

Choice of Forum for Government Contract Claims: Court of Federal Claims vs. Board of Contract Appeals

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Introduction

The Contract Disputes Act of 1978 (CDA) provides Government contractors with a choice of forum to challenge a Contracting Officer's (CO) adverse Final Decision¹ on a contract claim.² A contractor has the *exclusive* right to choose the forum to litigate its claim³ and either may file a suit in the United States Court of Federal Claims (CFC) or may appeal to the appropriate agency board of contract appeals.⁴ Because the Government cannot appeal a CO's decision, only a contractor may initially invoke the jurisdiction of the CFC or a board.⁵ However, once a contractor has filed an action in one of

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¹ As discussed below, for purposes of a contractor's right either to file suit in the Court of Federal Claims or right to appeal to the appropriate Board of Contract Appeals, an adverse Contracting Officer's Final Decision can include, for example, the failure of the Contracting Officer to issue a requested Final Decision within a reasonable period of time, which is known as a "deemed denial" of the contractor's claim. *See* 41 U.S.C. § 605(c)(5) (2000); FAR § 33.211(g) (2007).

² 41 U.S.C. § 607 (2000); *see also* 41 U.S.C. §§ 601–613 (2000).

³ *LaBarge Prods., Inc. v. West*, 46 F.3d 1547, 1554 (Fed. Cir. 1995); *S.J. Groves & Sons Co. v. United States*, 661 F.2d 171, 173 (Ct. Cl. 1981); *Holly Corp., ASBCA No. 24975, 80-2 BCA ¶ 14,675*.

⁴ 41 U.S.C. §§ 606, 609(a); *see also LaBarge Prods.*, 46 F.3d at 1554; *Nat'l Neighbors, Inc. v. United States*, 839 F.2d 1539, 1541 (Fed. Cir. 1988); S. REP. NO. 95-1118, at 2 (1978), *reprinted in* 1978 U.S.C.C.A.N. 5235, 5236.

⁵ *See* 41 U.S.C.A. §§ 606, 609(a); *Seaboard Lumber Co. v. United States*, 903 F.2d 1560, 1562 (Fed. Cir. 1990); *see also Pathman Constr. Co. v. United States*, 817 F.2d 1573, 1578 (Fed. Cir. 1987) ("A major purpose of the Disputes Act {CDA} was to induce resolution of contract disputes with the Government by negotiation rather than litigation.").

the forums, the choice ordinarily is final.⁶ It is therefore important that the contractor select the most advantageous forum in its initial filing.

The Federal Courts Administration Act of 1992, which included the Court of Federal Claims Technical and Procedural Improvements Act of 1992, somewhat clarified the circumstances under which a contractor possesses a forum choice.⁷ In addition to changing the name of the U.S. Claims Court to the *U.S. Court of Federal Claims*,⁸ the Federal Courts Administration Act expanded the CFC's jurisdiction to include non-monetary Government contract disputes.⁹ This made the CFC's CDA contract disputes jurisdiction almost identical to that of the boards'. Thus, contractors may choose between the CFC and the boards of contract appeals in virtually all CDA litigation resulting from adverse CO final decisions.¹⁰

Since the 1993 publication of a related article on this subject,¹¹ there have been significant developments and changes related to the court and the boards that affect a contractor's choice-of-forum decision-making. To assist a contractor in selecting the most appropriate forum for resolving its Government contracts dispute, this article provides important and current information about the forums, including the new *Civilian Board of Contract Appeals*. This article discusses (1) the often confusing sources of jurisdiction for contract actions in the court and boards, (2) the claims that may raise special jurisdictional issues, (3) the relief available in Government contract cases at the forums, (4) the important pre-litigation considerations that may influence a contractor's forum choice, (5) the similarities and differences between the rules, procedures and practices of the court and boards that apply to pretrial procedures, accelerated and expedited actions, discovery, motions, trials, and decisions and opinions, and (6) appellate review of court and board decisions by the U.S. Court of Appeals for the Federal Circuit (Federal Circuit).

⁶ *Bonneville Assocs. v. United States*, 43 F.3d 649, 653 (Fed. Cir. 1994); *Glenn v. United States*, 858 F.2d 1577, 1580 (Fed. Cir. 1988); *Nat'l Neighbors*, 839 F.2d at 1542; *Tuttle/White Constructors, Inc. v. United States*, 656 F.2d 644, 646 (Ct. Cl. 1981).

⁷ Federal Courts Administration Act of 1992, Pub. L. No. 102-572, § 907, 106 Stat. 4506, 4518 (1992) (amending 41 U.S.C. § 605).

⁸ *Id.* § 902, 106 Stat. at 4516.

⁹ *Id.* § 907(b)(1), 106 Stat. at 4519.

¹⁰ *See, e.g., id.* § 907, 106 Stat. at 4519.

¹¹ *See* Schaengold et al., *Choice of Forum for Contract Claims: Court v. Board*, 3 FED. CIR. B.J. 35 (1993).

I. About the Forums

1. Court of Federal Claims

The Federal Courts Improvement Act of 1982 established the U.S. Claims Court (Claims Court) pursuant to Article I of the U.S. Constitution.¹² The Claims Court inherited the trial jurisdiction of its predecessor, the U.S. Court of Claims, and extended it to include pre-award bid protest actions.¹³ Congress expanded the Claims Court's CDA contract jurisdiction to include non-monetary disputes¹⁴ and renamed it the *Court of Federal Claims* by the Federal Courts Administration Act of 1992.¹⁵ The Administrative Dispute Resolution Act of 1996 added post-award bid protests to the court's jurisdiction¹⁶ and, as of January 1, 2001, made the court the exclusive judicial forum for the resolution of bid protests.¹⁷

The CFC has national jurisdiction and may sit anywhere within the United States;¹⁸ in addition, the Federal Courts Administration Act authorizes the court to conduct proceedings outside of the United States.¹⁹ Prior to the Federal Courts Administration Act, a Federal Circuit decision ruled that the court, unlike the boards, could not sit outside the United States.²⁰ Other changes made by that Act include specifically granting the court the authority to tax costs, the authority to assess attorney's fees and other costs, and contempt powers.²¹

The CFC is composed of sixteen active judges who are appointed by the President, confirmed by the Senate, and serve fifteen-year terms.²² At pres-

¹² Federal Courts Improvement Act of 1982, Pub. L. No. 97-164, § 105(a), 96 Stat. 25 (amending 28 U.S.C. § 171(a)); *see* *Bowen v. Mass.*, 487 U.S. 879, 908 n.48 (1988); *Seaboard Lumber Co. v. United States*, 903 F.2d 1560, 1562 (Fed. Cir. 1990).

¹³ 28 U.S.C. § 1491(a)(3) (1994) (prior to repeal by Administrative Dispute Resolution Act of 1996, Pub. L. No. 104-320, § 12(a)(2), 110 Stat. 3870, 3884); *see also* *United States v. John C. Grimberg Co.*, 702 F.2d 1362, 1364, 1369 (Fed. Cir. 1983).

¹⁴ Federal Courts Administration Act of 1992, Pub. L. No. 102-572, § 907(b)(1), 106 Stat. 4506, 4519 (amending 28 U.S.C. § 1491(a)(2)).

¹⁵ *Id.* § 902, 106 Stat. at 4516.

¹⁶ Administrative Dispute Resolution Act of 1996, Pub. L. No. 104-320, § 12(a)(3), 110 Stat. 3870, 3874 (amending 28 U.S.C. § 1491(b)).

¹⁷ *Id.* § 12(d), 110 Stat. at 3874-75.

¹⁸ 28 U.S.C. §§ 173, 2505 (2000).

¹⁹ Federal Courts Administration Act § 906.

²⁰ *In re United States*, 877 F.2d 1568, 1572, 1573 (Fed. Cir. 1989).

²¹ Federal Courts Administration Act §§ 908-910.

²² 28 U.S.C. §§ 171(a), 172(a) (2000).

ent, there are also ten senior judges,²³ which may suggest (as discussed below) that the court has extra capacity for the prompt resolution of its cases. The President designates one of the active judges to serve as chief judge until that person reaches the age of seventy or the President designates another judge to be chief judge.²⁴ At the expiration of their term of office, judges may be reappointed (i.e., be nominated by the President, if the President so chooses, and confirmed by the Senate), or they may take *senior* status and continue to adjudicate cases.²⁵

Unlike board judges, CFC judges, are not required to have Government contracts experience.²⁶ Therefore, it is not unusual for an individual's case to be heard and decided by a single CFC judge who does not have a formal Government contracts background.²⁷ Active CFC judges, however, are assigned two law clerks, compared with board judges, who ordinarily do not have a law clerk.²⁸ Under the Federal Courts Administration Act, the active judges of the court are authorized two law clerks, a significant advantage compared to the rather minimal staffing currently available to the boards.²⁹ Cases are randomly assigned to a single judge; however, directly related cases are assigned to the judge who was assigned the earliest filed case.³⁰ The parties have a continuing duty to inform the court of any pending directly related cases filed in the court.³¹ “[F]or the convenience of parties or witnesses or in the interest of justice,” the CFC may order the consolidation of two or more suits arising from the same contract or transfer such suits to the appropriate board.³² Therefore, if a contractor files actions based on the same contract at

²³ The ten Senior Judges on the CFC are Judges Bruggink, Futey, Gibson, Hodges, Lydon, Margolis, Merow, Smith, Wiese, and Yock. Biographies—Judges, Senior Judges, and Special Masters, <http://www.uscfc.uscourts.gov/Biosnew.htm> (last visited Jan. 10, 2008).

²⁴ 28 U.S.C. § 171(b) (2000).

²⁵ See 28 U.S.C. § 178.

²⁶ Compare 41 U.S.C. §§ 438(b)(1)(B), 607(b)(1) (2000), with 28 U.S.C. §§ 44, 171 (2000).

²⁷ 28 U.S.C. § 174(a) (2000).

²⁸ See 28 U.S.C. § 794 (judges may appoint as many law clerks as the Judicial Conference approves for district judges); See also Federal Law Clerk Information System, <https://lawclerks.ao.uscourts.gov/web/jobSearch>.

²⁹ *Id.*

³⁰ Rule of the United States Court of Federal Claims (RCFC) 40.1, 40.2(a); see RCFC 40.2(b) (providing mechanism for possible reassignment of indirectly related cases).

³¹ RCFC 40.2(a). For indirectly related cases, a party may, but is not required to, inform the court of indirectly related such cases. See RCFC 40.2(b).

³² 41 U.S.C. § 609(d) (2000); see also *Morse Diesel Int'l v. United States*, 69 Fed. Cl. 558, 562–63 (2006); *Giuliani Contracting Co. v. United States*, 21 Cl. Ct. 81, 82–83 (1990). A case may also be “transferred by order of the assigned judge to another judge upon the

both the CFC and a board, the contractor risks consolidation of the cases in one forum without any control over which forum receives its cases.

2. Boards of Contract Appeals

The boards of contract appeals are designed to provide “to the fullest extent practicable, informal, expeditious, and inexpensive resolution of disputes” arising from Government contracts.³³ 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.*”³⁴ The CDA specifically authorized federal agencies to establish boards of contract appeals,³⁵ even though most of the boards had been in existence prior to the CDA.³⁶ For example, the Armed Services Board of Contract Appeals (ASBCA) was created in 1949 through the merger of two predecessor boards.³⁷ 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.³⁸ In

agreement of both judges” or if the chief judge of the CFC deems it necessary for efficient administration of justice. RCFC 40.1. *Morse Diesel Int’l v. United States*, 69 Fed. Cl. 558 (2006) (citing *Joseph Morton Co. v. United States*, 757 F.2d 1273 (Fed Cir. 1985)). The chief judge of the Court of Federal Claims has the authority to “reassign any case” if the chief judge “deems such action necessary for the efficient administration of justice.” RCFC 40.1(c). Then-Chief Judge Smith exercised this authority when approximately 120 thrift cases were filed at the court. *Plaintiffs in All Winstar-Related Cases at the Court v. United States*, 35 Fed. Cl. 707 (1996). A case may also be “transferred by order of the assigned judge to another judge upon the agreement of both judges.” RCFC 40.1(b).

³³ 41 U.S.C. § 607(e).

³⁴ S. REP. NO. 95-1118, at 25 (1978), *reprinted in* 1978 U.S.C.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.”).

³⁵ See 41 U.S.C. § 607.

³⁶ Joel P. Shedd, Jr., *Disputes and Appeals: The Armed Services Board of Contract Appeals*, 29 LAW & CONTEMP. PROBS. 39, 41 (1964) (“At present [1964] there are eleven boards of contract appeals in the various departments and agencies engaged in procurement of supplies and services by contract.”).

³⁷ Shedd, *supra* note 36, at 56.

³⁸ *Boeing Petroleum Servs., Inc. v. Watkins*, 935 F.2d 1260, 1261 (Fed. Cir. 1991); *United States v. General Dynamics, Corp.*, 828 F.2d 1356, 1364 (9th Cir. 1987); *Comm’ns Res. Group, Inc.*, GSBICA No. 11038-C, 92-2 BCA ¶ 24,769; *PX Eng’g Co.*, ASBCA No. 40714, 91-2 BCA ¶ 23,921; *Dry Roof Corp.*, ASBCA No. 29061, 88-3 BCA ¶ 21,096; *Four-Phase Sys., Inc.*, ASBCA No. 26794, 84-2 BCA ¶ 17,416.

addition, under the CDA, the boards are not subject to direction or control by procuring agency management authorities.³⁹

There are currently three boards of contract appeals: (1) the ASBCA, which has jurisdiction over Department of Defense (DOD) (including the Departments of the Army, Navy, and Air Force and all other agencies, components and entities within the DOD) and National Aeronautics and Space Administration (NASA) contracts;⁴⁰ (2) the Civilian Board of Contract Appeals (CBCA or “Civilian Board”), which has jurisdiction over most civilian, federal executive agency contracts (with the exception of NASA, Tennessee Valley Authority (TVA) and U.S. Postal Service related contracts);⁴¹ and (3) the Postal Service Board of Contract Appeals (PSBCA), which has jurisdiction over U.S. Postal Service and the Postal Rate Commission contracts.⁴²

Prior to the January 2007 establishment of the Civilian Board of Contract Appeals, there were ten agency boards of contract appeals: the ASBCA; General Services Administration Board of Contract Appeals (GSBCA); Department of Transportation Board of Contract Appeals (DOTBCA); PSBCA; Department of Agriculture Board of Contract Appeals (AGBCA); Department of Veterans Affairs Board of Contract Appeals (VABCA); Department of the Interior Board of Contract Appeals (IBCA); Department of Energy Board of Contract Appeals (EBCA); Department of Housing and Urban Development Board of Contract Appeals (HUDBCA); and Department of Labor Board of Contract Appeals (LBCA). Some boards, such as the ASBCA (which currently has eighteen judges), do not carry the full complement of judges for which they are authorized.⁴³ In 1993 and 2000, respectively, the

³⁹ 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, Jt. 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”).

⁴⁰ 41 U.S.C. § 607(d).

⁴¹ *Id.*

⁴² *Id.* The CDA also applies to the TVA Board of Contract Appeals in limited circumstances. *See* 41 U.S.C. §§ 607(a)(2), 607(b)(2); 18 C.F.R. § 1308.3 (2005) (CDA applies only if TVA contract includes disputes clause requiring resolution through agency administrative process); 41 U.S.C. §§ 602(b) (CDA does not apply to certain TVA contracts, including contracts for the sale of fertilizer and electric power). Unlike the other boards, the Federal Circuit does not have appellate jurisdiction over TVA Board decisions. *See* 41 U.S.C. § 607(g) (2). The forum choice that is the subject of this article is unavailable for TVA contracts and, therefore, a discussion of the TVA Board is beyond the scope of this article.

⁴³ *See* American Bar Association, *Government Contract Law: The Deskbook for Procurement Professionals*, 459 (3rd ed. 2007) (ASBCA consists of 25-30 administrative law

NASA Board of Contract Appeals (NASABCA) and the Corps of Engineers Board of Contract Appeals (ENGBCA) merged into the ASBCA.⁴⁴ In 1996, the National Defense Authorization Act eliminated the GSBCA's jurisdiction over bid protests—which constituted a substantial part of that board's docket—and potentially freed that board's judges to focus more on contract claims litigation.⁴⁵

Before the passage of the National Defense Authorization Act for Fiscal Year (FY) 2006, an executive agency could establish an agency board of contract appeals when the agency head determined, after consultation with the Administrator of the Office of Federal Procurement Policy, 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.”⁴⁶ If the volume of contract claims was insufficient to justify an agency board, or if an agency head otherwise considered it appropriate, the board of another executive agency could decide appeals from decisions by COs of that agency.⁴⁷ As a result, it was not always immediately clear which board had jurisdiction to hear a contractor's appeal.⁴⁸ The establishment of the Civilian Board of Contract Appeals has substantially clarified this situation.

Board judges must have at least five years' experience in public contract law, are usually appointed by a senior official of their agency, and are only removed for cause.⁴⁹ Generally, a panel of at least two (and usually three) administrative

judges); ASBCA Personnel, <http://docs.law.gwu.edu/asbca/biog.htm> (last visited Jan. 10, 2008) (listing the eighteen current judges at the ASBCA).

⁴⁴ 58 Fed. Reg. 44,462 (Aug. 23, 1993) (to be codified at 48 C.F.R. pt. 1833); see West, *ASBCA Docket Up 9% in FY2000 After Merger with ENGBCA*, 42 GC ¶ 444 (2000); West, *Developments in Brief*, 42 GC ¶ 290 (2000); FY2000 ASBCA REP. OF ACTIVITIES 3 (Oct. 19, 2000).

⁴⁵ See West, *GSBCA's Docket to Change Under Defense Authorization Act*, 38 GC ¶ 70 (1996); see generally National Defense Authorization Act for Fiscal Year 1996, Pub. L. No. 104-106, § 5101, 110 Stat. 680.

⁴⁶ 41 U.S.C. § 607(a).

⁴⁷ See, e.g., 48 C.F.R. § 633.270-2 (2007) (granting GSBCA authority to hear appeals for the Department of State); 48 C.F.R. § 733.270-1 (2007) (granting the ASBCA authority to hear CO appeals from CO final decisions for the Department of Health and Human Services and the Agency for International Development); 48 C.F.R. § 1033.201 (2007) (granting GSBCA authority to hear appeals for the Department of the Treasury); 48 C.F.R. § 1333.70-1 (2007) (granting GSBCA authority to hear appeals for the Department of Commerce); 48 C.F.R. § 3033.211 (2006) (granting DOTBCA authority to hear appeals for the Department of Homeland Security); 48 C.F.R. § 3433.203 (2007) (granting GSBCA authority to hear appeals for the Department of Education).

⁴⁸ See, e.g., San Antonio Cattle Co., ASBCA No. 43714, 92-3 BCA ¶ 25,044.

⁴⁹ See 41 U.S.C. §§ 438(b)(2), 607(b)(1); see also 5 U.S.C. § 3105 (2000).

judges decides board appeals, only one of whom will be present and preside over a contractor hearings.⁵⁰ As discussed below, appeals involving small claims, accelerated procedures, or alternative methods of dispute resolution ordinarily may be decided by a single board judge.⁵¹ Some boards have procedures for reconsideration of panel decisions, or for the review of panel decisions that include a dissent, by an expanded group of board judges—by the *full board* in the case of the Civilian Board⁵² or by a *division* of the ASBCA or, in rare circumstances, the Senior Deciding Group of the ASBCA.⁵³

Prior to the January 2006 passage of the National Defense Authorization Act for Fiscal Year 2006, the authors believe the prevailing wisdom among practitioners was that board litigation tended to be less expensive than litigation in the CFC. In the authors' experience, however, some practitioners have asserted that the boards' more informal approach may have led to greater expense. Some practitioners in the field have reported to the authors that certain board judges were more willing to allow the parties to take all their requested depositions rather than restricting them to a limited number. Also, in some instances, board judges may have been less aggressive about maintaining a firm discovery and trial schedule. As a result of the enactment of the National Defense Authorization Act for Fiscal Year 2006, some practitioners allege that the informality of some of the boards has been reduced by the January 2007 establishment of the Civilian Board of Contract Appeals. The authors, however, believe that this is an erroneous contention.

3. FY 2006 National Defense Authorization Act

Notwithstanding its *defense*-related title, section 847 of the FY 2006 National Defense Authorization Act had a profound impact on eight of the former *civilian* boards of contract appeals.⁵⁴ With the exception of the PSBCA and the TVA Board, which remain as separate boards, this Act con-

⁵⁰ See, e.g., 10 C.F.R. § 1023.7 (2005) (EBCA); 48 C.F.R. § 6101.1(e) (2005) (GS-BCA).

⁵¹ See 41 U.S.C. § 608(b); see, e.g., ASBCA R. 12 (Small Claims and Accelerated Procedures).

⁵² 48 C.F.R. §§ 6101.1(e), 6101.28 (2006); see, e.g., *Bus. Mgmt. Research Assocs. v. Gen. Servs. Admin.*, CBCA No. 464, 07-1 BCA ¶ 33,486, at 1 (full board presiding).

⁵³ ASBCA R. Preface II(c); see, e.g., *In re Gen. Elec. Co.*, ASBCA Nos. 36005, 38152, 39696, 91-2 BCA ¶ 23,958, at 3; Telephone Interview with Hon. Terrence Hartman, ASBCA Judge (Apr. 20, 2006).

⁵⁴ Pub. L. No. 109-163, § 847, 119 Stat. 3136, 3391-95 (2006); 7172 Fed. Reg. 65,825-26 (Nov. 9, 2006); 72 Fed. Reg. 36,794 (July 5, 2007) (to be codified at 48 C.F.R. pt. 6101-6105); 71 Fed. Reg. 65,825-26 (Nov. 9, 2006). See generally "Dateline February 2006," 20 Nash & Cibinic Rep. (Feb. 2006).

solidated the jurisdiction of and cases from the eight other *civilian* boards⁵⁵ into a new *Civilian Board of Contract Appeals* established within the General Services Administration.⁵⁶ More specifically, the FY 2006 National Defense Authorization Act provides that, effective January 6, 2007:

In the case of any such proceedings pending before an agency board of contract appeals other than the Armed Services Board of Contract Appeals or the board of contract appeals for the Tennessee Valley Authority, 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.⁵⁷

The Civilian Board hears and decides contract disputes between Government contractors and civilian federal executive agencies under the Contract Disputes Act of 1978 and its associated regulations and rules.⁵⁸ The Civilian Board also assumes jurisdiction over disputes for which a predecessor board exercised jurisdiction before the Act's passage.⁵⁹

Although the ASBCA remains a separate board with jurisdiction over DOD and NASA contracts, the FY 2006 Defense Authorization Act also affected the ASBCA's jurisdiction.⁶⁰ 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.⁶¹ On January 6, 2007, with the exception of NASA contract appeals, the ASBCA lost its jurisdiction to the Civilian Board to hear new

⁵⁵ The FY 2006 National Defense Authorization Act consolidated the jurisdiction and cases of the following civilian boards: 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), 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).

⁵⁶ § 847(a)-(d), 119 Stat. at 3391-95; 71 Fed. Reg. at 65,825-26; 72 Fed. Reg. at 36,794.

⁵⁷ § 847(c)(2)(B), 119 Stat. at 3393; *see also* 71 Fed. Reg. at 65,825-26.

⁵⁸ *See generally* 41 U.S.C. §§ 601-613 (2000); *see also* 71 Fed. Reg. at 65,825-26; 72 Fed. Reg. at 36,794. The exception to this rule is that the Civilian Board does not hear disputes from the Department of Defense (including the Departments of the Army, Navy, and Air Force and all other agencies, components, and entities within the DOD), NASA, the U.S. Postal Service, the Postal Rate Commission, and the TVA.

⁵⁹ § 847(a), 119 Stat. at 3392 (codified at 41 U.S.C. § 438(c)(2)); *see also* 71 Fed. Reg. at 65,825, 72 Fed. Reg. at 36,794.

⁶⁰ § 847(d)(2), 119 Stat. at 3392-93 (amending 41 U.S.C. § 607).

⁶¹ 48 C.F.R. § 333.203 (2006); 48 C.F.R. § 733.270-1 (2005).

appeals in such cases.⁶² Arguably, at that time, the ASBCA may have also lost its authority to hear appeals from civilian agencies that were filed before January 6, 2007 but were pending on the ASBCA's docket.⁶³ While the statutory language is unclear on this subject, 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 that board had proper jurisdiction at the time when the notice of appeal was filed.⁶⁴ Presumably, ASBCA cases on appeal to the Federal Circuit that originated from a civilian agency contract will probably be remanded (if necessary) to the ASBCA because of that board's prior handling of and familiarity with the cases.

Although the GSA Administrator (in consultation with the Administrator, Office of Federal Procurement Policy) may appoint new judges to the Civilian Board (when vacancies arise) without regard to their political affiliation, judges serving as full-time board judges (as of January 5, 2007) for one of the eight predecessor boards – with the exception of the LBCA -- automatically became judges of the new Civilian Board.⁶⁵ 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.⁶⁶ 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 approximately twenty three judges on the Civilian Board.⁶⁷ However,

⁶² 41 U.S.C. § 607(d) (2000) (discussing jurisdiction of the ASBCA).

⁶³ *But see* § 847(c)(2), 119 Stat. at 3392–93 (excluding the termination of agency boards established by the CDA if the proceeding was pending on the effective date of the National Defense Authorization Act for Fiscal year 2006).

⁶⁴ *See* § 847(c), 119 Stat. at 3392–93 (terminating certain boards of contract appeals); § 847(d)(2); *see also* 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). It is possible that the Federal Circuit will disagree with this conclusion, when, and if, it is faced with the issue of to which board to remand an appeal.

⁶⁵ § 847(a), 119 Stat. at 3391–92 (codified at 41 U.S.C. § 438(b)).

⁶⁶ *See* Judges of the Civilian Board of Contract Appeals, <http://www.cbca.gsa.gov/jures304> (last visited Jan. 10, 2008).

⁶⁷ *See* Senior Executive Assoc. on Behalf of the Administrative Law Judges of the BCA, Pay Rates for Administrative Judges of the BCA: Should a Judge's Pay Be Adjusted Based on Performance?, (May 11, 2006), *available at* http://seniorexecs.org/fileadmin/user_upload/Static_site_images/misc/Statement_by_SEA_on_behalf_of_the_Administrative_Judges_of_the_Boards_of_Contract_Appeals.pdf. 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. *See*

because of several retirements and one death, only eighteen of those judges joined the new Civilian Board.⁶⁸ As of the publication of this article, no new judges had been appointed to the Civilian Board.⁶⁹

4. Binding Authority

The CFC and the boards of contract appeals are bound by the decisions of the U.S. Supreme Court, the *precedential* (i.e., published) decisions of the Federal Circuit, and by the published decisions of the Federal Circuit's predecessor courts, the Court of Claims and the Court of Customs and Patent Appeals.⁷⁰ The CFC judges are not bound by the decisions of other CFC judges⁷¹ or by the boards of contract appeals' decisions.⁷² Similarly, the boards are not bound by decisions of the CFC or of the other boards.⁷³ Ordinarily, however, a board will follow its previous panel decisions.⁷⁴ In a *full board* decision, the CBCA ruled that "the holdings of our predecessor boards shall be binding as precedent in this [Civilian] Board."⁷⁵ The Civilian Board

41 U.S.C. § 438(b)(1)(C). The LBCA judges are not included in the statistics discussed in the sentence in the text above.

⁶⁸ See Judges of the Civilian Board of Contract Appeals, <http://www.cbca.gsa.gov/jures304> (last visited Jan. 10, 2008).

⁶⁹ *Id.*

⁷⁰ *South Corp. v. United States*, 690 F.2d 1368, 1370 (Fed. Cir. 1982) (adopting as precedent the decisions of the predecessor Court of Claims and Court of Customs and Patent Appeals); see, e.g., *Gevyn Constr. Corp. v. United States*, 827 F.2d 752, 754 n.2 (Fed. Cir. 1987) (decisions of the Court of Claims are binding on the Federal Circuit); see also FED. R. APP. P. 32.1 (allowing citation of non-precedential or unpublished decisions of the U.S. Court of Appeals of the Federal Circuit that are "issued on or after January 1, 2007."). See generally, Robert D. English, *Cite Unseen: Unpublished Decisions in the Federal Circuit and Federal Circuit Rule 32.1*, 17 FED. CIR. B.J. 181 (2007) (noting the different treatment of precedent in the U.S. Courts of Appeals and discussing the potential affect of FED. R. APP. P. 32.1 on the Federal Circuit).

⁷¹ See *Casa De Cambio Comdiv S.A. De C.V. v. United States*, 291 F.3d 1356, 1364 n.1 (Fed Cir. 2002) (citing *W. Coast Gen. Corp. v. Dalton*, 39 F.3d 312, 315 (Fed. Cir. 1994)).

⁷² *W. Coast Gen.*, 19 Cl. Ct. 98, 101 n.* (1989).

⁷³ *In re M.A. Mortenson Co.*, ASBCA No. 53346, n.3, 05-2 ¶ BCA 33,014 (2005); *Roy McGinnis & Co.*, ASBCA 40004, 91-1 BCA ¶ 23,395; *Dailing Roofing, Inc.*, ASBCA No. 34739, 89-1 BCA ¶ 21,311; *Smith's, Inc. of Dothan*, VABCA No. 2198, 85-2 BCA ¶ 18,133.

⁷⁴ See, e.g., *Commc'ns Res. Group, Inc.*, GSBCA No. 11038-C, 92-2 BCA ¶ 24,769 (Borwick, J., concurring); *Gen. Elec. Automated Sys. Div.*, ASBCA No. 36214, 89-1 BCA ¶ 21,195; see also 41 U.S.C. § 608(e) (2000).

⁷⁵ *Bus. Mgmt. Research Assocs. v. Gen. Servs. Admin.*, CBCA No. 464, 07-1 BCA ¶ 33,486, at 2 (full board) (slip op. at 2).

did not address what would happen if—as has occurred in the past—two of its predecessor boards disagreed on a legal rule.⁷⁶ Finally, the CFC and the boards have no authority to deviate from the mandate issued by the Federal Circuit in a particular case.⁷⁷

These rules which concern binding authority may have a significant, and sometimes controlling, impact on a contractor's choice of forum. Before choosing the forum in which to file its action, the contractor should research the key legal issues affecting its case. If the Federal Circuit or one of its predecessors (the Court of Claims or the Court of Customs and Patent Appeals) has ruled on these issues, those decisions are binding on both the CFC and the boards.⁷⁸ In addition, the contractor should determine how the CFC and the boards interpret such binding decisions.

If there are no rulings from the Federal Circuit or its predecessors on the key issues, then the contractor must explore the decisions of the CFC and the boards. If the board in question has ruled on the issues, absent unusual circumstances, the board will usually follow its panels' previous decisions.⁷⁹ In fact, the boards sometimes disagree with decisions of other boards and the CFC.⁸⁰ It also is not unusual to find differing legal interpretations among the CFC judges and CFC judges also sometimes disagree with Board decisions.⁸¹

⁷⁶ The CBCA has not held whether it has a preference for the case law from the predecessor board that would have had jurisdiction over the case.

⁷⁷ *Jewelers Vigilance Comm., Inc. v. Ullenberg Corp.*, 853 F.2d 888, 892 (Fed. Cir. 1988); *In re Wella A.G.*, 858 F.2d 725, 728 (Fed. Cir. 1988); *N. Helex Co. v. United States*, 634 F.2d 557, 560 (Ct. Cl. 1980).

⁷⁸ *Coltec Inds. V. United States*, 454 F.3d 1340, 1353 (Fed. Cir. 2006) (“There can be no question that the Court of Federal Claims is required to follow the precedent of the Supreme Court, our court [Federal Circuit], and our predecessor court, the Court of Claims.”). While one CFC opinion views the decisions of the Temporary Emergency Court of Appeals (TECA), whose jurisdiction was transferred to the Federal Circuit in 1993, as binding precedent on the CFC, the prevailing view appears to be to the contrary. *Yankee Atomic Elec. Co. v. United States*, 54 Fed. Cl. 306, 310 n.5 (1992). *See, e.g., Jade Trading v. United States*, 65 Fed. Cl. 487, 496 (2005) (stating that TECA rulings on evidentiary privilege were not binding on the Federal Circuit).

⁷⁹ *See, e.g., Commc'ns Res. Group, Inc., GSBCA No. 11038-C, 92-2 BCA ¶ 24,769; Gen. Elec. Automated Sys. Div., ASBCA No. 36214, 89-1 BCA ¶ 21,195.* A board is not obligated to follow the decisions of other boards or the CFC. *See supra* note 73 and accompanying text.

⁸⁰ *See, e.g., In re Roy McGinnis & Co., ASBCA No. 40004, 91-1 BCA ¶23,395, at 7–8.*

⁸¹ *Id.*

5. Statistics

For fiscal years (FY) 2001, 2002, 2003, 2004, 2005, and 2006, respectively, 27%, 13%, 5.4 %, 17.9%, 23.4%, and 28.1% of the complaints filed at the CFC involved contract administration problems.⁸² For FYs 2001, 2002, 2003, 2004, 2005, and 2006, respectively, 7.3% (57 cases), 2.6% (39 cases), 1.8% (55 cases), 2.9% (69 cases), 3.7% (61 cases), and 6.8% (73 cases) of the complaints filed involved contract bid protests.⁸³ For FYs 2001, 2002, 2003, 2004, 2005, and 2006, respectively, approximately 22.1%, 28.2%, 29%, 19.3%, 28.8%, and 22.7% of the dispositions for those years involved contract disputes.⁸⁴ For FYs 2001, 2002, 2003, 2004, 2005, and 2006, respectively, approximately 6% (64 cases), 4.7% (41 cases), 5.1% (45 cases), 7.1% (67 cases), 5.5% (58 cases), and 8.5% (71 cases) of the dispositions for those years involved contract bid protests.⁸⁵ In recent years, the vaccine compensation cases, over which the court had jurisdiction pursuant to 42 U.S.C. § 300aa-1 *et seq.*, have made up the largest number of cases on the court's docket.⁸⁶ There were 4,847 pending in the court at the end of FY 2004, as compared to 684 contract claims—the second largest category of cases—pending at the same time.⁸⁷ At the end of FY 2005 and 2006, 5,291 and 5,347 vaccine compensation cases were pending in the court compared to 770 and 875 contract claims, the second largest category, for those same

⁸² See LOENIDAS RALPH MECHAM, JUDICIAL BUSINESS OF THE UNITED STATES COURTS, tbl. G2-A (2001) [hereinafter MECHAM 2001]; LOENIDAS RALPH MECHAM, JUDICIAL BUSINESS OF THE UNITED STATES COURTS, tbl. G2-A (2002) [hereinafter MECHAM 2002]; LOENIDAS RALPH MECHAM, JUDICIAL BUSINESS OF THE UNITED STATES COURTS, tbl. G2-A (2003) [hereinafter MECHAM 2003]; LOENIDAS RALPH MECHAM, JUDICIAL BUSINESS OF THE UNITED STATES COURTS, tbl. G2-A (2004) [hereinafter MECHAM 2004]; LOENIDAS RALPH MECHAM, JUDICIAL BUSINESS OF THE UNITED STATES COURTS, tbl. G2-A (2005) [hereinafter MECHAM 2005]; James C. Duff, Judicial Business of the United States Courts, tbl. G2-A (2006) [hereinafter DUFF 2006]. These reports are available at <http://www.uscourts.gov/judbususc/judbus.html>.

⁸³ See MECHAM 2001, *supra* note 82, at tbl. G2-A; MECHAM 2002, *supra* note 82, at tbl. G2-A; MECHAM 2003, *supra* note 82, at tbl. G2-A; MECHAM 2004, *supra* note 82, at tbl. G2-A; MECHAM 2005, *supra* note 82, at tbl. G2-A; DUFF 2006, *supra* note 82, at tbl. G2-A.

⁸⁴ See MECHAM 2001, *supra* note 82, at tbl. G2-A; MECHAM 2002, *supra* note 82, at tbl. G2-A; MECHAM 2003, *supra* note 82, at tbl. G2-A; MECHAM 2004, *supra* note 82, at tbl. G2-A; MECHAM 2005, *supra* note 82, at tbl. G2-A; DUFF 2006, *supra* note 82, at tbl. G2-A.

⁸⁵ See MECHAM 2001, *supra* note 82, at tbl. G2-A; MECHAM 2002, *supra* note 82, at tbl. G2-A; MECHAM 2003, *supra* note 82, at tbl. G2-A; MECHAM 2004, *supra* note 82, at tbl. G2-A; MECHAM 2005, *supra* note 82, at tbl. G2-A; DUFF 2006, *supra* note 82, at tbl. G2-A.

⁸⁶ See, e.g., MECHAM 2004, *supra* note 82, at tbl. G2-A; MECHAM 2005, *supra* note 82, at tbl. G2-A; DUFF 2006, *supra* note 82, at tbl. G2-A.

⁸⁷ MECHAM 2004, *supra* note 82, at tbl. G2-A.

years, respectively.⁸⁸ The CFC has 8 Special Masters devoted to the management and adjudication of vaccine cases.⁸⁹ The volume of these cases has likely slowed the court's resolution of other cases on its docket.

For FYs 2001, 2002, 2003, 2004, 2005, and 2006, respectively, the CFC issued judgments in favor of plaintiffs in the total amounts of approximately \$483 million, \$929 million, \$877 million, \$585 million, \$934 million, and \$900 million.⁹⁰ For those same years, the court awarded judgments or offsets to the defendant in the amounts of approximately \$6.4 million, \$2 million, \$11 million, \$2.7 million, \$1.7 million, and \$234,143, respectively.⁹¹ These judgments and offsets are for all cases on the court's docket and are not limited to Government contract awards.⁹²

In the past, most of the boards did not publish statistics concerning their dockets. Historically, the most comprehensive statistics have been provided by the ASBCA. For FYs 2002, 2003, 2004, 2005, and 2006, respectively, the ASBCA docketed 435, 429, 461, 476, and 438 appeals, disposed of 559, 539, 481, 484, and 530 appeals, and sustained 23%, 22%, 23%, 18%, and 16% of its disposed of appeals.⁹³ The ASBCA observed that, of its 150 dispositions on the merits for FY 2005, "58% of the decisions found merit for the contractor" and of the 137 appeals it disposed of on the merits for FY 2006, 63% of the decisions found merit for the contractor.⁹⁴ As of October 1 for the years 2002, 2003, 2004, 2005, and 2006, respectively, 782, 672, 652, 644, and 552 appeals were pending at the ASBCA.⁹⁵ In recent years, the ASBCA's docket has dramatically decreased from 2,503 pending appeals on October 1, 1987, to 2,027 pending cases on October 1, 1993, to 1,088 pending ap-

⁸⁸ See *MECHAM 2005*, *supra* note 82, at tbl. G2-A; *DUFF 2006*, *supra* note 82, at tbl. G2-A.

⁸⁹ United States Court of Federal Claims—Vaccination Program, <http://www.uscfc.uscourts.gov/OSMPage.htm> (last visited Jan. 10, 2008).

⁹⁰ See *MECHAM 2001*, *supra* note 82, at 36; *MECHAM 2002*, *supra* note 82, at 35; *MECHAM 2003*, *supra* note 82, at 32; *MECHAM 2004*, *supra* note 82, at 35; *MECHAM 2005*, *supra* note 82, at 38; *DUFF 2006*, *supra* note 82, at 48.

⁹¹ See *MECHAM 2001*, *supra* note 82, at 36; *MECHAM 2002*, *supra* note 82, at 35; *MECHAM 2003*, *supra* note 82, at 32; *MECHAM 2004*, *supra* note 82, at 35; *MECHAM 2005*, *supra* note 82, at 38; *DUFF 2006*, *supra* note 82, at 48.

⁹² *DUFF 2006*, *supra* note 82, at 48, tbl. G2-A.

⁹³ FY2006 ASBCA REP. OF ACTIVITIES 1–2 (Oct. 31, 2006) [hereinafter ASBCA 2006 REPORT].

⁹⁴ FY2005 ASBCA REP. OF ACTIVITIES 3 (Nov. 8, 2005) [hereinafter ASBCA 2005 REPORT]; ASBCA 2006 REPORT, *supra* note 93, at 1.

⁹⁵ ASBCA 2006 REPORT, *supra* note 93, at 1.

peals on October 1, 2000, to 552 pending on October 1, 2006.⁹⁶ Parties requested ASBCA alternative dispute resolution (ADR) services 79, 42, 39, 39, and 39 times for FYs 2002, 2003, 2004, 2005, and 2006, respectively.⁹⁷ However, the number of ADR requests can be misleading—and fail to show the magnitude of the usefulness of ADR at the ASBCA—as the requests often involve multiple appeals. Notably, in FY 2004, of the thirty-three matters subject to nonbinding ADR, thirty-one were successfully resolved; in FY 2005, of the 111 matters subject to nonbinding ADR, 110 were successfully resolved, and; in FY 2006, of the twenty-one matters subject to nonbinding ADR, nineteen were successfully resolved.⁹⁸

Most of the Civilian Board's predecessors did not publish statistics concerning their dockets. 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.⁹⁹ At the close of FY 2004, the GSBCA had sixty 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 thirty-four non-CDA cases on its docket.¹⁰⁰ At the close of FY 2006, the GSBCA had thirty-seven non-CDA appeals on its docket.¹⁰¹ Of the thirty-one CDA decisions issued by the GSBCA on the merits in FY 2005, sixteen decisions granted in whole or in part the relief requested by the contractor.¹⁰² Of the forty-five CDA decisions

⁹⁶ FY2002 ASBCA REP. OF ACTIVITIES 1 (Oct. 17, 2002) [hereinafter ASBCA 2002 REPORT]; ASBCA 2006 REPORT, *supra* note 93, at 1.

⁹⁷ ASBCA 2002 REPORT, *supra* note 96, at 3; FY2003 ASBCA REP. OF ACTIVITIES 3 (Dec. 4, 2003) [hereinafter ASBCA 2003 REPORT]; FY2004 ASBCA REP. OF ACTIVITIES 3 (Nov. 9, 2004) [hereinafter ASBCA 2004 REPORT]; ASBCA 2005 REPORT, *supra* note 94, at 3; ASBCA 2006 REPORT, *supra* note 93, at 3.

⁹⁸ ASBCA 2004 REPORT, *supra* note 97, at 3; ASBCA 2005 REPORT, *supra* note 94, at 3; ASBCA 2006 REPORT, *supra* note 93, at 3; West, *ASBCA Docket Bucks Downward Trend*, 46 GC ¶ 465 (2000).

⁹⁹ 2000 GSBCA ANN. REP. 3 (Oct. 31, 2000); 2001 GSBCA ANN. REP. 3 (Oct. 30, 2001); 2002 GSBCA ANN. REP. 3 (Oct. 30, 2002); 2003 GSBCA ANN. REP. 3 (Oct. 30, 2003); 2004 GSBCA ANN. REP. 3 (Oct. 29, 2004) [hereinafter GSBCA ANNUAL REPORT 2004]; 2005 GSBCA ANN. REP. 3 (Oct. 28, 2005) [hereinafter GSBCA ANNUAL REPORT 2005]; 2006 GSBCA ANN. REP. 3 (Oct. 30, 2006) [hereinafter GSBCA ANNUAL REPORT 2006].

¹⁰⁰ GSBCA ANNUAL REPORT 2004, *supra* note 99, at 3; GSBCA ANNUAL REPORT 2005, *supra* note 99, at 3.

¹⁰¹ See GSBCA ANNUAL REPORT 2006, *supra* note 99, at 4.

¹⁰² See GSBCA ANNUAL REPORT 2005, *supra* note 99, at 3.

issued by the GSBICA on the merits in FY 2006, twenty-six decisions granted in whole or in part the relief requested by the contractor.¹⁰³

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 but also include several Equal Access to Justice Act petitions).¹⁰⁴ As of March 31, 2007, the Civilian Board had 300 CDA appeals and 228 other cases pending on its docket.¹⁰⁵ In its first quarter, the Civilian Board resolved eighty-one CDA appeals while forty-seven new CDA appeals were filed at the Board; it also resolved thirty-six other cases, while forty-nine other cases were filed at the Board.¹⁰⁶ Of the twenty-nine CDA appeals decided by the Civilian Board on the merits in its first quarter, eighteen were granted in part.¹⁰⁷ As of July 1, 2007, the Civilian Board had 303 CDA appeals and 239 other cases pending on its docket. As of October 1, 2007, the Civilian Board had 262 CDA appeals and 260 other cases pending on its docket. Of the thirty-five CDA appeals decided by the Civilian Board on the merits between July 1 and September 30, 2007, twenty-eight of the appeals were granted in part.¹⁰⁸

II. Sources of Jurisdiction

1. Contract Disputes Act

Under the CDA, a Government contractor may seek to overturn an adverse CO’s final decision on a contract claim, or the CO’s failure to issue a decision within a reasonable period of time (i.e., a *deemed denial* of the contract claim), either by filing a lawsuit in the CFC or by filing an appeal at the appropriate agency board of contract appeals.¹⁰⁹ In both forums, the facts and the law

¹⁰³ See GSBICA ANNUAL REPORT 2006, *supra* note 99, at 3; Interview with Stephen M. Daniels, Chairman, CBCA, and Robert W. Parker, Vice-Chairman, CBCA (July 10, 2007).

¹⁰⁴ See CBCA Q. REP. I, 3 (Apr. 30, 2007).

¹⁰⁵ *Id.*

¹⁰⁶ *See id.*

¹⁰⁷ *Id.* at 3.

¹⁰⁸ 2007 CBCA ANN. REP. 4 (Oct. 30, 2007).

¹⁰⁹ See 41 U.S.C. §§ 606, 609(a) (2000); *Pathman Constr. Co. v. United States*, 817 F.2d 1573, 1576, 1578 (Fed. Cir. 1987) (“A major purpose of the Disputes Act was to induce resolution of contract disputes with the Government by negotiation rather than litigation.”) (quotations omitted).

are decided *de novo*, so neither the CFC nor the boards are bound by, or owe deference to, a CO's findings of fact or law.¹¹⁰

As a general rule, the contractor is the party named on the contract with the Government and, under the CDA, only it can bring an action before a board against the Government.¹¹¹ 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."¹¹² However, exceptions to this rule exist. For example:

[a] third-party beneficiary [to a Government 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 *Kern*, the contractor was acting as a purchasing agent for the Government, the contract clearly stated the agency relationship, and the contract made the Government directly liable to the subcontractor for the purchase price.¹¹³

The CDA governs many of the Government contracts suits in the CFC and virtually all such suits before the boards. The CDA applies to express and implied-in-fact contracts entered into by an 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.¹¹⁴ The CDA, therefore, does not apply to all Government contracts or procurement

¹¹⁰ 41 U.S.C. §§ 605(a), 609(a)(3); *Wilner v. United States*, 24 F.3d 1397, 1401–02 (Fed. Cir. 1994) (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, 1562 (Fed. Cir. 1990); *Assurance Co. v. United States*, 813 F.2d 1202, 1206 (Fed. Cir. 1987); *In re Space Age Eng’g, Inc.*, ASBCA No. 26028, 82-1 BCA ¶ 15,766, at 52.

¹¹¹ *Key Fed. Fin. v. Gen. Serv. Admin.*, CBCA Nos. 411, 412, 07-1 BCA ¶ 33,555, at 15 (citing 41 U.S.C. § 606).

¹¹² *Id.* (citations omitted).

¹¹³ *Id.* at 15 (citations omitted). However,

[I]t 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. DOJ, CBCA 52, 07-2 BCA ¶ 33,630, at 3 (citations omitted); see FAR § 44.203 (c) (2007).

¹¹⁴ 41 U.S.C. § 602(a).

actions.¹¹⁵ The CDA does not provide jurisdiction for bid protests or for the recovery of bid preparation costs,¹¹⁶ but it does provide jurisdiction in connection with lease agreements for real property¹¹⁷ and the sale of timber by the Government.¹¹⁸ Without the issuance of a CO's final decision or the deemed denial of a contractor's claim, neither the Boards nor the CFC may assume jurisdiction over a CDA contract dispute.¹¹⁹

The Federal Circuit—the appellate authority for both the CFC and the boards—has upheld the CDA's review procedures although they do not provide for an Article III trial court or for jury trials.¹²⁰ The Federal Circuit reasons that these limitations on dispute resolution are constitutionally permissible as a condition of the waiver of the Government's sovereign immunity to suit.¹²¹

2. Federal Courts Administration and Federal Acquisition Streamlining Acts

In a 1991 decision, the Federal Circuit held that the Claims Court did not have jurisdiction over cases that contested only the propriety of default terminations and that were unaccompanied by monetary claims.¹²² In contrast, the Federal Circuit had previously ruled that the boards of contract appeals possessed jurisdiction to hear such appeals.¹²³ The Federal Courts Administration Act provides the CFC with jurisdiction over disputes “concerning termination

¹¹⁵ See, e.g., *Pasteur v. United States*, 814 F.2d 624, 627–28 (Fed. Cir. 1987); *Newport News Shipbldg. & Dry Dock v. United States*, 7 Cl. Ct. 549, 553–54 (1985).

¹¹⁶ *LaBarge Prods., Inc. v. West*, 46 F.3d 1547, 1551 (Fed. Cir. 1995); *Coastal Corp. v. United States*, 713 F.2d 728, 730 (Fed. Cir. 1983); *United States v. John C. Grimberg Co.*, 702 F.2d 1362, 1368 (Fed. Cir. 1983); *Clean Giant, Inc. v. United States*, 19 Cl. Ct. 390, 392–93 (1990); *Ammon Circuits Research*, ASBCA No. 50885, 97-2 BCA ¶ 29,318, at 3–4; *RC 27th Ave. Corp.*, ASBCA No. 49176, 97-1 BCA ¶ 28,658, at 4.

¹¹⁷ See, e.g., *Ralden Partnership v. United States*, 891 F.2d 1575, 1576 (Fed. Cir. 1989); *Alvin, Ltd. v. U. S. Postal Serv.*, 816 F.2d 1562, 1563–64 (Fed. Cir. 1987); *Forman v. United States*, 767 F.2d 875, 879 (Fed. Cir. 1985); *Am. Nat'l Bank of Chi.*, GSBCA No. 7457, 85-1 BCA ¶ 17,811.

¹¹⁸ *Seaboard Lumber Co. v. United States*, 903 F.2d 1560, 1561–62 (Fed. Cir. 1990); *Sierra Pac. Indus.*, AGBCA No. 79-200, 80-1 BCA ¶ 14,383.

¹¹⁹ 41 U.S.C. §§ 605, 606; see also *Am. Bus. Corp. v. DOL*, CBCA No. 637, 07-1 BCA ¶ 33,524, at 2; *All Star Metals, LLC v. DOT*, CBCA No. 91, 07-1 BCA ¶ 33,562, at 3.

¹²⁰ See *Seaboard Lumber Co.*, 903 F.2d at 1567–68; *Gregory Timber Res., Inc. v. United States*, 855 F.2d 841, 843 (Fed. Cir. 1988).

¹²¹ *Id.*

¹²² *Overall Roofing & Constr. Inc. v. United States*, 929 F.2d 687, 688 (Fed. Cir. 1991), *superseded by statute*, Federal Courts Administration Act of 1992, Pub. L. No. 102-572, 106 Stat. 4506.

¹²³ *Malone v. United States*, 849 F.2d 1441, 1443–44 (Fed. Cir. 1988).

of a contract, rights in tangible or intangible property, compliance with cost accounting standards, and other non-monetary disputes” on which a CO’s final decision has been issued under the CDA.¹²⁴ In the past, most boards had assumed jurisdiction over such cases.¹²⁵ This language also potentially clarifies the boards’ ability to provide non-monetary 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 [CFC].”¹²⁶

In addition to expanding the court’s jurisdiction to include non-monetary CDA disputes, the Federal Courts Administration Act amended the CDA so that a defect in a contractor’s claim certification does not deprive jurisdiction to a court or board.¹²⁷ Instead, a defective certification simply has to be corrected before the court or board’s entry of a final judgment in the case.¹²⁸ The Federal Courts Administration Act also amended the CDA to permit a claim certification to “be executed by any person duly authorized to bind the contractor with respect to the claim.”¹²⁹ It further provides that for claims in excess of \$50,000, a CO is not obligated to render a final decision if, within sixty days after receipt of the claim, the CO notifies the contractor of the reasons why the attempted certification is defective.¹³⁰ If a contractor’s certification is found to be defective, interest will be paid on its claim (assuming the certification is corrected and it prevails on the claim) from the date on which the CO received the original claim.¹³¹

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.¹³² The district court must direct its request to the board that would have jurisdiction under the CDA to

¹²⁴ Federal Courts Administration Act of 1992, Pub. L. No. 102-572, § 907(b)(1), 106 Stat. 4506, 4519 (amending 28 U.S.C. § 1491(a)(2)).

¹²⁵ *Malone*, 849 F.2d at 1444; *Johnson & Gordon Sec., Inc. v. Gen. Servs. Admin.*, 857 F.2d 1435, 1437–38 (Fed. Cir. 1988); *Gen. Elec. Automated Sys. Div.*, ASBCA No. 36214, 89-1 BCA ¶ 21,195; *Michael M. Grimberg*, DOTBCA No. 1543, 87-1 BCA ¶ 19,573; *Smith’s Inc. of Dothan*, VABCA No. 2198, 85-2 BCA ¶ 18,133. *But see Seneca Timber Co.*, AGBCA No. 83-228-1, 86-1 BCA ¶ 19,573.

¹²⁶ 41 U.S.C. § 607(d) (2000).

¹²⁷ Federal Courts Administration Act § 907(b)(1).

¹²⁸ *Id.* § 907(a)(1). *But see Eurostyle Inc.*, ASBCA No. 45934, 94-1 BCA ¶ 26,458 (“[C]omplete absence of any certification is not a mere defect which may be corrected.”).

¹²⁹ § 907(a)(1), 106 Stat. at 4518.

¹³⁰ *Id.*

¹³¹ *Id.* § 907(a)(3).

¹³² Federal Acquisition Streamlining Act of 1994, Pub. L. No. 103-355, § 2354, 108 Stat. 3243, 3323 (adding 41 U.S.C. § 609(f)).

adjudicate the contract claim at issue, and the board must provide its advisory opinion in a “timely manner.”¹³³ This authority has not added significantly to the boards’ workload; in fact, some boards reportedly have never received a request from a district court for such an advisory opinion.

3. Tucker Act

The Tucker Act provides a strictly construed, limited waiver of sovereign immunity¹³⁴ that grants the CFC jurisdiction over express and implied-in-fact contracts with the United States.¹³⁵ Actions based on contracts with the Government that are not governed by one of the categories enumerated in the CDA, and which claim in excess of \$10,000, must generally be brought in the CFC pursuant to the Tucker Act.¹³⁶ Contract actions not governed by the CDA, and which seek \$10,000 or less, generally may be filed in either the CFC or the appropriate U.S. district court.¹³⁷ A discussion of district court jurisdiction over Government contract actions under the so-called “little Tucker Act”¹³⁸ is beyond the scope of this article. However, it is worth noting that to maintain uniformity in Government contracts law, the Federal Circuit has jurisdiction over appeals from such district court decisions,¹³⁹ and that a district court, when exercising jurisdiction in this situation, “in effect sits as the Court of Federal Claims.”¹⁴⁰

To maintain a cause of action in the CFC under the Tucker Act, “the contract must be between the plaintiff and the Government and entitle the plaintiff to money damages in the event of the Government’s breach of that contract.”¹⁴¹ The Tucker Act is, however, only a jurisdictional statute; it does not confer any substantive right of recovery. “Such a right must be grounded in [the U.S. Constitution], a contract, a statute, or a regulation.”¹⁴² A claimant who does not rely on a breach of contract claim must establish that some substantive provision of law, regulation, or the Constitution mandates compensation to

¹³³ 41 U.S.C. § 609(f) (2000).

¹³⁴ *Hart v. United States*, 910 F.2d 815, 817 (Fed. Cir. 1990).

¹³⁵ 28 U.S.C. § 1491(a)(1) (2000).

¹³⁶ *See Galloway Farms, Inc. v. United States*, 834 F.2d 998, 999–1000 (Fed. Cir. 1987) (citing *United States v. Hohri*, 482 U.S. 64, 66–67 n.1 (1988)).

¹³⁷ *Id.*

¹³⁸ 28 U.S.C. § 1346(a)(2) (2000).

¹³⁹ *See* 28 U.S.C. § 1295(a)(2).

¹⁴⁰ *Doe v. United States*, 372 F.3d 1308, 1313 (Fed. Cir. 2004) (citing *United States v. Sherwood*, 312 U.S. 584, 589–91 (1941)).

¹⁴¹ *Ransom v. United States*, 900 F.2d 242, 244 (Fed. Cir. 1990).

¹⁴² *Carr v. United States*, 864 F.2d 144, 146 (Fed. Cir. 1989) (citing *United States v. Connolly*, 716 F.2d 882 (Fed. Cir. 1983)).

state a claim within the CFC's Tucker Act jurisdiction.¹⁴³ Under the Tucker Act, the claimant has six years from the time the claim first accrues to file an action in the CFC (assuming a shorter CDA limitation does not apply).¹⁴⁴ When a claim is based on a contractual obligation of the Government to pay money, "the claim first accrues on the date when the payment becomes due and is wrongfully withheld in breach of the contract."¹⁴⁵ However, a claim does not accrue unless the claimant knew or should have known that the claim existed.¹⁴⁶ Furthermore, a claim does not accrue until "all the events have occurred which fix the liability of the Government and entitle the claimant to institute an action."¹⁴⁷

Among the (non-CDA) Tucker Act contract cases filed in the last fifteen years at the court, the court's time has been significantly occupied by the more than 120 "Winstar-related"¹⁴⁸ thrift cases. These cases involve breach of contract allegations related to the passage and implementation of the Financial Institutions Reform, Recovery, and Enforcement Act of 1989.¹⁴⁹ Although declining in both number and complexity, these cases have been a substantial drain on the time and resources of the CFC and, to a lesser extent, the Federal Circuit. Some of the "Winstar" cases have generated nine or more opinions before finally being resolved.¹⁵⁰ Other significant non-CDA Tucker Act contract-related actions include cases where the Government has a contract with a party for other than the procurement of goods or services, such as uranium enrichment cases,¹⁵¹ and contract disputes arising out of grants or

¹⁴³ *Yancey v. United States*, 915 F.2d 1534, 1537 (Fed. Cir. 1990) (citing *United States v. Mitchell*, 445 U.S. 535 (1983)).

¹⁴⁴ 28 U.S.C. § 2501.

¹⁴⁵ *Kinsey v. United States*, 852 F.2d 556, 557 (Fed. Cir. 1988) (citing *Oceanic Steamship Co. v. United States*, 165 Ct. Cl. 217, 225 (1964)).

¹⁴⁶ *Jones v. United States*, 801 F.2d 1334, 1335 (Fed. Cir. 1986).

¹⁴⁷ *Kinsey*, 852 F.2d at 557.

¹⁴⁸ *United States v. Winstar Corp.*, 518 U.S. 839 (1996).

¹⁴⁹ Pub. L. No. 101-73, 103 Stat. 183 (1989).

¹⁵⁰ *See, e.g.*, *Bluebonnet Sav. Bank v. United States (Bluebonnet IX)*, 466 F.3d 1349, 1353–58 (summarizing prior history including: "Bluebonnet I" holding the enactment of FIRREA breached plaintiffs' contract; "Bluebonnet II" finding the Government's breach foreseeably caused plaintiffs to incur damages but awarding no damages; "Bluebonnet III" reversing trial court's zero-damages determination, remanding to the trial court, and instructing trial court to award damages; "Bluebonnet IV" awarding \$132,398,200 in damages based on the Bluebonnet III mandate; "Bluebonnet V" vacating award of \$132,398,200 and remanding for determination of the "net financial effect" of the Government's breach; "Bluebonnet VI"; "Bluebonnet VII" awarding \$96,798,842 in damages; and "Bluebonnet VIII.").

¹⁵¹ *E.g.*, *Florida Power & Light Co. v. United States*, 307 F.3d 1364, 1370–73 (Fed. Cir. 2002).

cooperative agreements.¹⁵² Significantly, the boards do not have jurisdiction over these non-CDA cases.

4. Other Sources of Jurisdiction

Unless the contractor in appropriate circumstances is able to elect to proceed under the CDA, cases that involve Government contracts that predate the March 1, 1979 effective date of the CDA are ordinarily governed by the contract's *Disputes* clause (and the Wunderlich and Tucker Acts). For pre-CDA contracts, appeals from a CO's decision ordinarily proceed first to the appropriate board.¹⁵³ Under the Wunderlich and Tucker Acts, appeals from board decisions then proceed to the CFC, which in this situation functions as an appellate tribunal, and then to the Federal Circuit.¹⁵⁴ 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.¹⁵⁵

The CDA did not take away the board's authority to exercise non-CDA jurisdiction.¹⁵⁶ Thus, the boards had and continue to have contract jurisdiction under certain regulations. The AGBCA had jurisdiction to hear suspension and debarment cases.¹⁵⁷ 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."¹⁵⁸ The ASBCA has also heard appeals with respect to certain contracts awarded by the former Iraqi Coalition Provisional Authority.¹⁵⁹ In addition, the HUDBCA had "jurisdiction over other matters assigned to it" by the HUD Secretary.¹⁶⁰ The EBCA had similar authority,¹⁶¹ and the GSBCA decided claims by federal employees under 31 U.S.C. § 3702 for reimbursement of expenses incurred

¹⁵² *Missouri Health & Med. Org. v. United States*, 641 F.2d 870, 871, 873 (Ct. Cl. 1981).

¹⁵³ Litigation of a few of these contracts is still pending.

¹⁵⁴ *See Vista Scientific Corp. v. United States*, 808 F.2d 50, 50 (Fed. Cir. 1986).

¹⁵⁵ *Asco-Falcon II Shipping Co. v. United States*, 18 Cl. Ct. 484, 491 (1989).

¹⁵⁶ *See Costruzioni & Impianti, S.R.L.*, ASBCA No. 53853, 03-1 BCA ¶ 32,201 (jurisdiction over appeal involving NAFI stems from ASBCA charter and the "Disputes" clause, not the CDA).

¹⁵⁷ 7 C.F.R. § 24.4(c) (2006).

¹⁵⁸ ASBCA Charter, 48 C.F.R. ch. 2, app. A (2007).

¹⁵⁹ Telephone Interview with Terrence Hartman, ASBCA Judge (Apr. 20, 2006).

¹⁶⁰ 24 C.F.R. § 20.4(b) (2007).

¹⁶¹ *See* 10 C.F.R. § 1023.1(c) (2007).

while on official temporary duty travel or in connection with relocation to a new duty station and claims involving rate determinations by carriers or freight forwarders under 31 U.S.C. § 3726(i)(1).¹⁶² The GSBCA also provided ADR services for any federal agency contract-related matter.¹⁶³ In FY 2004, the ASBCA provided ADR services in twenty undocketed disputes.¹⁶⁴ Pursuant to the FY 2006 National Defense Authorization Act, and with the concurrence of the relevant agency, the Civilian Board may also assume jurisdiction over disputes heard by a predecessor board immediately before the Act's January 6, 2007 effective date and may assume other functions of such a predecessor board that it exercised immediately before the Act's effective date.¹⁶⁵

III. Jurisdictional Issues

1. Tort Claims

The CFC and the boards of contract appeals do not have jurisdiction over traditional tort actions.¹⁶⁶ Nevertheless, the CFC possesses jurisdiction over claims based upon a "tortious breach" of contract by the Government.¹⁶⁷

¹⁶² 48 C.F.R. §§ 6103.1, 6104.1 (2006).

¹⁶³ 48 C.F.R. § 6102.4 (2006).

¹⁶⁴ ASBCA 2004 REPORT, *supra* note 97, at 3.

¹⁶⁵ Pub. L. No. 109-163, § 847(a), 119 Stat. 3136, 3391-92 (2006). For example, the Civilian Board also currently hears and decides (1) cases arising under the Indian Self-Determination Act, 25 U.S.C. §§ 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. §§ 1501 et seq., (3) claims by federal employees under 31 U.S.C. § 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. § 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. § 3529. CBCA, Board Mission, <http://www.cbca.gsa.gov/mission.htm> (last visited Jan. 11, 2008); Rules of Procedure of the Civilian Board of Contract Appeals, 72 Fed. Reg. 36,794, 36,819 (July 5, 2007) (to be codified at 48 C.F.R. pt. 6105); Establishment of the Civilian Board of Contract Appeals, 71 Fed. Reg. 65,825-26 (Nov. 9, 2006).

¹⁶⁶ 28 U.S.C. § 1491(a)(1) (2000); *Wood v. United States*, 961 F.2d 195 (Fed. Cir. 1992); *New Am. Shipbuilders v. United States*, 871 F.2d 1077, 1079 (Fed. Cir. 1989); *Smithson v. United States*, 847 F.2d 791, 795 (Fed. Cir. 1988); *Rault Center Hotel*, No. ASBCA 31232, 91-3 BCA ¶ 24,247; *Alfred Bronder*, ASBCA No. 29938, 86-3 BCA ¶ 19,102; *H&J Constr. Co.*, ASBCA No. 18521 75-1 BCA 11,171.

¹⁶⁷ *See Wood*, 961 F.2d at 198; *Jeppesen Sanderson, Inc. v. United States*, 19 Cl. Ct. 233, 237 (1990); *L'Enfant Plaza Props. v. United States*, 645 F.2d 886, 891-92 (Ct. Cl. 1981).

Similarly, the boards' jurisdiction extends to certain tort claims that "relate to or arise out of" contract provisions or that involve claims of tortious breach of contract.¹⁶⁸

2. Counterclaims and Fraud

Both the CFC and the boards have jurisdiction to consider Government counterclaims.¹⁶⁹ Ordinarily, except for fraud counterclaims, the Government may not assert counterclaims that have not been the subject of a CO's final decision.¹⁷⁰ 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.¹⁷¹

As fraud is traditionally a tort action, neither the CFC nor the boards have jurisdiction to award relief to contractors on fraud claims.¹⁷² However, when choosing the appropriate forum for pursuing its contract dispute, a contractor should carefully consider the court's jurisdiction over Government fraud counterclaims.¹⁷³

¹⁶⁸ TAS Group Inc., CBCA No.52, 07-2 BCA ¶ 33,630 (collecting cases in support of jurisdiction over cases involving tortious breach of contract); Houston Ship Repair, Inc., DOTBCA No. 4505, 06-2 BCA ¶ 33,381; Polaris Travel, Inc., EBCA Nos. C-9401166, C-9403174, 96-2 BCA ¶ 28,518; Aulson Roofing Inc., ASBCA No. 37677, 91-2 BCA ¶ 23,720; Huff & Huff Serv. Corp., ASBCA No.36039, 91-1 BCA ¶ 23,584; Marangos Constr. Corp., ASBCA No.37188, 90-1 BCA ¶ 22,309.

¹⁶⁹ 28 U.S.C. §§ 1503, 2508; 41 U.S.C. § 609(e) (2000); Martin J. Simko Constr., Inc. v. United States, 852 F.2d 540, 542 (Fed. Cir. 1988); Brown v. United States, 524 F.2d 693 (Ct. Cl. 1975).

¹⁷⁰ *E.g.*, Joseph Morton Co. v. United States, 757 F.2d 1273, 1279 (Fed. Cir. 1985); BMY-Combat Sys. Div. v. United States, 26 Cl. Ct. 826, 849 (1992); Am. Mfg. Co., ASBCA 25816, 83-2 BCA ¶ 16,608; Space Age Eng'g, Inc., ASBCA No.26028, 82-1 BCA ¶ 15,766, *aff'd*, 83-2 BCA ¶ 16717; *see* 41 U.S.C. § 605(a) (2000); *see also* FAR § 33.210.

¹⁷¹ Seaboard Lumber Co. v. United States, 903 F.2d 1560, 1568 (Fed. Cir. 1990); *see also* Gregory Timber Res., Inc. v. United States, AGBCA No. 84-319-1, 87-3 BCA ¶ 20,086, *aff'd*, 855 F.2d 841 (Fed. Cir. 1988).

¹⁷² Edwards v. United States, 19 Cl. Ct. 663, 669 (1990); Hartle v. United States, 18 Cl. Ct. 479, 482-83 (1989); DeBarros v. United States, 5 Cl. Ct. 391, 394 (1984); TDC Mgmt. Corp., DOTCAB No.1802, 90-1 BCA ¶ 22,627.

¹⁷³ *See* 28 U.S.C. §§ 1503, 2508; *Simko Constr.*, 852 F.2d at 542. *See generally* Ralph C. Nash & John Cibinic, *Fraudulent Claims: A Phalanx of Government Remedies*, 14 NASH & CIBINIC REP. ¶ 21 (Apr. 2000).

The CFC may hear Government counterclaims based upon alleged fraud under a special plea in fraud,¹⁷⁴ the False Claims Act,¹⁷⁵ or the CDA.¹⁷⁶ The court may award relief to the Government in excess of the contractor's claim, and the Government's fraud counterclaim is not required to be the subject of a CO's final decision.¹⁷⁷ Moreover, a contractor's potential fraud liability may be large enough to exceed its claim. Under the civil False Claims Act, the Government may claim a civil penalty of up to \$11,000 per claim plus up to three times the Government's damages (and the costs of recovering the penalty and damages) resulting from the contractor's violation of the statute.¹⁷⁸ Under the CDA, a contractor that submits a fraudulent claim will be "liable to the Government for an amount equal to such unsupported part of the claim in addition to all costs to the Government attributable to the cost of reviewing" the fraudulent component of the claim.¹⁷⁹ In addition, the CDA's six-year statute of limitations does not apply to claims by the Government that are based on fraudulent contractor claims.¹⁸⁰

Another statute, the "Forfeiture of Claims Act," provides that a "claim against the United States shall be forfeited . . . by any person who corruptly practices or attempts to practice any fraud against the United States in the proof, statement, establishment, or allowance thereof."¹⁸¹ Under this Act, forfeiture is required "if fraud is practiced during contract performance or in the making of a claim."¹⁸² Significantly, under this Act, forfeiture of a claim may lead to forfeiture of other claims.¹⁸³ Therefore, even if a contractor has an untainted claim under a contract, if the contractor is found to have committed an act of fraud under the same contract, it will almost certainly lose

¹⁷⁴ *BMY-Combat Sys.*, 26 Cl. Ct. at 848–49; *Ingalls Shipbldg., Inc. v. United States*, 13 Cl. Ct. 757, 767 (1987), *rev'd on other grounds*, 857 F.2d 1448 (Fed. Cir. 1988); *Brown Constr. Trades, Inc. v. United States*, 23 Cl. Ct. 214, 216 (1991).

¹⁷⁵ *Brown v. United States*, 524 F.2d 693, 703 (Ct. Cl. 1975); *BMY-Combat Sys.*, 26 Cl. Ct. at 849; 31 U.S.C. § 3729(a) (2000).

¹⁷⁶ 41 U.S.C. § 604 (2000); *BMY-Combat Sys.*, 26 Cl. Ct. at 826, 849; *SGW, Inc. v. United States*, 20 Cl. Ct. 174 (1990).

¹⁷⁷ *See* 41 U.S.C. § 605(a); *Simko Constr.*, 852 F.2d at 547; *BMY-Combat Sys.*, 26 Cl. Ct. at 849.

¹⁷⁸ 31 U.S.C. § 3729(a) (2000). Although the Act provides for penalties ranging from \$5,000 to \$10,000, the Department of Justice has adjusted the penalties to between \$5,500 to \$11,000 pursuant to other statutory authority. 28 C.F.R. §§ 85.1, 85.3 (2007).

¹⁷⁹ 41 U.S.C. § 604.

¹⁸⁰ 41 U.S.C. § 605(a).

¹⁸¹ 28 U.S.C. 2514 (2000).

¹⁸² *UMC Elecs. v. United States*, 43 Fed. Cl. 776, 790 (1999), *aff'd*, 249 F.3d 1337 (Fed. Cir. 2001).

¹⁸³ *See id.* at 790–91.

the ability to recover.¹⁸⁴ Thus, if a contractor chooses to initiate suit in the CFC, the contractor's claim may be reduced by setoff or extinguished, or the Government may be awarded affirmative relief.

The boards' jurisdiction over Government fraud counterclaims is more limited. The CDA does "not authorize any agency head to settle, compromise, pay, or otherwise adjust any [Government contract] claim involving fraud."¹⁸⁵ 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.¹⁸⁶ When litigation is commenced before a board in a case that the Government believes involves fraud, the Government will frequently try to obtain a fraud judgment against the contractor in U.S. district court. The Government typically files a motion to stay the board litigation while the fraud case is adjudicated in district court.¹⁸⁷ 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.¹⁸⁸

Therefore, in selecting a forum, a contractor should consider whether the Government will assert a fraud claim. If this likelihood is significant, the contractor should first carefully assess the merits of its claim. If the contractor decides to proceed with the claim, the contractor may be better off doing so before a board than before a court. If the action is asserted before the CFC, the Government may have the matter, including the fraud claim, adjudicated

¹⁸⁴ See *Little v. United States*, 152 F. Supp. 84, 87-88 (Ct. Cl. 1957); *UMC Elecs.*, 43 Fed. Cl. at 790.

¹⁸⁵ 41 U.S.C. § 605(a).

¹⁸⁶ 41 U.S.C. § 605(a); TDC Mgmt. Corp., DOTCAB No. 1802, 90-1 BCA ¶ 22,627; Fidelity Constr. Co., DOTCAB No.1113, 80-2 BCA ¶ 14,819, *aff'd*, 700 F.2d 1379 (Fed. Cir. 1983); Quality Env't Sys., Inc., ASBCA No. 22178, 87-3 BCA ¶ 20,060; Warren Beaves, DOTCAB No.1324, 83-1 BCA ¶ 16,232.

¹⁸⁷ *E.g.*, Hardrives, Inc., IBCA No.2319, 91-2 BCA ¶ 23,769; San-Val Eng'g, Inc., GS-BCA No.10371, 92-1 BCA ¶ 24,558; T. Iida Contracting, Ltd., ASBCA No.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.").

¹⁸⁸ TDC Mgmt., DOTCAB No. 1802, 90-1 BCA ¶ 22,627 & 88-1 BCA ¶ 20,242; see P.H. Mech. Corp., GSBCA No.10567, 94-2 BCA ¶ 26,785. *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).

in a single forum. If that same matter were before a board, the Government could not recover affirmative relief from the contractor based on a fraud claim, nor could it count civil penalties toward any setoff against the contractor's claim.¹⁸⁹ The Government would need to bring a separate and independent action in a U.S. district court. But, many district courts have allowed the Government, when suing a contractor for false claims in district court, to include CDA claims in the suit and have all the claims resolved before that tribunal.¹⁹⁰

IV. Relief Available

The principal remedy available in contract disputes before the CFC and the boards is money damages, which is usually recovered in the form of expectation or reliance damages.¹⁹¹ However, other remedies may also be available depending upon the circumstances of the dispute. Reformation¹⁹² or rescis-

¹⁸⁹ See 41 U.S.C. § 605(a).

¹⁹⁰ *E.g.*, United States v. United Indus., Inc., 929 F. Supp. 947, 951 (E.D. Va. 1996); United States v. Rockwell Int'l Corp., 795 F. Supp. 1131, 1135, 1138–39 (N.D. Ga. 1992); United States v. JT Constr. Co., 668 F. Supp. 592 (W.D. Tex. 1987). *But see* United States v. Hughes Aircraft Co., No. CV89-6842-WJR (SX), 1991 WL 133569, at *1 (C.D. Cal. Apr. 5, 1991).

¹⁹¹ *See, e.g.*, S. Cal. Fed. v. United States, 422 F.3d 1319, 1334 (Fed. Cir. 2005); Glendale Federal Bank, FSB v. United States, 378 F.3d 1308, 1313 (Fed. Cir. 2004); Hi-Shear Tech. Corp. v. United States, 356 F.3d 1372, 1382–83 (Fed. Cir. 2004); Energy Capital Corp. v. United States, 302 F.3d 1314, 1324 (Fed. Cir. 2002); Carabetta Enters. v. United States, 68 Fed. Cl. 410, 413–14 (2005), *aff'd*, 482 F.3d 1360 (Fed. Cir. 2007); CACI Int'l, Inc, ASBCA No. 53058, 05-1 BCA ¶ 32,948; W. Aviation Maint., GSBCA 14165, 00-2 BCA ¶ 31,123; 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).

¹⁹² *Giesler v. United States*, 232 F.3d 864, 869 (Fed. Cir. 2000); *LaBarge Prods., Inc. v. West*, 46 F.3d 1547, 1552–53 (Fed. Cir. 1995); *Roseburg Lumber Co. v. Madigan*, 978 F.2d 660, 665 (Fed. Cir. 1992); *Bobula v. U.S. Dep't of Justice*, 970 F.2d 854, 859 (Fed. Cir. 1992) (noting that equitable relief is sometimes available in a suit brought under the Tucker Act, when that relief “is incidental to and collateral to a claim for money damages”); *Atlas Corp. v. United States*, 895 F.2d 745, 750–51 (Fed. Cir. 1990); *American President Lines, Ltd. v. United States*, 821 F.2d 1571, 1582 (Fed. Cir. 1987); *United States v. Hamilton Enters.*, 711 F.2d 1038, 1043 (Fed. Cir. 1983); *Applied Devices Corp. v. United States*, 591 F.2d 635, 636 (Ct. Cl. 1979); *Jeppesen Sanderson, Inc. v. United States*, 19 Cl. Ct. 233, 236 (1990); *Parcel 49 C Ltd. P'ship v. Gen. Servs. Admin.*, GSBCA 16447, 05-2 BCA ¶ 33,013; *Wyodak Enters., Inc.*, VABCA 3678, 95-1 BCA ¶ 27,493; *Wheeled Coach Indus. v. Gen. Servs. Admin.*, GSBCA 10314, 93-1 BCA ¶ 25,245; *Pac. Coast Molybdenum Co., AGBCA 84-162-1, 89-2 BCA ¶ 21,755, aff'd*, 902 F.2d 44 (Fed. Cir. 1990); *Bay Harbor Co.*,

sion¹⁹³ of the contract, or restitution¹⁹⁴ may be available in both the CFC and boards. In certain circumstances, those tribunals may declare a contract *void ab initio*, nullified, or invalid.¹⁹⁵ On relatively rare occasions, the tribunals have also ruled that they had jurisdiction over *quantum meruit* or *quantum valebant* claims.¹⁹⁶ Absent express congressional consent, neither forum has

ASBCA 41589 92-3 BCA ¶ 25,210; S. Dredging Co., ENGBCA 5843, 92-2 BCA ¶ 24,886; Thompson Numerical, Inc., ASBCA 41327, 91-3 BCA ¶ 24,169; see FAR § 33.205.

¹⁹³ *Giesler*, 232 F.3d at 869; Dairyland Power Coop. v. United States, 16 F.3d 1197, 1202 (Fed. Cir. 1994); *Roseburg Lumber Co.*, 978 F.2d at 665; Thompson Numerical, Inc., ASBCA No.41327, 91-3 BCA ¶ 24,169; Don Simpson, IBCA No.2058, 86-2 BCA ¶ 18,768; Sealite Corp., ASBCA No.25805, 84-1 BCA ¶ 17,144; FAR § 33.205.

¹⁹⁴ Mobil Oil Exploration & Producing S.E., Inc. v. United States, 530 U.S. 604, 623–24 (2000); *Glendale Fed. Bank*, 378 F.3d at 1313; *Glendale Fed. Bank v. United States*, 239 F.3d 1374, 1380 (Fed. Cir. 2001), *aff'd*, 378 F.3d 1308 (Fed. Cir. 2004); *Roseburg Lumber Co.*, 978 F.2d at 665; *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); *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); *AT&T v. Gen. Servs. Admin.* GSBCA No. 14732, 02-1 BCA ¶ 31,713; *AT&T v. Gen. Servs. Admin.* GSBCA No. 14732, 00-2 BCA ¶ 31,128; *Newhall Ref. Co.*, EBCA No. 363-7-86 et al., 89-3 BCA ¶ 22,142.

¹⁹⁵ *AT&T v. United States*, 177 F.3d 1368, 1375–76 (Fed. Cir. 1999), *aff'd*, 307 F.3d 1374 (Fed. Cir. 2002) (en banc); *Total Med. Mgmt. v. United States*, 104 F.3d 1314, 1321 (Fed. Cir. 1997); *Ala. Rural Fire Ins. Co. v. United States*, 572 F.2d 727, 733 (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 Gen.-Bauuntemehmen*, ASBCA No.43980 et. al, 01-2 BCA ¶ 31,431; *Medica, S.A.*, ENGBCA No.PCC-142, 00-2 BCA ¶ 30,966; see also *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).

¹⁹⁶ *Perri v. United States*, 340 F.3d 1337, 1343–1344 (Fed. Cir. 2003) (Federal Circuit has allowed recovery where goods and services had been provided pursuant to an express contract but the Government refused to pay because the contract had been rendered invalid); *United States v. Amdahl Corp.*, 786 F.2d 387, 395 (Fed. Cir. 1986); *Urban Data Sys.*, 699 F.2d at 1154 n.8 (Fed. Cir. 1983); *Prestex, Inc.*, 320 F.2d at 374; *Fluor Enters. v. United States*, 64 Fed. Cl. 461, 465, 495–96 (2005); *Transfair Int'l, Inc. v. United States*, 54 Fed. Cl. 78, 87 n.12 (2002); *Flathead Contr.*, CBCA No.118, 07-1 BCA ¶ 33,556; *Mitch Moshtaghi*, ASBCA No.53711, 03-2 BCA ¶ 32,274 (holding that it had jurisdiction to hear quantum merit claim to the extent the allegation was based on an implied-in-fact promise). *But see* *United Rentals, Inc.*, HUDBCA No. 03-D-100-C1, 06-1 BCA ¶ 33,131. In this regard, the CFC and 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); *City of Cincinnati v. United States*, 153 F.3d 1375, 1377 (Fed. Cir. 1998); *Northrop Corp. v. United States*, 47 Fed. Cl. 20, 40–41 (2000); *United Pac. Ins. Co.*, ASBCA No. 53051, 03-2 BCA ¶ 32,267, *aff'd*, 380 F.3d 1352 (Fed. Cir. 2004); *Eaton Corp.*, ASBCA No. 38386, 91-1 BCA ¶ 23,398.

the authority to award punitive damages.¹⁹⁷ But, both forums may have the authority to award consequential damages in certain circumstances.¹⁹⁸ Both forums may award attorney's fees to a prevailing party under the Equal Access to Justice Act.¹⁹⁹ As noted previously in this article, the CFC 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 non-monetary disputes."²⁰⁰ Accordingly, the CFC has the author-

¹⁹⁷ *Fields v. United States*, 53 Fed. Cl. 412, 420 (2002); *Christos v. United States*, 48 Fed. Cl. 469, 478 n.22 (2000), *aff'd*, 300 F.3d 1381 (Fed. Cir. 2002); *Janice Cox*, ASBCA No.50587, 01-1 BCA ¶ 31,377; *Advance Eng'g Corp.*, ASBCA No. 46889, 95-1 BCA ¶ 27,475, *aff'd on recons.* ASBCA No. 96-1 BCA ¶ 28,003.

¹⁹⁸ *San Carlos Irrigation & Draining Dist. 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)); *San Carlos Irrigation & Drainage Dist. v. United States*, 877 F.2d 957, 960 (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."); *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); *Consol. 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); *Wells Fargo Bank, N.A. v. United States*, 88 F.3d 1012, 1022–24 (Fed. Cir. 1996); *Eaton Contracts Servs., Inc.*, ASBCA No. 52888, 04-1 BCA ¶ 32,536; *M&W Constr. Corp.*, ASBCA No. 53482, 02-1 BCA ¶ 31,804 ("[T]he label 'consequential damages' is generally a confusing and disfavored term and not particularly helpful in determining what damages are recoverable."); *PAE Int'l*, ASBCA No. 45314, 98-1 BCA ¶ 29,347, *appeal sustained*, ASBCA No. 98-1 BCA ¶ 29,348 ("[C]onsequential or special damages, in order to be recoverable, must be foreseeable at the time the contract is executed.") (internal quotations omitted); *Stroh Corp.*, GSBCA No. 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); *Nat'l Park Concessions*, IBCA 2995, 94-3 BCA ¶ 27,104; *Tele-Sentry Sec., Inc.*, GSBCA 8950, 92-3 BCA ¶ 25,088; *Dunbar & Sullivan Dredging Co.*, ENGBCA 5218, 87-2 BCA ¶ 19,773. *See generally* Ralph C. Nash & John Cibinic, "Recovering Consequential Damages From the Government: An Impossible Dream?," 5 NASH & CIBINIC REP. ¶ 20 (1991).

¹⁹⁹ 28 U.S.C. § 2412(b) (2000); 5 U.S.C. § 504 (2000); *Skip Kirchdorfer, Inc. v. United States*, 16 Cl. Ct. 27, 34–35 (1988); *Hughes Moving & Storage, Inc.*, ASBCA No.45346, 00-1 BCA ¶ 30,776; *see* Paul L. Whalen, *Equal Access to Justice Act: Recent Developments*, 02-05 BRIEFING PAPERS 1 (2002); *Donald A. Tobin & George W. Stiffler, Recovering Legal Fees Under EAJA/Edition II*, 91-7 BRIEFING PAPERS 1 (1991).

²⁰⁰ 28 U.S.C. § 1491(a)(2); *Alliant Techsystems, Inc. v. United States*, 178 F.3d 1260, 1264–70 (Fed. Cir. 1999); *Loveladies Harbor v. United States*, 27 F.3d 1545, 1550 n.14

ity to provide declaratory relief for these non-monetary CDA disputes. The boards have also exercised this authority.²⁰¹

Neither the CFC nor the boards may grant specific performance,²⁰² injunctive relief,²⁰³ or mandamus relief²⁰⁴ 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.”²⁰⁵ Both the boards and the CFC may direct a CO, “[with]in a specified period of time,” to issue a Final Decision “in the event of undue delay” by the CO.²⁰⁶ However, that authority does not permit the boards or the CFC “to dictate the contents of the decision.”²⁰⁷ 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

(Fed. Cir. 1994); *ATK Thiokol v. United States*, 68 Fed. Cl. 612, 626 (2005).

²⁰¹ *Malone v. United States*, 849 F.2d 1441, 1445 (Fed. Cir. 1988); *Garrett v. Gen. Elec. Co.* 987 F.2d 747, 750–51 (Fed. Cir. 1993); *Johnson & Gordon Sec., Inc. v. Gen. Servs. Admin.*, 857 F.2d 1435, 1437 (Fed. Cir. 1988); *Rohr, Inc., ASBCA Nos. 44193, 44376, 93-2 BCA ¶ 25,871*; *Gen. Elec. Automated Sys. Div., ASBCA No. 36214, 89-1 BCA ¶ 21,195*; *Nachtmann Analytical Lab. v. Int’l Boundary & Water Comm’n, CBCA No.500, 07-1 BCA ¶ 33,570*; *Michael Grinberg, DOTCBA No. 1543, 87-1 BCA ¶ 19,573*; *W. Aviation Maint., Inc. v. Gen. Servs. Admin., GSBCA No.14165, 98-2 BCA ¶ 29,816*; *Smith’s Inc. of Dothan, VABCA No. 2198, 85-2 BCA ¶ 18,133*. *But see Cedar Lumber, Inc., AGBCA Nos. 85-214-1, 85-221-1, 85-3 BCA ¶ 18,346, rev’d on other grounds, 799 F.2d 743 (Fed. Cir. 1986)*.

²⁰² *Massie v. United States*, 226 F.3d 1318, 1321–22 (Fed. Cir. 2001); *Nat’l Ctr. for Mfg. Scis. v. United States*, 114 F.3d 196, 198 (Fed. Cir. 1997); *Wood v. United States*, 961 F.2d 195, 199 (Fed. Cir. 1992); *Blackwell v. United States*, 23 Cl. Ct. 746, 750 (1991); *Edwards v. United States*, 19 Cl. Ct. 663, 668 (1990); *Rig Masters, Inc. v. United States*, 42 Fed. Cl. 369, 373 (1998); *Statistica, Inc., ASBCA No. 44116, 92-3 BCA ¶ 25,095*; *Gen. Elec. Automated Sys., ASBCA No. 36214*; *John Barrar, ENGBCA No. 5918, 92-3 BCA ¶ 25,074*; *W. Aviation, GSBCA No.14165*; *Hub Testing Labs., Inc., GSBCA No. 11693, 92-3 BCA ¶ 25,081*; *Sabbia Corp., VABCA No. 5557, 99-2 BCA ¶ 30,394*.

²⁰³ *Rohr, ASBCA No. 44193*; *Statistica, Inc., ASBCA No.44116*; *Dixon Pest Control, ASBCA No. 41042, 91-1 BCA ¶ 23,640*; *Wyskiver, PSBCA No. 3621, 95-2 BCA ¶ 27,755*; *Sabbia, VABCA No. 5557*.

²⁰⁴ *Doko Farms v. United States*, 13 Cl. Ct. 48, 56 (1987); *Smith v. United States*, 654 F.2d 50, 52 (Ct. Cl. 1981); *Alford v. United States*, 3 Cl. Ct. 229, 230 (1983); *Statistica, ASBCA No.44116*; *Raymond Kaiser Eng’rs, ASBCA No.34133, 87-3 BCA ¶ 20,140*; *Maria Manges, ASBCA No.25350, 81-2 BCA ¶ 15,398*.

²⁰⁵ *Cal. Bus. Tels., CBCA No.135, 07-1 BCA ¶ 33,553* (citing *P.J. Dick, Inc. v. Gen. Servs. Admin., CBCA No.461, 07-1 BCA ¶ 33,534*).

²⁰⁶ 41 U.S.C. § 605(c)(4) (2000).

²⁰⁷ *Hub Testing, GSBCA No.11693*; *see Raymond Kaiser, ASBCA No.34133*.

negotiations concerning an equitable adjustment.²⁰⁸ In addition, 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.²⁰⁹ Where the CO has failed to issue a Final Decision on a contractor's claim within the required period, either tribunal may stay proceedings to obtain the CO's Final Decision.²¹⁰ Neither tribunal may ordinarily discipline an agency's noncompliance with the supervisory and reporting instructions related to congressional oversight.²¹¹

The CDA provides the boards' authority "to grant any relief that would be available to a litigant asserting a contract claim" in the CFC.²¹² As the Federal Circuit 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 [CFC] precisely to alleviate the fragmentation problem."²¹³ However, a board may grant the relief available in the CFC only if the board properly has jurisdiction over the matter under the CDA.²¹⁴ Consequently, even though the CFC has separate bid protest jurisdiction and may award costs in such cases,²¹⁵ this language from the CDA does not apply to the award of bid preparation costs because the boards have no jurisdiction

²⁰⁸ *Sabbia Corp.*, VABCA 5557; Steven S. Freedman, PSBCA No. 3867, 96-1 BCA ¶ 28,170; *Rohr, Inc.*, ASBCA No. 44193; *Hub Testing*, GSBCA No. 11693; *Dixon Pest*, ASBCA No. 41042; Erwin Melvie, PSBCA No. 1744, 87-3 BCA ¶ 20, 158 (quoting Janie Marie Winkle, PSBCA No. 1548, 86-3 BCA ¶ 19,255); *Consumers Packing Co.*, ASBCA No. 27092, 82-2 BCA ¶ 15,996.

²⁰⁹ *Chung-Ho Chiao*, DOTBCA 2264, 91-1 BCA ¶ 23,404; *Inslaw, Inc.*, DOTBCA No. 1609, 90-2 BCA ¶ 22,701; *Tom Shaw, Inc.*, DOTBCA No.2100, 90-1 BCA ¶ 22,286; *Tab Distributors*, PSBCA 4134, 99-1 BCA ¶ 30,110; *Hastetter*, PSBCA No. 3064, 92-3 BCA ¶ 25,189.

²¹⁰ 41 U.S.C. § 605(c).

²¹¹ *AT&T v. United States*, 177 F.3d 1368, 1375 (Fed. Cir. 1999), *aff'd*, 540 U.S. 937 (2003); *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).

²¹² 41 U.S.C. § 607(d).

²¹³ *LaBarge Prods., Inc. v. West*, 46 F.3d 1547, 1554 (Fed. Cir. 1995) (quoting *Paragon Energy Corp. v. United States*, 645 F.2d 966, 972 (Ct. Cl. 1981), *aff'd*, 230 Ct. Cl. 884 (1982) (citation omitted)).

²¹⁴ *Statistica, Inc.*, ASBCA No.44116, 92-3 BCA ¶ 25,095.

²¹⁵ 28 U.S.C. § 1491(b)(1)-(2) (2000).

over bid protests.²¹⁶ Furthermore, the Federal Circuit has stated “not every injury resulting from a breach of contract is remediable in damages.”²¹⁷ Also, the boards do not have authority to award damages allegedly resulting from a contractor’s debarment,²¹⁸ while the CFC lacks jurisdiction to review the propriety of a debarment decision.²¹⁹ Neither forum has authority to review wage classification disputes.²²⁰

V. Pre-Litigation Considerations

1. Filing Time Limits

From the outset, the substantially different time limits for bringing an action may dictate the choice between the CFC or a board as the forum for contesting an adverse CO’s final decision. A contractor has either (1) ninety days from the “date of receipt” of the CO’s final decision to file a simple notice of appeal to the appropriate board (and, then, ordinarily thirty days from its receipt of the notice of docketing of the appeal to file its complaint at the board),²²¹ or (2) twelve months from the “date of receipt” of the final decision to file suit (i.e., a formal complaint) in the CFC.²²² The CFC may be the better choice in cases where the contractor will need a substantial amount of time to factually develop its complaint or where it would like to delay the incurrence of the costs associated with generating a complaint.

The boards do not have jurisdiction to waive the late filing of an appeal²²³ and, similarly, the CFC may not ordinarily consider a suit filed late.²²⁴ Therefore,

²¹⁶ *Coastal Corp. v. United States*, 713 F.2d 728, 730 (Fed. Cir. 1983); *Statistica*, ASBCA No. 44116, Ammon Circuits Research, ASBCA No.50885, 97-2 BCA ¶ 29,318; see RC 27th Ave. Corp., ASBCA No.49176, 97-1 BCA ¶ 28,658. The GSBCA’s former jurisdiction under the Brooks Act over certain bid protests involving automatic data processing equipment and services was eliminated in 1996. See Clinger-Cohen Act of 1996, Pub. L. No. 104-106, § 5101, 110 Stat. 186, 680.

²¹⁷ *Wells Fargo Bank, N.A. v. United States*, 88 F.3d 1012, 1022 (Fed. Cir. 1996).

²¹⁸ *Ben M. White Co.*, ASBCA No.39444, 90-3 BCA ¶ 23,115, *aff’d on recons.*, 91-1 BCA ¶ 23,295.

²¹⁹ *Imco, Inc. v. United States*, 97 F.3d 1422, 1425 (Fed. Cir. 1996); *Vincent Schickler v. United States*, 54 Fed. Cl. 264, 272 (2002).

²²⁰ *Inman & Assocs., Inc.*, ASBCA No.37869, 89-3 BCA ¶ 22,066.

²²¹ 41 U.S.C. § 606 (2000); ASBCA R. 6.

²²² 41 U.S.C. § 609(a)(3); see *White Buffalo Constr., Inc. v. United States*, 28 Fed. Cl. 145, 147 (1992) (filing one day after the expiration of the twelve-month statutory period rendered the complaint untimely).

²²³ *White Buffalo Constr.*, 28 Fed. Cl. at 147.

²²⁴ See CT. FED. CL. R. 3(b)(2)(C) (limited exception for considering certain late-filed complaints sent by certified or registered mail)(repealed 2002); *Borough of Alpine v. United*

if a contractor waits more than ninety days to contest the CO's final decision, it ordinarily loses its choice and must file its action in the CFC. Once the period for filing an appeal to a board or a suit in the CFC has expired, the Government may obtain (if necessary, because the contractor is refusing to comply with the Final Decision) a judgment on the basis of the CO's final decision in state or federal court without litigating the merits.²²⁵

A related procedural issue concerns the timing and substance of the Government's initial filing(s). At the CFC, the Government has sixty days to file an answer, which must include affirmative defenses and counterclaims.²²⁶ In board cases, the Government has thirty days from the date it receives the complaint, which can be more than thirty days after the notice of appeal is filed, to file its answer.²²⁷ The Government also must file the *Rule 4 file* within thirty days of receiving the notice of appeal. This file consists of "all documents pertinent to the appeal, including" (1) the CO's final decision, (2) the contract, (3) relevant correspondence between the parties, (4) affidavits or transcripts prepared during the course of proceedings before the agency, and (5) any additional relevant information.²²⁸ As a practical matter, it is not

States, 923 F.2d 170, 172-73 (Fed. Cir. 1991); *Gunn-Williams v. United States*, 8 Cl. Ct. 531, 534 (1985).

²²⁵ See *United States v. Suntip Co.*, 82 F.3d 1468, 1471, 1474-75 (9th Cir. 1996); *Seaboard Lumber Co. v. United States*, 903 F.2d 1560, 1562 (Fed. Cir. 1990); *United States v. Ulvedal*, 372 F.2d 31, 34-35 (8th Cir. 1967); *United States v. Roarda, Inc.*, 671 F. Supp. 1084, 1085-86 (D. Md. 1987); *United States v. Dabbs*, 608 F. Supp. 507, 509 (S.D. Miss. 1985).

²²⁶ R. CT. FED. CL. 12, 13.

²²⁷ ASBCA R. 6(a)-(b).

²²⁸ *E.g.*, ASBCA R. 4(a); PSBCA R. 5(a); 39 C.F.R. § 955.5(a) (2007); see also, Williard & Jackson, *Selected Procedural Issues at the Boards of Contract Appeals* 98-7 BRIEFING PAPERS 5 (1998). The Civilian Board's rules on this subject are more detailed and provide that the Rule 4 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.

CBCA R. 4(a), 48 C.F.R. § 6101.4(a).

unusual for contractors to receive extensions from the board (but not the CFC) on the due date for the complaint. Also, the Government may receive extensions from the board on the due dates for the Rule 4 file and the answer and from the court on the answer due date.

2. Election Doctrine

Under the *Election Doctrine*, the CDA precludes a contractor from pursuing its claim in both forums.²²⁹ Consequently, once a contractor files an action in one forum, that selection is ordinarily binding, and it may not have that action dismissed and then proceed in the other forum.²³⁰ However, a contractor's election of a forum is only binding if that forum has jurisdiction over the proceeding.²³¹ Therefore, if a contractor files a board appeal after the ninety-day time limit has passed and the board thus lacks jurisdiction over the dispute, the contractor may still file suit in the CFC (assuming its suit is timely and the court otherwise has jurisdiction).²³² An appeal of a denial of an improperly certified claim constitutes a valid election and, thus, a contractor may not subsequently appeal such a claim to the other forum. Previously, a contractor was permitted to re-file before the Federal Courts Administration Act was enacted, because proper certification of a claim was a jurisdictional prerequisite for initiating an action in the court or boards.²³³

3. Representation and Settlement

In cases before the boards, the federal agencies are represented by attorneys from their own staffs.²³⁴ These agency attorneys frequently handle only Government contract cases and often become involved with a procurement before the contract award. Many agencies use the same attorneys who assisted the CO in denying the contractor's claim as trial counsel before the boards.

In the CFC, the Department of Justice (DOJ) represents the Government. The DOJ attorney will only rarely have had any involvement in the

²²⁹ *Nat'l Neighbors, Inc., v. United States*, 839 F.2d 1539, 1541-42 (Fed. Cir. 1988).

²³⁰ *Bonneville Assocs. v. United States*, 43 F.3d 649, 653 (Fed. Cir. 1994); *Glenn v. United States*, 858 F.2d 1577, 1580 (Fed. Cir. 1988); *Nat'l Neighbors*, 839 F.2d at 1541-42; *Tuttle/White Constructors, Inc. v. United States*, 656 F.2d 644, 646 (Ct. Cl. 1981).

²³¹ *Nat'l Neighbors*, 839 F.2d at 1542-43.

²³² *See id.*

²³³ 41 U.S.C. § 605(c)(6) (2000); *see Universal Canvas, Inc. v. Stone*, 975 F.2d 847, 850 (Fed. Cir. 1992); *see also United States v. Grumman Aerospace Corp.*, 927 F.2d 575, 580 (Fed. Cir. 1992).

²³⁴ *See* CBCAR 5(a)(2), 48 C.F.R. § 6101.5(a)(2) (2007) ("[I]f not prohibited by agency regulation or otherwise," the Government may appear—but in practice rarely, if ever, does—before the Civilian Board through the CO or the CO's authorized representative.).

procurement at the agency level and will also have responsibility for a variety of non-Government contract cases. Ordinarily, an agency attorney will serve as *of counsel* to the DOJ attorney, and the agency attorney may also take an active role in discovery and at trial.

The boards permit contractors to represent themselves *pro se*.²³⁵ Thus, a sole proprietor contractor can appear and handle the appeal himself, a partner can represent a partnership, and an officer of the corporation can represent the corporation. Notably, at least one board has explicitly stated that it “give[s] greater procedural latitude to *pro se* appellants than . . . to parties represented by lawyers.”²³⁶ Before the boards, contractors may also be represented by an attorney admitted to practice in the highest court of any state.²³⁷ In contrast, the CFC permits an individual to appear *pro se* or to represent a member of the individual’s immediate family, but requires any other party or organization, including corporations, partnerships, and joint ventures, to be represented by counsel.²³⁸ An attorney must be admitted to the court’s bar to practice before the court.²³⁹ The CFC’s rules require that there be “but one attorney of record for a party in any case at any one time.” All other attorneys representing a party are designated as *of counsel*.²⁴⁰

In the CFC, only the DOJ has the actual authority to settle a case—even over the objection of the agency involved in the claim—²⁴¹ and the CO is without authority to settle cases filed in the court.²⁴² Although the DOJ does not frequently exercise its authority to settle contrary to an agency’s desire, the existence of this possibility may cause agencies to soften their positions once the DOJ becomes involved. Further, because it was not previously involved in the case, the DOJ may bring a more objective perspective and/or may not be influenced by strained relationships between the parties to the appeal, which could facilitate settlement. These facts could weigh in favor of a contractor filing its case in the CFC if a *fresh look* at the dispute could

²³⁵ *E.g.*, ASBCA R. 26; CBCA R. 5(a), 48 C.F.R. § 6101.5(a).

²³⁶ *Greenlee Constr., Inc. v. Gen. Servs. Admin.*, CBCA No.416, 07-1 BCA ¶ 33,514.

²³⁷ *E.g.*, ASBCA R. 26; CBCA R. 5(a), 48 C.F.R. § 6101.5(a).

²³⁸ R. CT. FED. CL. 83.1(c)(8).

²³⁹ R. CT. FED. CL. 83.1(a).

²⁴⁰ R. CT. FED. CL. 83.1(c)(1).

²⁴¹ 28 U.S.C. §§ 516, 519 (2000); *Sharman Co. v. United States*, 2 F.3d 1564, 1571–72 (Fed. Cir. 1993) (once a contract claim is in litigation in the Court of Federal Claims, the DOJ “gains exclusive authority to act in the pending litigation.”); *Hoskins Lumber Co. v. United States*, 24 Cl. Ct. 259, 264–65 (1991); *Durable Metal Prods., Inc. v. United States*, 21 Cl. Ct. 41, 45–46 (1990); *Claude E. Atkins Enters. v. United States*, 15 Cl. Ct. 644, 647 n.2 (1988); Executive Order No. 6166, *reprinted in* 5 U.S.C. § 901 note (2000).

²⁴² *Hoskins Lumber*, 24 Cl. Ct. at 264–65; *Durable Metal Prods.*, 21 Cl. Ct. at 45; *see* PETER S. LATHAM, *GOVERNMENT CONTRACT DISPUTES* § 9-15 (2nd ed. 1986).

result in a favorable settlement, narrow the issues, or otherwise facilitate the disposition of the case.

On the other hand, because agencies cannot settle court cases without the agreement of the DOJ, a contractor loses the flexibility it had in dealing solely with agency officials once a case is filed in the CFC. (In this regard, because agency counsel may be more familiar with or have greater access to the facts of the case, the actors in the underlying dispute and the decision makers ultimately responsible for the settlement of the case, board litigation may lead to a more prompt resolution.) The DOJ attorney representing the Government will be new to the case and subject to strict DOJ procedures regarding settlement, which include receiving approval from senior DOJ officials.²⁴³ Furthermore, some practitioners view DOJ attorneys as more aggressive and less likely to settle than their agency counterparts and as more likely to desire to gain trial experience, possibly at the expense of settling a case. DOJ attorneys also do not ordinarily have to worry about future business relationships with the contractor, unlike agency counsel who may be influenced by this factor.²⁴⁴ Settlement also can be impeded because the DOJ attorney may be constrained, or otherwise influenced, by more global concerns (i.e., the impact on other cases) related to the issues in the contractor's particular case.

In cases pending before the boards, the CO retains the authority to settle. If the contractor is negotiating a settlement of a case pending before a board with an agency lawyer, it is imperative that the contractor receive the CO's agreement to the settlement because, ordinarily, agency lawyers have no authority to settle cases before the boards unless such authority is expressly delegated by the CO.²⁴⁵ In the case of the Civilian Board, 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.²⁴⁶

²⁴³ See 28 C.F.R. §§ 0.160–0.172 & app (2007); U.S. DEP'T OF JUSTICE, THE DEPARTMENT OF JUSTICE MANUAL § 4-3.110–4-3.432 (Aspen Publishers 2002 & Supp. 2007-3).

²⁴⁴ LATHAM, *supra* note 242, § 9–15.

²⁴⁵ Marino Constr. Co., VABCA No. 2752, 90-1 BCA ¶ 22,553; J.H. Strain & Sons, Inc., ASBCA No. 34432, 88-3 BCA ¶ 20,909; J.W. Bateson Co., ASBCA No. 24425, 84-1 BCA ¶ 16,942; Ralph C. Nash & John Cibinic, *Settlement of Claims: Who Is Authorized To Do What?*, 6 NASH & CIBINIC REP. ¶ 52 (Sept. 1992); see generally GSA, GSA DELEGATIONS OF AUTHORITY MANUAL ch. 6 (1984).

²⁴⁶ CBCA R. 25(b), 48 C.F.R. § 6101.25(b) (2007).

The board's decision adopting the parties' stipulation "is an adjudication of the case on the merits"²⁴⁷ and typically will provide or allow for payment by the Government from the Judgment Fund.²⁴⁸

Neither the boards nor the CFC may ordinarily reject a settlement that has been agreed to by the CO or DOJ, respectively.²⁴⁹ 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 a type of contract that can be litigated under the CDA.²⁵⁰ However, some boards may be willing to review and act upon a motion to enforce a settlement agreement.²⁵¹ The boards have the authority to determine the validity of a settlement agreement because such a ruling is a prerequisite to board jurisdiction under the CDA over a bona fide dispute.²⁵² In contrast, the CFC clearly possesses the authority to enforce a settlement agreement. The court's Tucker Act jurisdiction is broader than that conferred by the CDA and includes virtually all express and implied-in-fact contracts with the Government.²⁵³ Therefore, if the Government refuses to comply with a settlement agreement, a contractor should file a motion to enforce the decision with the appropriate board, recognizing that it may have to file its *enforcement* (or breach of settlement contract) action in the CFC.

²⁴⁷ CBCA R. 25(b), 48 C.F.R. § 6101.25(b).

²⁴⁸ See e.g., *RB Realty Inc. v. Gen. Servs. Admin.*, CBCA No.482, 07-1 BCA ¶ 33,487; *Bhandari Constructors & Consultants, Inc. v. Dep't of Veterans Affairs*, CBCA No.4 et al., 07-1 ¶ 33,497; *New England Design Assocs. v. Dep't of Veterans Affairs*, CBCA No.9 et al., 2007 WL 731066 (Mar. 1, 2007); see CBCA R. 31(a), 48 C.F.R. § 6101.31(a); see also 31 U.S.C. § 1304 (2000); 41 U.S.C. § 612 (1996). See generally Carl L. Vacketta & Eric B. Kantor, *Obtaining Payments From the Government's "Judgment Fund"*, 97-3 BRIEFING PAPERS 1-2, 3 (1997).

²⁴⁹ See e.g., *Fed. Data Corp. v. SMS Data Prods. Group*, 819 F.2d 277, 278-79 (Fed. Cir. 1987); *Cosmo Constr. Co.*, IBCA No.412, BCA ¶ 4059.

²⁵⁰ E.g., *Rimar Constr. Co.*, AGBCA No. 88-33-1, 89-3 BCA ¶ 22,074; see 41 U.S.C. § 602(a). But see *City Contractors, Inc.*, DOTBCA No. 2073, 91-1 BCA ¶ 23,531.

²⁵¹ See e.g., *E. Coast Sec. Servs., Inc. v. Dep't of Homeland Security*, DOTBCA No. 4469R, 06-1 BCA ¶ 33,290; *Seagraves Coating Corp.*, GSBCA No.13069 (11270)-REIN et. al, 96-2 BCA ¶ 28,543; *PRC, Inc.*, DOTCAB No.2543 et al., 94-2 BCA ¶ 26,613; *G.E.T. Constr. Co.*, ASBCA Nos. 24234, 28709, 84-2 BCA ¶ 17,464; *Montgomery Ross Fisher, Inc.*, VABCA No. 3696, 94-1 BCA ¶ 26,527; *Construccion Electromecanicas S.A.*, ASBCA No.41413, 94-1 BCA ¶ 26,296.

²⁵² See e.g., *Marino Constr. Co.*, VABCA No.2752, 90-1 BCA ¶ 22,553; *Rimar Constr. Co.*, AGBCA Nos. 88-33-1, 88-232-1, 89-3 BCA ¶ 22,074.

²⁵³ 28 U.S.C. § 1491(a)(1) (2000).

In summary, if a contractor's dispute with the Government has been highly contentious, it may make sense for the contractor to file at the CFC in order to (possibly) receive a more objective and detached legal view of the merits of the case. In contrast, the cognizant board may be the preferable forum when the parties are not that far apart in settlement negotiations and may be able to quickly settle.

4. Alternative Dispute Resolution

Both the court and the boards encourage and support the use of ADR methods.²⁵⁴ The use of ADR at both forums is voluntary, and there is little practical difference between them. However, some boards, unlike the CFC, may actively aid in ADR efforts before the issuance of a Final Decision by the CO. The Civilian Board may engage in ADR efforts on contract-related matters even before the filing of a claim, the issuance of a CO's Final Decision, or before a contract has been awarded, even with respect to agencies over which it does not have jurisdiction.²⁵⁵ In FY 2004, the ASBCA provided ADR services in twenty undocketed disputes.²⁵⁶ In addition, certain GSBCA judges served as Special Masters for the Federal Aviation Administration's Office of Dispute Resolution for Acquisition (ODRA).²⁵⁷

(1) *Court of Federal Claims*—The CFC promotes the use of ADR techniques through Appendix H to its rules and its Second Amended General Order No. 40.²⁵⁸ These ADR techniques are voluntary and cannot be employed unless there is agreement by both the contractor and the Government.²⁵⁹ Should the parties decide that they wish to employ ADR techniques, they should make this interest known to their assigned judge through an early status conference or in the parties' joint preliminary status report.²⁶⁰ The assigned judge will

²⁵⁴ See generally Carol Park Conroy & Martin J. Harty, *Alternative Dispute Resolution at the ASBCA*, 00-7 BRIEFING PAPERS 1 (2000); Donald P. Arnavas & Joseph P. Hornyak, *Alternative Dispute Resolution/Edition II*, 96-11 BRIEFING PAPERS 1-3 (1996).

²⁵⁵ CBCA R. 54(a)(1), 48 C.F.R. § 6101.54(a)(1) (2007); Alternative Dispute Resolution (ADR) at the Civilian Board of Contract Appeals, http://www.cbca.gsa.gov/CBCA-17712-v1-CBCA_ADR.htm (last visited Jan. 14, 2008); Civilian Board of Contract Appeals, Board Mission, <http://www.cbca.gsa.gov/mission.htm> (last visited Jan. 14, 2008).

²⁵⁶ FY2004 ASBCA ANN. REP. 3 (Nov. 30, 2004).

²⁵⁷ See e.g., Jeff Kinney, *FAA: ODRA: TSA, Screening Firm Should Negotiate Labor Rates After Letter Contract Performed*, 84 FED. CONT. REP. (BNA) 305 (Sept. 27, 2005).

²⁵⁸ See RCFC app. H; Ct. Fed. Cl. Second Amended General Order No. 40 (Mar. 17, 2004), available at <http://www.usfc.uscourts.gov/Taskforce/Gen40.pdf>; see *Gregson v. Sec'y of the Dept. of Health & Human Servs.*, 17 Cl. Ct. 19, 25 (1989); *Durable Metal Prods., Inc. v. United States*, 21 Cl. Ct. 41, 48 (1990).

²⁵⁹ RCFC app. H; *Durable Metal Prods.*, 21 Cl. Ct. at 48.

²⁶⁰ See RCFC app. A, ¶ 3(e); RCFC app. A, ¶ 4(i); RCFC app. H, ¶ 3.

then decide whether to refer the case to ADR.²⁶¹ Ordinarily, when the parties request ADR, the assigned judge will concur and refer the case to ADR. The court will then randomly assign the case to a settlement judge or refer it to the third-party neutral selected by the parties.²⁶²

At the court, “[t]here is no single format for ADR. Any procedures agreed to by the parties and adopted by the settlement judge or third-party neutral may be used.”²⁶³ ADR techniques at the court include but are not limited to mediation, mini-trials, early neutral evaluation, and nonbinding arbitration. “These processes may be conducted either by a settlement judge or a third-party neutral.”²⁶⁴ The settlement judge, who is randomly appointed by the clerk of the court, is not the judge initially assigned to preside over the case. The settlement judge is intended to be a neutral advisor with whom the parties can discuss the merits of their case in detail. Through these discussions, the settlement judge can provide the parties with an impartial assessment of the strengths and weaknesses of their respective positions and, in this way, encourage settlement.²⁶⁵ All information submitted to the settlement judge remains confidential and that judge is not allowed to discuss the case with the assigned judge.²⁶⁶

The CFC’s Second Amended General Order No. 40 established an ADR pilot program for cases assigned to four different judges of the court.²⁶⁷ Cases before these four judges are also simultaneously assigned (at the time of the filing of the complaint) to an ADR judge.²⁶⁸ This pilot program is designed to study whether early meetings with an ADR judge or meetings with the ADR judge after the close of discovery can facilitate the settlement process.²⁶⁹ Some practitioners (both private and Government) have reported that they believe this pilot program often starts too early in the litigation process.²⁷⁰ For example, the first meeting with the ADR judge often occurs before the Government has filed its answer. As a result, the Government usually has not fully developed its positions and meaningful discussions cannot be held.

²⁶¹ See RCFC app. H, ¶ 3(b).

²⁶² *Id.*

²⁶³ RCFC app. H, ¶ 3.

²⁶⁴ RCFC app. H, ¶ 1.

²⁶⁵ RCFC app. H, ¶ 2(a).

²⁶⁶ RCFC app. H, ¶ 3(d).

²⁶⁷ Second Amended General Order No. 40, *supra* note 258.

²⁶⁸ Second Amended General Order No. 40, *supra* note 258.

²⁶⁹ Second Amended General Order No. 40, *supra* note 258.

²⁷⁰ See generally Bobbi McAdoo, *A Report to the Minnesota Supreme Court: The Impact of Rule 114 on Civil Litigation Practice in Minnesota*, 25 HAMLIN L. REV. 401, 425 (2002); Roselle L. Wissler & Bob Dauber, *Leading Horses to Water: The Impact of an ADR “Confer and Report” Rule*, 26 JUST. SYS. J. 253, 268 (2005).

Moreover, outside of Appendix H and the Second Amended General Order No. 40, many of the judges of the court are dedicated to playing an active role in encouraging the settlement of their cases.²⁷¹ To this end, assigned judges have demonstrated a willingness to meet with counsel and party representatives to discuss their positions in aid of settlement.²⁷² This approach has often proven effective. Many of the CFC judges are willing to hold status conferences with the parties whenever either party believes it would assist in clarifying procedural or other issues in the case, or would assist in the disposition or settlement of the case.²⁷³ Some judges are also willing to flexibly schedule the various case milestones so that settlement opportunities present themselves before the parties have expended significant resources in discovery or motions practice.²⁷⁴

(2) *Boards of Contract Appeals*—The boards' ADR approach is similar to that of the court.²⁷⁵ The boards' use of ADR results in part from the Administrative Dispute Resolution Act of 1996, as amended,²⁷⁶ which requires federal agencies to develop policies addressing the use of ADR in rulemaking, enforcement actions, contract administration, and litigation. The ADR Act provides for the use of *neutrals* to aid in settlement negotiations, conciliation, facilitation, mediation, fact-finding, mini-trials, or any combination of these ADR methods.²⁷⁷ The ADR Act amended the CDA by allowing COs and contractors to use any ADR procedure set forth in the ADR Act or other mutually agreeable procedures to resolve a claim certified by the contractor.²⁷⁸

The boards generally provide the parties with written notice concerning the availability of ADR with the notice of docketing of the appeal. The ASBCA's notice specifically identifies and describes three ADR techniques—*settlement judge*, *mini-trial*, and *summary trial with binding decision*—and generally encourages the parties to engage in any other means of ADR that may settle the case.²⁷⁹ At the ASBCA, the board chairman must approve a joint ADR request

²⁷¹ Schaengold, *supra* note 11, at 58.

²⁷² Schaengold, *supra* note 11, at 58.

²⁷³ Schaengold, *supra* note 11, at 58.

²⁷⁴ Schaengold, *supra* note 11, at 58.

²⁷⁵ See, e.g., CBCA R. 54, 48 C.F.R. § 6101.54 (2007); Alternative Dispute Resolution (ADR) at the Civilian Board of Contract Appeals, http://www.cbca.gsa.gov/CBCA-17712-v1-CBCA_ADR.htm (last visited Jan. 14, 2008); ASBCA Notice Regarding Alternative Methods of Dispute Resolution, *available at* <http://docs.law.gwu.edu/asbca/adr.htm>.

²⁷⁶ 5 U.S.C. § 571-584 (2000).

²⁷⁷ 5 U.S.C. § 571(3), (9) (2000).

²⁷⁸ 41 U.S.C. § 605(d) (2000).

²⁷⁹ See ASBCA Notice Regarding Alternative Methods of Dispute Resolution, *supra* note 275.

and ordinarily does not withhold such approval.²⁸⁰ To facilitate frank and open discussions, any settlement judge or neutral advisor who has participated in an ADR procedure at the ASBCA that has failed to resolve the underlying dispute, will ordinarily not participate in the restored appeal.²⁸¹ Further, the judge or advisor will not discuss the merits of the appeal or substantive matters involved in the ADR proceedings with other board personnel.²⁸² Generally, ADR proceedings will be concluded within 120 days following the ASBCA Chairman's approval of their use.²⁸³

Before the Civilian Board, 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.²⁸⁴ The parties may request that the board's chairman appoint a particular judge or judges as the board neutral or neutrals.²⁸⁵ 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."²⁸⁶ The Civilian Board identified five examples of available ADR techniques: *Facilitative mediation*; *Evaluative mediation*; *Mini-trial*; *Non-binding advisory opinion*; and *Summary binding decision*.²⁸⁷ 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."²⁸⁸

For docketed appeals, if ADR fails to resolve the dispute completely, the appeal will generally return to the presiding Civilian Board judge for adjudication.²⁸⁹ If the ADR proceeding involved private communications between the neutral and individual parties—and that neutral is also the presiding

²⁸⁰ ASBCA Notice Regarding Alternative Methods of Dispute Resolution, *supra* note 275.

²⁸¹ ASBCA Notice Regarding Alternative Methods of Dispute Resolution, *supra* note 275.

²⁸² ASBCA Notice Regarding Alternative Methods of Dispute Resolution, *supra* note 275.

²⁸³ ASBCA Notice Regarding Alternative Methods of Dispute Resolution, *supra* note 275.

²⁸⁴ CBCA R. 54(b), 48 C.F.R. § 6101.54(b) (2007).

²⁸⁵ CBCA R. 54(b), 48 C.F.R. § 6101.54(b).

²⁸⁶ CBCA R. 54(a)(2), 48 C.F.R. § 6101.54(a)(2).

²⁸⁷ CBCA R. 54(c), 48 C.F.R. § 6101.54(c).

²⁸⁸ CBCA R. 54(c)(6), 48 C.F.R. § 6101.54(c)(6).

²⁸⁹ ASBCA Notice Regarding Alternative Methods of Dispute Resolution, *supra* note 275.

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.²⁹⁰ If no private communications occurred during the ADR proceeding, 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.²⁹¹

VI. Rules and Procedures

The CFC and each board have their own rules of procedure. In comparison with the rules of the boards, those of the court are more detailed and formalized. The Rules of the Court of Federal Claims (RCFC) are modeled after the Federal Rules of Civil Procedure, which govern proceedings before the U.S. district courts.²⁹² The court's rules include procedures similar to those in the local rules of the various U.S. district courts that have the effect of conforming the Federal Rules to the nature of practice before the CFC.²⁹³ CFC judges "may regulate practice [in an individual case] in any manner consistent with federal law or rules."²⁹⁴

On June 14, 1979, the Office of Federal Procurement Policy promulgated the Final Uniform Rules of Procedure for Boards of Contract Appeals under the Contract Disputes Act of 1978.²⁹⁵ Notwithstanding this uniform set of rules, each of the boards has its own set of rules that should be carefully consulted. The Civilian Board's interim rules are much more detailed than the rules of the ASBCA or the PSBCA.²⁹⁶

²⁹⁰ CBCA R. 54(b)(1), 48 C.F.R. § 6101.54(b)(1).

²⁹¹ CBCA R. 54(b)(1), 48 C.F.R. § 6101.54(b)(1).

²⁹² Foreword to the RCFC; *Cutright v. United States*, 15 Cl. Ct. 576, 577 (1988), *rev'd on other grounds*, 953 F.2d 619 (Fed. Cir. 1992); *White Mountain Apache Tribe v. United States*, 5 Cl. Ct. 288 (1984).

²⁹³ See Foreword to the RCFC.

²⁹⁴ RCFC 83(b); see RCFC 83 Rules Committee Note.

²⁹⁵ Final Uniform Rules of Procedure for Boards of Contract Appeals under the Contract Disputes Act of 1978, 44 Fed. Reg. 34,227 (June 14, 1979).

²⁹⁶ Rules of Procedure of the Civilian Board of Contract Appeals, Interim Rule, 72 Fed. Reg. 36,794 (proposed July 5, 2007) (codified at 48 C.F.R. pt. 6101). 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 C.B.C.A. Rule 16's provision to the board of the authority to issue subpoenas to, and enforce them against, U.S. Government agencies. See McGovern et al., *A Level Playing Field: Why Congress Intended the Boards of Contract Appeals to Have Enforceable Subpoena Power Over Both Contractor and the Government*, 36 PUB. CONT. L.J. 495, 496 (2007); Developments, *ABA Contract Committee's Draft White Paper Finds Support for Board Subpoena Power Over Federal Agencies*, 49 GC ¶ 209 (May 23, 2007); David M. Nadler & Joseph Berger, *Subpoena Power at the Civilian Board of*

1. Pretrial Procedures

(1) *Court of Federal Claims*—Pretrial procedures in the CFC are governed by Appendix A, “Case Management Procedure,” to the court’s rules.²⁹⁷ Appendix A, which may be modified by the judge “as appropriate” for the circumstances of the case or as suggested by the parties, defines the responsibilities of the parties and the court before trial and “represents the court’s standard pretrial order.”²⁹⁸ Appendix A addresses the scheduling and timing for the parties’ filing of a joint preliminary status report, the meetings of counsel, the filing of pretrial legal memoranda, the filing of dispositive motions, and the pretrial conference.²⁹⁹

Barring extensive filing of pretrial motions, it will take approximately two years for a case to progress from the filing of the complaint to the issuance of a decision.³⁰⁰ After the filing of the complaint, the Government has sixty

Contract Appeals—GSA Should Reconsider Its Position and Reverse Course, 49 GC ¶ 349 (Sept. 19, 2007). 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.” P.J. Dick, Inc. v. Gen. Servs. Admin., 07-1 BCA ¶ 33,518 n.2; *see also* P.J. Dick, Inc. v. Gen. Servs. Admin., 07-1 BCA ¶ 33,542 n.1; Interview with Stephen M. Daniels, Chairman, CBCA, and Robert W. Parker, Vice-Chairman, CBCA (July 10, 2007).

On July 5, 2007, the Civilian Board’s rules were issued in interim form, and they became effective on that date. Rules of Procedure of the Civilian Board of Contract Appeals, Interim Rule, 72 Fed. Reg. at 36,794. 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.” *Id.* at 36,795. 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.” *Id.* 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.” *Id.* The board further observed that the “interim final rule maintains most of the rules all of the former boards had in place.” *Id.* Written comments on these interim rules must be submitted to the Board no later than September 28, 2007, to be considered in the formulation of the final rules, which will be promulgated by a majority vote of its judges. *Id.* at 36,794.

²⁹⁷ RCFC app. A, (1).

²⁹⁸ RCFC app. A, (1)–(2); RCFC app. A Rules Committee Note.

²⁹⁹ RCFC app. A, (4)–(6), (12)–(14).

³⁰⁰ *See generally* RCFC app. G (repealed 2002) (stating the time periods allowed for various pretrial activities); DAVID B. STINSON, THE UNITED STATES COURT OF FEDERAL CLAIMS: HANDBOOK AND PROCEDURES MANUAL, ch. IV (1993) (describing the time frame and deadlines of the court).

days to answer.³⁰¹ Typically, the Government will request and receive (at least) a thirty-day extension of time to answer. Discovery may last eight to nine months (or longer).³⁰² The filing of motions and decisions on motions may take another five to six months (or longer).³⁰³ If the matter is not resolved on dispositive motion, the case will proceed to trial in approximately two to three months, and a decision may be rendered three to four months (or longer) thereafter.

During the sixty-three days before the final pretrial conference, typically there will be a meeting of opposing counsel and the exchange and filing of exhibits, witness lists, and pretrial memoranda.³⁰⁴ Appendix A provides a standard procedure for setting key pretrial dates once the final pretrial conference date is established.³⁰⁵ For example, if the court were to set November 1 as a contractor's final pretrial conference date, the pre-trial meeting of counsel would occur no later than about August 29, the contractor's pretrial memorandum (i.e., the Memorandum of Contentions of Fact and Law plus the exhibit and witness lists) would be due no later than about September 13, and the Government's pretrial memorandum (i.e., the Memorandum of Contentions of Fact and Law plus the exhibit and witness lists) would be due no later than about October 11.³⁰⁶

(2) *Boards of Contract Appeals*—The boards' rules are not nearly as detailed as those of the CFC. As in the court, however, the efficiency with which a case is handled by a board is more a function of the presiding judge than of the rules. The ASBCA stated its intention to schedule pretrial proceedings so as to achieve more efficient processing of cases.³⁰⁷ While it intends to "continue to seek the cooperation of the parties in establishing reasonable schedules, the board also intends to unilaterally establish schedules where the parties fail to respond to requests for proposed schedule dates."³⁰⁸

³⁰¹ RCFC 12(a)(1).

³⁰² See STINSON, *supra* note 300, ch. IV, at 4–5.

³⁰³ See STINSON, *supra* note 300, ch. IV, at 6–8.

³⁰⁴ RCFC app. A, (13)–(16).

³⁰⁵ RCFC app. A, (11)–(18).

³⁰⁶ See RCFC app. A, (13)–(16) (requiring party shall meet at a "Meeting of Counsel" 63 days before the pretrial conference, plaintiff's memorandum shall be filed 49 days before pretrial conference, and defendant's memorandum filed 21 days before pretrial conference).

³⁰⁷ FY1991 ASBCA ANN. REP. 3 (Sept. 31, 1991).

³⁰⁸ *Id.* See CBCA R. 1(a), 48 C.F.R. § 6101.1(a) (2007) (CBCA 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."). CBCA R. 1(c)–(d), 48 C.F.R. § 6101.1(c)–(d) (looking "to the Federal Rules of Civil Procedure for guidance in construing those Board rules which are similar to Federal Rules," and, "[i]n making rulings and issuing orders and

2. Accelerated and Expedited Procedures

Both the CFC and the boards provide accelerated procedures for certain types of cases. The boards, however, have more structured rules for, and have greater experience in, handling these cases. The board rules for *accelerated* and *expedited* cases should usually result in faster resolution of these cases than in the CFC.

(1) *Court of Federal Claims*—Appendix A to the court’s rules provides that within forty-nine days of the Government’s filing of an answer, counsel must meet and file a joint preliminary status report.³⁰⁹ As part of that status report, one or both parties may request expedited trial scheduling.³¹⁰ A party may request an expedited hearing with respect to any type of case.³¹¹ However, Appendix A states that an expedited trial schedule is “generally appropriate when the parties anticipate that discovery, if any, can be completed within a ninety-day period, the case may be tried within three days, no dispositive motion is anticipated, and a bench ruling is sought.”³¹² Expedited scheduling is not granted as a matter of right but, rather, at the discretion of the judge. In the joint preliminary status report, the party or parties should state the reasons in support of a request for expedited scheduling.³¹³ If the judge grants a request for expedited trial scheduling, the judge will set a discovery deadline, a pretrial conference date, and a trial date.³¹⁴ Although, Appendix A provides no guidance as to the date that will be set for trial, its predecessor, which is no longer in effect, stated that trial should be held “as soon as practicable.”³¹⁵ While discovery will be limited in expedited proceedings, the current rules provide no guidance on how much discovery will be allowed.³¹⁶ The predecessor rule provided that, unless changed by the court or agreement of the parties, discovery was limited to five depositions and thirty interrogatories.³¹⁷

Unlike the boards’ accelerated and expedited procedures, there are several constraints associated with the court’s expedited procedures that may be factors in a contractor’s forum choice. First, as noted above, the CFC is not

directions pursuant to [these rules], the Board takes into consideration those Federal Rules of Civil Procedure which address matters not specifically covered herein.”).

³⁰⁹ RCFC app. A, (3)–(4).

³¹⁰ RCFC app. A, (4)(j).

³¹¹ *See id.*

³¹² *Id.*

³¹³ *Id.*

³¹⁴ *See* RCFC app. A, (7).

³¹⁵ RCFC app. G, (6)(b) (repealed 2002).

³¹⁶ *Compare* RCFC app. A, (4)(j) (requiring discovery to be completed in 90 days), *with* RCFC app. A, (9) (setting no limit on discovery otherwise).

³¹⁷ RCFC app. G, (6)(b) (repealed 2002).

obligated to grant a request for an expedited trial.³¹⁸ Second, no deadline is imposed on the court for rendering a decision.³¹⁹ Third, Appendix A suggests that the court will not issue a written opinion in expedited matters.³²⁰

(2) *Boards of Contract Appeals*—Except as noted below with respect to the Civilian Board, the rules of the various boards for accelerated and expedited procedures are substantially the same.³²¹ Authorized by the CDA, these procedures are available solely at the contractor's election and may not be invoked by the Government.³²² For claims of \$100,000 or less, the CDA provides an *accelerated* procedure whereby the board's decision is rendered, "whenever possible," within 180 days of the election of the accelerated procedure.³²³ For claims of \$50,000 or less, the CDA provides an "expedited" procedure, where a decision is to be rendered, "whenever possible," within 120 days of election.³²⁴ For expedited claims, the CDA calls for simplified rules of procedure and a decision by only one judge.³²⁵ Decisions rendered under the expedited procedures, however, are unappealable (except on grounds of fraud) and have no precedential value.³²⁶

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[.]"³²⁷ While the board's rules do not provide further details on this power, presumably—outside of the small claims and accelerated procedures discussed below—such an expedited schedule will be granted when good cause is demonstrated.

The Civilian Board's *small claims procedure* is available solely at the contractor's election, which may be made when (1) there is a monetary amount in dispute of \$50,000 or less, or (2) there is a monetary amount in dispute of \$150,000 or less and the contractor is a small business concern.³²⁸ In small claims cases, the panel chair—who decides the case alone—"may issue a decision, which may be in summary form, orally or in writing."³²⁹ A decision issued orally "shall be reduced to writing; however, such a decision takes effect

³¹⁸ See RCFC app. A, (2).

³¹⁹ See generally RCFC app. A (setting no deadlines for the completion of a trial).

³²⁰ See RCFC app. A, (4)(j).

³²¹ See e.g., ASBCA R. 12; PSBCA R. 13, 39 C.F.R. § 955.13 (2007).

³²² 41 U.S.C. §§ 607(f), 608(a) (2007).

³²³ 41 U.S.C. § 607(f).

³²⁴ 41 U.S.C. § 608(a), (c).

³²⁵ 41 U.S.C. § 608(b).

³²⁶ 41 U.S.C. § 608(d)–(e).

³²⁷ CBCA R. 51(a), 48 C.F.R. § 6101.51(a) (2007); see also 41 U.S.C. §§ 607(f), 608(a).

³²⁸ CBCA R. 52(a), 48 C.F.R. § 6101.52(a); see also 41 U.S.C. § 608(a).

³²⁹ CBCA R. 52(b), (d), 48 C.F.R. § 6101.52(b), (d), see also 41 U.S.C. § 608(b).

at the time it is rendered, prior to being reduced to writing.”³³⁰ 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.³³¹ To meet the 120-day deadline, “[p]leadings, discovery, and other prehearing activities may be restricted or eliminated.”³³²

The Civilian Board’s *accelerated procedure* is available solely at the contractor’s election, when there is a monetary amount in dispute of \$100,000 or less.³³³ In accelerated procedure cases, the panel chair and one other panel member decide the case. If they disagree, a third panel member will participate in the decision.³³⁴ Unlike small claims appeals, accelerated procedure cases are appealable. To meet the 180-day deadline, “[p]leadings may be simplified, and, discovery and other prehearing activities may be restricted or eliminated.”³³⁵

3. Discovery

Before both the CFC and the boards, the parties generally can expect to engage in the amount of discovery that is commensurate with the complexity of the case. There is little difference between the forums with respect to the forms of discovery permitted and the means for addressing discovery disputes. However, the CFC’s discovery rules are more detailed and definitive and provide certain limitations on the amount of discovery.

The *prevailing wisdom* among practitioners is that the boards allow contractors a greater deal of control over the discovery schedule than does the CFC. The court has more rigid procedures in place, mandating meetings among counsel and discovery plans.³³⁶ The boards may offer contractors more flexibility, with some board judges allowing contractors to aggressively pursue their cases or to proceed at a more relaxed pace.

The Rule 4 file was one of the most significant differences between practicing before the boards and the CFC. As discussed above, that Rule, which applies only at the boards, requires the Government to provide the contractor and

³³⁰ CBCA R. 52(b), 48 C.F.R. § 6101.52(b).

³³¹ CBCA R. 52(b), 48 C.F.R. § 6101.52(b); *see also* 41 U.S.C. § 608(d)–(e).

³³² CBCA R. 52(c), 48 C.F.R. § 6101.52(c).

³³³ CBCA R. 53(a), 48 C.F.R. § 6101.53(a) (2007); *see also* 41 U.S.C. § 607(f) (2007).

³³⁴ CBCA R. 53(b), 48 C.F.R. § 6101.53(b).

³³⁵ CBCA R. 53(c), 48 C.F.R. § 6101.53(c).

³³⁶ *Compare* RCFC app. A (detailing the CFC case management procedures), *with* ASBCA R. 6, 14–15 (describing the pleading and discovery procedures of the ASBCA).

the board a file consisting of “all documents pertinent to the appeal.”³³⁷ In effect, the rule provides the contractor an initial round of automatic discovery without eliminating any of the customary discovery procedures and provides those documents to the Board. The contractor may supplement the Rule 4 file and, absent objection from a party, the documents in the Rule 4 file are considered to be part of the record.³³⁸

When the CFC amended its rules in 2002 to require certain initial disclosures of documents and likely witnesses,³³⁹ the Rule 4 file became a somewhat less significant difference between the forums. The initial disclosures in the CFC, however, do not occur until sixty-three days after the filing of the Government’s answer,³⁴⁰ as compared to the requirement that the Rule 4 file be provided within thirty days of the Government’s receipt of the notice of appeal.³⁴¹ Thus, even if these timetables are only roughly adhered to by the parties, the contractor will receive the Rule 4 file much earlier (approximately at least ninety-three days earlier) than it would receive the initial disclosures in the CFC. In addition, the initial disclosures in the CFC do not have to include the documents themselves. Instead, the disclosures may simply identify “by category and location” the relevant documents.³⁴² When the documents are identified, rather than being produced, there will almost always be additional delay before the documents can be reviewed by the contractor. Thus, the Rule 4 file still remains an important difference between the forums.

(1) *Court of Federal Claims*—The rules of discovery in the CFC are similar to those of the Federal Rules of Civil Procedure. While some board judges may (or may not) limit the amount and type of discovery, the court’s rules explicitly limit the number of depositions to ten, the length of each deposition to one day of seven hours,³⁴³ and the number of interrogatories to twenty-five (“including all discrete subparts”).³⁴⁴ The court may alter these limits or the parties may stipulate to changes to these limits.³⁴⁵ While the CFC’s rules do not limit the number of document requests or requests for admissions, the

³³⁷ ASBCA R. 4(a); PSBCA R. 5(a), 39 C.F.R. § 955.5(a) (2007); CBCA R. 4(a), (e), 48 C.F.R. § 6101.4(a), (e) (2007).

³³⁸ ASBCA R. 4(b), (e); PSBCA R. 5(b), (e), 39 C.F.R. § 955.5(b), (e); *see also* CBCA R. 4(e), 48 C.F.R. § 6101.4(e).

³³⁹ RCFC 26(a)(1)(A)–(B).

³⁴⁰ *See* RCFC 26(a)(1) (requiring initial disclosure 14 days after the filing of the Joint Preliminary Status Report, which RCFC app. A, (4) requires to be filed 49 days after the government’s answer).

³⁴¹ *See* ASBCA R. 4(a).

³⁴² *See* RCFC 26(a)(1)(B).

³⁴³ *See* RCFC 30(a)(2), (d)(2).

³⁴⁴ RCFC 33(a).

³⁴⁵ *See* RCFC 26(b)(2), 30(a)(2), 33(a).

rules provide that the court may limit the number of requests for admission.³⁴⁶ Additionally, the court will not permit a party to make an unreasonable number of document requests or engage in protracted or burdensome discovery, and a party may seek a protective order to block improper discovery practices.³⁴⁷ Appendix A to the CFC's rules provides some guidelines on the format for submitting and responding to interrogatories and requests for admissions.³⁴⁸ In addition, Appendix A advises that counsel's signature on interrogatory answers is governed by the strict certification requirements contained in the CFC's Rule 11.³⁴⁹

To some extent, the duration and extent of discovery may be controlled by the parties. The parties are responsible for proposing a plan and schedule for discovery, including deadlines for completing discovery, in the joint preliminary status report.³⁵⁰ Generally, the CFC judges will adhere to the discovery plan and deadlines set by the parties. The court frowns on the use of excessive party or judicial resources for discovery or for the resolution of discovery disputes. To this end, Appendix A specifically requires that parties filing a Motion to Compel Discovery or a Motion for a Protective Order must include a statement that the parties have tried to resolve the discovery dispute.³⁵¹

The court has the authority to impose a broad array of sanctions for a party's failure to cooperate in discovery including: (1) an order establishing for the purposes of the case certain matters or designating certain facts, (2) an order prohibiting a party from introducing designated matters in evidence, or (3) an order dismissing the action or any part thereof or rendering a judgment by default against the disobedient party.³⁵² Unlike the boards, the court possesses the authority to impose monetary sanctions for a party's failure to cooperate in discovery.³⁵³ Significantly, under the court's rules, sanctions for

³⁴⁶ See RCFC 26(b)(1)–(2), 34(a), 36(a).

³⁴⁷ See RCFC 26(c).

³⁴⁸ RCFC app. A, (9).

³⁴⁹ See *id.*

³⁵⁰ RCFC app. A, (5).

³⁵¹ See RCFC app. A, (10).

³⁵² RCFC 37(b)(2).

³⁵³ See RCFC 26(g)(3) (“If without substantial justification a certification is made in violation of [these discovery rules], the court, upon motion or of its own initiative, shall impose . . . an appropriate sanction, which may include an order to pay the amount of the reasonable expenses incurred because of the violation, including a reasonable attorney’s fee.”); see also *M.A. Mortenson Co. v. United States*, 15 Cl. Ct. 362, 365 (1988) (requiring Government to pay plaintiff’s attorney’s fees as sanction for discovery violations), *aff’d*, 996 F.2d 1177 (Fed. Cir. 1993).

discovery abuses may be imposed on counsel for a party, as well as on the party itself.³⁵⁴

(2) *Boards of Contract Appeals*—The boards encourage *voluntary* discovery.³⁵⁵ While boards may limit the frequency or extent of use of the discovery methods,³⁵⁶ there are no formal limits in the boards' rules on the amount of discovery (e.g., on the number or length of depositions) that may be taken. However, the Civilian Board's rules provide that 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."³⁵⁷

With the possible important exception of the DOJ's position (discussed below) that the Civilian Board does not have the authority to enforce subpoenas against Government agencies, an argument that would apply to all boards, nothing prevents the parties to a board proceeding from obtaining discovery as completely as they could in a court proceeding.³⁵⁸ In this regard, the boards have the authority to compel depositions, testimony, production of documents, responses to requests for admissions or interrogatories, and any other discovery allowed by the board.³⁵⁹ Under the CDA, the boards specifically have the power to issue subpoenas,³⁶⁰ and they may also impose sanctions for failure to comply with board orders including: dismissing an appeal for failure to prosecute (where the contractor had failed to answer Government's discovery requests and failed to comply with board orders), barring the introduction of evidence (in certain extreme situations), and deeming admitted requests

³⁵⁴ RCFC 26(g)(3).

³⁵⁵ ASBCA R. 14(a); PSBCA R. 15(a), 39 C.F.R. § 955.15(a) (2007); CBCA R. 13(a), 48 C.F.R. § 6101.13(a) (2007).

³⁵⁶ ASBCA R. 14(a); PSBCA R. 15(a), 39 C.F.R. § 955.15(a); CBCA R. 13(c), 48 C.F.R. § 6101.13(c).

³⁵⁷ CBCA R. 13(d), 48 C.F.R. § 6101.13(d).

³⁵⁸ See CBCA R. 13(a)–(c), 48 C.F.R. § 6101.13(a)–(c); Rules of Procedure of the Civilian Board of Contract Appeals, Interim Rule, 72 Fed. Reg. 36,794 (proposed July 5, 2007) (codified at 48 C.F.R. pt. 6101).

³⁵⁹ 41 U.S.C. § 610 (2000); see e.g., ASBCA R. 14–15; CBCA R.13(f)–(h), 16, 33(c), 48 C.F.R. §§ 6101.13 (f)–(h), 6101.16, 6101.33(c).

³⁶⁰ 41 U.S.C. § 610; ASBCA R. 14(f), 21; PSBCA R. 35, 39 C.F.R. § 955.35; CBCA R. 16, 48 C.F.R. § 6101.16; see also McGovern et al., *supra* note 296, at 496–97. *But see* Rules of Procedure of the Civilian Board of Contract Appeals, Interim Rule, 72 Fed. Reg. at 36,795 (“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.”).

for admission.³⁶¹ Unlike the CFC, the boards do not have the authority to impose monetary sanctions for discovery violations.³⁶²

The issuance of the Civilian Board's interim rules was delayed because of the disagreement between the DOJ and the Civilian Board with respect to the board's authority to issue subpoenas to, and enforce them against, Government agencies.³⁶³ As promulgated, CBCA Rule 16 appears to provide the board full subpoena powers including to Government agencies.³⁶⁴ 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.³⁶⁵

Accordingly, "the [DOJ] 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

³⁶¹ See 41 U.S.C. § 610; ASBCA R. 14, 21, 35; see e.g., *Ellis Constr. Co., Inc.*, ASBCA No. 50091, 98-1 BCA ¶ 25,552; *E-Systems, Inc.*, ASBCA No. 46111, 97-1 BCA ¶ 28,975; *Am. Ballistics Co.*, ASBCA No. 38578, 92-3 BCA ¶ 124,873. The failure to honor a subpoena in aid of discovery under CBCA R. 13, could lead to the sanctions 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.

CBCA R. 13(g)-(h), 33(c), 48 C.F.R. §§ 6101.13(g)-(h), 6101.33(c). See *Mountain Valley Lumber, Inc.*, AGBCA No. 2003-171-1, 06-2 BCA ¶ 33,339. The Civilian Board's rules also permit it to draw inferences from a refusal to testify or answer questions during a hearing. CBCA R. 21(g), 48 C.F.R. § 6101.21(g).

³⁶² E.g., *Mountain Valley Lumber, Inc.*, AGBCA No. 2003-171-1, 06-2 BCA ¶ 33,611; *E-Systems, Inc.*, ASBCA No. 46111, 97-1 BCA ¶ 28,975 ("The Board does not have the authority to impose monetary sanctions") (citing *Stemaco Prods., Inc.*, ASBCA No. 45469, 94-3 BCA ¶ 27,060).

³⁶³ See Rules of Procedure of the Civilian Board of Contract Appeals, Interim Rule, 72 Fed. Reg. at 36,795.

³⁶⁴ See CBCA R. 16, 48 C.F.R. § 6101.16 (2007).

³⁶⁵ Rules of Procedure of the Civilian Board of Contract Appeals, Interim Rule, 72 Fed. Reg. at 36,795 (emphasis added).

or component federal agencies.”³⁶⁶ While the authors of this article disagree with the DOJ’s interpretation of the boards’ 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 Federal Circuit.³⁶⁷ Notably, if the DOJ is correct in its argument, this could create a significant difference between the authority of the boards and the CFC and impact contractors’ choice of forum decision-making.

4. Motions

In both the CFC and the boards, most requested actions must be made in the form of a motion filed with the court or board and served on opposing counsel.³⁶⁸ There are some differences between the forums in the form that a motion must take. The requirements for preparation and submission of Motions for Summary Judgment are generally more detailed in the CFC than in the boards.³⁶⁹ However, with the potential exception of motions to enforce subpoenas, there are no significant differences between the forums in the remedies that may be sought by motions, and the approach to deciding most motions is substantially the same.

The CFC applies a streamlined approach to addressing motions. The court will decide many motions, including contested motions, without a hearing.³⁷⁰ The court will typically decide, without a hearing, motions to amend pleadings, to enlarge or shorten time limits, to file documents out of time or in excess of page limits, to reschedule oral argument, to substitute counsel, or to reconsider matters.³⁷¹ In the interest of expediting the prosecution of a case, the court generally decides these nondispositive motions promptly.

The CFC may be the forum of choice if a contractor believes it may prevail in its case by dispositive motion. Generally, the CFC has demonstrated

³⁶⁶ *Id.*

³⁶⁷ *See generally*, McGovern et al., *supra* note 296 (providing an excellent discussion of the authority of the boards of contract appeals to issue subpoenas to, and enforce them against, Federal Government agencies); *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 No. 10396, 90-3 BCA ¶ 22,977 (Department of Justice complies with G.S.B.C.A. subpoena to it); *Developments*, *supra* note 296, at ¶ 209.

³⁶⁸ *See* ASBCA R. 5; RCFC 7(b); CBCA R. 8, 48 C.F.R. § 6101.8.

³⁶⁹ *Compare* RCFC 56(h) (listing lengthy procedures for summary judgment motions), *with* ASBCA R. 5 (noting all the rules for motions in one short paragraph). The CBCA has the most detailed board rules on motions. *See* CBCA R. 8, 48 C.F.R. § 6101.8.

³⁷⁰ *See* RCFC app. H, (2) (repealed 2002).

³⁷¹ *See id.* While these examples were provided in a repealed appendix of the court’s rules, the authors believe that these examples remain accurate.

a greater willingness to resolve cases through the use of dispositive motions, including motions for summary judgment.³⁷² CFC judges frequently use summary judgment as a tool for deciding cases or for narrowing issues in part because of the DOJ's willingness, in some cases, to stipulate to certain of the facts of a case.³⁷³ Moreover, the judges of the CFC have greater resources for addressing motions for summary judgment than are available to board judges. For example, active CFC judges have two law clerks each,³⁷⁴ whereas most board judges are not assigned a single law clerk.³⁷⁵

Although most nondispositive motions will be decided by the court without hearings, former Appendix H to the CFC's rules provided that the court ordinarily will hear oral argument on contested motions if one of the parties requests a hearing in its motion.³⁷⁶ This remains the court's general practice. Such a hearing may be by telephone.³⁷⁷ Of course, a contractor may always request a hearing on any motion in either forum.

There are no detailed requirements in the CFC's rules for the filing of motions, briefs, or memoranda that are ten pages or less.³⁷⁸ The filing requirements are much more complicated for motions longer than ten pages as well as for motions for summary judgment. A motion over ten pages must include a table of contents, a table of authorities, a statement of questions involved, and a statement of the case, as well as an argument section.³⁷⁹ In motions for summary judgment, the moving or cross-moving party must file proposed findings of uncontroverted fact at the same time it files its motion.³⁸⁰ In addition to filing an opposition, an opposing party must file a response to the movant's proposed findings of uncontroverted fact, including a statement indicating whether it agrees or disagrees with each of the movant's proposed findings.³⁸¹ In reviewing motions, the court will disregard all factual representations made in documents filed with the court unless the representations are supported by affidavit, declaration, or documentation.³⁸²

³⁷² See RCFC 12(b)–(c).

³⁷³ See *Centex Corp. v. United States*, 49 Fed. Cl. 691, 692 n.2 (2001).

³⁷⁴ See 28 U.S.C. § 794 (2000).

³⁷⁵ See 28 U.S.C. § 794 (judges may appoint as many law clerks as the Judicial Conference approves for district judges); See also Federal Law Clerk Information System, <https://lawclerks.ao.uscourts.gov/web/jobSearch>.

³⁷⁶ See RCFC app. H, (2) (repealed 2002).

³⁷⁷ See *Magic Brite Janitorial v. United States*, 69 Fed. Cl. 319, 320 (2006).

³⁷⁸ See RCFC 5.2(a).

³⁷⁹ See RCFC 5.2.

³⁸⁰ RCFC 56(h)(1).

³⁸¹ RCFC 56(h)(2) (opposing party may also file proposed findings of uncontroverted fact as to any relevant matters not covered in the movant's summary judgment papers).

³⁸² See RCFC 56(h)(3).

Because motions practice historically has not been as prominent a feature of board proceedings,³⁸³ the board rules on motions generally are not detailed. Nevertheless, in recent years, the boards have encouraged the increased use of motions practice.³⁸⁴ Of the boards, the Civilian Board provides the most detailed coverage on motions in its rules, which specify the required content for motions and time limits for oppositions and provide fairly detailed guidance on the contents of a motion for summary judgment, which the Civilian Board designates as a motion for summary relief.³⁸⁵ The other boards provide more modest direction on motions practice in their rules including, for example, that motions challenging the board's jurisdiction must be "promptly filed" and that a hearing may be held on application of either party.³⁸⁶

There is little difference between the procedures for and the substance of hearings on motions in the court and the boards. Before either forum, a contractor 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 may vary dramatically between judges regardless of the forum. Some judges may use the entire hearing to pose questions to counsel. Other judges 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 judges of the court and boards place modest, or even no, limits on the length of hearings and will allow parties to air their arguments fully. For simple, and even some complex, motions, many judges of the court and boards are amenable to allowing oral argument to take place by telephone conference. This approach may be particularly appropriate where the contractor's place of business or its counsel are not located in the Washington, D.C. metropolitan area.

5. Trials and Hearings

The format and conduct of trials in the CFC and the boards are fairly similar. However, CFC trials are conducted with greater formality while the

³⁸³ Amavas & Ferrell, *Motions Before Contract Appeals Boards*, 86-9 BRIEFING PAPERS 1, 2 (1986).

³⁸⁴ See Michael J. Schaengold et al., *Choice of Forum for Contract Claims: Court vs. Board*, 3 FED. CIR. B.J. 35, 65-66 (1993).

³⁸⁵ See CBCA R. 8, 48 C.F.R. § 6101.8 (2007).

³⁸⁶ See, e.g., ASBCA R. 5(a); PSBCA R. 6, 30, 39 C.F.R. §§ 955.6, 955.30 (2007); see also ASBCA, Guidance for Summary Judgment Motions, <http://docs.law.gwu.edu/asbcal/info/pdf/Guidance%20SJM.pdf> (2007) (providing some additional, helpful guidance on motions for summary judgment before that Board, making the process similar to the Civilian Board's motion for summary relief).

boards tend to be more lenient in ruling on evidentiary issues, partly because the mission of the boards is to provide a less formal forum for dispute resolution.³⁸⁷

(1) *Court of Federal Claims*—Trials in the CFC are conducted in much the same manner as they are conducted in non-jury U.S. district court cases.³⁸⁸ Because the CFC is required to hold proceedings in accordance with the Federal Rules of Evidence,³⁸⁹ court judges examine evidence and testimony, allow the introduction of evidence, and rule on objections to evidence in accordance with the formal requirements of the Federal Rules of Evidence. As with motions, the CFC judges approach trials and evidentiary issues with varying degrees of formality. Some judges of the court will play a more active role than others in witness examination.

(2) *Boards of Contract Appeals*—The level of formality in trials before the boards varies greatly, depending upon the style of the presiding judge, the relative importance of the case, and the attitude of, or agreement between, the parties. On the whole, however, less formal proceedings can generally be expected before the boards than before the court. Furthermore, the parties may elect to submit the appeal on the record without a hearing.³⁹⁰ Nevertheless, a “hearing will be held if either party elects one.”³⁹¹

Perhaps the most significant difference between board and court proceedings relates to evidence. At the CFC, a contractor faces a more traditional procedure for the submission and acceptance of evidence into the record than at the boards. Generally, the boards use the Federal Rules of Evidence only as a guideline.³⁹² The primary vehicle for entry of evidence into the record at the boards is the “Rule 4 file.”³⁹³ Pursuant to the boards’ rules, the Government must file all documents and tangible things relevant to the claim—including

³⁸⁷ See 41 U.S.C. § 607(e) (2000).

³⁸⁸ See 28 U.S.C. § 2503 (2000).

³⁸⁹ 28 U.S.C. § 2503(b); see also *Davis v. Sec’y of the Dept. of Health & Human Servs.*, 19 Cl. Ct. 134, 137–38 (1989).

³⁹⁰ See PSBCA R. 12, 39 C.F.R. § 955.12 (2007); CBCA R. 19, 48 C.F.R. § 6101.19 (2007); see also CBCA R. 18, 48 C.F.R. § 6101.18 (2007) (“In most cases, the Board will require the parties to make an election soon after discovery closes.”).

³⁹¹ CBCA R. 18, 48 C.F.R. § 6101.18. Depending upon the Board, 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), which can result in one party not appearing for the hearing or appearing in a limited role (e.g., to cross-examine witnesses). See 48 C.F.R. §§ 6101.18–19.

³⁹² See CBCA R. 10, 48 C.F.R. § 6101.10(a) (“As a general matter, and subject to the other provisions of [this rule], the [Civilian] Board will look to the Federal Rules of Evidence for guidance when it makes evidentiary rulings.”); see also ASBCA R. 20(a); PSBCA R. 21, 39 C.F.R. § 955.21.

³⁹³ See CBCA R. 4, 48 C.F.R. § 6101.4.

the CO's Final Decision, the contract, and all relevant correspondence—and provide copies to the contractor. The contractor then has an opportunity to add additional documents and tangible things to the Rule 4 file.³⁹⁴ All items in the Rule 4 file for which there is no objection become part of the evidentiary record without further procedure at trial.³⁹⁵

There are some subtle differences between the rules of the boards regarding the use of hearsay evidence. The ASBCA allows the parties to offer such evidence “as they deem appropriate and as would be admissible under the Federal Rules of Evidence or in the sound discretion of the presiding administrative judge or examiner.”³⁹⁶ At the Civilian Board, “[h]earsay evidence is admissible unless the Board finds it unreliable or untrustworthy.”³⁹⁷

6. Decisions and Opinions

The judges of the CFC and the boards of contract appeals generally issue written decisions following trials and significant motions. As noted above, cases in the CFC are decided by a single judge. Decisions are not reviewed by other judges of the court. Moreover, the CFC does not employ procedures to ensure consistency in the court's decisions, and any inconsistency must be resolved when and if the matter is appealed to the Federal Circuit. Thus, if both favorable and unfavorable CFC precedents exist, a contractor should not choose the CFC as its forum with the firm expectation that its case will be decided based upon the more favorable court precedent of that court.

While the Claims Court generally published most of its decisions in *U.S. Claims Court Reporter*, and the CFC has published most of its decisions in the renamed *Federal Claims Reporter*, the court also issues unpublished decisions. CFC judges may also issue oral opinions from the bench, particularly in cases that are neither factually nor legally complicated.³⁹⁸ Appendix A of the court's rules suggests that the CFC may issue decisions from the bench in connection with an expedited trial.³⁹⁹ However, the rules do not require that the judges of the court ever issue a decision from the bench. Thus, the expectation of a quick decision from the bench is not guaranteed. Caution should be exercised

³⁹⁴ CBCA R. 4(a), (d), 48 C.F.R. § 6101.4(a), (d).

³⁹⁵ See ASBCA R. 4; PSBCA R. 5, 39 C.F.R. § 955.5; CBCA R. 4, 48 C.F.R. § 6101.4.

³⁹⁶ ASBCA R. 20(a).

³⁹⁷ CBCA R. 10, 48 C.F.R. § 6101.10(a).

³⁹⁸ See *Total Med. Mgmt. v. United States*, 104 F.3d 1314, 1319 (Fed. Cir. 1997); *Wheeler v. United States*, 768 F.2d 1333, 1334 (Fed. Cir. 1985); *Burlington N. R.R. v. United States*, 752 F.2d 627, 629 (Fed. Cir. 1985).

³⁹⁹ See RCFC app. A, (4)(j).

in selecting the CFC over the boards solely on this basis. In contrast, virtually all board decisions are required to be issued in writing.⁴⁰⁰

A significant difference between the court and the boards is that the decisions of the boards are collegial. Unlike CFC decisions, board decisions (with the exception of expedited or small claims appeals) are generally the work of a panel of at least two, and usually three, judges, even though hearings before the boards are usually before a single judge. A majority of judges on the panel must agree for the decision to be issued.⁴⁰¹ The collegial process at the boards helps to ensure that decisions of each board are consistent with the prior precedent of that specific board. This process also may be the cause of the perception among some practitioners that (1) the CFC—with only one judge on each case—decides cases faster than the boards; and (2) the boards—with at least two judges reviewing and ruling on a case—are less likely to be reversed on appeal. The authors are aware of no statistical data confirming or refuting either of these *perceptions*.

On rare occasions, a case before the ASBCA may be decided by more than a three judge panel; a “division” of the ASBCA may decide a case or, in even rarer circumstances, the Senior Deciding Group of the ASBCA may resolve the case.⁴⁰² Before the Civilian Board, a request for full board consideration of a case “is not favored.”⁴⁰³ “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.”⁴⁰⁴ In this regard, the Civilian Board’s first decision was made by the full board in order to clarify “that the holdings of our predecessor boards shall be binding as precedent in this Board.”⁴⁰⁵

Full Civilian Board consideration of a case may be initiated by a party’s motion or by initiation of the board.⁴⁰⁶ In either situation, a majority of the Civilian Board judges must agree to consideration of the case by the

⁴⁰⁰ ASBCAR. 28; PSBCAR. 29, 39 C.F.R. § 955.29; CBCAR. 25, 48 C.F.R. § 6101.25(a) (1).

⁴⁰¹ See *e.g.*, CBCA R. 1, 48 C.F.R. § 6101.1(e) (2007); Preface to the Rules of the ASBCA II(c).

⁴⁰² Preface to the Rules of the ASBCA II(c) (“Appeals referred to the Senior Deciding Group are those of unusual difficulty, significant precedential importance, or serious dispute within the normal division decision process.”); see *e.g.*, Gen. Elec. Co., ASBCA No. 36005, 91-2 BCA ¶ 23,958; Telephone Interview with Terrence Hartman, Judge, ASBCA (Apr. 20, 2006).

⁴⁰³ CBCA R. 28(a)(1), 48 C.F.R. § 6101.28(a)(1).

⁴⁰⁴ CBCA R. 28(a)(1), 48 C.F.R. § 6101.28(a)(1).

⁴⁰⁵ Bus. Mgmt. Research Assocs. v. Gen. Servs. Admin., CBCA No. 464, 07-1 BCA ¶ 33,486, at 2 (full board).

⁴⁰⁶ CBCA R. 28(a)(1), (b), 48 C.F.R. § 6101.28(a)(1), (b).

full board.⁴⁰⁷ When initiated by a party's motion, the request must be filed within ten days after the party's receipt of the panel's "decision on a motion for reconsideration or relief from decision."⁴⁰⁸ 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.⁴⁰⁹

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."⁴¹⁰

VII. Appellate Review

The Federal Circuit has jurisdiction over appeals from final decisions of the CFC and from final decisions (with minor exceptions) of the boards of contract appeals under the CDA.⁴¹¹ A party has sixty days from the date of entry of the judgment or order to file a notice of appeal of an adverse CFC decision⁴¹² and 120 days after the date it receives an adverse board decision to file a notice of appeal.⁴¹³ Interestingly, if not somewhat oddly, while a notice of appeal of a CO's final decision to a board must be filed in less than one-fourth of the time the contractor has to file suit in the CFC, the contractor has *double* the time to appeal from an adverse board decision than it has to appeal an adverse CFC judgment.⁴¹⁴ For the Government to appeal an adverse board decision, it must obtain the approval of both the agency head

⁴⁰⁷ CBCA R. 28(a)(3), (b), 48 C.F.R. § 6101.28(a)(3), (b).

⁴⁰⁸ CBCA R. 28(a)(2), 48 C.F.R. § 6101.28(a)(2).

⁴⁰⁹ CBCA R. 28(b), 48 C.F.R. § 6101.28(b); *see also* CBCA R. 26(c), 27(c), 48 C.F.R. §§ 6101.26(c), 6101.27(c).

⁴¹⁰ CBCA R. 28(c), 48 C.F.R. § 6101.28(c).

⁴¹¹ 28 U.S.C. § 1295(a)(3), (10) (2000); 41 U.S.C. § 607(g)(1) (2000). *Cf.* *Marine Logistics, Inc. v. England*, 265 F.3d 1322, 1324 (Fed. Cir. 2001) (ordering transfer of maritime contract claim to district court); *Dalton v. Sw. Marine, Inc.*, 120 F.3d 1249, 1252–53 (Fed. Cir. 1997) (allowing appeals from board decisions involving maritime contracts to proceed to district court). *See generally* Michael J. Shea & Michael J. Schaengold, *A Guide to the Court of Appeals for the Federal Circuit*, 90-13 BRIEFING PAPERS 1 (1990) (discussing the types of government contract appeals reviewed by the Federal Circuit).

⁴¹² 28 U.S.C. § 2522; FED. R. APP. P. 4(a)(1)(B).

⁴¹³ 41 U.S.C. § 607(g)(1); FED. CIR. R. 15(a)(2).

⁴¹⁴ *Compare* 41 U.S.C. § 606 (requiring appeal of CO decision to a board in 90 days), *and* 41 U.S.C. § 607(g)(1)(A) (allowing 120 days to appeal a board decision to the Federal Circuit), *with* 41 U.S.C. § 609(a) (allowing appeal of CO decision to the Court of Federal

and the Attorney General (who has delegated this function to the Solicitor General),⁴¹⁵ while the Government appeal of a CFC decision only requires the approval of the Attorney General (again, through the Solicitor General). Before the enactment of the CDA, the Government could not appeal an adverse board decision.⁴¹⁶

The Federal Circuit freely reviews CFC decisions for errors of law but will not set aside its findings of fact unless they are “clearly erroneous.”⁴¹⁷ The decisions of the boards on questions of law are not final or conclusive and are freely reviewable.⁴¹⁸ Nevertheless, the Federal Circuit has frequently stated that it gives some deference to the board’s expertise in interpreting contract regulations.⁴¹⁹ 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.”⁴²⁰ 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.⁴²¹

Therefore, the factual findings of the boards, reviewed by the Federal Circuit under the *substantial evidence* standard, are apparently accorded greater deference than the CFC’s factual findings, which are reviewed under the “clearly erroneous” standard.⁴²² In fact, the Federal Circuit has stated that

Claims in 12 months), *and* 28 U.S.C. § 2522; FED. R. APP. P. 4(a)(1)(B) (giving only 30 days to appeal a Court of Federal Claims decision to the Federal Circuit).

⁴¹⁵ 28 U.S.C. § 1295(b); 41 U.S.C. § 607(g)(1)(B).

⁴¹⁶ *See* *Dewey Elecs. Corp. v. United States*, 803 F.2d 650, 656 (Fed. Cir. 1986).

⁴¹⁷ *E.g.*, *Krygoski Constr. Co. v. United States*, 94 F.3d 1537, 1540 (Fed. Cir. 1996); *Yancey v. United States*, 915 F.2d 1534, 1537 (Fed. Cir. 1990); *Atlas Corp. v. United States*, 895 F.2d 745, 749 (Fed. Cir. 1990); *Milmark Servs., Inc. v. United States*, 731 F.2d 855, 857 (Fed. Cir. 1984).

⁴¹⁸ 41 U.S.C. § 609(b).

⁴¹⁹ *See* *SMS Data Prods. Group, Inc. v. United States*, 900 F.2d 1553, 1555 (Fed. Cir. 1990); *S.S. Silberblatt, Inc. v. United States*, 888 F.2d 829, 831 (Fed. Cir. 1989); *Fortec Constructors v. United States*, 760 F.2d 1288, 1291 (Fed. Cir. 1985); *see also* *Erickson Air Crane Co. v. United States*, 731 F.2d 810 (Fed. Cir. 1984).

⁴²⁰ 41 U.S.C. § 609(b); *see also* *Fed. Data Corp. v. United States*, 911 F.2d 699, 702 (Fed. Cir. 1990); *SMS Data*, 900 F.2d at 1555; *Blount Bros. v. United States*, 872 F.2d 1003, 1005 (Fed. Cir. 1989); *FMC Corp. v. United States*, 853 F.2d 882, 885 (Fed. Cir. 1988); *United States v. Boeing Co.*, 802 F.2d 1390, 1393 (Fed. Cir. 1986).

⁴²¹ *Blount Bros.*, 872 F.2d at 1005; *FMC Corp.*, 853 F.2d at 885.

⁴²² *See* *Statistica, Inc. v. Christopher*, 102 F.3d 1577, 1581 (Fed. Cir. 1996); *Tandon Corp. v. Int’l Trade Comm’n*, 831 F.2d 1017, 1019 (Fed. Cir. 1987); *Milmark Servs.*, 731

there is a “significant difference” between the standards of “substantial evidence” and “clearly erroneous” and that “in close cases this difference can be controlling.”⁴²³ As a practical matter, however, it is difficult to determine the extent to which the different standards of review for factual determinations make a difference in a Federal Circuit appeal. One Federal Circuit judge has stated that, with respect to choosing between the CFC and the boards, the difference in the origin of a contract case has practically no impact on the Federal Circuit’s review of an appeal.⁴²⁴

Federal Circuit statistics show that there are fairly similar rates of affirmance in appeals of CFC and Board decisions. From the establishment of the Federal Circuit in 1982 through June 30, 1988, approximately 73 percent of the Claims Court appeals (which included many non-Government contract cases) and 77 percent of the board appeals were affirmed.⁴²⁵ For the court years ending in June 1988, June 1989, and June 1990, 72 percent, 80 percent, and 81 percent of the board appeals and 81 percent, 76 percent, and 88 percent of the Claims Court appeals, respectively, were “affirmed in whole or in part” by the Federal Circuit.⁴²⁶ Table I, below, lists the Federal Circuit reversal rates for the boards and the CFC (which includes many non-Government contract cases) from 1997 to present. Unfortunately no statistics exist solely on the reversal rate of CFC Government contract decisions and the Federal Circuit’s reversal rates for CFC decisions in Table I include many non-Government contract cases.

F.2d at 857; *see generally* SSIH Equip. S.A. v. Int’l Trade Comm’n, 718 F.2d 365, 380–83 (Fed. Cir. 1983) (Nies, J., additional opinion) (explaining review of fact by trial and appellate courts).

⁴²³ *Tandon Corp.*, 831 F.2d at 1019 (Fed. Cir. 1987); *see also In re Zurko*, 142 F.3d 1447, 1449 (Fed. Cir. 1998) (en banc).

⁴²⁴ Hon. Paul R. Michel, Circuit Judge, Fed. Cir., Do Appeals to the Federal Circuit From the Boards and the Claims Court Differ? If so, How? (May 9, 1991) *in* 140 F.R.D. 57, 236 (1992).

⁴²⁵ HOWARD T. MARKEY, THE FIRST TWO THOUSAND DAYS: REPORT OF THE UNITED STATES COURT OF APPEALS FOR THE FEDERAL CIRCUIT FOR 1982–1988 at 27 (1988).

⁴²⁶ HOWARD T. MARKEY, THE SEVENTH YEAR: REPORT OF THE UNITED STATES COURT OF APPEALS FOR THE FEDERAL CIRCUIT FOR 1988–89 13 tbls. 5–6 (1989); HOWARD T. MARKEY, THE EIGHTH YEAR: REPORT OF THE UNITED STATES COURT OF APPEALS FOR THE FEDERAL CIRCUIT FOR 1989–1990 15 tbl. 6 (1990).

Table I⁴²⁷

Year	Source of Appeal	Reversal Rate
1997	Boards	18%
	Court of Federal Claims	23%
1998	Boards	6%
	Court of Federal Claims	15%
1999	Boards	14%
	Court of Federal Claims	21%
2000	Boards	24%
	Court of Federal Claims	21%
2001	Boards	17%
	Court of Federal Claims	37%
2002	Boards	23%
	Court of Federal Claims	18%
2003	Boards	7%
	Court of Federal Claims	28%
2004	Boards	11%
	Court of Federal Claims	11%
2005	Boards	5%
	Court of Federal Claims	12%
2006	Boards	13%
	Court of Federal Claims	19%

Guidelines

These *Guidelines* are intended to assist a contractor in determining which forum—the Court of Federal Claims (CFC) or a board of contract appeals—is most appropriate for litigating and settling its Government contract dispute. They are not, however, a substitute for professional representation in any specific situation:

1. Under the Contract Disputes Act of 1978 (CDA), a contractor has either ninety days from receipt of a Contracting Officer's (CO) final decision to file an appeal with a board or one year to file suit in the CFC. If the contractor lets the ninety days lapse, it may not appeal to a board. Instead, the contractor must file suit in the CFC within one year.

⁴²⁷ United States Court of Appeals for the Federal Circuit, Appeals Filed, Terminated, and Pending for 1997–2006, <http://www.cafc.uscourts.gov/statistics.html> (last visited Jan. 14, 2008).

2. Once a contractor files an action in either the CFC or a board, that choice is ordinarily binding. The contractor is precluded from dismissing the action and then proceeding in the other forum.
3. If a contractor files actions in both the CFC and a board that are based on the same contract but involve separate disputes, the CFC has the authority to consolidate the cases in one forum and could consolidate the cases in the forum that the contractor finds less desirable.
4. If the contractor files an action in the CFC, authority to settle the case passes from the CO to the Department of Justice (DOJ). The DOJ may, but rarely does, settle cases over the objection of the agency. If the contractor files an appeal at a board, the CO retains authority to settle the case while the appeal is pending at the board.
5. In the CFC, but not the boards, the Government may recover affirmative relief from a contractor in a fraud counterclaim. In contrast, the boards have authority only to reduce a contractor's claim to the extent the claim is deemed fraudulent.
6. Although the Court of Appeals for the Federal Circuit (Federal Circuit) applies different standards of review to the factual findings of the CFC and the boards, ordinarily this should not affect the contractor's choice of forum.
7. If the contractor believes it can prevail in its case by dispositive motion, the CFC may be the forum of choice. Generally, the court has shown a greater willingness than the boards to resolve cases on dispositive motions, including motions for summary judgment.
8. If the contractor's claim is for \$150,000 or less, the contractor may wish to initiate its action before a board under the special accelerated or expedited procedures. The boards have more experience and more specialized procedures for deciding these cases on an accelerated or expedited basis and will most likely be a less expensive forum for bringing accelerated or expedited actions.
9. Carefully analyze the case law of the Federal Circuit (and its predecessor courts), the CFC (and its predecessor, the Claims Court), and the boards of contract appeals on the key issues affecting the case. Decisions of the Federal Circuit and its predecessors are binding on the CFC and the boards. Decisions by CFC judges are not binding on other judges of that court or on the boards. While a board will almost always follow prior decisions of panels of that same board, the boards are not bound by decisions of other boards or the CFC.
10. The DOJ has recently taken the position that the boards of contract appeals do not have the authority to enforce subpoenas issued to the Government. If the DOJ is correct in its belief, this would create a significant difference

between the board—which would lack authority to enforce subpoenas against the Government—and the CFC, which clearly possesses such authority.

