those years.[50]

The rationale of the Supreme Court in *Grace* is based not only on the contractual provisions that establish the boards as the forum for trial of the facts but also on the belief that administrative proceedings are more efficient for settlement. The Court also remarked that "reliance upon a few expert agencies to make the records and initially to pass on the merits of the claims properly presented to them will lead to greater uniformity in the important business of fairly interpreting Government contracts." [51]

However, some observers presently believe that, in the time-consuming process of judicial review, the interests of economy and speed become overriding and are better served by allowing the court to retain control over the

[49] *Grace, supra* note 30.
[50] Study Group 4, *Final Report*, vol. II, pp. A–69 to A–77.
[51] *Grace, supra* note 30 at 429.

nated attack on the problem is being undertaken.

AVOIDANCE OF PROTESTS

The number of protests continues to rise each year. In fiscal 1972 over 1,200 protests were lodged with GAO alone. This represents a 16 percent increase over the number filed the previous year. The annual increase in the number of protests threatens to destroy the value of the award protest system by turning it into a device that potentially could impede the overall efficient functioning of the procurement process.

A reasonably effective scheme for reducing the number of protests does not exist. Better communication between contracting agencies and offerors is needed in order to eliminate protests that occur because of misinformation about contract award decisions. More comprehensive review of solicitation or award controversies by higher-level management officials is required in order to prevent protests based on improper management practices. Finally, there is a need for closer coordination of agency award protest procedures and practices.

Summary of Recommendations

The overall thrust of our recommendations is to revise, expand, and integrate the varying regulations governing the administrative resolution and avoidance of protests by promulgating adequate procedures for informing protestors of the steps that can be taken in order to resolve their complaints; establishing mandatory time requirements for processing protests; and providing more protection for protestors. We also recommend improving contracting agency debriefing procedures and urge periodic review by GAO of agency award protest procedures and practices.

These recommendations are discussed in detail in Chapter 3.

EQUITABLE AND SPECIAL MANAGEMENT POWERS UNDER PUBLIC LAW 85–804

The Present Act

Public Law 85–804 empowers the President to permit agencies that exercise functions in connection with the national defense to enter into, amend, or modify contracts without regard to other provisions of law pertaining to the making, performance, amendment, or modification of contracts. By Executive order the President has authorized the Department of Defense and ten other agencies to exercise the authority conferred by the act. Relief under the act must be accompanied by a determination that the exercise of its authority will facilitate the national defense, and the powers conferred by the act only may be used during periods of national emergency.

The primary purpose of the act is to provide authority for prompt administrative resolution of problems occurring in defense contracts that otherwise would not be solvable under the normal statutory, regulatory, and common-law principles governing the procurement process. Although not so classified under the act or implementing regulations, the powers of the act may be categorized broadly as those permitting certain management determinations and those allowing the correction of certain inequitable situations.

The management powers have been used to provide additional funds to a contractor whose performance is essential to a Government program but whose productive ability will be impaired by a threatened loss; to require special terms and conditions in Government contracts; and to dispose of Government property. The equitable remedial authority of the act has been used to settle breach of contract claims administratively, correct or mitigate the effect of mistakes, and formalize informal commitments.

Summary of Findings

Restricting Public Law 85–804 to contractual actions that facilitate the national defense pre-

variety of legal and judicial thinking in the system, allowing relatively large claims to be adjudicated without requiring the claimant to come to Washington, and counteracting the inflation that has occurred since the present limit of $10,000 was set.

However, the Court of Claims should remain as the leader in Government contract law. For this reason, the very large cases, as well as a substantial majority of the other cases should continue to be adjudicated in the Court of Claims. Thus, we recommend that the jurisdictional increase be limited to $100,000.

DISSENTING POSITION

Because of the related recommendations concerning the geographically dispersed SCBCA system and improved agency procedures for settling disputes without resort to court action, one Commissioner* believes that direct access to the courts should provide primarily for more rapid and due process resolution of the larger, more difficult cases. The Court of Claims should remain the leader in Government contract law. It is unwise to unnecessarily precipitate any large increase in the number of cases that might go to the district courts instead of the alternate forums which may, under our recommended system, be more appropriate. Accordingly, he believes the jurisdictional limit of the district courts should be raised from the current $10,000 only to $25,000. A $25,000 limit would counteract the inflationary increase noted, and an increase to that level is warranted. The $25,000 limit would have the added advantage of correlating with the $25,000 SCBCA limit, thus eliminating some of the potential for "forum shopping" that is viewed by some as an undesirable element in the process.

OTHER CONSIDERATIONS

Payment of Interest

Recommendation 11. Pay interest on claims awarded by administrative and judicial forums.

*Commissioner Sanders.

Until recently, contractors have been generally unable to recover interest on amounts recovered at the close of a dispute, unless payment was specially authorized by statute. However, in October 1971 the Comptroller General ruled that interest may be paid,[53] and a number of procuring agencies have promulgated rules allowing interest payment in certain instances.[54] The Government, through its mandatory contractual clauses, has long required a contractor to pay interest on any amounts owing to the Government that are not paid within 30 days.[55]

The recent moves to allow payment of interest are justifiable and fair. The goals of the administrative and judicial processes are to reimburse the successful party. These goals are frustrated, however, if final payment of a judgment ignores the long delays and losses resulting from a lengthy mandatory review procedure. Without interest payment, Government contractors, whether or not they are required to continue performance despite an expensive dispute, must bear the additional financial burdens for an extended period with hope of recouping only the principal costs due them.

Further, we believe that the payment of interest will have a beneficial effect in providing additional inducement for the settlement of claims short of litigation. The prospect of agencies being required to pay interest on claims delayed by litigation encourages the agencies to avoid these payments by settling claims at an early stage and gives the contractor added bargaining power with the assurance of full payment if the claim is eventually paid.

Payment of Judgments From Agency Appropriations

Recommendation 12. Pay all court judgments on contract claims from agency appropriations if feasible.

At present, payment on judgments of $100,000 or less in the Court of Claims is made

[53] 51 Comp. Gen. 251 (1971).

[54] Defense Procurement Circular No. 97 (Feb. 15, 1972); FPR 1-1.322, ASPR 7-104.82.

[55] *See, e.g.*, ASPR 7-104.39.

pended for mere suspicion of an action, that if proved could result in debarment. Debarment may be imposed for a maximum of three years; suspension is authorized for a maximum period of 18 months, unless the Department of Justice has begun prosecutive action for the alleged violation.[3]

Findings and Conclusions

The statutes and regulations on debarment and suspension vary in the treatment of procedures for challenging a proposed debarment or suspension action. In some cases, the contractor is afforded the type of due process protections normally associated with an adversary proceeding, including the right to an open hearing, confrontation and cross-examination of witnesses, and the right to appeal an adverse decision. In other cases, some of these protections are not available.

Although debarment and suspension actions are judicially reviewable, the courts have not indicated in detail the rules of practice and procedure necessary to assure a fair hearing to a contractor in contesting a debarment or suspension action. The lack of uniformity of the regulations and the need to provide a fair hearing indicate that a review should be made of debarment and suspension procedures.

[3] However, a recent court of appeals opinion states that a contractor normally must be offered an opportunity for a hearing within one month after its suspension.

tractor; that too many appeals in its name would indicate a litigious attitude; or that the subcontractor claim has no merit or little chance of success. The prime contractor may find that its pecuniary interest is adverse to that of the subcontractor with regard to the subcontractor's claim. Under the present sponsorship system the subcontractor is often at the mercy of the prime contractor insofar as timely assertion and followthrough of the claim is concerned.

On the other side, there are clearly a number of advantages in the present sponsorship approach. From the Government's point of view, the sponsorship approach is the simplest method of administering complex procurements. By administering its procurement through a single point of contact, the Government's job is made both simpler and cheaper. The single point of contact approach also helps suppress frivolous claims. If direct access were allowed to all Government subcontractors, contracting officers might, without appropriate safeguards, be presented with numerous frivolous claims that the prime contractor would not have sponsored. By forcing the prime contractor to administer its subcontractor network, the Government permits prime contractors and subcontractors at all tiers to use to some extent their familiar commercial procedures in contract award and administration. This advantage should not be underestimated, since the considerable variation between Government and commercial contract administration often requires extensive revisions in the administrative procedures of Government prime contractors and considerable re-education of contract personnel. Finally, by denying the subcontractors direct access to administrative remedies, the Government is forcing the prime contractor and the subcontractor to negotiate their disputes. Allowing direct access would eliminate some incentive to negotiate a settlement. This might result in additional time-consuming and expensive litigation. The forced negotiation under the present system can create a psychological familiarity between the prime contractor and subcontractor, resulting in a greater likelihood of successful negotiation in future dealings.

On balance, we have concluded that, although some inequities presently exist with respect to the treatment of subcontractor claims, these inequities are best handled by improved subcontract administration by the prime contractor with appropriate supervision by the Government. The additional problems of contract administration and program management that would arise if subcontractors were given direct access to the Government in disputes and claims outweigh the benefit to be gained. However, Government contracting agencies must remain alert to problems associated with subcontractor claims and assure that those resulting from Government actions are decided fairly.

Obligation to Continue Work

At present practically all Government contracts include the so-called standard disputes clause. This clause provides that 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." [59]

Although the obligation created by this language is limited to matters made subject to the disputes clause by other contractual provisions, the uncertainty of the coverage of the clause and the nature of most disputes mean that a contractor runs an extreme risk if it chooses to stop work pending resolution of a dispute with the procuring agency. For all practical purposes, a contractor is committed to continue working in accordance with the decision of a contracting officer, no matter how long it takes to get a final resolution.

The traditional argument regarding the benefit of this provision to the Government is based on the theory that the Government's business is the people's business and should not be vulnerable to all the ordinary marketplace risks. It is contended that to give the contractor the option of stopping work would give it a competitive equality that is unsuitable for public procurement. The choice of stopping work is a bargaining weapon used to create economic advantage or to avoid economic disaster, but unlike private competition, when a contractor enters into a public contract it is

[59] ASPR 7-602.6(a). *See supra* note 4 for text.

the contracting officer's decision on many small claims is for all practical purposes final, since two-thirds of small businesses we questioned indicated they would not appeal an adverse contracting officer decision on a claim of $5,000 or less.[5]

The contracting officer is an agent of the Government charged with the responsibility of administering the contract, which inherently makes him the Government representative in any dispute, yet he is legally required to act independently and impartially in resolving disputes. Formulation of a decision under the disputes clause may not be legally delegated to or usurped by anyone not authorized by the terms of the contract to make the decision.[6]

This dual role has led to much confusion and misunderstanding on the part of contractors. Nearly a third of the businesses questioned indicated that they believe contracting officers are generally unwilling to resolve disputes, or at least are not encouraged to perform a disputes-resolving function. Moreover, 16 percent believe that the reasons given by contracting officers in their final decisions are not the ones that prompt their decisions. This reflects an apparently widespread belief that contracting officers may avoid difficult decisions for any number of reasons, including fear of damage to their careers and of conflicts within their own staff. However, 20 Government agencies were nearly unanimous in stating that it was their policy to attempt to resolve disputes at the contracting officer level. Only two agencies indicated a policy of having close issues decided by a board of contract appeals.[7]

Whatever view one may take of this rather complex problem, which is extremely dependent on personalities, there is evidence to show that the disputes-resolving procedure is not being carried out as effectively on the contracting officer's level as it should be. Our data indicate that 38 percent of all cases brought to the boards are subsequently settled.[8] This does not mean, of course, that the failure to settle prior to appeal to a board is always entirely or even significantly that of the contracting officer. Often the contractor's refusal or inability to present sufficient evidence or persuasive arguments to the contracting officer is the reason for failure in early settlement attempts. However, the large number of cases settled at the board level, and the widespread complaints of inadequate settlement prosecution, indicates that more settlement effort is needed.

Contracting Officer Authority

Recommendation 1. Make clear to the contractor the identity and authority of the contracting officer, and other designated officials, to act in connection with each contract.

While the initial steps in the disputes process are under the cognizance of the contracting officer, the extent to which he makes decisions under the contract depends both on his own knowledge and judgment and the advice, judgment, and sometimes the direction of others. The contracting officer does not operate in a vacuum. He has at his disposal legal, fiscal, and other expert advisors and assistants. He discharges his responsibilities under specific authority delegated to him, within the framework of the agency procurement regulations, and subject to the policy direction, surveillance, and, if required, approval of higher authority. It is unrealistic to assume that the various levels of management that bear the responsibility for the propriety and wisdom of the agency's actions should at all times remain aloof from the manner in which contracts are administered and contractual actions are taken, including matters in disputes.

The role of the contracting officer must vary with the nature of the procurement and the organizational structure in which he functions. This covers a spectrum from total independence and responsibility for all contractual actions taken under a contract to delegated authority limited and circumscribed by many management reviews and directions. Within this framework of authority and responsibil-

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[5] Study Group 4, *Final Report*, vol. II, p. A–87.

[6] *Climatic Rainwear Co.* v. *United States*, 88 F. Supp 415 (1950); *Penner Installation Corp.* v. *United States*, 89 F. Supp 545 (1950); *Beals Plumbing & Heating*, GSBCA No. 1163, 1964 BCA ¶ 4358.

For a contrasting view, see Shedd, *Principles on Authority of Contracting Officers in Administration of Government Contracts*, 5 Pub. Contract L.J. 88 (1972).

[7] Study Group 4, *Final Report*, vol. II, p. A–53.

[8] *See* Appendix A, p. 75.

recommend that contractors have an option of direct access to court in order to assure them of the right to a full judicial hearing on any claim or dispute.

I would draw the process to its inevitable conclusion and combine the boards as a Court of Contract Appeals, with jurisdiction to hear all appeals from administrative decisions relating to Government contracts. The details of the appropriate administrative procedures necessary for obtaining a quick and efficient administrative remedy should be left to the respective agencies, except that legislative action should be taken to ensure that new boards of contract appeals do not evolve within the agencies to defeat the contractor's right to a full judicial hearing in the Court of Contract Appeals, or to unduly delay that hearing. The Court of Contract Appeals should have independence of the personnel (judges appointed by the President and confirmed by the Senate) and subpoena and discovery power. It should substantially follow the Federal Rules of Procedure and perform its functions in the same manner as any court of record is expected to do. The Judges of the Court of Claims could act as the appellate court with respect to the Court of Contract Appeals.

These proposals with respect to a Court of Contract Appeals are not inconsistent with our recommendations for a Small Claims Board of Contract Appeals (SCBCA) to hear disputes involving relatively small amounts of money. Such a regional system of small claims tribunals is obviously needed to provide quick, cost-effective resolution of small claims. The SCBCA system could, however, be made an arm of the Court of Contract Appeals.

I believe that if the boards are thus combined into a Court of Contract Appeals, and supplemented by the SCBCA system, the problems of (a) fragmentation of remedies, (b) remand, (c) the right of the Government to seek judicial review, and (d) direct access to the Court of Claims would become moot. As I have stated, I support the recommendations of the Commission in this area, but I believe this proposal to carry those recommendations to their logical conclusion deserves airing.

TABLE 1. BOARDS OF CONTRACT APPEALS

Board	*Status*	*Number of members*	*Appeals on July 1, 1972 docket*
Agriculture	Part-time	7	52
Armed Services	Full-time	32	1,254
AEC	Ad hoc	16	4
Commerce	Part-time	6	8
Corps of Engineers	Full-time	5	218
GSA	Full-time	7	201
Interior	Full-time	5	58
Labor	Full-time	9	*
NASA	Part-time	5	28
Transportation	Full-time	4	77
VA	Full-time	7	56
		Total	1,956

*Established July 1972.

Source: Agency boards of contract appeals.

able the agencies to detect and correct erroneous contracting officer decisions at an early point, and will give the agency time to examine carefully large claims, legally important claims, or claims the contractor intends to take directly to court. These conferences should give management level agency personnel a better understanding of the functioning of their agency at the working level.

We do not recommend that attendance at the conference by the contractor be mandatory in disputes involving $25,000 or less. The obvious reason for this is that such a conference in processing small claims would impose a time-consuming layer of review and would work against the purpose of the efficient and inexpensive forum for small claims. See Recommendation 4. On the other hand, we recommend that contractor attendance be mandatory for any size dispute if the contractor intends to proceed directly to court in accordance with Recommendation 6. The reason for this is that the procuring agency will lose cognizance over the dispute to the Department of Justice when the court suit is filed. We believe there should be a strong effort to settle the dispute within the agency prior to the transfer.

THE ADMINISTRATIVE FORUMS

The agency boards of contract appeals are the central focus of the present disputes-resolving system. The origin of the boards of contract appeals generally is traced to 1868, when the Supreme Court upheld the right of the Secretary of War to use a board to hear and settle claims voluntarily submitted by contractors.[9] The first formal use of boards occurred during World War I. Boards were used to a lesser extent in the 1920's and 1930's and came into full use during World War II.[10]

There are at present 11 agency-affiliated boards of contract appeals in the executive branch, as well as boards maintained by the House Office Building Commission, the Postal Service, and the Government of the District of Columbia. The Armed Services Board of Contract Appeals (ASBCA) is the largest of the boards, with approximately 32 members. Some 1,092 appeals were filed with that board during fiscal 1972.[11] Table 1 shows the number of members and docketed appeals, as of July 1972, for each of the agency boards, and if the board members are full-time, part-time, or ad hoc.

With the exception of boards (usually called "contract adjustment boards") established in certain agencies under Public Law 85–804 (discussed in Chapter 4) the agency boards of contract appeals are the only formal administrative disputes-resolving forums available to

[9] *United States* v. *Adams*, 74 U.S. (7 Wall.) 463 (1869).

[10] *See* Shedd, *Disputes and Appeals: The Armed Services Board of Contract Appeals*, 29 Law & Contemp. Prob. 39 (1964), reprinted as S. Doc. No. 99, 89th Cong., 2d Sess., app. B (1966).

[11] *See* 14 G.C. ¶ 291.

CHAPTER 3

Disputes Related to the Award of Contracts

This chapter examines the methods by which disputes are resolved during the process that leads to the award of a Government contract. Such disputes are called "award protests," [1] and, in the following analysis, the forums that hear these complaints are collectively entitled the "award protest system." [2]

The first section of the chapter discusses the award protest as a means for subjecting contract solicitation and award decisions to review, either internally within the procuring agency or by an independent adjudicatory body. The section considers the nature of the contract award process, the purpose of award protests, and the characteristics of the interests that are involved in the award protest system. After this introduction to a unique aspect of Government contract law, the chapter describes the forums available for the resolution of award protests and recommends changes that are needed if the award protest system is to function fairly and effectively.

BACKGROUND

Government contracts are formed according to the same offer-acceptance principles used to form a contract between buyer and seller in private contract law. The Government usually begins the contract award process by issuing a solicitation, commonly in the form of an invitation for bids (IFB) or request for proposals (RFP), which is a request for offers to supply a particular Government need. Those interested in doing business with the Government respond with offers in the manner called for by the solicitation. The Government then considers the offers in the way prescribed for the method of competition selected, chooses the best offer, and makes an award of a contract.

The award process in Government procurement differs from that in private exchanges in one very important respect. Government contracts are formed according to an extensive and complex set of formal rules, comprised for the most part of Federal statutes, Executive orders, executive regulations, and agency internal procedures.[3] These rules prescribe the steps the parties are to take during the award process, including the proper solicitation to be used in each circumstance, the contents of the solicitation, the correct manner of response to the solicitation, the period within which a response must be made, and how the response will be evaluated. No counterpart to this elaborate system of rules exists in private contract law.

The existence of this "code of conduct" in one marketplace but not in another has come about because of differing views about the nature of the interests involved. In the commercial marketplace it "was believed that if men were free to make their own self-interested decisions whether to buy or sell there would be produced and exchanged the greatest amount of goods and services at the least price." [4] This concept of the freedom of private businessmen to decide whether and with whom to contract also applied to how they should contract.

[1] For a definition of "award protests," see p. 5, *supra*.

[2] The present award protest system is depicted at p. 6, *supra*.

[3] *See, e.g.*, 10 U.S.C. §§ 2301–14 (1970) (Armed Services Procurement Act); 32 CFR Parts 1–39 (1972) (Armed Services Procurement Regulation); Exec. Order No. 10936, 3 CFR, 1959–1963 Comp., at 466, 41 U.S.C. § 252 (1970) (reports of identical bids); and 32 CFR Parts 591–616 (Army Procurement Procedure (APP)).

[4] L. Jaffe, *Judicial Control of Administrative Action* 4 (1965).

head of a procuring agency within the executive branch has implied and delegable authority to settle breach of contract claims by agreement.[20] This conclusion, however, has been rejected by the Comptroller General.[21] However, if the contract contains a clause that provides a remedy, the Comptroller General recognizes there is authority to settle, either by agreement or unilateral decision.[22]

Second, the split in jurisdiction between the boards and courts can lead to a problem of identification and fragmentation of disputes and remedies between those under the contract and those for breach of contract. Although the choice of forums for each is clear, the distinction between disputes under the contract and those for breach of contract often is not. Since Government contracting officers in practice settle both types of disputes—a remedy that is less expensive and faster than that provided by the boards or the courts—contractors usually initially present their breach of contract disputes to those officers.[23] If a contracting officer denies a claim, the contractor is faced with a jurisdictional decision that might place its entire claim in peril. A dispute subject to the contract disputes clause must be appealed within 30 days to a board of contract appeals.[24] The statute of limitations for a breach of contract claim allows the contractor six years to institute a suit in the court.[25]

The critical question facing the contractor is which course to take. If the contractor chooses to follow the breach theory and goes directly to court, it may lose entirely if the court determines that the dispute is properly under the contract and must be processed according to the contract disputes clause provision; that is, through the agency board of contract appeals. Once the 30-day appeal time under the disputes clause has been exhausted, there is usually no further recourse to the boards, and the claim may be forfeited. For this reason, contractors often go through the agency boards to the courts because only this will assure them of having a full hearing on the merits of the dispute.

Some advantages in this distinction between types of disputes have been claimed. One is that claims for breach of contract tend to be characterized by complicated legal issues, are relatively costly and time-consuming, and often are not confined to the particular items directly involved, but extend through the whole contract and even to the contractor's other work. In view of this, it has been argued that because the boards presently lack the power to subpoena and swear witnesses, compel discovery, and in general have less procedural safeguards than do courts, they are unsuited for handling such disputes. It also has been argued that since breach claims often involve sophisticated legal issues, they should not have to be presented to non-lawyers (the contracting officers) for initial determination. Rather, these disputes should go through some legal pleading process with lawyers representing each side to determine those facts that are relevant, and the facts should be defined from the outset in exhibits and transcripts for comparison with the law. Another contention is that contracting officers and even boards cannot reach decisions that are entitled to credit for fairness and impartiality, since breach claims may charge illegality, corruption, discrimination, or favoritism on the part of the contracting officer or head of the agency, or in the policies and regulations promulgated by them.[26]

Whatever the merits of the distinction between types of claims, however, the problem caused by the distinction is of real concern in a relatively small number of cases and has declined as a problem because the procuring agencies tend to insert clauses into their contracts that bring more and more disputes under the contract.

SPEED AND ECONOMY VS. DUE PROCESS IN THE BOARDS

A more serious problem often raised in connection with board proceedings today is a conflict between a speedy and economical res-

[20] *Cannon Constr. Co.* v. *United States*, 162 Ct. Cl. 94, 319 F.2d. 173 (1963); *see also Brock & Blevins Co.* v. *United States*, 170 Ct. Cl. 52, 343 F.2d. 951 (1965); *Constr. Serv. Co.* v. *United States*, 174 Ct. Cl. 756, 357 F.2d 973 (1966).

[21] 44 Comp. Gen. 353 (1964).

[22] *Utah, supra* note 14.

[23] *Morrison-Knudson Co.* v. *United States*, 170 Ct. Cl. 757, 345 F.2d 833 (1965).

[24] ASPR 7-602.6(a). *See supra* note 4 for text.

[25] 28 U.S.C. § 2401 (1970).

[26] *See* Speck, *Concerning an "All-Breach" Contract Disputes Clause*, 29 Fed. B.J. 47, 51-54 (1969).

be vitally important if follow-on work is to be obtained. Similarly, a growing dependence on Government contracting for its source of income may cause a business to seek a contract in order to keep its plant facilities operating or its personnel employed. The Government contract, therefore, has for many businessmen a value that must be measured by more than the profit that flows directly to a company as the result of performing a specific contract.

In addition to serving the private interests of individual contractors, award protests may also serve the private interests of certain classes or groups within the procurement community. In this circumstance, the award protest functions as a means to prevent administrative action thought to be inimical to the long-range interests of the group lodging the protest.[12]

There is a public interest in ensuring that congressional policies requiring competition and equal access to the award process are implemented by competent men employing sound procedures. This is tantamount to saying that the system of proposal solicitation, evaluation, and award must have integrity to achieve basic policies. The Comptroller General often has stated that the integrity of the award process outweighs any particular pecuniary advantage to the Government that may result from an improper award.[13] The public also has an interest in ensuring that procuring activities are capable of acting in an effective manner to implement programs and satisfy public needs.

At times the private and public interests in the award process appear to be consistent. Policies that promote competitive procedures administered with integrity will necessarily afford prospective contractors better protection in securing economic opportunities and give them little reason to protest the administration of the award process. Moreover, allowing protests to be brought to the attention of Government officials develops public confidence that the policies are being properly implemented and helps eliminate improper management practices.

On the other hand, at times these interests will seem to be in competition. A procuring agency's view of its mission may often collide with private interests in obtaining the award and even the public interest in the integrity of the competitive system. This problem becomes most apparent and troublesome when a protest is lodged after a contract has been awarded. In this situation the delay inherent in adjudicating such protests may, from the agency's view, inhibit a successful completion of its mission. Yet failure to adjudicate legitimate protests may not only unjustly deprive the rightful recipients of their economic opportunities, it may lessen future business interest in bidding on Government contracts.

The purpose of this introduction to the nature and function of award protests has been to indicate that complex problems underlie any analysis of the present award protest system. The following sections describe the various forums and procedures used to resolve award protests. While we have not found that the present institutional structure of the award protest system is in need of fundamental modification, we do recommend that certain procedural changes be made in order for the system to operate with the greatest fairness and effectiveness.

THE PROCURING AGENCY

A protestor may always lodge a protest with the agency that has issued the solicitation on which the protest is based. GAO regulations, in fact, now urge that the protestor first seek resolution of its complaint with the procuring agency before it proceeds to GAO.[14] Adjudication of award protests by procuring agencies is conducted in an informal manner. No hearings are held, and no right of appeal to a quasi-judicial forum such as a board of contract appeals exists.

Where there has been a written protest, the agency generally makes its decision on the written record compiled from the contract file and any documents submitted to the contracting officer by parties to the protest. The regulations state that where a protest has been

[12] *See, e.g., Perkins* v. *Lukens Steel Co.*, 310 U.S. 113 (1940); *Lodge 1858, American Federation of Gov. Emp.* v. *Paine*, 436 F.2d 882 (D.C. Cir. 1970). *See also Contractors Ass'n. of Eastern Pa.* v. *Secretary of Labor*, 442 F.2d 159 (3d Cir. 1971).

[13] 43 Comp. Gen. 268, 272 (1963).

[14] 4 CFR § 20.2(a) (1972).

because the accelerated procedures for small claims now available in the agency boards are not being utilized. In mid-1970 there were 1,123 disputes pending before the ASBCA of which only 38 were being processed under the accelerated procedures. Yet fully 48 percent of the board's appeals were eligible for the accelerated procedures. Overall, accelerated procedures were used in only seven percent (149) of the appeals that we examined, although 51 percent of those appeals involved $10,000 or less. Half the boards stated that no appeals on their dockets used accelerated procedures.[32]

We believe there are two primary reasons for the failure to use accelerated procedures. One is the inclination of the board members, familiar with the panoply of procedural safeguards provided in board rules, to give the full procedural treatment. The other is the preference of appellants and their lawyers to choose the "higher class" remedy, even though it may be more expensive.

Moreover, as a result of inflationary pressures, an increasing number of claims that are too large to qualify for the accelerated procedure under present agency board procedures are, nevertheless, too small to justify economically the full agency board hearing procedure. This does not mean necessarily that the contractor must spend more on claims preparation and presentation than the claim is worth, although this may sometimes be the case. Rather, it means that too many resources, in relation to the size of the claim, are expended by both contractor and Government in resolving the dispute, even though the contractor may make a "profit" if it wins. The proceeding is not cost-effective.

The contractor can, if it decides to appeal, often expect to wait a year or longer after docketing for a board decision. Data assembled and analyzed by Study Group 4 (Legal Remedies) indicate that 30 percent of the cases appealed to the boards were resolved within six months, 27 percent within six to 12 months, 19 percent within 12 to 18 months, nine percent within 18 to 24 months; and a full 15 percent took longer than 24 months. However, the board members and attorneys who handle cases before the boards have correctly pointed out that the time a case is on the docket is not necessarily indicative of the speed available to a claimant within the present procedure. Often the claimant or both the claimant and the Government may desire to continue the case for further negotiations, marshalling of evidence, or other tactical reasons. Hence we must conclude that the docket times as reported are longer than they might have been had the claimant moved expeditiously in every instance.

Table 3 summarizes the time for administrative resolution of disputes within the present system.

TABLE 3. TIME REQUIRED FOR DISPUTES RESOLUTION

Percentage resolved within:	*Contracting officer level*	*Board level*
0–6 months	67%	30%
6–12 months	14%	27%
12–18 months	9%	19%
18–24 months	4%	9%
24 or more months	6%	15%
	100%	100%

Source: Study Group 4, *Final Report*, Feb. 1972, vol. II, pp. A–51, A–64.

While a further analysis of the figures in table 3 would probably show that smaller cases took less average time for resolution than larger cases, the time required to process a small claim through the contracting officer and board level today is often substantial.

PRESENT BOARD STANDARDS

The failure of some boards to make their decisions widely available; the conflicting interpretation of the same contractual language; and the qualifications, rank, pay, and method of selection of board members all have been suggested as candidates for reform within the agency board system. Another source of widespread dissatisfaction among contractors is the belief that members of some boards are not sufficiently separated from agency contracting and legal functions to possess the objectivity and independence expected. It is also claimed that the members of part-time boards and of some ad hoc boards have such heavy demands imposed on their time by other agency responsibilities that the quality of their

[32] *See* Appendix A, p. 75.

ternal regulations do not provide for the occasion when a contractor refuses to stop work on a no-cost basis.[26]

The primary focus of award protest resolution and avoidance must be in the procuring agencies. Although it appears to have been the intent of the basic procurement regulations to leave much of the procedural development of award protest regulations to the individual agencies, this has not occurred. Accordingly, the use of a contracting agency to resolve award protests should be promoted by including award protest procedures in the basic procurement regulations that adequately inform protestors of the steps that can be taken to seek review of administrative decisions.

If the utility of an award protest system is acknowledged by agency officials and the use of such a system is encouraged, the result should be beneficial both to prospective contractors and to contracting agencies. Agency officials have asserted that the current rise in protests is attributable to shrinking procurement expenditures and the consequent necessity for sellers to fight for every contract solicited. The point often missed is that previous failures to protest during more expansive periods may have sanctioned bad management practices for which the agencies only now are being held accountable. If no stigma is attached to an award protest, prospective contractors will feel freer to seek immediate correction of unfair treatment, and the contract award process eventually may be improved thereby to the extent that protests will be greatly minimized.

It is not the purpose of this recommendation to hamstring procurement actions through prolonged disputes with contractors. The procuring agency award protest procedures should provide a means for contractors to receive fair consideration for the award. However, the agency review should be conducted in an informal manner by higher management authority rather than through an adversary-type proceeding.

[26] Several agencies, however, have attempted to establish procedures for contracting officers to follow in the event a contractor refuses to enter into a mutual agreement to stop work on a no-cost basis. *See* HUDPR 24-2.407-8(b); DSPR 1202.407-9(c)(2); APP 592.407-8(j)(3).

GENERAL ACCOUNTING OFFICE

A protestor may lodge an award protest with GAO in accordance with procedures published in the Code of Federal Regulations.[27] Those procedures allow an "interested party" to protest the award (or proposed award) of a contract by or for a Government agency whose accounts are subject to settlement by GAO.[28] An interested party is one whose economic interest may be involved in the procurement and includes offerors for Government contracts, potential contractors, subcontractors, labor unions, and other associations.[29]

The number of award protest cases received by GAO has steadily increased over the past few years. As shown in table 4, GAO rendered 715 protest decisions involving 34 different agencies in fiscal 1971. That same year it handled 1,054 award protest cases, including 339 cases that were withdrawn by protestors or closed for various reasons, including agency cancellation of the procurement or positive agency action in response to the protest.[30]

TABLE 4. AWARD PROTEST DECISIONS RENDERED BY GAO DURING FISCAL 1971

Department	*Total*
Agency for International Development	2
Agriculture	13
Air Force	114
Architect of the Capitol	3
Army	168
Atomic Energy Commission	6
Civil Service Commission	1
Commerce	3
Defense (OSD)	3
Defense Supply Agency	68
District of Columbia Government	11
Federal Communications Commission	2
Federal Housing Administration	1
General Services Administration	57
Government Printing Office	4

[27] *See* 4 CFR Part 20 (1972).

[28] 4 CFR § 20.1(a) (1972). Not all agency procurement decisions are reviewed by GAO. For example, the Comptroller General has declined to adjudicate award protests involving TVA except upon the request of TVA. Comp. Gen. Dec. B-174523, Nov. 23, 1971, Unpublished. *See* 16 U.S.C. § 831h (1970). Protests involving Postal Service contracts also are not adjudicated by GAO. *See* 39 U.S.C. § 2008(e) (1970); Postal Service Protest P 71-11.

[29] Shnitzer, *Handling Bid Protests Before GAO*, Briefing Papers, No. 70-3, June 1970, at 2. Address by Paul G. Dembling, General Counsel, U.S. General Accounting Office, before a National Contract Management Association, Washington, D.C., Chapter Meeting, Sept. 15, 1971.

[30] *See* Appendix A, p. 77.

The aim of any remedial system is to give the parties what is due them as determined by a thorough, impartial, speedy, and economical adjudication. However, it is difficult to be economical, yet thorough; thorough, yet speedy. A balance of these variables that is appropriate in one case may not be appropriate in another case. The overriding problem with the present agency board system is that the boards attempt to adjudicate claims across the entire spectrum of size and complexity. Although the boards generally are doing an adequate job under the circumstances, this is not the most effective way to handle contract disputes.

Justice and efficient operation of the contract disputes-resolving system can be obtained best with a flexible system that provides alternative forums for resolution of particular kinds of disputes. The claimant should be able to choose a forum according to the needs of his particular case; that is, one where the degree of due process desired can be balanced by the time and expense considered appropriate for the case. To this end, we conclude that alternate forums, each with special characteristics, should be maintained for initial resolution of disputes above the contracting officer and informal agency review level.

Key elements of our recommended system would be agency boards of contract appeals, acting as quasi-judicial forums and strengthened by adding additional safeguards to assure objectivity and independence. Some moderate consolidation of the boards would be achieved by eliminating part-time and ad hoc boards.

We have chosen this approach over a reversion to more informal boards for several reasons. First, the boards of contract appeals have developed into generally satisfactory forums for the resolution of most contract disputes, and, with only relatively minor changes, can be strengthened to continue in this role even more effectively. Second, the existing problems of judicial review of board decisions can be satisfactorily resolved by changes in the Wunderlich Act to provide broader discretion in the courts to supplement the board record. Finally, the management effort for resolution of disputes would be better conducted through an informal conference without any of the trappings of a due process procedure.

Specific recommendations concerning the administrative forums other than the contracting officer are discussed in the remainder of this section.

Agency Boards of Contract Appeals

Recommendation 3. Retain multiple agency boards; establish minimum standards for personnel and caseload; and grant the boards subpoena and discovery powers.

This recommendation is essentially the middle ground of the two most common proposals regarding the boards: consolidation of the boards into a single court-like "superboard," or the removal of the boards as a layer of review.

Theoretically, a consolidated "superboard" would benefit from economies of scale; the use of full-time personnel on the consolidated board would eliminate the unfairness or appearance of unfairness attributed to the use of part-time personnel on existing boards; and a more uniform practice would result from the coordinated application and improvement of rules and practice that would be possible with a large caseload in such a board. The consolidated board, while it doubtless would approach the status and appearance of a court, would nonetheless be solely procurement-oriented, with the resultant Government contract expertise and flexibility that courts of less specialized jurisdiction will never have. While the consolidated board would not be as responsive to individual agencies as would an agency-oriented board, it would be responsive to Government-wide procurement policy and would foster a desirable uniformity among agency procurement practices.

At the other extreme, the agency boards could be eliminated from the remedial process and the contractor forced to go directly to court in appealing a contracting officer's decision. This proposal stresses that the speedy administrative remedy has been lost in the modern world of large, complex claims and pressures for increased due process. The courts were the original forums for resolution of contract disputes, and elimination of the boards

the Comptroller General commenting on GAO's proposed new award protest procedures, expressed the view that the awarding of Government contracts is purely an executive function, because "the authority to withhold awards and reject bids is reposed by statute only in the heads of Executive departments or agencies and certain specified offices of the military departments." [37] Neither the Federal courts nor Congress has asserted this view. Over a period of years the courts have given tacit approval to adjudication of award protests by GAO.[38] One court recently recognized GAO as having special competence in dealing with award protests and characterized the use of the court's injunctive powers to prevent contract action while the matter is decided by GAO as a "felicitous blending of remedies and mutual reinforcement of forums. . . ." [39] Moreover, the absence of congressional intervention, in the face of committee investigations into the operations of the award protest system [40] and annual reports to Congress from GAO about its activities,[41] indicates that GAO also exercises jurisdiction over award protests with the acquiescence of Congress.

Adjudication of award protests by GAO serves several important functions in the procurement process. GAO's separation from the contracting agencies assures contractors that their complaints are considered free from any bias toward individual agency policies and thus promotes the confidence of both private enterprise and the general public that Government business is conducted with integrity. Such separation from the daily concerns of the contracting agencies also allows GAO to frame and solve problems in terms of the overall best interests of the Government. The award protest decisions issued by the Comptroller General within the past five decades form a cogent body of Government contract law that is useful for guidance in solving individual problems occurring in the contract award process and provide a basis for development of more generally applicable procurement regulations. GAO's establishment as an administrative forum potentially allows it to afford a speedier solution of disputes than would be possible if Federal courts were the only arbiter.

We recommend that GAO continue to adjudicate award protests. We do not attempt here to offer legal argument that will lay at rest the issue of the constitutionality of this function. Such an issue only can be resolved by the Supreme Court of the United States.

DISSENTING POSITION

One Commissioner believes that the constitutionality question discussed above could be satisfactorily resolved administratively through the simple act of shifting the entire protest-resolving apparatus (people, records, and all) from its current residence in the GAO to the Department of Justice. Such action would preserve the body of case decisions developed over the years by the GAO, would retain the personal expertise developed by GAO personnel in resolving disputes, and would not disrupt the processing of protests under consideration, were the physical move accomplished in a well-executed fashion. Conceivably, the shift could be accomplished without even the necessity for much physical relocation of records and personnel if administrative jurisdiction and control over the protest-resolving function were simply shifted from the GAO to the Department of Justice while the bulk of the personnel involved remained in their present location.

He believes that administrative attempts at resolution of the constitutionality question should be pursued between the Comptroller General and the Attorney General, short of initiating any action to seek resolution by the Supreme Court.

[37] Letter from John Mitchell, Attorney General of the United States, to Hon. Elmer B. Staats, Comptroller General of the United States, June 14, 1971.

[38] *See John Reiner & Co.* v. *United States*, 163 Ct. Cl. 381, 325 F.2d 438 (1963); *A.G. Schoonmaker Co.* v. *Resor*, 445 F.2d 726 (D.C. Cir. 1971); *M. Steinthal & Co.* v. *Seamans*, 455 F.2d 1289 (D.C. Cir. 1971).

[39] *Wheelabrator Corp.* v. *Chafee*, 455 F.2d 1306, 1316 (D.C. Cir. 1971).

[40] *See Selected Problems of Small Business in the Area of Federal Procurement*, S. Rep. No. 1671, *supra* note 16; House Committee on Government Operations, *Eighteenth Report, GAO Bid Protest Procedures*, H.R. Rep. No. 1134, 90th Cong., 2d Sess. (1968).

[41] U.S. General Accounting Office, *Annual Report of the Comptroller General of the United States, 1970*, H.R. Doc. No. 92-14, 92d Cong., 1st Sess. 110-12 (1971); U.S. General Accounting Office, *Annual Report of the Comptroller General of the United States, 1971* 131-33 (1972).

Small Claims Boards

Recommendation 4. Establish a regional small claims boards system to resolve disputes involving $25,000 or less.

Because our recommendations concerning the agency boards of contract appeals would not alleviate the problem of processing small claims, we recommend establishment of a system of small claims boards of contract appeals (SCBCA) as a mechanism to provide a fast, relatively informal forum for the adjudication of claims of $25,000 or less.[34]

The SCBCA system would be under central administrative control and located in geographically dispersed cities according to caseload demands. A contractor would have the option of taking a dispute involving $25,000 or less to an SCBCA. There would be no judicial review of an SCBCA decision, but a contractor could receive a new (de novo) trial in court after an adverse SCBCA decision if it desired. A decision adverse to the Government would be final, except in cases of fraud.

The SCBCA system would operate under informal, accelerated procedures, and the agency boards of contract appeals would no longer have an optional accelerated procedure. The natural tendency for any quasi-judicial administrative board is to become increasingly formal and cumbersome, as have the agency boards in recent years. In the case of the SCBCA system, the lack of pressure to build a record due to the de novo judicial review will subdue the tendency to become more formal. However, the system should have appropriate supervision and control to ensure that it remains expeditious and informal.

We consider $25,000 an appropriate ceiling for the SCBCA's jurisdictional limit. Based on data developed in our study, 63 percent of the present appeals handled by agency boards would be eligible for the SCBCA procedure.[35]

The SCBCA system could be independent, or could operate as an arm of an agency board, or even the Court of Claims. However, the operation of the SCBCA system should be as autonomous as possible from any parent board or court, since it is important that the SCBCAs establish their own tradition, organization, and procedures that are distinct and highly visible. If the SCBCAs were closely tied to the agency boards or courts, they would appear to be merely a second-class version of the parent forum, and like the present accelerated procedures, they might not be used. More important, the members of the SCBCAs must develop a particular expertise in handling small claims rapidly and fairly, with a minimum of "due process" procedures. This will require a firm approach with litigants who want to overjudicialize their appeals.

Finally, the SCBCA system should be staffed with board members of a grade and caliber equal to the members of the agency boards.

All Disputes Power

Recommendation 5. Empower contracting agencies to settle and pay, and administrative forums to decide, all claims or disputes arising under or growing out of or in connection with the administration or performance of contracts entered into by the United States.

We can find no valid reason for the distinction between disputes "under the contract," that procuring agencies may settle and pay, and disputes in "breach of contract," that they may not.

The irony in the present situation is that, while the procuring agencies are not supposed to have the power to decide or settle breach of contract disputes, that is, disputes not based on a contract clause conveying board jurisdiction, they may in effect gain this power merely by placing a clause in the contract providing an administrative remedy for the particular dispute.[36] This transforms the dispute into one administratively cognizable under the contract. The distinction between disputes arising under the contract and breach of contract disputes is not logical or useful, since it is based on the

[34] Bills to establish regional small claims divisions of existing boards were introduced in Congress by Senator McIntyre (S. 3616) and Rep. Conte (H.R. 15045) in May 1972. Apart from the fact that their small claims boards would be divisions of existing boards, these bills differ from our recommendations in that they make no provisions for an option of a due process hearing or de novo judicial review, and propose a higher jurisdictional limit.

[35] *See* table 2, *supra*.

[36] Shedd, *Administrative Authority to Settle Claims for Breach of Government Contracts*, 27 Geo. Wash. L. Rev. 481, 517 (1959).

protest procedures.[48] Unlike its previous procedures, the new procedures provide time constraints on the various steps of award protest adjudication. For example, the new procedures attempt to cut the average 48-day period used by contracting agencies to submit an administrative report to "20 [working] days after receipt by the agency of the complete statement of protest. . . ." Recent statistics have shown an average reduction of approximately 25 working days in the time needed to resolve protests received after the new procedures were implemented.[49]

GAO's attempt, through its new procedures, to reverse the annual increase in award protest processing time has not been fully implemented by the executive branch.[50] GAO itself has concluded that it "has no authority . . . to impose time limits on contracting agencies for reports on protests. . . ." [51] The freedom of individual agencies to submit administrative reports according to their own schedule has led to frequent complaints that executive agencies have prejudiced a protestor's position by waiting until a contract has been partially performed before such documents are submitted to GAO, knowing that GAO often has been reluctant to overturn an award in such circumstances.

The complete solution to this problem cannot be achieved by one agency alone. It is evident that the impetus for expediting the process must come from all the Government agencies involved in the resolution of protests. If the agencies are confused about their authority and relationship to each other, and if this confusion causes resistance and lack of cooperation in expediting decisions, then achievement of the goal surely must fail. For the system to operate with fairness the agencies must act together to provide a comprehensive, coordinated regulatory system for resolution of disputes pertaining to the award of Government contracts.

[48] 36 Fed. Reg. 24791 (1971). *See* 4 CFR Part 20 (1972).

[49] Figure is based on statistics furnished by Office of General Counsel, U.S. General Accounting Office.

[50] *See* Letter from George P. Shultz, Director, Office of Management and Budget, Executive Office of the President, to Hon. Elmer B. Staats, Comptroller General of the United States, June 8, 1971; Letter from John Mitchell, Attorney General of the United States, to Hon. Elmer B. Staats, Comptroller General of the United States, June 14, 1971.

[51] 36 Fed. Reg. 24791 (1971).

Procedures for Considering Award Protests

In the past the GAO protest procedure was normally ex parte.[52] An opportunity was afforded the protestor to have an informal meeting with the GAO attorney assigned to the protest or other GAO officials. Only in rare instances were joint conferences held with all interested parties in attendance. The new GAO procedures now provide that all interested parties will be given an opportunity to attend a conference requested by any of the other parties to the protest.

GAO prepares no transcript of any type of informal conference, and no provision is made for the taking of sworn testimony or the cross-examination of witnesses. The GAO decision on the protest is based entirely on the record in its file, compiled from the agency report and other documents submittted by interested parties.

The complaint has been made that GAO has failed to adopt appropriate procedural safeguards that ensure impartiality in adjudication of award protests. There are two parts to this source of dissatisfaction.

WEIGHTING OF EVIDENCE

When facts submitted by a protestor are disputed by the facts contained in the procuring activity's administrative report on the protest, GAO has stated in the past that "in the absence of evidence sufficiently convincing to overcome the presumption of the correctness of the administrative report, this Office will accept the administrative report as accurately reflecting the disputed facts." [53] It is charged that the use of such a presumption prevents GAO from making an independent evaluation of all the issues presented to it.[54] Although

[52] No formal hearing was held on the merits of the protest. Communications about the protest were ex parte in the sense that they usually were limited to an exchange of views between a GAO official and one party to the protest. Other parties to the protest were normally not made privy to these communications. *See* Shnitzer, *supra* note 29, at 4–5.

[53] 41 Comp. Gen. 47, 54 (1961); *accord*, 46 Comp. Gen. 631, 646 (1967). *See also* 37 Comp. Gen. 568, 570 (1958); 16 *id.* 1105, 1106 (1937); 3 *id.* 51, 54 (1923).

[54] *See* Statement of Theodore M. Kostos, Esq., before the Commission on Government Procurement's Remedies Study Group, Washington, D.C., Feb. 17, 1971; Statement of W. Stanfield Johnson, Esq., *id.*; American Bar Association, Public Contract Law Section, *Report of the Committee on Bids and Protests*, June 1971 (unpublished).

may have access to the Court of Claims or a U.S. district court. And if it does exhaust its administrative remedies and then, on losing at the board level, seeks judicial review, the board's findings of fact are essentially conclusive. If it is a dispute in breach of contract, the contractor must, of course, now go directly to either the Court of Claims or a district court.

Thus, under the present disputes procedure, the contractor has only limited access to the courts. The *Bianchi* [42] Supreme Court decision and its progeny in *Grace* [43] and *Utah* [44] have made the administrative forum the principal locus within which the contractor may present its claim. The boards, in effect, have become the final arbiters of fact, while the courts may only inspect the board record to determine if the findings of fact were "fraudulent, arbitrary, capricious or unsupported by substantial evidence."

In recent years it has been contended that contractors ought to have greater access to the courts, although admittedly a dispute processed through the courts may take longer and be more expensive to litigate than in an administrative forum. Those opposed to direct access, and in favor of mandatory exhaustion of administrative remedies through a board of contract appeals, believe that a primary goal of an administrative procedure is to produce sound, expeditious decisions that result in final disposition of the great majority of cases. They consider that the well-established trend in the law recognizes the benefits of mandatory exhaustion of administrative remedies. They contend that making the disputes-resolving procedures currently available in the boards of contract appeals optional would result in increased delays and formality that would affect the expeditious completion of the contract. Although it is true that some cases will eventually reach the courts and suffer even greater delay by reason of the administrative process, these cases presently amount to only about five percent of all cases decided by the boards.[45] Those opposed to direct access also believe that permitting optional forums invites "forum shopping," by encouraging litigants to choose a tribunal on the basis of its past treatment of the same type of party, and would thus tend to undermine the basic tenet of our jurisprudence that the quality of justice in one tribunal is no different from that of another.

We conclude, however, that direct access to the courts should be restored to the contractor to assure it of a day in court, a fully judicialized, totally independent forum that historically has been the forum within which contract rights and duties have been adjudicated. The rationale of the Tucker Act, which ended to a great degree the doctrine of sovereign immunity, is that the Government acting as a buyer subjects itself to this judicial scrutiny when it enters the marketplace, and should not in all cases be administratively the judge of its own mistakes, nor adjust with finality disputes to which it is a party. This recommendation does no more than reaffirm the intent of this statute. While most disputes will undoubtedly best be resolved in an administrative proceeding, the contractor should not be denied a full judicial hearing on a dispute it deems important enough to warrant the maximum due process available under our system. Direct access to courts guarantees that, at the option of the contractor, the remedial process may extend from the contracting officer to the courthouse on all aspects of a dispute.

"Forum shopping" under a remedies system featuring alternative forums is not an undesirable result, because it will promote efficiency and fair results among the forums. Each of the recommended forums is designed for a different purpose and should ultimately handle different types of claims. Moreover, under the present system there exists considerable disharmony between the administrative and judicial forums that oversee the resolution of disputes. There is an ongoing competition for jurisdiction of contract claims. Tension is generated by the fact-law dichotomy under Wunderlich Act standards, judicial suspension for further administrative factfinding, and remand to the boards for a quantum determination.

Taking a claim directly to court instead of to a board of contract appeals may cause additional delay and expense over and above that required for resolution at the board level. However, the claimant desiring the court proceed-

[42] *Bianchi, supra* note 27.
[43] *Grace, supra* note 30.
[44] *Utah, supra* note 14.
[45] Study Group 4, *Final Report*, vol. II, p. A–72.

issuance of a ruling by the Comptroller General.[56]

The basic executive procurement regulations, however, provide that:

> Where a written protest against the making of an award is received, award shall not be made until the matter is resolved, unless the contracting officer determines that:
> (i) the items to be procured are urgently required; or
> (ii) delivery or performance will be unduly delayed by failure to make award promptly; or
> (iii) a prompt award will otherwise be advantageous to the Government.[57]

The regulations further provide that when a protest has been lodged with GAO prior to award a contracting officer must seek approval at "an appropriate level above that of the contracting officer, in accordance with Departmental procedures," if he decides to proceed with an award despite the pending protest.[58] The "appropriate level" for approval varies with each agency. For example, one agency regulation requires the approval of a "superior officer" while a second agency regulation requires approval by the Deputy for Procurement within the office of an Assistant Secretary. The only coordination required with GAO is that the contracting agency notify GAO of the intent to make an award and inquire regarding the status of the protest.[59]

GAO has concluded that it has no power to compel the agencies to withhold award while a protest is pending with GAO.[60] We believe that agencies should retain the authority to make an award while a protest is pending with GAO. Such decisions should be based, however, on a high-level agency finding as stated in the GAO procedures.

Effective Remedy for Protestor

Recommendation 17. GAO should continue to recommend termination for convenience of the Government of improperly awarded contracts in appropriate instances.

[56] 4 CFR § 20.4 (1972).
[57] ASPR 2-407.8(b)(3); FPR 1-2.407-8(b)(4).
[58] ASPR 2-407.8(b)(2); *accord* FPR 1-2.407-8(b)(3).
[59] ASPR 2-407.8(b)(2); FPR 1-2.407-8(b)(3).
[60] *See* 36 Fed. Reg. 24791 (1971).

The majority of protests are not lodged with GAO until after an award has been made.[61] While GAO should have discretion in recommending that a contract be canceled or merely that corrective action be taken with respect to future procurements, it is important to provide protestors with an effective remedy when they are wrongfully denied an award.

Since our study began, GAO has recommended in several protest cases that an improperly awarded contract be terminated for the convenience of the Government and reawarded to the protestor who proved entitlement to that award.[62] Such a procedure is meritorious in that it often provides an effective remedy to a protestor without unduly penalizing the contractor who erroneously has been allowed to begin performance. We recommend that this remedy continue to be used in appropriate circumstances.

FEDERAL COURTS

Until 1970, Federal courts generally held that they would not, on the complaint of a private party, review the actions of administrative officials in soliciting or awarding a Government contract. The Supreme Court in 1940 reasoned in *Perkins* v. *Lukens Steel Co.*[63] that protestors had no "standing" [64] to seek judicial review of contracting agency decisions because Federal procurement statutes bestowed no "litigable rights upon those desirous of selling to the Government." [65] To have standing to sue

[61] In fiscal 1972, 55 percent of all protests decided were lodged after award. In fiscal 1971, 60 percent were lodged after award. Moreover, 26 percent of the decisions involving protests lodged before award were rendered after an award in fiscal 1972. *See* Appendix A, p. 78.
[62] *See, e.g.*, 51 Comp. Gen. 423 (1972); 51 *id.* 293 (1971); 51 *id.* 62 (1971); 49 *id.* 809 (1970).
[63] 310 U.S. 113 (1940).
[64] "The five major questions about judicial review of administrative action are whether, when, for whom, how, and how much judicial review should be provided. The question of who may challenge administrative action—the third of the five major questions—is customarily discussed by courts in terms of 'standing' to challenge." K. Davis, 3 *Administrative Law Treatise* 208 (1958).
[65] 310 U.S. at 127. This doctrine was first clearly pronounced in a suit against Denver city officials by a bidder on a city contract, and the case has served as precedent for subsequent cases involving the award of Federal contracts. *See Colorado Pav. Co.* v. *Murphy*, 78 F. 28 (8th Cir. 1897), *appeal dismissed*, 166 U.S. 719 (1897). *See also O'Brien* v. *Carney*, 6 F. Supp. 761, 762 (D. Mass. 1934). In *Perkins* the Supreme Court stated that § 3709 of the Revised Statutes, requiring public advertising for contracts, "was not en-

decisions and, second, that the Government could put contractors to additional expense and delay by the use of appeals. Our recommendations answer these arguments by: (1) assuring the independence of the boards; (2) allowing the contractor interest on its claim when it recovers; (3) providing the contractor the optional use of small claims forums or direct access to court to reduce time and expense; and (4) requiring that the final decision by the Government to seek judicial review be made by the Attorney General.

DISSENTING POSITION

Some Commissioners* dissent from the recommendation to grant the Government the right to judicial review.

They believe there are three primary reasons why the Government should not have the right of judicial review:

- To maintain the integrity of the disputes process
- To protect contractors from unwarranted prolonged reviews of disputes
- To avoid creating an unneeded right.

First, most Government contracts include a disputes clause that subjects contractors to administrative reviews and determinations of contract disputes in accordance with the intent of the Wunderlich Act. Throughout this administrative process, designated representatives of the Government are decisionmakers. And, pending final decision on the dispute, a contractor is obligated—under the terms of Government contracts—to proceed with performance in accordance with the Government's decision, no matter how strongly it may dispute the issue at hand.

In return for these substantial rights that contractors surrender under the disputes procedure, the Government has traditionally recognized that its ultimate administrative determination, by a board of contract appeals, should be final as far as the Government is concerned. Otherwise, it would cast aspersions on the validity of the entire administrative process and, in effect, result in impeaching all of the designated officials who have represented the Government throughout that process.

Although the Government's representatives exercise objective and independent judgments in making their determinations, it must nevertheless be recognized that these officials are appointed solely by the Government, which is as it should be, since a board of contract appeals constitutes the duly authorized representative of its Secretary for determining appeals. Thus, an attempt, within an agency, to overturn a board decision must be equated with an attempt to overturn the decision of the Secretary himself, whose word should be final as far as his agency is concerned.

Second, the finality provision of the disputes clause is one of the salient features of the disputes process. It culminates the administrative process in the manner contemplated by the Wunderlich Act, and it overcomes the problems that constituted the reasons for enacting the Wunderlich Act in the first place.

The intent of Wunderlich was to establish a quick and efficient procedure for resolving disputes under Government contracts. Prior to Wunderlich, contractors could be unduly subjected to prolonged and unwarranted delays in order to obtain a final determination of contract disputes. To avoid this, Wunderlich was enacted and, thus, board decisions became final and conclusive and, as clearly enunciated in the *S&E Contractors* case, unappealable by the Government. The many years of delay involved in the *S&E* case itself illustrates how gross the inequity and wrong can be vis-a-vis certain contractors when the Government takes a board decision to the courts.

Moreover, if the Government could appeal an adverse board decision, the power of the board would be severely diminished, thereby weakening the entire administrative process. The board decision would be no more than another subordinate Government official's decision that could only influence somewhat the outcome of the dispute but not represent an end to the chain of decisions the Government required before it recognized that it had treated a contractor wrongfully.

Third, a final reason for not creating a Government right to appeal from an adverse board decision is fundamental—this right is not needed. In the past 20 years, there have been

*Commissioners Beamer, Horner, Joers, McGuire, and Sanders.

and the GAO opinion are neither arbitrary nor capricious.[77]

If the protestor proceeds first to a Federal court and obtains a judicial determination of the merits of its protest, then it may not obtain a subsequent decision from another forum. The contracting agencies and GAO are bound by the court's decision.[78] The protestor's only recourse is to appeal an adverse lower court opinion to a higher court.[79]

Need to Clarify Authority for Judicial Review of Contract Award Decisions

Three weeks after the *Scanwell* decision, the Supreme Court issued two major opinions bearing on the doctrine of standing to sue, although, again, the cases did not involve offerors for Government contracts. In *Association of Data Processing Service Organizations, Inc.* v. *Camp*[80] the court stated a plaintiff has standing to challenge administrative action that "has caused him injury in fact, economic or otherwise" if the interest sought to be protected is "arguably within the zone of interests to be protected or regulated by the statute or constitutional guarantee in question" and judicial review has not been precluded.[81] In a companion case, *Barlow* v. *Collins*,[82] the court commented that "preclusion of judicial review of administrative action adjudicating private rights is not lightly to be inferred. . . . Indeed, judicial review of such administrative action is the rule, and nonreviewability an exception which must be demonstrated."[83]

These Supreme Court cases have not settled the question of whether offerors on Government contracts may challenge administrative action in the contract award process. Certain courts have subsequently granted standing to protestors.[84] Others have continued to deny standing to offerors based on *Perkins* v. *Lukens Steel*.[85] The latter have reasoned, in essence, that the Supreme Court has not, unlike the *Scanwell* decision, ruled that any person "aggrieved in fact" by agency action may sue the Government. Rather, these courts contend, the Supreme Court opinions impose the additional requirement that a protestor must show that some Federal statute grants it a legal interest in the procurement process that is entitled to be protected and enforced in a court of law.[86] The result of these differing decisions is that award protests may certainly be brought in certain judicial forums, such as the district courts within the District of Columbia Circuit and the Court of Claims, but it is an open question at best in other jurisdictions whether the offeror will be granted standing to sue the Government.

The brief history of judicial involvement in the award protest system shows the potential

[77] *A. G. Schoonmaker Co.* v. *Resor*, 445 F.2d 726 (D.C. Cir. 1971). The court in a later decision emphasized that "[t]he GAO's decision is not necessarily dispositive, however, and we take occasion to point out that there certainly may be instances where the District Court will find procurement illegality that the GAO failed to recognize, or at any event failed to correct." *M. Steinthal & Co.* v. *Seamans*, 455 F.2d 1289, 1305 (D.C. Cir. 1971).

[78] It is the policy of GAO "not to render decisions on protests where the material issues are or have been involved in litigation before a court of competent jurisdiction." Comp. Gen. Dec. B–173489, Oct. 8, 1971 (denying reconsid. of 51 Comp. Gen. 168 (1971)). *See* 51 Comp. Gen. 87 (1971) (*reconsid. den.*, B–171782, Sept. 7, 1971, Unpublished); Comp. Gen. Dec. B–171917, May 4, 1971, Unpublished. GAO will consider a protest where protestor has obtained an injunction staying agency action until GAO has adjudicated the protest.

[79] Cases in the Court of Claims may be reviewed by the Supreme Court of the United States. 28 U.S.C. § 1255 (1970). The courts of appeals have jurisdiction of appeals from all final decisions of the district courts, except where a direct review may be had in the Supreme Court. 28 U.S.C. § 1291 (1970). Cases in the courts of appeals may be reviewed by the Supreme Court. 28 U.S.C. § 1254 (1970).

[80] 397 U.S. 150 (1970).

[81] 397 U.S. at 152–56.

[82] 397 U.S. 159 (1970).

[83] 397 U.S. at 166.

[84] *See, e.g., Ballerina Pen Company* v. *Kunzig*, 433 F.2d 1204 (D.C. Cir. 1970); *National Helium Corp.* v. *Morton*, 455 F.2d 650 (10th Cir. 1971). *See also Contractors Assn., of Eastern Pa.* v. *Secretary of Labor*, 442 F.2d 159 (3d Cir. 1971).

[85] *See Gary Aircraft Corp.* v. *United States*, 342 F. Supp. 473, 476–78 (W.D. Tex. 1972) (motion for prelim. injunc. denied and complaint dismissed based, in part, on *Perkins* v. *Lukens Steel Co.*); *Rubber Fabricators, Inc.* v. *Laird*, No. 71–1889 (4th Cir., Nov. 15, 1971) (District Court ruled bidder had no standing to sue under *Perkins* v. *Lukens Steel Co.* and denied motion for prelim. injunc.; Court of Appeals granted injunc. pending appeal; injunc. dissolved because case rendered moot; Court of Appeals never reached standing issue). *See also Allen M. Campbell Gen. Con., Inc.* v. *Lloyd Wood Const. Co.*, 446 F.2d 261, 264 n.5 (5th Cir. 1971) (since *Perkins* v. *Lukens Steel Co.* "never [has been] judicially overruled or even mentioned by the Supreme Court in recent standing decisions, we assume without deciding that the question in other contexts is an open one.")

[86] *See Merriam* v. *Kunzig*, 347 F. Supp. 713, 720–24 (E.D. Pa. 1972) (complaint dismissed for lack of standing because "specific interest of the plaintiff cannot reasonably be considered to be included in the zone of interests to be protected or regulated" by statutes examined); *Gary Aircraft Corp.* v. *United States*, 342 F. Supp. 473, 476–78 (W.D. Tex. 1972). Protests also have been dismissed on the ground that the agency's decision was committed to agency discretion and not reviewable by a court of law. *See Gary Aircraft Corp., supra*, 342 F. Supp. at 478; *Hi-Ridge Lumber Company* v. *United States*, 443 F.2d 452 (9th Cir. 1971); *Pullman, Inc.* v. *Volpe*, No. 71–2442 (E.D. Pa., Dec. 14, 1971).

litigation once it has reached the review level and to make whatever findings are required. They believe that the delay resulting from the requirement that the case be remanded to a busy board is too great a price to pay for maintaining the distinction between factfinding and reviewing findings of law and is, furthermore, a waste of the readily accessible factfinding mechanism available in the court.

Others believe that the present remand practice, since it involves primarily a referral for determination of quantum, is appropriate, since the boards are a forum where the agency officials can deal directly with the contractor and frequently negotiate a reasonable settlement without requiring a full hearing. The responsibility and authority for settlement is primarily in the agency, and a consideration of what is a reasonable contract adjustment requires the first-hand knowledge of those Government officials responsible for administering the contract, especially the contracting officer. Finally, there is concern that to permit the courts to open the board record and admit new evidence on a particular factual question is to risk de novo review of other questions as well, since the bounds of such a hearing will be difficult or impossible to define.

The present judicial review process does not contribute to speedy and economical resolution of disputes. The limitations and uncertainties appear to have increased emphasis on procedures that can have a resultant ping-pong effect between the boards and the courts, while the substance of the case is largely ignored. This, along with the lengthy time period needed to initiate court action in the first place, can make a case stale since a board of contract appeals may not be directed to reopen a case until several years after its initial decision. During such an interval, witnesses and records for both sides may be lost or become difficult to find.

Although the boards of contract appeals should be strengthened in ways that will contribute to making better records and decisions, we see no advantage in continuing the rigid Wunderlich Act review standards and remand practice. The system would be more responsive to the interests of economy and fair treatment if the courts were allowed discretion to supplement the board record with additional evidence where appropriate and to take appropriate action to resolve the dispute. This should not foreclose the discretion to remand a case to an agency board of contract appeals. However, the delay and added expense resulting from a mandatory remand procedure is too great a price to pay. Considering the factfinding mechanism available in the judicial forums—particularly the Court of Claims—and the limited number of contract disputes that are litigated in the courts, revisions in the standards for scope of review and remand should benefit both contractors and the Government.[52]

District Court Jurisdiction

Recommendation 10. Increase the monetary jurisdictional limit of the district courts to $100,000.*

The Tucker Act was intended to create an integrated jurisdictional plan so that the Court of Claims and the U.S. district courts could offer an equal opportunity for a fair trial of like claims within the stated jurisdictional amount of the district courts. The act was intended in part to release the pressure put on Congress by individuals for private bills to terminate disputes. It also was intended to allow those with small claims to bring suit in the district in which they and their witnesses resided without incurring the expense and inconvenience of litigation in Washington.

These remain valid reasons for giving the district courts a role in the disputes-resolving process, although in recent years that role has greatly diminished, largely because inflation has made the present jurisdictional limit of $10,000 far too low. It is clear that this limit must be raised if the district courts are to play an effective role in the process.

Expanding the district court jurisdiction to $100,000 would broaden the base of Government contract law by involving a greater

[52] Pub. L. No. 92-415, signed by the President in Sept. 1972, grants the court the power to remand with such "directions" as it may deem proper and just. Our recommendation would give the court the additional power to take additional evidence itself instead of remanding. In addition, Rep. Celler in May 1972 introduced a bill (H.R. 14726) that would amend the Wunderlich Act to grant the contractor a de novo review of an adverse board decision with, however, the board decision bearing a presumption of correctness.

*See dissenting position, *infra*.

GAO Review of Agency Award Protest Procedures and Practices

Recommendation 20. Conduct periodic reviews by GAO of agency award protest procedures and practices.

GAO conducts hundreds of independent audits and reviews of executive branch programs that are "intended to give the Congress, as well as the agency heads, an objective appraisal of the operations of the agency or activity covered which . . . need congressional or executive branch attention." [93] However, GAO does not regularly conduct comprehensive reviews of agency award protest procedures and practices.

We believe that periodic, objective appraisal of agency award protest procedures and practices is desirable as a means of calling attention to management practices that must be corrected if protests are going to be reduced. Such a regular review would assist in achieving the comprehensive and coordinated set of award protest procedures that the award protest system needs.

[93] Statement of Hon. Elmer B. Staats, Comptroller General of the United States, *Hearings on the Capability of GAO to Analyze and Audit Defense Expenditures Before the Subcomm. on Executive Reorganization of the Senate Committee on Government Operations*, 91st Cong., 1st Sess., Exhibit 1, at 29 (1969).

from funds provided for by the Permanent and Definite Appropriations Act [56] on approval by the General Accounting Office. For judgements over $100,000, the Department of Justice must report to the Department of the Treasury, which in turn must obtain the funds from Congress.

This practice has two drawbacks. First, there may be an incentive in certain cases on the part of the procuring agency to avoid settlements and prolong litigation in order to have the final judgment against the agency occur in court, thus avoiding payment out of agency funds. Second, the practice may tend to hide from Congress the true economic costs of some procurements by not requiring the agencies to seek additional appropriations to pay the judgment.

In order to promote settlements and to assure that the total economic cost of procurement programs is charged to those programs, all judgments awarded in court on contract claims should be paid from the defendant agency's appropriations. If the agency does not have the funds to make the payment, the agency should be required to request additional appropriations from Congress, if possible.

Subcontract Disputes [57]

Government procurement, for policy and practical reasons, involves extensive subcontracting. The Government encourages subcontracting to help small business and widen the industrial base. Although the subcontractor finds itself directly involved with the Government in many matters, including exposure to audits, inspections, production supervision, and termination settlements, it has no direct access to the Government in the resolution of disputes. The privity doctrine holds that the Government deals with the prime contractor in these matters, who then deals with the subcontractor and represents it in any claims actions before the agencies and the courts.[58]

Many of the Government actions that result in prime contractor claims also affect the subcontractor. These may include delay caused by Government orders to suspend work, defective specifications, change orders and constructive changes, delays or deficiencies in Government-furnished property, disallowances under cost-reimbursement contracts, compensation under incentive contracts, termination settlements, and the enforcement of socioeconomic regulations.

With the avenue of direct relief largely closed, the subcontractor must find alternative means to obtain relief for Government actions. The subcontractor can usually bring suit in court against the prime contractor, but such a suit lacks the relative speed and economy of a direct administrative proceeding against the Government. Perhaps more important, it means a suit against a customer that may be damaging to the subcontractor's future business and may be unfair to the prime contractor since the Government is the actual party at fault. The prime contractor may bring the Government into the suit as a third-party defendant, but even this is not always possible. At present, the subcontractor's only means of access to the boards of contract appeals is to persuade the prime contractor to "sponsor" it (to bring a claim to the board on its behalf) or to seek permission to bring the action itself in the prime contractor's name, assuming it can establish the Government's liability to the prime contractor on the claim.

There is some evidence to suggest that the present position of the Government subcontractor can lead to unfair results when the subcontractor has a dispute with the Government. The prime contractor may refuse to sponsor a subcontractor claim for several reasons. The prime contractor may feel that the subcontractor claim would reflect adversely on the management ability of the prime con-

[56] 31 U.S.C. § 724a (1970).

[57] For a discussion of subcontractor problems generally, see Part A, Chapter 8.

[58] *See, United States* v. *Blair*, 321 U.S. 730, 737–38 (1944); *Merritt* v. *United States*, 267 U.S. 338 (1925). ASPR 23–203(a) and NASA PR 23.203 specifically prohibit contracting officers from approving a provision in a subcontract granting the subcontractor the right of direct appeal from a contracting officer decision to the boards. ASPR 23–203(a) is a recent attempt by the Department of Defense to promulgate regulations governing subcontractor remedies; *see, Hotchkiss Constr. Co.*, ASBCA No. 8708, 1963 BCA ¶ 3691 and *American LaFrance*, ASBCA No. 8497, 1964 BCA ¶ 4051.

Several agencies, however, do permit subcontractors direct appeal to the Government. *See, e.g., Rules of Atomic Energy Commission Board of Contract Appeals*, 10 CFR § 3.1(ii); *Carpenter Steel Co.*, AECBCA No. 5–65, 65–1 BCA ¶ 4796. The National Science Foundation has also approved subcontractor direct access. *Western Knapp Engineering Co.*, ASBCA No. 8943, 1963 BCA ¶ 3767.

CHAPTER 4

Equitable and Special Management Powers Under Public Law 85-804

Public Law 85–804 [1] empowers the President to authorize Government agencies that exercise functions in connection with the national defense to enter into, amend, or modify contracts without regard to other provisions of law relating to the making, performance, amendment, or modification of contracts.[2] Currently, the Department of Defense and ten other agencies have been authorized by Executive order [3] to utilize Public Law 85–804 when exercise of its powers will "facilitate the national defense." [4]

Although the act permits an agency to use the authority without regard to other provisions of law relating to the making, performance, amendment, or modification of contracts, it does not authorize:

- Use of the cost-plus-a-percentage-of-cost system of contracting [5]
- Any contract in violation of existing law relating to limitation of profits [6]
- An amendment to increase the contract price to an amount higher than the lowest rejected bid of any responsible bidder when the contract was negotiated because the bids received after formal advertising were unreasonable or collusive [7]
- Formalization of an informal commitment, unless it is found that at the time the commitment was made it was impracticable to use normal procurement procedures.[8]

Moreover, it cannot be used as general authority for the negotiation of contracts,[9] nor does it permit the waiver of any bid, payment, performance, or other bond required by law.[10] The act also requires that any commitment in excess of $50,000 must be approved by an official at the Secretarial level or by an agency contract adjustment board.[11]

The act and the Executive order describe only in broad terms the appropriate situations for use of the authority. More detailed guidance is found in the Armed Services Procurement Regulation (ASPR),[12] Federal Procurement Regulations (FPR),[13] and certain agency internal regulations.[14] ASPR and FPR provide that three types of action are permitted under the act: (1) contractual adjustments; (2) making

[1] Act of Aug. 28, 1958, 72 Stat. 972 (codified at 50 U.S.C. § § 1431–35 (1970)). For a further discussion of this law, see Part H, Chapter 3.

[2] 50 U.S.C. § 1431 (1970).

[3] Exec. Order No. 10789, 3 CFR at 332 (1972), 50 U.S.C. § 1431 (1970), *as amended by* Exec. Order No. 11051, 27 Fed. Reg. 9683, 9689 (1962); Exec. Order No. 11382, 32 Fed. Reg. 16247, 16248 (1967); Exec. Order No. 11610, 36 Fed. Reg. 13755 (1971). Presently authorized agencies are the departments of Agriculture, Air Force, Army, Commerce, Defense, Interior, Navy, Treasury, and Transportation; and AEC, GPO, GSA, NASA, and TVA. Although 14 agencies are listed, the military departments and Department of Defense are counted as one agency in the text. Exec. Order No. 11051, 27 Fed. Reg. 9683, 9689 (1962) deleted the Office of Civil and Defense Mobilization. Exec. Order No. 11382, 32 Fed. Reg. 16247, 16248 (1967) deleted the Federal Aviation Agency and added the Department of Transportation.

[4] 50 U.S.C. § 1431 (1970).

[5] 50 U.S.C. § 1432(a) (1970).

[6] 50 U.S.C. § 1432(b) (1970).

[7] 50 U.S.C. § 1432(e) (1970). *See* 10 U.S.C. § 2304(a) (15) (1970); 41 U.S.C. § 252(c) (14) (1970).

[8] 50 U.S.C. § 1432(f) (1970).

[9] 50 U.S.C. § 1432(c) (1970). The act states that it is not to be construed to constitute authorization for "the negotiation of purchases of or contracts for property or services required by law to be procured by formal advertising and competitive bidding."

[10] 50 U.S.C. § 1432(d) (1970).

[11] 50 U.S.C. § 1431 (1970).

[12] *See* ASPR Section XVII.

[13] *See* FPR Part 1–17.

[14] *See, e.g.*, AF ASPR Supp. Part 1017; DSPR Part 1217; AECPR Part 9–17; NASA PR Part 17.

not assumed to recover the maximum profit.[60] The contractor is only expected to secure a reasonable return for supplying a commodity necessary to the public.

While there are undoubtedly situations when it is essential that Government contract work continue uninterrupted, some deny that this is necessary for all Government contracts. Inserting the requirement in all contracts provides the Government with extreme advantages in obtaining performance as the Government wants it and relegates the contractor to an after-the-fact contest to determine what it will be paid for doing work the Government way.

The question is whether the harm done to the contractor by this obligation outweighs the benefit to the Government. Theoretically, no damage should ever occur to the contractor because the Government does in the end pay additional expenses demonstrated to have been incurred. Furthermore, the rule against stopping work is not in fact inflexible; exceptions have been made. For example, if a contractor stops work in anticipation of a change order, the delay may be considered a constructive suspension of work.[61]

We conclude that the existence of the obligation does no great harm to the contractor, especially if our recommendations for the informal review conference, direct access to court, and the SCBCA system (all of these would speed up the resolution of disputes) are adopted. In addition, the payment of interest will ensure full recovery to the contractor of the full amount due on the claim. At the same time, the obligation lends stability and predictability to procurement programs that are vital to the functioning of the Government. It would be administratively unworkable to draw a line between vital and nonvital programs. Therefore, the obligation to continue work should be maintained.

SUPPLEMENTAL STATEMENT BY PERKINS McGUIRE, CHAIRMAN

While I endorse and support as a step in the right direction the Commission's recommendations concerning the resolution of disputes arising in connection with contract performance, I would favor a more fundamental change in the disputes-resolving system.

It is evident from our findings that the major problems in the present system arise because the agency boards of contract appeals are attempting to perform a dual role—that of a due process court and, at the same time, that of an expeditious, economical administrative disputes-resolving forum. This attempt to play a dual role, and the resulting failure to delineate clearly the purpose and character of the boards, has resulted in a number of Supreme Court decisions that have compounded the problem for both the Government and its contractors. If the decisions of the boards are the decisions of administrative tribunals acting as agents for one of the parties (the Supreme Court in the recent *S&E* decision stated "their decisions constitute administrative adjudication in its purest sense"), the contractor has not had its day in court, because as administrative boards they lack the essential judicial authority for a complete trial and do not offer sufficient procedural due process safeguards. However, in the earlier *Grace* and *Utah* decisions and under the Wunderlich Act, the boards' decisions have been treated as the decisions of due process judicial bodies and the parties, particularly the Government, have been cut off from full consideration of the dispute by a court. I believe the resolution of this conflict cannot be achieved until a final determination is made as to the character or function to be performed by the boards, whether judicial or administrative.

We have found that, as a practical matter, most of the agency boards are now operating as contract trial courts utilizing a relatively high degree of due process safeguards in their procedures. We have recommended that whatever lack of due process now exists be remedied by eliminating substandard or inefficient part-time and ad hoc boards, granting the boards subpoena and discovery powers, and taking measures to ensure the independence and objectivity of the members. These recommendations constitute giant steps toward the transformation of the boards into true due process trial courts. Yet we have declined to complete the transformation, so we felt compelled to

[60] Cf., *e.g.*, the Renegotiation Act, 50 app. U.S.C. § 1211 (1970) where a contractor whose business is certain specified Government contracts must report on his profits and is liable to return profits which are determined to be in excess of standards established by legislation and the Renegotiation Board.

[61] *Utilities Contracting Co.*, ASBCA No. 9723, 65-1 BCA ¶ 4582.

the primary concern for making a contractual adjustment.[27]

CORRECTION OF MISTAKES

The basic procurement regulations provide that in formally advertised procurements, mistakes in bids (other than clerical mistakes) shall be corrected at a high executive level within the agency if the mistake is alleged after opening of bids and prior to award of the contract.[28] Such correction may take the form of permitting the bidder to withdraw its bid, or, in the case of clear and convincing evidence establishing the existence of a mistake and the bid actually intended, to correct the bid.[29] Mistakes prior to the award of a negotiated procurement normally do not require a special procedure to be invoked, because the offeror in a negotiated procurement may usually withdraw or change its offer up until the time for contract award.[30]

The Comptroller General has ruled that contracting agencies have no authority to reform contracts on the basis of a mistake discovered after award.[31] However, he has "delegated" authority to the contracting agencies to reform contracts to correct mistakes up to $1,000.[32] The primary regulations provide that high-level officials may rescind or reform a contract when a mistake is discovered after award, provided either that reformation will not reduce or increase the contract amount by more than $1,000 (and does not cause the corrected price to be more than the price of the next higher bid) or, in a contract to be rescinded in its entirety, the total contract amount does not exceed $1,000.[33] All cases not covered by this or other provisions of the regulations treating the disclosure of mistakes after award must be processed under the authority of Public Law 85–804.[34]

Under Public Law 85–804, a defense contract may be amended or modified to correct or mitigate the effect of a mistake, which may include a mutual mistake as to material fact, a contractor's mistake so obvious it was or should have been apparent to the contracting officer, or a failure to express in the contract the agreement as both parties understood it.[35] This provision provides a speedy administrative remedy for the correction of mistakes, thus avoiding the necessity of bringing a suit in the courts or going to the General Accounting Office.[36] Currently, the most extensive use of Public Law 85–804 authority is for correction of mistakes.[37]

FORMALIZATION OF INFORMAL COMMITMENTS

In contrast to the law governing private exchanges, which provides that the acts of an agent may bind the principal if the agent had apparent authority to do so,[38] Government contract law states that the Government as a buyer is not bound by its agents unless they possess actual authority to bind the Government.[39] Thus, when a seller furnishes goods or

[27] For an analysis of contract adjustment board decisions concerning amendments without consideration based on Government action, *see* Lakes, *supra* note 23, at 99–122; Jansen, *supra* note 23, at 980–87; O'Roark, *supra* note 23, at 66–75.

[28] *See* ASPR 2–406.3; FPR 1–2.406–3.

[29] *Ibid.*

[30] For a discussion of the rules which apply to mistakes in bids, *see* Welch, *Mistakes in Bids*, 1 The Briefing Papers Collection 47 (1970); Doke, *Mistakes in Government Contracts—Error Detection Duty of Contracting Officers*, 18 S.W.L.J. 1 (1964); Nash & Cibinic, *supra* note 21, at 267–73.

[31] *See* 20 Comp. Gen. 782 (1941).

[32] This delegation is limited to reforming contract prices which are erroneous, and "[a]ll other matters of reformation which have not been specifically granted by [GAO] are considered to have been reserved by [GAO] and should continue to be submitted for its consideration." 45 Comp. Gen. 496, 499 (1966).

[33] ASPR 2–406.4(b) (advertised); 3–510 (negotiated); *accord*, FPR 1–2.406–4(b) (advertised); 1–3.104 (negotiated).

[34] ASPR 2–406.4(g). *See* FPR 1–2.406–4(b).

[35] ASPR 17–204.3; FPR 1–17.204–3.

[36] The Court of Claims and the Federal district courts have the power under the Tucker Act, 28 U.S.C. §§ 1346(a)(2), 1491 (1970), to reform or rescind a Government contract on the basis of mistake. *See United States* v. *Milliken Imprinting Co.*, 202 U.S. 168 (1906); *Southwest Welding & Mfg. Co.* v. *United States*, 179 Ct. Cl. 39, 373 F.2d 982 (1967); *Poirier & McLane Corp.* v. *United States*, 128 Ct. Cl. 117, 120 F. Supp. 209 (1954); *Universal Transistor Products Corp.* v. *United States*, 214 F. Supp. 486 (E.D.N.Y. 1963); *Rash* v. *United States*, 175 Ct. Cl. 797, 360 F.2d 940 (1966); Nash & Cibinic, *supra* note 21, at 965–73. The Comptroller General, under his authority to settle and adjust all claims, 31 U.S.C. § 71 (1970), will also reform or rescind contracts based upon mistake. *See* The George Washington University, *Correction of Mistakes in Contracts Under Public Law 85–804* 22–23 (Government Contracts Monograph No. 1, 1961); Ramey & Erlewine, *Mistakes and Bailouts of Suppliers under Government Contracts and Sub-Contracts—a Study of Doctrine, Practice, and Adhesions*, 39 Corn. L.Q. 634 (1954); Welch, *Mistakes in Bids*, 18 Fed. B.J. 75 (1958); Nash & Cibinic, *supra* note 21, at 973–76. The boards of contract appeals have ruled that they do not have the authority to reform or rescind a contract. *See* authorities cited in Nash & Cibinic, *supra* note 21, at 874 n.1.

[37] *See* table 6, p. 56, *infra*. For a discussion of contract adjustment board decisions concerning correction of mistakes, *see* Lakes, *supra* note 23, at 123–72; Jansen, *supra* note 23, at 987–93; O'Roark, *supra* note 23, at 75–87.

[38] *See* Restatement (Second) of Agency § 159 (1958).

[39] *See* McIntire, *Authority of Government Contracting Officers: Estoppel and Apparent Authority*, 25 Geo. Wash. L. Rev. 162

circumstances have included: (1) sale of facilities to contractors where it would be uneconomical or impracticable to relocate them; (2) sale of property to contractors performing Government contracts in isolated areas where supplies needed for contract performance cannot otherwise be obtained; (3) sale of unserviceable ammunition components or scrap to metal processors in order to preclude interruptions in the production of ammunition; and (4) sale of special protective equipment to contractors and their employees.[51] The act has been used, too, as authority to furnish nondisposable, nonseverable industrial facilities to contractors, because otherwise there is only limited statutory authority for the construction of such facilities.[52]

Contractual Fairness vs. Special Management Powers

Although not so categorized by the regulations, our analysis of the authority shows that there are two main types of powers. The first type of powers are those which seek to provide contractual fairness to defense contractors by correcting inequitable situations; that is, amendments without consideration based on Government action, correction of mistakes, and formalization of informal commitments. The second type of powers are those which enable management officials to hurdle certain obstacles to the attainment of critical procurement objectives. The latter include the residual powers,[53] power to make advance payments, and the power to amend contracts without consideration based on the essentiality of the contractor. The importance of distinguishing these powers is discussed at the end of this chapter.[54]

[51] *See* Lakes, *supra* note 23, at 310–12; Jansen, *supra* note 23, at 1003–04.

[52] *See* Part A, Chapter 8 for discussion and recommendations with respect to providing additional authority to dispose of Government property in the hands of contractors.

[53] In addition to the uses described in the text, the residual powers have been used under Title II, First War Powers Act of 1941, the Reactivated Title II, and Pub. L. No. 85–804 as authority for: (1) payment for property requisitioned during combat; (2) lease of real property under emergency conditions; (3) direct loan to contractor; (4) novation; (5) settlement and compromise of contract claims; (6) release of chattel mortgages; (7) guarantee of loans; (8) release of obligation under guaranteed loan; (9) recission of termination for default and substitution of termination for convenience; (10) inclusion of arbitration clauses; (11) waiver of restrictions on purchase of foreign-made, prison-made, and blind-made products; and (12) negotiation of a lump-sum settlement of a contract terminated for convenience of the Government. *See* Lakes, *supra* note 23, at 301–02; Jansen, *supra* note 23, at 1001–02.

[54] *See* pp. 59–60, *infra*.

Permanency of Authority

Recommendation 21. Make authority presently conferred by Public Law 85–804 permanent authority.

Only in the past three decades have we attempted to study the needs of procurement agencies in general and devise comprehensive Government-wide standards for authority and guidance in procuring goods and services. Spurring the recognition of these needs was the advent of World War II when it was discovered that the contracting agencies did not possess sufficient authority to purchase war materials promptly and efficiently. Navy procurement, for example, at the beginning of the war "was governed by an astonishing mass of undigested and uncoordinated legislation—statutes that had accumulated on the books over a period of more than one hundred years. Many were completely archaic, many were conflicting, and not a few had been enacted to serve special and now forgotten interests." [55]

To overcome such impediments to the requirements of large-scale wartime procurement, Congress passed title II of the First War Powers Act of 1941,[56] the predecessor of Public Law 85–804. During debate on the bill some members of Congress feared that granting contracting agencies the power to make or amend contracts without regard to other provisions of law meant granting them unlimited power in procurement matters.[57] For this reason Congress restricted exercise of the act's authority to those instances where its use would "facilitate the prosecution of the war."

After the war Congress responded to the lack of comprehensive and coordinated pro-

[55] Dept. of the Navy, *Navy Contract Law* 6 (2d. ed. 1959). "In the aggregate they presented an obstacle to efficient and speedy purchasing that must have been the lament of many a supply officer." *Ibid.* *See* statutes listed in 87 Cong. Rec. 9864 (1941) (remarks of Rep. Walter).

[56] Act of Dec. 18, 1941, ch. 593, § 201, 55 Stat. 839. For an extended discussion of the historical antecedents of Pub. L. No. 85–804 *see* Lakes, *supra* note 23, at 25–55; Jansen, *supra* note 23, at 960–65; *Navy Contract Law*, *supra* note 55, at ch. 1.

[57] *See* 87 Cong. Rec. 9837–47, 9855–68, 9893–95 (1941).

Government contracting, however, is undertaken for the benefit of the public. The public, through Congress, has decided that Government contracting must be accomplished in a special way, primarily by fulfilling Government needs through competitive pricing methods that assure equal opportunities for businessmen to compete as well as the lowest possible cost to the Government. Rules designed to guarantee that these goals are met have existed almost from the beginning of our present form of Government. In 1809 Congress required that purchases and contracts for supplies or services for the military be made by "open purchase or by previously advertising for proposals" [5] in order to prevent favoritism and to give the Government the benefit of competition among suppliers.[6]

If rules are to be effective, though, there must be some way of making those who are governed by them adhere to them. The question of how to enforce prescribed solicitation and award procedures also arose early in the history of Government procurement. In 1853, for example, a seller complained to the President that while the Secretary of the Interior had acted honestly in awarding a contract to another bidder, "he decided erroneously as to the questions of fact" in selecting the lowest bidder.[7] The matter was referred to the Attorney General who advised that the Secretary of the Interior alone had the power to decide such questions of fact and that no statute provided a method by which even an erroneous decision could be revised.[8]

This early protest against the award of a Government contract identifies problems that have yet to be completely resolved. Two important questions are whether the decisions of a contracting official that lead to the award of a Government contract may be reviewed by any forum which is external to the contracting agency, and if so, who may initiate such review? Until 1970, Federal courts usually ruled that private complaints about the operation of the contract award process could not be heard in a court of law. The reason generally given was that the procurement regulations and statutes were promulgated solely for the benefit of Government officials as guidance in performing their duties and only higher executive authority or Congress could seek compliance with those rules.[9] However, the General Accounting Office (GAO) shortly after its creation in 1921 became receptive to direct complaints from private parties about how Government officials had acted when buying goods and services. Thus, the private "award protest" was offered as an alternative method of subjecting such administrative action to review.

Today private protests against the decisions of procurement officials are a major means of initiating review of procurement actions. In fiscal 1972, GAO handled 1,227 protests and issued 758 opinions affecting the formation of Government contracts.[10] But the implementation of this alternative has led to further problems. Even if the private protestor has a legitimate grievance that the Government has not followed the rules, and an external forum is willing to review the contracting agency's action, does the protestor have any enforceable rights in the contract award process?

The question is not easy to answer. Part of the problem is that the award protest system has grown by trial and error. No statute specifically grants the right to a seller to challenge the solicitation or award of a Government contract, nor does any statute clearly empower protest forums such as GAO or the Federal courts to review the decisions of administrative officials made during the contract award process.[11] Without such clear statutory right, it is uncertain whether a remedy that personally benefits the protestor can ever be granted.

Another problem in fashioning remedies is caused by the competing private and public interests at work in the contract award process. The most obvious motivation of a private firm to bid on a Government contract is to gain profit in its business ventures through performance of that contract. But the profits of a particular contract may not be the only consideration in submitting a bid or proposal. Since many businesses make Government contracting their sole or principal source of income, the award of a particular contract may

[5] Act of Mar. 3, 1809, ch. 28, § 5, 2 Stat. 536.
[6] 2 Ops. Atty. Gen. 257, 259 (1829).
[7] 6 Ops. Atty. Gen. 226 (1853).
[8] *Ibid.*, at 226–27.
[9] *See Perkins* v. *Lukens Steel Co.*, 310 U.S. 113 (1940).
[10] *See* Appendix A, p. 77.
[11] For a discussion of the statutory basis used by each forum to review award protests, see pp. 40–41, 45–47.

curement authority by enacting two primary procurement statutes.[58] Reflecting a change in attitude about Government procurement, certain title II powers which were once thought to be extraordinary in nature, such as the negotiation authority, were permanently incorporated into the new statutes.[59] Despite its now narrower scope, contracting agencies found that title II still was necessary in defense contracting. At President Truman's urging, the title was "reactivated" in 1951, at the outset of the Korean War.[60] The continued commitment of the United States to expanding the procurement process to facilitate the accomplishment of national defense goals following the Korean War caused Congress to extend the reactivated title II five more times.[61]

After extensive hearings by Congress in 1958, in which agencies testified on the necessity for the authority and the Comptroller General reported that no abuse of the powers had been discovered,[62] Congress passed Public Law 85–804. The purpose of the hearings was not only to discover whether there was a need for the powers but also whether that need was permanent in nature. For a reason which is not clear from the legislative history, a provision was inserted in the bill limiting use of the authority to periods of national emergency declared by Congress or by the President.[63]

Because the national emergency declared by President Truman in 1951 is still in effect,[64] Public Law 85–804 authority presently may be used by authorized agencies. It is clear, though, after three decades of use, that the vitality of the authority transcends any "national emergency." Its purpose is to enable contracting agencies to "supplement other contract authority by providing a statutory basis for dealing with individual procurement problems which inevitably arise and which must be resolved to assure the uninterrupted performance of contracts and to correct inequities." [65] The need for such authority will remain as long as agencies are engaged in accomplishing national goals through large-scale procurement programs.*

General Applicability of Authority

Recommendation 22. Authorize use of Public Law 85–804 by all contracting agencies under regulations prescribed by the President.

Among the 11 agencies authorized to use Public Law 85–804, the Department of Defense has resorted to it most often. During calendar year 1970 DOD approved actions under the act totaling $4.2 million. In calendar 1971 that figure rose to $629 million because of the severe financial problems of Lockheed Aircraft Corporation. The most frequent use of the authority has been for correction of mistakes, formalization of informal commitments, and inclusion of contingent liability clauses in contracts. Tables 6 and 7 show the number of contractual actions that have occurred in the Department of Defense under the authority of Public Law 85–804 for the period 1968–1971, and the dollar amount of contractual adjustment actions taken within the same time period.

Use of Public Law 85–804 authority is conditioned on an authorization from the President and compliance with regulations pre-

[58] *See* Armed Services Procurement Act of 1947, Act of Feb. 19, 1948, ch. 65, 62 Stat. 21 (codified at 10 U.S.C. §§ 2301–2314 (1970)); Federal Property and Administrative Services Act of 1949, Act of June 30, 1949, ch. 288, tit. III, 63 Stat. 377, 393 (codified at 41 U.S.C. §§ 251–260 (1970)).

[59] *See* 10 U.S.C. § 2304 (1970); 41 U.S.C. § 252(c) (1970).

[60] Act of Jan. 12, 1951, ch. 1230, 64 Stat. 1257.

[61] When the Reactivated Title II expired, according to its provisions, on June 30, 1952, the Korean War was still being waged. Congress, therefore, extended the act one more year. Act of June 30, 1952, ch. 524, 66 Stat. 295. Four other extensions were subsequently granted. *See* Act of June 30, 1953, ch. 173, 67 Stat. 132; Act of June 29, 1954, ch. 415, 68 Stat. 322; Act of June 1, 1955, ch. 120, 69 Stat. 82; Act of Sept. 7, 1957, Pub. L. No. 85-306, 71 Stat. 628.

[62] *See Authority for Certain Actions Relating to Defense Contracts, Hearings on H.R. 12894 Before Subcomm. No. 4 of the House Committee on the Judiciary,* 85th Cong., 2d. Sess., at 2–61 (1958).

[63] The Department of Defense originally intended to ask Congress for the authority on a permanent basis, but at the request of the Bureau of the Budget, the legislation was reworded to condition exercise of the authority upon the existence of a declared national emergency. The change is not explained in the legislative history; however, the hearings do contain a discussion of the nature of the authority and individual conclusions that the need is permanent so long as the agencies are engaged in large-scale procurement programs. *See Authority for Certain Actions Relating to Defense Contracts, Hearings on H.R. 12894, supra* note 62, at 17, 41–43.

[64] Presidential Proclamation No. 2914, 3 CFR, 1949–1953 Comp., at 99.

[65] Statement of Robert Dechert, General Counsel, Department of Defense, *Authority for Certain Actions Relating to Defense Contracts, Hearings on H.R. 12894, supra* note 62, at 4.

*For a dissenting view regarding this recommendation, see p. 59, *infra*.

received before award the procuring agency should, when desirable, solicit the views of GAO regarding the protest before an award is made.[15]

Fairer Treatment and Consideration of Award Protests

Recommendation 13. Promulgate award protest procedures that adequately inform protestors of the steps that can be taken to seek review of administrative decisions in the contract award process.

In 1968 the Senate Select Committee on Small Business concluded that "[p]resent procedures for handling [award] protests are entirely inadequate and unsatisfactory. A complete revision of these procedures is required." [16] Despite the committee's recommendation that "[p]rocurement regulations should be revised so as to fully acquaint bidders with the opportunities and procedures for filing [award] protests," [17] the present state of these regulations continues to be a source of dissatisfaction with the award protest system.

General guidance for processing award protests is contained in the Armed Services Procurement Regulation (ASPR)[18] and the Federal Procurement Regulations (FPR),[19] and most procuring agencies have, to some extent, supplemented these regulations with their own internal procedures.[20] The primary fault of ASPR and FPR is that they do not tell the protestor how to use the procuring agency to resolve the protest. The thrust of these regulations is to inform the agency officials as to what administrative actions must occur in the event a protest is received.

Contracting officers are required to "consider all protests or objections to the award of a contract, whether submitted before or after award," [21] but not all contracting officers actually decide award protests. Some agencies have a policy of deciding all protests at a high management level, while other agencies resolve them at various levels throughout the organization.[22] The regulations do not tell a protestor where a protest should be lodged in each case, what officials will have responsibility for deciding the protest, and whether individual or group conferences with either agency officials or all affected parties in attendance can be requested.[23]

ASPR and FPR provide that the contracting officer "may require that written confirmation of an oral protest be submitted" [24] but are not explicit regarding the manner in which a protest may be lodged or what the contents of the protest should be. No automatic dissemination of pertinent information is provided to all affected parties, and no provision is made for equal access by the protestor and all affected parties to the pertinent documents compiled and submitted by the Government and the parties to the protest.

In the event of a postaward protest—the type most potentially disruptive of an agency's program—ASPR and FPR offer few guidelines even for agency officials. They provide that the contractor who has been awarded the contract shall be notified of the pending protest, and the contracting officer may seek a mutual agreement with the contractor to suspend performance on a no-cost basis if the delay in receiving the supplies and services is not prejudicial to the Government's interest and it appears likely that the award may be invalidated.[25] ASPR and FPR and most agency in-

[15] ASPR 2-407.8(b)(2); FPR 1-2.407-8(b)(3).

[16] Senate Select Committee on Small Business, Subcommittee on Government Procurement, *Selected Problems of Small Business in the Area of Federal Procurement*, S. Rep. No. 1671, 90th Cong., 2d Sess. 2 (1968).

[17] *Ibid.*

[18] Procedures for protests against the award of advertised procurements are contained in ASPR 2-407.8. "Protests against awards of negotiated procurements shall be treated substantially in accordance with 2-407.8." ASPR 3-509.

[19] Procedures for protests against the award of advertised procurements are contained in FPR 1-2.407-8. FPR contains no provision similar to ASPR 3-509 for protests against the award of negotiated procurements.

[20] *See, e.g.*, APP 592.407-8; DSPR 1202.407-9; HEWPR 3-2.407-8; AGPR 4-2.407-8; GSPR 5-2.407-8; NASA PR 2.407-8; HUDPR 24-2.407-8; AECPR 9-2.407-8; VAPR 8-2.407-8; IPR 14-2.407-8.

[21] ASPR 2-407.8(a)(1); *accord*, FPR 1-2.407-8(a)(1).

[22] For example, one such regulation states "[i]t is the responsibility of the contracting officer to decide whether a protest has a valid basis and to take appropriate action when possible without referral to NASA Headquarters." NASA PR 2.407-8(a)(2). Another, however, states "[e]xcept as outlined above [when protests will be referred to agency headquarters], the Staff Officer responsible for procurement at the Major Command headquarters is authorized to render final decisions on protests before and after award which are lodged at no higher than Major Command level." AF ASPR Supp. 2-407.8(a).

[23] *See* 4 CFR §§ 20.1, 20.9 (1972).

[24] ASPR 2-407.8(b); FPR 1-2.407-8(b)(1).

[25] FPR 1-2.407-8(c); *accord*, ASPR 2-407.8(c).

prescribe the criteria to be followed. The other restrictions and requirements contained in Public Law 85–804 would continue to apply.

In proposing this extension of Public Law 85–804, we have considered the possibility that excessive use of the authorities provided in the act might undermine important requirements of other statutes and sound procurement policy. We believe this is highly unlikely in view of the specific controls contained in the act and the implementing regulations. A major function of the act has been to compensate for gaps in routine procurement authority which inevitably arise, and its future utilization should continue on this basis.

In eliminating the single objective of "facilitating national defense," it also will be important that criteria be established for certain types of actions—such as amendments without consideration in essentiality cases. We believe these criteria should be left to the regulations prescribed by the President, and could be developed by the Office of Federal Procurement Policy.

Recommendation 23. Incorporate Public Law 85–804 into the primary procurement statute.

Maintaining Public Law 85–804 separate from the primary procurement statutes seems to serve no special purpose if the statute is to have Government-wide application. Accordingly, we believe the provisions of this act should be integrated with the basic procurement statute recommended in Part A, Chapter 3.

Dissenting Position: Recommendations 21–23

One Commissioner does not favor these recommendations for the following reasons:

The modification of a contract without consideration is an extraordinary legal remedy which reasonably should be limited to promoting the national defense in time of emergency. The settlement of breach of contract claims would be possible under the broadened powers available to the procuring agencies and administrative disputes-resolving forums under Recommendation 5. There is already other provision for correction of mistakes, and informal commitments may generally be formalized by the ratification of the commitment by an authorized Government official. While these actions may perhaps be handled somewhat more expeditiously under the Public Law 85–804 procedure, there seems little purpose in extending the duplication beyond the terms of the present statute. The other available actions under the law are generally also of the type most appropriate for use within the limits established by the present act.

Reports to Congress

Recommendation 24. Revise existing requirements in Public Law 85–804 on reporting to Congress.

Public Law 85–804 requires that completed actions involving the exercise of the powers provided for in the act be reported to Congress annually.[70] To keep Congress informed of the expenditure of large sums of money pursuant to the exercise of special management powers we recommend that contracting agencies be required to inform Congress prior to taking any action that would obligate the United States for an amount in excess of $1 million. In all other instances we recommend that the contracting agencies continue to make reports to Congress about all actions taken under the contractual fairness and special management powers in the same manner as is now provided in Public Law 85–804.

One Commissioner believes $5 million represents a more realistic figure for the threshold reporting requirement to Congress.

Administration of the Authority

In defining the types of authority delegated to contracting agencies by Public Law 85–804 and the situations in which that authority may be used, the implementing regulations do not

[70] 50 U.S.C. § 1434 (1970).

TABLE 4. AWARD PROTEST DECISIONS RENDERED BY GAO DURING FISCAL 1971—Continued

Department	*Total*
Health, Education, and Welfare	13
Housing and Urban Development	8
Interior	20
Internal Revenue Service (Treasury)	3
Justice	2
Labor	5
Marine Corps	1
Maritime Administration	1
National Aeronautics and Space Admin.	18
National Institutes of Health	1
Navy	142
Office of Economic Opportunity	3
Panama Canal Company	1
*Post Office	10
State	2
*Tennessee Valley Authority	1
Transportation	19
Treasury	1
Veterans Administration	8
Total	715

*Protests involving procurements by these agencies are no longer adjudicated by GAO.

Source: General Accounting Office, *Annual Report of the Comptroller General of the United States, 1971.*

Authority of GAO to Adjudicate Protests

Recommendation 14. Continue the General Accounting Office as an award protest-resolving forum.*

Despite the evident popularity of GAO as a forum for deciding award protests, its authority to consider award protests and issue decisions that are binding on procuring agency officials or on any other officials of the executive branch has been questioned by the Attorney General of the United States and by members of the procurement community. This concern is based on interpretations of the Constitution and of the statutes that give GAO the authority to settle public accounts. To understand the nature of these objections, it is first necessary to understand the rationale used by GAO for intervention in the contract award process.

GAO issued its first award protest decision in 1924,[31] three years after it had been created by the Budget and Accounting Act of 1921. The Budget and Accounting Act grants GAO authority to settle and adjust "[a]ll claims and demands whatever 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. . . ." [32] In settlement of public accounts, "[b]alances certified by the General Accounting Office . . . shall be final and conclusive upon the Executive Branch of the Government. . . ." [33] The Comptroller General also may render a decision, upon the application of the head of an executive department (or other establishment not under any of the executive departments) or a disbursing officer, "upon any question involving a payment to be made by them or under them, which decision, when rendered, shall govern the General Accounting Office in passing upon the account containing said disbursement." [34]

While the foregoing statutes contain no express authority for GAO to adjudicate award protests, GAO has interpreted its duty to audit and settle public accounts as containing an obligation to determine the legality of contract expenditures and assure compliance with the laws and regulations relating to expenditure of public funds. GAO has concluded that by deciding award protests it is preventing unauthorized payments by determining in advance the validity of a contract that obligates public funds.[35] The fact that, until 1970, no other forum independent of the procuring agency existed to insure that the contract award process operated with integrity is also cited as a reason for GAO's actions in this area.[36]

The Attorney General, in a 1971 letter to

*See dissenting position, *infra.*

[31] Comp. Gen. Dec. A–4471, Sept. 20, 1924, Unpublished (post-award protest). In 1925 the Comptroller General rendered the first GAO decision on a protest made before the award of a contract. Comp. Gen. Dec. A–10024, Aug. 19, 1925, Unpublished.

[32] 31 U.S.C. § 71 (1970).

[33] 31 U.S.C. § 74 (1970).

[34] *Ibid. See* 31 U.S.C. § 82d (1970) for similar provision relating to certifying officers.

[35] *See* address by Robert F. Keller, Assistant Comptroller General of the United States, before a Joint Program of the Government Contracts Committees of the District of Columbia, Federal, and American Bar Associations, Washington, D.C., Mar. 24, 1971; address by Paul G. Dembling, General Counsel, U.S. General Accounting Office, before a National Contract Management Association San Francisco Area Chapter Meeting, Oct. 6, 1970. *See also* 17 Comp. Gen. 554, 557 (1938).

[36] *See* Keller address, *supra* note 35.

CHAPTER 5

Debarment and Suspension Procedures [1]

Debarment and suspension are actions taken to prevent Government contractors, or potential contractors, from bidding on, entering into, or continuing to perform Government contracts. The purpose of these actions is to terminate business relations for varying periods with nonresponsible, defaulting, or dishonest contractors. Debarment is based on the violation of a statute or regulation and is provided for by both. Suspension may be based on suspicion of violation of certain statutes and regulations but is provided for only in the regulations.

STATUTORY BASES FOR DEBARMENT

The Davis-Bacon Act [2]

This act requires a construction contractor performing under a Government contract to pay wages at rates set by the Secretary of Labor. Failure to do so may result in the contractor's debarment for three years. About 40 related statutes [3] call for similar wage determinations, and debarment for a period "not to exceed 3 years" can result from failure to pay the established wage rates.[4]

In the case of Davis-Bacon violations, the Comptroller General makes the debarment determination; in cases under the related acts, the Secretary of Labor makes the determination.

The General Accounting Office (GAO) has established criteria [5] for the reports it requires as a basis for the Comptroller General's debarment determination under Davis-Bacon. The GAO criteria require a chronological narration of facts, copies of investigative reports, exhibits, and correspondence; explanations of actions taken by offenders; and any additional information and evidence. The recommendation of the agency concerned and that of the Department of Labor are requested, but the Comptroller General's decision is based on findings and recommendations developed in accordance with the GAO criteria and the rules of practice of the Department of Labor.

The Department of Labor rules [6] for recommending debarment for a Davis-Bacon Act violation and for determining whether debarment is justified under one of the related acts provide for (1) notifying the contractor or subcontractor of the violation, (2) a summary of the investigative findings, (3) "an opportunity to present such reasons or considerations" as the parties may have to offer opposing debarment, (4) an informal hearing before a hearing examiner, regional wage and hour director, or "any other Departmental officer of appropriate ability," and (5) an appeal from an adverse decision in the foregoing hearing, if requested, to the Solicitor of Labor (recently delegated to Administrator, Employment Standards Administration) who may "in his discretion . . . permit oral argument."

[1] *See* Part A, Chapter 11, for a discussion of debarment policies in relation to socioeconomic problems.

[2] 40 U.S.C. §§ 276a–276a–5.

[3] *See, e.g.*, Federal-Aid Highway Act of 1956, 23 U.S.C. § 113(a); National Housing Act, 12 U.S.C. § 1715c; Urban Mass Transportation Act of 1964, 49 U.S.C. § 1609; and Airport and Airway Development Act of 1970, 49 U.S.C. § 1722(6) (1970).

[4] *See* 29 CFR § 5.6(b)(1) (1972).

[5] Ms. Comp. Gen. B–3368, Mar. 19, 1957 (rescinds Circular Letter A–34106).

[6] *See* 29 CFR § 5.6(c) (1972).

Expedition in Processing Protests

Recommendation 15. Establish, through executive branch and GAO cooperation, more expeditious and mandatory time requirements for processing protests through GAO.

The first step in GAO adjudication of award protests requires the procuring agency to submit an administrative report. Agency regulations provide that the report shall include copies of the protest, the solicitation, and the relevant bids or proposals, plus other pertinent documents and a statement by the contracting officer setting forth his findings, actions, and recommendations in the matter.[42] The average time required by agencies to prepare these administrative reports and forward them to GAO was approximately 48 days during 1968–1972.[43]

After the administrative report is received, GAO begins consideration of the protest. The protestor is normally permitted to review, copy, and comment on the contracting agency's administrative report.[44] The contracting agency, in turn, is permitted to review and comment on any material submitted by the protestor. Likewise, the rules now provide that GAO will make available to any interested party relevant information that has been submitted by other interested parties or agencies.[45]

After all documents have been submitted, and requested conferences held, an assigned attorney within the Office of General Counsel writes an opinion. The opinion is then reviewed through successive levels of the organization and subsequently issued as a Comptroller General decision. The average time required for GAO to decide an award protest after receiving the administrative report has increased each year. In calendar 1968 the average time needed to process an award protest was 34 days. In fiscal 1972 GAO needed 61 days.

Table 5 indicates the average total time that elapsed before a case was decided by GAO during 1968–1972. This average processing time, which includes the time needed by the agency to prepare and forward the administrative report and the period needed by GAO to adjudicate the protest, increased from 88 days in calendar 1968 to 116 days in fiscal 1972.

Both contractors and contracting agencies have been critical of the upward spiral of time needed for GAO adjudication of award protests. Contractors complain that not only must production capability be maintained during the protest period, with no practical possibility for recompense of costs incurred during delay, but other business opportunities also may have to be bypassed by companies or their employees.[46] Government agencies state that delay in performance of a contract often impedes the successful accomplishment of agency goals.[47]

On December 23, 1971, GAO published new

[42] ASPR 2-407.8(a)(2); FPR 1-2.407-8(a)(2).

[43] *See* table 5 *infra*.

[44] *See* 4 CFR § 20.6 (1972).

[45] 4 CFR § 20.7 (1972). *See also* 4 CFR §§ 20.3, 20.6 (1972).

[46] *See* Statement of Daniel Ross, Esq., before the Commission on Government Procurement's Remedies Study Group, Washington, D.C., Feb. 17, 1971; Statement of Michael Rukin, President, Analytical Systems Corporation, Burlington, Massachusetts, before the Commission on Government Procurement's Remedies Study Group, Boston, Massachusetts, Mar. 24, 1971.

[47] *See* Letter from Major General Edmund F. O'Connor, DCS/Procurement and Production, Dept. of the Air Force, Hq. Air Force Systems Command to Vice Admiral Joseph M. Lyle, USN Retired, National Security Industrial Association, Sept. 16, 1971; *Bid Protests: DOD Surveys Indicate More Bid Protests Filed, Higher Percentage of Bid Protests Denied*, 418 FCR, Feb. 28, 1972, A-1 at A-2; Markey, *GAO Protests—A Mounting Problem*, Hdqtrs. Naval Material Command Procurement Newsletter, Quarterly Review (July-Sept. 1971).

TABLE 5. AGENCY AND GAO AVERAGE AWARD PROTEST PROCESSING TIME

Year	*No. protests decided by GAO*	*Total avg. processing days***	*Avg. agency processing days*	*Avg. GAO processing days*
1972*	758	116	49	61
1971*	715	110	49	57
1970	625	94	46	42
1969	533	92	47	38
1968	568	88	47	34

*Reported on a fiscal year basis. Remainder are reported on a calendar year basis. Data rounded by the Commission.
**Total does not equal "average agency processing days" plus "average GAO processing days." Extra days are attributable to other parties.
Source: Based on statistics supplied by Office of General Counsel, General Accounting Office.

decision becomes final, and the contractor is debarred by the Secretary of Labor.

Thus, the rules of practice are similar to those used in the courts, except that, as is common in administrative hearings, formal rules of evidence are not required.

Service Contract Act of 1965 [12]

This statute governs wages, fringe benefits, and working conditions of service employees and authorizes debarment of contractors by the Secretary of Labor for violations of the statute. The act also requires the Secretary to follow the procedures specified under the Walsh-Healey Act.

Buy American Act [13]

This act requires contractors to use only materials produced in the United States, although certain exceptions are provided for based on findings of an agency head. A construction contractor on a Government project who fails to comply with the requirements of this act can be debarred for three years after a finding of violation is made public by the agency head.

Violation of Buy American provisions by supply and service contractors is not treated by the act itself but is a basis for debarment under agency regulations. Rules for fact-finding and determination of a violation of the Buy American Act are the responsibility of the contracting agency.

Clean Air Act [14]

This act establishes and defines the Federal role in a national program to improve the quality of air resources through prevention and control of air pollution. It provides for limited debarment of contractors convicted of an offense as defined by the act. The pertinent provision does not use the term debarment, but it produces the same effect. It prohibits Government agencies from contracting for goods, materials, and services when performance of the contract would be "at any facility at which the violation which gave rise to such conviction occurred [the limitation referred to above] if such facility is owned, leased, or supervised" by the violator.

The statute requires the President to issue an order to implement the purposes and policy of the act by prescribing relevant procedures, sanctions, and penalties, and by requesting all Federal agencies to apply the provisions of the act in their grants, loans, and contracts.

Executive Order 11602 of July 1, 1971,[15] is the implementing order. It assigns responsibility for attainment of the purposes and objectives of the act to the Administrator of the Environmental Protection Agency (EPA). These responsibilities of EPA specifically include: (1) designation of facilities that have given rise to conviction under the act and circulation of a list of such facilities to all Federal agencies and (2) issuance of standards and rules for effectuating the purposes of the statute, and the Executive order.

Actions for violation of pollution standards are brought in the U.S. district courts and, upon conviction, the violator is debarred from participation in the procurement process. In such an action judicial rules of practice would, of course, pertain. However, the act charges EPA with gathering data for control plans, compliance determinations, and for other purposes from those subject to the act, including suspected violators. Decisions are to be made on the basis of "information available to [the Administrator]." EPA is still in the process of formulating the rules of practice for carrying out these functions.

Federal Water Pollution Control Act Amendments of 1972 [16]

This act establishes and defines the Federal

[12] 41 U.S.C. §§ 351–57 (1970).
[13] 41 U.S.C. §§ 10a–10d (1970).
[14] 42 U.S.C. §§ 1857–58a (1970).
[15] 3 CFR at 568 (1972).
[16] Pub. L. No. 92–500, amending the Federal Water Pollution Control Act, 33 U.S.C. §§ 1151–1175 (1970).

such statements have not appeared in recent GAO decisions, the impression persists that GAO still relies on this "presumption of correctness" when adjudicating award protests.

Another complaint relates to the evaluation of technical matters in a protest. Though GAO on certain occasions has sought independent evaluation and advice from an impartial Government agency, normally the soliciting agency's technical evaluations are substituted for GAO's own judgment. It is charged that this procedure also causes the evidence in a protest to be unfairly weighted in favor of the contracting agency.

FACTFINDING PROCEDURES

A second part of the complaint about the failure to provide due process adjudication of award protests deals with the manner in which GAO gathers evidence.[55] Although the present rules do provide for group conferences, ex parte communications are not expressly prohibited. The procedure of using ex parte communications has been criticized for its tendency to put evidence before GAO that is not known to the other party and, therefore, not rebuttable through other witnesses or documenation. Failure to provide open, oral hearings, with the opportunity for confrontation and cross-examination of witnesses, also enables parties, it is claimed, to give slanted versions of the facts to GAO. Finally, the inability of one party, through lack of discovery power, to obtain disclosure of facts in the exclusive possession of another often prevents that party from presenting evidence necessary for the successful demonstration of the merits of its case.

CONCLUSIONS

GAO has made a conscientious endeavor to respond to such criticism. It now provides for the automatic dissemination of pertinent data to interested parties, seeks to reduce ex parte communications, and no longer gives as much weight to the "presumption of correctness" in administrative reports.

[55] *See* Statement of Theodore M. Kostos, Esq., *supra* note 54; American Bar Association, Public Contract Law Section, *Report of the Committee on Bids and Protests*, *supra* note 54.

We commend GAO for its responsiveness and recommend that it continue to improve its procedures for handling award protests. In making this observation, we recognize of course that a balance must be preserved between due process and prompt handling of disputes. There are distinctive values in the informality and flexibility of the GAO award protest procedures. To concentrate too heavily on the due process aspect would diminish these values.

We do not recommend, therefore, that GAO adopt the full battery of due process procedures used in a court of law but only those that will insure "basic fairness" or objective consideration of award protests. To do otherwise could destroy the protestor's option of obtaining a prompt and economical administrative determination of its protest. The Federal courts are a reasonable alternative forum in which to lodge a protest if the complexity or importance of the protest requires the use of more formalized factfinding procedures. It is essential, in our estimation, that GAO strive to provide swift, economical, and informal resolution of protests.

Review of Decision to Award Contract During Pending Protest

Recommendation 16. Establish in the executive procurement regulations, in cooperation with the General Accounting Office, a coordinated requirement for high-level management review of any decision to award a contract while a protest is pending with GAO.

In an attempt to restrain the award of a contract while a protest is pending with GAO, the new GAO award protest procedures provide:

> When notice is given the agency that a protest has been filed with the General Accounting Office, award shall not be made prior to a ruling on the protest by the Comptroller General, unless there has first been furnished to the General Accounting Office a written finding by the head of the agency, his deputy, or an Assistant Secretary (or equivalent), specifying the factors which will not permit a delay in the award until

being considered and the period of time during which the contractor may present information for consideration by the agency. Evidence may be presented in person, in writing, or through a representative and usually must be presented within 30 days, although this period can be extended upon request. If a suspension is not in effect at the time, the notice of proposed debarment will act as such, and no contracts will be awarded until determination is made.

Finally, the contractor must be notified in writing within ten days if a debarment is put into effect. The reasons and time period for the debarment must be stated, and the contractor must be informed that the action is effective throughout the Department of Defense. If the debarment is not to be effected, the contractor must be notified in writing as soon as that decision is made.

COMPARATIVE CAUSES AND PROCEDURES FOR SUSPENSION

Suspension is intended to avoid fraud, criminal offenses, Federal antitrust violations, embezzlement, and other business-related dishonesty incident to public contracts. "Causes for Suspension," [19] is the same as its counterpart, "Causes for Debarment," [20] except that a contractor need only be suspected of the offenses to be suspended.

The period of suspension is limited to 12 months unless an Assistant Attorney General requests continuance. In this event, six months may be added, but in no case will suspension continue beyond 18 months unless "prosecutive action has been initiated within that period," in which case suspension continues until legal proceedings are completed.[21] The scope of suspension is the same as for debarment.

A firm or individual is entitled to written notice of a suspension within ten days after its effective date. The notice must describe the irregularities on which the suspension is based. However, the Government is not required to discuss its evidence but merely describe it in general terms. The suspended contractor must be told that the period of suspension is temporary pending completion of investigation and such legal proceedings as may be appropriate. Bids and proposals will not be accepted nor may contracts be awarded unless the Government determines that such action is in its best interest.

COMPARISON WITH FEDERAL PROCUREMENT REGULATIONS (FPR) PROCEDURES

There are some differences between the rules established for debarment and suspension in ASPR and the counterpart rules of FPR that govern the activities of the civilian agencies. Perhaps the most significant difference is that the FPR, by stating as its goal the satisfaction of "demands of fairness," in effect prescribes a hearing.[22] ASPR says merely that "information in opposition to a proposed debarment may be presented in person, in writing or through representation."

There are no provisions in ASPR or FPR for several of the elements of an adversary hearing; for example, subpoena, rights to cross-examination, and clear separation of functions between those who propose debarment and those who decide the issue. Suspension rules in both regulations appear to be essentially the same.

Executive Order—Equal Employment Opportunity

Violation by a contractor of the Equal Opportunity provision prescribed by Executive Order 11246 and repeated in the rules issued by the Secretary of Labor can result in debarment of a noncomplying contractor. Responsibility for administering the program was assigned to the Department of Labor's Office of Federal Contract Compliance (OFCC).

The Department of Labor's rules of practice, to be followed prior to a debarment action under the Executive order, call for a written

[19] ASPR 1-605.1.

[20] ASPR 1-604.1.

[21] ASPR 1-605.2. *But see* note 25, *infra*, for a case in which the Court of Appeals for the District of Columbia disapproved such a suspension beyond one month.

[22] FPR 1-1.604-1(b).

the Government, the protestor was required to show "injury or threat to a particular right of [its] own, as distinguished from the public's interest in the administration of the law." [66]

In 1970 the United States Court of Appeals for the District of Columbia Circuit held in *Scanwell Laboratories, Inc.* v. *Shaffer* [67] that Scanwell had standing under the Administrative Procedure Act (APA) [68] to sue the Government as a "private attorney general" seeking to protect the public interest in "having agencies follow the regulations which control government contracting." [69] The court found that certain decisions issued by the Supreme Court following *Perkins* v. *Lukens Steel Co.* in cases not involving Government contracting, plus the adoption of the APA in 1946, indicated that the *Perkins* decision was no longer viable law. Shortly thereafter, the Court of Claims, using a different standard but agreeing with the *Scanwell* decision, followed suit by ruling that an unsuccessful bidder who made a prima facie showing that the Government acted arbitrarily and capriciously in awarding a contract to another bidder had standing to sue for money damages.[70]

The factfinding procedures and types of relief available in the courts to the parties in a judicial award protest differ from those available in the administrative forums. The courts use formal trial procedures, thus allowing a party to the protest, for example, to confront and cross-examine witnesses and discover documents in the possession of another party. The district courts have the power to issue injunctions in order to halt performance or award of a contract temporarily pending a hearing on the merits of the case [71] or to direct the award permanently to a protestor.[72] The Court of Claims has no injunctive powers [73] but may award any amount of damages.[74]

The protestor also may seek the help of the courts in enjoining further agency action until GAO has decided the issue on its merits.[75] If the protestor does lodge its initial protest with GAO, it may then, if dissatisfied with the GAO decision, lodge the same protest with a Federal court.[76] One court has indicated that, in considering a protest which had been previously adjudicated by GAO, the action of the agency in following GAO recommendations should not be overturned where such action

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acted for the protection of sellers and confers no enforceable rights upon prospective bidders." 310 U.S. at 126 (1940). From 1940 until 1970 a majority of lower Federal courts followed the *Perkins* rationale and ruled in subsequent award protest cases that offerors for Government contracts have no standing to challenge administrative actions of procurement officials in the contract award process. *See Walter P. Villere Co.* v. *Blinn*, 156 F.2d 914, 916 (5th Cir. 1946); *Friend* v. *Lee*, 221 F.2d 96, 100 (D.C. Cir. 1955); *Edelman* v. *Federal Housing Administration*, 382 F.2d 594, 597 (2d Cir. 1967); *Lind* v. *Staats*, 289 F. Supp. 182, 184–86 (N.D. Cal. 1968); Pierson, *Standing to Seek Judicial Review of Government Contract Awards: Its Origins, Rationale and Effect on the Procurement Process*, 12 B.C. Ind. & Com. L. Rev. 1, 4–7 (1970); Comment, *The Erosion of the Standing Impediment in Challenges by Disappointed Bidders of Federal Government Contract Awards*, 39 Fordham L. Rev. 103, 109–112 (1970). Judicial review of award protests also has been denied on the ground that administrative procurement decisions are unreviewable because such decisions are essentially discretionary in nature. *O'Brien* v. *Carney*, 6 F. Supp. 761, 762–63 (D. Mass. 1934). *See United States Wood Preserving Co.* v. *Sundmaker*, 186 F. 678, 683 (6th Cir. 1911) (municipal award protest). *See also* note 86 *infra*.

[66] 310 U.S. at 125.

[67] 424 F.2d 859 (D.C. Cir. 1970).

[68] The act provides that "[a] person suffering legal wrong because of agency action, or adversely affected or aggrieved by agency action within the meaning of a relevant statute, is entitled to judicial review thereof." 5 U.S.C. § 702 (1970). Judicial review is precluded, however, if a statute precludes review or "agency action is committed to agency discretion by law." 5 U.S.C. § 701 (1970). Under § 706 the court has the power to "compel agency action unlawfully withheld or unreasonably delayed [and to] hold unlawful and set aside agency action, findings, and conclusions" found to be unacceptable under certain standards prescribed by the act, including agency action which is "arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law. . . ."

[69] 424 F.2d at 864. Although for almost 30 years *Perkins* v. *Lukens Steel* was viewed as barring suits against the Government by prospective contractors, in a few isolated cases standing was granted to disappointed or potential bidders. *See Heyer Products Company* v. *United States*, 135 Ct. Cl. 63, 140 F. Supp. 409 (1956) (unsuccessful bidder is entitled to recover cost of preparing bid if bids not invited in good faith); *Gonzalez* v. *Freeman*, 334 F.2d 570 (D.C. Cir. 1964) (plaintiff has standing to challenge debarment process by which he was prevented from doing business with the Government); *Superior Oil Company* v. *Udall*, 409 F.2d 1115 (D.C. Cir. 1969), *vacated sub nom.*, 421 F.2d 1089 (D.C. Cir. 1969) (court may issue permanent injunction directing award to bidder and barring award to another bidder for Government oil lease); Pierson, *supra* note 65, at 7–11; K. Davis, *Administrative Law Treatise* 781–82 (Supp. 1970); Johnson & Cobb, *Scanwell and Its Implications on the Adjudication of Disputes Over the Award of Government Contracts*, June 1971, at 3–10 (unpublished paper prepared for the Commission on Government Procurement).

[70] *Keco Industries, Inc.* v. *United States*, 192 Ct. Cl. 773, 428 F.2d 1233 (1970).

[71] When such temporary relief should be granted is discussed in *M. Steinthal & Co.* v. *Seamans*, 455 F.2d 1289 (D.C. Cir. 1971). *See Wheelabrator Corp.* v. *Chafee*, 455 F.2d 1036 (D.C. Cir. 1971).

[72] *Superior Oil Company* v. *Udall*, 409 F.2d 1115 (D.C. Cir. 1969), *vacated sub nom.*, 421 F.2d 1089 (D.C. Cir. 1969). *See Simpson Electric Co.* v. *Seamans*, 317 F. Supp. 684 (D.D.C. 1970). This remedy has been directed infrequently.

[73] The jurisdiction of the Court of Claims is limited to money claims against the United States. *United States* v. *King*, 395 U.S. 1 (1969).

[74] *See* 28 U.S.C. § 1491 (1970).

[75] *See M. Steinthal & Co.* v. *Seamans*, 455 F.2d 1289 (D.C. Cir. 1971); *Wheelabrator Corp.* v. *Chafee*, 455 F.2d 1306 (D.C. Cir. 1971).

[76] *See M. Steinthal & Co.* v. *Seamans*, 455 F.2d 1289 (D.C. Cir. 1971).

termines that disclosure of the Government's evidence (at the trial-type hearing) would be harmful to law enforcement. Based on this determination, the suspension may continue up to 18 months before an indictment is returned. Suspension may be reimposed if an indictment is subsequently returned following termination of the original suspension. Suspensions based on other reasons should not exceed 90 days except when based on written determination of an Assistant Secretary for additional 90 day periods, maximum suspension not to exceed one year. No summary suspension without notice and trial-type hearing.

(As previously indicated,[30] summary suspension beyond one month has been disapproved recently by a Federal Circuit Court of Appeals. Revision of the pertinent regulations has not yet been made. Other aspects of the foregoing recommendations have been only partially put into effect.)

- Rejection of an otherwise successful bid for reasons of lack of business integrity or honesty requires written explanations to the bidder and opportunity for reply, consistent with need for making temporary contract award.

(Not yet implemented.)

- Agency rules on debarment procedures and practice should be published, be uniform, and provide for speedy and fair determinations.

(Not implemented, especially with regard to uniformity, although regulations applying beyond the preliminary investigative stage are generally published and require notice of findings and determinations.)

- Debarment decisions (including findings, conclusions, and reasons) should be in writing and copies should be given to the debarred contractor. Decisions should be published. Grounds for debarment should be set forth in agency regulations, should be published, should be uniform, and should include standards for determining (i) business affiliations; (ii) extending debarments to affiliates; (iii) when debarments of an individual will be imputed to a firm; and (iv) applicability of extending a debarment to other agencies. Fraud should be based upon substantial evidence. Debarment for a reasonable time shall not exceed three years and shall be terminable upon showing of current responsibility.

(The regulations appear to have followed the substance of these recommendations.)

- The Buy American and Davis-Bacon acts should be amended to authorize administrative discretion regarding scope and period of debarment.

(Neither act has been amended.) [31]

SUMMARY

Authorizations to debar are set forth in, referred to in, or inferred from dozens of statutes. Most of those providing such authority expressly or by reference have a common concern with wages and labor conditions. The statutes differ in their coverage with respect to the scope and term of debarment, the authority to hold hearings, confrontation of witnesses, subpoena power, appointment of hearing examiners, and a number of attributes of the traditional adversary hearing. They say little about what procedural safeguards are available to a contractor in a debarment proceeding and nothing about the procedures appropriate for proceedings to suspend a contractor.

To the extent that there are procedures for these actions, they are almost entirely the subject of regulations. This applies to both statutory and regulatory debarment and suspension. Procedures vary depending on which statute serves as a basis for the action. This is the case even within the same agency—when the agency is charged with administering debarments under more than one statute. The Department of Labor is the notable example. Variations in procedures also occur with regard to actions which are rooted in different administrative or executive regulations. In effect, procedural safeguards apparently considered essential to one debarment or suspen-

[30] *See Horne Bros. Inc.* v. *Laird, supra* note 25.

[31] Removal from the debarred list of violators of Davis-Bacon related statutes is provided for upon appropriate findings by 29 CFR § 5.6(b)(1) and § 5.6(d) (1972).

value of judicial review of award protests. The more formalized factfinding procedures used by the courts give a protestor the option of obtaining a due process adjudication of its protest. Judicial independence from daily contact with the contract award process allows the courts to provide fresh insights into the workings of that process. The geographical dispersion of the Federal district courts provides easier access to a protest-resolving forum. Finally, the power of the courts to award damages makes the potential for granting effective relief to a protestor greater than is possible from an administrative forum and resolves the dilemma often faced by the administrative forums of terminating a contract.

In view of the present uncertainty regarding the standing of protestors to challenge contract awards in court, we believe consideration should be given to clarifying the statutory basis for court jurisdiction. We agree with the conclusion of the Court of Appeals for the District of Columbia Circuit that injunctive relief should not be granted unless the aggrieved offeror demonstrates that there was *no rational basis* for the agency's decision.[87] We also believe that awarding proposal preparation costs as damages for the wrongful rejection of a proposal is appropriate and should be authorized by statute if necessary.[88]

AVOIDANCE OF PROTESTS

Although award protests serve a necessary and useful function in Government procurement, the annual number of protests is rising to a level that potentially could have an adverse effect on the procurement process. In fiscal 1972, the 1,227 protests disposed of by GAO represented a 16 percent increase over the number dealt with the previous year.[89] Similar statistics cannot be ascertained regarding protests that are lodged in the agencies and never brought to GAO or the courts, but it is clear from the sampling of statistics we have received that the number of these protests also is rising each year.[90] In fairness to protestors and to maintain the integrity of the procurement system, it is important to cope with this heavier workload by devising means to identify and remove the causes of these complaints.

Better Debriefing Procedures

Recommendation 18. Improve contracting agency debriefing procedures.

One agency study has indicated that a certain portion of award protests are made unnecessarily because they are based on incomplete or erroneous information concerning the rationale for making the administrative decisions on which those protests are based.[91] Often, after full information is available, the protests are withdrawn. The study acknowledges that a failure to communicate adequately with sellers during debriefing has resulted in protests.[92] The importance of having adequate debriefing procedures established in the basic procurement statutes is discussed in Volume I, Part A, Chapter 3.

Pre-Award Protest Procedure

Recommendation 19. Establish a pre-award protest procedure in all contracting agencies.

We also recommend that all contracting agencies establish a pre-award protest procedure aimed at bringing complaints quickly to the attention of management officials before they are channeled into the independent award protest-resolving forums.

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[87] *M. Steinthal & Co.* v. *Seamans*, 455 F.2d 1289 (D.C. Cir. 1971).

[88] Several courts have indicated that the Court of Claims may award proposal preparation costs as damages. *See M. Steinthal & Co.* v. *Seamans*, 455 F.2d 1289 (D.C. Cir. 1971); *Keco Indus., Inc.* v. *United States*, 192 Ct. Cl. 773, 428 F.2d 1233 (1970); *Continental Business Enterprises, Inc.* v. *United States*, 452 F.2d 1016 (Ct. Cl. 1971). The APA does not authorize monetary relief. *Hooper* v. *United States*, 331 F. Supp. 1056 (D. Conn. 1971). *See* 5 U.S.C. § 706 (1970). It is therefore questionable, if standing is based upon the APA, whether district courts may award proposal preparation costs. Statutory authorization may be required in this instance.

[89] GAO disposed of 1,054 cases in fiscal 1971. *See* Appendix A, p. 77.

[90] *See* Study Group 4, *Final Report*, Feb. 1972, vol. II, pp. A–35—A–37.

[91] Department of the Air Force, Air Force Systems Command (AFSC), *Hq. AFSC Study on Protests*, Apr. 29, 1971 (unpublished).

[92] *Ibid.*

APPENDIX A

Summary of Data

This appendix presents data on institutions and procedures that govern the resolution of disputes concerning the award and performance of Government contracts. It reflects the responses to questionnaires sent to industry, including representatives of the small business community, and to Government procuring agencies. The industry respondents were selected at random from lists prepared by business associations, the Commission staff, and Study Group 4 (Legal Remedies).

Information concerning the General Accounting Office (GAO) is based on interviews with GAO personnel and examination of pertinent GAO files. Profile data on about 2,800 contract disputes were obtained from 13 agency responses to a questionnaire prepared by Study Group 4. Additional data may be found in Volume II of its report.

LIST OF ABBREVIATIONS

For convenience of tabulating the data, the following abbreviations have been used.

AEC	Atomic Energy Commission
AECBCA	Atomic Energy Commission Board of Contract Appeals
AFLC	Air Force Logistics Command
ASBCA	Armed Services Board of Contract Appeals
BCA	Board of Contract Appeals
CO	Contracting Officer
COMMBCA	Commerce Department Board of Contract Appeals
CPAF	Cost-plus-award-fee
CPFF	Cost-plus-a-fixed-fee
CPIF	Cost-plus-incentive-fee
D.C. Govt.	District of Columbia Government
DOD	Department of Defense
DOT	Department of Transportation
DOTCAB	Department of Transportation Contract Appeals Board
DSA	Defense Supply Agency
ENGBCA	Corps of Engineers Board of Contract Appeals
FAA	Federal Aviation Administration
FHA	Federal Highway Administration
FP	Fixed-price
FPI	Fixed-price-incentive
GAO	General Accounting Office
GSA	General Services Administration
GSABCA	General Services Administration Board of Contract Appeals
HEW	Department of Health, Education, and Welfare
HUD	Department of Housing and Urban Development
IBCA	Department of Interior Board of Contract Appeals
IFB	Invitations for bids
Langley	Langley Air Force Base
NASA	National Aeronautics and Space Administration
NASABCA	National Aeronautics and Space Administration Board of Contract Appeals
SOW/S&D	Statement of Work/Specification and Design
VA	Veterans Administration
VACAB	Veterans Administration Contract Appeals Board

The real party in interest was the prime contractor in 82 percent of the cases at the board level and in 92 percent of the cases at the contracting officer level. The percentages of real parties in interest that were prime contractors by jurisdiction were:

Contracting officer level		*Board level*	
Air Force	89%	ASBCA	86%
Navy	85%	GSABCA	72%
NASA	99%	ENGBCA	74%
GSA	97%	IBCA	94%
AEC	50%	NASABCA	94%
Army	98%	DOTCAB	88%
		AECBCA	63%
		VACAB	100%
		COMMBCA	87%

The real party in interest was a small business in 50 percent of the cases at the board level and in 61 percent at the contracting officer level.

METHOD OF AWARD

The contractor was selected through formal advertising in 76 percent of the cases at the board level and in 74 percent at the contracting officer level. The percentages by jurisdiction were:

Contracting officer level		*Board level*	
Air Force	9%	ASBCA	56%
Navy	97%	GSABCA	93%
NASA	65%	ENGBCA	95%
GSA	93%	IBCA	89%
AEC	50%	NASABCA	40%
Army	52%	DOTCAB	86%
		AECBCA	73%
		VACAB	99%
		COMMBCA	87%

Negotiated competitive and negotiated sole-source contracts were involved in 15 percent of the cases at the board level and in 19 percent at the contracting officer level. The percentages by jurisdiction were:

Contracting officer level		*Board level*	
Air Force	46%	ASBCA	26%
NASA	35%	GSABCA	2%
GSA	5%	ENGBCA	4%
AEC	50%	IBCA	8%
Army	38%	NASABCA	47%
Navy	0%	DOTCAB	12%
		AECBCA	27%
		VACAB	0%
		COMMBCA	13%

NASA was the only agency hearing more appeals on negotiated contracts than on formally advertised contracts.

METHOD OF PAYMENT

A firm fixed-price contract was involved in 86 percent of the cases at the board level and in 86 percent at the contracting officer level. The percentages of cases involving fixed-price contracts by jurisdiction were:

Contracting officer level		*Board level*	
Air Force	24%	ASBCA	76%
Navy	97%	GSABCA	93%
NASA	88%	ENGBCA	95%
GSA	100%	IBCA	96%
AEC	85%	NASABCA	66%
Army	78%	DOTCAB	96%
		AECBCA	83%
		VACAB	100%
		COMMBCA	96%

The next highest percentage of cases at the board level involved cost-plus-a-fixed-fee contracts (2 percent); at the contracting officer level, fixed-price-incentive contracts (5 percent).

PURPOSE OF CONTRACT

Construction contracts accounted for 48 percent of the cases at the board level; supply contracts, 29 percent. The sampling of disputes at the contracting officer level revealed a reverse emphasis: 21 percent of the cases involved construction contracts, while 60 percent involved supply contracts.

The percentages for construction contracts by jurisdiction were:

Contracting officer level		*Board level*	
Air Force	0%	ASBCA	22%
Navy	98%	GSABCA	47%
NASA	0%	ENGBCA	89%
GSA	6%	IBCA	76%
AEC	42%	NASABCA	4%
Army	0%	DOTCAB	53%
		AECBCA	53%
		VACAB	80%
		COMMBCA	30%

NOTE: Differences between contracting officer percentages are partly the result of the sources selected for contracting officer data. When ASBCA and ENGBCA are combined (1,451 cases, of which 663 were construction), they average 46 percent construction contracts.

advance payments; and (3) exercise of "residual powers." [15]

Contractual Adjustments

Four types of contractual adjustments are specified in the regulations. The first two are labeled together as "amendments without consideration," [16] although each is authorized on a significantly different basis.[17] The last two are "correction of mistakes" [18] and "formalization of informal commitments." [19]

AMENDMENTS WITHOUT CONSIDERATION—ESSENTIALITY

When a contractor becomes financially unable to fully perform a Government contract, the Government normally will terminate the contract and reprocure the supplies or services from another contractor.[20] In certain circumstances the needs of a procurement program are so urgent that the program will be damaged irreparably if subjected to lengthy delays while supplies or services are reprocured. A more feasible alternative for the Government in this situation is to amend the contract without consideration and provide the contractor with the additional funds it will need to continue performance.[21]

Public Law 85–804 provides a legal basis for amending a defense contract where the contractor's productive ability will be impaired by an actual or threatened loss and its continued performance on any defense contract or its continued operation as a source of supply is essential to the national defense.[22] This contractual adjustment is called an amendment without consideration based on the essentiality of the contractor.[23] In such case the contract may be adjusted only to the extent necessary to avoid or remove the impairment to the contractor's productive ability.[24]

AMENDMENTS WITHOUT CONSIDERATION—GOVERNMENT ACTION

An amendment without consideration also is authorized when a contractor suffers a loss (not merely a diminution of anticipated profits) on a defense contract because of Government action.[25] This authority is used to provide relief to a Government contractor where an administrative remedy is not otherwise available. For example, a contractor may have a remedy against the Government in a court of law for breach of a defense contract because of Government interference with the performance of the contract, but it has no administrative remedy because neither the contracting officer nor the board of contract appeals has jurisdiction to settle such a claim.[26] The provision additionally may be used to provide relief to a contractor where the Government is not liable as a matter of law but fairness dictates that some adjustment be made in the contract. In contrast to the first type of amendment, concern about the accomplishment of a particular program objective is not relevant to the issue of whether an amendment without consideration should be granted based on Government action. In this situation, fairness is

[15] ASPR 17–103; FPR 1–17.103.

[16] *See* ASPR 17–204.2; FPR 1–17.204–2.

[17] *See* pp. 52–53, *infra*.

[18] ASPR 17–204.3; FPR 1–17.204–3.

[19] ASPR 17–204.4; FPR 1–17.204–4.

[20] *See* ASPR Section VIII; FPR Part 1–8.

[21] According to the usual principles of contract law, a Government contract generally only may be amended to benefit a contractor if the Government receives some benefit ("consideration") in return for the contract change. *See* 47 Comp. Gen. 170 (1967); *J. J. Preis & Co.* v. *United States*, 58 Ct. Cl. 81 (1923); R. Nash, Jr. & J. Cibinic, Jr., *Federal Procurement Law* 201–06 (2d ed. 1969).

[22] ASPR 17–204.2(a); FPR 1–17.204–2(a).

[23] For an analysis of contract adjustment board decisions concerning amendments without consideration based on essentiality, *see* C. Lakes, *Extraordinary Contractual Authority in Government Defense Procurement* 75–98 (1962 unpublished doctoral dissertation No. 5877 in the George Washington University Library); Jansen, *Public Law 85–804 and Extraordinary Contractual Relief*, 55 Geo. L. J. 959, 974–980 (1967); O'Roark, *Extraordinary Contractual Actions in Facilitation of the National Defense From a Department of Defense Attorney's Point of View*, 47 Mil. L. Rev. 35, 55–66 (1970).

[24] ASPR 17–204.2(a); FPR 1–17.204–2(a).

[25] ASPR 17–204.2(b); FPR 1–17.204–2(b). The regulations state that "the character of the Government action will generally determine whether any adjustment in the contract will be made and its extent." *Id.* The example given states "[w]here the Government action is directed primarily at the contractor and is taken by the Government in its capacity as the other contracting party, the contract may be adjusted if fairness so requires. . . ." *Id.* Thus, the regulation implicitly distinguishes between Government actions in its capacity as the other contracting party and those in its sovereign capacity. *See* Lakes, *supra* note 23, at 100; Jansen, *supra* note 23, at 981–85; O'Roark, *supra* note 23, at 68–69.

[26] This deficiency would be largely corrected by the Commission recommendations that contracting officers or boards of contract appeals be empowered to settle or decide breach of contract claims. *See* pp. 22–23, *supra*.

The percentages of cases at the contracting officer and board levels involving the six provisions that most commonly result in disputes were:

		Contracting Officer Level						*Board of Contract Appeal Level*								
Provision in Dispute	*Total No.*	*Air Force*	*Navy*	*NASA*	*GSA*	*AEC*	*Army*	*AS BCA*	*NASA BCA*	*GSA BCA*	*ENG BCA*	*AEC BCA*	*COMM BCA*	*DOT CAB*	*VA CAB*	*IBCA*
SOW/S&D	741	23%	3%	11%	9%	28%	30%	11%	26%	52%	32%	27%	14%	15%	3%	33%
Changes	670	15%	52%	2%	2%	13%	11%	21%	7%	18%	22%	22%	12%	25%	22%	22%
Default termination	658	4%	9%	56%	78%	11%	23%	21%	12%	5%	5%	9%	24%	5%	3%	6%
Changed conditions	158	*	6%	*	0%	0%	*	3%	0%	0%	13%	0%	10%	22%	0%	9%
Liquidated damages	130	1%	0%	1%	2%	9%	4%	5%	9%	0%	4%	0%	12%	7%	1%	7%
Time extension	126	3%	0%	3%	0%	9%	7%	0%	20%	7%	6%	2%	5%	3%	6%	6%

*Not a construction contract unit.

services pursuant to the request of a Government official not having actual authority to contract for the Government, the seller has no legal recourse against the Government for payment for the goods or services. The authority of Public Law 85–804 can be used to formalize such commitments when it facilitates the national defense.[40]

Advance Payments

Advance payments are loans from the Government to a contractor for the purpose of enabling the contractor to complete the contract.[41] Although there was justification for including a provision for making advance payments within the authority of Public Law 85–804 at the time it was drafted,[42] the act is almost never used for this purpose since adequate authority is now contained in two other statutes.[43]

Residual Powers

The term "residual powers" is defined in the regulations as including "all the authority under the Act except that which is covered by Part 2 hereof [relating to contractual adjustments] and the authority to make advance payments." [44] The most frequent use of the residual powers has been to indemnify contractors against liabilities from claims for death or injury or property damage arising out of nuclear radiation, use of high-energy propellants, or other risks not covered by the contractor's insurance program.[45] Although certain statutes expressly or implicitly authorize indemnification agreements in specific circumstances,[46] no general authority for such agreements exists.[47]

Another important use of the residual powers has been to include clauses in contracts requiring contractors and subcontractors to abide by the terms of project labor stabilization agreements.[48] Public Law 85–804 is resorted to in these situations because such clauses are restrictive of competition and cannot be inserted in Government contracts without express statutory authority.[49]

The residual powers also have been used to dispose of Government property where such disposal is not feasible by competitive bidding or in other circumstances not covered by the Federal Property and Administrative Services Act or other property disposal statutes.[50] Such

(1957); Whelan & Dunigan, *Government Contracts: Apparent Authority and Estoppel*, 55 Geo. L.J. 830 (1967); Nash & Cibinic, *supra* note 21, at ch. 3.

[40] The example given by the regulations of a circumstance in which an informal commitment may be formalized is "where any person, pursuant to written or oral instructions from an officer or official of a Military Department and relying in good faith upon the apparent authority of the officer or official to issue such instructions, has arranged to furnish or has furnished property or services to a Military Department or to a defense contractor or subcontractor without formal contractual coverage for such property or services." ASPR 17–204.4; *accord*, FPR 1–17.204–4. For a discussion of contract adjustment board decisions concerning formalization of informal commitments, *see* Lakes, *supra* note 23, at 183–204; Jansen, *supra* note 23, at 993–999; O'Roark, *supra* note 23, at 87–95.

[41] ASPR E–104; FPR 1–30.104.

[42] At the time Pub. L. No. 85–804 was drafted, advance payments only could be made under negotiated contracts. On the same day that Pub. L. No. 85–804 was passed, however, Pub. L. No. 85–800 was also passed to permit advance payments under advertised contracts as well as under negotiated contracts. Act of Aug. 28, 1958, §§ 4, 9, 72 Stat. 966–67.

[43] *See* 10 U.S.C. § 2307 (1970); 41 U.S.C. § 255 (1970).

[44] ASPR 17–300; *accord*, FPR 1–17.300. The term is not used in the act or the Executive order.

[45] *See* Letter from Barry J. Shillito, Asst. Sec. of Defense (Install. & Logist.), Dept. of Defense, to Hon. Carl Albert, Spkr. Hse. Rep., Apr. 7, 1972 [report to Congress pursuant to 50 U.S.C. § 1434 (1970)], 118 Cong. Rec. H2975–76 (daily ed. Apr. 11, 1972).

[46] *See, e.g.*, 10 U.S.C. § 2354 (1970); 42 U.S.C. § 2210 (1970). *See also* Jansen, *supra* note 23, at 1005–07; Lakes, *supra* note 23, at 332–36.

[47] In Part H we discuss and make recommendations for the enactment of general legislation for financial protection of the public and contractors against loss or damage occasioned by a catastrophic accident. Exec. Order No. 10789 has been amended to exempt indemnity agreements from the provision of the order which states that exercise of authority under the act is limited to "the amounts appropriated and the contract authorization provided therefor. . . ." Exec. Order No. 11610, 36 Fed. Reg. 13755 (1971), *amending* Exec. Order No. 10789, 3 CFR at 332 (1972), 50 U.S.C. § 1431 (1970). For a discussion of the events which lead to the promulgation of Exec. Order No. 11610, *see* Memorandum for the Chairman, ASPR Committee, from ASPR Special Subcommittee, Case 71–115—*Extraordinary Contractual Actions*, Oct. 13, 1971, on file with ASPR Committee, Department of Defense.

[48] Such agreements have been used as a means of curing excessive costs and delay to certain Government programs caused by local shortages of construction labor and conflicts between union and nonunion workers which produced slowdowns, strikes, and abnormal wages. *See* Letter from T. O. Paine, Admin., National Aeronautics and Space Administration (NASA), to Hon. John W. McCormack, Spkr. Hse. Rep., Mar. 25, 1970 [report to Congress pursuant to 50 U.S.C. § 1434 (1970)], 116 Cong. Rec. 9860 (1970); Letter from T. O. Paine, Acting Admin., NASA, to Hon. John W. McCormack, Spkr. Hse. Rep., Mar. 24, 1969 [report to Congress pursuant to 50 U.S.C. § 1434 (1970)], 115 Cong. Rec. 7813 (1969); Letter from John V. Vinciguerra (for General Manager), Atomic Energy Commission, to Hon. Carl Albert, Spkr. Hse. Rep., Mar. 8, 1972 [report to Congress pursuant to 50 U.S.C. § 1434 (1970)], 118 Cong. Rec. H1952 (daily ed. Mar. 9, 1972).

[49] 42 Comp. Gen. 1 (1962).

[50] Property of the United States cannot be disposed of except pursuant to an Act of Congress. *United States* v. *Nicoll*, 27 Fed. Cas. 149 (No. 15879) (C.C.D.N.Y. 1826); *Royal Indemnity Co.* v. *United States*, 313 U.S. 289 (1941); 34 Ops. Atty. Gen. 320 (1924).

OBJECT OF APPEAL

The principal object of an appeal to a board was entitlement (involving no issue of quantum) in 51 percent of all the cases, and the amount of equitable adjustment was the object of 39 percent of all cases. Quantum was considered in only 3 percent of all the cases; however, GSABCA considered it in 11 percent of its cases and IBCA in 19 percent. Time extensions were sought in 7 percent of all appeals.

At the contracting officer level, the principal object of the claim was a time extension in 40 percent of the disputes, amount of equitable adjustment in 16 percent, and entitlement (without quantum) in 11 percent. The highest percentage of the claims for time extension at the contracting officer level occurred in GSA and NASA.

HEARINGS AND ACCELERATED PROCEDURES

The profiles showed that no hearing was held in 36 percent (778) of the cases on appeal at the board level while a hearing was held in 29 percent (636) of the cases. However, 30 percent (657) of the responses did not answer the question. If only the 1,533 replies are considered, in 51 percent of the cases no hearing was held, and in 41 percent there was a hearing.

Accelerated procedures, as provided and defined in the rules of the various boards polled, were used in only 7 percent (140) of the cases before the boards, although 51 percent of the claims were for $10,000 and under. Fifty percent of all the responses stated that no such procedure was invoked. However, AECBCA used accelerated procedures in 63 percent of its cases, a larger percentage than any other agency.

MANNER OF RESOLUTION

The manner of resolution at the board level was most often a decision on the merits, although almost an equal number of times it was a negotiated settlement prior to the board's decision. Of 2,187 cases in the sample, 875 (40 percent) went to decision on the merits, with 463 (or 53 percent of those decisions) indicated as denials of the claim. Denials represented 21 percent of the total number of appealed cases.

Nearly as many cases were settled as went to board decisions—825 or 38 percent. A total of 1,160 cases, or 53 percent, were dismissed; of these 873 (40 percent), including settlements, were dismissed with prejudice.

Resolution at the board of contract appeal level can be tabulated as follows: [See table at bottom of page; numbers represent cases.]

The data furnished indicate that in about half of the board of contract appeal cases decided on the merits, the board upheld the contractors' claims in whole or in part. The contractor enjoyed some success in 57 percent of all cases appealed, as represented by 825 settlements and 417 decisions wholly or partially favoring contractors.

Cases were remanded by the boards to the contracting officer in 4 percent of the decisions.

At the contracting officer level, the contracting officer issued a final finding of fact and decision (negative to the contractor) in 92 percent of the cases brought before him. The data bank shows that in 2 percent of the cases the contracting officer refused to issue a decision.

Overall, 46 percent of the contracting officer

	Total cases	*Denials*	*Decision on merits*	*Dismissed*	*Settled*
NASABCA	53	0	4	21	18
GSABCA	348	97	143	179	75
DOTCAB	51	9	21	27	25
AECBCA	30	8	9	18	12
VACAB	152	27	35	116	68
ASBCA	937	168	379	521	382
ENGBCA	514	133	236	232	212
COMMBCA	23	5	12	10	10
IBCA	79	16	36	36	23
Total	2,187	463	875	1,160	825

TABLE 6. NUMBER OF CONTRACTUAL ACTIONS TAKEN PURSUANT TO PUBLIC LAW 85-804 BY DEPARTMENT OF DEFENSE (Calendar 1968-1971)

Department	*Amendments without consideration*		*Correction of mistakes*		*Formalization of informal commitments*		*Contingent liabilities* [b]	*Disposition of property*		*Other* [c]	
	Apprv.	*Den.*	*Apprv.*	*Den.*	*Apprv.*	*Den.*		*Apprv.*	*Den.*	*Apprv.*	*Den.*
Air Force	8 [a]	18	79	99	5	5	94	0	0	7	5
Army	6 [a]	30	103	53	87	22	22	9	4	96	0
DCA	0	0	0	0	1	0	0	0	0	0	0
DSA	1	23	209	79	18	3	0	0	0	29	9
Navy	11	15	87	21	12	1	312	1	2	1	1
Total	26	86	478	252	123	31	428	10	6	133	15

[a] Includes 1 amendment without consideration in favor of Lockheed Aircraft Corp. in 1971.

[b] This column represents approved actions. One action disapproved by Army in 1971.

[c] Air Force: contract modification or termination.
Army: 95 actions for insertion of employee compensation clauses (ASPR 18-703.2); 1 action under "Secretarial authority and residual powers."
Navy: "Secretarial authority and residual powers."
DSA: 7 approved actions for removal of price escalation ceiling; subject of other actions not reported.

Source: Based on reports submitted to Congress by Department of Defense pursuant to 50 U.S.C. § 1434 (1970).

CORRELATION OF TIME AND CONTRACT PROVISION

A matrix displaying time against the clause in dispute shows that, of the cases at the board level involving the Changes clause, 21 percent are resolved within six months, an additional 26 percent within the next six months, and yet another 21 percent within a 12- to 18-month period, in other words, more than two-thirds within a year and a half. Of the cases that took more than four years to resolve, the largest number concerned the Changes clause.

Time for disposing of SOW/S&D cases runs fairly uniformly with the Changes clause.

Thirty-five percent of the cases before boards involving the default provisions were resolved within the first six months.

Changed conditions disputes generally took more than a year to resolve at board level, since only 33 percent of such disputes were on the docket less than 12 months.

At the contracting officer level, more than 90 percent of the cases involving default terminations were decided within six months. For most of the cases involving the inspection provision, a final decision was also made within six months.

CORRELATION OF TIME AND ACCELERATED PROCEDURES AT THE BOARD LEVEL

Fifty-four percent of the cases using accelerated procedures were resolved within six months (76 appeals of 140), compared to 29 percent of the cases not using accelerated procedures (336 appeals of 1,141).

TREND TOWARD SETTLEMENT

The profile shows that, within six-month intervals between January 1970 and June 1971, a fairly constant number of cases were settled. Before January 1970, going back in time, the number decreases rapidly. But since most of the data are clustered in the period of time between January 1970 to June 1971, the number of settlements before that date is bound to decrease.

CORRELATION BETWEEN METHOD OF PAYMENT AND PURPOSE OF CONTRACT

At the board of contract appeals level, the percentage of fixed-price contracts by purpose was:

Construction	97%
Supply	86%
Repair	89%
Transportation	56%
Architect-engineer	100%

At the contracting officer level:

Construction	99%
Supply	95%
Repair	95%

DISPUTES RELATED TO AWARD OF CONTRACTS

DISPOSITION OF AWARD PROTESTS

Protests were denied in 92 percent of the decisions rendered during 1969–1972. Cancellation of the contract was recommended in one percent of the decisions rendered, representing 15 percent of the decisions favoring the protestor. GAO suggested corrective action in agency award practices in 12 percent of the protests resolved by it. During 1971–1972, 24 percent of the protests received by GAO were withdrawn. The following table shows the disposition of award protests received by GAO during 1969–1972:

Disposition	*Fiscal 1972*	*Fiscal 1971*	*Fiscal 1970*	*Fiscal 1969*
Protest decisions rendered	758	715	583	554
Protests denied	706	641	548	520
Protests sustained	52	74	35	34
Protests withdrawn	299	274	188	No statistics available
Miscellaneous disposition	170	65	No statistics available	No statistics available
Total protests handled	1,227	1,054	No statistics available	No statistics available
Contract cancellation recommended	12	4	5	8
Corrective action suggested	105	85	65	73

Source: Statistics for 1970–1972 furnished by Office of General Counsel, U.S. General Accounting Office. Statistics for 1969 are from *Annual Report of the Comptroller General of the United States, 1969* 255 (1969).

TABLE 7. DOLLAR AMOUNT OF CONTRACTUAL ADJUSTMENT ACTIONS TAKEN PURSUANT TO PUBLIC LAW 85–804 BY DEPARTMENT OF DEFENSE (Calendar 1968–1971)

Department	Amendments without consideration [a]		Correction of mistakes [a]		Formalization of informal commitments [a]	
	Approved	Denied	Approved	Denied	Approved	Denied
Air Force	185 [b]	9,801	1,401	1,866	50	140
Army	828 [c]	19,068	2,281	7,321	996	241
DCA	----	-----	-----	----	81	0
DSA	44	4,035	495	895	49	3
Navy	2,589	14,972	3,813	611	31	5
Total	3,646	47,876	7,990	10,693	1,207	389

[a] Dollar amounts in thousands.

[b] Figure does not include one 1971 amendment without consideration totalling 500 million dollars in favor of Lockheed Aircraft Corp. (C–5A aircraft).

[c] Figure does not include one 1971 amendment without consideration totalling 123 million dollars in favor of Lockheed Aircraft Corp. (AH–56A helicopters).

Source: Based on reports submitted to Congress by Department of Defense pursuant to 50 U.S.C. § 1434 (1970).

scribed by him. The regulations governing such use are contained in Executive Order 10789 and the two basic procurement regulations. The latter expressly provide that the authority "shall not be utilized so as to encourage carelessness and laxity on the part of persons engaged in the defense effort nor be relied upon where other adequate legal authority exists." [66] They provide that "[t]he mere fact that losses occur under a Government contract is not, by itself, a sufficient basis for the exercise of the authority conferred by the Act." [67] These regulations also implement the statutory mandate for making a public record of all actions taken and describe the findings and kinds of information which must be recorded for each action.

The regulations contain built-in findings that contractual fairness actions, such as adjustments for mistakes or losses due to Government action and formalization of informal commitments, benefit the national defense.[68] Thus, it is not necessary in these situations—if fairness dictates the action—to make individual determinations with respect to facilitating the national defense.[69] However, specific determinations are required for the exercise of the special management powers. In essentiality cases, for example, a direct relationship to the national defense must be shown by a determination that continuance of the contractor's performance or source of supply is essential to the successful accomplishment of an agency's national defense program.

The original limitation of the predecessor of Public Law 85–804 to "facilitate the prosecution of the war" was intended as a time limit on the authority. Today, the limitation to national defense contracts restricts its use to procurement actions related to that specific objective. As the Nation turns to Government procurement programs to achieve other national goals the same need for procurement tools to achieve fairness and accomplish these goals exists. A procurement program that relates to health, solving urban living conditions, or improving the environment, for example, is just as important as national defense. Yet, today, the anomaly is that where defense objectives are involved, the President can authorize the use of Public Law 85–804; for other objectives he may not.

The restrictions on a broader application of Public Law 85–804 stem from the language in 50 U.S.C. § 1431 that provides "the President may authorize any department or agency . . . which exercises functions in connection with the national defense. . . ." Our recommendation could be implemented by eliminating the phrase "in connection with the national defense" in section 1431. This would make it clear that although any agency could be granted authority to utilize Public Law 85–804, the President would still control its use and

[66] FPR 1–17.102(b); *accord*, ASPR 17–102(b).

[67] FPR 1–17.204–1; ASPR 17–204.1.

[68] *See* ASPR 17–204.2(b), 17–204.3, 17–204.4; FPR 1–17.204–2(b), 1–17.204–3, 1–17.204–4.

[69] *See* O'Roark, *supra* note 23, at 49–50.

Agency	*Challenged adequacy or legality of solicitation*	*Challenged responsiveness of another bid or offer*	*Challenged responsibility of another bidder or offeror*	*Other challenges*
DOT				
FHA	1	5	2	0
Coast Guard	0	10	0	2
FAA	9	6	12	21
HEW	13	7	1	16
AEC	0	2	0	0
Agriculture	20	12	4	2
Commerce	2	2	1	1
Interior	11	12	5	No rpt.
Total	304	315	141	292

Source: Study Group 4, *Final Report*, vol. II, at A–17.

TYPE OF COMPETITION PROTESTED

Approximately two-thirds of the protest decisions issued by GAO during fiscal years 1970–1972 involved an advertised procurement and one-third concerned a negotiated procurement.

Type of Competition	*Fiscal 1972*	*Fiscal 1971*	*Fiscal 1970*
Advertised procurement	482	476	395
Negotiated procurement	274	237	188
Part advertised-part negotiated	2	0	0
Type of competition not reported	0	2	0
Total decisions rendered	758	715	583

Source: Statistics furnished by Office of General Counsel, U.S. General Accounting Office.

take into account the different judgments required in its administration.[71] In practice, however, it has been discovered that determinations under the act often are made by the type of decisionmaker who is most capable of and most appropriate for that judgment, whether or not he is the decisionmaker de jure.

One study has shown that in a request for an amendment without consideration based on the essentiality of a contractor to a defense contract, a contract adjustment board usually will consult agency personnel who have overall management responsibility for the agency's programs and then make a determination in accordance with the managerial response that is given.[72] "In this type of case," the study states, "the Board brings little or no judgment to bear on the critical issue."

In contrast, if the issue is one of ultimate fairness to the contractor, the boards have been found to be very much involved. In correction of mistake, breach of contract, and formalization of informal commitment cases, the practice of the boards has been to rely on their own judgment. "In a somewhat legal context, the Board seeks to find out what is fair under the circumstances and acts accordingly. Such cases are of the same nature as many which are routinely handled by Boards of Contract Appeals under the Disputes clause." [73]

ASPR and FPR do not provide for an appeal to the contract adjustment board after denial of a request for adjustment by a management official.[74] When a case is before the board, the contractor generally does not have the right to confront other witnesses; rebuttal of evidence is discretionary; and documents are withheld or disclosed only under special circumstances. Thus, a contracting party may not know the nature or particular thrust of the evidence against him.

Most likely this practice has occurred because it has been stated generally that the exercise of Public Law 85–804 powers is discretionary with the Government and the contractor has no right to relief.[75] Our analysis shows, however, that this is true only for the special management powers. The cases involving contractual fairness stem from well-known legal causes of action for which relief can be sought in a court of law and accorded a due process, adversary hearing. If the purpose to be served by this authority is to be achieved, a contractor should be granted the same objective consideration of his request for relief.

One set of agency regulations (AEC) now recognizes the two main categories of authority under Public Law 85–804.[76] We believe that adminstration of the act would be improved if the implementing regulations were revised along similar lines.

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[71] In the Department of Defense, certain specified "heads of procuring activities" have been delegated authority to approve or direct an appropriate action which will correct a mistake or formalize an informal commitment, except where such action will obligate or release an obligation to the Government in excess of $50,000. The form of relief which may be granted, however, is limited to the examples contained in the regulations. A head of a procuring activity may *deny* any request for a contractual adjustment, including an amendment without consideration. *See* ASPR 17–203.

[72] Report to the Atomic Energy Commission By Its Advisory Panel on Public Law 85–804 Authority, Feb. 24, 1969 (unpublished report in the files of the Atomic Energy Commission) at 3 [authors of the report are Valentine B. Deale, Esq.; William Mitchell, Esq. (former AEC General Counsel); and Ralph C. Nash, Jr., Assoc. Dean, National Law Center, The George Washington University].

[73] *Ibid.*

[74] The AEC regulations do provide for such appeals. *See* AECPR 9–17.207–50(b).

[75] *See, e.g.*, Reda, *Unorthodox Avenues of Contractual Relief*, 12 AFJAG L. Rev. 222, 226–27 (1970).

[76] *See* AECPR Part 9–17.

APPENDIX B

Methodology

The analysis in Chapters 2 and 3 of the methods used to resolve disputes related to the performance and award of Government contracts is based primarily on a study conducted by our Study Group 4 (Legal Remedies). The group included attorneys and management personnel drawn from private industry, the Federal Government, the private bar, and the academic community. The study group members are listed in Appendix B of Part A.

Extensive data about both disputes-resolving systems were assembled. The study group conducted six public meetings, at various locations throughout the United States, that were attended by more than 250 individuals representing all parts of the procurement sector. Fifty-five formal presentations were made at the public meetings and other views were heard through open discussions between the audiences and members of the study group.

Additional data were collected through the use of questionnaires sent to Government agencies, large and small businesses, and the Commission's network of legal advisors. The study group also developed a profile of 2,800 contract disputes and appeals that occurred during the period 1967–1971 in 13 Federal agencies. Information concerning award protests was furnished by the General Accounting Office.

The discussion of contractual fairness and special management powers under Public Law 85–804 in Chapter 4 is based upon findings of a Special Task Force. Members of this task force were:

Valentine B. Deale	Private Practitioner
Paul Gantt	Chairman, AEC Board of Contract Appeals
Colonel Cecil Thomas Lakes	Deputy General Counsel and Command Staff Judge Advocate, Army Materiel Command
William Mitchell	Private Practitioner and former AEC General Counsel
Ralph C. Nash, Jr.	Professor of Law Graduate Studies in Law National Law Center George Washington University

A previous study of Public Law 85–804, conducted by Professor Nash, Mr. Mitchell, and Mr. Deale for the Atomic Energy Commission, provided base material for use by the Task Force.

The decision on this appeal includes findings, conclusions, and a recommendation or order for debarment. The Solicitor's recommendation or order for debarment is final unless the case is "accepted for review" by the Wage Appeals Board.[7]

The foregoing rules of practice appear to have these weaknesses:

- The file on which the case is built is essentially ex parte, subject to internal guidelines that are neither available to the challenged contractor for examination nor for rebuttal of findings or confrontation of witnesses.
- The nature of the presentations to rebut a proposed debarment, whether by oral hearing or another procedure and whether or not allowing other adversary-type practice, is discretionary with the Department of Labor.
- Functions are not clearly separated as between officials who propose debarment and those who decide the matter.
- Final steps in the formal rules governing appeals are discretionary with the Department of Labor.

Contract Work Hours and Safety Standards Act[8]

This act applies only to overtime earnings. The rules of practice are the same as those for the Davis-Bacon related statutes; however, the Work Hours Act also provides a right of appeal on the question of liquidated damages assessed against a contractor or subcontractor found in violation of the act. If such contractor does not prevail in the appeal, which by the terms of the act goes eventually to the Court of Claims, it may yet be debarred for overtime violation by the Secretary of Labor.[9] Hence, the comments offered above are applicable.

[7] 29 CFR § 5.6(c)(3) (1972). For such a case involving a Davis-Bacon recommendation see *Framlau Corp.* v. *Dembling*, No. 72-1156 (E.D. Pa. June 14, 1972).

[8] 40 U.S.C. §§ 327–33 (1970).

[9] 29 CFR § 5.1 (1972).

Walsh-Healey Public Contracts Act[10]

The Walsh-Healey Act applies to contracts for supplies in excess of $10,000 and provides for debarment for breach of any of the agreements or representations required by the act. The period of debarment can extend for as long as three years.

Rules of practice for investigation of the facts and determination of the debarment[11] differ significantly from those for proceedings under the Davis-Bacon and related statutes.

After a breach or violation of Walsh-Healey is reported to a local or regional office of the Department of Labor a formal complaint is issued, a date is set for a hearing before a trial examiner, and a time is also set for answer (which must contain a "concise statement of the facts"' rather than a simple denial). Whether or not an answer is filed, a hearing is scheduled and the case proceeds. The rules provide for motions by all parties to the hearings, for intervention, and, on the application of any party, for the subpoena of witnesses. Detailed provisions are made for the conduct of the hearing by a trial examiner who shall have no other duties inconsistent with his duties and responsibilities as an examiner. Ex parte proceedings are specifically prohibited except upon proper notice and opportunity to participate. The rules also provide for confrontation and examination of witnesses, cross-examination, and introduction of documentary and other evidence. In short, these rules sharply curtail the discretionary rights of the Government.

Upon issuance of the trial examiner's order and decision embodying his finding of facts and conclusions of law on all issues, the contractor may petition for a review. When review is requested, the Administrator of Workplace Standards issues an order denying the review or announces his review decision. If the contractor is found in violation of the act, he may petition the Secretary of Labor for relief from the ineligible list provisions. The petition must be filed within 20 days of service of the trial examiner's decision or of the Administrator's review decision. In the absence of such a petition, the trial examiner's

[10] 41 U.S.C. §§ 35–45 (1970).

[11] *See* 41 CFR Part 50–203 (1972).

21. Make authority presently conferred by Public Law 85–804 permanent authority.

22. Authorize use of Public Law 85–804 by all contracting agencies under regulations prescribed by the President.

23. Incorporate Public Law 85–804 into the primary procurement statute.

[One Commissioner dissents to recommendations 21–23.]

24. Revise existing requirements in Public Law 85–804 on reporting to Congress.

role in a national program to prevent water pollution. It was passed during the last few days of the 92nd Congress.

The law authorizes debarment in the same manner as does the Clean Air Act; that is, by prohibiting Government contracts to be performed in a facility where the violation arises. A conviction of the offense is required for debarment. The law also provides for the President to issue an order to implement the purposes and policy of the act and to prescribe "procedures, sanctions, penalties." The implementing order is yet to be issued.

REGULATORY BASES FOR DEBARMENT

Agency Regulations

Regulations in addition to those issued pursuant to statute, as discussed above, provide further bases for debarment. For purposes of discussion the Armed Services Procurement Regulation (ASPR) has been chosen since its treatment of debarment is similar to that in the regulations of other agencies.[17]

AGENCY DEBARMENTS—CAUSES AND PROCEDURES

The basis for agency debarments set out by ASPR are:

(i) conviction by or a judgment obtained in a court of competent jurisdiction for—

(A) commission of fraud or a criminal offense as an incident to obtaining, attempting to obtain, or in the performance of a public contract;

(B) violation of the Federal antitrust statutes arising out of submission of bids or proposals; or

(C) commission of embezzlement, theft, forgery, bribery, falsification or destruction of records, receiving stolen property, or any other offense indicating a lack of business integrity or business honesty which seriously and directly affects the question of present responsibility as a Government contractor. . . .

(ii) clear and convincing evidence of violation of contract provisions, as set forth below, when the violation is of a character so serious as to justify debarment action—

(A) willful failure to perform in accordance with the specifications or delivery requirements in a contract (including violations of the Buy American Act with respect to other than construction contracts);

(B) a history of failure to perform, or of unsatisfactory performance, in accordance with the terms of one or more contracts; *provided,* that such failure or unsatisfactory performance is within a reasonable period of time preceding the determination to debar. (Failure to perform or unsatisfactory performance caused by acts beyond the control of the contractor shall not be considered as a basis for debarment);

(C) violation of the contractural provision against contingent fees; or

(D) violation of the Gratuities clause, as determined by the Secretary in accordance with the provisions of the clause.

(iii) for other cause of such serious and compelling nature, affecting responsibility as a Government contractor, as may be determined by the Secretary of the Department concerned to justify debarment; or

(iv) debarment for any of the above causes by some other executive agency of the Government. (Such debarment may be based entirely upon the record of facts obtained by the original debarring agency, or upon a combination of additional facts with the record of facts obtained by the original debarring agency.) [18]

The regulation provides for a three-year maximum for a debarment, with shorter periods commensurate with the seriousness of the cause. Debarment may not be extended past the original period solely on the basis of initial findings. Notice of an extension must be given and the safeguards present in the initial debarment continue to apply.

The rules require that written notice be given of the proposed action. Such notice must include the reasons why debarment is

[17] *See* FPR 1-1.600 to 1-1.607 and NASA PR 1.600 to 1.607.

[18] ASPR 1-604.1.

GSPR	General Services Administration Procurement Regulation
HEWPR	Department of Health, Education, and Welfare Procurement Regulations
HUD	Department of Housing and Urban Development Procurement Regulations
IBCA	Department of the Interior Board of Contract Appeals
IFB	Invitation for bid
NASA	National Aeronautics and Space Administration
NASABCA	National Aeronautics and Space Administration Board of Contract Appeals
NASA PR	National Aeronautics and Space Administration Procurement Regulations
OFCC	Office of Federal Contract Compliance
PCO	Procurement Contracting Officer
RFP	Request for proposal
SCBCA	Small Claims Board of Contract Appeals
SOW/S&D	Statement of Work/Specifications and Design
TCO	Termination Contracting Officer
TVA	Tennessee Valley Authority
USAF	United States Air Force
U.S.C.	United States Code
VA	Veterans Administration
VACAB	Veterans Administration Board of Contract Appeals
VAPR	Veterans Administration Procurement Regulations

notice, a period for voluntary compliance, a further notice of proposed debarment, opportunity for the contractor to request a hearing, and a set of standards for the conduct of hearings.[23]

PROCEDURAL DUE PROCESS

It is well established that lack of procedural fairness in a debarment proceeding will invalidate those proceedings. Yet questions remain about the extent of due process required in debarment proceedings.[24]

Recently a court has indicated that safeguards similar to those that apply to debarment proceedings are essential for suspension proceedings.[25]

Administrative Conference Recommendation 29

Following a thorough study of debarment and suspension in the early 1960's, the Administrative Conference of the United States advocated measures to improve procedural fairness.[26] These recommendations and implementing actions to date, are summarized below:

- Prior to an initial debarment or suspension action, the contractor should be given notice, with reasons, for the proposed action and an opportunity to be heard at an impartial trial-type hearing.

  (To date, adversary hearings are required only for debarments under the Walsh-Healey and Service Contract acts, and Executive Order 11246.)

- Debarment based on a debarment by another Government agency should be preceded by notice to the contractor and an opportunity for him to reply.

  (This recommendation is not yet reflected in practice.)

- "Lack of Responsibility" determinations should be governed by the overall conference recommendation. (The Administrative Conference intended that debarment "be interpreted broadly to include every type or kind of agency action, however called . . . at whatever level . . ., which has the effect or result of" excluding individuals or firms from participation in the procurement process. Hence, "review lists," "experience lists," and the like having this effect and the processes by which lack of "responsibility" is determined under certain statutes,[27] orders,[28] and regulations [29] would fall within the definition of "lack of responsibility" determinations. The Conference further intended that its overall recommendations as to kinds of procedures to apply to debarment proceedings would apply equally to the kinds of actions amounting to debarments just discussed, though perhaps not precisely so-entitled.)

  (Not followed uniformly in practice except to the extent indicated in the comment above concerning Walsh-Healey and Service Contract acts and Executive Order 11246.)

- Notice of proposed debarment may include immediate suspension if in connection with a criminal prosecution or civil action and may continue for the period of trial of the first instance plus 120 days. If indictment is not returned within one year following notice, the suspension should be terminated unless the Attorney General de-

[23] 41 CFR § 60–1.26, as supplemented by recently proposed detailed procedures for such hearings (*see* 41 CFR § 60–1.26(b) and 41 CFR Part 60–30, in 37 Fed. Reg. 5957–63 (1972)) go far in providing the "safeguards" normally associated with adversary hearings and the standards set by the courts for debarment and suspension hearings.

[24] *See Gonzalez* v. *Freeman*, 334 F.2d 570 (D.C. Cir., 1964); *Copper Plumbing and Heating Co.* v. *Campbell*, 290 F.2d 368 (D.C. Cir., 1961); *Schlesinger* v. *Gates*, 249 F.2d 111 (D.C. Cir., 1957); and *Framlau Corp.* v. *Dembling*, note 7, *supra*.

[25] *Horne Bros., Inc.* v. *Laird*, No. 72–1392 (D.C. Cir., May 17, 1972). *See* 51 Comp. Gen. _____ (B–175777, June 15, 1972).

[26] *See* recommendations in *Selected Reports of the Administrative Conference of the United States*, S.Doc. No. 24, 88th Cong., 1st Sess., 265–307 (1963).

[27] *See generally* 10 U.S.C. § 2305(c) and 41 U.S.C. § 253(b) (1970) which provide that contracts are to be awarded only to "responsible" bidders.

[28] Exec. Order No. 11246, Sept. 24, 1965, 3 CFR, 1964–65 Comp., at 339, 42 U.S.C. 2000e (1970). See discussion of the order and its penalties in the text above.

[29] *See* ASPR 1–904 and FPR 1–1.1204 specifically. *See also* 41 CFR Part 60–2 (1972) implementing Exec. Order No. 11246, *supra* note 28, under which the Comptroller General recently decided (Comp. Gen. Dec. B–174816, Mar. 2, 1972, Unpublished) that lack of a hearing before a first-time finding of "nonresponsibility" for failure to generate a satisfactory "Affirmative Action Program" did not constitute lack of due process. GAO characterized the first finding as a "temporary or limited suspension" and said that it did not consider the first nonresponsibility finding an "order for debarment" under Exec. Order No. 11246 so as to afford the contractor an opportunity for hearing.

Part H—Selected Issues of Liability: Government Property and Catastrophic Accidents

sion proceeding have not been considered necessary for another, although the nature of the offense and the penalty may be similar or even the same.

It is now established that debarment and suspension actions are judicially reviewable, but it is still unclear what kind of administrative proceeding is essential to satisfy due process requirements. The fundamental question is to what extent a number of the elements of a trial-type hearing—notice, appointment of hearing examiner, subpoena, evidence, cross-examination, to mention several—are required for debarment and suspension hearings.

Clearly, the lack of uniformity and the substantial questions regarding due process dictate a thorough, expert policy review of debarment and suspension proceedings, and the enactment of legislative changes if necessary. Bearing in mind the caution of the court in *Gonzales* v. *Freeman* that to the debarment power there attaches an obligation to deal with uniform fairness to all,[32] such a review should have as its goal published, uniform, expeditious, and fair rules. The proposed Office of Federal Procurement Policy would appear to be well suited for this task.

[32] 334 F.2d 570, 580 (D.C. Cir. 1964).

CONTENTS

DISPUTES ARISING IN CONNECTION WITH CONTRACT PERFORMANCE

Thirteen Federal agencies submitted responses in the form of profiles that represent a sampling of contract disputes over recent years.

The profiles requested the following information:

- Name of contractor and size of business
- Real party in interest and size of business
- Type of contract—method of payment, purpose, and method of selection
- Method of payment provided in contract
- Purpose of contract
- Method of selection of contractor
- Object of appeal
- Amount sought on appeal
- Organizational unit where appeal originated
- Contract provisions involved in dispute
- Docket and decision dates
- Was there a hearing
- Were accelerated procedures used
- Manner of resolution
- Amount of settlement or award
- Appeal to a higher level

About 2,187 profiles were received from the 13 agencies covering disputes brought before nine agency boards of contract appeals during the period October 1967 through June 1971. In addition, 597 profiles of disputes at the contracting officer level were received. The data collection effort at the contracting officer level was made on a more limited basis and covered a shorter timespan. While no attempt was made to relate a particular dispute at the contracting officer level to the corresponding board appeal, some of this information can be found in the original profiles.

NUMBER OF PROFILES RECEIVED

Board level	*Number of profiles*
AECBCA	30
COMMBCA	23
ASBCA	937
ENGBCA	514
DOTCAB	51
GSABCA	348
IBCA	79
NASABCA	53
VACAB	152
Total	2,187

Contracting officer level	*Number of profiles*
AEC	26
Air Force	70
Army	50
Navy	100
GSA	250
NASA	101
Total	597
Total from both levels	2,784

DECISION DATES OF PROFILES

Board level	*Earliest date*	*Most recent date*
AECBCA	Jan. 68	Jan. 71
ASBCA	May 70	Apr. 71
COMMBCA	June 64	Apr. 71
ENGBCA	Sept. 60	June 71
DOTCAB	Jan. 69	Mar. 71
GSABCA	May 69	June 71
IBCA	Oct. 67	May 71
NASABCA	Apr. 69	June 71
VACAB	June 68	May 71

Contracting officer level	*Earliest date*	*Most recent date*
AEC	Dec. 67	Mar. 71
Air Force	Dec. 67	June 71
Army	Mar. 69	Apr. 71
Navy	Jan. 70	Apr. 71
GSA	Mar. 70	May 71
NASA	Oct. 67	June 71

SIZE AND REAL PARTY IN INTEREST

In more than 50 percent of the cases at the board level, the prime contractor was identifiable as a small business; in only 31 percent was it identified as a large business; in 19 percent, the contractor's size was unknown. At the contracting officer level, the figure was 61 percent for small business; 27 percent for large business; and 12 percent unknown.

The percentages of cases involving small business prime contractors were:

Contracting officer level		*Board level*	
Air Force	9%	ASBCA	53%
Navy	34%	GSABCA	57%
NASA	68%	ENGBCA	47%
GSA	85%	IBCA	71%
AEC	42%	NASABCA	64%
Army	64%	DOTCAB	39%
		AECBCA	63%
		VACAB	20%
		COMMBCA	9%

CHAPTER 1

Introduction and Summary of Recommendations

This part of the report covers two topics related to the consequences of accidents occurring in connection with Government procurement programs: (1) how the risk of liability for damage to Government property caused by defective products purchased by the Government should be spread between the Government and its contractors and (2) the need to develop adequate means (a) to compensate the victims of a catastrophic accident [1] occurring in connection with a Government procurement and (b) to protect Government contractors from uninsurable risks in connection with such an accident. These topics, summarized below, are discussed in greater detail in Chapters 2 and 3.

SELF-INSURANCE OF GOVERNMENT PROPERTY

When the Government procures goods there is always a risk that they will prove defective and cause damage to Government property. The damage caused may greatly exceed the cost of the product itself; the failure of a single component may cause the destruction of an entire system. For example, the failure of a small resistor could cause the loss of a multimillion dollar missile.

In spreading the risk of loss of or damage to Government property between the contractor and itself, the Government has in the past generally acted as a self-insurer of its own property against damage caused by defects in products supplied by contractors. Accordingly, the insurance industry has structured its coverage and set its premium rates to contractors on the basis of this past Government practice. However, the Government as a whole has not published any general policy governing the extent to which and under what circumstances the Government will act as a self-insurer. Recent events, notably a case in which the Australian Government sued an American landing-gear subcontractor for loss of an entire aircraft sold to Australia by the U.S. Government, have caused uncertainty in the insurance and contractor communities as to future Government practice.

In the absence of a clear statement of the Government's policy, this uncertainty could result in an increased cost of the products sold to the Government through increased insurance rates. Any reversal of the practice of acting as self-insurer will likely result in significant increases in the cost of contractor insurance, and the higher cost will be passed on to the Government.

The Department of Defense (DOD) has adopted a written policy to act, with some exceptions, as self-insurer for loss of or damage to Government property occurring after final acceptance of supplies delivered to the Government and resulting from any defects or deficiencies in such supplies. While it is the best statement yet of agency policy, the DOD policy has itself produced some uncertainty in its application in that it does not expressly cover a number of areas. Though the DOD policy generally is thought applicable to subcontractors, there is no express statement that subcontractors are relieved of liability to the same extent as prime contractors. In addition, where procured items are sold or otherwise furnished by

[1] For purposes of this report, a "catastrophic accident" is defined as an accident causing damage that exceeds the limits of available insurance coverage. See Chapter 3, *infra*, for a discussion of the term.

The percentages for supply contracts by jurisdiction were:

Contracting officer level		*Board level*	
Air Force	33%	ASBCA	46%
Navy	0%	GSABCA	23%
NASA	84%	ENGBCA	4%
GSA	81%	IBCA	16%
AEC	38%	NASABCA	58%
Army	80%	DOTCAB	29%
		AECBCA	23%
		VACAB	19%
		COMMBCA	48%

When cases before the ASBCA and ENGBCA are added (1,451 cases of which 451 were supply contracts), the combined average is 31 percent, the same as the average for all boards.

The percentages of other types of contracts were very small in comparison to those of supply and construction contracts. Construction and supply contracts combined represented 77 percent of all board cases and 81 percent of all contracting officer decisions. The number of cases by type of contract were:

Type of contract	*Board*		*C.O.*		*Total*
Construction	1,058	77%	125	81%	1,183
Supply	637		361		998
Repair	154		37		191
Nonpersonal services	138		4		142
Research and development	63		30		93
Other	137		40		177
Total	2,187		597		2,784

NATURE OF THE DISPUTE

At the board level, the specifications were most often the cause of the dispute, followed by changes and termination for default:

Provision	*Number of cases*	
SOW/S&D	652	(30%)
Changes	580	(26%)
Default termination	356	(16%)

By board, the above totals break down as follows:

Board	*SOW/S&D cases as a percentage of total caseload*
GSABCA	56%
IBCA	53%
ENGBCA	43%
ASBCA	15%

Board	*Changes cases as a percentage of total caseload*
DOTCAB	29%
AECBCA	33%
VACAB	22%
ASBCA	28%
ENGBCA	29%
IBCA	37%

At the contracting officer level, the major sources of the controversies were:

Provision	*Number of cases*	
Default termination	302	(51%)
Changes	90	(15%)
SOW/S&D	89	(15%)

At both the contracting officer and board levels, the three most prevalent sources of controversy were: SOW/S&D, changes, and default termination.

The provisions in dispute at the contracting officer and board levels ranked by number of cases were:

Provision in dispute	*Total no.*	*No. cases at C.O. level*	*No. board cases*	*C.O. rank*	*Board rank*
SOW/S&D	741	89	652	3	1
Changes	670	90	580	2	2
Default termination	658	302	356	1	3
Changed conditions	158	6	152	14	4
Liquidated damages	130	13	117	8	5
Time extension	126	14	112	7	7
Inspection	79	40	39	4	13
Overhead costs	27	18	9	5	24
Options and price escalation	25	15	10	6	23

Government relief. We have found these existing laws inadequate because they generally lack mechanisms for providing prompt financial relief to victims, contain no authorizations for agencies to provide interim funds pending final settlement, provide no clear declaration of congressional policy encouraging broad indemnification of Government contractors, and unreasonably limit the amount of recovery by foreign citizens.

We recommend that legislation be enacted to assure in advance prompt and adequate compensation for victims of catastrophic accidents occurring in connection with Government programs. We further recommend that legislation be enacted to provide Government indemnification of contractors for liability above the limit of available insurance.

Some general observations on the preceding table are that, while SOW/S&D provisions were not heavily involved in two construction contract units (Navy and GSA), they were high (23 percent or more) in three non-construction-oriented units. In boards which handle numerous construction contract cases, SOW/S&D provisions were involved in more than 30 percent of the cases before two boards (ENGBCA and IBCA) and in more than 50 percent of the cases before one board (GSA-BCA). Changes were a major issue (52 percent of the cases) in the Navy unit, which is oriented toward construction contracts, but not in GSA, where only 6 percent of the contracting officer decisions involved construction contracts. The changes clause was fairly uniformly involved in the cases before most boards (18 percent to 25 percent). Default termination was high in GSA and NASA at the contracting officer level. Changed conditions did not appear as a major cause of disputes.

Certain contract provisions, then, rather than contract types, seem to be more causative of controversy. This conclusion can be drawn from the fact that the contract type varied; more than 60 percent of the disputes at the contracting officer level arose from supply contracts and nearly 50 percent of the board cases arose from construction contracts, while the same three provisions (SOW/S&D, changes, and default termination) were the major sources of controversy at both levels.

AMOUNT SOUGHT

Claims of $25,000 and under accounted for 63 percent of the disputes before all the boards, and claims of $10,000 and under accounted for 51 percent. The breakdown for the three boards handling the largest number of disputes was:

Board	*Claims of $25,000 and under*	*Claims of $10,000 and under*
ASBCA	62%	49%
GSABCA	82%	66%
ENGBCA	49%	34%

The frequency of small claims must be considered in the light that some boards docket each claim separately although a number of them may be part of one controversy. Each claim before those boards was coded as a separate dispute. Other boards, however, consolidate claims under a given contract, so that only one entry was made in the data bank. Before the VACAB, for instance, 92 percent of the disputes involved claims of $10,000 or under, whereas before the ASBCA, less than half the claims were in that category.

The size of the claims handled by the ASBCA, the ENGBCA, and all other boards combined was:

	$1,000 or under	*$1,001 to $10,000*	*$10,001 to $25,000*	*$25,001 to $50,000*
ASBCA	27%	40%	36%	44%
ENGBCA	13%	20%	29%	33%
All other boards	60%	40%	35%	23%
Total	100%	100%	100%	100%

	$50,001 to $100,000	*$100,001 to $500,000*	*$500,001 to $1 million*	*$1,000,001 to $10 million*
ASBCA	40%	37%	40%	32%
ENGBCA	33%	42%	44%	46%
All other boards	27%	21%	16%	22%
Total	100%	100%	100%	100%

The profiles on disputes at the contracting officer level indicated that 59 percent of the claims were for $25,000 and under and 44 percent were for $10,000 and under. The percentages by agency were:

Agency	*Claims of $25,000 and under*	*Claims of $10,000 and under*
NASA	60%	37%
GSA	100%	91%
AEC	72%	43%

The total amount involved in the board appeals analyzed was $203 million. The breakdown of claims above and below $25,000 was:

Amount claimed	*Total number of claims*	*Total value*
Over $25,000	562 (35%)	$197,456,977 (97%)
$25,000 and under	1,048 (65%)	$5,768,210 (3%)

Comparison of the amounts sought at the board level and at the contracting officer level in the units where there are comparable data shows:

Agency	*Claims of $25,000 and under*		*Claims of $10,000 and under*	
	C.O.	*Board*	*C.O.*	*Board*
NASA	59%	56%	36%	38%
AEC	71%	73%	43%	57%
GSA	100%	82%	91%	66%

CHAPTER 2

Self-Insurance of Government Property

This chapter discusses the question of who should bear the risk of damage to Government property caused by defects in products purchased by the Government.

The scope of the topic perhaps can be explained best by a recent incident that has given rise to much concern among contractors and the insurance industry. Lockheed Aircraft Corporation was the manufacturer of the P–3B antisubmarine patrol aircraft, and the Menasco Manufacturing Company, as a subcontractor to Lockheed, furnished the landing gear. The U.S. Navy sold some P–3B's to Australia. In April 1968, an alleged failure in the landing gear, during flight training of Australian Air Force personnel, caused one of the aircraft to crash and burn on landing. The aircraft was a total loss, but no lives were lost and there was no other damage. In August 1969, the Australian Government sued Lockheed and Menasco for damages in the amount of $4 million against Lockheed and $5 million against Menasco.[1] The money claimed covered the cost of replacing the plane, value of the equipment aboard, maintenance and operating costs, and loss of use of the aircraft. Exemplary damages were sought for gross recklessness and gross disregard for the safety of the aircraft and its crew. An out-of-court settlement was subsequently reached with Menasco, Lockheed, and the U.S. Government contributing to the price of a replacement aircraft.

The case illustrates two fundamental issues that will be considered in this chapter: (1) What is the extent of contractor and subcontractor obligations to repair, replace, or pay for loss of or damage to major, or high-cost, end-item supplies provided under the terms of a Government contract? (2) What is the extent of contractor or subcontractor obligations for loss of or damage to property other than the end item itself and for other expenses resulting from such loss or damage?

The second issue is the primary concern in the *Menasco* case. The case is notable because, prior to this incident, the DOD practice had been not to hold the manufacturer of a defective product liable for damage to Government property caused by the defect. While the military services long had used several different clauses providing for warranties and correction of defects,[2] it was not until 1964 that DOD issued a comprehensive list of instructions for use of warranties in fixed-price contracts.[3] This DOD action was based on the conclusion that in fixed-price contracts such provisions were enforceable and any increase in price was outweighed by the added protection to the Government. In 1967, the Armed Services Procurement Regulation (ASPR) was expanded in this area by adding a "Correction of Deficiencies" clause[4] and a "Warranty of Construction" clause.[5] The latter clause imposed liability on a contractor for "consequential damages," which include damage to Government property and may be defined as follows:

> Consequential damages . . . relate to all other recoverable losses from use or loss of use of the defective item, such as complete loss or damage to end item or the system in which it is used, injury to the person or

[1] *Australia* v. *Lockheed Aircraft Corp.*, No. 69–1623–WPG (Cal. Cent. Dist. Ct., Complaint filed Aug. 18, 1969).

[2] Payne, "Government Contract Warranties: Isn't the Caveat Venditor Rather Than Emptor?" 4 *Nat'l Contract Management J.*, 31, 35 (1970).

[3] ASPR 1–324.1–.6.

[4] ASPR 1–324.9.

[5] ASPR 1–324.10.

decisions adverse to the contractor were appealed to a board of contract appeals. The unit breakdown of this figure is:

NAVY	85%
AEC	73%
ARMY	79%
NASA	34%
GSA	13%
USAF	36%

TIME ON DOCKET

In interviews with ASBCA personnel as well as members of the legal staffs who handled appeals before boards, it was pointed out that the time that a case is on the docket is not necessarily indicative of the speed available to a claimant within the appellate procedure.

Agency	*Time*					*Total*
	0–6 months	*6–12 months*	*12–18 months*	*18–24 months*	*2 years & more*	
NASABCA	13	8	4	0	0	25
GSABCA	113	82	64	26	32	317
DOTCAB	3	15	3	4	20	45
AECBCA	27	2	0	0	0	29
VACAB	51	50	43	8	0	152
ASBCA	294	290	157	88	100	929
ENGBCA	101	95	100	49	145	490
COMMBCA	5	3	9	2	4	23
IBCA	13	23	13	6	14	69
Total	620	568	393	183	315	2,079

Oftentimes, the claimant or both the claimant and the Government may desire to continue the case for further negotiations, the marshalling of evidence, or other tactical reasons. Hence, we must conclude that the docket times as reported are longer than they might have been had the parties moved expeditiously in every instance.

The profiles in the data bank show that within 24 months 85 percent of the cases appealed to a board are resolved: 30 percent are resolved within six months, another 27 percent between six and 12 months, another 19 percent between 12 and 18 months, and 9 percent between 18 and 24 months.

A breakdown by agency shows that AEC was the speediest in resolving disputes, disposing of 93 percent of the cases within the first six months. DOTCAB was the slowest, since only 7 percent of their cases were concluded within a similar time period. The ASBCA, the board with the largest docket, disposed of almost two-thirds of their cases within a year from the date docketed.

Thirty percent of the ENGBCA cases went on for more than two years. However, 28 percent of the ENGBCA cases involved more than $100,000 as compared to 17 percent of the ASBCA cases with claims in that category.

The following table shows the length of time cases were on the dockets of the boards:

C.O. level	*Time*					*Total*
	0–6 months	*6–12 months*	*12–18 months*	*18–24 months*	*2 years & more*	
USAF	16	11	3	9	13	52
NAVY	21	42	24	3	8	98
NASA	83	7	4	2	4	100
GSA	215	9	7	3	6	240
AEC	10	3	2	2	6	23
ARMY	28	8	8	1	2	47
Total	373	80	48	20	39	560

At the contracting officer level, 94 percent of the disputes were resolved within 24 months; 67 percent within six months, 14 percent between six and 12 months, 9 percent between 12 and 18 months, and 4 percent between 18 and 24 months. GSA was the speediest (90 percent within six months), followed by NASA (83 percent), while Navy was the slowest (21 percent).

The number of cases in each category is tabulated as follows:

curement Circular (DPC) No. 86. The circular provided:

> The purpose . . . is to establish Department of Defense policy with respect to contractor liability for loss of or damage to property of the Government occurring after final acceptance of supplies delivered to the Government and resulting from any defects or deficiencies in such supplies. The policy announced . . . [is] the result of a long period of study and [is] aimed at reducing Government procurement costs by limiting the contractor's risk.

A new paragraph was added to the ASPR providing:

> It is the policy of the Department of Defense generally to act as a self-insurer for loss of or damage to property of the Government occurring after final acceptance of supplies delivered to the Government and resulting from any defects or deficiencies in such supplies.[17]

There were a number of exceptions and limitations to this policy of self-insurance. In April 1971, Revision No. 9 to ASPR incorporated DPC No. 86 into ASPR. The fact that the ASPR Committee did not consider the new coverage on warranties and consequential damages as conclusive or exhaustive was clearly stated in DPC No. 86:

> Still under consideration are additional revisions concerning express or implied warranty provisions and extension of the policy established by this item to contracts other than those calling for delivery of supplies.

The ASPR Committee has continued its study and expects to issue additional regulations to cover warranties and consequential damages.

No other procuring agency appears to have studied the issues as extensively as has DOD. No other formal policy or regulation has been issued similar to the ASPR provisions on the subject of contractor liability for defective supplies which cause loss of or damage to other Government property.[18]

PRIME CONTRACTORS

Recommendation 1. That the Government, with appropriate exceptions, generally act as a self-insurer for the loss of or damage to Government property resulting from any defect in items supplied by a contractor and finally accepted by the Government.

There is a need for a uniform, stated Federal policy in this area of potential liability, and we support the DOD policy that the Government, with certain exceptions, act as a self-insurer for the loss of or damage to Government property resulting from any defect in items supplied by a contractor and finally accepted[19] by the Government. Moreover, the DOD policy should be expressly extended to include subcontractors and third-party transferees. The latter extension is considered separately in Recommendations 2 and 3, *infra.*

CURRENT CONTRACT CLAUSES AND REGULATIONS

The procurement regulations of various executive agencies include prescribed contract clauses that govern postacceptance rights, obligations, and remedies for defective supplies. The terms of these clauses provide the Government with a number of different remedies, including the rights to (1) correct or replace defective or deficient supplies during the manufacturing process or prior to delivery, (2) reject such supplies at the time of delivery, (3) correct or replace after acceptance, (4) an equitable adjustment of price for deficient supplies that are not corrected or replaced, and (5) recovery of reprocurement costs if the contractor fails to correct or replace deficient or defective supplies. Except for latent defects,

[17] ASPR 1-330(a).

[18] A review was made of the Federal Procurement Regulations and those issued by the General Services Administration, Coast Guard, Federal Aviation Administration, Dep't of Transportation, Atomic Energy Commission, and National Aeronautics and Space Administration (NASA). NASA has followed the ASPR clauses of Dep't of Defense in section 1-324. The warranty of construction clause in NASA PR 1.324-10 states:

> [T]he Contractor shall remedy at his own expense any damage to Government owned or controlled real or personal property, when that damage is the result of the contractor's failure to conform to contract requirements or any such defect of equipment, material, workmanship, or design. The contractor shall also restore any work damaged in fulfilling the terms of this clause.

This imposes an express obligation to repair damaged Government property other than the end item of the contract under which defective supplies or services are sold.

[19] Prior to acceptance by the Government, the property would of course belong to the contractor. If, because of defects, it caused damage to Government property at that point, either tort law or special contract clauses presumably would govern.

PERIOD WHEN PROTEST LODGED

Approximately four out of every ten protest decisions (42 percent) issued by GAO in fiscal years 1971–1972 involved protests that had been lodged before the award of a contract. However, approximately one of every five decisions on pre-award protests was not rendered until after award.

Time of receipt	*Fiscal 1972*	*Fiscal 1971*
Protests received before award	338	282
Protests received after award	420	431
Period of receipt not reported	0	2
Total decisions rendered	758	715
Protests received before award but decisions rendered after award	87	36

Source: Statistics furnished by Office of General Counsel, U.S. General Accounting Office.

AGENCY SUSPENSION OF AWARD WHILE PROTEST PENDING WITH GAO

Seven of 16 responding agencies put the responsibility for the decision to suspend award into the hands of the contracting officer. Of these seven, four allow the contracting officer to act alone, one requires GAO concurrence, and two have the contracting officer consult an official in higher headquarters. Nine more of the responding agencies indicated that a higher authority decides the issue of suspension of procurement activity, generally (except for one agency) in a headquarters office.

Eleven agencies stated that they conduct exhaustive review of protests filed with GAO and act to rectify the situation if appropriate. The review may include presentation of additional evidence to the contracting officer, conferences and correspondence, and submission of technical or legal opinions. Only four agencies stated that no attempt is made to review such protests, and one agency replied that it seldom attempts to resolve protests at this stage. One agency did not answer the question.

SIZE OF CONTRACT AWARD CANCELED

Data was gathered on 21 award protests decided during 1967–1971 in which GAO recommended cancellation of a contract. Analysis of this data does not support a hypothesis that GAO recommends cancellation of the contract only where the size of the contract is nominal. GAO recommended cancellation of ten contracts where the contract price was less than $100,000. In another 11 contracts, GAO recommended cancellation where the dollar amount exceeded $100,000. Four of the 11 involved sums greater than $250,000; another four had a contract price above $500,000. The largest contract award reversed by GAO exceeded $6,000,000.

CAUSES OF AWARD PROTESTS

Data was collected from 13 procuring agencies or agency components to determine the primary causes of award protests. Each agency supplied information on both protests submitted directly to the agency and those submitted to GAO. Analysis of 1,052 protests revealed that three major issues were raised.

The adequacy or legality of the solicitation was challenged in 29 percent of the protests. The responsiveness of another bid or offer was at issue in another 30 percent of the cases. The responsibility of another bidder was disputed in 13 percent of the protests. The remaining 28 percent of the challenges were concerned with various matters, including ambiguous or restrictive specifications, evaluation criteria, mistake in bid, and set-aside procedures. The causes by agency during 1968–1970 are shown below:

Agency	*Challenged adequacy or legality of solicitation*	*Challenged responsiveness of another bid or offer*	*Challenged responsibility of another bidder or offeror*	*Other challenges*
Army	184	153	67	123
Navy	38	66	19	74
Air Force				
AFLC	24	21	19	8
Langley	2	1	0	No rpt.
DSA (1970 only)	0	18	11	45

and the extent to which the Government, or its suppliers, should bear such a risk.

THE ROLE OF INSURANCE

Most suppliers carry some form of general or product liability insurance providing financial protection for claims resulting from loss or damage caused by defective products. However, we have been unable to obtain detailed data on specific types and amounts of coverage. Despite the lack of specific details regarding premium costs and the extent of product liability coverage, a number of basic facts about product liability insurance and insurance practices can be verified.

"Product liability" is commonly understood to mean liability of a contractor for injury to persons or property caused by its defective products, and includes liability to third parties who are not parties to the contract. Such liability to third persons is insurable, and most manufacturers and suppliers carry product liability insurance for third-person liability. However, product liability insurance is not intended to be a guarantee of good workmanship; it does not normally cover loss of or damage to the product itself nor the cost of repair, replacement, or removal of the product.

Military aircraft, missiles, space systems, and other complex products, including spare parts and components, which are destroyed or severely damaged, are not generally included in the premium rate of the manufacturer and its component manufacturer's product liability insurance coverage.

Neither commercial nor Government product liability insurance covers the "business risk" of the failure of a product to perform its intended purpose due to improper design or specification. An example of an uninsurable business risk is the costly recall situation, or "sistership" liability, such as liability caused by the grounding of all aircraft of the same type.

It is not uncommon for the product liability insurance carried by industry to cover both its commercial and Government work. This is especially true at the subcontractor and supplier level.

The premium costs for product liability insurance are determined or structured by loss experience, and experience with a particular company is nearly always the major or controlling factor in setting premium rates. Costs for premiums are reflected in contract pricing through a number of different accounting methods. Often, such premium costs are allocated to an overhead expense pool which is then prorated as part of an indirect expense rate against all contracts. Sometimes costs may be charged as a direct expense to a contract. Some companies segregate amounts for military insurance coverage from commercial coverage.

Because premium costs are determined by loss experience and the exposure to liability for such losses, there is a direct relationship between costs paid by the Government in its contract prices (directly or indirectly) and the amount of damages it recovers as a result of loss or of damage to Government property.

PRICING

Finally, the present uncertainty and vagueness of the extent of contractor and supplier liability for loss of or damage to Government property have made it difficult to price the risks involved adequately or accurately.

Warranties in Government contracts pose a nearly insoluble pricing problem. While Government policy allows the inclusion of a factor in the price to cover the cost of including a warranty, the contractor's difficulty is one of establishing some reasonable basis for predicting warranty costs for a product being produced for the first time. The problem is further complicated because postacceptance Government remedies are provided for in so many different standard clauses and are stated to be "nonexclusive"; that is, are merely remedies in addition to whatever other remedies may exist under the law.

CONCLUSIONS

A lack of a clear and explicit definition of postacceptance rights of the Government and obligations of contractors and suppliers increases the probability of disputes and litigation. It places indefinite risk on contractors and suppliers because of the inability to predict or determine the extent of the exposure to liability. Further, the lack of a clear statement

SUBCONTRACTORS AND THIRD PARTIES

Recommendation 2. Apply the Government policy of self-insurance to subcontractors on the same basis as to prime contractors.

Recommendation 3. Ensure that, where items delivered by a contractor to the Government are transferred by the Government to a third party, the third party has no greater rights against the contractor or its subcontractors than the Government would have if it retained the item.

SUBCONTRACTORS AND SUPPLIERS

To a large extent, the warranty problems of subcontractors and suppliers under Government contracts are the same as those of prime contractors. The impact of the assignment of risk for loss of or damage to Government property can be magnified as it moves down the tiers of subcontractors and suppliers. While the extent of pyramiding or accumulation of insurance costs has not been established, such costs will include premiums for product liability insurance protection throughout the complete subcontracting chain. The same risk exposure will be covered to some degree by every subcontractor and supplier who bears the risk of liability.

From industry's viewpoint, DPC No. 86 has not provided acceptable relief from the risk of loss of or damage to Government property for subcontractors. This risk exposure may be unrecognized by the supplier when standard commercial items are incorporated in special high-value Government products or systems without the supplier's knowledge of the purpose for which its product is used. The resolution of this issue is beyond the authority of and cannot be negotiated by prime contractors or higher-tier subcontractors with lower-tier suppliers. It is a matter of governmental policy and decision.

THIRD PARTIES

As seen from the *Menasco* case, DOD has no policy as to what the risk assumption is to be when a Government-procured item is sold or otherwise furnished to other parties. The typical aircraft products liability insurance policy expressly excludes coverage for liability for damage to military products supplied to U.S. or foreign governments whether sold directly or transferred from one to the other.

As a result of *Menasco*, some contractors are now hesitant to sell major items to the Government when it is known that the items are to be furnished or sold to a foreign government. The problem is even more inequitable and impossible of reasonable solution if equipment is sold to the Government and later sold or transferred to a foreign government without the knowledge of the contractor. Any equipment sold to the Government is, of course, subject to such disposition without the consent or knowledge of the contractor.

CONCLUSIONS

In summary, the Government policy of acting as a self-insurer for loss of or damage to its property occurring after final acceptance and arising out of any defective supplies and services after expiration of the warranty period, if any, should apply to all tiers of subcontractors and suppliers. The Government's policy of self-insurance for defects or deficiencies of supplies should be included as a constraint in the sale or transfer of products to others including foreign governments, subject to possible reservations and conditions that the Departments of Defense and of State might have to consider for reasons of foreign policy and national defense. No transferee or purchaser should acquire greater rights than those granted to the Government under the terms of the original procurement. The document of transfer, contract, grant, loan, etc., should expressly limit the rights and obligations arising out of any defect or deficiency to those included in the contract under which an item originally was procured.

APPENDIX C

List of Recommendations

1. Make clear to the contractor the identity and authority of the contracting officer, and other designated officials, to act in connection with each contract.

2. Provide for an informal conference to review contracting officer decisions adverse to the contractor.

3. Retain multiple agency boards; establish minimum standards for personnel and caseload; and grant the boards subpoena and discovery powers.

4. Establish a regional small claims boards system to resolve disputes involving $25,000 or less.

5. Empower contracting agencies to settle and pay, and administrative forums to decide, all claims or disputes arising under or growing out of or in connection with the administration or performance of contracts entered into by the United States.

6. Allow contractors direct access to the Court of Claims and district courts.

7. Grant both the Government and contractors judicial review of adverse agency boards of contract appeals decisions. [Five Commissioners dissent.]

8. Establish uniform and relatively short time periods within which parties may seek judicial review of adverse decisions of administrative forums.

9. Modify the present court remand practice to allow the reviewing court to take additional evidence and make a final disposition of the case.

10. Increase the monetary jurisdictional limit of the district courts to $100,000. [One Commissioner dissents.]

11. Pay interest on claims awarded by administrative and judicial forums.

12. Pay all court judgments on contract claims from agency appropriations if feasible.

13. Promulgate award protest procedures that adequately inform protestors of the steps that can be taken to seek review of administrative decisions in the contract award process.

14. Continue the General Accounting Office as an award protest-resolving forum. [One Commissioner dissents.]

15. Establish, through executive branch and GAO cooperation, more expeditious and mandatory time requirements for processing protests through GAO.

16. Establish in the executive procurement regulations, in cooperation with the General Accounting Office, a coordinated requirement for high-level management review of any decision to award a contract while a protest is pending with GAO.

17. GAO should continue to recommend termination for convenience of the Government of improperly awarded contracts in appropriate instances.

18. Improve contracting agency debriefing procedures.

19. Establish a pre-award protest procedure in all contracting agencies.

20. Conduct periodic reviews by GAO of agency award protest procedures and practices.

CHAPTER 3

Catastrophic Accidents

Dramatic scientific and technological advances have occurred in the past few decades. Frequently they have been initiated and paid for by the Federal Government, particularly in national defense, space, and nuclear programs. The probability of a catastrophic accident occurring in connection with one of these programs cannot be accurately estimated, nor can the extent of the damage that might result. Yet, there is a remote chance that thousands of lives could be lost and billions of dollars in property damages might result from a single calamitous incident.[1] This chapter, in contrast to the preceding chapter, which was concerned solely with liability for damage to Government property, is concerned with the means available to compensate the victims of a catastrophic accident and to protect Government contractors from uninsurable risks arising from such accidents.

Illustrations of potential disastrous occurrences have been extensively postulated in the news media. The unintentional explosion of a nuclear device being carried by an airplane, the misfiring of a military or civilian missile or rocket, and the accidental release of poisonous or other hazardous substances are examples of catastrophic events which might arise from Government activities. Catastrophic accidents could occur during research and development, production, or operational use.

One disaster reaching catastrophic proportions and involving a Government program did occur on April 16 and 17, 1947.[2] At the close of World War II the Government decided to market ammonium nitrate as a fertilizer. It was highly explosive, and two ships carrying fertilizer-grade ammonium nitrate under a Government contract exploded at the docks in Texas City, Texas. The explosions destroyed virtually the entire dock area of Texas City, killing some 570 persons and injuring 3,500. Approximately 1,000 homes, industrial plants, and other buildings either suffered major damage or were totally destroyed. The total claims were originally estimated at $200 million. After a decision by the United States Supreme Court denying relief to the plaintiffs,[3] Congress enacted the Texas City Disaster Relief Act[4] in 1955, eight years after the disaster. Under a 1959 amendment,[5] it was estimated that an additional $4 million would be needed for payment although appraisals of the actual damages ranged from $300 million to billions of dollars. The Army paid $17.1 million in settlement of claims under the limited settlement authority of the Relief Act, with the last payment being made in September 1962[6] 15 years after the disaster.

This has been the only catastrophic accident in connection with any Government program. Indeed, extraordinary precautions undertaken to safeguard against such accidents have resulted in an impressive safety record. However, since human and mechanical error cannot be completely eliminated, the risk of a devastating disaster is real and must be faced.

If a catastrophic accident occurs, there is no assurance at present that any of the victims

[1] Report of the Committee on Federal Legislation of the Association of the Bar of the City of New York, *Protection Against Catastrophic Accidents in Connection With Government Activities*, in *Hearings on H.R. 474 Before a Subcommittee of the House Committee on Government Operations*, 91st Cong., 1st sess., part 8, appendix 19, at 2332 (1969).

[2] F. J. Hand, "The Texas City Disaster," in *Hearings on H.R. 474*, *supra* note 1, appendix 20, at 2337.

[3] *Dalehite* v. *United States*, 346 U.S. 15 (1953).

[4] Act of Aug. 12, 1955, Pub. L. No. 84–378, 69 Stat. 707.

[5] Act of Sept. 25, 1959, Pub. L. No. 86–381, 73 Stat. 706.

[6] Hand, "The Texas City Disaster," in *Hearings on H.R. 474*, *supra* note 2, at 2340.

APPENDIX D

Acronyms

ACO	Administrative Contracting Officer
AEC	Atomic Energy Commission
AECBCA	Atomic Energy Commission Board of Contract Appeals
AECPR	Atomic Energy Commission Procurement Regulations
AFJAG	Air Force Judge Advocate General
AFLC	Air Force Logistics Command
AFSC	Air Force Systems Command
AGPR	Department of Agriculture Procurement Regulations
APA	Administrative Procedure Act
APP	Army Procurement Procedure
ASBCA	Armed Services Board of Contract Appeals
ASPR	Armed Services Procurement Regulation
BCA	Board of Contract Appeals
CFR	Code of Federal Regulations
CO	Contracting Officer
COMMBCA	Department of Commerce Board of Contract Appeals
CPAF	Cost-plus-award-fee
CPFF	Cost-plus-a-fixed-fee
CPIF	Cost-plus-incentive-fee
D.C.	District of Columbia
DCA	Defense Communications Agency
DOD	Department of Defense
DOT	Department of Transportation
DOTCAB	Department of Transportation Contract Appeals Board
DSA	Defense Supply Agency
DSPR	Defense Supply Procurement Regulations
ENGBCA	Corps of Engineers Board of Contract Appeals
EPA	Environmental Protection Agency
FAA	Federal Aviation Administration
FHA	Federal Highway Administration
FP	Fixed-price
FPI	Fixed-price-incentive
FPR	Federal Procurement Regulations
F.2d	Federal Reporter, Second Series
GAO	General Accounting Office
GC	Government Contractor
GPO	Government Printing Office
GSA	General Services Administration
GSABCA	General Services Administration Board of Contract Appeals

The President, on December 16, 1950, issued a declaration of national emergency which is still in effect.[9] Executive Order 10789 of November 14, 1958, prescribes the Presidential regulations on using the statutory authority and designates the agencies authorized to utilize its powers.[10] The Executive order provided that actions taken under it had to be within the limits of the amount appropriated and the contract authorization provided therefor, but on July 22, 1971, the President amended the order by issuing Executive Order 11610 which, among other things, deleted the limitation.[11] Thus, there is now no ceiling. Unlimited financial protection is theoretically available in instances where indemnification is applicable. DPC No. 103 implements Executive Order 11610 for the Department of Defense.

Section 2354 of Title 10, United States Code, provides that military departments may indemnify research and development contractors, to the extent the contractors are not compensated by insurance or otherwise, against claims by third persons, including claims for loss of or damage to property from a risk that the contract defines as unusually hazardous.

The Price-Anderson Amendment to the Atomic Energy Act of 1954 declares that the Government will indemnify certain AEC licensees and permits the Government to indemnify other AEC licensees as well as AEC contractors and subcontractors.[12] This statute contemplates that the licensees or, as determined by AEC, contractors will have financial protection by means of insurance or self-insurance, and that, up to certain maximums, the indemnification would begin where such insurance stops.

In 1962 Congress also authorized the Veterans Administration to indemnify contractors engaged in research into prostheses and related devices.[13]

COMPENSATION AND INDEMNIFICATION

Recommendation 4. Enact legislation to assure prompt and adequate compensation for victims of catastrophic accidents occurring in connection with Government programs.

Recommendation 5. Enact legislation to provide Government indemnification, above the limit of available insurance, of contractors for liability for damage arising from a catastrophic accident occurring in connection with a Government program.

INADEQUACIES OF PRIVATE MEANS OF RELIEF

The present means of providing relief through the private sector are inadequate for relieving the consequences of catastrophic accidents arising from Government-connected programs.

First, the amount of insurance available is not sufficient to pay judgments for losses sustained by the injured public when the total damage reaches catastrophic proportions. Normally, when a company is exposed to risks so large that it is unable to assume them, it spreads the risk by purchasing insurance. The enormity of a potential catastrophe in some Government programs is such that sufficient insurance would not be available. Therefore, contractors could be liable for amounts which would bankrupt them but still leave huge portions of the injuries and losses uncompensated.

Second, private insurance held by potential victims is an incomplete means of relief. It will not be carried by a high percentage of disaster victims and, even when it is carried, it only affords protection up to a certain dollar limit.

Finally, even to the extent a contractor is covered by liability insurance, if a catastrophe were to arise out of a Government program, payment to insured members of the public would depend ordinarily on their establishing liability for damages. The victim might have difficulty proving the accident to be the responsibility of one or more contractors, particularly if the accident destroyed the evidence or if the evidence were unavailable because of Government security classifications.

INADEQUACIES OF EXISTING STATUTORY AUTHORITY

In general, the existing laws of the United States are inadequate to cope with two basic

[9] Proc. No. 2914, 3 CFR, 1949–1953 Comp., at 99, 50 U.S.C. App. Prec. 1 (1970).
[10] 3 CFR, 1954–1958 Comp., at 426, 50 U.S.C. § 1431 (1970).
[11] 3 CFR, 1971 Comp., at 190, 50 U.S.C. § 1431 (Supp. I, 1971).
[12] 42 U.S.C. § 2210 (1970).
[13] 38 U.S.C. § 216 (1970).

extraordinary nuclear occurrence must involve an AEC contractor or subcontractor and must occur "during the course of the contract activity." Though there is no provision for automatic indemnification flowing directly from the statute, a victim of a serious nuclear occurrence is required to prove only that he or his property has been damaged and that the damage resulted from the occurrence. Price-Anderson does not specifically establish the basis of legal liability for nuclear incidents—whether strict liability or otherwise—nor does it establish a Federal statute of limitations for such incidents. Moreover, Price-Anderson does not (1) automatically make waivers of defenses applicable, (2) specifically direct the AEC to require the waivers, (3) require an assumption of liability by any person, (4) provide for the exclusive liability of any person, or (5) provide for the exclusive liability of the facility operator.

LIABILITY FOR CATASTROPHES OCCURRING ABROAD

There is less chance of calamitous accidents arising out of U.S. Government programs abroad than in this country. Still, if such a cataclysm did occur in a foreign country, the victim would have limited means of obtaining redress.

The Government might authorize payments which would afford relief if they were prompt and adequate, but they might be so long in coming to the victims that additional hardship would result from the delay. If the victim were to sue the manufacturer of a defective instrument or component which allegedly caused the accident, he could expect delays from protracted litigation that would be uncertain as to outcome. He would have the same obstacles to his recovering as victims in the United States now face.

A foreign victim could not sue the U.S. Government in American courts because the Federal Tort Claims Act [20] excepts "any claim arising in a foreign country" when both the conduct causing injury and the injury itself occurred in a foreign country. Not so clear is whether the act would cover cases involving conduct in the United States causing injury in a foreign country.

[20] 28 U.S.C. § 2680(k) (1970).

If the foreign victim were to sue the United States in the local courts of his country in which a catastrophe occurred, the United States could invoke the principle of sovereign immunity. There is little doubt that sovereign immunity applies to such inherently "sovereign" activities as weapon programs and space activities.[21]

Title 10 of the United States Code provides for prompt settlement of indirect or noncombat activities of United States armed forces causing damage to, or loss of, real or personal property of any foreign country or of its citizens including personal injury or death. No claim may be for more than $15,000.[22]

Finally, the Outer Space Committee of the United Nations has in process the ratification of a "Convention on International Liability for Damage Caused by Space Objects," an international agreement providing for full and prompt compensation to victims of accidents. The agreement would make a space-launching country absolutely liable to pay compensation for damage caused by its space object on the earth's surface or to aircraft in flight.

CONCLUSIONS

In summary, present means are inadequate for compensating for the consequences of a catastrophic accident arising from a Government program. They do not assure in advance prompt relief to members of the public who may be victims of such a catastrophe, and they do not protect Government contractors from potentially ruinous liabilities. We recommend that both deficiencies be corrected.

The report of Study Group 8 (Negotiations and Subcontracting),[23] contains specific proposals, including alternatives, with respect to these objectives. They include (a) provisions for interim payments to victims, (b) alternative mechanisms for determination and payment of total compensation to injured parties, and (c) approaches to indemnification of contractors. The proposals of the study group, though more specific and detailed in some aspects, generally are compatible with our recommendations.

[21] Legislative Drafting Research Fund of Columbia University, *Catastrophic Accidents in Government Programs* in *Hearings on H.R. 474, supra* note 1, appendix 18, at 2143, 2277 n. 304.

[22] 10 U.S.C. § 2734 (1970).

[23] Study Group 8, *Final Report*, vol. 2, pp. 587–662.