

# BRIEFING PAPERS<sup>®</sup> SECOND SERIES



PRACTICAL TIGHT-KNIT BRIEFINGS INCLUDING ACTION GUIDELINES ON GOVERNMENT CONTRACT TOPICS

## A GUIDE TO THE CIVILIAN BOARD OF CONTRACT APPEALS

By Michael J. Schaengold and Robert S. Brams

On January 6, 2006, President Bush signed into law the National Defense Authorization Act for Fiscal Year 2006.<sup>1</sup> Section 847 of that Act established—effective January 6, 2007—the new Civilian Board of Contract Appeals (CBCA) through the consolidation of most—but not all—of the then-existing non-defense-related boards of contract appeals. This BRIEFING PAPER provides you with important and current information about the new Civilian Board and then discusses (1) the sources of jurisdiction for contract and other actions before that board, (2) claims that raise special jurisdictional issues, (3) the relief available in Government contract cases before the Civilian Board, (4) prelitigation considerations that may affect an appeal at the board, (5) the rules and procedures of the Civilian Board that apply to discovery and other pretrial procedures, motions, trials/hearings, decisions and full board consideration, and accelerated, expedited, and small claims procedures, and (6) appellate review of the new board's decisions by the U.S. Court of Appeals for the Federal Circuit.

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of the Postal Service Board of Contract Appeal (PSBCA) and the Tennessee Valley Authority (TVA) Board which remain separate boards, the Act consolidated the jurisdiction of and cases from the eight other *civilian* boards—i.e., the General Services Administration Board of Contract Appeals (GSBCA), the Department of Transportation Board of Contract Appeals (DOTBCA), the Department of Agriculture Board of Contract Appeals (AGBCA), the Department of Veterans Affairs Board of Contract Appeals (VABCA), the Department of the Interior Board of Contract Appeals (IBCA), the Department of Energy Board of Contract Appeals (EBCA), the Department of Housing and Urban Development Board of Contract Appeals (HUDBCA), and the Department of Labor Board of Contract Appeals (LBCA)<sup>3</sup>—into a new “Civilian Board of Contract Appeals,” which has been established within the General Services Administration.<sup>4</sup> More specifically, the FY 2006 Defense Authorization Act provides that, effective January 6, 2007, “[i]n the case of any such proceedings pending before an agency board of contract appeals [other than the ASBCA, PSBCA, or TVA Board], the proceedings shall be continued by the Civilian Board of Contract Appeals, and orders which were issued in any such proceeding by the agency board shall continue in effect until modified, terminated, superseded, or revoked by the Civilian Board of Contract Appeals, by a court of competent jurisdiction, or by operation of law.”<sup>5</sup>

The Civilian Board hears and decides contract disputes between Government contractors and federal executive agencies—with the exception of the Department of Defense (including the Departments of the Army, Navy, and Air Force and all other agencies, components and entities

within the DOD), the National Aeronautics and Space Administration, the U.S. Postal Service and the Postal Rate Commission, and the TVA—under the Contract Disputes Act of 1978<sup>6</sup> and regulations and rules issued thereunder.<sup>7</sup> As discussed in more detail below, pursuant to the FY 2006 Defense Authorization Act, with the concurrence of the relevant agency, the Civilian Board may also assume jurisdiction over disputes for which a predecessor board exercised jurisdiction before the Act’s January 6, 2007 effective date or assume other functions performed by such a predecessor board before that date.<sup>8</sup>

The Armed Services Board of Contract Appeals (ASBCA) remains a separate board with jurisdiction over DOD and NASA contracts but even the ASBCA’s jurisdiction was affected by the FY 2006 Defense Authorization Act.<sup>9</sup> Before the Act’s January 6, 2007 effective date, the ASBCA heard appeals from certain civilian agencies, including the Department of Health and Human Services and the Agency for International Development.<sup>10</sup> On January 6, 2007, with the exception of NASA contract appeals, the ASBCA lost its jurisdiction to the Civilian Board to hear such cases in new appeals. Arguably, at that time, the ASBCA may have also lost its authority to hear appeals from civilian agencies that were filed before the effective date of the FY 2006 Defense Authorization Act but were pending on the ASBCA’s docket on January 6, 2007. While the statutory language is unclear on this subject,<sup>11</sup> a practical determination apparently has been made to allow any appeal filed before January 6, 2007, to remain with the board with which it was filed, provided that such board properly had jurisdiction over the appeal at the time of the filing of the notice of appeal.<sup>12</sup> Presumably, ASBCA cases on appeal to the



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Federal Circuit that originated from a civilian agency contract will be remanded (if necessary) to the ASBCA because of that board's prior handling of and familiarity with the cases.

## The Civilian Board

### ■ About The Forum

The Civilian Board is located at 1800 M Street, N.W., 6th Floor, Washington, D.C. 20036, and all of its operations are housed at that location. Its mailing address is 1800 F Street, N.W., Washington, D.C. 20405. The Office of the Clerk of the board's phone number is 202/606-8800; its fax number is 202/606-0019; and its Internet address is <http://www.cbca.gsa.gov>.<sup>13</sup> The Civilian Board has three modern courtrooms, which have full audio-video (including, e.g., videoconferencing of witnesses) and electronic capabilities. The board also has three modern conference rooms, which can be used for alternative dispute resolution or mediation sessions, and two witness rooms. The Civilian Board, which currently has 18 judges, is led by a chairman and vice chairman (who also serve as judges). The Civilian Board has a modest staff, and, although the judges do not have law clerks, the board employs three staff attorneys who may be available to assist a judge in a particularly complex appeal.<sup>14</sup>

Generally, Civilian Board appeals are decided by a panel of three board judges, only one of whom will be present and preside over your proceedings.<sup>15</sup> As discussed later in this PAPER, appeals involving small claims or alternative methods of dispute resolution may be decided by a single board judge, and certain accelerated procedures cases may be decided by a panel of two judges.<sup>16</sup> Civilian Board judges are assigned responsibility for managing cases (i.e., as the panel chair) on a rotational basis and panels are randomly assigned.<sup>17</sup> As discussed below, the Civilian Board has procedures for reconsideration of panel decisions by the full board.<sup>18</sup>

Although the GSA Administrator (in consultation with the Administrator, Office of Federal Procurement Policy) will appoint new judges (when vacancies arise)—without regard to their political affiliation—to the Civilian Board, those judges serving

as full-time board judges (as of January 5, 2007) for one of the eight predecessor boards merged into the Civilian Board automatically became judges of the new Civilian Board.<sup>19</sup> In January 2006, the GSA Administrator appointed Stephen Daniels, the then-GSBCA Chairman, to be Chairman of the new Civilian Board and Robert Parker, the then-GSBCA Vice Chairman, to be Vice Chairman of the Civilian Board. If, as of the January 6, 2006 enactment of the FY 2006 Defense Authorization Act, all of the judges on the predecessor boards had moved to the new Civilian Board, there would have been 23 judges on the Civilian Board.<sup>20</sup> However, because of, among other reasons, several retirements and the death of one judge, 18 of those judges joined the new Civilian Board. As of the publication of this PAPER, no new judges had been appointed to the Civilian Board. Civilian Board judges who are appointed in the future must have at least five years of experience in public contract law.<sup>21</sup> Civilian Board judges may only be removed for cause.<sup>22</sup>

Pursuant to the CDA, the mission of the boards of contract appeals is to provide “to the fullest extent practicable, informal, expeditious, and inexpensive resolution of disputes” arising from Government contracts.<sup>23</sup> The CDA's legislative history states that “[t]he contractor should feel that he is able to obtain his ‘day in court’ at the agency boards and *at the same time have saved time and money through the agency board process.*”<sup>24</sup> Similarly, the Civilian Board's rules (which, as discussed below, were issued on July 5, 2007,<sup>25</sup> and are more detailed than most of its predecessor boards) state that they “shall be construed to secure the just, informal, expeditious, and inexpensive resolution of every case.”<sup>26</sup>

Under the CDA, the boards are established as independent, quasi-judicial forums that do not act as representatives of and, in fact, are “quite distinct from” their respective procuring agencies.<sup>27</sup> Furthermore, under the CDA, the boards are not subject to direction or control by procuring agency management authorities.<sup>28</sup> The establishment of the Civilian Board was intended to reinforce the principle of board independence.<sup>29</sup>

Before the establishment of the Civilian Board, the “prevailing wisdom” among practitioners was that board litigation tended to be less expensive than litigation in the U.S. Court of Federal Claims.

Some practitioners, however, asserted that that the boards' more informal approach led to greater expense. For example, some believed that board judges may have been more willing to allow the parties all the depositions they requested rather than restricting them to a limited number and may have been, in some instances, less aggressive about maintaining a firm discovery and trial schedule.<sup>30</sup> As a result of the passage of the FY 2006 Defense Authorization Act and its establishment of the Civilian Board,<sup>31</sup> some practitioners maintain that the informality of some of the former boards may have been reduced. For example, they note that, with the exception of the GSBCA's rules, the Civilian Board's rules are more detailed than virtually all of its predecessor boards. It is not clear to the authors of this PAPER, however, that there is any increase in formality at the Civilian Board as compared to its predecessors. In fact, the more detailed rules provide better guidance to the parties to a Civilian Board case and allow for the more efficient resolution of its cases.

In a November 9, 2006 *Federal Register* notice, the GSA announced that, in the light of the January 6, 2007 opening of the Civilian Board, affected “[federal executive a]gency acquisition personnel should review agency regulations, contract provisions, and language in contracting officer decision letters that may refer contractors to one of the affected boards of contract appeals for dispute resolution, including alternative dispute resolution, and modify those provisions accordingly.”<sup>32</sup> Certain affected agencies have taken regulatory action to comply with this *Federal Register* notice and the FY 2006 Defense Authorization Act.<sup>33</sup>

### ■ Binding Authority

The Civilian Board, like its predecessor boards, is bound by the decisions of the U.S. Supreme Court, the “precedential” (i.e., published) decisions of the U.S. Court of Appeals for the Federal Circuit, and by the published decisions of the Federal Circuit's predecessor courts (i.e., the Court of Claims and the Court of Customs and Patent Appeals).<sup>34</sup> Unless reversed, vacated, or overruled by the Supreme Court or the Federal Circuit, the Civilian Board is bound by its own decisions and by the decisions of its predecessor boards.<sup>35</sup> The Civilian Board is not bound

by decisions of the Court of Federal Claims (or the former U.S. Claims Court) or of the ASBCA, PSBCA, or TVA Board.<sup>36</sup> The Civilian Board, like its predecessor boards, does not have the authority to deviate from the mandate issued by the Federal Circuit in a particular case.<sup>37</sup> Although the “full [Civilian] Board” ruled that “the holdings of our predecessor boards shall be binding as precedent in this [Civilian] Board,”<sup>38</sup> the Civilian Board did not address what would happen if—as has occurred in the past—two of its predecessor boards disagreed on a legal rule. It is unknown if, in that situation, there will be a preference for the case law from the predecessor board that would have had jurisdiction over the case being decided by the Civilian Board.

### ■ Statistics

Most of the predecessor boards did not publish statistics concerning their dockets. (The most comprehensive board statistics have been published by the ASBCA, whose work is outside of the scope of this PAPER.) With respect to the GSBCA, at the conclusion of Fiscal Years 2000, 2001, 2002, 2003, 2004, 2005, and 2006, the GSBCA had 166, 150, 148, 172, 154, 156, and 126 CDA appeals, respectively, on its docket. At the close of FY 2004, the GSBCA had 60 non-CDA (e.g., travel and relocation claims, transportation audit reviews, and cost application) cases on its docket, and, by the close of FY 2005, the GSBCA had 34 non-CDA cases on its docket. At the close of FY 2006, the GSBCA had 37 non-CDA appeals on its docket. Of the 31 CDA decisions issued by the GSBCA on the merits in FY 2005, 16 decisions granted in whole or in part the relief requested by the contractor. Of the 45 CDA decisions issued by the GSBCA on the merits in FY 2006, 26 decisions granted in whole or in part the relief requested by the contractor.<sup>39</sup>

At its January 6, 2007 inception, the Civilian Board had 334 CDA appeals on its docket and 215 “other cases” (the latter of which almost exclusively arise from the other categories of cases over which the board has jurisdiction under the FY 2006 Defense Authorization Act, and which are discussed below, but also include several Equal Access to Justice Act petitions). As of March 31, 2007, the Civilian Board had 300 CDA appeals

and 228 other cases pending on its docket. In its first quarter, the Civilian Board resolved 81 CDA appeals while 47 new CDA appeals were filed at the Board; it also resolved 36 other cases, while 49 other cases were filed at the Board. Of the 29 CDA appeals decided by the Civilian Board on the merits in its first quarter, 18 were granted in part.<sup>40</sup>

## Sources Of Jurisdiction

### ■ Contract Disputes Act

Under the CDA, a Government contractor may seek to overturn an adverse CO's final decision on a contract claim (or a CO's deemed denial of that claim) either by filing an appeal at the appropriate agency board of contract appeals or by filing a lawsuit in the Court of Federal Claims.<sup>41</sup> Without the issuance of a CO's final decision or the deemed denial of a contractor's claim, the Civilian Board has no jurisdiction over an appeal.<sup>42</sup> The Civilian Board has observed that, "[a]s a general rule, the contractor is the party named on the contract with the Government. Under the CDA, only that contractor can bring an action against the Government before th[e] Board." The board noted further that the "CDA defines a 'contractor' as 'a party to a Government contract other than the Government.' Waivers of sovereign immunity are strictly construed. Thus, subcontractors are generally barred from filing a direct appeal under the CDA." "However," as the board pointed out, "there have been exceptions to this rule. For example, ... [a] third-party beneficiary [to a contract] could enforce the payment provision of the contract in a direct action against the Government. In another case, the court found privity between the Government and a subcontractor where the prime contractor was determined to be a mere government agent"—in that situation a "purchasing agent for the Government"—where "the contract made the Government directly liable to the subcontractor for the purchase price."<sup>43</sup>

The contractor has the exclusive right to choose the forum in which to litigate its claim,<sup>44</sup> and, in general, the contractor has the right to choose between the appropriate board of contract appeals

and the Court of Federal Claims in virtually all CDA litigation resulting from adverse CO final decisions. Moreover, because the Government cannot appeal a CO's decision, the jurisdiction of the Civilian Board initially may be invoked solely by the contractor.<sup>45</sup> In both forums, the facts and the law are decided *de novo*, which means that the Civilian Board is not bound by, and does not owe deference to, a CO's findings of fact or law.<sup>46</sup>

The CDA governs virtually all Government contracts appeals before the Civilian Board. The CDA applies to express and implied-in-fact contracts entered into by a federal executive agency for (1) the procurement of property, other than real property in being, (2) the procurement of services, (3) the procurement of construction, alteration, repair, or maintenance of real property, or (4) the disposal of personal property.<sup>47</sup> The CDA, therefore, does not apply to all Government contracts or procurement actions.<sup>48</sup> For example, the CDA does not provide jurisdiction to the Civilian Board for bid protests or for the recovery of bid preparation costs,<sup>49</sup> but it does provide jurisdiction in connection with lease agreements for real property<sup>50</sup> and the sale of timber by the Government.<sup>51</sup> The Court of Appeals for the Federal Circuit, the appellate authority for the Civilian Board, has upheld the CDA's review procedures, which do not provide for an Article III trial court or for jury trials, on the basis that these limitations on dispute resolution are constitutionally permissible as a condition of the waiver of the Government's sovereign immunity to suit.<sup>52</sup>

Under the CDA, "[e]ach claim by a contractor against the government relating to a contract and each claim by the government against a contractor related to a contract shall be submitted within 6 years after the accrual of the claim."<sup>53</sup> Thus, as the Board has held, "[i]f a claim accrued—if all events that fixed the alleged liability were known or should have been known—more than six years before the claim was submitted to the contracting officer, the [Civilian] Board lacks jurisdiction to consider an appeal involving the claim." In determining accrual, a "claim based on a single distinct event, which may have continued ill effects later on, is considered to have accrued upon the occurrence of that event."<sup>54</sup>

### ■ Federal Courts Administration & Federal Acquisition Streamlining Acts

In a 1991 decision, the Federal Circuit held that the U.S. Claims Court (now the Court of Federal Claims) did not have jurisdiction over cases that contested only the propriety of default terminations and that were unaccompanied by monetary claims.<sup>55</sup> In contrast, the Federal Circuit had previously ruled that the boards of contract appeals possessed jurisdiction to hear such appeals.<sup>56</sup> The Federal Courts Administration Act of 1992, which effectively overruled the Federal Circuit's 1991 decision, provides the Court of Federal Claims with jurisdiction over disputes "concerning termination of a contract, rights in tangible or intangible property, compliance with cost accounting standards, and other nonmonetary disputes" on which a CO's final decision has been issued under the CDA.<sup>57</sup> In the past, most boards had assumed jurisdiction over such cases.<sup>58</sup> Significantly, as discussed further below, this statutory language also potentially clarifies the Civilian Board's ability to provide nonmonetary relief because the CDA provides that the boards are "authorized to grant any relief that would be available to a litigant asserting a contract claim" in the Court of Federal Claims.<sup>59</sup>

The Federal Acquisition Streamlining Act of 1994 amended the CDA to provide U.S. district courts the authority to obtain advisory opinions from a board on matters of contract administration that otherwise would be the proper subject of an appealable CO's final decision.<sup>60</sup> The district court must direct its request to the board that would have jurisdiction under the CDA to adjudicate the contract claim at issue, and the board must provide its advisory opinion in a "timely manner."<sup>61</sup> As in the case of its predecessor boards, this authority is not expected to add significantly to the Civilian Board's workload.

### ■ Other Sources Of Jurisdiction

Cases that involve Government contracts that predate the CDA's March 1, 1979 effective date are ordinarily governed by the contract's "Disputes" clause (and the Wunderlich and Tucker Acts) rather than the CDA, unless the contractor, in appropriate circumstances, elects to proceed under the CDA. For pre-CDA contracts, and liti-

gation over a few of these contracts apparently is still pending, appeals from a CO's decision ordinarily proceed first to the appropriate board. Then, under the Wunderlich and Tucker Acts, appeals from board decisions—including from the Civilian Board—proceed to the Court of Federal Claims, which in this situation functions as an appellate tribunal, and then to the Federal Circuit.<sup>62</sup> In certain limited situations, because of a contract provision or an applicable regulation or because of the existence of a claim "arising under" the contract, certain disputes involving non-CDA contracts awarded after the CDA effective date must follow this same procedure.<sup>63</sup> Few of these cases exist, and a discussion of them is beyond the scope of this PAPER.

The CDA did not take away the board's authority to exercise non-CDA jurisdiction.<sup>64</sup> Thus, the boards historically have exercised contract jurisdiction under certain regulations. For example, the AGBCA had jurisdiction to hear suspension and debarment cases,<sup>65</sup> and the ASBCA may hear appeals "pursuant to the provisions of any directive whereby the Secretary of Defense or a Secretary of a Military Department has granted a right of appeal not contained in the contract on any matter consistent with the contract appeals procedure."<sup>66</sup> The ASBCA also hears appeals with respect to certain contracts awarded by the former Iraqi Coalition Provisional Authority.<sup>67</sup> In addition, the HUDBCA had "jurisdiction over other matters assigned to it" by the HUD Secretary,<sup>68</sup> the EBCA had similar authority,<sup>69</sup> and the GSBCA decided, among other matters, claims by federal employees for reimbursement of expenses incurred while on official temporary duty travel or in connection with relocation to a new duty station and claims by carriers or freight forwarders involving rate determinations. The GSBCA also provided, on a cost-reimbursable basis, ADR services on any federal agency contract-related matter, whether arising before contract award or during contract performance.<sup>70</sup> In FY 2004, the ASBCA provided ADR services in 20 undocketed disputes.<sup>71</sup>

Pursuant to the FY 2006 Defense Authorization Act, with the concurrence of the relevant agency, the Civilian Board may also assume jurisdiction over disputes which a predecessor board heard immediately before the Act's January 6, 2007

effective date or assume other functions performed by such a predecessor board immediately before that date.<sup>72</sup> For example, the Civilian Board also currently hears and decides (1) cases arising under the Indian Self-Determination Act, 25 U.S.C.A. §§ 450m et seq., (2) disputes between insurance companies and the Department of Agriculture's Risk Management Agency involving actions of the Federal Crop Insurance Corporation under 7 U.S.C.A. § 1501 et seq., (3) claims by federal employees under 31 U.S.C.A. § 3702 for reimbursement of expenses incurred while on official temporary duty travel or in connection with relocation to a new duty station, (4) claims by carriers or freight forwarders under 31 U.S.C.A. § 3726(i)(1) involving actions of the GSA regarding payment for transportation services, and (5) pursuant to § 204 of the General Accounting Office Act of 1996, Public Law No. 104-316, requests of agency disbursing or certifying officials, or agency heads, on questions involving payment of travel or relocation expenses that were formerly considered by the Comptroller General under 31 U.S.C.A. § 3529.<sup>73</sup>

## Jurisdictional Issues

### ■ Tort Claims

The Civilian Board, like its predecessors, does not have jurisdiction over traditional tort actions.<sup>74</sup> The board's jurisdiction, however, does include certain tort claims that "relate to or arise out of" contract provisions or involve claims of tortious breach of contract.<sup>75</sup>

### ■ Counterclaims & Fraud

The Civilian Board, like its predecessors, has jurisdiction to consider counterclaims raised by the Government.<sup>76</sup> Ordinarily, except for fraud counterclaims, the Government may not assert counterclaims that have not been the subject of a CO's final decision.<sup>77</sup> The Federal Circuit has ruled that a Government contractor (by executing a Government contract) waives any right to have a Government counterclaim under or in connection with the contract litigated in an Article III trial court or to have a jury trial on the counterclaim.<sup>78</sup>

As fraud is traditionally a tort action, the Civilian Board does not have jurisdiction to award relief to contractors on fraud claims,<sup>79</sup> and its jurisdiction over Government fraud counterclaims is limited.<sup>80</sup> The CDA does "not authorize any agency head to settle, compromise, pay, or otherwise adjust any [Government contract] claim involving fraud."<sup>81</sup> The boards do not have the authority to grant the Government monetary relief or statutory remedies based upon a Government claim of fraud. The boards also do not have jurisdiction to render final determinations as to the commission of fraud by a contractor.<sup>82</sup> When litigation is commenced at a board in a case that the Government believes involves fraud, the Government will frequently pursue its fraud allegations in U.S. district court in an effort to obtain a fraud judgment against the contractor. At the same time, the Government typically files a motion for a stay of the board litigation while the fraud case is resolved in district court.<sup>83</sup> The boards are authorized to reject a contractor claim or reduce a contractor claim to the extent that claim is fraudulent or based upon falsified information or documentation. In short, the boards will consider Government fraud claims in evaluating the relevant evidence.<sup>84</sup>

## Relief Available

The principal remedy available in contract disputes before the Civilian Board is money damages, which are usually recovered in the form of expectation or reliance damages.<sup>85</sup> However, other remedies may also be available depending upon the circumstances in your case. For example, in certain circumstances, reformation<sup>86</sup> or rescission<sup>87</sup> of the contract and/or restitution<sup>88</sup> may be available. In certain typically unusual circumstances, the Civilian Board may declare a contract void ab initio, nullified, or invalid.<sup>89</sup> (The Civilian Board has jurisdiction over a contractor's "request for the release of retainage," i.e., a request for the release of fund retained by an agency as an offset.<sup>90</sup>) The boards have also, on relatively rare occasions, ruled that they had jurisdiction over quantum meruit, quantum valebant, and/or unjust enrichment claims.<sup>91</sup> Absent express congressional consent, the boards do not have the authority to award punitive damages.<sup>92</sup> However, although

the exact meaning of certain classifications or labels for damages is often confusing, unhelpful, and not controlling, the boards may have the authority to award, in certain circumstances, consequential damages;<sup>93</sup> in addition, the boards may award attorney's fees and related expenses to a prevailing party under the Equal Access to Justice Act.<sup>94</sup>

The boards may not grant specific performance,<sup>95</sup> injunctive relief,<sup>96</sup> or mandamus relief<sup>97</sup> with respect to contract administration problems. The Civilian Board has ruled that, while it "lacks authority to resolve disputes premised on a theory of promissory estoppel," which is a quasi-contract form of relief, it has authority to award damages "under a theory of equitable estoppel against the Government."<sup>98</sup> The Civilian Board may direct a CO, "within a specified time period," to issue a final decision "in the event of undue delay" by the CO.<sup>99</sup> However, that authority does not permit the Civilian Board "to dictate the contents of the decision."<sup>100</sup> The boards cannot direct the reinstatement of a contract, order the award of contracts or task orders, or order a CO to exercise a contract option or to enter into negotiations concerning an equitable adjustment,<sup>101</sup> and the boards do not have the authority to order the CO to issue an apology, order the resignation of Government personnel, direct the performance of specific acts by Government officials, order the assignment of a different CO to a procurement, or order an ejection.<sup>102</sup> Where the CO has failed to issue a final decision on your claim within the required period, the Civilian Board may stay proceedings to obtain the CO's decision.<sup>103</sup> The boards may not ordinarily discipline an agency's noncompliance with the supervisory and reporting instructions related to congressional oversight.<sup>104</sup>

As a result of the Federal Courts Administration Act, the Court of Federal Claims has jurisdiction over cases involving "a dispute concerning termination of a contract, rights in tangible or intangible property, compliance with cost accounting standards, and other nonmonetary disputes."<sup>105</sup> Accordingly, the Court of Federal Claims has the authority to provide, in effect, declaratory relief for these nonmonetary CDA disputes. Most boards have also exercised such

authority,<sup>106</sup> in part because the CDA provides the boards authority "to grant any relief that would be available to a litigant asserting a contract claim" in the Court of Federal Claims.<sup>107</sup> As the Federal Circuit has observed, the "CDA was enacted, in part, to end 'the fragmentation of mechanisms for the resolution of claims in connection with Government contracts.' Complete relief was [generally] made available both at the agency boards of contracts appeals and in the Court of Federal Claims precisely to alleviate the fragmentation problem."<sup>108</sup>

However, a board may grant the relief available in the Court of Federal Claims only if the board properly has jurisdiction over the matter under the CDA.<sup>109</sup> Consequently, this CDA language does not apply to, for example, the award of bid preparation costs because, under the CDA, the boards have no jurisdiction over bid protests.<sup>110</sup> (The GSBCA's former jurisdiction under the Brooks Act over certain bid protests involving automatic data processing equipment and services was eliminated in 1996.<sup>111</sup>) Furthermore, you should note that the Federal Circuit has stated that "not every injury resulting from a breach of contract is remediable in damages."<sup>112</sup> The boards also do not have authority to award damages allegedly resulting from a contractor's debarment<sup>113</sup> and do not have the authority to review wage classification disputes.<sup>114</sup>

## Prelitigation Considerations

### ■ Filing Time Limits

A contractor has 90 days from the "date of receipt" of the CO's final decision to file a notice of appeal to the Civilian Board (and, then, 30 days from its receipt of the notice of docketing of the appeal to file its complaint with the board).<sup>115</sup> The Civilian Board does not have jurisdiction to permit the late filing of a notice of appeal.<sup>116</sup> The board's rules provide that the notice of appeal "should include" the following information: (a) the number and date of the contract, (b) the name of the Government agency and its component against which the claim has been asserted, (c) the name, address, and telephone number of the CO whose decision is appealed and the date of the decision,

(d) if the appeal is from the failure of the CO to decide a claim, the name, address, and telephone number of the CO who received the claim, (e) a “brief account of the circumstances giving rise to the appeal,” and (f) an “estimate of the amount of money in controversy, if any and if known.”<sup>117</sup> It is also a good practice to attach to the notice of appeal the CO’s final decision that is the subject of the appeal or, if the appeal is from a deemed denial of a claim, a copy of the claim as submitted to the CO.<sup>118</sup>

Before the Civilian Board, the Government has 30 days from the date it receives the complaint to file its answer.<sup>119</sup> The Government also must file the “Rule 4 file” within 30 days of receiving the notice of appeal. This file consists of “all documents and other tangible things relevant to the claim and to the contracting officer’s [final] decision which has been appealed,” including “(1) [t]he contracting officer’s [final] decision, if any, from which the appeal is taken; (2) [t]he contract, if any, including amendments, specifications, plans, and drawings; (3) [a]ll correspondence between the parties that are relevant to the appeal, including the written claim or claims that are the subject of the appeal, and evidence of their certification, if any; (4) [a]ffidavits or statements of any witnesses concerning the matter in dispute and transcripts of any testimony taken before the filing of the notice of appeal; (5) [a]ll documents and other tangible things on which the contracting officer relied in making the decision, and any related correspondence; (6) [t]he abstract of bids, if relevant; and (7) [a]ny additional existing evidence or information necessary to determine the merits of the appeal, such as internal memoranda and notes to the file.”<sup>120</sup> As a practical matter, it should be noted that it is not unusual for contractors to receive extensions from the board on the due date for the complaint and for the Government to receive extensions from the board on the due dates for the Rule 4 file and the answer.

### ■ Election Doctrine

Under the “Election Doctrine,” the CDA precludes a contractor from pursuing its claim before both the Civilian Board and the Court of Federal Claims. Consequently, once you file an

action before the Civilian Board, that selection is ordinarily binding, and you may not have that action dismissed and then proceed in the Court of Federal Claims.<sup>121</sup>

### ■ Representation & Settlement

In cases before the Civilian Board, federal agencies are represented by attorneys from their own staffs. Alternatively, “if not prohibited by agency regulation or otherwise,” the Government may appear—but rarely, if ever, does—through the CO or the CO’s authorized representative.<sup>122</sup> Agency attorneys appearing before the Civilian Board frequently handle only Government contract cases and often become involved with a procurement before contract award. Many agencies use as trial counsel before the board the same attorneys who assisted the CO in denying the contractor’s claim.

The Civilian Board permits contractors to represent themselves *pro se*—that is, without counsel. Thus, a sole-proprietor contractor can appear and handle the appeal herself, a partnership can be represented by a partner, and a corporation can be represented by one of its officers. Contractors may also be represented by an attorney admitted to practice in the highest court of any state.<sup>123</sup> Notably, the Civilian Board has stated that it “gives greater procedural latitude to *pro se* appellants than...to parties represented by lawyers.”<sup>124</sup>

In cases pending before the boards, the CO retains the authority to settle. If you are negotiating a settlement of a case pending before the Civilian Board with an agency lawyer, it is imperative that you receive the CO’s agreement to the settlement because ordinarily agency lawyers have no authority to settle cases before the Civilian Board unless such authority is expressly delegated by the CO.<sup>125</sup> When a case “is settled, the parties may file with the board a stipulation setting forth the amount of the award. The Board will adopt the parties’ stipulation by decision, provided the stipulation states the parties will not seek reconsideration of, or relief from, the Board’s decision, and they will not appeal the decision.”<sup>126</sup> The board’s decision adopting the parties’ stipulation “is an adjudication of the case on the merits”<sup>127</sup> and typically will provide for or allow for payment by the Government from the Judgment Fund.<sup>128</sup>

A board may not ordinarily reject a settlement to which the CO has agreed.<sup>129</sup> Furthermore, if the Government contests the validity of a settlement agreement or will not enforce the settlement agreement, some boards have ruled that they are without authority to issue a decision ruling that the agreement is binding on the Government because a settlement agreement is not the type of contract that can be litigated under the CDA.<sup>130</sup> However, some boards may be willing to review and act upon a motion to enforce a settlement agreement.<sup>131</sup> The boards have the authority to determine that a settlement agreement is not valid, however, because such a ruling is a prerequisite to board jurisdiction under the CDA over a bona fide dispute.<sup>132</sup>

### ■ Alternative Dispute Resolution

The Civilian Board's use of ADR results in part from the Administrative Dispute Resolution Act of 1996, as amended,<sup>133</sup> which requires federal agencies to develop policies addressing the use of ADR in rulemaking, enforcement actions, contract administration, and litigation. The Civilian Board "encourages parties to consider the use of Alternative Dispute Resolution (ADR) procedures at all stages of a contract controversy: pre-appeal, post-appeal, and post-hearing—whenever the parties believe that a neutral third person may be helpful to the settlement process." To that end, the board "makes its judges available to serve as ADR Neutrals."<sup>134</sup> The use of ADR at the new board is voluntary and all parties, as well as the board ADR neutral, must agree ADR is appropriate.<sup>135</sup> The Civilian Board correctly advises that "[a]doption of an ADR procedure as early in the appeal process as feasible can save parties substantial costs and delay and can help them maintain or restore amicable relations."<sup>136</sup>

The Civilian Board may engage in ADR efforts on contract-related matters even before the filing of a claim or the issuance of a final decision by the CO, or before a contract has been awarded, and even with respect to agencies over which it does not have jurisdiction.<sup>137</sup> (The GSBCA provided, on a cost-reimbursable basis, ADR services on any federal agency contract-related matter, whether arising before contract award or during contract performance.<sup>138</sup> In the past, certain GSBCA judges

served as Special Masters for the Federal Aviation Administration's Office of Dispute Resolution for Acquisition (ODRA).<sup>139</sup>)

The Civilian Board provides the parties with written notice concerning the availability of ADR in its notice of docketing of the appeal, and, if ADR is agreed to by the parties, the parties may request the appointment of one or more board judges to act as a board neutral or neutrals. The parties may request that the board's chairman appoint a particular judge or judges as the board neutral or neutrals.<sup>140</sup> Before the start of ADR, the parties must sign an ADR agreement that establishes the guidelines for implementing the selected ADR method(s).<sup>141</sup> Under the Civilian Board's rules, "ADR may be used concurrently with standard litigation proceedings such as the filing of pleadings and discovery, or the presiding judge may suspend such proceedings for a reasonable period of time while the parties attempt to resolve the appeal using ADR."<sup>142</sup>

The Civilian Board has identified five examples of available ADR techniques:

(1) *Facilitative mediation*—Facilitative mediation usually begins with the parties—in a joint session—making "informal presentations to one another and the ADR Neutral regarding the facts giving rise to the controversy as well as an explanation of their legal positions." The ADR neutral, as mediator, aids the parties in settling their case, often by meeting with each party separately in confidential sessions and engaging in private discussions with each of the parties, for the purpose of facilitating settlement offers.<sup>143</sup>

(2) *Evaluative mediation*—Under this technique, in addition to engaging in facilitative mediation, the neutral also discusses informally with the parties, either jointly or in private sessions, the strengths and weaknesses of their respective positions.<sup>144</sup>

(3) *Mini-trial*—A mini-trial is a somewhat more formal procedure in which the "parties make abbreviated presentations to an ADR Neutral who sits with the parties' designated principal representatives as a mini-trial panel to hear and evaluate evidence relating to an issue in controversy." The neutral "may thereafter meet with the principal representatives to attempt to mediate a settlement." The mini-trial process may also be a

prelude to the neutral's provision of a non-binding advisory opinion or to the neutral's rendering a binding decision, which are discussed below.<sup>145</sup>

(4) *Non-binding advisory opinion*—When using this technique, the “parties present to the ADR Neutral information on which the Neutral bases a non-binding, advisory opinion regarding the merits of the dispute.” The neutral’s opinion “may be delivered to the parties jointly, either orally or in writing.” How the information is presented will vary from case to case, depending on the circumstances of the dispute and the terms of the ADR agreement. Similar to the procedure used in a mini-trial, the parties’ presentations “may range from an informal proffer of evidence together with limited argument from the parties to a more formal presentation, with oral testimony and documentary evidence and argument from counsel.”<sup>146</sup>

(5) *Summary binding decision*—A summary binding decision “is a binding ADR procedure similar to binding arbitration,” where, “by prior agreement of the parties, the ADR Neutral renders a brief written decision which is binding, non-precedential, and non-appealable.” As in a procedure under which the neutral provides a non-binding advisory opinion, the manner in which information is presented to the neutral for rendering a summary binding decision may vary.<sup>147</sup>

The Civilian Board also advises that “[i]n addition to other ADR procedures,” including modifications to those discussed above, as agreed to by the board and the parties, “the parties may use ADR neutrals outside the Board and techniques which do not require direct Board involvement.”<sup>148</sup>

For docketed appeals, if ADR fails to resolve the dispute completely, the appeal will generally return to the presiding judge for adjudication. If the ADR proceeding involved private communications between the neutral and individual parties—and that neutral is also the presiding judge—unless the parties and judge agree that the judge should continue to serve as the presiding judge, the neutral will have no further involvement with the case.<sup>149</sup> If no private communications occurred during the ADR proceeding (i.e.,

all communications with the neutral were made during a joint session with all parties present), the neutral, after considering the parties’ wishes, has the discretion to decide whether or not to retain the case as presiding judge and adjudicate the appeal.<sup>150</sup> A CBCA judge who serves as an ADR neutral must maintain the confidentiality established for ADR under the board’s rules.<sup>151</sup>

## Civilian Board Rules Of Procedures

### ■ July 5, 2007 Interim Rules

The Civilian Board has its own Rules of Procedure that are—with the exception of the former GSBCA’s rules—more detailed and formal than those of its predecessors, which were generally short and sometimes lacking in specificity.<sup>152</sup> Subject to its receipt and review of public comments, the Civilian Board will promulgate and change its rules by a majority vote of its judges. Before the January 2007 establishment of the Civilian Board, a draft of the Civilian Board’s proposed rules was circulated for comment to the judges on those boards to be consolidated into the Civilian Board and to certain bar association groups.<sup>153</sup>

The Civilian Board’s rules had not been issued when the board opened for business on January 6, 2007, because of the Department of Justice’s disagreement with proposed CBCA Rule 16’s provision to the board of the authority to issue subpoenas to, and enforce them against, U.S. Government agencies.<sup>154</sup> Consequently, “[p]ending publication of interim rules for [the Civilian Board], the Board and the parties [were] guided in processing appeal[s] by the rules of the [relevant predecessor Board], the Federal Rules of Civil Procedure, and orders issued by the Board.”<sup>155</sup>

On July 5, 2007, the Civilian Board’s rules were issued in interim form, and they became effective on that date.<sup>156</sup> The accompanying *Federal Register* notice stated that the rules were “based on and do not differ in any substantial way from the rules of procedure which existed at the predecessor civilian agency boards.” While the rules of the predecessor civilian boards “all had the same general intent and coverage,” there were differences among them “in terms of both structure and wording, and no two

civilian agency boards had identical sets of rules.” In drafting its rules, the Civilian Board said, it “studied the rules of procedure of all of the civilian agency boards and developed an interim final rule which blends those rules.” The board further observed that the “interim final rule maintains most of the rules all of the former boards had in place.”<sup>157</sup> Written comments on these interim rules must be submitted no later than September 28, 2007, to be considered in the formulation of the final rules.<sup>158</sup>

The disagreement between the Department of Justice and the Civilian Board with respect to the board’s authority to issue subpoenas to, and enforce them against, Federal Government agencies apparently was *not* resolved by the issuance of the board’s interim rules. As promulgated, CBCA Rule 16 appears to provide the board full subpoena powers including to Government agencies.<sup>159</sup> However, the accompanying *Federal Register* notice states: “Questions have been raised about the scope of the board’s subpoena authority over federal agencies. *The Department of Justice has recently provided advice concluding that the statute that granted subpoena authority to the separate agency boards of contract appeals, and that provides such authority to the consolidated Board, does not provide the necessary legal authority for a board to enforce a subpoena against a federal agency.*” Accordingly, “the agency does not interpret the term ‘person’ where it is used in [48 C.F.R. §] 6101.16 [Civilian Board Rule 16] to include the United States or component federal agencies.”<sup>160</sup> While the authors of this PAPER disagree with the Department of Justice’s interpretation of the board’s subpoena power and believe that the weight of the relevant legal authority is against the Department, this issue likely will have to be resolved by the Court of Appeals for the Federal Circuit.<sup>161</sup>

CBCA Rule 1(a) provides that its rules govern all further proceedings in cases previously pending at a predecessor board “except to the extent that, in the opinion of the Board, their use in a particular case pending on the effective date would be infeasible or would work an injustice.”<sup>162</sup> The board’s rules further provide that the board “looks to the Federal Rules of Civil Procedure for guidance in construing those Board rules which are similar to Federal Rules,”<sup>163</sup> and, “[i]n making rulings and issuing orders and direc-

tions pursuant to these rules, the Board takes into consideration those Federal Rules of Civil Procedure which address matters not specifically covered herein.”<sup>164</sup>

Although the Civilian Board’s rules are more detailed than most of its predecessors, these rules are not as detailed as the Rules of the Court of Federal Claims (or the Federal Rules of Civil Procedure). As with a court, the efficiency with which a case is handled by the board is more a function of the presiding judge than of the rules.

### ■ Discovery

Before the Civilian Board, you can generally expect to engage in the amount of discovery that is commensurate with the complexity of your case. The board’s rules provide that “[t]he parties are encouraged to exchange documents and other information voluntarily.”<sup>165</sup> While the board “may limit the frequency or extent of use of the discovery methods,”<sup>166</sup> there are—unlike in the Federal Rules of Civil Procedure or the Rules of the Court of Federal Claims—no formal limits in the board’s rules on the amount of discovery (e.g., on the number or length of depositions) that may be taken. However, the “[p]arties may engage in discovery only to the extent the Board enters an order which either incorporates an agreed plan and schedule acceptable to the Board or otherwise permits such discovery as the moving party can demonstrate is required for the expeditious, fair, and reasonable resolution of the case.”<sup>167</sup>

With the possible important exception of the Department of Justice’s position (discussed above) that the Civilian Board does not have the authority to enforce subpoenas against Federal Government agencies, nothing should prevent the parties to a Civilian Board proceeding from obtaining discovery as completely as they could in a court proceeding. In this regard, but potentially subject to the Department of Justice’s arguments that the board cannot enforce subpoenas against Government agencies, the Civilian Board has the authority, in appropriate circumstances, to compel depositions, testimony, production of documents, and responses to requests for admissions, interrogatories, or any other discovery allowed by the board.<sup>168</sup> Under the CDA, the boards specifically have the power to issue and enforce

subpoenas,<sup>169</sup> and they may also impose sanctions for failure to comply with board orders including, for example, dismissing an appeal for failure to prosecute (where the contractor had failed to answer the Government's discovery requests and failed to comply with board orders), barring the introduction of evidence (in certain extreme situations), and deeming admitted requests for admission.<sup>170</sup> The Civilian Board does not have the authority to impose monetary sanctions for discovery violations.<sup>171</sup>

### ■ Motions

In the Civilian Board, most actions requested of the judge must be made in the form of a motion filed with the board and served on opposing counsel. Because motions practice historically has not been as prominent a feature of board of contract appeals proceedings as of court proceedings,<sup>172</sup> the board rules on motions generally have not been as detailed as court rules on this subject. Of the boards existing before the CBCA's creation, the GSBCA provided the most detailed coverage on motions in its rules.<sup>173</sup> The Civilian Board, which to a large extent carries over the GSBCA rules, has fairly detailed motions rules,<sup>174</sup> particularly with respect to motions for summary judgment, which are designated as "motions for summary relief."<sup>175</sup>

As the Civilian Board has noted, "[t]he mere fact that both parties have filed motions for summary relief does not warrant the granting of summary relief unless one of the moving parties proves that it is entitled to judgment as a matter of law upon facts that are not genuinely disputed. We must review the evidence submitted in support of each cross-motion and consider each party's motion on its own merits, taking care in each instance to examine the evidence in the light most favorable to the non-moving party."<sup>176</sup> In considering a motion for summary relief, the board "cannot try issues of fact, i.e., weigh evidence or judge credibility, but only determine whether there are issues to be tried."<sup>177</sup> Furthermore, the Civilian Board has stated that "[a] party's speculative hope that yet more discovery will produce necessary evidence, after considerable opportunity for discovery has failed to turn up proof, is not a good reason for denying a motion for summary relief."<sup>178</sup>

Before the Civilian Board, you should expect that the judge presiding over the argument will be familiar with the parties' filings and the law applicable to the case. The approach to questioning from the bench, however, may vary significantly between judges. Some judges may use the entire hearing to pose questions to counsel. Others may pose no questions to counsel and simply allow counsel to present their arguments. Still others may take a mixed approach—allowing counsel to present their arguments but at the same time posing questions during argument. Generally, the Civilian Board judges place modest, or no, limits on the length of motions hearings and will allow parties to air their arguments fully. For simple, and even some complex, motions, board judges are often amenable to allowing oral argument to take place telephonically or via videoconferencing.

### ■ Trials/Hearings

The level of formality in trials, which are designated as "hearings,"<sup>179</sup> before the Civilian Board will likely vary significantly, depending upon the style of the presiding judge, the relative importance of the case, and the attitudes of, or agreement between, the parties. On the whole, however, you can generally expect slightly less formal proceedings before the Civilian Board than before a court. However, you should note that either party or both parties can elect to submit the appeal on the record without a hearing.<sup>180</sup> Nevertheless, a "hearing will be held if either party elects one."<sup>181</sup>

With respect to evidence, the Civilian Board's rules provide that "[a]s a general matter, and subject to the other provisions of [this rule], the Board will look to the Federal Rules of Evidence *for guidance* when it makes evidentiary rulings."<sup>182</sup> At the Civilian Board, "[h]earsay evidence is admissible unless the Board finds it unreliable or untrustworthy."<sup>183</sup> As previously discussed, a very important mechanism for the entry of evidence into the record at the Civilian Board is the "Rule 4 file." Pursuant to Civilian Board Rule 4, the Government must file all documents and tangible things relevant to the claim—including the CO's final decision, the contract, and all relevant correspondence—and provide copies to the contractor, which then has an opportunity to add additional documents and

tangible things to the Rule 4 file.<sup>184</sup> All items in the Rule 4 file that have not been objected to become part of the evidentiary record without further procedure at trial.<sup>185</sup>

While hearings are held at “the time and place ordered by the Board,”<sup>186</sup> often such hearings will be held at the Civilian Board’s Washington, D.C. headquarters.<sup>187</sup> However, the board has authority to hold hearings throughout the United States and may travel to hold hearings in a more convenient place for the parties and witnesses. Where appropriate, the Civilian Board also has the authority to travel overseas to hold hearings. This latter authority will probably be exercised rarely.

The Civilian Board’s rules explicitly provide that hearings may be limited to issues of liability, “reserving the determination of the amount of recovery, if any, for other proceedings.”<sup>188</sup> In other words, your case may be bifurcated—into liability and damages hearings—by the board. During a hearing, if a witness refuses to answer a question, the board “may direct that witness to answer and, in the event of continued refusal, the board may state for the record the inferences it draws from the refusal to answer.”<sup>189</sup>

### ■ Decisions & Full Board Consideration

Civilian Board judges generally issue written decisions following significant motions and must do so after hearings.<sup>190</sup> Except for small claims and certain accelerated procedures cases, and in the case of full board consideration of an appeal, Civilian Board decisions are the work of a panel of three judges, even though hearings are before a single judge.<sup>191</sup> At least two judges on the panel must agree for the decision to be issued.<sup>192</sup> This collegial process helps to ensure that decisions of the Civilian Board are consistent with prior binding precedent. The Civilian Board “may...take notice of any fact or law of which a court could take judicial notice.”<sup>193</sup> Where the board’s decision awards monetary relief, the rules provide that “[w]hen permitted by law, payment of Board awards may be made in accordance with 31 U.S.C. [§] 1304 [i.e., from the Judgment Fund]. Awards by the Board pursuant to the Equal Access to Justice Act shall be directly payable by the respondent agency over which the applicant has prevailed in the underlying appeal.”<sup>194</sup>

A request for full board consideration of a case, which means that all of the Civilian Board judges will consider that case, “is not favored.” “Ordinarily,” full board consideration “will be ordered only when it is necessary to secure or maintain uniformity of Board decisions or the matter to be referred is one of exceptional importance.”<sup>195</sup> For example, the Civilian Board’s first decision was made by the full board in order to, among other reasons, clarify “that the holdings of our predecessor boards shall be binding as precedent in this Board.”<sup>196</sup>

Full board consideration of a case may be initiated by a party’s motion or by initiation of the board. In either situation, a majority of the Civilian Board judges must agree to consideration of the case by the full board. When initiated by a party’s motion, the request must be filed within 10 working days after the party’s receipt of the panel’s “decision on a motion for reconsideration or relief from decision.”<sup>197</sup> In addition, a “majority of the judges may initiate full Board consideration of a matter at any time while the case is before the Board, no later than the last date on which any party may file a motion for reconsideration [i.e., either 7 working or 30 calendar days from the decision’s issuance depending upon the type of case] or relief from decision or order [i.e., 120 calendar days from the decision’s issuance], or if such a motion is filed by a party, within ten days after a panel has resolved it.”<sup>198</sup> After a case is granted full board consideration, “the Board shall promptly, by order, issue its determination, which shall include the concurring or dissenting view of any judge who wishes to express such a view.”<sup>199</sup>

### ■ Accelerated, Expedited & Small Claims Procedures

The Civilian Board possesses the authority to “[e]stablish[] an expedited schedule of proceedings, such as by limiting the times provided in...[its] rules for various filings, to facilitate a prompt resolution of the case.”<sup>200</sup> While further details on this power are not provided by the board’s rules, presumably—outside of the small claims and accelerated procedures discussed below—such an expedited schedule will be granted when good cause is demonstrated.

The board’s “small claims procedure” is available solely at the contractor’s election, which usually must be made “no later than 30 calendar

days after the contractor's receipt of the agency's answer."<sup>201</sup> The contractor "may elect" the small claims procedure when (a) there is a monetary amount in dispute of \$50,000 or less, or (b) there is a monetary amount in dispute of \$150,000 or less and the contractor is a small business concern.<sup>202</sup> In small claims cases, which must be resolved "[w]henver possible,...within 120 calendar days from the Board's receipt of the [contractor's] election" of this procedure, the panel chair—who alone decides the case—"may issue a decision, which may be in summary form, orally or in writing."<sup>203</sup> A decision issued orally "shall be reduced to writing; however, such a decision takes effect at the time it is rendered, prior to being reduced to writing."<sup>204</sup> Decisions in small claims cases are final and conclusive, cannot be set aside (and cannot be appealed) except in case of fraud, and have no precedential value.<sup>205</sup> To meet the 120-day deadline, "[p]leadings, discovery, and other prehearing activities may be restricted or eliminated."<sup>206</sup>

The board's "accelerated procedure" is available solely at the contractor's election—which usually must be made "no later than 30 calendar days after the [contractor's] receipt of the agency answer"—only when there is a monetary amount in dispute of \$100,000 or less.<sup>207</sup> In accelerated procedure cases, which must be resolved, "[w]henver possible,...within 180 calendar days from the Board's receipt of the [contractor's] election" of this procedure, the panel chair and one other panel member decide the case, unless they disagree, in which case the third panel member will participate in the decision.<sup>208</sup> Unlike small claims appeals, accelerated procedure cases are appealable. To meet the 180-day deadline, "[p]leadings, discovery, and other prehearing activities may be restricted or eliminated."<sup>209</sup>

## Appellate Review

The U.S. Court of Appeals for the Federal Circuit has jurisdiction over appeals from final decisions of the Civilian Board under the CDA.<sup>210</sup> You have 120 days after the date you receive an adverse Civilian Board decision to file an appeal.<sup>211</sup> For the Government to appeal an adverse Civilian Board decision, it must obtain the approval of both the agency head and the Attorney General (who has delegated this function to the Solicitor General).<sup>212</sup> Before the enactment of the CDA, the Government could not appeal an adverse board decision.<sup>213</sup>

The decisions of the Civilian Board on questions of law are not final or conclusive and, thus, are freely reviewable. Nevertheless, the Federal Circuit has frequently stated that it gives some deference to a board's expertise in interpreting contract regulations.<sup>214</sup> Board decisions on questions of fact are "final and conclusive and shall not be set aside unless the decision is fraudulent, or arbitrary, or capricious, or so grossly erroneous as to necessarily imply bad faith, or if such decision is not supported by substantial evidence."<sup>215</sup> The Federal Circuit has stressed that even if there is adequate evidence to support an alternative finding of fact, if the one chosen by the board is supported by substantial evidence, it is binding on the court regardless of how the court might have decided the issue on a *de novo* review.<sup>216</sup>

Federal Circuit statistics for recent fiscal years—but before the establishment of the Civilian Board—indicate that the Federal Circuit has reversed the following percentage of board of contract appeals decisions: 18% (1997); 6% (1998); 14% (1999); 24% (2000); 17% (2001); 23% (2002); 7% (2003); 11% (2004); 5% (2005); and 13% (2006).<sup>217</sup>

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## GUIDELINES

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These *Guidelines* are intended to provide you with important information about the new Civilian Board of Contract Appeals. They are not, however, a substitute for professional representation in any specific situation.

1. Understand that the Civilian Board of Contract Appeals came into existence on January 6, 2007, through the consolidation of the Contract

Disputes Act jurisdiction of, and cases from, eight civilian boards of contract appeals: the General Services Administration Board of Contract Appeals (GSBCA), the Department of Transportation Board of Contract Appeals (DOTBCA), the Department of Agriculture Board of Contract Appeals (AGBCA), the Department of Veterans Affairs Board of Contract Appeals (VABCA), the Department of the Interior Board of Contract Appeals (IBCA), the Department

of Energy Board of Contract Appeals (EBCA), the Department of Housing and Urban Development Board of Contract Appeals (HUDBCA), and the Department of Labor Board of Contract Appeals (LBCA).

2. Recognize that, in general, the Civilian Board's CDA jurisdiction extends to all federal agencies with the exception of the Department of Defense (including the Departments of the Army, Navy, and Air Force and all other agencies, components and entities within the DOD), the National Aeronautics and Space Administration, the U.S. Postal Service and the Postal Rate Commission, and the Tennessee Valley Authority. The ASBCA, PSBCA, and TVA Board remain in existence as separate boards of contract appeals.

3. Be aware that with respect to any cases pending before a board of contract appeals (other than the ASBCA, PSBCA or TVA Board) that was merged into the Civilian Board, those proceedings have been continued by the Civilian Board, and orders that were issued in such proceedings by the predecessor board remain in effect until modified, terminated, superseded, or revoked by the Civilian Board, by a court of competent jurisdiction, or by operation of law.

4. Keep in mind that, with the concurrence of the relevant agency, the Civilian Board may also assume jurisdiction over non-CDA disputes for which a predecessor board exercised jurisdiction, or assume other functions performed by such a board, as of January 5, 2007. The Civilian Board currently hears and decides (a) cases arising under the Indian Self-Determination Act, (b) disputes between insurance companies and the Department of Agriculture's Risk Management Agency involving actions of the Federal Crop Insurance Corporation, (c) claims by federal employees for reimbursement of expenses incurred while on official temporary duty travel or in connection with relocation to a new duty station, and (d) claims by carriers or freight forwarders involving actions of the GSA regarding payment for transportation services.

5. Carefully analyze the case law of the U.S. Supreme Court (if any), the Court of Appeals for the Federal Circuit (and its predecessor courts), the Civilian Board (and its predecessor boards) on the key issues affecting your case. Decisions of the

Supreme Court (if any), the Federal Circuit (and its predecessor courts), and of the Civilian Board (and its predecessor boards) are binding on the Civilian Board. Decisions of the Court of Federal Claims, the Claims Court, the ASBCA, the PSBCA and the TVA Board are not binding on the Civilian Board.

6. Be aware that the Civilian Board's rules are more detailed than—with the exception of the GSBCA's rules—those of its predecessor boards.

7. Remember that you may request full board consideration of your case (after the board's issuance of a decision on your motion for reconsideration or relief from decision), which means that all of the Civilian Board judges will consider your case. This procedure, which is not favored and infrequently invoked, will be used only if (a) it is necessary to secure or maintain uniformity of board decisions, or (b) the matter to be referred is one of exceptional importance.

8. Recognize that the board's "small claims" procedure is available solely at the contractor's election when (a) there is a monetary amount in dispute of \$50,000 or less, or (b) there is a monetary amount in dispute of \$150,000 or less and the contractor is a small business concern. Small claims cases must be resolved by the board, whenever possible, within 120 calendar days from the board's receipt of the contractor's election of this procedure, are decided by the panel chair alone, are final and unappealable except in the case of fraud, and have no precedential value. To meet the 120-day deadline, normal prehearing and hearing procedures may be restricted or eliminated.

9. Bear in mind that the Civilian Board's "accelerated procedure" is available solely at the contractor's election when there is a monetary dispute of \$100,000 or less. Accelerated procedure cases must be resolved by the board, whenever possible, within 180 calendar days from the board's receipt of the contractor's election of this procedure, are decided by the panel chair and one other panel member (unless they disagree, in which case the third panel member will participate in the decision), are appealable, and have precedential value. To meet the 180-day deadline, normal prehearing and hearing procedures may be restricted or eliminated.

**10.** Be aware that while the Civilian Board is not required to strictly apply the Federal Rules of Evidence, as a general matter, it will look to the Federal Rules of Evidence for guidance when it makes evidentiary rulings. In particular, Rule 4 file documents may escape review for conformance with the Federal Rules of Evidence. Hearsay evidence is admissible unless the board finds it “unreliable or untrustworthy.”

**11.** Keep in mind that the Civilian Board strongly encourages and has well-developed and effective rules with respect to alternative dispute resolution. You should carefully review the board’s rules on this subject and seriously consider the use of ADR to resolve your dispute. Remember that the board also offers its ADR services before the filing of a claim by the contractor, the issuance of a CO’s final decision, or the contractor’s filing of a notice of appeal.

## ★ REFERENCES ★

- 1/ Pub.L.No.109-163, 119 Stat.3136, 3391 (Jan. 6, 2006).
- 2/ Id. § 847; see Business Mgmt. Research Assocs. v. General Servs. Admin., CBCA 464, 07-1 BCA ¶ 33,486 (full board) (slip op. at 1); 72 Fed. Reg. 36,794 (July 5, 2007); 71 Fed. Reg. 65,825–26 (Nov. 9, 2006). See generally “Dateline February 2006,” 20 Nash & Cibinic Rep. (Feb. 2006).
- 3/ Before passage of the FY 2006 Defense Authorization Act, under the Contract Disputes Act, an agency board of contract appeals could be established within an executive agency when the agency head, after consultation with the Administrator of the Office of Federal Procurement Policy, determined that the volume of contract claims “justifies the establishment of a full-time Board of at least three members who shall have no other inconsistent duties.” 41 U.S.C.A. § 607(a) (2006). If the volume of contract claims was insufficient to justify an agency board or if an agency head otherwise considered it appropriate, appeals from decisions by COs of that agency could be decided by the board of another executive agency. 41 U.S.C.A. § 607(c) (2006). For example, before the Civilian Board’s January 2007 establishment, the ASBCA heard appeals from CO final decisions for the Department of Health and Human Services and the Agency for International Development, 48 C.F.R. § 333.203 (2006); 48 C.F.R. § 733.270-1 (2006), the GSBICA decided appeals for the Departments of State, Commerce, Education, and the Treasury, 48 C.F.R. § 633.270-2 (2006); 48 C.F.R. § 1333.70-1 (2006); 48 C.F.R. § 3433.203 (2006); 48 C.F.R. § 1033.201 (2006), and the DOTBCA handled appeals for the Department of Homeland Security, 48 C.F.R. § 3033.211 (2006).
- 4/ Pub.L.No.109-163, § 847(a)–(d); Business Mgmt. Research Assocs. v. General Servs. Admin., CBCA 464, 07-1 BCA ¶ 33,486 (full board) (slip op. at 2); see 72 Fed. Reg. 36,794 (July 5, 2007); 71 Fed. Reg. 65,825–26 (Nov. 9, 2006).
- 5/ Pub.L.No.109-163, § 847(c)(2)(B), quoted in Duggirala v. General Servs. Admin., CBCA 463, 07-1 BCA ¶ 33,489 (slip op. at 8–9); see 71 Fed. Reg. 65,825–26 (Nov. 9, 2006).
- 6/ 41 U.S.C.A. §§ 601–613.
- 7/ CBCA, CBCA Board Mission, <http://www.cbca.gsa.gov/mission.htm> (last visited June 29, 2007); Pub. L. No. 109-163, § 847(a)–(d); see 72 Fed. Reg. 36,794 (July 5, 2007); 71 Fed. Reg. 65,825–26 (Nov. 9, 2006).
- 8/ Pub. L. No. 109-163, § 847(a) (codified at 41 U.S.C.A. § 438(c)(2)); see 72 Fed. Reg. 36,794 (July 5, 2007); 71 Fed. Reg. 65,825–26 (Nov. 9, 2006).
- 9/ Pub.L.No.109-163, § 847(d)(2)(amending 41 U.S.C.A. § 607); see id. at § 847(c)(1).
- 10/ 48 C.F.R. § 333.203 (2006) (HHS); 48 C.F.R. § 733.270-1 (2006) (AID).
- 11/ See Pub. L. No. 109-163, § 847(d)(2).
- 12/ U.S. Court of Appeals for the Federal Circuit Judicial Conference, U.S. Court of Federal Claims/Boards of Contract Appeals Joint Breakout Session (May 19, 2006) (to be published in the Federal Rules Decisions Reporter).
- 13/ See 71 Fed. Reg. 65,825–26 (Nov. 9, 2006); 72 Fed. Reg. 36,794, 36,796 (July 5, 2007); 48 C.F.R. § 6101.1(f) (CBCA R. 1(f)).
- 14/ Interview by the author, Michael J. Schaengold, with CBCA Chairman Daniels and Vice-Chairman Parker (July 10, 2007) and a tour of the CBCA’s facilities on that same date.
- 15/ 48 C.F.R. § 6101.1(e) (CBCA R. 1(e)).
- 16/ 48 C.F.R. §§ 6101.1(e), 6101.52(b), 6101.53(b), 6101.54(c)(4), (5) (CBCA R. 1(e), 52(b), 53(b), 54(c)(4), (5)).
- 17/ Interview by the author, Michael J. Schaengold, with CBCA Chairman Daniels and Vice-Chairman Parker (July 10, 2007).
- 18/ 48 C.F.R. §§ 6101.1 (e), 6101.28 (CBCA R. 1(e), 28); see Business Mgmt. Research Assocs. v. General Servs. Admin., CBCA 464, 07-1 BCA ¶ 33,486 (full board) (slip op. at 1).
- 19/ Pub.L.No.109-163, § 847(a) (codified at 41 U.S.C.A. § 438(b)).
- 20/ While the new Civilian Board will assume the CDA jurisdiction of the eight boards referenced in the text (including the LBCA), because of the special status of its judges, the LBCA judges will not transfer to the new Civilian Board. The LBCA judges are not included in the statistics discussed in the sentence in the text which includes this footnote.
- 21/ Pub.L.No.109-163, § 847(a) (codified at 41 U.S.C.A. § 438(b)(1)(B)); see 41 U.S.C.A. § 607(b)(1) (ASBCA).
- 22/ See Pub. L. No. 109-163, § 847(a) (codified at 41 U.S.C.A. § 438(b)(2)) (citing 5 U.S.C.A. § 5721); see also 48 C.F.R. § 6301.0 (DOTBCA); Gregory Timber Resources, Inc., AGBCA 84-319-1, 87-3 BCA ¶ 20,086, aff’d, 855 F.2d 841 (Fed. Cir. 1988), 30 GC ¶ 335; San Antonio Cattle Co., ASBCA 43714, 92-3 BCA ¶ 25,044; 5 U.S.C.A. § 3105; ASBCA Charter ¶ 2, DFARS app. A, pt. 1. But see GAO, The Armed Services Board of Contract Appeals Has Operated Independently 15–20 (GAO/NSIAD-85-102, Sept. 23, 1985).
- 23/ 41 U.S.C.A. § 607(e); see 48 C.F.R. §§ 6101.1(c), (d), 6101.51 (CBCA R. 1(c), 1(d), 51).
- 24/ S. Rep. No. 95-1118, at 25 (1978), reprinted in 1978 U.S.C.A.N. 5235, 5259 (emphasis added) (“[B]oard proceedings...should be of sufficient positive value in time and monetary savings that contractors would elect to take their appeals to the agency boards.”).

- 25/ 72 Fed. Reg. 36,794 (July 5, 2007) (revising 48 C.F.R. pts. 6101–6105).
- 26/ 48 C.F.R. § 6101.1(c) (CBCA R. 1(c)).
- 27/ Boeing Petroleum Servs., Inc. v. Watkins, 935 F.2d 1260 (Fed. Cir. 1991), 33 GC ¶ 224; United States v. General Dynamics, Corp., 828 F.2d 1356, 1364 (9th Cir. 1987); PX Eng'g Co., ASBCA 40714, 91-2 BCA ¶ 23,921; Dry Roof Corp., ASBCA 29061, 88-3 BCA ¶ 21,096, 30 GC ¶ 329; Communications Resource Group, Inc., GSBCA 11038-C, 92-2 BCA ¶ 24,769; Gregory Timber Resources, Inc., AGBCA 84-319-1, 87-3 BCA ¶ 20,086, aff'd, 855 F.2d 841 (Fed. Cir. 1988), 30 GC ¶ 335; Four-Phase Sys., Inc., ASBCA 26794, 84-2 BCA ¶ 17,416. While the CDA specifically authorized agencies to establish boards of contract appeals, many of the boards had been in existence for some time before the CDA's 1978 passage. See Schaengold & Brams, "Choice of Forum for Contract Claims: Court vs. Board/Edition II," Briefing Papers No. 06-6, at 4 (May 2006) (and citations therein).
- 28/ Four-Phase Sys., Inc., ASBCA 26794, 84-2 BCA ¶ 17,416; PX Eng'g Co., ASBCA 40714, 91-2 BCA ¶ 23,921; Martin Marietta Corp., ASBCA 25828, 84-1 BCA ¶ 17,119; see Communications Resource Group, Inc., GSBCA 11038-C, 92-2 BCA ¶ 24,769; Time Contractors, Joint Venture, DOTCAB 1669, 86-2 BCA ¶ 19,003 (under the CDA, the "authority of the various contract appeals boards does not arise by delegation from the head of the agency").
- 29/ See "Boards of Contract Appeals: GSA Announces Official Launch Date for New Civilian Board of Contract Appeals," 86 Fed. Cont. Rep. 473 (Nov. 14, 2006); Matthews, "Boards of Contract Appeals: Daniels To Head Consolidated Civilian Board; Says Logistics Will Pose Greatest Challenge," 85 Fed. Cont. Rep. (BNA) 167 (Feb. 14, 2006); U.S. Court of Appeals for the Federal Circuit Judicial Conference, U.S. Court of Federal Claims/Boards of Contract Appeals Joint Breakout Session (May 19, 2006) (to be published in the Federal Rules Decisions Reporter); see also 71 Fed. Reg. 46,306, 46,319 (Aug. 11, 2006).
- 30/ Schaengold & Brams, "Choice of Forum for Contract Claims: Court vs. Board/Edition II," Briefing Papers No. 06-6, at 18 (May 2006).
- 31/ Pub. L. No. 109-163, § 847, 119 Stat. 3136, 3391 (2006).
- 32/ 71 Fed. Reg. 65,825, 65,826 (Nov. 9, 2006).
- 33/ E.g., Department of Homeland Security, 72 Fed. Reg. 24,536 (May 3, 2007) & 72 Fed. Reg. 1296 (Jan. 11, 2007); Indian Health Service, 71 Fed. Reg. 76,600 (Dec. 21, 2006).
- 34/ South Corp. v. United States, 690 F.2d 1368, 1370 (Fed. Cir. 1982), 24 GC ¶ 417; New Era Constr. v. United States, 890 F.2d 1152 (Fed. Cir. 1989); Remington Prods., Inc. v. North Am. Phillips Corp., 892 F.2d 1576 (Fed. Cir. 1990); Gevyn Constr. Corp. v. United States, 827 F.2d 752 (Fed. Cir. 1987), 29 GC ¶ 330; Business Mgmt. Research Assocs. v. General Servs. Admin., CBCA 464, 07-1 BCA ¶ 33,486 (full board) (slip op. at 2); Greenlee Constr., Inc. v. General Servs. Admin., CBCA 416, ¶ 33,515 (slip op. at 8 n.7). Federal Rule of Appellate Procedure 32.1 allows the citation of nonprecedential or unpublished decisions of the U.S. Court of Appeals of the Federal Circuit that were "issued on or after January 1, 2007." See Fed. Cir. R. 32.1(c). However, these nonprecedential or unpublished Federal Circuit decisions are not binding on the Federal Circuit or the CBCA. See Fed. Cir. R. 32.1(d).
- 35/ Business Mgmt. Research Assocs. v. General Servs. Admin., CBCA 464, 07-1 BCA ¶ 33,486 (full board) (slip op. at 2); P.J. Dick, Inc. v. General Servs. Admin., CBCA 453, 07-1 BCA ¶ 33,518 (slip op. at 2 n.2).
- 36/ Greenlee Constr., Inc. v. General Servs. Admin., CBCA 416, 07-1 BCA ¶ 33,515 (slip op. at 8 n.7); Roy McGinnis & Co., ASBCA 40004, 91-1 BCA ¶ 23,395, 32 GC ¶ 348; Dailling Roofing, Inc., ASBCA 34739, 89-1 BCA ¶ 21,311.
- 37/ Jewelers Vigilance Comm., Inc. v. Ullenberg Corp., 853 F.2d 888 (Fed. Cir. 1988); In re Wella A.G., 858 F.2d 725 (Fed. Cir. 1988); Northern Helex Co. v. United States, 634 F.2d 557 (Ct. Cl. 1980).
- 38/ Business Mgmt. Research Assocs. v. General Servs. Admin., CBCA 464, 07-1 BCA ¶ 33,486 (full board) (slip op. at 2).
- 39/ Matthews, "Boards of Contract Appeals: Daniels To Head Consolidated Civilian Board; Says Logistics Will Pose Greatest Challenge," 85 Fed. Cont. Rep. (BNA) 167 (Feb. 14, 2006); FY 2005 Annual Report of the GSBCA to the GSA Administrator (Oct. 28, 2005); FY 2006 Annual Report of the GSBCA to the GSA Administrator (Oct. 30, 2006); Interview by the author, Michael J. Schaengold, with CBCA Chairman Daniels and Vice-Chairman Parker (July 10, 2007).
- 40/ Quarterly Report of the Civilian Board of Contract Appeals to the GSA Administrator (Apr. 30, 2007).
- 41/ 41 U.S.C.A. §§ 606, 609(a); see also Pathman Constr. Co. v. United States, 817 F.2d 1573, 1578 (Fed. Cir. 1987) ("major purpose" of the CDA is to "induce resolution of contract disputes with the government by negotiation rather than litigation").
- 42/ American Bus. Corp. v. Dep't of Labor, CBCA 637, 07-1 BCA ¶ 33,524 (slip op. at 2); All Star Metals, LLC v. Dep't of Transportation, CBCA 91, 07-1 BCA ¶ 33,562 (slip op. at 3).
- 43/ KeyFed. Fin. v. General Servs. Admin., CBCA 411, 07-1 BCA ¶ 33,555 (slip op. at 15–16) (citations omitted) (quoting 41 U.S.C.A. § 601(4)). However, as the Civilian Board has recently stated, it "is well established that subcontractors may pursue claims against the Government on sponsorship of the prime contractor. The Government's liability can arise under its contract with the prime contractor, the terms of which have been passed onto subcontractors, where the subcontractor's performance is impacted by the actions or inactions of Government agents." TAS Group, Inc. v. Dep't of Justice, CBCA 52, 2007 WL 2083629, slip op. at 3 (July 16, 2007) (finding that "the term 'subcontractor' is subsumed within the term 'contractor' for the purpose of the requirements of the contract").
- 44/ S.J. Groves & Sons Co. v. United States, 661 F.2d 171 (Ct. Cl. 1981), 23 GC ¶ 434; LaBarge Prods., Inc. v. West, 46 F.3d 1547, 1554 (Fed. Cir. 1995), 37 GC ¶ 136; Holly Corp., ASBCA 24975, 80-2 BCA ¶ 14,675, 23 GC ¶ 17. See generally Schaengold & Brams, "Choice of Forum for Contract Claims: Court vs. Board/Edition II," Briefing Papers No. 06-6 (May 2006).
- 45/ Holly Corp., ASBCA 24975, 80-2 BCA ¶ 14,675, 23 GC ¶ 17; Roubin & Janeiro, Inc., GSBCA 4991-R, 81-1 BCA ¶ 14,868; Inslaw, Inc., DOTBCA 1609 et al., 89-1 BCA ¶ 21,238; 41 U.S.C.A. §§ 606, 609(a); see also Seaboard Lumber Co. v. United States, 903 F.2d 1560, 1562 n.3 (Fed. Cir. 1990), 32 GC ¶ 190; cf. Pathman Constr. Co. v. United States, 817 F.2d 1573, 1578 (Fed. Cir. 1987) ("major purpose" of the CDA is to "induce resolution of contract disputes with the government by negotiation rather than litigation").
- 46/ 41 U.S.C.A. §§ 605(a), 609(a)(3); Wilnerv. United States, 24 F.3d 1397, 1401–02 (Fed. Cir. 1994), 36 GC ¶ 361 (en banc) ("[A] contractor is not entitled to the benefit of any presumption arising from the contracting officer's [final] decision. De novo review precludes reliance upon the presumed correctness of the [CO's final] decision."); Seaboard Lumber Co. v. United States, 903 F.2d 1560 (Fed. Cir. 1990), 32 GC ¶ 190; Assurance Co. v. United States, 813 F.2d 1202 (Fed. Cir. 1987), 29 GC ¶ 99; Precision Specialties, Inc.,

- ASBCA 48717, 96-1 BCA ¶ 28,054, 38 GC ¶ 11; Space Age Eng'g, Inc., ASBCA 26028, 82-1 BCA ¶ 15,766.
- 47/ 41 U.S.C.A. § 602(a); AMEC Constr. Mgmt., Inc. v. General Servs. Admin., CBCA 389, 07-1 BCA ¶ 33,505 (slip op. at 5); see All Star Metals, LLC v. Dep't of Transportation, CBCA 91, 07-1 BCA ¶ 33,562 (slip op. at 3).
- 48/ Pasteur v. United States, 814 F.2d 624 (Fed. Cir. 1987); Newport News Shipbldg. & Dry Dock v. United States, 7 Cl. Ct. 549 (1985), 27 GC ¶ 101 (Note).
- 49/ LaBarge Prods., Inc. v. West, 46 F.3d 1547, 1551 (Fed. Cir. 1995), 37 GC ¶ 136; Coastal Corp. v. United States, 713 F.2d 728 (Fed. Cir. 1983), 25 GC ¶ 270; United States v. John C. Grimberg Co., 702 F.2d 1362 (Fed. Cir. 1983), 25 GC ¶ 96; Ammon Circuits Research, ASBCA 50885, 97-2 BCA ¶ 29,318; RC 27th Ave. Corp., ASBCA 49176, 97-1 BCA ¶ 28,658. In 1996, the GSBCA's jurisdiction over automatic data processing equipment (and related) bid protests—which had constituted a substantial part of that board's docket—was eliminated. Clinger-Cohen Act of 1996, Pub. L. No. 104-106, § 5101, 110 Stat. 186 (1996).
- 50/ E.g., Alvin, Ltd. v. U.S. Postal Service, 816 F.2d 1562 (Fed. Cir. 1987), 29 GC ¶ 157; Forman v. United States, 767 F.2d 875 (Fed. Cir. 1985), 27 GC ¶ 225; American Nat'l Bank of Chicago, GSBCA 7457, 85-1 BCA ¶ 17,811, 28 GC ¶ 315 (Note); see also Ralden Partnership v. United States, 891 F.2d 1575 (Fed. Cir. 1989), 32 GC ¶ 25.
- 51/ Seaboard Lumber Co. v. United States, 903 F.2d 1560 (Fed. Cir. 1990), 32 GC ¶ 190; Sierra Pac. Indus., AGBCA 79-200, 80-1 BCA ¶ 14,383.
- 52/ Seaboard Lumber Co. v. United States, 903 F.2d 1560 (Fed. Cir. 1990), 32 GC ¶ 190; see also Gregory Timber Resources, Inc. v. United States, 855 F.2d 841 (Fed. Cir. 1988).
- 53/ 41 U.S.C. § 605(a).
- 54/ Greenlee Constr., Inc. v. General Servs. Admin., CBCA 416, 07-1 BCA ¶ 33,515 (slip op. at 9); see Hart v. United States, 910 F.2d 815, 817 (Fed. Cir. 1990); Kinsey v. United States, 852 F.2d 556, 557 (Fed. Cir. 1988).
- 55/ Overall Roofing & Constr. Inc. v. United States, 929 F.2d 687 (Fed. Cir. 1991), 33 GC ¶ 133.
- 56/ Malone v. United States, 849 F.2d 1441 (Fed. Cir. 1988), 30 GC ¶ 314.
- 57/ Pub. L. No. 102-572, § 907(b)(1), 106 Stat. 4506 (1992) (amending 28 U.S.C.A. § 1491(a)(2)).
- 58/ Malone v. United States, 849 F.2d 1441 (Fed. Cir. 1988), 30 GC ¶ 314; Johnson & Gordon Sec., Inc. v. General Servs. Admin., 857 F.2d 1435 (Fed. Cir. 1988), 30 GC ¶ 372; General Elec. Automated Sys. Div., ASBCA 36214, 89-1 BCA ¶ 21,195; Michael M. Grimberg, DOTBCA 1543, 87-1 BCA ¶ 19,573, 30 GC ¶ 314 (Note); Smith's Inc. of Dothan, VABCA 2198, 85-2 BCA ¶ 18,133, 28 GC ¶ 198 (Note). But see Seneca Timber Co., AGBCA 83-228-1, 86-1 BCA ¶ 19,573, 30 GC ¶ 314 (Note).
- 59/ 41 U.S.C.A. § 607(d).
- 60/ Pub. L. No. 103-355, § 2354, 108 Stat. 3243, 3323 (1994) (adding 41 U.S.C.A. § 609(f)).
- 61/ 41 U.S.C.A. § 609(f).
- 62/ 41 U.S.C.A. §§ 321, 322 (1982); 28 U.S.C.A. § 1491(a)(1) (1982); Sperry Corp. v. United States, 845 F.2d 965 (Fed. Cir. 1988), 30 GC ¶ 150; Vista Scientific Corp. v. United States, 808 F.2d 50 (Fed. Cir. 1986); see Gevyn Constr. Corp. v. United States, 827 F.2d 752 (Fed. Cir. 1987), 29 GC ¶ 330; Maitland Bros. Co. v. United States, 20 Cl. Ct. 53 (1990); Fred A. Arnold, Inc. v. United States, 18 Cl. Ct. 1 (1989), 31 GC ¶ 355.
- 63/ E.g., Tattelbaum v. United States, 749 F.2d 729 (Fed. Cir. 1984), 26 GC ¶ 367 (Note); Asco-Falcon III Shipping Co. v. United States, 18 Cl. Ct. 484 (1989); Gregory Lumber Co. v. United States, 9 Cl. Ct. 503 (1986).
- 64/ Logan Machinists, Inc., DOTBCA 4184, 05-1 BCA ¶ 32,894; Sufi Network Servs., Inc., ASBCA 54503, 04-1 BCA ¶ 32,606 ("ASBCA jurisdiction, if any, of any appeal arising under an unaffiliated [nonappropriated funds instrumentality] contract derives from such contract's Disputes clause"); Costruzioni & Impianti, S.R.L., ASBCA 53853, 03-1 BCA ¶ 32,201 (jurisdiction over appeal involving NAFI stems from ASBCA charter and the "Disputes" clause, not the CDA); Philomath Timber Co., IBCA 2409, 89-1 BCA ¶ 21,418.
- 65/ 7 C.F.R. § 24.4(c).
- 66/ ASBCA Charter ¶ 1, DFARS app. A, pt. 1.
- 67/ Telephone Interview by the author, Michael J. Schaengold, with ASBCA Judge Terrence Hartman (Apr. 20, 2006).
- 68/ 24 C.F.R. § 20.4(b).
- 69/ 10 C.F.R. § 1023.1(c).
- 70/ See Schaengold & Brams, "Choice of Forum for Contract Claims: Court vs. Board/Editor II," Briefing Papers No. 06-6, at 14 (May 2006).
- 71/ ASBCA Annual Report 3 (Nov. 9, 2004).
- 72/ Pub. L. No. 109-163, § 847(a) (codified at 41 U.S.C.A. § 438(c)(2)); see 72 Fed. Reg. 36,794 (July 5, 2007); 71 Fed. Reg. 65,825-26 (Nov. 9, 2006). While the new Civilian Board will assume the CDA jurisdiction of the eight boards referenced above (including the LBCA), because of the special status of its judges, the LBCA judges will not transfer to the new Civilian Board.
- 73/ CBCA, CBCA Board Mission, <http://www.cbca.gsa.gov/mission.htm> (last visited June 29, 2007); 72 Fed. Reg. 36,794 (July 5, 2007); 71 Fed. Reg. 65,825-26 (Nov. 9, 2006); Pub. L. No. 109-163, § 847(a).
- 74/ Syed v. General Servs. Admin., CBCA 426, 07-1 BCA ¶ 33,516 (slip op. at 4); 41 U.S.C.A. § 607(d); 41 U.S.C.A. § 438(c)(1); 28 U.S.C.A. § 1491(a)(1); Wood v. United States, 961 F.2d 195 (Fed. Cir. 1992); New Am. Shipbuilders v. United States, 871 F.2d 1077 (Fed. Cir. 1989); Rault Center Hotel, ASBCA 31232, 91-3 BCA ¶ 24,247, 33 GC ¶ 283; Alfred Bronder, ASBCA 29938, 86-3 BCA ¶ 19,102, 30 GC ¶ 371 (Note); H&J Constr. Co., ASBCA 18521, 75-1 BCA ¶ 11,171, 17 GC ¶ 265.
- 75/ TAS Group, Inc. v. Dep't of Justice, CBCA 52, 2007 WL 2083629, slip op. at 4-5 (July 16, 2007) (and cases cited therein); Houston Ship Repair, Inc. v. Dep't of Transportation, DOTBCA 4505, 06-2 BCA ¶ 33,381; Polaris Travel, Inc., EBCA C-9401166, 96-2 BCA ¶ 28,518; Aulson Roofing Inc., ASBCA 37677, 91-2 BCA ¶ 23,720; Huff & Huff Serv. Corp., ASBCA 36039, 91-1 BCA ¶ 23,584.
- 76/ Monster Gov't Solutions v. Dep't of Homeland Security, DOTBCA 4532 et al., 06-1 BCA ¶ 33,236; Volk Constr., Inc., IBCA-1419-1-81 et al., 87-3 BCA ¶ 19,968.
- 77/ E.g., Joseph Morton Co. v. United States, 757 F.2d 1273 (Fed. Cir. 1985), 27 GC ¶ 224; 7 World Trade Co., GSBCA 13284-SEC, 96-1 BCA ¶ 28,240; Volk Constr., Inc., IBCA-1419-1-81 et al., 87-3 BCA ¶ 19,968; BMY-Combat Sys. Div. v. United States, 26 Cl. Ct. 826 (1992); American Mfg. Co., ASBCA 25816, 83-2 BCA ¶ 16,608; Santa Fe Engrs., Inc., ASBCA 26883, 82-2 BCA ¶ 16,030; Space Age Eng'g, Inc., ASBCA 26028, 82-1 BCA ¶ 15,766; see 41 U.S.C.A. § 605(a); FAR 33.210.

- 78/ Seaboard Lumber Co. v. United States, 903 F.2d 1560 (Fed. Cir. 1990), 32 GC ¶ 190; see also Gregory Timber Resources, Inc. v. United States, AGBCA 84-319-1, 87-3 BCA ¶ 20,086, aff'd, 855 F.2d 841 (Fed. Cir. 1988), 30 GC ¶ 335.
- 79/ E.g., TDC Mgmt. Corp., DOTBCA 1802, 90-1 BCA ¶ 22,627; see also Edwards v. United States, 19 Cl. Ct. 663 (1990).
- 80/ E.g., P.H. Mech. Corp. v. General Servs. Admin., GSBCA 10567, 94-2 BCA ¶ 26,785; see Fidelity Constr. Co., DOTBCA 1113 et al., 80-2 BCA ¶ 14,819, at 73,140 (holding that the CDA did not grant the board jurisdiction to render a determination as to whether or not fraud exists).
- 81/ 41 U.S.C.A. § 605(a).
- 82/ 41 U.S.C.A. § 605(a); S. Rep. No. 95-1118, at 20 (1978), reprinted in 1978 U.S.C.A.N. 5235, 5253-54; TDC Mgmt. Corp., DOTBCA 1802, 90-1 BCA ¶ 22,627; Time Contractors, Joint Venture, DOTCAB 1669 et al., 86-2 BCA ¶ 19,003, 29 GC ¶ 55 (Note); Fidelity Constr. Co., DOTCAB 1113 et al., 80-2 BCA ¶ 14,819, 25 GC ¶ 82; Quality Env't Sys., Inc., ASBCA 22178, 87-3 BCA ¶ 20,060; Warren Beaves, DOTCAB 1324, 83-1 BCA ¶ 16,232, 25 GC ¶ 82.
- 83/ E.g., Hardrives, Inc., IBCA 2319, 91-2 BCA ¶ 23,769; Hardrives, Inc., IBCA 2319, 93-2 BCA ¶ 25,779, 35 GC ¶ 180 (Note); Time Contractors, DOTCAB 1669, 86-2 BCA ¶ 19,003, 29 GC ¶ 55 (Note); San-Val Eng'g, Inc., GSBCA 10371, 92-1 BCA ¶ 24,558; Afro-Lecon, Inc. v. United States, 820 F.2d 1198 (Fed. Cir. 1987); T. Iida Contracting, Ltd., ASBCA 51865, 00-1 BCA ¶ 30,626 ("To justify a stay in ASBCA proceedings on account of a contractor's fraud, movant has the burden to show that there are substantially similar issues, facts and witnesses in civil and criminal proceedings, and there is a need to protect the criminal litigation which overrides any injury to the parties by staying the civil litigation."); see Turner Constr. Co. v. General Servs. Admin., GSBCA 15502 et al., 05-2 BCA ¶ 33,118.
- 84/ TDC Mgmt., DOTBCA 1802, 90-1 BCA ¶ 22,627; TDC Mgmt. Corp., DOTBCA 1802, 88-1 BCA ¶ 20,242; Warren Beaves, DOTCAB 1324, 83-1 BCA ¶ 16,232, 25 GC ¶ 82; Dry Roof Corp., ASBCA 29061, 88-3 BCA ¶ 21,096, 30 GC ¶ 329; see P.H. Mech. Corp., GSBCA 10567, 94-2 BCA ¶ 26,785, at 118,510; Comada Corp., ASBCA 26599, 83-2 BCA ¶ 16,681, at 83,012. But see J.E.T.S., Inc. v. United States, 838 F.2d 1196 (Fed. Cir. 1988) (affirming, without discussing jurisdiction, board decision denying contractor's request for equitable adjustment based on fraud convictions for falsely certifying company's small business status).
- 85/ Southern Cal. Fed. v. United States, 422 F.3d 1319, 1334 (Fed. Cir. 2005); Hi-Shear Tech. Corp. v. United States, 356 F.3d 1372, 1382-83 (Fed. Cir. 2004), 45 GC ¶ 55; Energy Capital Corp. v. United States, 302 F.3d 1314, 1324 (Fed. Cir. 2002), 44 GC ¶ 330; Carabetta Enters. v. United States, 68 Fed. Cl. 410, 413-14 (2005); Glendale Federal Bank, FSB v. United States, 378 F.3d 1308, 1313 (Fed. Cir. 2004); CACI Int'l, Inc., ASBCA 53058, 05-1 BCA ¶ 32,948; Donald E. Skaggs, PSBCA 4486, 00-2 BCA ¶ 30,933; Western Aviation Maint., GSBCA 14165, 98-2 BCA ¶ 29,816, 41 GC ¶ 36; Western Aviation Maint., GSBCA 14165, 00-2 BCA ¶ 31,123, 41 GC ¶ 36; Steven S. Freedman, PSBCA 3867, 96-1 BCA ¶ 28,170; LBM, Inc., ASBCA 39,606, 91-2 BCA ¶ 24,016; see also S&W Tire Serv., GSBCA 6376, 82-2 BCA ¶ 16,048 (board need not find a remedy-granting clause to award relief).
- 86/ Giesler v. United States, 232 F.3d 864, 869 (Fed. Cir. 2000), 42 GC ¶ 480; LaBarge Prods., Inc. v. West, 46 F.3d 1547, 1552-53 (Fed. Cir. 1995), 37 GC ¶ 136; Roseburg Lumber Co. v. Madigan, 978 F.2d 660, 665 (Fed. Cir. 1992); United States v. Hamilton Enters., 711 F.2d 1038 (Fed. Cir. 1983), 26 GC ¶ 94 (Note); Parcel 49 C Ltd. P'ship v. General Servs. Admin., GSBCA 16447, 05-2 BCA ¶ 33,013; Wyodak Enters., Inc., VABCA 3678 et al., 95-1 BCA ¶ 27,493, 37 GC ¶ 222; Wheeled Coach Indus. v. General Servs. Admin., GSBCA 10314, 93-1 BCA ¶ 25,245; Pacific Coast Molybdenum Co., AGBCA 84-162-1, 89-2 BCA ¶ 21,755, aff'd, 902 F.2d 44 (Fed. Cir. 1990); Bay Harbor Co., ASBCA 41589 92-3 BCA ¶ 25,210; Southern Dredging Co., ENGBCA 5843, 92-2 BCA ¶ 24,886; Thompson Numerical, Inc., ASBCA 41327, 91-3 BCA ¶ 24,169; see FAR 33.205.
- 87/ Giesler v. United States, 232 F.3d 864, 869 (Fed. Cir. 2000), 42 GC ¶ 480; Roseburg Lumber Co. v. Madigan, 978 F.2d 660, 665 (Fed. Cir. 1992); Thompson Numerical, Inc., ASBCA 41327, 91-3 BCA ¶ 24,169; RACO Servs., Inc., IBCA 2260, 87-1 BCA ¶ 19,653; Don Simpson, IBCA 2058, 86-2 BCA ¶ 18,768, 29 GC ¶ 289 (Note); Sealite Corp., ASBCA 25805, 84-1 BCA ¶ 17,144, 26 GC ¶ 314 (Note); FAR 33.205; see McClure Elec. Constructors, Inc. v. United States, 132 F.3d 709 (Fed. Cir. 1997), 40 GC ¶ 120; Dairyland Power Coop. v. United States, 16 F.3d 1197, 1202 (Fed. Cir. 1994), 36 GC ¶ 189; National Line Co. v. United States, 607 F.2d 978 (Ct. Cl. 1979), 21 GC ¶ 451.
- 88/ AT&T v. General Servs. Admin., GSBCA 14732, 00-2 BCA ¶ 31,128; AT&T v. General Servs. Admin., GSBCA 14732, 02-1 BCA ¶ 31,713; Newhall Ref. Co., EBCA 363-7-86, 89-3 ¶ BCA 23,142, at 111,146; Roseburg Lumber Co. v. Madigan, 978 F.2d 660, 665 (Fed. Cir. 1992); Acme Process Equip. Co. v. United States, 347 F.2d 509, 528 (Ct. Cl. 1965), rev'd on other grounds, 385 U.S. 138 (1966); Mobil Oil Exploration & Producing S.E., Inc. v. United States, 530 U.S. 604, 623-24 (2000), 42 GC ¶ 277; see also Barnes Oil Co. v. United States, 84 F. Supp. 646, 648 (Ct. Cl. 1949); Hometown Fin., Inc. v. United States, 56 Fed. Cl. 477, 484-85 (2003), aff'd, 409 F.3d 1360 (Fed. Cir. 2005); Glendale Fed. Bank, FSB v. United States, 378 F.3d 1308, 1312 (Fed. Cir. 2004); Glendale Fed. Bank, FSB v. United States, 239 F.3d 1374, 1380 (Fed. Cir. 2001), 43 GC ¶ 84.
- 89/ See AT&T v. United States, 177 F.3d 1368, 1375-76 (Fed. Cir. 1999), 41 GC ¶ 254 (en banc); Total Med. Mgmt. v. United States, 104 F.3d 1314, 1321 (Fed. Cir. 1997), 39 GC ¶ 67; Lockheed Martin Corp. v. Walker, 149 F.3d 1377 (Fed. Cir. 1998), 40 GC ¶ 422; Alabama Rural Fire Ins. Co. v. United States, 572 F.2d 727, 733-34 (Ct. Cl. 1978); John Reiner & Co. v. United States, 325 F.2d 438, 440 (Ct. Cl. 1963); Prestex, Inc. v. United States, 320 F.2d 367, 374-75 (Ct. Cl. 1963); Erwin Pfister General-Bauunternehmen, ASBCA 43980 et al., 01-2 BCA ¶ 31,431; Medica, S.A., ENGBCA PCC-142, 00-2 BCA ¶ 30,966, 42 GC ¶ 251; see also LaBarge Prods., Inc. v. West, 46 F.3d 1547, 1552-53 (Fed. Cir. 1995), 37 GC ¶ 136; Urban Data Sys., Inc. v. United States, 699 F.2d 1147, 1154 (Fed. Cir. 1983); Trilon Educ. Corp. v. United States, 578 F.2d 1356, 1360 (Ct. Cl. 1978).
- 90/ All Star Metals, LLC v. Dep't of Transportation, CBCA 91, 07-1 BCA ¶ 33,562 (slip op. at 3 n.1).
- 91/ United States v. Amdahl Corp., 786 F.2d 387 (Fed. Cir. 1986); Gould, Inc. v. United States, 935 F.2d 1271 (Fed. Cir. 1991); Urban Data Sys., v. United States, 699 F.2d 1147, 1154 n.8 (Fed. Cir. 1983); Prestex, Inc. v. United States, 320 F.2d 367, 374-75 (Ct. Cl. 1963); Flathead Contractors, CBCA 118, 07-1 BCA ¶ 33,556 (slip op. at 47-48); Mitch Moshtaghi, ASBCA 53711, 03-2 BCA ¶ 32,274, at 159,669 (ASBCA had jurisdiction to hear quantum meruit claim to the extent the allegation was based on an implied-in-fact promise); Healthcare Practice Enhancement Network, VABCA-5864E, 02-1 BCA ¶ 31,770. But see United Rentals, Inc., HUDBCA 03-D-100-C1, 06-1 BCA ¶ 33,131. In this regard, the boards do not have jurisdiction to hear claims involving implied-in-law contracts but do have jurisdiction over implied-in-fact contract claims. Barrett Ref. Corp. v. United States, 242 F.3d 1055, 1059 (Fed. Cir. 2001), 43 GC ¶ 135; City of Cincinnati v. United States, 153 F.3d 1375, 1377 (Fed. Cir. 1998); United Pac. Ins. Co., ASBCA 53051, 03-2 BCA ¶ 32,267, at 159,623, aff'd, 380 F.3d 1352 (Fed. Cir. 2004); United Rentals, Inc., HUDBCA

- 03-D-100-C1, 06-1 BCA ¶33,131, 46 GC ¶193; Eaton Corp., ASBCA 38386, 91-1 BCA ¶23,398, at 117,403; see *Coastal Corp. v. United States*, 713 F.2d 728 (Fed. Cir. 1983), 25 GC ¶270.
- 92/ *Crutcherv. General Servs. Admin.*, GSBGA 15586, 02-1 BCA ¶31,763, at 156,878; *Schrager Auction Galleries, Ltd. v. Dep't of Treasury*, GSBGA 15658-TD, 02-1 BCA ¶31,710; *Janice Cox, ASBCA 50587*, 01-1 BCA ¶31,377; *Advance Eng'g Corp.*, ASBCA 46889, 95-1 BCA ¶27,475, at 136,870, 37 GC ¶292, *aff'd on recons.*, 96-1 BCA ¶28,003.
- 93/ *Wells Fargo Bank, N.A. v. United States*, 88 F.3d 1012, 1022-24 (Fed. Cir. 1996), 38 GC ¶421; *Eaton Contracts Servs., Inc.*, ASBCA 52888, 04-1 BCA ¶32,536; *M&W Constr. Corp.*, ASBCA 53482, 02-1 BCA ¶31,804 ("label 'consequential damages' is generally a confusing and unfavorable term and not particularly helpful in determining what damages are recoverable"); *PAE Int'l*, ASBCA 45314, 98-1 BCA ¶29,347, 40 GC ¶535 ("consequential or special damages, in order to be recoverable, must be foreseeable at the time the contract is executed"); *Stroh Corp.*, GSBGA 11029, 96-1 BCA ¶28,265 ("To be recoverable, consequential damages must be foreseeable at the time of contract award. Foreseeable means within the contemplation of the parties at the time of award." (citation omitted)); *Land Movers, Inc.*, ENGBCA 5656, 92-1 BCA ¶24,473 (same); *Consolidated Edison Co. of N.Y., Inc. v. United States*, 67 Fed. Cl. 285, 290 (2005); *Boston Edison Co. v. United States*, 64 Fed. Cl. 167, 182 (2005); see *San Carlos Irrigation & Draining District v. United States*, 111 F.3d 1557, 1563 (Fed. Cir. 1997) ("Remote and consequential damages are not recoverable in a common law suit for breach of contract...especially...in suits against the United States for the recovery of common law damages...") (quoting *Wells Fargo Bank, N.A. v. United States*, 88 F.3d 1012, 1020 (Fed. Cir. 1996), 38 GC ¶421); *Prudential Ins. Co. of Am. v. United States*, 801 F.2d 1295, 1300 (Fed. Cir. 1986) (holding that consequential or special damages, to be recoverable, must be foreseeable at the time the contract is executed); *San Carlos Irrigation & Drainage Dist. v. United States*, 877 F.2d 957, 959-60 (Fed. Cir. 1989) (appellant "may be able to recover consequential damages if it can prove that they were foreseeable at the time of contract formation"); *National Park Concessions*, IBCA 2995, 94-3 BCA ¶27,104, 36 GC ¶563; *Tele-Sentry Security, Inc.*, GSBGA 8950, 92-3 BCA ¶25,088; *Dunbar & Sullivan Drudging Co.*, ENGBCA 5218, 87-2 BCA ¶19,773; "Recovering Consequential Damages From the Government: An Impossible Dream," 5 *Nash & Cibinic Report* ¶20 (1991).
- 94/ 5 U.S.C.A. §504; *Hughes Moving & Storage, Inc.*, ASBCA 45346, 00-1 BCA ¶30,776; *Oklahoma Aerotronics, Inc.*, ASBCA 28006, 88-3 BCA ¶20,917; see also 28 U.S.C.A. §2412. See generally *Whalen*, "Equal Access to Justice Act: Recent Developments," *Briefing Papers No. 02-5* (Apr. 2005); *Tobin & Stiffler*, "Recovering Legal Fees Under EAJA/Edition II," *Briefing Papers No. 91-7* (June 1991).
- 95/ *National Center for Mfg. Sciences v. United States*, 114 F.3d 196, 198 (Fed. Cir. 1997), 39 GC ¶339; *Sabbia Corp.*, VABCA 5557, 99-2 BCA ¶30,394; *Western Aviation Maint., Inc. v. General Servs. Admin.*, GSBGA 14165, 98-2 BCA ¶29,816, 41 GC ¶36; *Massie v. United States*, 226 F.3d 1318, 1321 (Fed. Cir. 2000); *United States v. Black Hawk Masonic Temple Ass'n*, 798 F. Supp. 646 (D. Colo. 1992); *John Barrar, ENGBCA 5918*, 92-3 BCA ¶25,074; *Statistica, Inc.*, ASBCA 44116, 92-3 BCA ¶25,095; *Hub Testing Labs., Inc.*, GSBGA 11693, 92-3 BCA ¶25,081; *General Elec. Automated Sys. Div.*, ASBCA 36214, 89-1 BCA ¶21,195.
- 96/ *Statistica, Inc.*, ASBCA 44116, 92-3 BCA ¶25,095; *Sabbia Corp.*, VABCA 5557, 99-2 BCA ¶30,394; *Rohr, Inc.*, ASBCA 44193, 93-2 BCA ¶25,871; *Dixon Pest Control*, ASBCA 41042, 91-1 BCA ¶23,640; *Lee Ann Wyskiver, PSBCA 3621*, 95-2 BCA ¶27,755; *United States v. Black Hawk Masonic Temple Ass'n*, 798 F. Supp. 646 (D. Colo. 1992).
- 97/ *Statistica, Inc.*, ASBCA 44116, 92-3 BCA ¶25,095; *Raymond Kaiser Engrs.*, ASBCA 34133, 87-3 BCA ¶20,140; *Maria Manges*, ASBCA 25350, 81-2 BCA ¶15,398; *Smith v. United States*, 654 F.2d 50 (Ct. Cl. 1981).
- 98/ *California Bus. Tels.*, CBCA 135, 07-1 BCA ¶33,553 (slip op. at 15) (citation omitted); see *P.J. Dick, Inc. v. General Servs. Admin.*, CBCA 461, 07-1 BCA ¶33,534 (slip op. at 5).
- 99/ 41 U.S.C.A. §605(c)(4); 48 C.F.R. §6101.1(b)(7) (CBCA R. 1(b)(7)); see 48 C.F.R. §6101.12(a) (CBCA R. 12(a)).
- 100/ *Hub Testing Labs.*, GSBGA 11693, 92-3 BCA ¶25,081; see *Raymond Kaiser Engrs.*, ASBCA 34133, 87-3 BCA ¶20,140.
- 101/ *Steven S. Freedman*, PSBCA 3867, 96-1 BCA ¶28,170; *Rohr, Inc.*, ASBCA 44193, 93-2 BCA ¶25,871; *Erwin Melvie*, PSBCA 1744, 87-3 BCA ¶20,158; *Monarch Enters., Inc.*, ASBCA 31375, 86-3 BCA ¶19,227; *Hub Testing Labs.*, GSBGA 11693, 92-3 BCA ¶25,081; *Dixon Pest Control, Inc.*, ASBCA 41042, 91-1 BCA ¶23,640; *Sabbia Corp.*, VABCA 5557, 99-2 BCA ¶30,394; *Consumers Packing Co.*, ASBCA 27092, 82-2 ¶BCA 15,996.
- 102/ *Chungh-Ho Chiao*, DOTBCA 2264, 91-1 BCA ¶23,404; *Inslaw, Inc.*, DOTBCA 1609, 90-2 BCA ¶22,701; *Tom Shaw, Inc.*, DOTBCA 2100, 90-1 BCA ¶22,286; *Hastetter*, PSBCA 3064, 92-3 BCA ¶25,189; *Tab Distributors*, PSBCA 4134, 99-1 BCA ¶30,110.
- 103/ 41 U.S.C.A. §605(c); 48 C.F.R. §6101.12(a) (CBCA R. 12(a)).
- 104/ See *AT&T v. United States*, 177 F.3d 1368, 1375 (Fed. Cir. 1999), 41 GC ¶254; *Longshore v. United States*, 77 F.3d 440, 443 (Fed. Cir. 1996) ("Congress has undoubted capacity to oversee the performance of Executive Branch agencies, consistent with its constitutional authority. It is not for this court to instruct Congress on how to oversee and manage its creations."); *E. Walters & Co. v. United States*, 576 F.2d 362, 367 (Ct. Cl. 1978).
- 105/ 28 U.S.C.A. §1491(a)(2); *Alliant Techsystems, Inc. v. United States*, 178 F.3d 1260, 1264-70 (Fed. Cir. 1999), 41 GC ¶308; *Loveladies Harbor v. United States*, 27 F.3d 1545, 1550 n.14 (Fed. Cir. 1994) (en banc); *ATK Thiokol v. United States*, 68 Fed. Cl. 612, 626 (2005), 48 GC ¶8.
- 106/ *Malone v. United States*, 849 F.2d 1441 (Fed. Cir. 1988), 30 GC ¶314; *Nachtmann Analytical Lab. v. Int'l Boundary & Water Comm'n*, CBCA 500, 07-1 BCA ¶33,570 (upholding termination for cause where contractor failed to meet one of the requirements specified in the contract as necessary for performance); *Western Aviation Maint.*, GSBGA 14165, 98-2 BCA ¶29,816, 41 GC ¶36; *Rohr, Inc.*, ASBCA 44193, 93-2 BCA ¶25,871; *Johnson & Gordon Sec., Inc. v. General Servs. Admin.*, 857 F.2d 1435 (Fed. Cir. 1988), 30 GC ¶372; *General Elec. Automated Sys. Div.*, ASBCA 36214, 89-1 BCA ¶21,195; *Michael M. Grimberg*, DOTBCA 1543, 87-1 BCA ¶19,573, 30 GC ¶314 (Note); *Smith's Inc. of Dothan*, VABCA 2198, 85-2 BCA ¶18,133, 28 GC ¶198 (Note). But see *Seneca Timber Co.*, AGBCA 83-228-1, 86-1 BCA ¶19,573, 30 GC ¶314 (Note); *Cedar Lumber, Inc.*, AGBCA 85-214-1, 85-3 BCA ¶18,346, 28 GC ¶198 (Note), *rev'd on other grounds*, 779 F.2d 743 (Fed. Cir. 1986), 28 GC ¶302. See also *Garrett v. General Elec. Co.*, 987 F.2d 747, 750 (Fed. Cir. 1993).
- 107/ 41 U.S.C.A. §607(d).
- 108/ *LaBarge Prods., Inc. v. West*, 46 F.3d 1547, 1554 (Fed. Cir. 1995), 37 GC ¶136 (quoting *Paragon Energy Corp. v. United States*, 645 F.2d 966, 972 (Ct. Cl. 1981)); see also *Pathman Constr. Co. v. United States*, 817 F.2d 1573, 1578 (Fed. Cir. 1987) ("major purpose" of the CDA is to "induce resolution of contract disputes with the government by negotiation rather than litigation").

- 109/** Statistica, Inc., ASBCA 44116, 92-3 BCA ¶ 25,095.
- 110/** Coastal Corp. v. United States, 713 F.2d 728 (Fed. Cir. 1983), 25 GC ¶ 270; Statistica, Inc., ASBCA 44116, 92-3 BCA ¶ 25,095; Computer Consoles, Inc., GSBCA 8450-C, 87-1 BCA ¶ 19,440, 29 GC ¶ 282 (Note); see Ammon Circuits Research, ASBCA 50885, 97-2 BCA ¶ 29,318; RC 27th Ave. Corp., ASBCA 49176, 97-1 BCA ¶ 28,658.
- 111/** See Clinger-Cohen Act of 1996, Pub. L. No. 104-106, § 5101, 110 Stat. 186 (1996) (eliminating GSBCA's bid protest authority).
- 112/** Wells Fargo Bank, N.A. v. United States, 88 F.3d 1012, 1022 (Fed. Cir. 1996), 38 GC ¶ 421.
- 113/** Ben M. White Co., ASBCA 39444, 90-3 BCA ¶ 23,115, aff'd on recons., 91-1 BCA ¶ 23,295.
- 114/** Inman & Assocs., Inc., ASBCA 37869, 89-3 BCA ¶ 22,066.
- 115/** 41 U.S.C.A. § 606; 48 C.F.R. §§ 6101.2(b)(1)(i), 6101.6(b) (CBCA R. 2(b)(1)(i), 6(b)).
- 116/** 48 C.F.R. § 6101.3(b) (CBCA R. 3(b)); see Cosmic Constr. Co. v. United States, 697 F.2d 1389 (Fed. Cir. 1982), 25 GC ¶ 67, aff'g ASBCA 26537, 82-1 BCA ¶ 15,541.
- 117/** 48 C.F.R. § 6101.2(a)(1)(ii) (CBCA R. 2(a)(1)(ii)).
- 118/** 48 C.F.R. § 6101.2(a)(1)(i) (CBCA R. 2(a)(1)(i)).
- 119/** 48 C.F.R. § 6101.6(c) (CBCA R. 6(c)).
- 120/** 48 C.F.R. § 6101.4(a) (CBCA R. 4(a)). See generally Willard & Jackson, "Selected Procedural Issues at the Boards of Contract Appeals," Briefing Papers No. 98-7 (June 1998).
- 121/** Bonneville Assocs. v. United States, 43 F.3d 649 (Fed. Cir. 1994); National Neighbors, Inc. v. United States, 839 F.2d 1539 (Fed. Cir. 1988), 30 GC ¶ 86; Glenn v. United States, 858 F.2d 1577 (Fed. Cir. 1988); Tuttle/White Constructors, Inc. v. United States, 656 F.2d 644 (Ct. Cl. 1981), 23 GC ¶ 408.
- 122/** 48 C.F.R. § 6101.5(a)(2) (CBCA R. 5(a)(2)).
- 123/** 48 C.F.R. § 6101.5(a) (CBCA R. 5(a)).
- 124/** Greenlee Constr., Inc. v. General Servs. Admin., CBCA 416, 07-1 BCA ¶ 33,514 (slip op. at 8).
- 125/** Marino Constr. Co., VABCA 2752, 90-1 BCA ¶ 22,553; J.W. Bateson Co., ASBCA 24425, 84-1 BCA ¶ 16,942; J.H. Strain & Sons, Inc., ASBCA 34432, 88-3 BCA ¶ 20,909 (refusing to enforce a settlement agreement that the agency's attorney entered into without authority); see American Bosch Arma Corp., ASBCA 10305, 67-2 BCA ¶ 6564, 9 GC ¶ 449; GSA Delegations of Authority Manual ADMP 5450.39C, ch. 6; Nash, "Settlement of Claims: Who Is Authorized to Do What?," 6 Nash & Cibinic Rep. ¶ 52 (Sept. 1992).
- 126/** 48 C.F.R. § 6101.25(b) (CBCA R. 25(b)).
- 127/** 48 C.F.R. § 6101.25(b) (CBCA R. 25(b)).
- 128/** E.g., RB Realty Inc. v. General Servs. Admin., CBCA 482, 07-1 BCA ¶ 33,487; Bhandari Constructors & Consultants, Inc. v. Dep't of Veterans Affairs, CBCA 4 et al., 07-1 BCA ¶ 33,497; New England Design Assocs. v. Dep't of Veterans Affairs, CBCA 9 et al., 2007 WL 731066 (Mar. 1, 2007); see 48 C.F.R. § 6101.31(a) (CBCA R. 31(a)); see also 31 U.S.C.A. § 1304; 41 U.S.C.A. § 612. See generally Vacketta & Kantor, "Obtaining Payments From the Government's 'Judgment Fund,'" Briefing Papers No. 97-3 (Feb. 1997).
- 129/** E.g., Federal Data Corp. v. SMS Data Prods. Group, 819 F.2d 277 (Fed. Cir. 1987), 29 GC ¶ 187; Cosmo Constr. Co., IBCA 412, 1964 BCA ¶ 4059, 6 GC ¶ 116.
- 130/** E.g., Rimar Constr. Co., AGBCA 88-33-1, 89-3 BCA ¶ 22,074, 31 GC ¶ 358; see 41 U.S.C.A. § 602(a). But see City Contractors, Inc., DOTBCA 2073, 91-1 BCA ¶ 23,531.
- 131/** East Coast Sec. Servs., Inc. v. Dep't of Homeland Security, DOTBCA 4469R, 06-1 BCA ¶ 33,290 (cited in AMEC Constr. Mgmt., Inc. v. General Servs. Admin., CBCA 389, 07-1 BCA ¶ 33,505 (slip op. at 3)); Seagraves Coating Corp., GSBCA 13069 (11270)-REIN et al., 96-2 BCA ¶ 28,543; PRC, Inc., DOTBCA 2543, 94-2 BCA ¶ 26,613; G.E.T. Constr. Co., ASBCA 24234, 84-2 ¶ BCA 17,464; Montgomery Ross Fisher, Inc., VABCA 3696, 94-1 BCA ¶ 26,527, 36 GC ¶ 33; Construcciones Electromecanicas S.A., ASBCA 41413, 94-1 BCA ¶ 26,296.
- 132/** Marino Constr. Co., VABCA 2752, 90-1 BCA ¶ 22,553; Rimar Constr. Co., AGBCA 88-33-1, 89-3 BCA ¶ 22,074, 31 GC ¶ 358.
- 133/** 5 U.S.C.A. § 571 et. seq. See generally Arnava, "Alternative Dispute Resolution/Edition III," Briefing Papers No. 03-5 (Apr. 2003); Arnava & Hornyak, "Alternative Dispute Resolution/Edition II," Briefing Papers No. 96-11 (Oct. 1996). See also Conroy & Harty, "Alternative Dispute Resolution at the ASBCA," Briefing Papers No. 00-7 (June 2000).
- 134/** CBCA, Alternative Dispute Resolution at the Civilian Board of Contract Appeals, [http://www.cbca.gsa.gov/CBCA-17712-v1-CBCA\\_ADR.htm](http://www.cbca.gsa.gov/CBCA-17712-v1-CBCA_ADR.htm) (last visited June 29, 2007); see 48 C.F.R. § 6101.54(a)(1), (2) (CBCA R. 54(a)(1), (2)).
- 135/** CBCA, Alternative Dispute Resolution at the Civilian Board of Contract Appeals, [http://www.cbca.gsa.gov/CBCA-17712-v1-CBCA\\_ADR.htm](http://www.cbca.gsa.gov/CBCA-17712-v1-CBCA_ADR.htm) (last visited June 29, 2007); 48 C.F.R. § 6101.54(a)(1) (CBCA R. 54(a)(1)) ("the parties shall jointly request ADR in writing").
- 136/** CBCA, Alternative Dispute Resolution at the Civilian Board of Contract Appeals, [http://www.cbca.gsa.gov/CBCA-17712-v1-CBCA\\_ADR.htm](http://www.cbca.gsa.gov/CBCA-17712-v1-CBCA_ADR.htm) (last visited June 29, 2007).
- 137/** CBCA, Alternative Dispute Resolution at the Civilian Board of Contract Appeals, [http://www.cbca.gsa.gov/CBCA-17712-v1-CBCA\\_ADR.htm](http://www.cbca.gsa.gov/CBCA-17712-v1-CBCA_ADR.htm) (last visited June 29, 2007); 48 C.F.R. § 6101.54(a) (CBCA R. 54(a)); CBCA, Civilian Board Mission, <http://www.cbca.gsa.gov/mission.htm> (last visited June 29, 2007).
- 138/** See 48 C.F.R. 6102.4(a) (GSBCA Rules) (2006); Schaengold & Brams, "Choice of Forum for Contract Claims: Court vs. Board/Edition II," Briefing Papers No. 06-6, at 14 (May 2006).
- 139/** E.g., Kinney, "FAA: ODR: TSA, Screening Firm Should Negotiate Labor Rates After Letter Contract Performed," 84 Fed. Cont. Rep. (BNA) 305 (Sept. 27, 2005).
- 140/** 48 C.F.R. § 6101.54(b) (CBCA R. 54(b)).
- 141/** 48 C.F.R. § 6101.54(b)(2) (CBCA R. 54(b)(2)).
- 142/** 48 C.F.R. § 6101.54(a)(2) (CBCA R. 54(a)(2)).
- 143/** 48 C.F.R. § 6101.54(c)(1) (CBCA R. 54(c)(1)); CBCA, Alternative Dispute Resolution at the Civilian Board of Contract Appeals, [http://www.cbca.gsa.gov/CBCA-17712-v1-CBCA\\_ADR.htm](http://www.cbca.gsa.gov/CBCA-17712-v1-CBCA_ADR.htm) (last visited June 29, 2007).
- 144/** 48 C.F.R. § 6101.54(c)(2) (CBCA R. 54(c)(2)); CBCA, Alternative Dispute Resolution at the Civilian Board of Contract Appeals, [http://www.cbca.gsa.gov/CBCA-17712-v1-CBCA\\_ADR.htm](http://www.cbca.gsa.gov/CBCA-17712-v1-CBCA_ADR.htm) (last visited June 29, 2007).

- 145/** 48 C.F.R. § 6101.54(c)(3) (CBCA R. 54(c)(3)); CBCA, Alternative Dispute Resolution at the Civilian Board of Contract Appeals, [http://www.cbca.gsa.gov/CBCA-17712-v1-CBCA\\_ADR.htm](http://www.cbca.gsa.gov/CBCA-17712-v1-CBCA_ADR.htm) (last visited June 29, 2007).
- 146/** 48 C.F.R. § 6101.54(c)(4) (CBCA R. 54(c)(4)); CBCA, Alternative Dispute Resolution at the Civilian Board of Contract Appeals, [http://www.cbca.gsa.gov/CBCA-17712-v1-CBCA\\_ADR.htm](http://www.cbca.gsa.gov/CBCA-17712-v1-CBCA_ADR.htm) (last visited June 29, 2007).
- 147/** 48 C.F.R. § 6101.54(c)(5) (CBCA R. 54(c)(5)); CBCA, Alternative Dispute Resolution at the Civilian Board of Contract Appeals, [http://www.cbca.gsa.gov/CBCA-17712-v1-CBCA\\_ADR.htm](http://www.cbca.gsa.gov/CBCA-17712-v1-CBCA_ADR.htm) (last visited June 29, 2007).
- 148/** 48 C.F.R. § 6101.54(c)(6) (CBCA R. 54(c)(6)); CBCA, Alternative Dispute Resolution at the Civilian Board of Contract Appeals, [http://www.cbca.gsa.gov/CBCA-17712-v1-CBCA\\_ADR.htm](http://www.cbca.gsa.gov/CBCA-17712-v1-CBCA_ADR.htm) (last visited June 29, 2007).
- 149/** 48 C.F.R. § 6101.54(b)(1) (CBCA R. 54(b)(1)); CBCA, Alternative Dispute Resolution at the Civilian Board of Contract Appeals, [http://www.cbca.gsa.gov/CBCA-17712-v1-CBCA\\_ADR.htm](http://www.cbca.gsa.gov/CBCA-17712-v1-CBCA_ADR.htm) (last visited June 29, 2007).
- 150/** 48 C.F.R. § 6101.54(b)(1) (CBCA R. 54(b)(1)); CBCA, Alternative Dispute Resolution at the Civilian Board of Contract Appeals, [http://www.cbca.gsa.gov/CBCA-17712-v1-CBCA\\_ADR.htm](http://www.cbca.gsa.gov/CBCA-17712-v1-CBCA_ADR.htm) (last visited June 29, 2007).
- 151/** 48 C.F.R. § 6101.54(b)(3) (CBCA R. 54(b)(3)) ("Written material prepared specifically for use in an ADR proceeding, oral presentations made at an ADR proceeding, and all discussions in connection with such proceedings are considered 'dispute resolution communications' as defined in 5 U.S.C. 571(5) and are subject to the confidentiality requirements of 5 U.S.C. 574. Unless otherwise specifically agreed by the parties, confidential dispute resolution communications shall be inadmissible as evidence in any pending or future Board proceeding involving the parties or the issue in controversy which is the subject of the ADR proceeding. However, evidence otherwise admissible before the Board is not rendered inadmissible because of its use in an ADR proceeding.")
- 152/** 72 Fed. Reg. 36,794 (July 5, 2007) (codified at 48 C.F.R. pt. 6101); cf. 72 Fed. Reg. at 36,795 ("These rules of procedure are based on and do not differ in any substantial way from the rules of procedure which existed at the predecessor civilian agency boards.")
- 153/** Matthews, "Daniels To Head Consolidated Civilian Board," 85 Fed. Cont. Rep. (BNA) 167 (Feb. 14, 2006); Interview by the author, Michael J. Schaengold, with CBCA Chairman Daniels and Vice-Chairman Parker (July 10, 2007); Telephone Interview by the author, Michael J. Schaengold, with GSBCA Vice Chairman Parker (Apr. 13, 2006); see also 72 Fed. Reg. 23,312 (Apr. 30, 2007) ("The Board intends to issue final, revised rules after considering all comments on the proposed rules.")
- 154/** 49 GC ¶ 209; 49 GC ¶ 21; see McGovern, Graham & Nibley, "A Level Playing Field: In Enacting the Contract Disputes Act, Congress Intended That the Boards of Contract Appeals Would Have Subpoena Power Over Both Contractor and the Government," 36 Pub. Cont. L.J. 495 (Summer 2007).
- 155/** P.J. Dick, Inc. v. General Servs. Admin., CBCA 453, 07-1 BCA ¶ 33,518 (slip op. at 2 n.2); P.J. Dick, Inc. v. General Servs. Admin., CBCA 469, 07-1 BCA ¶ 33,542 (slip op. at 2 n.1); Interview by the author, Michael J. Schaengold, with CBCA Chairman Daniels and Vice-Chairman Parker (July 10, 2007).
- 156/** 72 Fed. Reg. 36,794 (July 5, 2007) (revising 48 C.F.R. pts. 6101-6105).
- 157/** 72 Fed. Reg. at 36,795.
- 158/** 72 Fed. Reg. 36,794.
- 159/** 48 C.F.R. § 6101.16 (CBCA R. 16).
- 160/** 72 Fed. Reg. at 36,795 (emphasis added).
- 161/** For an excellent discussion of the authority of the boards of contract appeals to issue subpoenas to, and enforce them against, Federal Government agencies, see McGovern, Graham & Nibley, "A Level Playing Field: In Enacting the Contract Disputes Act, Congress Intended That the Boards of Contract Appeals Would Have Subpoena Power Over Both Contractor and the Government," 36 Pub. Cont. L.J. 495 (Summer 2007); see also Yousuf v. Samantar, 451 F.3d 248, 254 (D.C. Cir. 2006) (Federal Government is a "person" under Federal Rule of Civil Procedure 45 for purposes of being subject to the district court's subpoena power); Heritage Reporting Corp., GSBCA 10396, 90-3 BCA ¶ 22,977 (Department of Justice complies with GSBCA subpoena to it); 49 GC ¶ 209.
- 162/** 48 C.F.R. § 6101.1(a) (CBCA R. 1(a)).
- 163/** 48 C.F.R. § 6101.1(c) (CBCA R. 1(c)).
- 164/** 48 C.F.R. § 6101.1(d) (CBCA R. 1(d)).
- 165/** 48 C.F.R. § 6101.13(a) (CBCA R. 13(a)).
- 166/** 48 C.F.R. § 6101.13(c) (CBCA R. 13(c)).
- 167/** 48 C.F.R. § 6101.13(d) (CBCA R. 13(d)). See Schaengold & Brams, "Choice of Forum for Contract Claims: Court vs. Board/Edition II," Briefing Papers No. 06-6, at 18-19 (May 2006).
- 168/** 41 U.S.C.A. § 610; 48 C.F.R. §§ 6101.13(f), (g), (h), 6101.16, 6101.33(c) (CBCA R. 13(f), (g), (h), 16, 33(c)).
- 169/** 41 U.S.C.A. § 610; 48 C.F.R. § 6101.16 (CBCA R. 16). But see 72 Fed. Reg. 36,794, 36,795 (July 5, 2007) ("The Department of Justice has recently provided advice concluding that the statute that granted subpoena authority to the separate agency boards of contract appeals, and that provides such authority to the consolidated Board, does not provide the necessary legal authority for a board to enforce a subpoena against a federal agency."); see also McGovern, Graham & Nibley, "A Level Playing Field: In Enacting the Contract Disputes Act, Congress Intended That the Boards of Contract Appeals Would Have Subpoena Power Over Both Contractor and the Government," 36 Pub. Cont. L.J. 495 (Summer 2007). The failure to honor a subpoena in aid of discovery, see 48 C.F.R. § 6101.13 (g), (h) (CBCA R. 13(g), (h)), could lead to the sanctions listed in 48 C.F.R. § 6101.33(c) (CBCA R. 33(c)), including: "(1) Taking the facts pertaining to the matter in dispute to be established for the purpose of the case in accordance with the contention of the party submitting the discovery request; (2) Forbidding challenge of the accuracy of any evidence; (3) Refusing to allow the disobedient party to support or oppose designated claims or defenses; (4) Prohibiting the disobedient party from introducing in evidence designated documents or items of testimony; (5) Striking pleadings or parts thereof, or staying further proceedings until the order is obeyed; (6) Dismissing the case or any part thereof; (7) Enforcing the protective order and disciplining individuals subject to such order for violation thereof, including disqualifying a party's representative, attorney, or expert/consultant from further participation in the case; or (8) Imposing such other sanctions as the Board deems appropriate." See Mountain Valley Lumber, Inc., AGBCA 2003-171-1, 06-1 BCA ¶ 33,173 & 06-2 BCA ¶ 33,339, 48 GC ¶ 261. The board's rules also permit it to draw inferences from a refusal to testify or answer questions during a hearing. See 48 C.F.R. § 6101.21(g) (CBCA R. 21(g)).
- 170/** 41 U.S.C.A. § 610; 48 C.F.R. §§ 6101.13(f), (g), (h), 6101.16, 6101.33(c) (CBCA R. 13(f), (g), (h), 16, 33(c)); see, e.g., Ellis Constr. Co., ASBCA 50091, 98-1 BCA ¶ 25,552; E-Systems, Inc., ASBCA 46111, 97-1 BCA ¶ 28,975, 39 GC ¶ 367; American Ballistics Co., ASBCA 38578, 92-3 BCA ¶ 124,873.

- 171/** Mountain Valley Lumber, Inc., CBCA 95, 2007 WL 1811503 (June 21, 2007), 49 GC ¶ 277; Time Contractors, J.V., DOTBCA 1669 et al., 86-3 BCA ¶ 19,318; E-Systems, Inc., ASBCA 46111, 97-1 BCA ¶ 28,975, 39 GC ¶ 367 ("The Board does not have the authority to impose monetary sanctions.") (citing Stemaco Prods., Inc., ASBCA 45469, 94-3 BCA ¶ 27,060); see also Warwick Constr., Inc., GSBCA 6925 et al., 83-2 BCA ¶ 16,663.
- 172/** See Amavas & Ferrell, "Motions Before Contract Appeals Boards," Briefing Papers No. 86-9 (Aug. 1986), 7 BPC 357.
- 173/** 48 C.F.R. § 6101.8 (2006).
- 174/** See 48 C.F.R. § 6101.8 (CBCA R. 8).
- 175/** See 48 C.F.R. § 6101.8(c) (dispositive motions), (g) (motions for summary relief) (CBCA R. 8(c) (dispositive motions), (g) (motions for summary relief)).
- 176/** Acquest Gov't Holdings U.S. Geological, LLC v. General Servs. Admin., CBCA 439, 07-1 BCA ¶ 33,576 (slip op. at 10). The Civilian Board has further observed that "[i]n resolving summary relief motions, a fact is considered to be material if it will affect our decision and an issue is genuine if enough evidence exists such that the fact could reasonably be decided in favor of the non-movant after a hearing." Lyda v. General Servs. Admin., CBCA 493, 2007 WL 2083623, slip op. at 6 (July 17, 2007).
- 177/** Acquest Gov't Holdings U.S. Geological, LLC v. General Servs. Admin., CBCA 439, 07-1 BCA ¶ 33,576 (slip op. at 14).
- 178/** Greenlee Constr., Inc. v. General Servs. Admin., CBCA 416, 07-1 ¶ BCA 33,514 (slip op. at 8).
- 179/** See 48 C.F.R. §§ 6101.20, 6101.21 (CBCA R. 20, 21).
- 180/** See 48 C.F.R. § 6101.19 (CBCA R. 19); see also 48 C.F.R. § 6101.18 (CBCA R. 18) ("In most cases, the Board will require the parties to make an election soon after discovery closes.").
- 181/** See 48 C.F.R. § 6101.18 (CBCA R. 18). It is possible for one party to elect a hearing and the other party to elect to submit its case on the record (i.e., without a hearing). This can result in one party not appearing for the hearing or appearing in a limited role (e.g., to cross-examine witnesses). 48 C.F.R. § 6101.18 (CBCA R. 18); see 48 C.F.R. § 6101.19 (CBCA R. 19).
- 182/** 48 C.F.R. § 6101.10(a) (CBCA R. 10(a)) (emphasis added).
- 183/** 48 C.F.R. § 6101.10(a) (CBCA R. 10(a)).
- 184/** 48 C.F.R. § 6101.4(a), (d) (CBCA R. 4(a), (d)).
- 185/** 48 C.F.R. § 6101.4(g) (CBCA R. 4(g)).
- 186/** 48 C.F.R. § 6101.20(a) (CBCA R. 20(a)).
- 187/** Interview by the author, Michael J. Schaengold, with CBCA Chairman Daniels and Vice-Chairman Parker (July 10, 2007).
- 188/** 48 C.F.R. § 6101.21(a)(4) (CBCA R. 21(a)(4)); see 48 C.F.R. §§ 6101.25(a)(2), 6101.51(b) (CBCA R. 25(a)(2), 51(b)).
- 189/** 48 C.F.R. § 6101.21(g) (CBCA R. 21(g)); see also 48 C.F.R. § 6101.16 (CBCA R. 16).
- 190/** 48 C.F.R. § 6101.25(a)(1) (CBCA R. 25(a)(1)).
- 191/** 48 C.F.R. §§ 6101.1(e), 6101.28, 6101.52(b), 6101.53(b) (CBCA R. 1(e), 28, 52(b), 53(b)).
- 192/** 48 C.F.R. § 6101.1(e) (CBCA R. 1(e)).
- 193/** 48 C.F.R. § 6101.25(a)(1) (CBCA R. 25(a)(1)).
- 194/** 48 C.F.R. § 6101.31(a) (CBCA R. 31(a)); see 5 U.S.C.A. § 504.
- 195/** 48 C.F.R. § 6101.28(a) (CBCA R. 28(a)); see Business Mgmt. Research Assocs. v. General Servs. Admin., CBCA 464, 07-1 BCA ¶ 33,486 (slip op. at 1).
- 196/** Business Mgmt. Research Assocs. v. General Servs. Admin., CBCA 464, 07-1 BCA ¶ 33,486 (full board) (slip op. at 2).
- 197/** 48 C.F.R. § 6101.28(a)(2) (CBCA R. 28(a)(2)).
- 198/** 48 C.F.R. § 6101.28(b) (CBCA R. 28(b)); see 48 C.F.R. §§ 6101.26(c), 6101.27(c) (CBCA R. 26(c), 27(c)).
- 199/** 48 C.F.R. § 6101.28(c) (CBCA R. 28(c)).
- 200/** 48 C.F.R. § 6101.51(a) (CBCA R. 51(a)); see 41 U.S.C.A. §§ 607(f), 608.
- 201/** 48 C.F.R. § 6101.52(a) (CBCA R. 52(a)); see 41 U.S.C.A. § 608.
- 202/** 48 C.F.R. § 6101.52(a) (CBCA R. 52(a)); 41 U.S.C.A. § 608(a); Pub.L. No. 109-163, § 857.
- 203/** 48 C.F.R. § 6101.52(b), (d) (CBCA R. 52(b), (d)); see 41 U.S.C.A. § 608(b), (c).
- 204/** 48 C.F.R. § 6101.52(b) (CBCA R. 52(b)).
- 205/** 48 C.F.R. § 6101.52(b) (CBCA R. 52(b)); see 41 U.S.C.A. § 608(b), (d), (e).
- 206/** 48 C.F.R. § 6101.52(c) (CBCA R. 52(c)); see 48 C.F.R. § 6101.6(d) (CBCA R. 6(d)).
- 207/** 48 C.F.R. § 6101.53(a) (CBCA R. 53(a)); see 41 U.S.C.A. § 607(f).
- 208/** 48 C.F.R. § 6101.53(b), (d) (CBCA R. 53(b), (d)); see 41 U.S.C.A. § 607(f).
- 209/** 48 C.F.R. § 6101.53(c) (CBCA R. 53(c)); see 48 C.F.R. § 6101.6(d) (CBCA R. 6(d)).
- 210/** 28 U.S.C.A. § 1295(a)(3), (10); 41 U.S.C.A. § 607(g)(1); 48 C.F.R. § 6101.32 (CBCA R. 32). See generally Shea & Schaengold, "A Guide to the Court of Appeals for the Federal Circuit," Briefing Papers No. 90-13 (Dec. 1990).
- 211/** 41 U.S.C.A. § 607(g)(1); Practice Note to Fed. Cir. R. 15.
- 212/** 28 U.S.C.A. § 1295(b); 41 U.S.C.A. § 607(g)(1)(B).
- 213/** Dewey Elecs. Corp. v. United States, 803 F.2d 650 (Fed. Cir. 1986), 28 GC ¶ 311.
- 214/** SMS Data Prods. Group, Inc. v. United States, 900 F.2d 1553 (Fed. Cir. 1990), 32 GC ¶ 187; S.S. Silberblatt, Inc. v. United States, 888 F.2d 829 (Fed. Cir. 1989); Fortec Constructors v. United States, 760 F.2d 1288 (Fed. Cir. 1985); see Erickson Air Crane Co. v. United States, 731 F.2d 810 (Fed. Cir. 1984), 26 GC ¶ 253.
- 215/** 41 U.S.C.A. § 609(b); Federal Data Corp. v. United States, 911 F.2d 699 (Fed. Cir. 1990), 32 GC ¶ 318; SMS Data Prods. Group, Inc. v. United States, 900 F.2d 1553 (Fed. Cir. 1990), 32 GC ¶ 187; Blount Bros. Corp. v. United States, 872 F.2d 1003 (Fed. Cir. 1980), 31 GC ¶ 215 (Note); FMC Corp. v. United States, 853 F.2d 882 (Fed. Cir. 1988), 30 GC ¶ 346; United States v. Boeing Co., 802 F.2d 1390 (Fed. Cir. 1986), 28 GC ¶ 297.
- 216/** Blount Bros. Corp. v. United States, 872 F.2d 1003 (Fed. Cir. 1980), 31 GC ¶ 215 (Note); FMC Corp. v. United States, 853 F.2d 882 (Fed. Cir. 1988), 30 GC ¶ 346.
- 217/** Federal Judiciary Annual Reports (Judicial Business of the U.S. Courts) for 1997-2006, available at <http://www.fedcir.gov/#information>.