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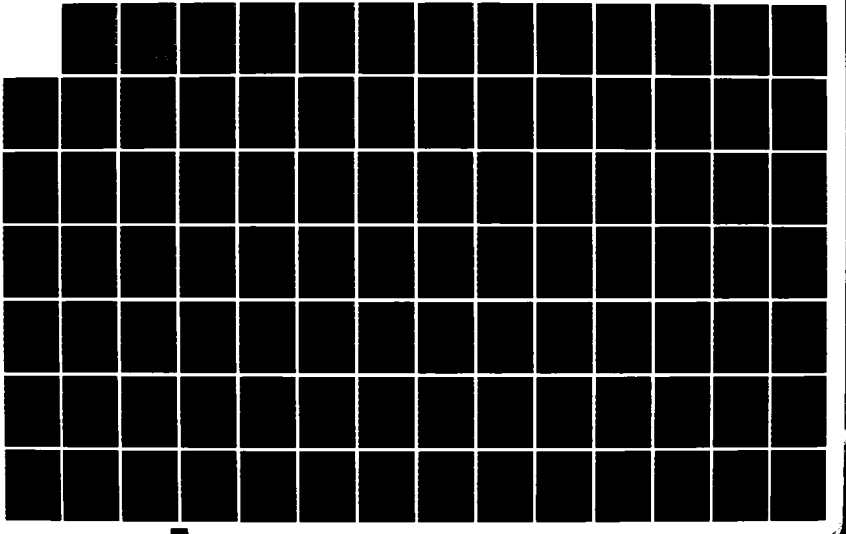

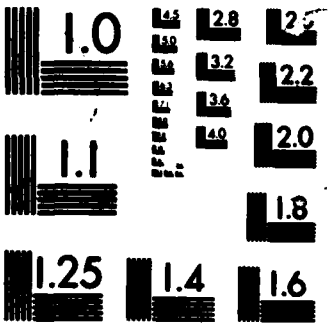

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NOTICE REQUIREMENTS IN FEDERAL ACQUISITION CONTRACTS

By

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TABLE OF CONTENTS

PREFACE

The author is a Judge Advocate, Major, United States Air Force, currently assigned to the Headquarters, The United States Logistics Group, Ankara Air Station, Turkey. The views expressed herein are solely those of the author and do not purport to reflect the position of the Department of the Air Force, Department of Defense, or any other agency of the United States Government.

C 1

INTRODUCTION

The United States Government has a pervasive impact in the nation's economy not just as a regulator but also as a massive consumer. As the size and complexity of the federal government has expanded explosively over the last half century, so has its demand for goods and services skyrocketed. A large share of these requirements is filled through contracts with private parties. Those who wish to understand or to participate in this process (or, preferably, both) must realize first that contracting with the US Government is not at all the same as typical contracting between private parties. Government personnel working in this process need to learn this lesson well most of all.

Virtually all aspects of the government procurement process are prescribed in excruciating detail in various regulations. Prior to April 1, 1984, there were two major systems in use. The Defense Acquisition Regulation (DAR)[1] governed the activities of the military departments and the Federal Procurement Regulation (FPR)[2] governed the civilian agencies. On April 1, 1984 a new unified regulatory system, the Federal Acquisition Regulation (FAR),[3] became effective. Thereafter the procedures set out in the FAR govern the solicitation, award, and administration of all government contracts. The desired uniformity has been reduced to some degree by the issuance of supplementary regulations by several major agencies.[4] For the forseeable future, practitioners

must be familiar with both the FAR and the relevant predecessor. Although the DAR and FPR systems will no longer be updated, they will remain applicable for administration of contracts awarded prior to April 1, 1984. Furthermore, since major portions of the FAR were adapted from and closely resemble the predecessor regulations, an understanding of relevant DAR and FPR provisions is vital to an understanding of the "new" FAR provisions.

Since the regulations provide such detailed guidance and mandate much of the contract language, the neophyte might assume that interpreting government contracts would be an easy task. Unfortunately, the truth is quite the opposite. Despite repeated attempts to simplify, government contracts remain a highly stylized art form. Like much modern art, it often seems incomprehensible to the "uninitiated." Words do not always mean what they seem to say. Alice and the March Hare would be right at home!

An excellent example of this potential interpretation trap is the application of the various notice provisions sprinkled throughout the typical government contract. Where sovereign immunity once reigned, the government now shields itself from breach of contract liability with a wide variety of clauses providing for administrative resolution of claims and disputes. Frequently the clause contains one or more provisions requiring the contractor to give notice to the government as a prerequisite to eligibility for equitable adjustment or further "appellate review." In the absence of the required notice, the clause language limits or eliminates the contractor's remedy. However,

results are often quite different than this would imply.

The purpose of this thesis is to analyze the notice provisions of several major clauses. Primary emphasis will be given to the Disputes Clause,[5] the Changes Clause,[6] and the Differing Site Conditions Clause.[7] A discussion of the clause provisions will demonstrate that the interpretation and application of the notice requirements by the courts[8] and agency boards of contract appeals[9] often deviate substantially from the apparent literal meaning. In some cases, it seems that the plain language of the clause is totally ignored, often without explanation. Finally, the thesis will analyze these deviations to provide a rationale for the approach taken by the boards and courts and will discuss whether there is any substantial detrimental impact to the government resulting from their approach.

CHAPTER 1

THE DISPUTES PROCESS

The procedure for administrative resolution of conflicts arising out of the performance of government contracts was designed to provide a relatively simple, efficient, and expeditious method of handling such disputes without resort to judicial channels. Such a process is beneficial both to the government and to the contractor. Of particular value to the government were requirements that contractors continue performance during the entire process. The first step in the standard procedure was submission of the controversy to the contracting officer for a "final decision." Notwithstanding its name, this decision was not necessarily final. The clause issued in 1960 under the Armed Services Procurement Regulation (ASPR, the predecessor of the DAR) was typical and provided, in part:

> DISPUTES (1958 JAN)
>
> (a) Except as otherwise provided in this contract, any dispute concerning a question of fact arising under this contract which is not disposed of by agreement shall be decided by the Contracting Officer, who shall reduce his decision to writing and mail or otherwise furnish a copy thereof to the Contractor. The decision of the Contracting Officer shall be final and conclusive unless, within 30 days from the date of receipt of such copy, the Contractor mails or otherwise furnishes to the Contracting Officer a written appeal addressed to the Secretary....[10]

This possible appeal to the head of the agency was the second step in the process. As a practical matter, the agency head did not personally decide such appeals. The majority of

agencies had established boards of contract appeals to handle this task.[11] Finally, decisions of the boards of contract appeals could be appealed under limited circumstances in the judicial system.[12]

Until 1978, this entire administrative process existed and functioned as a creature of agency regulations and contract clauses. A major review of the entire process resulted in the Contract Disputes Act of 1978.[13] The provisions of the act are mandatory for all government contracts awarded on or after March 1, 1979. Contractors may elect the procedures of the act even under contracts awarded previously so long as the claim in question was pending on March 1, 1979, or arose thereafter. Since the contractor has the choice, it is possible that disputes may be handled under pre-Disputes Act procedures so long as such contracts remain valid.

The Act made a number of very significant changes in the existing system, although much of the framework was retained. The three step process described above was retained, but with a major proviso. Now the contractor is allowed to choose to appeal a contracting officer's final decision directly to the United States Claims Court (USCC) without first appealing to the agency board of contract appeals.[14] However, under either alternative, the first required step normally is the contracting officer's final decision. Only in rare cases can the contractor or the government now proceed without such a final decision.[15]

Just as before, a contracting officer's "final decision" is

appealable within a specified time period. Appeals to the agency board of contract appeals must be taken "within ninety days from the date of receipt of a contracting officer's decision."[16] If the contractor elects to appeal instead to the USCC, he must file his action "within twelve months from the date of the receipt by the contractor of the decision of the contracting officer...."[17] The DAR and FPR disputes clauses were updated to include new provisions implementing the Disputes Act requirements.[18] The Disputes Act gives no other guidance on application of these notice requirements. Much of the case law developed by the courts and boards apparently will still provide valuable precedent where such guidance is needed. The remainder of this chapter will examine in detail the application of these requirements in agency board and court cases. Where changes have occurred as a result of the Contract Disputes Act, they will be noted and explained. A more detailed discussion of other aspects of the disputes process itself is outside the scope of this paper.[19]

A. VALID FINAL DECISION REQUIREMENT

1. Existence of Final Decision

Since receipt of the contracting officer's "final decision" is the event which initiates a contractor's appeal period, it is vital that the contractor recognize that such a decision has been made. If there is no valid final decision, the appeal process simply has not begun. Recognizing a final decision has not always been a straightforward matter. In one early case, a

contractor submitted a request for additional reimbursement and the government response included the following "final decision:"

> Payment for dyeing the gray goods returned to the Government, as requested by your letter, cannot be made under the terms of the contract.[20]

Not surprisingly, no appeal was made within the thirty day period set out in the contract, and the Armed Services Board dismissed the appeal as untimely.[21] It is not hard to imagine how unsuspecting contractors could be "tricked" into forfeiting their appeal rights if final decisions were allowed to be "disguised." Fundamental fairness dictates that any notification intended to be a final decision should clearly inform the contractor of this fact. Regulations designed to insure that this occurred were in force in each of the armed services as far back as the early 1950s.[22] Subsequently, the ASPR (and then DAR) and the FPR incorporated specific guidance as to language which was required to be placed into any "final decision."[23]

The Contract Disputes Act codified the requirement for a written contracting officer decision and added that: "[t]he decision shall state the reasons for the decision reached, and shall inform the contractor of his rights as provided in this chapter."[24] This mandate has been implemented in FAR 33.011. The contracting officer's written decision must include: (1) a description of the claim or dispute; (2) reference to the pertinent contract terms; (3) a statement of the areas of factual agreement or disagreement; (4) a statement of the decision and the contracting officer's supporting rationale; and (5) a para-

graph including language "substantially as follows:"

> This is the final decision of the Contracting Officer. You may appeal this decision to the Board of Contract Appeals. If you decide to appeal, you must, within 90 days from the date you receive this decision, mail or otherwise furnish written notice to the Board of Contract Appeals and provide a copy to the Contracting Officer from whose decision the appeal is taken. The notice shall indicate that an appeal is intended, reference this decision, and identify the contract by number. Instead of appealing to the Board of Contract Appeals, you may bring an action directly in the U.S. Claims Court (except as provided in the Contract Disputes Act of 1978, 41 U.S.C. 603, regarding Maritime Contracts) within 12 months of the date you receive this decision. If you appeal to the Board of Contract appeals, you may, solely at your election, proceed under the Board's small claims procedure for claims of $10,000 or less or its accelerated procedure for claims of $50,000 or less.[25]

The Disputes Act added statutory weight to the standard practice of refusing to consider "premature" appeals filed before issuance of a contracting officer's decision.[26] Normally, if there is no valid contracting officer's decision, the boards and courts have no jurisdiction under the Contract Disputes Act to consider an appeal.[27] More importantly, the statutory requirement explicitly applies to claims on behalf of the government as well.[28] Thus, a government "counterclaim" must also be the subject of a contracting officer's decision.[29] Furthermore, once the decision is issued, it will be up to the contractor to determine whether to appeal, and if so, in which forum.

2. Appeal Without Final Decision

In Ray & Ray's Carpet & Linoleum, Inc.,[30] the Government Services Board created a special exception to the normal requirements for a contracting officer final decision. It appears that

the board had already heard the entire case prior to the discovery of this issue. The case involved less than $50,000 so there was no statuary requirement for contractor certification of the claim (see discussion, infra). Both parties wanted a decision and the board concluded that referral of the case to the contracting officer would be a "useless act." Since the purpose of a board proceeding is simple, expeditious disputes resolution, this approach shows commendable common sense, although the plain language of the Disputes Act suffers somewhat.

In reaching its decision, the board made a point of the fact that the statute explicitly allows contractor appeals without the prerequisite of a contracting officer's final decision in one other circumstance. The statute specifies time periods within which the contracting officer is required to decide claims.[31] If the contracting officer fails to issue a decision in the required time, the contracting officer will be deemed to have denied the claim and a contractor may commence an appeal or a lawsuit as otherwise authorized in the statute.[32]

In Synectics Corporation,[33] the government attempted to use this provision to block a contractor's claim for interest on an invoice not timely paid by the government. The invoice was submitted on October 8, 1980. The contractor asserted that the last date authorized contractually for proper payment would have been November 12, 1980. Therefore, the contractor demanded interest calculated from that day forward. Accepting the contractor's calculation, the government argued that there was a "constructive"

contractor claim as of November 13, 1980. Since the claim was for less than $50,000, the contracting officer should have decided it within sixty days. Since he did not, the constructive claim was constructively denied. Allowing for reasonable mail time, the constructive denial was constructively received by the contractor on February 17, 1981. Since there was no appeal within ninety days, the government concluded that the appeal was untimely and should be dismissed.

The board noted quickly the missing link in the government's novel approach. The language of 41 USC §605(c)(1) requires the contracting officer to issue a decision on a "claim of $50,000 or less within sixty days from his receipt of a written request from the contractor that a decision be rendered within that period." No such request had been made at that time, so there was no basis for a constructive denial here. However, the theory seems logically valid in the case where a written request is made. A contractor in that situation should carefully monitor the ensuing time periods. It would not be unusual, in such a case, for the contracting officer to miss the deadline but to issue a decision eventually. If the contracting officer's decision is issued one hundred twenty days after receipt of the contractor's written request, does the contractor's appeal period start upon receipt of <u>that</u> decision, or did it start upon issuance of the constructive denial sixty days earlier? Since the language of the constructive denial provision is not permissive, the subsequent issuance of an actual final decision might be treated as a

nullity. The appeal periods in the statute may not be waived (see discussion, infra), so the contractor's argument would presumably be that the contracting officer's actual decision implicitly involved a reconsideration of the constructive one. As discussed more fully below, if the contracting officer continues to actively consider a claim after issuance of a purported final decision, no finality may attach to the decision.[34] But, what if the contracting officer issued no decision and did not consider the contractor's claim at all? Unfair as it would seem for the government to benefit from such a defalcation, the statutory language would seem to require that finality attach to the "constructive" final decision if the contractor does not appeal in a timely fashion and no other action tolls the appeal period.[35]

3. Existence of a Dispute

A final decision otherwise proper in form may, nonetheless, be invalid if there is no underlying dispute. The purpose of the grant of authority to a contracting officer in the Disputes Clause of a contract is precisely the exercise of a quasi-judicial function. The authority may not be used to "settle" a "dispute" unless one actually exists. No formal procedures are necessary, but the contracting officer must at least provide sufficient information to the contractor so that it may present its side of the story meaningfully.[36] United Aero, Inc.,[37] involved an attempt by the government to assess excess costs of reprocurement after a valid termination for default. The letters involved

purported to be contracting officer final decisions, but no information had been given to the contractor about the reprocurement at all and there had been no discussions or other opportunity for the contractor to express his position. The government argued that Section 6(a) of the Contract Disputes Act[38] authorized this type of claim without prior discussion with the contractor. Although the language is somewhat ambiguous, the board relied on the implementing regulations and the fact that the statute is explicitly a disputes act to determine that the contracting officer's §6(a) power still is predicated on the prerequisite of some sort of factual dispute. Since none existed here, the purported final decisions were invalid and thus there was no timeliness issue.

The prerequisite of a "dispute in fact" does not imply that the contractor must be provided an opportunity to present arguments or argue the merits of his position at a hearing or other formal session. It is enough that the position of each be known to the other and that there be actual disagreement.[39] The stringency with which this rule is applied will probably depend upon which party is complaining. When the contractor has in fact appealed and is prepared to proceed, the government is unlikely to prevail on a motion to dismiss the appeal as premature (or to suspend it pending a valid final decision). In such a case, the position of the parties is clear and "no useful purpose would be served by dismissing the appeals...."[40] However, if the contractor fails to appeal, the government will not be able to success-

fully seek dismissal for untimeliness since the invalid final decision will not be deemed to have started the running of the appeal period.

4. Certification of Claims

The Contract Disputes Act of 1978 (CDA) introduced a new certification requirement which has had a secondary impact on the issuance of final decisions as well.

> For claims of more than $50,000, the contractor shall certify that the claim is made in good faith, that the supporting data are accurate and complete to the best of his knowledge and belief, and that the amount requested accurately reflects the contract adjustment for which the contractor believes the government is liable.[41]

The significance of this requirement initially escaped some contractors and contracting officers. In W.H. Mosely Company,[42] the contractor had submitted a Value Engineering Change Proposal (VECP) for which the government denied a monetary award. A claim for over $1 million was then submitted to the contracting officer. This claim was not certified, although that was not automatically wrong since this was a pre-CDA contract. However, the claim was still pending after March 1, 1979, so the contractor had the right to elect CDA coverage. Since no certification was ever made, it might seem that the contractor's intent was to retain coverage under his contract's pre-CDA disputes procedure. However, the contracting officer's final decision indicated otherwise, for it set out the appeal rights applicable under the CDA. In accordance with those procedures, Moseley then filed a timely direct access appeal in the Court of Claims.

Much to Moseley's surprise, the Court of Claims dismissed his suit for failure to properly certify the claim. Citing its recent decision in Paul E. Lehman, Inc. v. U.S.,[43] the Court held that a claim submitted under the CDA for more than $50,000 is not valid unless certified as required in the statute. This requirement is jurisdictional. Neither the contracting officer, the boards, nor the Court of Claims has any authority to waive the statutes mandate, so prejudice to the government is irrelevant.[44] Further, the court declined to allow "retroactive" certification of the claim, leaving Moseley with no Court of Claims remedy.[45]

Moseley then returned to the contracting officer who refused to issue a new final decision, maintaining that the original decision was valid. If so, this left Moseley high and dry. He had no access to the Court of Claims and had not filed an appeal within the time limits to be valid under board rules. Moseley petitioned for certiorari to the Supreme Court arguing both that certification was not a prerequisite and that, in any case, the government had discretion to accept his later certification as valid. Particularly in light of the government's failure to advise him of the requirement for contemporaneous certification (implementing regulations had not yet been issued), he argued that the government should be estopped from enforcing the certification requirement.[46] The Supreme Court was not moved by Moseley's case and denied certiorari.[47]

This was the background of the appeal as it reached the Armed Services Board for the first time. The contractor was

seeking direction from the board requiring the contracting officer to issue a new decision. The government defended by arguing that this really was a pre-CDA case where the contractor had failed to timely appeal within the required thirty days. Even if it were treated as a CDA case, no appeal was made even within the statutory 90-day appeal period, so the first decision should be regarded as final. Under this theory, the contractor, who followed the procedures set out in the final decision, would be foreclosed from all appellate remedy. The Board could not accept such a result. Two alternative defects were fatal to the government's position.

First, if this was regarded as a pre-CDA claim, then the contracting officer's final decision was deficient. The boards and courts had long held that a valid final decision must fully, clearly, and accurately advise the contractor of his appeal rights. Both the DAR and the FPR contained directives to that effect and now the requirement is codified by the CDA, as noted above. If the proper information is not included, then there is no valid final decision.[48] The board reasoned:

> Clearly, if a decision may not be recognized as final because it does not advise a contractor of its right to appeal, it should not be recognized as final if its instructions concerning the elective right to appeal or to bring an action in court are prejudicially erroneous. The mandate that contracting officers inform contractors of their rights, which is now a statutory requirement...precludes the Board from recognizing the C.O.'s decision in this case as a procedurally valid final decision.[49]

Second, the ruling of the Court of Claims clearly indicated that a claim for more than $50,000 which was not properly cer-

tified simply could not start the disputes process under the CDA. In the absence of valid certification, there just is not a valid claim. Neither the contracting officer nor a board can waive this certification requirement imposed by Congress. Thus, without valid certification, the contracting officer has no claim before him upon which to base a final decision.[50]

In this case, the contracting officer's decision clearly indicated his belief that he was processing the claim, at the contractor's election, under the CDA. His decision was, therefore, fatally defective because of the lack of certification. However, the contractor's claim now was properly before the contracting officer for decision since a proper certification had been made. Consequently, pursuant to 41 U.S.C. §605(c)(4), the board issued an order to the contracting officer directing him to issue a decision on the claim. Because of certain ambiguous language in the court's Moseley opinion, the board was uncertain whether a direct access appeal would be allowed by the court after the new final decision, although an appeal to the board would certainly exist. Perhaps the confusion arose because Lehman and Moseley both involved claims under pre-CDA contracts where the contractors had the option of choosing CDA procedures in lieu of those set out in the contract disputes clause. However, in cases like Skelly & Loy, involving post-CDA contracts, a contracting officer decision on an uncertified, over $50,000, claim is simply a nullity. As set out in Skelly & Loy:

> However, since we hold that where a contractor has

> not certified the claim, the review process has not begun...no valid "election" has taken place. As a consequence, a contractor - who resubmits a certified claim to the contracting officer for a new (valid) decision - should not be foreclosed from appealing such a decision under either of the alternative routes.[51]

There is a certain amount of conflict between this certification requirement and other standard clauses (discussed below) which require submission of contractor claims for equitable adjustment within relatively short periods of time. This is seldom a fatal problem, but it can place the contractor in a difficult position. Often the basis of the claim is known early, but the certifiable amount can not be computed until much later. The FAR stipulates that proper certification of a claim is a prerequisite to the payment of interest on contractor claims as authorized in 41 USC §611. Thus, the contractor not only loses potential interest, but also has no effective way to resolve the fundamental issue of entitlement until he can reliably establish the amount of his claim. Often the only real issue is entitlement. A bifurcated claims provision would be a useful solution. For claims over $50,000, contractors should be allowed to seek a contracting officer's decision limited to the issue of entitlement, if they desire. In such a case, no certification except as to good faith would be necessary. While this might appear to promote extra litigation, it should have the opposite effect. If the issue of entitlement is resolved, the thorny issue of quantum may be moot. Even if not, the parties will be incentivized to resolve the entitlement issues in a subsequent negotiation phase. Certification as now required in the

act for the entire claim could be required at that point.

5. Splitting Contractor Claims

Another flaw which can render a superficially valid contracting officer's decision ineffective is related to the content of the claim and the resulting decision. Where the contractor submitted three related issues as part of a single claim, the appeal period did not start to run until the contracting officer had issued a decision convering all issues.[52] The contracting officer may not unilaterally split up a contractor's claim and thus place an extra burden on him. Pilaras Painting Co.[53] is similar but involved some thirty to forty related but separate claims. Seven adverse contracting officer decisions had been separately issued and appealed to the board already, and the board had decided that all of the claims should be consolidated for hearing. Thereafter, the contractor requested that the contracting officer consolidate his decision on all the remaining claims. However, the contracting officer did not do so. The instant case involves one of those claims, separately decided, which the contractor failed to appeal within the standard 30-day period. The board refused to dismiss the appeal as untimely, holding that under these circumstances it was improper to issue separate decisions even though the claims initially were submitted separately.

In a variation on this theme, a contracting officer can not subject a contractor to a requirement to submit multiple appeals on the same matter. If the contractor timely appeals a

decision, there is no need for him to appeal again when the contracting officer issues a new decision restating the first.[54] A contractor must be very leary of such cases, however. If circumstances indicate that the first decision was not meant to be final, as may well be the case when the contracting officer continues considering the issue, then the "appeal" was premature and may be a nullity. When a valid final decision is issued, the time for a valid appeal will then begin running.

6. Contracting Officer Signature

Neither the regulations nor the Disputes Act specifically require that the decision actually be signed by the contracting officer to be valid. Of course, where no signature appears, there may be a question about whether it is in fact a decision of the contracting officer, as required. While good practice would normally require a signed copy be furnished to the contractor, Churchill Chemical Corporation[55] found a decision to be valid without a signature. The decision was the fifth in a series of decisions and the board found the omission of the signature to be merely an "administrative oversight." However, the Armed Services Board recently found an unsigned, telegraphically transmitted, final decision ineffective until receipt by the contractor of the signed confirmation of the telegram.[56] A subsequent Defense Acquisition Circular authorized telegraphic unsigned notices of default to constitute valid final decisions, but it would be no surprise if other decisions without signatures were found ineffective. This is a proper result. Draft decisions

are frequently prepared for review and subsequent changes. Contractors should not have to guess whether an unsigned document is one actually executed by the contracting officer.

So long as a final decision contains the appropriate identifying language and explanation of contractor rights, there is no reason it may not be combined with a separate action. As noted above, a termination for default is itself a type of final decision. A unilateral change order can also double as a final decision. In Dimarco Corporation,[57] the contracting officer unilaterally resolved a number of price adjustment claims via a change order. There was clear notification that the order constituted a final decision and denial of all appellate rights. The contractor's failure to appeal within the statutory 90-day period deprived the board of jurisdiction and the appeal was dismissed as untimely.

B. GOVERNMENT UNTIMELINESS

The burdens of timely response imposed on contractors throughout the disputes process do not fall equally on the government. Contractors who assume otherwise do so at some risk! In Kennan Pipe & Supply Co.,[58] the government filed a motion to dismiss based on the contractor's failure to timely appeal. The contractor pointed to long delays in the processing of change orders by the government, in contravention of contract terms, and argued that he had reasonably concluded that the time limits set out in other clauses would also not be strictly applied. Enforcing the limits strictly would be unfair in light of the

government's own conduct. The board was unmoved and found itself without jurisdiction to hear the untimely appeal.

Even when the government is dilatory (or worse) in raising the defense of untimeliness, there is no "penalty." The board can not obtain jurisdiction by such "default," and the timeliness issue can be raised at any time.[59] Arguably, a different result could occur under the Court of Claims waiver doctrine applicable in recent pre-CDA cases (see discussion, infra). However, timeliness under the CDA is jurisdictional (see discussion, infra). Even if a board had erroneously issued a decision based on an untimely appeal, from which no timely appeal had been taken, that decision actually is a nullity and should be subject to reconsideration and dismissal for lack of jurisdiction. Nevertheless, presumably the doctrine of laches would eventually be applicable to assure finality. It will be rare that the issue of timeliness is not raised during the initial board or court hearing!

Having initiated a timely appeal at a contract appeals board, the contractor may assume that the government may be under some compulsion to respond reasonably promptly. However, that may not be so. In L.A. Barton & Co.,[60] the contracting officer had concluded that the contractor had provided insufficient notice. He therefore neglected to assemble the appropriate appeal file. After considerable delay, the contractor attempted to have what amounted to a "default" judgment entered on his behalf. The board rejected the motion, indicating that the contracting officer's inaction was not sufficient to "divest" the

board of jurisdiction.

The CDA provides somewhat more definitive guidance on the times in which contractor claims must be resolved,[61] but the sanction is merely a presumptive denial of the claim allowing the contractor to get on with further appeals. There is no such guidance on time limitations on government claims against a contractor. No definite time limit is set out, either in the statute or the clauses, and the Armed Services Board has refused to create such a remedy.[62]

C. CONTRACTOR RECEIPT OF THE FINAL DECISION

Since receipt by the contractor of the final decision is the event which starts the running of the appeal period, it is often critical to prove exactly when that event occurred. Current regulations required the contracting officer to "furnish a copy of the decision to the contractor by certified mail, return receipt requested, or by any other method that provides evidence of receipt."[63] The existence of such a receipt would seemingly foreclose most questions, but that is not always true.

1. Authorized Agent

The regulations do not define the term "contractor" for this purpose and the issue frequently involes the question of whether receipt by some individual "counts" as receipt by "the contractor." The boards generally have construed the term broadly. Nothing in the clauses or agency regulations specifies that the contractor "himself" or senior management personnel of a contractor must receive the final decision to start the appeal

period. The individual who signs as "agent" of the addressee on the return receipt of a certified letter will generally be presumed to be an "authorized agent" of the contractor. This is true even though the individual who signs for the letter holds a clerical position with no authority to bind the company in any way.[64] In similar circumstances, the wife of a contractor who accepts delivery of the final decision letter is considered to be an authorized agent of the contractor as well.[65] Thus, in the absence of proof that such an individual is not an authorized agent, his or her receipt marks the critical time. The fact that the contractor's offices are officially closed for a holiday period and the letter is not even opened for some time is immaterial.[66] Transmittal of the final decision document from the recipient to the company official authorized to act upon it is the responsibility of the contractor and he bears the risk if it is not done in a timely fashion.

In rare cases, receipt of the final decision by an individual who is not even an employee of the contractor can start the appeal period running. For example, in Martin Machine Works, Inc.,[67] a relative of the contractor's president signed for the final decision at the post office. He had formerly been an employee of the company and the board found that his previous relationship with the company had vested him with "apparent authority" to accept such mail. Therefore, the 30-day period began running when the ex-employee accepted the letter and the contractor's appeal was untimely.[68]

Oddly enough, the signature of an authorized contractor's agent on the return receipt may not be sufficient to prove the date of contractor receipt without additional evidence.[69] In one case, the government provided its stamped post office receipt in support of a motion to dismiss for failure to timely file an appeal (within twelve months of receipt of the decision). Finding that the post office date stamp, standing alone, did not establish that the contractor had received the letter on the date stamped on the receipt, the Court of Claims denied the motion without prejudice. At a later hearing, the government provided an affidavit from a Post Office official explaining that the date stamp is required to be placed on the receipt no later than one working day after receipt by the addressee. Since the receipt bore a date stamp of July 2, 1980, it was received at least by that date and an appeal filed on July 6, 1981 was untimely.[70] Presumably this type of procedure could be judicially noticed in future cases. A different facet of the case could be more significant, however. The letter in question was received by a secretary in the contractor's organization and the court specifically noted that her duties included receiving incoming mail.[71] Although dicta, this might foreshadow USCC eforts to tighten up the rule on receipt by "authorized agents."

2. Authorized Addressee

Contractors, especially large corporate entities, often operate from a variety of locations. It is incumbent on the contracting officer to correspond with a contractor at the

appropriate designated address. If a final decision is erroneously sent to the incorrect address, receipt by some other office of a contractor will not start the notice period running. This situation might commonly arise when the government corresponds directly with a corporate home office, instead of the project office specified by the contractor.[72] Delay caused by this misaddressing of a final decision will not be held against the contractor.

It is not improper to send the final decision to the contractor's attorney of record.[73] The attorney-client relationship is one of agency and notice to the agent is imputed to the contractor. This satisfies the requirement of the disputes clause. On the otherhand, a contractor normally has no right to assume that the government will send a copy of the final decision to his attorney. Even though the government knows that a contractor is represented by an attorney, the requirements of the disputes clause impose no duty to notify that attorney of any action.[74] However, if the government has established a course of conduct of communicating directly with the contractor's attorney, the contractor conceivably could demonstrate reasonable reliance upon that practice as a bar to running of the notice period.[75] Furthermore, if a contractor has properly notified the government that correspondence should be directed to its attorney, the notice period on a final decision sent to the contractor will not begin running until it is received by the designated attorney.[76]

3. Proof of Receipt

Where the post office return receipt now required by the regulations is available, it should provide adequate proof of the date the contractor received the final decision. In the absence of such evidence, the government will have the burden of proving that the contractor received the decision at a particular time.[77] Unsupported supposition will not carry this burden.[78] However, the boards have allowed certain reasonable presumptions. Absent any evidence or contractor claim to the contrary, the Armed Services Board accepted the presumption that a telegram would have reached the contractor in the normal course of business either on the day of or the day after dispatch.[79] Thus, appeal from an April 29th telegraphic termination via a June 21st letter was untimely. The government also has been successful in proving that a letter, mailed at a particular time and place, would have normally arrived within a specified period of time. The contractor's later appeal corroborated that the final decision did arrive. The appeal was more than thirty days after the predicted arrival time, and in the absence of contrary contractor proof, the appeal was dismissed.[80]

Where the contractor can offer alternate substantiating evidence, government proof of "regular" mail delivery times will not prevail. For example, a final decision erroneously sent to the contractor's old address was delayed over four months. The receipt itself and contractor testimony showed the date of actual receipt and the appeal period began running on that date.[81]

However, mere allegations by the contractor that he never received the final decision will not be enough. Where the government showed that it had mailed three unregistered letters to the contractor's address and that the contractor had refused delivery of one registered letter and failed to call for five others after the post office left notices, the board was satisfied that the government had met its duty "to mail or otherwise furnish" a copy of its final decision to the contractor.[82]

The government's actions may so confuse the issue as to render an actual contractor receipt a nullity. In Carolina Parachute Corp.,[83] the contractor received three separate copies of a final decision. The second arrived a few weeks after the first and was marked "original." Several weeks later, another identical copy arrived. The contracting officer testified that this happened through inadvertant error and in no way indicated an intent to extend the time for appeal or to reconsider the initial final decision. Finding that the contractor was understandably confused by these circumstances (which were not explained to him), the board found that the appeal period did not start running until the last notice was received.

A similar situation was considered in Waste Paper Converters.[84] An initial copy of the contracting officer's final decision was sent via regular mail on September 29, 1983. Subsequently the contracting officer discovered this error. He executed a new final decision on October 28, 1983 and it was dispatched by certified mail. The contractor received this

decision on October 31, 1983. Since the appeal was not made until ninety-eight days later, the board said the appeal was untimely. This is an easy case in the sense that the contractor's appeal was late no matter which date of receipt is used. However, it is more interesting in that the board, with no discussion at all, totally disregarded the first final decision (if it ever was received by the contractor at all!). The ASBCA, at least, may be indicating that a reissuance of a final decision will start the running of the appeal period over again. Presumably, this could not apply when the passage of time has rendered the decision final pursuant to Section 6 of the CDA.[85] Contracting officers, thus, should be cautious when providing additional copies of a final decision to contractors and should clearly indicate that no reconsideration of the initial decision has occurred.

4. Subcontractor Appeals

It is well recognized that in some circumstances a contractor may file an appeal, in its own name, on behalf of a subcontractor. However, neither the disputes clauses nor the CDA make any special time allowances for such cases. Thus, the critical time is the date of the contractor's receipt of the decision, not the date on which the subcontractor received it.[86] Subcontractors involved in such situations should do everything possible to insure that the prime has the necessary information and takes the necessary action to timely appeal. The 90-day period for appeal to a board and the option of direct appeal to the USCC within one year make this much more feasible.

D. RECONSIDERATION

1. When is Reconsideration Allowed?

The commonly used term "final decision" is a misnomer. The decision may become "final" at some future point, but it is not "final" when issued. The contractor has the right to appeal and the contracting officer also may reconsider his/her decision. Indeed, under some circumstances the contracting officer not only can, but must reconsider the decision.[87] The contracting officer must reconsider if the initial decision is found to contain substantive errors. Such corrections may be either beneficial to the contractor, or not, depending on circumstances.

The limit, both on the contracting officer's duty and authority to make such adjustments, is the standard appeal period. Once the initial decision has become final due to the passage of the specified time without a contractor appeal, the rights of the government and the contractor have vested and reconsideration is no longer possible.[88] Even if the contracting officer actually reconsiders the decision and issues a new decision, the result is a nullity if the initial decision had become final.[89] For the same reason, a contractor can not revive its rights under an unappealed final decision by requesting a new final decision on the same issue.[90] A contracting officer simply has no authority to waive vested government rights.[91]

For cases subject to the CDA, this rule raises an interesting twist. Assuming that ninety-one days or more have passed since the contractor received the decision and if no appeal has been

made to a board, then no board remedy exists any more. However, the contractor still may file a direct access appeal in the USCC within one year from receipt of the contracting officer's decision. Should the vesting of the Government's rights regarding an appeal to the Board preclude the contracting officer from reconsideration? So long as the direct access appeal remains viable, the decision is not absolutely final. The contracting officer, thus, should retain the right to reconsider the decision, if circumstances warrant. If there is in fact a reconsideration, the new final decision should carry with it the right for the contractor to appeal in a timely fashion to either the board or USCC.[91A]

Once a timely appeal has been made, no finality attaches to the contracting officer's decision. Thus, a contracting officer can reconsider and amend a final decision while the case is being considered on appeal.[92] The parties, thus, might amicably settle a dispute through a new "final decision" during the pendancy of an appeal. Clearly such a result should be encouraged.

2. What Constitutes Reconsideration?

When a contracting officer actually reconsiders a decision, whether at the contractor's request or on his/her own initiative, that very act clearly indicates that the contracting officer no longer regards that initial decision as his/her final word on the issue in dispute. Intuitively, no finality should attach to such a decision.[93] The contract and statutory appeal periods start anew when the contracting officer issues the "new" final deci-

sion, even if it is no more than a confirmation of the previous decision. The contracting officer's act of reconsideration effectively sets the appeal clock back to the first day, regardless of the outcome.

Unfortunately, it is not always clear when reconsideration has occurred. A request by the contractor, standing alone, is not enough,[94] particularly where the contracting officer does not respond at all to a contractor request for reconsideration. Such silence or inaction does not constitute evidence that the contracting officer was in fact reconsidering. Thus, the contractor had no reasonable basis for believing that reconsideration was occurring and his untimely appeal was dismissed.[95] Although the contracting officer has no obligation to answer such requests for reconsideration at all, common courtesy normally dictates some response. To avoid inadvertantly tolling the appeal period, the contracting officer must carefully handle the response.[96]

In M.J. Johnson Aircraft Engineering Co.,[97] the contractor had received a notice of termination for default. He did not file a timely notice of appeal. Thereafter he unilaterally resumed performance and sent notification of this to the contracting officer. The response was a reaffirmation of the original termination. The ASBCA found that this was not a reconsideration at all. Further, as noted above, the expiration of the appeal period would have precluded a valid reconsideration even if the contracting officer had wanted to do so.

Contracting officers also have to be circumspect in dealing with a contractor in the period following the final decision. It is not unusual for the contractor to request a meeting to discuss aspects of the decision. In a typical case,[98] the attorney representing the contractor sent a letter challenging certain elements of the decision to the contracting officer and requested a meeting. After the meeting, the attorney sent a letter stating his understanding that the contracting officer had agreed to respond in writing about the option of reconsideration. The contracting officer had not come away from the meeting with that same understanding, unfortunately. The contracting officer later indicated that he believed (erroneously) that he had no power to reconsider under the CDA and he did not respond to the letter. While a mere request for reconsideration imposes no responsibility upon the government, the board found this situation different. The contracting officer's conduct affirmatively misled the contractor and, in so doing, destroyed the finality of the initial decision. He should have responded to the attorney's letter, or, alternatively, he should have regarded the initial correspondence as an appeal. While a meeting with a contractor for the purpose of discussing a final decision does not automatically constitute reconsideration,[99] such meetings frequently indicate factually that the contracting officer is still actively considering the issues. This amounts to reconsideration which destroys any finality of the intial decision.[100] The government must make it very clear that no reconsideration is intended, if

that is, in fact, the case. The contractor's "good faith" belief that the contracting officer has agreed to reconsider may otherwise be sufficient to toll the running of the appeal period.[101] Similarly, the contracting officer's agreement to allow retesting of the contractor's product can result in a tolling of the appeal period.[102] The contractor reasonably interpreted that action as showing reconsideration and he was, therefore, not required to appeal within the original time period.

A contracting officer's dealings with agency counsel can also create problems in this area. While contracting officers not only can but should consult their attorneys about final decision, it is generally appropriate to do so before the final decision is issued. This situation arose in West Land Builders.[103] The contractor asked the contracting officer about reconsideration after receiving her final decision. According to the contractor, she told him the decision "may change" and that he (the contractor) should talk to the VA District Counsel. The contracting officer did refer the matter to the district counsel for review. This process took several months and the district counsel met with the contractor several times. Finally, the district counsel wrote a memo to the contracting officer confirming her decision. A copy was sent to the contractor. The board had no difficulty finding that these actions constituted a reconsideration of the first decision. The contracting officer treated her decision as pending, subject to the counsel's review, and it thus should not be treated with any more finality than she gave it herself.

3. Effect of Reconsideration

Since a timely reconsideration renders a purported final decision ineffective, it prevents any appeal period from running during the period of reconsideration. Where the original decision is confirmed, a new appeal period will run from the time the contractor is notified that the reconsideration has ceased.[104] There may well be no formal notification at all; but it may be expected that, if no firm confirmation is made to the contractor, he will not be penalized for failing to read the government's mind.

When the reconsideration results in an amended final decision, the contracting officer clearly must issue proper notice of this revision to the contractor pursuant to the CDA. The appeal period from this new decision runs from the date the contractor receives it, just as with any other final decision.

Occasionally a contracting officer reconsiders a decision after the contractor has made a timely appeal. If the contracting officer subsequently modifies his/her decision, the contractor will have a new right to appeal and must give timely notice to preserve it. However, if the contracting officer confirms the original decision, a new appeal ought not to be necessary.[105] Otherwise, a contracting officer might be able to unfairly delay or eliminate timely appeals through the ruse of reconsideration. A cautious contractor should timely-appeal again, just to be safe.

4. Extension of the Appeal Period

Under pre-CDA disputes procedures, the Armed Services Board, in particular, had recognized that the contracting officer could extend the period during which an appeal could be taken.[106] Just as with reconsiderations, the contracting officer could make such an agreement only before the expiration of the initial appeal period.[107] While the contracting officer, thus, could toll the running of an appeal period, he/she had no authority to waive a vested right of the government once the decision became final. A request for extension, not itself constituting a valid appeal, did not bind the government to respond and did not toll the running of the appeal period when the contracting officer granted no extension.[108]

Very few cases discuss this procedure. Since it is relatively simple to appeal, it would be unusual for a contractor to go to the effort of requesting additional time. An appeal could easily be filed to protect the contractor's rights and could easily be dropped later. Existing regulations did not encourage a contracting officer to allow such an extension in any case. Under the procedures now mandated by the CDA, this procedure would seem to be foreclosed. The 90-day time limit for filing appeals is now a statutory requirement, and the contracting officer has no authority to waive this limit.[109] Of course, the truly accommodating contracting officer might "reconsider" a decision during the 90-day period, thus starting a new appeal period running.[110] Such a procedure is neither recommended nor appropriate.

E. VALID APPEALS

The DAR Disputes clause in effect prior to the CDA contained language informing the contractor that "[t]he decision of the Contracting Officer shall be final and conclusive unless, within 30 days from the date of receipt of such copy, the Contractor mails or otherwise furnishes to the Contracting Officer a written appeal addressed to the Secretary."[111] This was very typical of disputes clauses of that era.[112] The CDA provides for a contractor's right to appeal to an agency board of contract appeals or, in the alternative, to the U.S. Claims Court. But, this guidance includes no instruction on the content of a valid appeal.[113] The FAR Disputes clause now in use states only that "[t]he Contracting Officer's decision shall be final unless the Contractor appeals or files a suit as provided in the Act."[114] It is apparent that the contractor gets little contractual or statutory guidance on the procedure required for making a valid appeal, especially under the FAR.

The contractor does get some help from the rules promulgated by the relevant board or the USCC. Typical of board rules in this area is Rule 2 of the Armed Services Board of Contract Appeals, which provides:

> A notice of appeal <u>should</u> indicate that an appeal is being taken and <u>should</u> identify the contract (by number), the department and/or agency involved in the dispute, the decision from which the appeal is taken, and the amount in dispute, if known. The notice of appeal <u>should</u> be signed personally by the appellant (the contractor taking the appeal), or by the appellant's duly authorized representative or attorney....[115] (Emphasis added.)

It is interesting to note that Rule 2 does not purport to impose mandatory requirements. Rule 1(a) provides the remaining coverage and it is directive:

> Notice of an appeal shall be in writing and mailed or otherwise furnished to the Board within 90 days from the date of receipt of a contracting officer's decision. A copy thereof shall be furnished to the contracting officer from whose decision the appeal is taken.[116] (Emphasis added.)

Although this language is mandatory, neither the CDA nor the FAR Disputes provision states these requirements. The lack of any requirement for a written appeal outside of the board rules could create an interesting problem, if a contractor asserts an oral appeal. Common sense dictates use of a written appeal, but a board would seem to be on weak ground demanding compliance with such a rule when neither the contract nor the CDA provide a basis for the rule.

The CDA does provide a somewhat more solid foundation for the procedures for direct access appeals to the USCC. The act states that such direct access appeals "shall be filed within twelve months from the date of receipt by the contractor of the decision of the contracting officer concerning the claim, and shall proceed de novo in accordance with the rules of the appropriate court. [Emphasis added.]"[117] Thus, the extensive and detailed rules of the USCC may be applied without serious question. The generous twelve month appeal period should preclude any serious problem concerning such court appeals, though some cases will always arise with the proverbial last second suits.

1. Basic Approaches

In determining whether a contractor has validly appealed, the boards have consistently looked at two factors. First, there must be some manifestation of dissatisfaction with the contracting officer's decision, and second, there must be an indication of a present intent to appeal to an authority above the contracting officer.[118] The boards have generally taken a very liberal approach in evaluating contractor correspondence to decide if the necessary intent was shown.[119] Under pre-CDA dispute clauses, the boards also required one additional step: the appeal had to be in writing.[120] Although, as noted above, neither the CDA nor the current FAR Disputes provision required written notice of appeal, it seems likely that Boards will continue the practice through board rules. The problems inherent in allowing oral appeals would be tremendous and could spur needless litigation.

While a liberal approach is generally taken, the boards have drawn the line in some cases. Not surprisingly, the appeal must be filed by the contractor or some authorized agent. Attorneys frequently fill this role without question. However, absent some evidence of agency, a contractor's insurance company has no standing to file a notice of appeal.[121] Also, where a contractor has not filed a timely appeal, he may not raise the same matter as a counter claim against a government claim.[122] The HUD Board refused to accept a contractor's theory of "constructive mailing" in Rainy Day Contractors.[123] The contractor's problem (and

perhaps a basis for a certain lack of sympathy) related to his then current residence in state prison. Within ninety days after his receipt of the final decision, the contractor gave a notice of appeal to his custody officer for mailing. Normal delays in the prison mailing system resulted in the letter not entering the U.S. mail until after the 90-day period had expired. The board rejected the argument that delivery of the appeal to the custody officer was sufficient to constitute mailing under the CDA. The contractor was well aware of possible delays in the prison mailing system and his failure to take adequate precautions to insure timely mailing was his own responsiblity.[124]

As a general rule, there can be no appeal until the contracting officer has issued his final decision.[125] Thus, even a clearly expressed intention to appeal is of no effect before the receipt of the decision.[126] However, in one case such a premature appeal saved the day for the contractor.[127] The contractor's "formal" appeal notice was late, but the board examined other correspondence to see if it met the requirements for an appeal. The only letter during the 30-day appeal period was ambiguous as it only requested information about the procedure to follow "to make a claim" for the amount deducted by the contracting officer's final decision. Nevertheless, an additional letter written before the final decision clearly spoke of an "intent to appeal for relief." Taken together, the two letters adequately expressed the necessary intent and constituted a valid "quasi-notice of appeal."

The Corps of Engineers BCA is unique in that its decision is appealable to the ASBCA, rather than to the USCC. It is the only such "intermediate" level board. The contractor must be doubly careful in cases involving pre-CDA Corps of Engineers contracts. Failure to timely appeal to the ENG BCA (as representative of the Chief of Engineers) also extinguishes the right to appeal to the ASBCA.[128] Furthermore, a decision of the ENG BCA must also be timely appealled, or the ASBCA will have no jurisdiction.[129]

The CDA provides increased recognition of board authority to handle subcontractor appeals, but it is still clear that the appeal is not valid unless "sponsored" in the name of the prime contractor. However, the contracting officer's failure to forward an otherwise timely appeal to the board, because he had not received adequate proof of "sponsorship," may not deprive the board of jurisdiction.[130] In the cited case, the board was satisfied that the contracting officer had timely notice of the intended appeal and that he should have forwarded it to the board. Thus, the board considered the appeal as timely.

A variation of the subcontractor appeal problem arose in Baeten Construction Company.[131] There, the contracting officer had issued a decision denying a constructive change claim filed on behalf of the subcontractor and he sent a copy of that decision directly to the subcontractor. On September 14, 1982, the subcontractor submitted an appeal. The language was not artfully drafted, but it was adequate, and the appeal was well within the time limits of the CDA. Still, there was a significant problem.

No authority existed for the subcontractor to appeal in its own name and the prime did not appeal on behalf of the subcontractor until February 15, 1983, well beyond the 90-day limit. In a surprising decision, the GSBCA held that the prime's appeal "related back" to the timely notice by the subcontractor and, thus, a valid timely appeal existed. Aside from confirming the desire of the board to reach the merits of a case wherever possible, this case should have little direct application. Only when a timely subcontractor attempted appeal has occurred can a later prime untimely appeal be given vitality through this relation back doctrine. A request from the subcontractor to the prime that an appeal be filed, standing alone, will not suffice.[132] Thus, ironically, a subcontractor appeal which is itself a nullity can become the foundation for an appeal which would otherwise be untimely.

2. Present Intent to Appeal

There is no required language or format which is necessary for an appeal and the word "appeal" need not be used either.[133] All that is necessary is that there be an indication of an intent to appeal at that point in time to some higher authority. In some cases, even a request for extension of the time for appeal has been held to constitute an adequate appeal.[134] However, mere acknowledgement of receipt of a final decision or other correspondence with the contracting officer not expressing an intent to appeal, is not sufficient even if dissatisfaction with the contracting officer's decision is stated.[135] Likewise, a

mere request for reconsideration, without more, does not constitute an appeal.[136]

A key element of a valid appeal is the referral of the matter to a higher authority for resolution. Under the pre-CDA disputes clauses, the appeal was to be addressed to the head of the agency. However, so long as an appeal expressed an intent to appeal to some authority higher than the contracting officer, the boards have been liberal in accepting the appeals as valid.[137] Objections to the final decision, no matter how strenuous, do not amount to an appeal when they are addressed solely to the contracting officer and do not demonstrate the intent to appeal further.[138]

The language of the Disputes Act, directly referenced in the FAR Disputes Clause, provides that "the contractor may appeal such decision to an agency board of contract appeals."[139] Nevertheless, this does not necessarily mean that an appeal must be submitted directly to the board to meet a statutory jurisdictional requirement. Thus, an appeal sent to the Secretary of the Air Force through the contracting officer has been held to be valid even though the 90th day had passed by the time the appeal actually reached the board.[140] The board reaffirmed its policy of liberality towards "misdirected appeal notices," so long as the appeal was initially timely and met the other requirements.[141] Likewise, an appeal sent to the contracting officer himself did not become untimely because the contracting officer failed to forward it to the board.[142] Here the contractor had

the option of choosing pre-CDA or CDA procedures. The appeal, sent on day forty-six of the appeal period, did not say anything about CDA election. The contracting officer concluded that it was an untimely appeal under pre-CDA procedures, so he refused to forward it. This simply was not his decision in the board's opinion. Even under the CDA, the board may "entertain" appeals not filed directly with it and the contracting officer, thus, should have forwarded the contractor's notice of appeal.[143]

Ambiguity in a contractor's timely notice may raise a question as to whether it is intended to be an appeal. Where the contracting officer queried a contractor about its intentions in sending a particular letter (within the notice period), the running of the appeal period was tolled.[144] If the contractor confirms within a reasonable time its intent to appeal, then the original notice will be treated as a valid appeal.

The conduct of the contracting officer in dealing with a contractor can also provide evidence of the existence of a valid appeal. In Burn Construction Co., Inc.,[145] no actual appeal notice was filed until the 31st day. However, the board found that the "course of conduct" between the parties, including correspondence and telephone conversations within the 30-day period, adequately manifested the contractor's intent to appeal. This may more properly be seen as a disguised waiver case [see discussion infra].

3. Proof of Timely Appeal

Under the terms of the CDA, an appeal to an agency board must

be made within ninety days after the contractor receives the contracting officer's decision.[146] As discussed above, the contractor has the alternative of appealing directly to the USCC. For this option, the contractor has twelve months from the date of receipt of the contracting officer's decision to file his appeal.[147] Frequently it will be critical to prove when the appeal was made in order to show that the jurisdictional time limits have been met. Since filing with the USCC is required, this will not result in problems of proof in the normal case. However, the USCC rules do allow for consideration of an appeal which was filed late under one circumstance. This is when the complaint is mailed to the court and it can be shown that it was mailed in sufficient time so that, in the ordinary course of the mail, it would have arrived in a timely fashion.[148] In the cited case, the court indicated that it will be liberal in considering any reasonable presumption of timely arrival in the ordinary course of the mails. Proof problems will be minimized since the court rule requires use of registered or certified mail, thus providing a ready evidentiary basis. The most frequently faced issue will thus be proof of timely appeal to an agency board.

To meet the 90-day limit, a contractor must "mail or otherwise furnish" an appeal to the Board within the specified time. A contractor has an unrestricted choice of methods of delivery, but the U.S. Postal Service is used in most cases. The critical event is the placing of the appeal into the mail. Use of a particular form of mail service is not required, though use of

registered or certified mail will provide the contractor with better proof of mailing time. No proof of receipt by the contracting officer is required, nor is the time of receipt by him/her important, unless some method other than the U.S. Postal Service is used.

Since there is no requirement for the use of registered or certified mail, the contractor is not entitled to an extension of time to allow use of such a special service.[149] Of course, failure to use registered or certified mail may be detrimental to a contractor trying to meet his burden of proving timely mailing since he will be forced to rely on less probative evidence.[150]

Most commonly, the envelope contains a dated postmark. Where this postmark is affixed by the U.S. Postal Service, there is a strong presumption that the letter was placed into the mails on the indicated date,[151] although a contractor can rebut the presumption with sufficient evidence.[152] Since the question of when the appeal was mailed is a matter peculiarly within the knowledge of the contractor, his failure to produce satisfactory evidence of timely mailing will result in dismissal of the untimely appeal.[153] A postmark imprinted by a postal meter within the control of the contractor provides some evidence of the date of mailing, but it is not as strong as the independent postal service postmark.[154] A date typed, stamped, or written onto the letter of appeal itself has very little probative value and will not overcome the presumption created by the postmark.[155]

To overcome the presumption established by the postal service

postmark, a contractor must do more than speculate that there may have been post office mishandling.[156] Typically, sworn testimony by the company employee(s) who prepared and/or actually placed the appeal letter into the mail will be acceptable.[157] This same type of testimony may be vital in cases where no postmark evidence is available[158] or where the government never received the appeal letter at all. Nonreceipt by the government does not prove that the appeal was never mailed, but again the contractor bears the burden of proving otherwise.[159] Liberality in this area is very evident, as shown in Astro Industries, Inc.[160] There the issue boiled down to whether the contractor had appealled at all. The contractor's secretary testified about the office's routine procedures for preparing, addressing, and depositing mail, though she couldn't remember specifically mailing this appeal letter. Then the contractor testified that he remembered drafting the appeal letter, providing it to his secretary for typing, signing the letter, and returning it to the secretary for mailing. This circumstantial evidence satisfied the board that it was more probable than not that the contractor's appeal was properly and timely mailed and the board thus allowed the case to proceed.

Finally, there is no "substantial compliance" doctrine. In J.W. Bateson Co., Inc.,[161] the last day for appeal fell on a Saturday. The contractor knew that the contracting office was closed and would remain so until Tuesday (Monday was Labor Day, a Federal holiday). Concluding that mailing the appeal letter on

Saturday would accomplish nothing more than hand delivery on Tuesday, he elected to take the latter course. While this action was understandable, it just did not meet the requirement of the disputes clause and the appeal was dismissed as untimely. Such a case might warrant waiver in a pre-CDA case, but CDA time limits are jurisdictional and not waivable, so contractors must insure strict compliance (see discussion on waiver, infra).

F. CALCULATING TIME PERIODS

Given that a specified number of days was available for contractor appeals, the pre-CDA disputes clauses did not specify how to calculate the period in actual cases. Thus, the boards adopted their own practices. The first fundamental rule adopted was that the day on which the contractor received the final decision was not to be counted, while the day on which the appeal was mailed would be included.[162] Also, the number of days allowed was measured in calendar days, not working days.[163] Where the 30th day fell on a Sunday, rules were adopted allowing appeals on the next business day to be treated as timely.[164] This same extension was allowed where the 30th day fell on a national holiday as well. However, even though the last day fell on a day recognized by the state as a holiday, no extension occurred since federal, not state, law controlled.[165] Likewise, the fact that the state of California authorized Saturday to be treated as a holiday for the purpose of extending performance to the next business day was irrelevant where federal law did not adopt the same approach.[166]

The passage of the CDA has had virtually no impact in this area. The act itself contains no definition as to how the appeal periods are to be computed and the major boards have continued to apply the procedures utilized in pre-CDA cases.[167] Arguments that this constitutes an impermissable waiver of an untimely appeal have been rejected.[168] Rather, the issue is merely how to compute the allowable period. Adoption of existing rules, similar to those of the Federal Rules of Civil Procedure, is quite logical, and nothing in the CDA evidences any intent to change this existing practice.[169] The applicable rule of procedure now prescribed for the ASBCA is representative of today's practice:

> In computing any period of time, the day of the event from which the designated period of time begins to run shall not be included, but the last day of the period shall be included unless it is a Saturday, Sunday, or a legal holiday, in which event the period shall run to the end of the next business day.[170]

The only significant change is the adoption of the rule that Saturday will not be counted as the last day of any period.

G. ELECTION OF REMEDIES

The CDA provided contractors with pre-CDA contracts a choice. As to claims pending on or initiated after the effective date of the Act, the contractor had the right to elect to proceed under the new procedures of the CDA in lieu of those stated in the disputes clause of the contract.[171] This choice will keep alive the possibility of appeals under pre-CDA procedures so long as contracts containing pre-CDA clauses still are in effect. Where such contractors elect CDA procedures, and for all disputes

involving post-CDA contracts, the issuance of a contracting officer's decision brings another opportunity for a choice. Contractors may choose between an appeal to the agency board or a suit in the USCC. In establishing these options, the CDA gave virtually no procedural guidance. While at least one board issued regulations requiring contractors to make a written election as to CDA coverage at the time of submission of a claim,[172] most agencies issued no formal guidance.

Under these circumstances, confusion could easily arise. Under pre-CDA contracts, a typical case involved a contractor appeal after the expiration of the 30-day appeal period of the old disputes clause. Where the notice of appeal stated no intention to elect to proceed under CDA procedures, the agency would file a motion to dismiss for untimeliness before the board. Considering just such a case, the ASBCA rejected the notion that the election had to be made within the 90-day period specified for appeals.[173] Although the appeal itself must be filed within the 90-day period, nothing in the Act requires that election occur at any particular time at all, and certainly nothing specified that election must occur within the expanded appeal period. Nothing in this case indicated that the delay in providing notice of CDA election caused the Government any confusion or prejudice, but the board did imply that in appropriate cases the board might dismiss an appeal where a contractor's late election was prejudicial to the government.[174] This result seems entirely consistent with the intent of the CDA to provide

expanded appellate rights to contractors without regard to existing contract language.[175] However, once a contractor has chosen the type of remedy he will follow (i.e., disputes clause or CDA procedures), he may not change his mind.[176] This is true even where the "choice" was flawed, e.g., an election of CDA procedures in a case involving an improperly certified claim. Though the claim and any contracting officer decision are invalid, the contractor's election of remedies will stand.[177]

Separate periods are explicitly provided within the CDA for timely appeals to the agency board and for timely filing of suits with the USCC. Since the two options are entirely separate, it is quite clear that a contractor need not seek administrative review in the agency board as a prerequisite to filing suit in the USCC. Thus, efforts by a contractor to seek review before a board do not toll the running of the 12-month time limit for filing direct access appeals in the USCC.[178] Likewise, a contractor's intention to pursue an accelerated appeal procedure is a court suit (based on its misunderstanding of the availability of such an option) was held not to toll the running of the statutory 90-day appeal period.[179]

More fundamentally, once a contractor who is fully and properly informed of his options in fact elects a forum for appeal, the contractor may not subsequently decide to switch to the alternate forum.[180] However, where the final decision does not accurately inform the contractor of his appeal rights, it is not a valid decision (see discussion, supra), and a contractor's

attempted appeal will not bind him. Furthermore, an attempted appeal to a board which is not viable, e.g., because it is untimely, does not constitute a valid election of the agency board option and the contractor may instead file suit in the USCC within the required twelve months.[181] An untimely appeal is simply a nullity and it would be ridiculous, as well as grossly unfair, for such a meaningless act to be construed as denying the contractor the right to file a USCC suit. In Olsberg,[182] the case of first impression, the court aptly stated:

> The plain terms of section 10(a)(1) of the 1978 act gave plaintiff a right, "in lieu of" appealing to the board in a timely fashion to bring an action in this court (within the congressionally prescribed time limit for so doing). That right is not lost merely by attempting, in a patently untimely fashion, to pursue an option that no longer existed. Defendant's contrary contention is unsupported by reason, logic, or authority, and cannot be accepted.
>
> . . . .
>
> In the facts and circumstances of this case, to uphold the government's position would be effectively to preclude any "adjudication", administrative or judicial, of the validity vel non of the contracting officer's denial of plaintiff's contract claims, notwithstanding plaintiff's timely initiation of a direct action on the claims in this court. Such a result is neither reasonable nor in keeping with the purpose and intent of the 1978 act. [Citation omitted][183]

H. WAIVER

1. Development of the Court of Claims Doctrine

Under pre-CDA disputes provisions, the contractor typically had thirty days in which to appeal a contracting officer's decision. According to the language of the clauses, a decision not appealled within this period became final. Since no direct

access appeal to a U.S. court existed, the contractor simply had no remedy if a timely appeal was not made. Especially because of the relatively short time period involved, this sometimes led to foreclosure of contractor appeals under circumstances which many felt were unfair. The resulting question became whether there might be some rare cases where equity demanded that the lack of a timely appeal be waived to permit consideration of the appeal on its merits. Thus arose one of the most interesting contests between the Court of Claims and the various boards of contract appeals (led principally by the ASBCA).[184]

Originally the boards and courts uniformly required strict adherence to the requirements of the contractual disputes provisions. Having voluntarily entered into a contract whose provisions mandated a particular disputes process, the contractor was required to conform to those requirements. Access to the Court of Claims existed only on appeal from an agency board and if the contractor forfeited his access to the agency board by failing to timely make his appeal, then there simply was no further remedy.[185] The Court of Claims' firm support for these principles was shown in Sol O. Schlesinger v. United States:[186]

> Ever since United States v. Blair, 321 U.S. 730 (1944), it has been established doctrine that literal adherence to the terms of the "Disputes" clause is essential to the disposition of all questions "arising under" a standard government contract. Typically, this clause provides for an initial resolution of contract disputes through a contracting officer's determination. Further, it affords a contractor the opportunity to challenge such determinations through the offices of an administrative [board] hearing. Fulfillment of each of

> these requisites is essential in order to insure judicial review; where such compliance cannot be shown, then there exists a jurisdictional void which we are not at liberty to ignore. And in the same manner that the exhaustion of administrative remedies operates as a sine qua non of our contract jurisdiction, so also does "timeliness" in appealing a contracting officer's determination serve as the source of the administrative appeal board's jurisdiction.[187]

While the boards might exercise liberality in determining if an appeal had been made,[188] they regularly and stringently rejected untimely appeals. In Allied Contractors, Inc.,[189] the ASBCA explained:

> The parties must not overlook that these procedural matters are of material importance--not just procedurally important--as they affect the maturity of rights under the contract. For instance, if the appeal is not taken in time, then the decision from which the appeal is attempted becomes final and, by the terms of the contract, it brings the disagreement to a permanent end, thereby fixing the rights of the parties under the contract. To treat it as other than final would deprive a party litigant of his contractual rights.[190]

Simply put, it was a fundamental question of jurisdiction. The authority of the board was derived from the agreement of the parties as set out in the contract disputes clause. How, then, could a board have jurisdiction to hear an appeal under circumstances other than those prescribed in the contract? In case after case, boards summarily dismissed, for lack of jurisdiction, cases involving untimely appeals on just that basis. Contractors still were forced to turn Mr. Justice Holmes' famous "square corners."[191]

The first hint that the Court of Claims might consider a more flexible approach concerned an isolated case even before Sol O. Schlesinger (supra). ASBCA consideration of the initial

appeal resulted in dismissal for lack of a timely appeal.[192] The contractor's appeal to the Court of Claims was not actually decided. Instead, the court issued an order containing the following:

> During oral argument, plaintiffs counsel informed the court that the reason why the appeal to the Board was not timely was because the wife of plaintiff's prior counsel had become seriously ill as a result of the death or injury of their child. [Their eleven-month-old baby had strangled on a marble and died.] As a result of this tragedy, plaintiff's counsel was not able to file an appeal within 30 days of the contracting officer's decision.
>
> In the light of this information we believe that the plaintiff should be given the opportunity to present this evidence before the Board in order that it might possibly reconsider its denial based on the ground that the appeal was untimely. We see no reason why the Board, in its sound discretion, may not elect to entertain this appeal and avoid a harsh result, if the allegations of plaintiff are as stated. See Moran Brothers, Inc. v. United States, Ct.Cl. No. 167-63, decided June 11, 1965 [the same day the Maitland order was issued] slip op. p.[sic]. We do not decide that the Board was in error in dismissing the appeal.[193]

Relying in part on this order, the contractor petitioned the Board to reinstate the initial appeal to hear additional evidence on the timeliness issue and the Board agreed to do so. However, the Board made it clear that the reinstatement was granted in deference to the Court of Claims.[194] The Board's decision constitutes an excellent review of the case law at that time. Not surprisingly, the board found that it had no authority to decide the appeal. Commenting on the Moran case cited by the order of the court of claims, the board found it not inconsistent with the rule that neither the contracting officer nor the agency

head[195] had authority to waive the government's vested right in the finality of an unappealed decision. Rather, that case involved promulgation by the agency head, before expiration of the appeal period, of new regulations authorizing an appeal period of sixty days as an alternative to the 30-day period stated in the contract. Though the court indicated in dicta that waiver was possible, the decision actually involved not waiver, but a determination that an appeal on the fifty-seventh day after receipt of the contracting officer's decision was, in fact, timely because it met the requirements of the new AEC rules. Since those rules were effective prior to expiration of the initial 30-day appeal period, no finality attached to that decision and there was no vested right to be waived.[196]

Leaving no stone unturned, the board further noted that even if it had authority to waive lack of timeliness, the facts of this case would not justify exercising such discretion. The tragedy which struck the attorney's family was not the key factor at all. Rather, the contractor, who knew of those circumstances and who made no clear arrangement with the attorney about his desire to appeal, and who took no steps to insure that a timely appeal was made, bore primary responsibility. It was this dereliction which caused the untimeliness.[197] There is no record of a further appeal from this second board dismissal.

While Schlesinger demonstrates that the court had yet to reverse directions, it was not to be long before the court began charting a new path which at least some boards were reluctant to

follow. Two key cases, both decided in 1972, led the way. First came Maney Aircraft Parts, Inc., v. United States,[198] and then Monroe M. Tapper and Associates v. United States.[199] In each of these cases, the court held that the boards in fact did have discretion to waive the 30-day appeal period limitation. Maney involved an ASBCA case[200] and Tapper was a Post Office case.[201] Since neither board had given any attention to a discretionary waiver, the court suspended its proceedings to provide the opportunity for such consideration.[202]

These cases reflect a classic contest of wills. In Maney, the board did consider the case again, but it declined the court's "suggestion" that it exercise its discretion to consider waiver.[203] The Senior Deciding Group of the ASBCA decisively stated its belief that the board had no such discretion as the Court of Appeals had indicated. However, the contractor's renewed appeal to the Court of Claims found a more sympathetic audience. More importantly, an intervening statutory change had vested the court with remand authority.[204] After holding that the board did in fact have discretion to waive untimely filing of appeals, the court remanded the case to the SBCA and ordered it "to exercise its discretion as to whether or not the plaintiff has shown good cause or a justifiable excuse, under all the facts and circumstances of the case, for failing to file its appeal within the 30-day limit, and by virtue thereof the 30-day time limit requirement should be waived."[205] Making it clear that the authority to proceed in the case came from the Court of Claims

remand and not its own Charter, the board examined the circumstances and found that waiver was not appropriate.[206] Maney again appealed to the court, but this time the court, without opinion, refused further review.[207] Thus, Maney helped establish a new legal theory, but the contractor himself reaped no reward.

Different results came in the Tapper case. There, the Postal Service Board (PSBCA) exercised discretion upon the court's first suspension of its proceedings and found that, assuming it had authority to waive a late appeal, waiver was not justified on the facts of the case.[208] On appeal, the Court of Claims reversed, finding that the board's decision was arbitrary, capricious, and contrary to the weight of the evidence.[209] Therefore, the court again remanded the case to the PSBCA for a hearing on the merits. Although the previous Maney and Tapper decisions had made clear the court's views on waiver, contractors had not been notably successful in convincing boards that waiver was proper.[210] The ASBCA and GSBCA continued to discuss cases for untimeliness without discussion of waiver or discretion.[211] In this light, Judge Solibakke, then Chairman of the ASBCA, made the following comment about the Tapper decision:

> In a spirited dissent, Judge Skelton took the court to task for requiring a discretionary action by the Board to be supported by substantial evidence. [The court applied Wunderlich Act[212] standards.] He remarked that it was also clearly inappropriate for the court to substitute, as it had, its view of the facts for those of the Board. (One can conclude that the majority of the court had decided it was time that it win one of these "discretionary" waiver cases.)[213]

That same year (1975) did mark the first "breakthrough" for

the waiver theory among the ranks of the boards. Relying on the guidelines set out in Tapper, the DOTCAB decided in Skyline Construction Co.[214] that the contractor had shown "good cause or justifiable excuse" for his one day delay and thus was entitled to a waiver. In 1976 the GSBCA finally exercised a discretionary waiver on its own for the first time in Conncor, Inc.[215] However, the ASBCA stuck to its position more stubbornly. Unless specifically ordered to do so by a Court of Claims remand order, it refused to exercise discretion to determine if a waiver should be granted.[216] That such a stubborn position began to wear a little thin is evidenced in Judge Andrews' concurring opinion in Cosmic:[217]

> I joined in the opinion of the Senior Deciding Group in Maney Aircraft Parts [citation omitted] in which we refused to accept the opinion of the court in Maney Aircraft Parts v. United States, 197 Ct.Cl. 159 (1972), that we had authority to waive the 30-day appeal period. We thought the court was incorrect as a matter of law and, moreover, the court was lacking in authority to direct the board to reconsider the case. A direction which a court lacks the authority to issue is not binding. Shortly after its first Maney decision the Court of Claims was given authority to remand appropriate matters to the boards with directions. P.L. 92-415, 86 Stat. 652, 28 USCA Sec. 1491, 1st par. Its subsequent orders to the effect that the boards of contract appeals have discretionary authority to waive the 30 day appeal period of the Disputes clause has [sic] become established precedent. Our continued refusal to consider waiver without a direct remand order from the court is little more than petulance.[218]

Whether Judge Andrews' comments had some effect, or for some other reason, the ASBCA finally accepted the Court position sixteen months later in California Country Comfort.[219] Considering the many years of obstinancy, the decision gives no hint that it

marks a significant departure from prior board decisions. The key language of the decision (joined by Judge Andrews) states only:

> ...[I]t is clear that the Court of Claims has sanctioned waiver of the thirty day contractual limit on the theory that the contracting party may waive a clause made for its benefit. [Citations omitted.] Based on the venerable doctrine of stare decisis, we are bound to follow the principles of law laid down by the court. Thus, we may consider, sua sponte, the question of waiver of the Disputes clause filing time limitation....[220]

Since this decision has direct impact only on claims under contracts written before the effective date of the CDA, a rapidly diminishing group, it does not presage a significant practical impact. Indeed, this may be a factor in the board's willingness to finally adopt the court's theory. One other unusual factor in this case could have been significant. The appeal involved a Nonappropriated Fund Instrumentality (NAFI) contract, and the contractor had no appellate rights other than to the board. Thus, a dismissal would have denied any remedy. Although that was the precise result under pre-CDA cases, this might be a basis for distinguishing this case from one involving a standard contractor with alternate access to the Claims Court.

2. Impact of the Contract Disputes Act

Initially there was some disagreement about the impact of the CDA on the court's waiver doctrine. The Department of Transportation board issued the first board decision dealing with this issue and found the waiver doctrine of Maney and Tapper no longer to have vitality.[221] Not long after that, and to no one's

surprise, the ASBCA also found the 90-day appeal period of the CDA a non-waivable jurisdictional requirement.[222] This same position was adopted by the ENG BCA,[223] the Energy Department BCA,[224] the Agriculture Department BCA,[225] and the Housing and Urban Development BCA.[226] The argument for this position was succinctly set out by the HUD BCA in E. Coombs Contracting Company, Inc.[227] as follows:

> The legislative history of the Contract Disputes Act makes clear that Section 7 was intended both to afford and circumscribe the right of contractors to proceed before an agency Board. In this regard, Senate Report No. 95-1118, 95th Cong., 2nd Sess., discloses, at page 23: '(Section 7) establishes the time limits available to the contractor to initiate an appeal to an agency board of contract appeals. This time frame (90 days) is considered adequate to insure the contractor the necessary time to review his position and to decide whether to appeal to an agency board.' Further, Section 6 of the Act confirms that Congress did not contemplate any administrative waiver of this jurisdictional time limit. Subsection (b) states: 'The contracting officer's decision on the claim shall be final and conclusive and not subject to review by any forum, tribunal, or Government agency, unless an appeal or suit is timely commenced as authorized by this Act.' [Emphasis in original.][228]

However, this view was not universally adopted. Though only in dicta, the Labor Board first expressed the view that the Maney and Tapper rule still should be given effect, saying: "[w]e believe that this rule, adopted when the time limit was set by contract, should also provide an 'emergency escape' when this limit is set by statute."[229] Next, in a concurring opinion which also was dicta, two administrative judges of the GSA Board raised the issue of waiver and left open the possibility that the board might retain its pre-CDA authority to waive a failure to file a

timely appeal "for good cause."[230] Finally, in a 9-2 decision, the full GSA Board expressly rejected the position that the CDA 90-day limit was intended to be jurisdictional.[231] In the view of the majority, Congress' intent was to expand, not to limit, available contractor remedies. In the absence of a clear intent to the contrary, new legislation should be construed consistently with existing rules. Since finding the 90-day limit to be jurisdictional would reduce the rights previously available to contractors (by eliminating the possibility of waiver of untimely filing of appeals), the board was unwilling to adopt such a position. However, in this particular case, the board found no good cause justifying the contractor's delayed appeal (on the one hundred and eighty-second day after receipt of the contracting officer's decision), and the appeal was therefore dismissed with prejudice.[232]

Notwithstanding the GSBCA's scholarly discussion, the ASBCA found no reason to reconsider its position. The Judkins decision was acknowledged and rejected first in Captain Joe's Surplus Stores, Inc.,[233] then in New Mexico Professional Standards Review Organization, Inc.[234] Shortly thereafter, the board gave expanded consideration to the issue and, in a detailed analysis, firmly rejected the Judkins rationale.[235]

Further dispute between these two principle boards now has been forestalled, at least for the time being, by the decision of the Court of Appeals for the Federal Circuit in Cosmic Construction Company v. U.S.[236] Cosmic's initial appeal to the

ASBCA had been dismissed by the board for lack of jurisdiction since it was not filed within ninety days. The court sustained the ASBCA's holding that it had no authority to waive the statutory 90-day limit, stating that no such discretion existed. Dealing with the arguments raised in Judkins, the court held that Judkins was erroneously decided and rejected the argument that Maney and Tapper had continuing viability in post-CDA cases:

> The Court of Claims sanctioned waiver of the thirty day contractual limit on the theory that a contracting party may waive a clause made for its benefit. Maney Aircraft Parts Inc. v. United States, 453 F.2d 1260 (1972); Monroe M. Tapper & Associates v. United States, 458 F.2d 66 (1972); Moran Bros. Inc. v. United States, 346 F.2d 590 (1965). The rationale supporting waiver in those cases is totally incapable of supporting the notion that an Executive Branch tribunal may waive a procedural requirement established by statute.[237]

Thus, except for cases arising under pre-CDA contracts where the contractor elects Disputes Clause procedures, the waiver doctrine of Maney and Tapper is now a dead letter.

3. Estoppel

Even though the government may not voluntarily waive the vested right which accrues when the contractor fails to timely appeal, it is possible that actions of a government representative might give rise to a situation where the doctrine of equitable estoppel would preclude enforcement of the appeal period limitation. Prior to the CDA, the ASBCA occasionally allowed such a result. In Peters Machine Company,[238] the board dealt with a situation where the contracting officer and contractor agreed in good faith on an extension of the 30-day appeal

period. This agreement occurred prior to the expiration of the 30-day period, so the issue of waiver of vested rights was not involved. Because of the contractor's reasonable reliance on the good faith agreement, the board held that the running of the appeal period had been tolled. The appeal thus was timely. The case of Continental Rubber Works[239] involved a contract termination accompanied by a representation by the contracting officer that there would be a repurchase of the goods covered under the terminated contract. Relying on that assurance, the contractor delayed his appeal of the termination. Subsequently, the contractor was notified that there would not be a repurchase after all. While reaffirming its lack of authority to waive the failure to timely appeal, the board held that the contracting officer's representation served to toll the running of the 30-day period until the contractor received notice that there would be no repurchase.

After implementation of the CDA, the ASBCA decided another case involving discussion of equitable estoppel principles, Policy Research, Incorporated.[240] On the facts of the case, the board found that the contractor could not have reasonably relied on alleged statements of a staff member of the ASBCA concerning the last date of her appeal period; therefore no case for estoppel existed. Nonetheless, the discussion clearly indicates the ASBCA's belief that the CDA has not eliminated the viability of this doctrine. Likewise, the GSBCA has indicated its support for such a doctrine in Wehran Engineering.[241] In its decision, the

board expressly relied on Ervin D. Judkins,[242] however, the doctrine is separate from the concept of waiver, and the Court's disavowal of Ervin D. Judkins does not automatically erase the viability of the estoppel doctrine. Although this type of case should be rare, a contractor who can demonstrate reasonable detrimental reliance on representations of government officials which caused him to fail to make a timely appeal should be allowed to invoke equitable estoppel to preclude the government from invoking his untimeliness.

I. FULFORD DOCTRINE

Where a contract is terminated for default, the contractor may appeal the validity of the determination within the time limit of the Disputes Clause, or as set out in the CDA, as applicable. However, the venerable Fulford Doctrine[243] long recognized that a contractor could also challenge the validity of the default by raising the issue of excusability upon timely appeal of an assessment of excess costs of reprocurement. Though originally limited to the issue of excusable delays, boards over the years have gradually expanded the Doctrine to include consideration of virtually any challenge to the propriety of the default determination on any type of contract.[244] However, this potential creates no rights for the contractor in the event excess costs of reprocurement are never assessed.[245]

Passage of the CDA raised questions about the continuing validity of the Fulford Doctrine. The Armed Services Board apparently found no substantive change to be necessary, as it

has continued to apply the Fulford Doctrine in the same manner typical of pre-CDA cases.[246] Further, the board felt no need to even discuss the continued vitality of the Doctrine. Similarly, the Agriculture Department Board has also applied the old Doctrine in a CDA case.[247]

However, the approach taken in the courts has not been so casual. Oddly enough, the first USCC decision dealing with the Fulford Doctrine under the CDA, D. Moody & Co., Inc. v. U.S.,[248] is also the first court case on Fulford. Though widely implemented in the boards, it just had not been the subject of a court case. In Moody, the contractor elected to file a direct access law suit in the Claims Court. His action was within twelve months of the Air Force's notice of assessment of excess costs of reprocurement, but it was more than fourteen months after the original default termination. The lawsuit, in classic Fulford fashion, challenged the validity of not only the reprocurement cost assessment, but also of the termination itself. After a detailed analysis of the origin and rationale for the Doctrine, the court found nothing in the CDA mandating abandonment of this useful Doctrine. Most significantly, it encourages board and judicial economy. Contractors might well not care to bother to appeal a default termination on principle, so long as excess costs of reprocurement are not involved. By recognizing the right to file a timely appeal after assessment of excess reprocurement costs (an event which may well never happen), the Doctrine encourages contractors not to file protective appeals

and lawsuits. These reasons remain equally viable under the CDA. Though the CDA statutorily limits the amount of time available for filing an appeal, it does not limit the events which may be recognized as originating contractor appeal rights. Thus, a proper analysis of the Fulford Doctrine shows that it is not a waiver of the time limit for appeal. Rather, it recognizes that two separate events give rise to the contractor's right to appeal the propriety of the default termination. Nothing in that process is contrary to the jurisdictional time limits set out in the CDA.

Five months later, a different USCC judge also had occasion to consider the applicability of the Fulford Doctrine in Z.A.N. Company v. U.S.[249] While acknowledging the "comprehensive and scholarly discussion" leading his fellow judge to adopt Fulford under similar factual circumstances, he refused to follow that precedent. Under his analysis, the government's termination for default constituted a claim under the CDA. Since no timely appeal had been taken, that decision had become final and the court had no jurisdiction to review it. However, the court read the Default Clause (DAR 7-103.11(1980)) as giving the contractor a separate right to file a claim seeking to have the termination treated as one for the government's convenience. Until the filing of such a claim, the contracting officer had no basis upon which to issue a decision on that issue. Thus, the finding in the termination notice that the default was inexcusable was premature and of no effect. In any later assessment of excess costs

of reprocurement, the contractor could defend by filing an affirmative claim that the default was excusable. Under the instant case, no such claim had been made, and therefore, there was no valid contracting officer decision upon which to base court jurisdiction.

Until further clarification, the final court position on this issue will be unfortunately clouded. Since the CDA legislative history shows no hint of any intent to overturn the Fulford Doctrine, the D. Moody opinion seems to represent a better approach. The desirable goals fulfilled by Fulford are undoubtedly at the root of the tortured analysis in Z.A.N. attempting to ameliorate the position that the default determination had become irrevocably final. However, in some respects Z.A.N. seems to be a retreat to the Fulford Doctrine as it existed in the earliest days when only issues of excusability could be raised. This is inconsistent with the more modern Disputes language recognizing the right to have a termination converted to one for convenience not only if the default was excusable, but also if for any reason it was determined that the contractor was not in default at all. Z.A.N. would preclude the later consideration unless the contractor timely appeals or files suit after the default notification itself, thus undermining the goal of the judicial economy furthered by Fulford. It seems unlikely that the drafters of the CDA intended such an illiberal result.

J. BOARD JURISDICTION BASED ON COURT ACTION

Notwithstanding failure to file a timely appeal before the

board, a contractor might still find himself in the board forum. As discussed above, even when boards refused to voluntarily exercise discretion to consider waiver of untimely appeals, the Court of Claims could, and did, exercise its remand authority to direct a board to consider an otherwise untimely appeal. Often no more was involved than the court - board dispute over waiver authority. However, some cases involved court determination on broader equity grounds. In the William Green case,[250] the contractor mistakenly pursued his belief that the proper remedy for his case was a breach of contract suit in the Court of Claims. This was wrong, but rather than merely dismissing the case, the court remanded it to the GSBCA. Though no proper appeal had been taken, the board recognized jurisdiction based solely on the court's remand order.[251]

One of the more unusual remand cases reported was Airco, Inc.[252] Like Green, this case involved a contractor who elected to pursue a breach of contract claim before the court. No appeal was ever filed before the board. Again the court remanded the case, but this time the language of the order was very strict. Dismissal by the board was allowed only if the agency (Air Force) could show that it had been substantially prejudiced by this failure, or that the contractor had been "inexcusably negligent" in failing to properly pursue his claim. No prejudice could be shown and the contractor's conduct, though deficient, could not honestly be classified as "inexcusably negligent," so the board was compelled to hear the case. This extremely broad order

appears to have been an aberration, not subsequently followed. Jurisdictional limitations of the CDA would preclude such cases now.

Under the CDA, however, the Claims Court has authority to order consolidation of cases on related claims "for the convenience of the parties and witnesses or in the interests of justice."[253] Since the contractor's right to elect to have his "day in court," in lieu of a board appeal, is a fundamental feature of the CDA, the act's legislative history makes it clear that the court should not arbitrarily deprive a contractor of its access to the judicial forum.[254] A balancing test is required to determine, in the interests of justice, the most appropriate forum. It is easy to imagine a scenario where a contractor makes a number of separate, but related, claims and then fails (through neglect or otherwise) to timely appeal one or more of the decisions to the appropriate board. When such decisions then are appealed to the court, it would frequently be appropriate for the court to order consolidation of all of the cases before the board, thus bestowing jurisdiction where no timely appeal had been made.

K. APPEALS TO THE COURT OF APPEALS

Whether a contractor chooses to have his case decided in the first instance by a board of contract appeals or by the claims court, he may seek to appeal the initial decision to the Court of Appeals for the Federal Circuit under Wunderlich standards.[255] The CDA provides a period of 120 days for this appeal, measured

from the date the contractor or the government receives the decision. Appeals from courts (thus the USCC) are covered under C.A.F.C. Rule 10(a)(1), which provides that appeals are deemed filed when mailed. However, the court has adopted no such presumptive rule as to appeals from boards, and has held that appeals from boards, to be timely under the CDA's jurisdictional requirements, must be <u>received</u> by the clerk of the court within the 120-day period.[256] Otherwise, the normal Federal Rules of Civil Procedure will apply, i.e., an appeal period which otherwise would end on a Saturday, Sunday, or Federal holiday will be extended until the close of the next regular business day.

CHAPTER 2

CHANGES

The United States Government is a fickle contracting partner. Its needs, desires, and requirements are constantly changing. The standard Changes Clause[257] provides the government contracting officer with a certain amount of flexibility to modify government contracts to meet these new demands.[258] Under the procedures contemplated by the clause, a contracting officer may issue a written order directing the contractor to modify the required contract performance. Contractors are protected since such changes may be made only "within the general scope" of the contract, and each change so ordered carries with it the right for an equitable adjustment. Differences in the cost and time of contract performance resulting from these changes, along with a reasonable profit, are to be included in the equitable adjustment.

In practice, formal change orders as described above form only one part of the "Changes" spectrum. The Changes Clause frequently provides the authority under which the parties negotiate bilateral supplemental agreements modifying contract performance. Further, the Changes Clause provides the basis for contractor claims under the "constructive change" doctrine. In all of these cases, contractors have a vital financial interest in obtaining the promised equitable adjustment. However, the right to an equitable adjustment is not absolute. Procedural safeguards are

built into the clauses to make sure the government is not required to pay a contractor more than he is due. The notice requirement of each clause serves this vital function by requiring contractors to identify changes and equitable adjustment claims within specified time periods. Ideally this assures that only proper changes are ordered and that accurate, timely, and complete cost data will be acquired to promptly negotiate the equitable adjustment. In practice, notice requirements in these clauses are frequently interpreted more liberally than written.

A. BASIC NOTICE PROVISIONS

1. Formal Change Orders

Although there are a number of variations, there are two basic types of contracts used in federal acquisitions, and each type has a set of required and optional clauses to be included in it. The first type includes contracts for the purchase of supplies and/or services, and the second consists of construction contracts. A large percentage of US Government contracts fall into one of these two categories.

There are significant differences between the "Changes" Clauses used in these two types of contracts, geared primarily to the different nature of the work involved. The clause found at FAR 52.243.1 is now used for most supply contracts[259], while the clause found at FAR 52.243-4 is used in construction contracts.[260] However, the principle common denominator is the authorization for unilateral issuance of change orders by the contracting officer in certain circumstances. The supply

"Changes" Clause provides that:

> The Contracting Officer may at any time, by written order, and without notice to the sureties, if any, make changes within the general scope of this contract....[261]

Under the construction "Changes" Clause, the language is:

> The Contracting Officer may, at any time, without notice to the sureties, if any, by written order designated or indicated to be a change order, make changes in the work within the general scope of the contract, including changes....[262]

These paragraphs describe the "formal" change order and are only slightly different. Each clause goes on to authorize an equitable adjustment in the contract price and delivery schedule. Further, each imposes a limitation on the contractor's right to this equitable adjustment. Under the supply "Changes" Clause:

> The contractor must submit any "proposal for adjustment" (hereafter referred to as proposal) under this clause within 30 days from the date of receipt of the written order. However, if the Contracting Officer decides that the facts justify it, the Contracting Officer may receive and act upon a proposal submitted before final payment of the contract.[263]

The construction "Changes" Clause provides:

> The contractor must submit any proposal under this clause within 30 days after (1) receipt of a written change order under paragraph (a) above...by submitting to the Contracting officer a written statement describing the general nature and amount of the proposal, unless this period is extended by the Government....
>
> No proposal by the Contractor for an equitable adjustment shall be allowed if asserted after final payment under this contract.[264]

Continuing the prior policy, the FAR explicitly authorizes the various agencies to adjust this 30-day notice period. However, the standard generally used remains thirty days. Based

on the language of the clauses one might expect that late contractor requests for equitable adjustment would frequently be rejected. As the discussion below will indicate, this is not so. The critical difference between these clauses and the "Disputes" Clauses is the explicit recognition of contracting officer authority to accept and act on proposals for equitable adjustment even after the stated time limit has expired. No jurisdictional restriction such as that imposed on appeals under the CDA exists, except for the requirement that claims for equitable adjustment must be made before final payment under the contract. Where the issue boils down to an exercise of contracting officer discretion which could cut an otherwise deserving contractor off from an equitable adjustment, it should come as no surprise that the boards and courts rarely allow strict enforcement of the 30-day notice provision. This liberality shows even in the calculation of the 30-day period. Although the clause language provides thirty days from the date of receipt of the written order, this has been ignored in cases where the contractor had no immediate reason to believe that costs would rise as a result of the change order. Instead, notice was required within thirty days after the date the contractor knew of the increased costs (and thus the need for and propriety of an equitable adjustment.)[265]

2. Constructive Change Orders

Ideally, the government would not change the requirements imposed on its contractors unilaterally except as a result of a carefully thought out process culminating in the issuance of a

formal written change order by the contracting officer. In reality, various government agents frequently impose upon contractors performance requirements beyond those actually included in the contract. The constructive change theory was developed as a mechanism to provide contractor's with administrative relief in such cases.[266]

Although the concept of constructive changes has been in widespread use for many years, neither the DAR, the FPR, nor the new FAR supply "Changes" Clause contain any explicit reference to such changes. On the other hand, construction "Changes" Clauses have long recognized that changes will be effected, intentionally or otherwise, outside the formal changes process. The present FAR clause parallels its predecessors and provides:

> (b) Any other written or oral order (which, as used in this paragraph (b), includes direction, instruction, interpretation, or determination) from the Contracting Officer that causes a change shall be treated as a change order under this clause; provided, that the Contractor gives the Contracting Officer written notice stating (1) the date, circumstances, and source of the order and (2) that the Contractor regards the order as a change order.
>
> . . .
>
> (d) [N]o proposal for any change under paragraph (b) above shall be allowed for any costs incurred more than 20 days before the contractor gives written notice as required....
>
> (e) The Contractor must submit any proposal under this clause within 30 days after (1) receipt of a written change order under paragraph (a) above or (2) the furnishing of a written notice under paragraph (b) above..., unless this period is extended by the Government.[267]

The construction "Changes" Clause thus contemplates a bifurcated notice requirement where constructive changes are involved.

First, a so-called "apprisal notice" is required. This requirement is designed to quickly inform the government of any action, other than a written change order, which the contractor believes to have caused a change in the contract requirements. Based on this notice, the government can promptly determine what corrective action, if any, is needed, and can insure the gathering and retention of relevant cost data. The incentive for timely contractor compliance is disallowance of any equitable adjustment relating to costs incurred more than twenty days prior to the written apprisal notice. Thus, to make sure it receives full compensation for the cost impact of constructive changes, a contractor must identify such changes and give apprisal notice to the contracting officer within twenty days.

Unlike the provision relating to formal written changes, this provision does not authorize the contracting officer to waive a late notice. This omission was intentional. The drafters of the 1968 clause upon which the FAR clause is modeled considered and rejected proposals that this provision should authorize waiver of the 20-day limitation where no prejudice to the government would result.[268] The drafters felt that the contractor was uniquely situated to know of such actions and that the government was entitled to prompt notice in return for its promise to make an equitable adjustment.[269] Further, it is not unlikely that some such changes are made erroneously. Despite the clause language stating that only actions of the Contracting Officer are recognized as a source of constructive change orders,

boards and courts have taken a very liberal view of actions taken by agents of the contracting officer and likewise have recognized authority flowing from the contracting officer's knowledge of circumstances amounting to constructive change orders. Prompt notice to the contracting officer allows him or her to recognize and rescind orders not in the government's best interests as quickly and inexpensively as possible.

The second part of the notice requirement is parallel to that applicable to formal changes. Once the "apprisal notice" has been given, the contractor has thirty days to submit its general proposal for equitable adjustment. As in formal change order cases, the contracting officer may extend this period. However, the proposal must in all cases be submitted prior to final payment.

Notwithstanding the apparently mandatory apprisal notice language and the intent of the drafters of this provision, it has not been strictly enforced on a regular basis, as will be more fully discussed below.[270]

3. Notification of Changes

Although the standard supply contract "Changes" Clause does not cover constructive changes, this does not mean that the subject is totally ignored. Early in the 1970s the Department of Defense instituted a "Notification of Changes" Clause[271] designed to be used primarily in negotiated research and development or supply contracts for the acquisition of major weapon systems or subsystems. While the contractor can use the clause in any

acquisition, the ASPR (DAR) instructions implementing the clause indicated that it would not normally be used in contracts for less than $1,000,000.00. This clause has been adopted, almost verbatim, for government-wide use in the FAR.[272] Key provisions include the following:

> (b) Notice. The primary purpose of this clause is to obtain prompt reporting of Government conduct that the Contractor considers to constitute a change to this contract. Except for changes identified as such in writing and signed by the Contracting Officer, the Contractor shall notify the Administrative Contracting Officer in writing promptly, within...(to be negotiated) calendar days from the date that the Contractor identifies any Government conduct (including actions, inactions, and written or oral communications) that the contractor regards as a change to the contract terms and conditions....
>
> (c) Continued Performance. Following submission of the notice required by (b) above, the Contractor shall diligently continue performance of this contract to the maximum extent possible in accordance with its terms and conditions as construed by the Contractor, unless the notice reports a direction of the Contracting Officer or a communication from a SAR [specifically authorized representative] of the Contracting Officer, in either of which events the Contractor shall continue performance.... The Contracting Officer shall promptly countermand any action which exceeds the authority of the SAR.
>
> . . .
>
> (e) Equitable Adjustments. ...The equitable adjustment shall not include increased costs or time extensions for delay resulting from the Contractor's failure to provide notice or to continue performance as provided, respectively, in (b) and (c) above.

Particularly noteworthy is the fact that subparagraph (b) recognizes actions or inactions other than those of the contracting officer as potential sources of constructive changes. Also, unless the contracting officer or his SAR are responsible

for the direction in question, the contractor must continue performance based on his interpretation of existing contract requirements. Thus, a premium is placed on government review of the contractor notice and any appropriate confirmation by the contracting officer. Finally, failure of the contractor to comply does not result automatically in a cost penalty. The language of the clause penalizes the contractor only to the extent that its failure to give timely notice prejudiced the government by causing extra costs or delay.

4. Defective Specifications

Since the standard supply contract "Changes" Clause deals explicitly only with the right of the contracting officer to issue formal written change orders, no guidance is given on the handling of contractor claims involving defective government furnished specifications. Such claims are handled under the constructive change doctrine and there is no explicit notice requirement. However, a contractor cannot expect to continue spending government money with impunity after he knows or reasonably should know of the deficiency. Any other position would be tantamount to granting a license to waste the taxpayer's money. Thus, an implied duty arises when the contractor knows or reasonably should know that government furnished specifications are defective to notify the government so that it may evaluate options.[273] The contractor who knowingly continues performance without providing such notice has assumed the risk of nonperformance, assuming that the government is unaware of the true cir-

cumstances. Thus, if the contractor fails, his default will not be excused. Furthermore, costs incurred in attempting to meet the known defective specifications will not be chargeable to the government.[274]

The construction contract "Changes" Clause and the "Notification of Changes" Clause both deal with defective specification situations. Under the construction contract clause, claims based on defective specifications are explicitly excepted from the 20-day apprisal notice requirement. Instead, the clause provides that "[i]n the case of defective specifications for which the Government is responsible, the equitable adjustment shall include any increased cost reasonably incurred by the Contractor in attempting to comply with the defective specifications."[275] This language reflects the practical rule applicable to supply contract defective specification cases[276] and is totally consistent with the rule set out in the Dynalectron cases above. It will be difficult for a contractor to argue that, knowing the specifications to be defective, he intentionally pursued performance without alerting the government to the problem.

The "Notification of Changes" Clause contains an even more comprehensive provision:

> In the case of drawings, designs or specifications which are defective and for which the Government is responsible, the equitable adjustment shall include the cost and time extension for delay reasonably incurred by the Contractor in attempting to comply with the defective drawings, designs, or specifications before the Contractor identified, or reasonably should have identified, such defect.[277]

The Dynalectron principle is clearly invoked in this language. Failure to give notice within a "reasonable" time may result in denial of recovery of certain costs, but it does not necessarily mean that recovery will be disallowed, even when no notice is provided. In Chimera Corporation,[278] the board refused to dismiss the appeal, even though the lack of notice had resulted in the staleness of certain evidence and the destruction of some relevant government records. The board ruled that although the government had suffered some prejudice, the contractor could overcome this prejudice by meeting a higher burden of persuasion on the merits.[279] Since boards of contract appeals decide cases based upon a preponderance of the evidence, it is not particularly clear just what practical effect this rule might have, except to erase even a prejudice defense.[280]

5. Government Claims

None of the notice provisions of the "Changes" Clauses impose any burden of notification upon the government, and the boards and courts have not implied any government duty to meet the standards imposed on contractors. Thus, where a change, whether formal or constructive, has resulted in decreased costs of performance, the government is entitled to claim an equitable reduction long after the change was made. The general ASBCA position has been that such a claim will be timely so long as it is made within a reasonable time after it becomes apparent that cost savings will result from the change.[281] The actual length of the government delay and a determination of whether the delay

has caused any prejudice to the contractor will both be factors relevant to the question of whether the government delay resulted in a waiver of its right to make a claim.[282] Since an allegation of government waiver is an affirmative defense, the contractor will have the burden of proving such a waiver.[283]

Although final payment marks the outside limit of contractor assertion of claims (see discussion below), the clauses do not place that limitation on the government. Nonetheless, in the first Norcoast case[284] the board indicated that final payment "may mark an outside time limit for the Government to assert deductive change claims."[285] The comment was dicta since final payment had not yet occurred, but it seems to show a willingness to impose an unnecessary restriction, though it has an equitable "feeling" since it parallels the contractor limitation. However, the clause does not require it, and so long as the reasonable time and prejudice tests of Roberts are met, there seems to be no sound reason for government claims to be cut off by final payment. In early cases the boards certainly accepted this principle.[286]

6. Final Payment

Both the supply and construction contract "Changes" Clauses contain language specifically denying a contractor the right to equitable adjustment as to any claim not submitted before final payment of the contract.[287] This apparently simple rule has proved extremely troublesome in practice, for no clear definition of "final payment" exists.[288] To some extent, a common sense

approach is necessary. When all work under the contract is complete, all required deliveries made, all government payments executed, and all outstanding claims resolved, final payment has been made.[289] However, a review of the cases is less than fully enlightening.

It is at least clear that final payment cannot occur before all required payments are made. In Chimera Corp.[290] the outstanding amount of $20 precluded final payment from occurring. Even the processing of what is labelled a "final payment voucher" is inadequate where the contracting officer has withheld a sum of money pending resolution of claims.[291] Some cases have held that mere awareness by the government of the contractor's intent to make a claim prevented a "final payment" from occurring,[292] and one case held that no final payment occurred since the contracting officer should have been aware of contractor's claims.[293] On the other hand, actual oral notice is sometimes accepted,[294] sometimes not.[295] Occasionally a board requires greater formality and holds that the failure to obtain an accord and satisfaction or some kind of a release means that final payment has not occurred.[296] However, the more modern approach is to assess all the circumstances, and failure to obtain a release does not automatically preclude finality.[297]

The more perplexing issue is whether the pendency of any one claim before the contracting officer at the time of what otherwise would be final payment will allow consideration of not only that claim (universally accepted), but also of any other unre-

lated claim (heavily disputed). In Progressive Metal Equipment, Inc.[298] the board adopted the latter position. Simplistically, the argument is clear: final payment cannot truly be made while there remains any open contractual issue. Orsrud Machine Works, Inc.[299] had reached an even broader conclusion. In this case, the board held that contractor's pending request for extraordinary contractual relief under P.L. 85-804 precluded final payment, and thus the contractor's later claim was not excluded. This seems unsupportable, since P.L. 85-804 relief is by definition available only when no contractual relief is available, and it involves a request for discretionary relief at a level above the contracting officer. Why should such a request preclude "final payment?"

These decisions created some conflict with prior cases which had held that the existence of a pending claim precluded final payment only with respect to the reserved issues.[300] The board reconsidered its position in Gulf & Western Industries, Inc.,[301] and it concluded that the pendency of one claim did not prevent the occurrence of a final payment which cut off consideration of any claim other than those previously asserted. Lest there by any confusion, Progressive Metal Equipment and Orsrud were expressly overruled.

In its initial review of the case, the Court of Claims affirmed the ASBCA decision since the decision was properly based on substantial evidence.[302] However, the court vacated that decision based on the appearance of bias caused by ex parte com-

munications with the defendant by one of the board administrative law judges who decided the case.[303] The U.S. Claims Court conducted a de novo hearing on the facts of the procedural final payment issue and then reversed the board's decision.[304] Although the court rejected the contractor's claim that it had in fact asserted its defective specification claim before the 19 October 1972 payment regarded as final by the government, it also rejected the government's contention that the 19 October 1972 payment constituted "final payment" under the "Changes" Clause. The government was unable to meet its burden[305] of demonstrating that final payment had occurred. Noting the conflicting lines of cases, the court concluded:

> Our view is that it makes more sense to interpret that phrase [final payment] on the basis of particular circumstances of each case, thereby focusing heavily on logic and reason and whether such payment, i.e., "final payment," comes at a sequence in time and events consistent with finality. On the basis of the foregoing, for example, if a timely and duly asserted informal claim is transmitted to the contracting officer prior to the contract balance payment, then it logically follows that sequentially that payment cannot be "final payment" under the contract because the contract remains open, and assuming arguendo the contractor's claims to be meritorious, future funds will, of course, be dispensed to the contractor after the contract balance payment in satisfaction thereof. Thus, it is the latter payment that should logically and reasonably be characterized as the "final payment."[306]

Though the court made a point of basing its decision on the "totality" of the circumstances, rather than solely on the pendency of the existing claim (still unresolved more than twelve years later, hardly indicative of government diligence!), the court's discussion points clearly to its belief that a single

pending claim will prevent final payment.

Though the court's logic is superficially attractive, it's conclusion is at odds with the purpose of the final payment restriction. Under the court's definition, the contractor could continue to raise new claims ad infinitum so long as at least one claim remains unresolved at any given time. In this case, all work directly relating to the contract ceased in 1972, but presumably a new claim raised today would not be barred since final payment hasn't occurred. If the government could prove prejudice because of the delay the claim might be barred,[307] but the court leans towards increasing the contractor's burden of "persuasion" instead,[308] as noted above. To resolve this issue, the clauses should include a clear definition of "final payment." This definition should explicitly cut off a contractor's right to pursue claims for equitable adjustments regarding claims not specifically reserved at the time of final payment. To insure that final payment is not unfairly "sprung" on contractors,[309] the contractor should be expressly notified that the government considers a particular payment as final and should be given a specified period (perhaps thirty days) to accept such payment (and, inherently, to reserve claims).

B. NOTICE AND ASSERTION OF CLAIMS

Submitting a claim for a contracting officer's final decision under the provisions of U.S. Government contracts involves meeting the requirements set out in the Contract Disputes Act of 1978.[310] Especially where certification is required for a claim

exceeding $50,000, this can be a somewhat formalized procedure meeting specific requirements. However, this is not the same process as is set out above.[311]

Where constructive changes are involved, a preliminary apprisal notice is required by two of the clauses, as discussed above. These clauses do give some guidance on the necessary content of the apprisal notice. Under the construction contract clause, it is a simple statement. Written notice to the contracting officer is required and it must identify the date, circumstances, and source of the order involved and include a statement that the contractor regards the order as a change order.[312] Under the "Notification of Changes" Clause, the required written notice is supposed to address a more detailed series of topics.[313] In practice, neither of these clauses is strictly enforced, as will be discussed below.[314] Since the supply contract clause does not address constructive changes at all, there is no apprisal notice explicitly applicable, and the courts and boards have not created one.[315]

In addition, the supply contract and construction contract "Changes" Clauses contemplate an "assertion" of a claim, but neither prescribes the content of this assertion in any detail.[316] No separate provision for a claim assertion is made in the "Notification of Claims" clause. The detailed initial notice presumably should provide sufficient information for the contracting officer to make any appropriate equitable adjustment, though in practice one would expect negotiation between the par-

ties on this issue. Clearly then, the contractor must provide some minimal amount of information, prior to final payment, to satisfy this requirement for a timely assertion of a claim. While the cases provide some guidance, it is not precisely established just what will suffice. A cautious contractor will make it abundantly and explicitly clear that he is claiming, as a matter of right under the "Changes" Clause, an equitable adjustment to his contract.

Since no particular format or content is prescribed, the most useful approach is to examine cases. A contractor may not be precluded from asserting its claim even when no timely notice was given at all under one of a variety of waiver theories (see discussion below), but no contractor should consciously plan on being thus protected. A key element seems to be an unambiguous express of a present intent to seek recovery under the contract clause. Thus, a contractor's letter which only expressed concern about various government actions and reminded the contracting officer about rising costs did not constitute a valid assertion of a claim.[317] The letter did not cite the "Changes" Clause. Though this isn't fatal, there must be some definite attributes of a claim rather than a request for grace.[318] Ambiguous requests for relief from the burdens of rising costs and oblique references to extra work being performed are just not specific enough to demonstrate the necessary intent to assert a claim. Likewise, discussions with government technical representatives about the probable content of their recommendations in the event

contractor did assert a claim did not amount to an actual assertion of a claim.[319] Discussions with a government technical representative also were involved in Jo-Bar Manufacturing,[320] where contractor comments to the effect that he "would have to get more money" or that he expected more money, were found not to be specific enough to constitute a claim.

On the other hand, in J.M. Covington Corp.,[321] two contractor letters which did not contain an unequivocal statement that the contractor intended to make a claim were accepted as a valid notice of a claim. Here the issue involved an alleged constructive claim. The two letters made it clear that the contractor thought that the contract left open a course of action which was being denied to him. Futher, the letters indicated the possibility of a claim if increased costs incurred. The board found these letters to be a valid notice of a constructive change. The fact that the contractor could not tell at that time whether any extra costs justifying a formal claim would occur was deemed significant.

Though a written notification is specified, an oral notice was sufficient when the contracting officer received the oral notice and informed the contractor that it was sufficient.[322] Further, an otherwise ambiguous notification may be satisfactory where it relates to a previous clear oral notification.[323] It is not much of a leap to accept oral notice as satisfactory all by itself, at least where the contracting officer himself is, as a result, on actual notice of the claim.[324] However, the govern-

ment must be on notice of a claim under the "Changes" Clause, and notices referring to claims under other contract clauses do not automatically provide notice of a "Changes" Clause claim.[325]

WAIVER OF NOTICE PROVISIONS

1. Prejudice

Subject to the final payment limitation, both the supply and construction contract "Changes" Clauses explicitly authorize the contracting officer to extend the 30-day period within which claims are supposed to be asserted. Such express authorization does not exist in the "Notification of Changes" Clause, but a contractor's failure to give timely notice does not automatically penalize the contractor. Only if the failure to provide timely notice causes an increase in costs or delay will the equitable adjustment be affected. In those cases, costs and delays resulting from the contractor's tardy notice will not be included in any equitable adjustment.

Though the word is not used, the "Notification of Changes" provision clearly creates a prejudice test. Unless there is prejudice to the government (reflected in increased costs or delays), the contractor is entitled to a full equitable adjustment. The express authority to extend the 30-day period in the other clauses[326] results in the application of the same rule, though under a less direct theory. One of the fundamental rules of administrative law is that where the government, or some specific government agent, is granted discretionary authority, that authority must be exercised without arbitrariness or capri-

ciousness. Thus, when a contracting officer refuses to waive a contractor's untimely notice of a "Changes" claim, there is an issue as to whether the contracting officer had a rational basis for his decision.[327] It is now generally accepted that if the delay in notification causes no prejudice to the government, then the contracting officer cannot refuse to waive the time limit.[328] Furthermore, the burden is on the government to prove that there has been prejudice.[329] In cases where the government had no viable alternative to the course of action taken by the contractor, no prejudice has occurred.[330] This same concept may apply, even though there may be viable options, when it appears that the government would have been unlikely to order a different course of action even if a formal notice had been given.[331] Under such circumstances, the government cannot realistically show that costs have been improperly incurred, thus it cannot show prejudice.

2. Government Knowledge

The contractor may also be relieved of his burden of providing notice when the government actually or constructively knows of the circumstances surrounding the claim, despite the contractor's failure to provide notice. This trend normally is traced to the Court of Claim's decision in Hoel-Steffen Construction Company v. U.S.,[332] a case involving the notice provision of a suspension of work type clause. Pointing out that the purpose of the notice provision is to provide procurement officials with the opportunity to collect relevant cost data and

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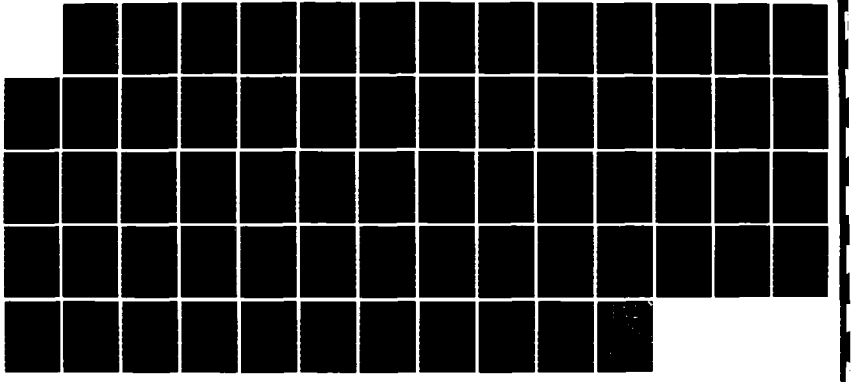

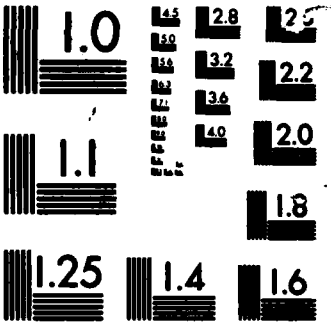

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to evaluate options, the court held that "[i]t is enough, under the Suspension clause, that the [government] knew or should have known that it was called upon to act."[333] In addition, in a comment which came to be quoted extensively the court stated:

> [t]o adopt the Board's severe and narrow application of the notice requirements, or the defendant's support of that ruling, would be out of time with the language and purpose of the notice provisions, as well as with this court's wholesome concern that notice provisions in contract-adjustment clauses not be applied too technically and illiberally where the government is quite aware of the operative facts.[334]

Thereafter there was a strong trend among the boards towards waiver in such cases. Typical of the changing mood was the Armed Services Board's decision in Davis Decorating Service.[335] Though the contractor gave no written notice to the contracting officer until after the work was complete, he regularly and repeatedly protested to the Government inspector about the extra work he alleged was going on. The inspector reported these protests to the base civil engineer in his daily reports. Thus, the technically responsible government officials were fully aware of the facts, and the board found that sufficient:

> We have many times stated that where the responsible Government officials are aware or should be aware of the facts giving rise to a claim, then strict compliance with the written notice requirements is not required. The Court of Claims has recently held that this principle applies to a twenty-day notice provision similar to that contained in the changes clause of the present contracts. Hoel-Steffen Construction Company v. United States, 197 Ct. Cl. 561 (1972). The several Boards of Contract Appeals decisions indicating a more literal approach were issued prior to that opinion.
>
> The Contracting Officer says that he personally knew nothing of the problem of the personal property. We

> think that the knowledge of the base civil engineer and his representatives is imputed to the Contracting Officer in this situation....[336]

In J.M. Covington[337] the Board followed the same guidelines. While the board fully accepted the concept that notice provisions are meant to protect the government from unknown, unanticipated, and excessive claims to which the government cannot adequately respond, it pointed out that this valid purpose would not be furthered by construing the provision as "a shield barring legitimate written, timely claims for extra work performed with the knowledge, consent or acquiescence of the Government merely because a certain format is not followed...."[338] Subsequent cases continued to follow this trend, and also applied it to situations where the government was constructively on notice of the circumstances and the probability of a claim.[339] However, there are some exceptions. In the same period as Davis and Covington, the ASBCA applied a much tougher test in deciding that the government did not have actual knowledge that the contractor was being delayed by wrongful Government actions.[340] Similarly, the Government Services Board in Balitmore Contractors[341] applied the strict interpretation barring costs incurred more than twenty days before apprisal notice.

3. Apprisal Notice

Cases relaxing the notification requirement also involved failure of contractor's to give the specifically required apprisal notice in constructive change cases under the construction contract "Changes" Clause.[342] In R.C. Hendreen Company[343] the

board made it clear that government knowledge of the operative facts relating to the merits of the claim was sufficient, despite lack of contractor notice and lack of knowledge that the contractor intended to assert a claim. Likewise, the government must bear the burden of proving that it was prejudiced by the lack of apprisal notice.[344] It has been suggested that these cases actually go beyond Hoel-Steffen and effectively erase the notice requirement expressly included in the clause.[345] The current approach, by ignoring the element of contractor intent to file a claim, actually imposes a substantially increased burden on the government. The older rule, exemplified in cases such as Elco Corporation[346] refused to equate government knowledge of contractor difficulties with notice, actual or constructive, of an assertion of a right to equitable adjustment. Now, the more common approach is that whenever the government knows or should know of facts which may give rise to a contractor claim for equitable adjustment, it must act on the assumption that a claim will be made. This means continuing analysis of the validity of any requirements imposed on the contractor and increased record keeping regarding work done and costs incurred. If the government does not perform these tasks, any resulting detriment to the government's ability to defend against the claim will not meet the requirement for prejudice, because the government had the opportunity to take the appropriate action! One may legitimately argue that this imposes on the government no more than a requirement to exercise good management. However, the task is monumen-

tal, and the notice requirement would seem to be an insurance policy that the government buys when a contractor signs the contract. Of course, the task for contractors is monumental too. There will be some cases, even those where formal change orders are issued, where it will not become apparent until long after the 30-day period has expired that contractor costs will increase. In such a case, the Court of Claims held that the 30-day period began running when the contractor realized his costs had increased.[347]

A quick review of the notice requirements as they apply to construction contracts provides a good summary of the principles discussed above. Before any recognition of the constructive change doctrine was included in the clause, only when a formal change order was given did the 30-day limitation literally apply, though it was applied stringently in most such cases.[348] Of course, this meant attempts to hold contractors to the 30-day notice period failed in constructive change cases.[349] When the new construction contract "Changes" Clauses were implemented in 1968, constructive changes were specifically recognized and a new apprisal notice requirement was implemented to deal with them. Initially, this 20-day apprisal notice requirement was strictly enforced.[350] In explaining its hardline, the GSBCA quoted favorably the following language:

> The reasoning in these cases seems to be that a provision in a contract of the nature we are discussing is a condition precedent, compliance with which must be shown; and this is true because it must be assumed that the parties in inserting the provision attached both

> value and importance to its precise terms. In such circumstances, the court is not at liberty either to disregard words used by the parties, descriptive of the subject matter or any material incident, or to insert words which the parties have not made use of. Harrison v. Fortlage, 161 U.S. 57, 63, 16 S.Ct. 488, 489, 40 L.Ed. 66.[351]

Then came the Court of Claims decision in Hoel-Steffen. Thereafter, a substantially more liberal approach was taken by most boards, both with regard to the 20-day apprisal notice and the 30-day assertion of claim requirement. In the absence of prejudice, proven by the government, claims are allowed even when notice has not been given, so long as the claim is asserted before final payment. However, the GSBCA maintains a noticeably stricter approach as to enforcing the 20-day apprisal notice,[352] and there are other rare cases applying a stricter rule.[353] In general however, the government must prove prejudice in order to successfully enforce "Changes" Clause notice provisions.

4. Government Proof of Prejudice

Proving prejudice is a difficult task for the government particularly in the "Changes" area.[354] As noted above, when government representatives are aware of the relevant facts going to the merits of the claim, prejudice does not exist. Nor is it enough to speculate that, given prompt notice, the government might have handled the situation differently.[355] The government must show specifically how it was prejudiced, and it does not succeed in many cases. Indeed, in some of the cases where the holding technically bars the claim for lack of timely notice, the board reaches this result only after reviewing and rejecting the

merits of the case.[356] Cases where prejudice has successfully been shown tend to involve unusual fact patterns. Hawaiian Airmotive[357] involved a claim for extra work due to a switch from lacquer to enamel base paint. The contractor submitted its letter claiming it had completed the lacquer paint work on the aircraft involved before the change order and thus incurred extra costs in repainting in enamel some three years after the no-cost change order had been issued. The government had no prior knowledge and had no records. Furthermore, the aircraft involved had been destroyed in a crash, so on-board records and physical evidence were unavailable. The claim was dismissed.

In Norair Engineering Corporation,[358] a contractor working on the construction of the Washington, D.C. subway system alleged that he had performed extra work in correcting damage caused by a derailment. The board conceded that he probably did the work, but there had been absolutely no notice of the alleged oral direction to perform the work. As a result, there were no records available, from either party, identifying the location, date, or composition of the extra work. With no substantive evidence available at all, the board dismissed.[359]

A different type of problem existed in Rogers Excavating.[360] The contract required work to begin within four days after issuance of the notice to proceed and allowed a 90-day completion period. Believing that mobilization did not meet the requirement to begin work within four days, the contracting officer rejected the contractor's proposed 39-day mobilization/51-day performance

plan. Immediately and without protest the contractor revised his schedule. Not until twenty days after completion of the work did he provide notice that he considered that order to be a constructive change. The government neither knew nor should it have known that the contractor believed its schedule to be more efficient because of site dewatering problems. The government was thus deprived of its right to consider alternate action. The board made note of the fact that the contracting officer had cooperated closely with the contractor on all weather related problems, and seemed convinced that the government in fact would have reconsidered if it had received timely notice. Thus, though the board agreed that an acceleration had occurred, it denied recovery for lack of timely notice.

It will be particularly difficult for the government to prove prejudice in cases where the work constructively changed is performed in less than twenty days. In such a case, full compliance with the clause's 20-day notice provision after completion of the work will give the government no opportunity to weigh alternate courses of action.[361] Thus, later notice cannot be said to deprive the government of anything prompt notice would have given except the opportunity to gather and maintain records and evidence closer to the actual occurrence. It's hard to prove prejudice this way!

The government will be estopped from asserting untimeliness of notice and trying to prove prejudice when its own actions induce the delayed claim submission. In Universal Painting

Corporation[362] the contracting officer had led the contractor to believe that he could submit a claim at the completion of the job. Clearly the government cannot enforce the notice provisions in such as case.[363] Finally, even if some small amount of prejudice is demonstrated, the boards may choose to merely increase the contractor's burden of persuasion in lieu of dismissing the case.[364]

5. Consideration On Merits

Prejudice will not be an issue when the contracting officer actually considers a contractor claim on its merits despite the lack of timely notice. This is easily understood regarding formal changes since the clauses specifically provide the contracting officer or government the discretion to extend the period, at least up to final payment. Deciding the claim on its merits implicitly amounts to such a waiver in the absence of any jurisdictional prohibition, and the waiver cannot be "undone" later.[365] The logic would not specifically apply to the apprisal notice provision of the construction contract "Changes" Clause since it contemplates no waiver. However, as discussed above, this provision is also waived in the absence of prejudice to the government in most cases. The assertion of claims portion of the clause also contemplates discretionary extension, so the same rule will apply. The Court of Claims also has applied this rule where a board considered the merits of a claim despite lack of timely notice.[366]

Some cases involve complicated and convoluted logic to reach

what now seems to be a simple result. For example, in John V. Boland Construction Co. v. U.S.[367] the contractor had been rebuffed repeatedly in its efforts to recover based on its failure to file its claim within the required thirty days. The first denial was in September of 1952, the case made it to the ASBCA in December of 1958, and it was dismissed there as well.[368] In 1962 the Court of Claims first heard the case and dismissed based on the bars of the statute of limitations and failure to exhaust administrative remedies.[369] Only a private relief bill passed by Congress gave the contractor a new chance to pursue his appeal. This decision, some twenty years after the initial denial, finally gave the contractor relief. Two factors seemed most important to the Court's findings. First, although the 14 June 1951 notice provided by contractor was late, the contracting officer granted some elements of the requested time extension in revised Change Order No. 8 on August 14, 1951. In this order the contracting officer explicitly noted that "[n]otice of the delay and the causes thereof was received in accordance with the terms of said contract." In the eyes of the court, this statement cured "any previous technical deficiencies." Second, the government was fully aware of the weather problems which had caused the delays. Today, the government knowledge alone would probably be sufficient to preclude enforcement of the notice provision. Surely, having considered and granted the time extension aspect of the claim, the government would be hard pressed to refuse consideration of the damages aspect, even though not submitted until a later date.

CHAPTER 3

DIFFERING SITE CONDITIONS

The cost and performance period of any construction project inherently depend upon the physical conditions which are found at the site. Since some of the conditions cannot be precisely determined, such as the weather, there will always be some risk associated with bidding on such projects. However, many of the variables involve physical attributes of the site which either are or can be precisely determined. Ideal competition would be possible only if each bidder had all such relevant data available to him.

The "Differing Site Conditions" Clause[370] used in Government construction contracts represents the determination that obtaining such information is not always necessary or desirable and that the government should bear any risk associated with any missing data which meets certain criteria. Further, the clause recognizes the government's responsibility for any substantive data which is provided by the government and turns out to be in material error. The clause itself is relatively simple, and states:

> (a) The Contractor shall promptly, and before the conditions are disturbed, give a written notice to the Contracting Officer of (1) subsurface or latent physical conditions at the site which differ materially from those indicated in this contract, or (2) unknown physical conditions at the site, of an unusual nature, which differ materially from those ordinarily encountered and generally recognized as inhering in work of the character provided for in the contract.

(b) The Contracting Officer shall investigate the site conditions promptly after receiving the notice. If the conditions do materially so differ and cause an increase or decrease in the Contractor's cost of, or the time required for, performing any part of the work under this contract, whether or not changed as a result of the conditions, an equitable adjustment shall be made under this clause and the contract modified in writing accordingly.

(c) No request by the Contractor for an equitable adjustment to the contract under this clause shall be allowed, unless the Contractor has given the written notice required; provided, that the time prescribed in (a) above for giving written notice may be extended by the Contracting Officer.

(d) No request by the Contractor for an equitable adjustment to the contract for differing site conditions shall be allowed if made after final payment under this contract.[371]

The government benefits from this assumption of risk. First, it relieves the government of any responsibility to affirmatively determine relevant conditions. Second, the government saves on costs which invariably would occur if any attempt were made to shift this risk to contractors. Where the contractor's have the burden of risk, they will either conduct extensive site examinations of their own prior to bidding, or they will inflate their bids sufficiently to cover such contingencies as they believe might possibly happen. Indeed, they may do both. The government suffers since multiple site examinations will all generate extra costs which will eventually be borne by the government in virtually all cases. Furthermore, where the potential difficulties do not develop, the government still pays the contingency cost and the contractor gains a windfall. Conversely, if the contractor underestimated the possible problems, he may

face a financial disaster which could result in the government receiving delayed or even incomplete performance.

By protecting the contractor from this risk the government insures better competition, since all will bid on the same basic requirement. Such "differing site conditions" as may actually arise may then be dealt with later, thus minimizing government costs and contractor risk simultaneously.[372]

Since the existence of differing site conditions may have a variety of impacts on the government, cost and otherwise, the government needs to know about such conditions as soon as possible. The notice provisions of the clause are intended to meet this need and do in fact do so, for the most part. However, just as with the "Changes" Clause notice provisions discussed above, practical application of the clause does not follow the literal wording of the clause, though the government enjoys considerably greater success under this clause than under the "Changes" Clauses in enforcing compliance with the notice provisions as written.

A. BASIC NOTICE PROVISIONS

1. Purpose

The most important aspect of the notice requirement set out in paragraph a of the clause (above) is the direction that notice be provided before the conditions are disturbed. No specific time period is stated as in the "Changes" Clauses, and there is no provision for allowability of costs beginning at some point defined by the date a delayed notice is given, as may occur in

constructive change cases. Rather, the clause simply disallows an equitable adjustment if the required notice has not been given. However, just as in the "Changes" Clauses, express provision is made for extension of the notice period.

Notification of the alleged differing site condition prior to its disturbance protects the government in a variety of ways. Most obviously it provides the government the best chance to examine the site to make the required determination as to whether a differing site condition may actually exist. When the contractor has proceeded with the work, he may well have obscured or totally destroyed the evidence needed to make the determination, to the prejudice of the government's interests.[373]

Government evaluation of the unchanged site is valuable not just to protect the government from invalid claims. It is probably more important for the government to have the knowledge that there in fact is a differing site condition. When that is known, the government can make its own determination as to the proper course of action. For a variety of reasons, not necessarily known to the contractor, the government may choose to change or even abandon the project in light of the new information. When the contractor continues on without giving the required notice, he deprives the government of this opportunity. Conceivably, he may incur liabilities which government funds are not available to cover.

The clause does not establish a requirement for an immediate submission of the claim for equitable adjustment.[374] Thus, once

the simple notice of the changed condition has been given, the claim may be made later, so long as it does not follow contract final payment.[375] Further, there need not be a statement that the contractor intends to file a claim, nor need the government know of such an intent.[376] Inherently this means that the contractor is not required to provide any information about the estimated cost of the work, as changed.[377] Finally, since the government is adequately placed on notice when a contractor first informs it of a changed condition, there is not a requirement to provide a new notice if the same physical conditions continue or reoccur.[378]

2. Sufficient Notification

Though the clause specifies that the required notice to the contracting officer will be in writing, no other guidance is given. Since no claim for equitable adjustment is required or contemplated at the time of the initial notice, the essence of the requirement is to let the government know that the contractor believes that a differing site condition exists. No particular words are required, and it is sufficient that the government is informed of the physical conditions encountered by the contractor.[379] Although there is no requirement that cost impact be identified, a contractor's request for payment of excess costs incurred because of unforeseen physical conditions will put the contracting officer on notice of the alleged existence of a differing site condition.[380] Even where no formal notice is provided, where the contractor wrote numerous letters,

made oral complaints, and entered relevant comments in a daily log available for government review, all of which indicated his contention that a differing site condition existed, the government was adequately on notice.[381] Likewise, a contractor who provided notice of encountering unforeseen rock within the work area two days after he began working gave adequate notice even though he did not designate it as notification under the clause.[382] Since the government in fact treated it as a changed conditions claim, it was hard pressed to argue that the notice was inadequate.

On the otherhand, a mere request for permission to dynamite "frequently encountered rock" was inadequate notice since rocky soil was a known condition and blasting was not uncommon.[383] The missing element was some indication that the contractor was encountering some condition <u>different</u> from that specified in the contract, or one which was materially different from that known and to be expected in work of the type being done. Thus, sufficient information must exist to make the government aware that the contractor thinks he has encountered some condition <u>not</u> contemplated by the contract.

As noted above, the clause states that written notice will be given to the contracting officer. In practice, neither part of that requirement is strictly enforced. The erosion of the requirement for a notice in writing is discussed below. The requirement that notice actually be provided to the contracting officer was relaxed long ago as well. Typically, some notice is

given to the government representative actually at the project site. In Larco Painting Company,[384] the board made a point of the fact that the inspector who actually received the notice had indicated to the contractor that he was going to relay the information to the contracting officer.[385] In more recent cases, notice to authorized government representatives is deemed sufficient since it is presumed that the information will be properly passed on to the contracting officer.[386] In fact, in a recent case, the government construction representative was deemed to be constructively on notice of the changed conditions, since he was at the construction site daily and his observations did or should have put him on notice, and this constructive knowledge was then imputed to the contracting officer.[387]

In that case, the board made a point of the fact that the construction representative was a trained, knowledgeable individual whose function at the site included precisely the kinds of observations involved. The government must thus accept the responsibility as well as the benefits of having such representatives on the construction site. On the other hand, notification to government personnel (other than the contracting officer) who are not in a position to understand or appreciate its import due to a lack of expertise will not serve as adequate notice.[388] Having insufficient expertise to understand that a changed condition is being alleged, such representatives will not have any obligation, actual or constructive, to relay such ambiguous information to the contracting officer.

3. Contracting Officer Discretion

It is interesting to note that the new FAR "Differing Site Conditions" Clause returns to the language used prior to the DAR and FPR clauses implemented in 1968 in allowing the contracting officer to exercise the right to extend the period during which notice may be given. The 1968 clauses intentionally granted this authority to the government in recognition of the rules adopted both by the Court of Claims and the boards by which such contracting officer decisions were reviewed and, if necessary, reversed when the decision had no rational basis.[389] As late as 1983 the ASBCA was compelled to reject a government argument that only the contracting officer could exercise such discretion.[390] While it is doubtful that there was any intent to attempt to restrict the boards and courts from reviewing a contracting officer exercise of discretion under the clause (and it is more doubtful that any such restriction would be accepted), this change could provide the basis for such an argument.

Neither the FAR clause nor its DAR and FPR predecessors place a limit upon this contracting officer discretion other than that claims must be made before final payment. In 1976, an amendment to FPR 1-18.117 sought to strictly control the exercise of such discretion. It provided, in part, that:

> ...this authority to extend the time for the notice does not entitle a contractor to a time extension beyond the time when he knew, or reasonably should have known, of the existence of a differing site conditions.... If the contractor fails to submit the required notice to the contracting officer by the time he knew, or reasonably should have known, of the

> existence of a differing site condition, he is not entitled to an equitable adjustment which reflects the increased costs and time required for performance prior to the time when the Government had actual notice of the existence of a differing site condition.

Furthermore, the guidance went so far as to establish a procedure, not set out in the clause, by which the contracting officer would request submission of the equitable adjustment claim by a specified date. The guidance then went on to state that:

> In the event that the contractor fails to submit a claim within the time specified in the [contracting officer's] request,...the contracting officer shall make a unilateral determination of the amount of the equitable adjustment which the contractor is entitled to and shall notify the contractor of the determination. Such unilateral determinations may not be appealed under the Disputes clause of the contract.

This rather astounding "guidance" was not at all consistent with existing case law, and seems to significantly infringe the rights of the contractor via an extracontractual determination. No reported cases deal with any attempt to enforce this provision and it appears neither in the FAR nor the current GSA FAR Supplement. It should remain that way. The drafters of the 1968 clause intended that prejudice to the government be a proper element for consideration,[391] even though specific reference to a no-prejudice rule was rejected. This rule seems to be most equitable to both parties. As discussed in Chapter 2 above, the exercise of discretion impliedly requires a good faith determination with a rational basis. Where the government suffers no prejudice because of a delayed notice, no legitimate reason to enforce the rule exists.

B. RELAXATION OF THE WRITTEN NOTICE REQUIREMENT

The FAR "Differing Site Conditions" Clause continues the traditional requirement for a written notice. This formal requirement is interesting in that it clearly represents a statement of what the government would like, though case law long ago permitted contractor's to pursue claims where no written notice has been given. Indeed, since the requirement for any notice at all may be waived under many circumstances, as will be discussed below, it is no surprise that the written notice requirement is not enforced.

The virtually identical requirements for written notice appeared in the 1968 versions of the "Changes," "Differing Site Conditions," and "Suspension of Work"[392] Clauses. Although relaxation of the written notice requirement is normally traced to the Court of Claims' liberal decision in Hoel-Steffen Construction Company,[393] acceptance of verbal notice in "Differing Site Conditions" type cases can be traced much further back.[394] The essence of the relaxed rule is that where the government has actual knowledge, then it has not been prejudiced. It does not matter whether that actual knowledge came from an oral notice from the contractor.[395] Of course, a contractor could more easily prove such knowledge if it had given the notice in writing.

C. WAIVER OF NOTICE PROVISIONS

The language and interpretation of the "Differing Site

Conditions" and "Changes" Clauses notice provisions are virtually the same and the concepts of waiver mirror each other. Thus, the discussion of this topic in Chapter 2 is also generally applicable here. However, an interesting anomaly has arisen regarding the normally accepted rule that actual consideration of a contractor's claim on its merits waives any lack of notice. In Schnip Building Company v. U.S.,[396] the court affirmed a prior decision of the ASBCA[397] and thus rejected the argument that the contracting officer's consideration of the claim on the merits waived the lack of notice. Although it could be argued that the board really found that the contracting officer had not actually made a decision on the merits of the claim, it appears that the Court's decision was based on the theory that the contractor's appeal vacated the contracting officer's decision, thus making it irrelevant. This seems to misconstrue the procedural impact of consideration on the merits. It is not the result, but the very fact that the contracting officer considered the merits, a discretionary act the clause authorizes him to take, which has supported the prior waiver rule. It may be that the court, in issuing this per curiam decision simply did not appreciate the import of the issue. The adopted Trial Judge's opinion does not demonstrate any knowledge of the prior line of cases, or any intent to overrule them. More recently, the Agriculture Department board held that a lack of formal notice was not fatal, in part because the claim had been considered on its merits.[398] It is doubtful that the Claims Court or the Court of Appeals will

maintain that consideration on the merits does not constitute a waiver in accordance with the discretion explicitly set out in the clause.

1. Prejudice

In cases involving claims under the "Differing Site Conditions" Clause, enforcement of the notice requirement will be waived when the government suffers no prejudice,[399] just as under the "Changes" Clause cases, supra. Likewise, the government must prove that there has been prejudice.[400] Where the government has actual or constructive notice of the changed condition, there is no prejudice resulting from the lack of notice.[401] The necessary knowledge involves the existence of the differing condition itself and not that the contractor intends to file a claim, as noted above. Furthermore, even where the government had no knowledge, no prejudice will exist and waiver will be appropriate when the evidence shows that there was no realistic alternative to choose, or at least no reasonable likelihood that the contracting officer would have acted differently if notice had been given.[402]

In some cases even where prejudice does exist to some degree the contractor will not be precluded from recovery. Instead, he will be required to meet a higher burden of persuasion to overcome the prejudice to the government, paralleling "Changes" cases.[403]

Finally, the contractor's notice requirement implicitly arises only when he knows or has reason to know of the differing

site condition. If he does not and could not reasonably have been aware of the changed conditions, no notice requirement has yet arisen.[404]

D. ENFORCEMENT OF NOTICE PROVISIONS

Although the discussion above may make it sound like the notice provisions of the "Differing Site Conditions" Clause are ignored in virtually all cases, that is not true. It is quite possible that the government may actually be materially prejudiced by a contractor's failure to give the required notice, and in such cases the lack of notice will bar the claim just as the clause states. Indeed, the government is much more likely to succeed in proving prejudice in these cases than under "Changes" Clause cases. As one commentator explained it:

> The disparity in results is not without reason. With respect to the Differing Site Conditions clause, there is an obvious and logical relationship between prompt notification of the differing site conditions 'before such conditions are disturbed' and the government's ability to investigate the alleged conditions in order to avoid costs or to take or require alternative action and to defend against a claim. In contrast, the twenty-day requirement prescribed by the Changes and Suspension of Work clauses is perceived as arbitrary.[405]

Most cases find prejudice in one or more of three areas. First, the government may be deprived of the opportunity to verify the actual conditions. Standing alone, this can often be overcome if the contractor can provide adequate proof. Second, the government may be deprived of the opportunity to consider alternatives. As noted above, if no realistic alternatives exist, this basis won't work. Finally, the government may be

precluded from obtaining or may fail to retain adequate records to verify and defend against a claim.

Typical of this type of case is Nelson Brothers Construction Co. v. U.S.[406] Here the contractor belatedly claimed for extra work in handling mudslides along the roadway being worked. The government knew he was doing the work but reasonably believed it to be work already contractually covered. In this case, the government knowledge was not sufficient to put it on notice of a changed condition and, in the absence of contractor notice, the government did not and had no reason to keep records regarding the work in question. This lack of evidence to refute the contractor's claim amounted to prejudice. Joseph Morton Co., Inc.[407] is a typical construction case. In a courthouse renovation project the contractor allegedly encountered concealed ductwork, not indicated in the plans, which had to be removed. However, the work was completed before any notice was given. The areas in question were covered again and could not be inspected, and contractor records were inadequate to prove the nature and amount (if any!) of such work. Clear prejudice to the government exists in such a case.

An even more definitive lack of evidence occurred in DeMauro Construction Corp.[408] The contractor belatedly claimed for unanticipated rock encountered during the excavation for a water main. To the extent the government had observed this excavation, it had considered the quantity of rock found by the contractor to be roughly that to be expected. Unfortunately, the contractor

had kept no records either. Examination of the excavated material might have solved the question, but it had been dumped on a beach and had been washed away by the waves. In this true absence of evidence, attributable to the contractor's failure to give notice, no recovery was allowed.[409]

The Armed Services Board in particular has indicated its continuing intention to enforce the notice provisions of the clause. When the government challenged the board's initial decision in Strum Craft Co., Inc.[410] as being contrary to precedent, the board responded in reaffirming the decision that:

> Our decision in no way overrules prior board decisions requiring strict compliance with the Differing Site Conditions clause notice provision. None of our prior decisions stand for the proposition that the Board acting sua sponte may not extend the time for submitting written notice of a differing site condition under any circumstances. The precedential value of our decision is necessarily limited by the facts presented. The circumstances here are unusual. The paucity of appeals sustained on such grounds is not proof of error, but attests to the importance the board continues to give to timely notice of differing site conditions.[411]

E. GOVERNMENT RESPONSES

The clause requires "prompt" investigation by the Contracting Officer after receipt of the notice required by the clause. As a practical matter, whenever the Contracting Officer receives notice, regardless of its form or source, which informs him of an alleged differing site condition, he must investigate. If he fails to do so, the government and not the contractor, will be responsible for the government's inability to later document or defend a claim. For example, in Peabody N.E., Inc.,[412] the

contractor believed that the volume of concrete deterioration he was encountering was substantially greater than indicated in the IFB. He therefore attempted to get the contracting officer's representative to measure the actual volume being encountered. The representative would not do so! Here the government clearly had every opportunity to make whatever examination it wished. That is what the notice provision is meant to insure. The government, through its agent, passed up the opportunity, and the contractor bears no responsibility for that failure.[413] This is the same situation that results when the government simply fails to respond to the notification at all. Where the contracting officer responds by denying that the circumstances constitute a differing site condition, the contractor should take additional steps to protect himself. First, he should make clear his disagreement with the contracting officer's position, lest he be later deemed to have waived any claim he might have.[414] Though this risk is very small, it is easy to avoid. Next, he should file a formal claim as soon as possible. Any adverse decision then can be appealed to a board or suit can be filed in the Claims Court.

CONCLUSION

From the government point of view, enforcement of the notice provisions discussed above leaves much to be desired. Similar notice provisions, such as those in the "Suspension of Work" Clause[415] and the "Limitation of Cost" Clause,[416] also are rarely enforced according to their literal terms. This type of result often occurs when the government drafts ambiguous clauses which are later construed more liberally than the government intended. If that were the case, then better, tighter draftsmanship would be a logical solution. However, for the most part, the application of the notice rules has little to do with ambiguous language in the clauses.[417] Indeed, the tightly drafted "apprisal notice" language of the construction contract "Changes" Clause enjoyed strict enforcement only briefly, as discussed above.

If ambiguous terminology is not at fault, what does motivate the courts and boards to virtually ignore the literal words of the contract in these areas? A starting point is to analyze what reasons the government articulates as the basis for the various notice provisions. Finality is relevant in the disputes and final payment restrictions. Efficient contract administration calls for quick submission (and resolution) of equitable adjustment claims. Enhancement of the government's ability to properly manage its contracts is particularly relevant to constructive change notices. And, finally, assuring meaningful government opportunities to analyze differing site conditions and to choose

options is crucial to the government assumption of risk under the "Differing Site Conditions" Clause. All of this adds up to the "facilitation" of the administrative remedies available to contractors under government contracts.

However, there is another strong undercurrent, particularly in the "Changes" arena. Many feel that attempts to shift to the contractor the risk of identifying rapidly any alleged "constructive change" is a thinly disguised admission that the government itself cannot adequately train and manage its employees. Viewed in this light, strict enforcement of the notice provisions may seem less appropriate. After all, the various administrative remedies are equitable in nature and replace what could otherwise be breach of contract actions.[418] Shifting the risk of government employee misfeasance to the contractor is inconsistent with the loftier stated purposes of the various equitable adjustment provisions. Denial of equitable adjustment claims based on strict enforcement of the notice provisions would seem particularly unjust where government representatives knew of, and perhaps even ordered, the work in question, and the government has received the benefit of the effort.

The Court of Claims in particular has been a leader in establishing legal precedent in this field. No small part of the "practical" notice procedures now in effect derive from Court of Claims guidance, and can thus be traced to the court's unique role during its existence.

...[T]he Court of Claims has always viewed its mission

> in a somewhat different context than any other federal court. From its very beginning in 1855, the court has had a unique status since it concerned itself only with matters wherein the United States was the defendant. Prior to this date, the hoary doctrine of sovereign immunity had blocked judicial consideration of most of the contract disputes between the Government and its citizens which the Congress had previously handled via the route of relief legislation. Presumably because of this background, the Court of Claims has sought to act as a sort of surrogate of the Congress is disbursing legislative-type relief under the theory that its mission was that of "the keeper of the Nation's conscience." Under this charter of sorts, the Court has attempted to "keep the Nation's conscience" by being a body that has sought above all to do their version of equity, often at the expense of violence to express contract language on accepted legal principles.[419]

To put matters simplistically, the court refused to enforce notice provisions when it believed no legitimate government interest was at stake. For instance, in Monroe M. Tapper,[420] a concurring judge clearly expressed the dominant mood:

> What evil is averted if an appeal filed in 31 days is not heard on the merits?
>
> . . .
>
> This is the sort of pettifogging controversey that causes intelligent people to prefer other careers over service on the bench. If the Boards cannot find a rational and workable line under the existing clause, it is to be hoped the mysterious processes that generate standard Government contract clauses may be set to work to gestate a substitute or amendment.[421]

Generally, the boards have followed this lead. Notice provisions are treated much like liquidated damage provisions: those which serve no reasonable government need will not be enforced. Of course, the courts and boards are not free to ignore the

legislative mandate of the CDA, but history indicates the court, at least, will try to find ways to "round the edges" of this square corner.[422] The courts and boards seem to feel that public policy should not allow imposition of such strict procedural hoops as prerequisites to equitable adjustments.[423]

In light of this, there is no reasonable likelihood that drafters of government contract clauses will be successful in finding the "magic notice language" which will be enforced strictly. Absent statutory intervention such as the CDA, success in applying strict notice provisions will come only through identifying and proving cases where the lack of notice really harms the government's interests.[424] In other cases, it must be recognized that the flexible notice rules are not all bad, especially if involved government personnel do their jobs properly.[425] Nothing is free, and contractors surely will pass the costs of any increased risk back to the government whenever possible.

FOOTNOTES

1. The DAR appeared (but was not official codified) in Chapter 1 of Title 32 of the Code of Federal Regulations (C.F.R.).

2. The FPR was officially codified in Chapter 1 of C.F.R. Title 41. FPR section numbers correspond to the section numbers in 41 C.F.R. Dual citations will not be used.

3. The FAR is codified as Chapter 1 of Title 48, C.F.R. Chapter 2 of Title 48 C.F.R. contains the codification of the Department of Defense (DOD) FAR Supplement. Chapter 5 is the General Services Administration Acquisition Regulation (GSAR), Chapter 9 is the Department of Energy Acquisition Regulation (DEAR), Chapter 18 is the National Aeronautics and Space Administration FAR Supplement (NASA FAR Sup.), Chapter 28 is the Department of Justice Acquisition Regulation (JAR), and Chapter 29 is the Department of Labor Acquisition Regulations (DOLAR). Each of the implementing/supplementing regulations parallels the FAR in format, arrangement and numbering system.

4. The Department of Defense, the General Services Administration, the Department of Energy, the National Aeronautics and Space Administration, the Department of Justice, and the Department of Labor have all issued such "implementing" regulations (supra n. 3). Furthermore, the extensive Department of Defense FAR Supplement (hereinafter DOD FAR Sup.) is further supplemented by individual Air Force, Army, Navy, and Defense Logistics Agency supplements. In addition, lower level supplements (e.g., Air Force Systems Command) are also being promulgated. The desired uniformity and increased simplicity may already be a lost dream.

5. DAR 7-103.12; DAR 7-602.6; FPR 1-7.102-12; FPR 1-7.602-6; FAR 52.233-1.

6. DAR 7-103.2; DAR 7-602.3; FPR 1-7.102-2; FPR 1-7.602-3; FAR 52.243-1; FAR 52.243-4.

7. DAR 7-602.4; FPR 1-7.602-4; FAR 52.236-2.

8. Court decisions involving government procurement law issues primarily came from the Court of Claims, although there are a small number of U.S. Supreme Court and District Court decisions as well. As of October 1, 1982, the Federal Courts Improvement Act (Pub. L. 97-164) replaced the Court of Claims. The United States Claims Court [hereafter USCC] performs trial court type functions and is the forum for direct access appeals of contracting officer final decisions under the Contract Disputes Act of 1978. Appellate functions were assumed by the new United States Court of Appeals for the Federal Circuit [hereafter C.A.F.C.].

9. Agency boards include the Armed Services Board of Contract Appeals [ASBCA], the General Services Administration Board of Contract Appeals [GSBCA], the Interior Department Board of Contract Appeals [IBCA], the National Aeronautics and Space Administration Board of Contract Appeals [NASA BCA], the Department of Energy Board of Contract Appeals [EBCA], the Corps of Engineers Board of Contract Appeals [ENG BCA], the Postal Service Board of Contract Appeals [PSBCA], the Department of Housing and Urban Development Board of Contract Appeals [HUD BCA], the Department of Transportation Contract Appeals Board [DOT CAB], the Department of Labor Board of Contract Appeals [LBCA], the Department of Agriculture Board of Contract Appeals [AGBCA], and the Veterans Administration Board of Contract Appeals [VABCA]. Such boards were established by direction of the relevant agency head until enactment of the Contract Disputes Act of 1978 (Pub. L. 95-563). Section 8 of the act provids a statutory basis for boards of contract appeals (41 U.S.C. §607), (Supp. VI, 1980).

10. This clause remained in effect under the DAR as well until revised to meet the requirements of the Contract Disputes Act of 1978 (CDA). See DAR 7-103.12 (1983 Feb) and the clause promulgated by the Office of Federal Procurement Policy in 12980 to implement the CDA, at 45 Fed Reg. 31,035 (DAR 7-103.12, 1980 June).

11. See supra n. 10. For more extensive discussions of the development and usage of the boards of contract appeals in this role, see Cuneo, "Determination of Government Contract Disputes", 4 Practical Lawyer 54 (1958), Shedd, "Disputes & Appeals" The Armed Services Board of Contract Appeals", 29 Law & Contemporary Problems 39 (Winter 1964); Nash, "The Disputes Procedure - Circa 1966", 1 Pub. Cont. Newsletter 3 (1966); and, Spector, "Public Contract Claims Procedures - A Perspective", 30 Fed. B.J. 1 (Winter 1971).

12. See 41 U.S.C. §§321-22, commonly known as the Wunderlich Act because of its effect in nullifying much of the Supreme Court's ruling in United States v. Wunderlich, 342 U.S. 98 (1951).

13. Pub. Law 95-563, 41 U.S.C. §§601, et seq. (Supp. IV, 1980).

14. 41 USC §609 (a)(1) provided in part that "...in lieu of appealing the decision of the contracting officer under section 605 of this title to an agency board, a contractor may bring an action directly on the claim in the United States Court of Claims, notwithstanding any contract provision, regulation, or rule of law to the contrary." Effective on October 1, 1982, this direct access appeal is now made to the United States Claims

Court (USCC) pursuant to Pub. L. 97-164 §161(10) (the "Federal Courts Improvement Act of 1982").

15. See 41 U.S.C. §605(a) and (c) (Supp. IV, 1980).

16. 41 U.S.C. §606 (Supp. IV, 1980).

17. 41 U.S.C. §609(a)(3) (Supp. IV, 1980).

18. The final regulations promulgated by the Office of Federal Procurement Policy (OFPP) (45 Fed. Reg. 31,035) contained the new clause. A new DAR Disputes Clause was issued in February 1983 (Defense Acquisition Circular 76-42, February 28, 1983) and was substantially identical. The FAR Disputes Clause (52.233-1 (1984)) is modified only slightly from the DAR provision.

19. For a comprehensive review and analysis of the disputes process, see Nash & Cibinic, Federal Procurement Law, Volume II, (3rd Ed., George Washington Universtiy, 1980), at pp. 2037-2241. Note however, that the discussion of the judicial aspects has been rendered somewhat outdated by the Federal Courts Improvement Act of 1982, supra n. 15.

20. Camel Manufacturing Co., ASBCA Nos. 3454, 3455, 56-2 BCA ¶1021, at p. 2145.

21. Id.

22. Joy, "The Disputes Clause in Government Contracts: A Survey of Court and Administrative Decisions", 25 Fordham L. Rev. 11 (1956) at 32, n. 125.

23. ASPR (DAR) 1-314(d) (1976) and FPR 1-318; see Crowell, Ryan, and McMillan, J., "Notice Requirements in Government Contracts", Briefing Papers No. 74-3, Fed. Pub. Inc., at p. 6 (June 1974).

24. 41 U.S.C. §605(a) (Supp. IV, 1980).

25. FAR 33.011(a)(4)(v); thus, a decision not containing this required information is invalid. See e.g., Fareast Service Company, ASBCA No. 27365, 85-1 BCA ¶17,756. This was a Disputes Clause case (Pre-CDA) and the defective final decision was not regarded as a nullity. Instead, the Board refused to enforce the 30-day limit and allowed an appeal on the fiftieth day.

26. For an interesting and unique example of a board's effective consideration of such a premature appeal, see B.W. Hovermill Company, ASBCA No. 5570, 59-2 BCA ¶2439. Before the Board panel the government's trial attorney pointed out the lack of a formal contracting officer decision. Board action was

suspended so that a formal decision could be issued. Subsequently, the contractor failed to formally appeal, and the Government moved for a dismissal for failure to timely appeal. The Board determined that the contractor reasonably believed that no "further appeal" was necessary and denied the motion. A motion for reconsideration was also denied, 60-1 BCA ¶2540.

27. Paragon Energy Corporation v. U.S., 645 F.2d 955, 227 Ct. Cl. (No. 98-80c (1981)); Chandler Manufacturing & Supply, ASBCA No. 27030, et al., 82-2 BCA ¶15,997; see also Fareast Service Company, ASBCA No. 27365, 85-1 BCA ¶17,756.

28. 41 U.S.C. §605(a), (Supp. IV, 1980).

29. Space Age Engineering, Inc., ASBCA No. 26028, 82-1 BCA ¶15,766.

30. GSBCA No. 5666, 83-1 BCA ¶16,184.

31. 41 U.S.C. §605(c) (Supp. IV, 1980).

32. 41 U.S.C. §605(c)(5) (Supp. IV, 1980).

33. ASBCA No. 26225, 82-1 BCA ¶15,478.

34. See Watson, Rice and Co., AGBCA No. 82-126-3, 82-2 BCA ¶16,009.

35. But see G & H Machinery Company v. The United States, USCC No. 216-84C, January 9, 1985, 3FPD ¶90, 32 CCF ¶73,201. In this case the contractor wrote to the contracting officer "demanding" that he issue a decision within the statutory sixty days. The contractor had actual knowledge that the contracting officer received this communication not later than July 29, 1982. Though the contracting officer did not issue a decision, the contractor took no action to appeal or file suit until the complaint herein was filed on May 1, 1984 (more than five years after the claim was initially presented to the contracting officer). The contracting officer was required to issue his decision not later than sixty days after July 29, 1982. Under section 605(c)(5) (f.n. 33, supra), "[a]ny failure by the contracting officer to issue a decision on a contract claim within the period required will be deemed to be a decision by the contracting officer denying the claim and will authorize commencement of...suit on the claim...." Relying on this language, the government argued that a denial had constructively occurred and that the suit should be dismissed since it was not filed within the statutory 12-month period after the denial.

Rejecting this argument, the court held that the 12-month period did not begin to run until the receipt by the

contractor of a contracting officer decision. In the court's opinion section 605(c)(5) is permissive in that it "authorizes" the contractor to file suit after the 60-day period expires; however, the court rejects the notion that the contractor was required to do so within the statutory periods. It would be unfair, says the court, to "compel the plaintiff to bear the consequences of the contracting officer's dereliction of duty."

In its desire to be "fair" to the contractor, the court has ignored a fundamental intent of the CDA to insure speedy resolution of disputes. Section 605 (c)(5) states unequivocably that the contracting officer's nonaction "will be deemed to be a decision...denying the claim...." The use of the term "will", as opposed to the "shall" used elsewhere in the act, makes this no less mandatory. The "authorization" in the second part of section 605 (c)(5) does not delete the basic requirements of sections 606 and 609 of the act. The court's conclusion that these time limits do not begin to run until actual receipt of the contracting officer's decision renders meaningless the section 605 (c)(5) language mandating a constructive denial. Such an interpretation is invalid and should be reversed.

The unfairness perceived by the court really results not from the government's inaction, but from the contractor's own inaction. Having invoked the right under section 605 (c)(1) to require the contracting officer to issue a decision, the contractor surely can be expected to pursue his remedies in a timely fashion, just as section 605 (c)(5) contemplates. Proving the date of receipt of the section 605 (c)(1) request is no more onerous than the government's burden of proving receipt of an actual decision and works no undue hardship on a contractor. Even if there may be some case where the contractor is prejudiced by not knowing the actual date of the government's receipt of its section 605 (c)(1) request, that has no bearing on this type of case where the contractor had actual knowledge of receipt by the government, at least as of July 29th. Even if the exact date of receipt within the two weeks prior to that date was unprovable, the suit filed on May 1, 1984, more than 21 months later, was at least seven months late. It should have been dismissed.

36. Supra n. 29.

37. ASBCA Nos. 26967, 26968, 83-1 BCA ¶16,268.

38. 41 U.S.C. 605(a) (Supp. IV, 1980).

39. See Desert Moving and Storage Company, Inc., ASBCA No. 12665, 68-2 BCA ¶7243, at 33,689.

40. Supra n. 28.

41. 41 U.S.C. §605(c)(1) (Supp. IV, 1980).

42. ASBCA No. 27370-18, 83-1 BCA ¶16,272.

43. 230 Ct.Cl. 11, 673 F.2d 352 (Ct.Cl. 1982), 29 CCF ¶82,266.

44. Id.; this effectively shortcuts any board movement to a waiver theory. See, e.g., Continental Drilling, AGBCA 81-182-1, 82-1 BCA ¶15,545, and Modern Const. Inc., GSBCA 6157, 81-2 BCA ¶15,457.

45. W.H. Moseley v. U.S., 230 Ct. Cl. 405, 677 F.2d 850 (Ct.Cl. 1982).

46. W.H. Moseley v. U.S., S.Ct. Dkt. No. 81-2323, filed June 21, 1982.

47. Cert. Den., Sup. Ct. No. 81-2323, October 4, 1982.

48. Roscoe-Ajax Construction Co., Inc. and Knickerbocker Construction Corp. v. U.S., 458 F.2d 55, 198 Ct.Cl. 133 (1972); Zidell Explorations, Inc. v. U.S., 427 F.2d 735, 192 Ct.Cl. 331 (1970); Chandler Manufacturing & Supply, supra n. 28; Virginia Polytechnic Institute, NASA BCA No. 1281-17, 82-2 BCA ¶16,072; Clyde Kirby, ASBCA No. 20558, 76-2 BCA ¶12,059. Some cases indicate that this type of deficiency doesn't render the final decision void, and that the contractor for whose benefit the rule exists, may waive it. Vepco, Inc., ASBCA 82-2 BCA ¶15,824; J. Fiorito Leasing, Ltd., PSBCA No. 1102, 83-1 BCA ¶16,546. Neither the older regulations (DAR and FPR) nor the FAR require verbatim quotation of specified language. As long as the contractor is clearly notified of the fact that the document is in fact a final decision and is properly notified of his rights, the decision is valid. However, better practice is to use the precise regulatory language. Accord, A.A. Beiro Construction Co., Inc., PSBCA No. 310, 76-2 BCA ¶12,221.

49. Supra n. 42, at 80,852.

50. Skelly & Loy v. U.S., 231 Ct.Cl. 370, 685 F.2d 414, (Ct.Cl. 1982). This case involved a post-CDA contract, thus no contractor choice of pre-CDA remedies was possible to confuse the issues. The Court made it clear that the intial failure to certify tainted all subsequent actions. Only after a properly certified claim is made can other actions occur validly. Retroactive certification is not allowed. See also, Fidelity Construction Company v. U.S., 700 F.2d 1379, 1FPD ¶68 (C.A.F.C. 1983); W.M. Schlosser Company, Inc. v. U.S., 705 F.2d 1336, 1 FPD ¶111 (C.A.F.C. 1983); and United Construction Co., Inc. v. U.S., USCC No. 325-84C, December 12, 1984 (32 CCF ¶73,130). The FAR Disputes Clause (52.233-1, April 1984) specifically includes language implementing this doctrine: "a written demand or writ-

ten assertion by the Contractor seeking the payment of money exceeding $50,000 is not a claim under the Act until certified as required...."

51. Skelly & Loy v. U.S., supra n. 50; W.M. Schlosser Company Inc. v. U.S., supra n. 50; United Construction Co., Inc. v. U.S., supra n. 50.

52. Harbison & Mahoney, ENG BCA Nos. 2819, 2820, 68-1 BCA ¶6880.

53. ASBCA No. 23157, 79-1 BCA ¶13,692.

54. George A. Rutherford Co., NASA BCA No. 12, 1962 BCA ¶3561.

55. GSBCA No. 4484, 76-1 BCA ¶11,754, reconsideration denied, 76-2 BCA ¶11,994.

56. Aargus Truck & Automotive Supply, Inc., ASBCA No. 26857, 82-2 BCA ¶16,122; see also, Pacific Coast Refrigration, Inc., ASBCA No. 14546, 71-2 BCA ¶9146.

57. Dimarco Corp., VABCA No. 1997, 84-3 BCA ¶17,562.

58. ASBCA No., 7873, 1962 BCA ¶3319.

59. M. Berger & Co., ASBCA Nos. 3537 and 3577, 57-1 BCA ¶1232.

60. ASBCA No. 22074, 77-2 BCA ¶12,647.

61. 41 U.S.C. §605(c) (Supp. IV, 1980); see, e.g., J & J Paving, Inc., DOT CAB No. 1570, 85-1 BCA ¶17,840. The contracting officer did not issue his final decision until 141 days after he received the claim, but nothing in the CDA required this conduct to be treated as a waiver of the government's right to defend against the claim, as requested by the contractor.

62. MGM Contracting Company, Inc., ASBCA No. 26895, 83-1 BCA ¶16,191.

63. FAR 33.011(b). Prior regulations were substantially the same. See, e.g., DAR 1-314(i)(2).

64. L & V Machine & Tool Works, Inc., ASBCA No. 15243, 71-2 BCA ¶9035; Dell Industries, ASBCA No. 19028, 77-1 BCA ¶12,297 (1976).

65. Ban Electronics, ASBCA No. 16615, 73-2 BCA ¶10,045; M.D. Willner, DOT CAB No. 73-9, 75-1 BCA ¶11,011.

66. Columbia Products, Inc., ASBCA No. 19076, 74-2 BCA ¶10,688.

67. ASBCA No. 19818, 75-1 BCA ¶11,204.

68. But see Chicago Garment Co., Inc., ASBCA No. 4657, 59-2 BCA ¶2278, 60-1 BCA ¶2581. The son of the contractor's president received the final decision. He was a former company officer, but held no official position any more. He did nothing except forward the letter to his father. The board held in this case that the son had no authority to bind the contractor, so the 30-day period did not begin until someone with authority received the letter.

69. Willie Hawkins dba Hawkins Electric & Construction v. U.S., 29 CCF ¶82,235 (Ct.Cl. No. 421-81C, 1982).

70. Willie Hawkins dba Hawkins Electric & Construction v. U.S., 1 FPD ¶46, 30 CCF ¶70,660 (USCC No. 421-81C, 1983).

71. Id., 1 FPD ¶46, at 3.

72. See Kaufman & Broad Building Co., ASBCA No. 9615, 1964 BCA ¶4052; Vinnell Corp. of California, ASBCA Nos 3382, 3383, and 3384, 57-2 BCA ¶1517; General Motors Corp., Turnstedt Divsion, ASBCA Nos. 2830 and 2831, 56-2 BCA ¶1041.

73. John V. Boland Construction Co., ASBCA No. 5105, 58-2 BCA ¶1989; accord, Argus Construction Co., AGBCA No. 221, 68-2 BCA ¶7247.

74. F.E. Constructors, J.V., ASBCA No. 24488, 80-2 BCA ¶14,505; Co-Mec, Inc., DOT CAB No. 76-3, 75-2 BCA ¶11,600; Allied Contractors, Inc., ASBCA No. 4873, 58-2 BCA ¶2026.

75. Accord, Co-Mec, Inc., supra n. 73.

76. Messinger Bearings, Inc., ASBCA No. 18032, 73-1 BCA ¶9986.

77. Hartman-Walsh Painting Company, ASBCA No. 5130, 59-1 BCA ¶2226.

78. Id.

79. County Machine Co., Inc., ASBCA No. 9272, 1963 BCA ¶3998.

80. John M. King Co., IBCA No. 614-1-67, 67-1 BCA ¶6182. Query, is present day mail service sufficiently less reliable and predictable to warrant a similar conclusion now?

81. Curtis L. Holt, dba Advance Maintenance Co., HUD BCA No. 75-11, 75-2 BCA ¶11,431.

82. SanColMar Industries, Inc., ASBCA No. 16879, 73-1 BCA ¶9812.

83. Carolina Parachute Corp., ASBCA No. 28595, 84-1 BCA ¶16,988 (1983).

84. Waste Paper Converters, ASBCA No. 29288, 84-2 BCA ¶17,339.

85. 41 USC §605(b) (Supp. IV, 1980).

86. See Frank Briscoe Co., Inc., GSBCA No. 2160, 66-2 BCA ¶6051.

87. Space Age Engineering, supra n. 30; Watson, Rice and Co., supra n. 35.

88. Id.; T.C. Bateson Construction Co., ASBCA No. 5011, 59-1 BCA ¶2083.

89. Bissett-Berman Corp., ASBCA No. 14986, 70-1 BCA ¶8288; American Construction Co., Inc., GSBCA No. 1375, 65-1 BCA ¶4828.

90. Conway Electric Co., ASBCA No. 7176, 1962 BCA ¶3294.

91. Joseph A. Coan, GSBCA No. 600, August 23, 1962; Goldschmidt and Bethune Company, War Department BCA [WDBCA] No. 856, 3 C.C.F. 381 (1945).

91A. But See Bruce F. Mattson, dba Mattson Electronics GSBCA No. 7595-COM, 85-1 BCA ¶17,771. In this case the contracting officer issued a final decision and a proposed contract modification simultaneously. The contractor raised objections and the contracting officer then agreed to prepare a revised modification. Allegedly the contracting officer agreed that the 90-day appeal period would run from the date of receipt of the revised modification, and the contractor argued that the revised modification superseded the initial final decision. Rejecting this theory, the GSBCA held that since no exceptions to the 90-day time period are set out in the statute, none exist. Thus the 90-day period had expired and no appeal could be made. The ASBCA's holding in Johnson Controls, Inc., ASBCA No. 28340, 83-2 BCA ¶16,915, that a reconsideration tolled the running of the 90-day period was expressly rejected. This opinion confuses waiver with determination of what constitutes the beginning of the allowable 90-day period and reaches an illogical result. It may reflect a reaction to the overturning of the GSBCA's attempt to apply a waiver theory under the CDA by the C.A.F.A. (See discussion infra).

92. Space Age Engineering, supra n. 30.

93. See Roscoe-Ajax, supra n. 48.

94. Richardson Camera Co., Inc. v. U.S., 199 Ct.Cl. 657, 467 F.2d 491 (1972).

95. New York Rubber Corporation, ASBCA No. 4618, 58-1 BCA ¶1593. In such cases today, such a request would be carefully examined to see if it might itself constitute a valid appeal. See the discussion infra on the contents of a valid appeal.

96. See Paul E. Griffin & Co., WDBCA No. 475, 2 C.C.F. 657 (1945); Kimura Construction Co., Ltd., ASBCA No. 3807, 57-2 BCA ¶1578.

97. ASBCA No. 4794, 58-2 BCA ¶1926.

98. Riverside General Construction Co., Inc., IBCA No. 1603-7-82, 82-2 BCA ¶16,127.

99. Richard J. Wand dba Dick Wand, Contractor, AGBCA No. 84-117-3, 84-1 BCA ¶17,018; M&E Fuel Oil Company, ASBCA No. 28701, 84-2 BCA ¶17,403.

100. Roscoe-Ajax, supra n. 48; Johnson Controls, Inc., supra n. 91A; J.W. Conway, Inc., ASBCA No. 5603, 60-1 BCA ¶2527; but see Bruce F. Mattson, dba Mattson Electronics, supra n. 91A.

101. Regan Construction Co., Inc. and Nager Electric Co., Inc., PSBCA No. 634, 81-2 BCA ¶15,165.

102. Continental Chemical Corp., GSBCA No. 2986, 69-2 BCA ¶7926.

103. VABCA No. 1664, 83-1 BCA ¶16,235.

103A. But See Bruce F. Mattson, dba Mattson Electronics, supra n. 91a.

104. Id.; Essex County Youth and Rehabilitation Commission, LBCA No. 81-BCA-6, 84-1 BCA ¶16,977 (1983).

105. Screw Craft Products Co., ASBCA No., 8418, 1964 BCA ¶4015.

106. Aero Electronics Company, ASBCA No. 4985, 59-1 BCA ¶2183; Reefer Construction Co., IBCA No. 209, 60-2 BCA ¶2831.

107. Jeppesen and Company, ASBCA No. 1962 (December 9, 1955); Aero Electronics Company, supra n. 105; Goldschmidt and Bethune Company, supra n. 90.

108. Korea Express Keangnam, Ltd., ASBCA No. 13488, 68-2 BCA ¶7292.

109. William P. Delacy, AGBCA No. 82-213-1, 82-2 BCA ¶15,810.

110. If the agency challenged such a "reconsideration" as a sham before a board, would the board dismiss an otherwise untimely appeal for lack of jurisdiction? It should.

111. DAR 7-103.12 (1958 Jan).

112. Supra n. 5.

113. 41 U.S.C. §606, and §609 (Supp. IV, 1980).

114. FAR 52.223-1 (April 1984), paragraph (f).

115. DOD FAR Supplement, Appendix A, Part 2.

116. Id.

117. 41 U.S.C. §609(a)(3) (Supp. IV, 1980).

118. See, e.g., H&S Corporation, ASBCA No. 26712, 82-2 BCA ¶15,910.

119. See, e.g., Id.; Lone Star Multinational Development Corp., ASBCA No. 20126, 75-2 BCA ¶11,530; Taylor Bros., Inc., ENG BCA No. 2641, 65-2 BCA ¶4968; Great Lakes General Contracting Co., Inc., ASBCA No. 5372, 59-1 BCA ¶2256; Mattel, Incorporated, ASBCA Nos. 3922 et al., 58-2 BCA ¶1946.

120. See, e.g., Eli E. Banks, ENG BCA No. 2770, 66-2 BCA ¶5852; Herrick L. Johnson, Inc., ASBCA No. 9340, 1964 BCA ¶4152. In J.D. Pollock Construction Co., GSBCA Nos. 5863, et al., 81-1 BCA ¶14,897, the board held that telegraphic notice to the Board was sufficient to meet CDA requirements.

121. Safeway Moving & Storage Corp., ASBCA No. 12167, 67-2 BCA ¶6435.

122. Braeburn Mfg. Company, ASBCA No. 4250, 57-2 BCA ¶1498.

123. HUD BCA No. 82-691-C15, 82-2 BCA ¶86,880.

124. This is essentially dicta. The final decision was first delivered to the contractor's home address where it was accepted by his wife. She held a broad Power of Attorney, and there is little doubt that the 90-day period actually started when she first received the decision, not when she later gave it to her husband. By this calculation even his delivery to the custody officer would have been untimely.

125. See section A, supra.

126. Guilam Contracting Co., Inc., GSBCA No. 1060, 1964 BCA ¶4137.

127. Larco-Industrial Painting Corp., ASBCA No. 13222, 68-2 BCA ¶7314.

128. Zisken Construction Co., ASBCA No. 6270, 60-2 BCA ¶2722.

129. Emory and Richards, ASBCA No. 3616, 56-2 BCA ¶1121 and cases cited therein.

130. Dawson Construction Co., Inc., EBCA No. 155-2-81, 81-2 BCA ¶15,162.

131. GSBCA No. 6977, 83-2 BCA ¶16,594.

132. Peter Kiewit Sons' Co., ENG BCA No. 4447, 80-2 BCA ¶14,646.

133. Donnell Hydraulic Co., ASBCA No. 5709, 60-1 BCA ¶2489; Paul George Tanis, VABCA No. 509, 65-2 BCA ¶5017; Midland Constructors, Inc., IBCA No. 272, 61-1 BCA ¶3012, 61-2 BCA ¶3153; Reading Clothing Manufacturing Company, ASBCA No. 3912, 57-1 BCA ¶1290.

134. United Brush Manufactories, ASBCA No. 6641, 1963 BCA ¶3728; J.M. Brown Construction Company, ASBCA No. 3469, 57-2 BCA ¶1377; but see Korea Express Keangnam, Ltd., supra n. 108.

135. A. Hedenberg & Co., Inc., GSBCA No. 2815, 69-1 BCA ¶7432; Richardson Camera Co., Inc. v. U.S., supra n. 93; John H. Jacobs Co., ASBCA No. 1524, 70-2 BCA ¶8479; Optical Electronics, Inc., NASA BCA No. 669-7, 69-2 BCA ¶7985; Edward Rosenberg, d/b/a Quaker City Products Company, ASBCA No. 3968, 57-2 BCA ¶1380.

136. Mattel, Incorporated, supra n. 118.

137. City Moving & Storage Co., Inc., GSBCA No. 3319, 71-2 BCA ¶8974 (contractor sent letter to contracting officer which protested the decision; he sent a copy to the President of the U.S. seeking "help in getting my money"); Rimmco, ASBCA No. 14386, 70-1 BCA ¶8290; Crowther Bros. Milling Co., ASBCA No. 4296, 57-2 BCA ¶1496.

138. Bluegrass Moving & Storage, ASBCA No. 15902, 71-2 BCA ¶9138; Accurate Products Co., ASBCA No. 9929, 1964 BCA ¶4412; Sanford A. Estes, d/b/a Sanford Estes and Company, ASBCA No. 6208, 60-1 BCA ¶2652; Dodson Electric Co., ASBCA No. 3686, 56-2 BCA ¶1129.

139. 41 U.S.C. §606 (Supp. IV, 1980).

140. Contraves-Goerz Corporation, ASBCA No. 26317, 83-1 BCA ¶16,309.

141. Id.

142. Yankee Telecommunication Laboratories, Inc., ASBCA No. 25240, 82-1 BCA ¶15,515.

143. Id., at 76,962.

144. Aerojet-General Corp., NASA BCA No. 675-6, 76-1 BCA ¶11,779.

145. AGBCA No. 76-174, 77-1 BCA ¶12,338.

146. Supra n. 17.

147. Supra n. 18.

148. See B.D. Click Co., Inc. v. U.S., 2 USCCR 8, 1 FPD ¶16 (1982).

149. Lomar Instrument Co., Inc., ASBCA No. 3297, 57-1 BCA ¶1228.

150. Hardwick Aircraft Co., ASBCA No. 10815, 65-2 BCA ¶5264; accord, Preferred Contractors, Inc., ASBCA Nos. 15569, 15615, 72-1 BCA ¶9283.

151. Solar Laboratories, Inc., ASBCA No. 21715, 77-2 BCA ¶12,617; L.E. Brannon, d/b/a Industrial Controls Co., GSBCA No. 4425, 75-2 BCA ¶11,586; Bardeen Mfg. Co., ASBCA No. 17724, 73-1 BCA ¶9948; Chicago Iron Works, Inc., GSBCA No. 3169, 70-2 BCA ¶8525; Ziskin Construction Co., ASBCA No. 6281, 60-2 BCA ¶2706.

152. Phillips Construction Co., Inc., ASBCA No 27055, 83-2 BCA ¶16,618; Blackhawk Heating & Plumbing Co., Inc., VACAB No. 1031, 72-2 BCA ¶9611; Allied Contractors, Inc., ASBCA No. 5254, 59-1 BCA ¶2143.

153. L.E. Brannon, d/b/a Industrial Controls Co., supra n. 150; Ziskin Construction Co., supra n. 150; Thermo Nuclear Wire Industries, ASBCA No. 7806, 1962 BCA ¶3427.

154. Chicago Iron Works, Inc., supra n. 150; Dawson Const. Co., Inc., ASBCA 29447, 85-1 BCA ¶17,862 (18 Jan 85). Note however that the new GSBCA rules of procedure expressly state that postage meter postmarks will not be acceptable evidence of a mailing date. See 26 Government Contractor ¶183, 25 Jun 84.

155. Solar Laboratories, Inc., supra n. 150; Bardun Mfg. Co., supra n. 150; John Horn Co., GSBCA No. 4243, 75-1 BCA ¶11,148.

156. Federal Iron & Metal Co., Inc., ASBCA No. 7565, 1962 BCA ¶3273.

157. Supra n. 151; this provides wide lattitude for the unscrupulous, but we assume the truthfulness of sworn testimony. Though this method leaves much to be desired, there is rarely much else a contractor could do, and the post office does sometimes experience problems. This method may have particular value when the appeal letter is placed into the mail, either in a post office or in an official collection box, late in the day. Particularly in small post offices, mail desposited after a certain time of the day will be processed for dispatch the next day, and nothing will show that the letter was placed into the mail system the previous day.

158. See e.g., Warren Oliver Co., VABCA No. 1657, 82-1 BCA ¶15,709.

159. Visutron, Inc., Security Electronics, GSBCA No. 7139, 84-1 BCA ¶17,022; Micrographic Technology, Inc., ASBCA No. 25577, 81-2 BCA ¶15,357; Zinco General Contractors, GSBCA No. 5652, 80-2 BCA ¶14,785.

160. ASBCA No. 19082, 74-2 BCA ¶10,921.

161. ASBCA Nos. 5191, 5192, 59-1 BCA ¶2268.

162. Guye Construction Co., ASBCA No. 4756, 59-1 BCA ¶2060.

163. Vanguard Pacific, Inc., GSBCA No. 4675, 76-2 BCA ¶12,159.

164. Bushman Construction Company, IBCA No. 193, 59-1 BCA ¶2148; J.G.B. Maintenance Specialists, ASBCA No. 8866, 1963 BCA ¶3766; Construction Services, Inc., GSBCA No. 2295, 67-2 BCA ¶6404.

165. Bushman Construction Company, supra n. 163.

166. Harrod & Williams, Inc., ASBCA No. 17714, 73-1 BCA ¶9994. In 1975 the ENG BCA adopted this rule of allowing Saturday to be excluded as the final appeal day, citing this as the "predominant" rule in lower fedral courts. Peninsula Marine, Inc., ENG BCA No. 3219, 75-1 BCA ¶11,130. The major boards did not follow this approach right away.

167. Micrographic Technology, Inc., supra n. 158; Warren Oliver Co., supra n. 157; Western Adhesives, GSBCA No. 6868-R,

83-1 BCA ¶16,493. See also, Vappi & Co., Inc., PSBCA No. 924, 81-1 BCA ¶15,080.

168. Western Adhesives, supra n. 167; Vappi & Co., Inc., supra n. 167.

169. Id.; see also, Pacific Steel Building Systems, Inc., ASBCA No. 26346, 83-1 BCA ¶16,362.

170. DOD FAR Supp. Appendix A, Rule 33(b).

171. Pub. L. 95-563, Section 16.

172. See Brown & Root Development, Inc. v. Tennessee Valley Authority, 681 F.2d 1313 (C.A. 11, 1982). The Court of Appeals upheld a challenge to the validity of this regulation. It had a rational basis and contractors were in no way restricted in their choice of remedies except for the minimal requirement to provide notice of the choice made.

173. Trinity Services, Inc., ASBCA No. 24007, 79-2 BCA ¶14,090.

174. Id., at 69,301; see also, Essex Electro Engineer, Inc. v. U.S., 702 F.2d 998 (C.A.F.C. 1983); and United Construction Co., Inc. v. U.S., supra n. 50.

175. See also Amalgamated Clothing and Textile Workers Union, LBCA No. 82-BCA-31, 84-2 BCA ¶17,269 (1983).

176. Tuttle/White Constructors, Inc. v. Unites States, 228 Ct.Cl. 354, 656 F.2d 644 (1981); W.M. Schlosser Company, Inc., supra n. 50.

177. W.M. Schlosser Company, Inc., supra n. 50.

178. Gregory Lumber Co. v. United States, 229 Ct.Cl. 762 (1982). The Court of Claims (prior to implementation of the Federal Courts Improvement Act) put its position firmly, finding that it "cannot and should not read into...[the statute] exceptions and tolling provisions Congress did not contemplate or authorize." 229 Ct.Cl. at 763.

179. Big Sky Contractors, Inc., AGBCA Nos. 82-143-1, et al., 82-1 BCA ¶15,731.

180. Tuttle/White Constructors, Inc. v. United States, supra n. 176; Santa Fe Engineers, Inc., v. United States, 230 Ct.Cl._____, 677 F.2d 876 (1982), cert. denied, 103 S. Ct. 569 (1983); Prime Construction Company, Inc. v. United States, U.S. Ct.Cl. No. 80-82c, July 2, 1982, 30 C.C.F. ¶70-111.

181. Cosmic Construction Co. v. U.S., 2 FPD ¶174 (USCC 1984); Olsberg Excavating Co. v. U.S., 2 FPD ¶33 (USCC 1983); Western Pacific Enterprises, ASBCA No. 25822, 81-2 BCA ¶15,217.

182. Supra n. 181.

183. Id., at p. 5.

184. For an excellent discussion of the early stages of this clash of wills, see Bell, "Government Contracts - Discretionary Waiver of the Thirty-Day Time Limit On Appeals," 76 Dick. L. Rev. 691 (Summer 1972).

185. See, e.g., United States v. Joseph A. Holpuch, 328 U.S. 234, 240 (1946); United States v. Blair, 321 U.S. 730, 735 (1943); Poloron Products, Inc. v. United States, 126 Ct.Cl. 816, 826 (1953).

186. 181 Ct.Cl. 21, 383 F.2d 1004 (1967).

187. Id., at 27, 383 F.2d at 1007.

188. See Reading Clothing Manufacturing Company, supra n. 133.

189. ASBCA No. 4777, 58-1 BCA ¶1638.

190. Id., at 6073.

191. Rock Island, Ark. & La. R.R. v. United States, 254 U.S. 141, 143 (1920). Board decisions dismissing untimely appeals for lack of jurisdiction are too common to require citation. Extraordinary circumstances and cases where the appeal was only a very little bit late (even one day) just were not considered, as shown in Mann Construction Co., ASBCA No. 9758, 1964 BCA ¶4125. There the last day for filing a timely appeal was November 22, 1963, the day President John F. Kennedy was assassinated. In the turmoil which followed, the contractor neglected to file its notice of appeal until the relevant government offices reopened three days later. None who are old enough to remember that day can forget the shock and confusion that affected so many people then, but the board was totally unmoved. Those extraordinary events were irrelevant since the board simply had no authority to allow a deviation from the contract's requirements for timely appeal.

192. Maitland Brothers, ASBCA No. 6607, 61-1 BCA ¶3073.

193. Ct.Cl. 74-62, order dated June 11, 1965, quoted in Maitland Brothers, ASBCA No. 6607, 66-1 BCA ¶5416, at 25,425 (emphasis added).

194. Maitland Brothers, supra n. 193, at 25,426. At this time the Court of Claims had no legal authority to remand a case to a board.

195. At this time the board's authority was derived from that given to the agency head by virtue of the contract "disputes" clause. The jurisdiction of the ASBCA was determined by the scope of authority "delegated" to it in its Charter from the agency head. As his authorized agent, the board could not have authority exceeding that of the agency head himself.

196. Moran Brothers, Inc., v. United States, 171 Ct.Cl. 245, 346 F.2d 590 (1965).

197. Maitland Brothers, supra n. 193 at 25,430.

198. 197 Ct.Cl. 159, 453 F.2d 1260 (1972).

199. 198 Ct.Cl. 72, 458 F.2d 66 (1972).

200. ASBCA No. 14363, 70-1 BCA ¶8076.

201. PSBCA No. 349, 70-1 BCA ¶8255.

202. In the absence of a remand statute, the court had no authority to require the boards to act.

203. ASBCA No. 14363, 72-1 BCA ¶9449.

204. Pub L. 92-415, 86 Stat. 652 (amending 28 U.S.C. §1491), August 29, 1972.

205. 198 Ct.Cl. 176, 479 F.2d 1350 (1973).

206. 73-2 BCA ¶10,326.

207. 205 Ct.Cl 881, 513 F.2d 638 (1974).

208. Monroe M. Tapper & Associates, PSBCA No. 349, 72-2 BCA ¶9628.

209. Monroe M. Tapper & Associates v. U.S., 206 Ct.Cl 446, 514 F.2d 1003 (1975).

210. Solibakke, "Disputes and Litigation," in Developments in Government Contract Law - 1975, M. Doke, Jr., ed., 265, 269-272.

211. Solibakke, supra n. 210, at 270. See particularly the cases cited at fn. 24 and the text associated therewith.

212. 41 U.S.C. §§321, 322 (1954).

213. Solibakke, supra n. 210, at 272.

214. DOTCAB No. 74-17, 75-1 BCA ¶11,147.

215. GSBCA No. 4654, 77-1 BCA ¶12,255 (1976). In reversing the position previously established in Grunley-Walsh Construction Co., GSBCA No. 3132, 70-2 BCA ¶8399, the board provided no real analysis or explanation. One can assume that the handwriting on the wall was quite clear enough for them.

216. Cosmic Construction Co., ASBCA No. 26537, 82-1 BCA ¶15,541 (1981); Dell Industries, ASBCA No. 19028, 77-1 BCA ¶12,297; J.R. Youngdale Construction Co., Inc., ASBCA No. 18090, 75-1 BCA ¶11,116 (1974); Henry Products Co., Inc., ASBCA 18299, 74-1 BCA ¶10,457.

217. Cosmic Construction Co., supra n. 216.

218. Id., at 77,050.

219. ASBCA No. 27041, 83-1 BCA ¶16,333.

220. Id., at 81,188. This case involved a preliminary motion only. The board had indicated it would defer consideration of the government's motion to dismiss for lack of timeliness until final determination of the appeal. The issue of waiver was to be included at the hearing. The government took the position that the board should not consider the issue of waiver absent a specific order from the appellate court to do so. It is this motion which was denied for the reasons quoted. In the subsequent decision, on the merits (adverse to the contractor), no mention of the timeliness issue, or waiver, is made at all. 84-1 BCA ¶17,033.

221. Avon C. Brown, Inc., DOT CAB No. 1082, 80-1 BCA ¶14,399. Other DOT decisions following this lead are Safety Sciences Ltd., DOT CAB No. 1127, 81-1 BCA ¶14,853 and Daymar, Inc., DOT CAB Nos. 1157, 1161, 81-1 BCA ¶14,938.

222. Sofarelli Associates, Inc., ASBCA No. 24580, 80-2 BCA ¶14,472; see also, Western Pacific Enterprises, ASBCA No. 25822, 81-2 BCA ¶15,217.

223. A.D. Roe Company, Inc., ENG BCA No. 4532, 81-1 BCA ¶14,926.

224. Dawson Construction Company, Inc., EBCA No. 155-2-81, 81-2 BCA ¶15,162.

225. Pleasant Logging & Milling Company, Inc., AGBCA No. 79-172 CDA, 80-2 BCA ¶14,605.

226. E. Combs Contracting Company, Inc., HUD BCA No. 81-616-C27, 81-2 BCA ¶15,404; Circle S Sales, HUD BCA No. 82-673-C11, 82-1 BCA ¶15,678.

227. Supra n. 226.

228. Id., at 77,513.

229. University of Wisconsin Institute For Research on Poverty, LBCA 81-BCA-1, 81-1 BCA ¶14,975, at 74,096.

230. Atlantic Chemical Co., Inc., GSBCA No. 5987, 81-2 BCA ¶15,196, concurring opinion by Judges LaBella and Takahasi, at 75,245.

231. Ervin D. Judkins, dba Imperator Carpet & Janitorial Service, GSBCA No. 6164, 81-2 BCA ¶15,350.

232. In the only other GSBCA case espousing this post-CDA waiver authority, the Board also found that no showing of good cause had been made, though the appeal was made on the ninety-first day. Steelcare, Inc., GSBCA No. 6406, 82-2 BCA ¶16,092.

233. ASBCA No. 26315, 82-1 BCA ¶15,523.

234. ASBCA No. 25867, 82-1 BCA ¶15,499.

235. Policy Research, Incorporated, ASBCA No. 26144, 82-1 BCA ¶15,618; see also, Stewart & Stevenson Services, Inc., ASBCA No. 27697, 83-1 BCA ¶16,368; Bob Boyd & Associates, Inc., ASBCA No. 27796, 83-1 BCA ¶16,403.

236. C.A.F.C. No. 23-82, December 10, 1982; 1 FPD ¶53.

237. Id., at p. 3, note 3.

238. ASBCA No. 21857, 78-1 BCA ¶12,865.

239. ASBCA No. 22447, 78-1 BCA ¶13,149.

240. Supra n. 235.

241. GSBCA No. 6055 - NAFC, 83-1 BCA ¶16,169.

242. Supra n. 231; apparently the board was unaware of the C.A.F.C. decision in Cosmic Construction Company, supra n. 236, issued six days earlier.

243. Derived from the case of Fulford Manufacturing Company, ASBCA Nos. 2143, 2144, 6 CCF ¶61,815 (1955) (Digest Only).

244. See Fairfield Scientific Corporation, ASBCA No. 21151, 78-1 BCA ¶13,082; Jack W. West Contracting Co., Inc., et al, GSBCA Nos. 3837, 3846, 74-1 BCA ¶10,559; Frank & Warren, Inc., GSBCA No. 2212, 67-1 BCA ¶6233; Manhatten Lighting Equipment Co., Inc., ASBCA Nos. 4026, 4208, 58-1 BCA ¶1665.

245. Polaroid Corp., ASBCA No. 6152, 60-1 BCA ¶2618.

246. See, e.g., Kellner Equipment Inc., ASBCA No. 26006, 82-2 BCA ¶16,077; G.S.E. Dynamics, Inc., ASBCA No. 25227, 81-1 BCA ¶15,096; Western Industrial Corporation, ASBCA Nos. 24969, et. al., 81-1 BCA ¶15,093.

247. William P. Delacy, AGBCA No. 82-213-1, 82-2 BCA ¶15,810.

248. 5 Cl.Ct. 70, 2 FPD ¶150 (1984).

249. 3 FPD ¶40, 32 C.C.F. ¶72,875 (USCC No. 432-81C, September 5, 1984).

250. William Green Construction Co., Inc. and United States Fidelity & Guarantee Co. v. U.S., 201 Ct.Cl. 616, 477 F.2d 930 (1973), cert. den. 417 S. Ct. 909.

251. William Green Construction Co., Inc., GSBCA No. 4113, 74-2 BCA ¶10,907.

252. ASBCA No. 20401, 76-1 BCA ¶11,689.

253. 41 U.S.C. §609(d) (Supp. IV, 1980).

254. See discussion in Space Age Engineering, Inc. v. U.S., 1 FPD ¶95 (USCC, 1983).

255. 41 U.S.C. §607(g)(1)(A) (Supp. V, 1981), (as amended by Federal Courts Improvement Act of 1982, Pub. L. No. 97-164, §156).

256. Placeway Const. Corp. v. U.S., 2 F.P.D. 16, (C.A.F.C. No. 83-712, August 2, 1983).

257. Supra n. 6.

258. For detailed discussions of the history and usage of Changes Clauses, see generally Nash, Government Contract Changes, (1975); Nash & Cibinic, Federal Procurement Law, Volume II, (3rd Ed., George Washington University, 1980), at pp. 1163-1259; vom Baur, "Constructive Change Orders," Government Contractor Briefing Papers No. 65-5, (Fed. Pubs. Inc., 1965) (see also Number 73-5 (October 1973) and 1976 Revision Note, same subject); Nash & Cibinic, "The Changes Clause in Federal Construction

Contracts," 35 Geo. Wash. L. Rev. 908 (1967); Crowell & Johnson, "A Primer On the Standard Form Changes Clause," 8 Wm. & Mary L. Rev. 550 (Summer 1967); Polen, "The Changes Clause and the Concept of 'Constructive Change': Novel Aspects of Contracts With Uncle Sam," 3 U. of San Fernando Valley L. Rev. 79 (1974); and vom Baur, "The Origin of the Changes Clause in Naval Procurement," 8 Pub. Cont. L. J. 175 (1976).

259. FAR 52.243-1 contains the basic clause and five alternates to be used as appropriate in various fixed-price supply contracts. The basic clause is a FAR revision based on DAR 7-103.2 (1958 Jan) and FPR 1-7.102-1. There was no substantive change to the notice requirements. A further variation of the clause set out in FAR 52.243-2 is used in cost-reimbursement contracts for supplies.

260. The clause set out in FAR 52.243-4 is derived almost verbatim from DAR 7-602.3 (1968 Feb) and FPR 1-7.602-3.

261. FAR 52.243-1(a); the clause goes on to list generic categories of changes which can be made.

262. FAR 52.243-4(a); the clause then lists by category areas of the contract in which these change orders may be issued. As a practical matter, virtually any change within the general scope of the contract can be made under the "Changes" Clause of either the supply or construction contract.

263. FAR 52.243-1(c).

264. FAR 52.243-4(e) & (f).

265. See J.M. Covington Corp., ASBCA No. 15633, 73-2 BCA ¶10,235.

266. A full discussion of this doctrine is beyond the scope of this paper. For further discussion and analysis, see the sources cited in n. 258, supra.

267. FAR 52.243-4(b), (d), & (e).

268. Hiestand, "A New Era In Government Construction Contracts," 28 Fed. B. J. 165, 173-174 (Summer 1968). Interestingly, Mr. Hiestand (the Chairman of the Interagency Working Group which developed the new (1968) construction contract "Changes" Clause, points out that the original Working Group recommendation called for "prompt notice" of such constructive changes, and contemplated flexible application depending on the circumstances of each case. The revised recommendation, which was adopted in the FPR and ASPR (and later DAR and now FAR) imposed the stringent provision discussed above. Many agencies

were in favor of explicitly rejecting any equitable adjustment except for formal written changes, but this position was rejected. The notice requirement ultimately adopted by the working group was essentially the same as that included in the "Suspension of Work" clause adopted by GSA and DOD in 1960 and 1961, the first explicit recognition of the "constructive" suspension doctrine. Imposition of the stringent notice provision was regarded as the quid pro quo for the elimination of the Rice Doctrine, U.S. v. Rice, 317 U.S. 61 (1942). See also, Gold, "Changes, Changed Conditions, Suspensions and Delays," 2 Pub. Cont. L. J. 56, at 61ff, (Oct 1968); and Wickwire and Watt, "Twenty-Day Notice Requirements Under 'Changes' and 'Suspension of Work' Clauses," 9 Pub. Cont. News. 9, (Apr 1974).

269. Id.

270. For a detailed discussion of the erosion of the apprisal notice requirement, see Weintraub, "'Apprisal Notice' Requirements In Federal Construction Contracts: Their Continued Validity," 12 Pub. Cont. L. J. 40 (1981). The author, an attorney with the U.S. Army Corps of Engineers, L.A. District, provides an excellent history of the apprisal notice requirement and a strong argument for its continued enforcement by the boards and courts. A good review of the earlier history is found in Buford, "Notice Requirements Under Government Construction Contracts," 44 Minn. L. Rev. 275 (1959).

271. ASPR (DAR) 7-104.86. This clause had its origin in the Navy "Anti-Claims" "Changes" Clause issued as a part of Navy Procurement Circular 15 (March 6, 1970), and slightly modified in Navy Procurement Circular 18 (October 27, 1970). Originally the Navy itself used the descriptive name "anti-claims clauses," though later references were altered to call them "claims identification and notice clauses." Though the clauses were advertised as designed to improve military control over constructive changes, many observers saw them as straightforward efforts to stick the contractors with the risk of constructive change costs by imposing notice provisions so stringent that most contractors could never meet them. These clauses caused a storm of protest, including many allegations that the government was seeking to make contractors pay the costs of the government's inability to properly manage its own acquisition process. See, e.g., vom Baur, "Fifty Years of Government Contract Law," 29 Fed. Bar J. 305, at 354-357, (Fall 1970); Polen, supra n. 258 at 89-90; McWhorter, "Current Developments and Problems Under Construction Contracts--From the Private Practitioner's Viewpoint," 2 Pub. Cont. L. J. 72, at 75-77, (1968); vom Baur, "Anti-Claims Clauses--The Admission of An Inability to Govern," Fed. Cont. Reporter No. 340, (August 24, 1970); Megyeri, "Navy 'Anti-Claims' Clauses," 7 Pub. Cont. News. 14, at 14-15, October 1971; Nash, Government Contractor's Communique, No. 72-5, Fed. Pubs. Inc.,

February 28, 1972; Latham, "The Forthcoming Repeal of the Anti-Claims Clauses," 7 Pub. Cont. News. 7, (June 1972); and "The Anti-Claims Clause: Extinguishing A Contractor Remedy," 14 Wm. & Mary L. Rev. 162 (1972). After receiving substantial comment on its original proposed "Contractor's Identification of Changes Clause," the ASPR committee made many changes before releasing the revised "Notification of Changes" Clause. The resulting clause does not abandon the strong notice requirement, but it is substantially more liberal than its Navy forbearer. See, Cuneo, "New Rules For Reasonable Identification of Constructive Change Orders," 8 Pub. Cont. News. 6, at 6-8, (July 1973).

272. FAR 52.243-7.

273. See Dynalectron Corporation-Pacific Division, ASBCA Nos. 11766 and 12271, 69-1 BCA ¶7595; Dynalectron Corporation-Pacific Division v. U.S., 207 Ct.Cl. 349, 518 F.2d 594 (1975); see also, Avante International Systems Corporation, ASBCA No. 26649, 83-1 BCA ¶16,416.

274. Id.; see also Axel Electronics, Inc., ASBCA No. 18,990, 76-1 BCA ¶11,667.

275. FAR 52.243-4(d).

276. Jos. D. Bonness, Inc., John F. Bloomer Co., Inc., and Fox Valley Construction Co., ASBCA No. 18828, 74-1 BCA ¶10,419.

277. FAR 52.243-7(e)(2).

278. ASBCA No. 18690, 76-1 BCA ¶11,901.

279. Id.; see also Parcoa, Inc., AGBCA No. 76-130, 77-2 BCA ¶12,658, and Gulf & Western Industries, Inc. v. U.S., USCC No. 384-77 (November 28, 1984), 3 FPD ¶72, 32 CCF ¶73,100. In the latter case the contractor had failed to file its claim for over five years. However, the government failed to prove that it had been prejudiced, so the court refused to bar the claim. Despite the lack of objective evidence of government prejudice, the Court imposed an increased burden of proof on the contractor to offset the inherent prejudice of the 5-year delay.

280. See Weintraub, supra n. 270, at p. 55.

281. Norcoast-Beck Aleutian, A Joint Venture, ASBCA No. 26389, 83-1 BCA ¶16,152.

282. See Joseph H. Roberts v. U.S., 174 Ct.Cl. 940, 357 F.2d 938 (1966).

283. Gulf & Western Industries, Inc., ASBCA No. 22204, 79-1 BCA ¶13,706, aff'd sub. nom. Gulf & Western Industries v. U.S., Ct.Cl. No. 384-77 (December 17, 1980), 27 CCF ¶80,928.

284. Norcoast-Beck Aleutian, A Joint Venture, ASBCA No. 25469, 81-1 BCA ¶15,072.

285. Id., at 74,551.

286. Eastern Sportswear Mfg. Co., Inc., ASBCA No. 4668, 58-2 BCA ¶1857; Belmont Garment Company, ASBCA No. 4702, 58-1 BCA ¶1782; Art Cap Company, Inc., ASBCA No. 3793, 58-1 BCA ¶1623, and cases cited therein.

287. FAR 52.243-1(c) and FAR 52.243-4(f). Interestingly, the "Notification of Changes" Clause, FAR 52.243-7, contains no such restriction.

288. A detailed analysis of the concept of "final payment" is beyond the scope of this paper. For a good, though somewhat dated, review, see Walsh, "Final Payment as Plea in Bar," 8 Pub. Cont. News. 6 (Jan 1973). Note that this same limiting role is played by "final payment" in a number of other remedy-granting clauses, such as the "Differing Site Conditions" Clause, the "Suspension of Work" Clause, and the "Government Property" Clause. Confusion about the meaning of "final payment" thus has widespread impact.

289. See Jo-Bar Manufacturing Corp. v. U.S., 210 Ct.Cl. 149, 535 F.2d 62 (1976); aff'g ASBCA No. 18766, 74-1 BCA ¶10,585.

290. Supra n. 278.

291. Southwest Engineering Co., Inc. v. U.S., 206 Ct.Cl. 892 (1975).

292. Northrup Carolina, Inc., ASBCA No. 13958, 71-2 BCA ¶8970; Lansdale Tube Co., ASBCA No. 5837, 61-2 BCA ¶3105 and ¶3260.

293. Machinery Associates, Inc., ASBCA No. 14510, 72-1 BCA ¶9476; see also Jo-Bar Manufacturing Corp. v. U.S., supra n. 289, although this implication is dicta here.

294. Jackson & Church Co., ASBCA No. 12229, 68-1 BCA ¶6815.

295. Hewitt Construction Corp., ASBCA No. 11321, 66-2 BCA ¶5758.

296. J.D. Dermody Co., NASA BCA No. 20, 1962 BCA ¶3316.

297. Mid-South Contractors, Inc., ASBCA No. 20279, 76-2 BCA ¶12,101, aff'd on recon, 77-1 BCA ¶12,311.

298. ASBCA No. 15954, 72-1 BCA ¶9301.

299. ASBCA No. 14800, 71-2 BCA ¶9013.

300. See, e.g., Machinery Associates, Inc., supra n. 293.

301. ASBCA No. 22204, 79-1 BCA ¶13,706.

302. Gulf & Western Industries, Inc. v. U.S., 639 F.2d 732 (Ct.Cl. 1980), 28 CCF ¶80,928.

303. Ct.Cl. Order, August 4, 1981.

304. Gulf & Western Industries, Inc. v. U.S., supra n. 279.

305. The allegation that contractor had failed to assert its claim before final payment is an affirmative defense and the government had the burden of proof. Cf. Scherr & McDermott, Inc. v. U.S., 175 Ct.Cl. 440, 360 F.2d 966 (1966).

306. Supra n. 304; 3 FPD ¶72, at 16. See Historical Services, Inc., DOT CAB Nos. 72-8, 72-8A, 72-2 BCA ¶9592 and Wilcox Electric, Inc., DOT CAB No. 73-14, 74-2 BCA ¶10,725.

307. See Eggers & Higgins v. U.S., 185 Ct.Cl. 765, 403 F.2d 225 (1968). The government has the burden of proof in such cases. Chimera Corp., supra n. 278.

308. Chimera Corp, supra n. 278; Progressive Enterprises, Inc., ASBCA No. 17360,73-2 BCA ¶10,065; C.H. Leavell & Co., ASBCA No. 16099, 72-2 BCA ¶9694.

309. See Northrup Carolina, Inc., supra n. 292.

310. 41 U.S.C. §605(c) (Supp. IV, 1980).

311. Of course, nothing precludes the contractor from filing a complete formal claim, certified where appropriate, at the earliest stages. However, especially where constructive changes are involved, contractors seldom have the information or inclination to do so.

312. FAR 52.243-4(b).

313. FAR 52.243-7(b).

314. This same approach has been applied to the "Suspension of Work" and "Differing Site Conditions" clauses though they also did and do require written notice. See especially the discussion in Weintraub, supra n. 270, at 48-57.

315. See, e.g., ITT Commercial Services, Inc., GSBCA No. 4210, 75-1 BCA ¶11,218; Colo-Macco, Inc., AGBCA No. 210, 69-2 BCA ¶7919; Merritt-Chapman & Scott Corp., ASBCA No. 9834, 66-2 BCA ¶5768; Farnsworth & Chambers Co., ASBCA Nos. 5768, 5869-5872, 5966, 5967, 60-2 BCA ¶2717.

316. The supply clause gives no definition at all. The construction clause calls for a written statement which addresses the "general nature and amount" of the claim. This proposal could be a part of the original apprisal notice. FAR 52.243-4e.

317. Specialty Assembling & Packing Co., Inc. v. U.S., 156 Ct.Cl. 252, 298 F.2d 794 (1962).

318. Id.; Gulf & Western Industries, Inc. v. U.S., supra n. 302; see also, Toyad Corporation, ASBCA No. 26785, 84-1 BCA ¶17,030.

319. Missouri Research Laboratories, Inc., ASBCA No. 12355, 69-1 BCA ¶7762.

320. Supra n. 289.

321. ASBCA No. 15633, 73-2 BCA ¶10,235.

322. Jackson & Church Co., supra n. 294.

323. Overly v. U.S., 87 Ct.Cl. 231 (1938).

324. At this point, oral notice is generally accepted. See Wientraub, supra n. 270, at p. 50.

325. Piracci Construction Co., Inc., GSBCA No. 3477, 74-2 BCA ¶10,799.

326. In the supply clause the authority is granted to the contracting officer; the construction clause is broader, at least in language, since it authorizes extension by the government.

327. For a time the Comptroller General asserted that the "Changes" Clauses gave the sole discretion to make such decisions to the contracting officer (who was named specifically in each clause then). Thus, he concluded that the boards had no authority to review that decision and to waive untimely notice through that review. Comp. Gen. Dec. B-152346, November 22, 1963, Unpub. (9 CCF ¶72,369). The Interior Board extensively analyzed this ruling and decisively rejected it. Korshoj Construction Co., IBCA No. 321, 1964 BCA ¶4206. See also, Fletcher Aviation Corp., ASBCA No. 7669, 1964 BCA ¶4192. The Comptroller General acquiesced in the boards' position in Comp. Gen. Dec. B-152346, September 13, 1965, Unpub., reversing the prior ruling. Under a clause like the current construction contract "Changes" Clause, where authority is broadly given to the "government," this could no longer be an issue, even if the CDA had not substantially expanded board jurisdiction.

328. For an extensive discussion of the development of this doctrine, see Hartford Accident and Indemnification Co., IBCA No. 1139-77, 77-2 BCA ¶12,604; see also, e.g., Rohr Industries; Inc., ENG BCA No. 4416, 83-2 BCA ¶16,810; Baltimore Contractors, Inc., GSBCA No. 3791, 77-1 BCA ¶12,294 (1976); Mil-Pak Co., Inc, ASBCA No. 19733, 76-1 BCA ¶11,836, aff'g on recon. 76-1 BCA ¶11,725; Honeywell, Inc., VACAB No. 1166, 76-1 BCA ¶11,745; Precision Tool & Engineering Corp, ASBCA No. 14148, 71 BCA ¶8738; Erie Controls, Inc., IBCA No. 350, 1963 BCA ¶3924; Korshoj Construction Co., supra n. 327.

329. Woerfel Corp. and Towne Realty Co., NASA BCA Nos. 1073-13, et al., 75-2 BCA ¶11,629; Chimera Corp. Inc., supra n. 278.

330. Mil-Pak Co., Inc., supra n. 328; M.M. Sundt Construction Co., ASBCA No. 17475, 74-1 BCA ¶10,627.

331. Santa Fe, Inc., VABCA No. 1983, 84-3 BCA ¶17,538; see also General Railway Signal Co., ENG BCA No. 4407, 84-3 BCA ¶17,632.

332. 197 Ct.Cl. 561, 456 F.2d 760 (1972).

333. Id., at 571-72, 456 F.2d at 766-67.

334. Id., at 573, 456 F.2d at 769.

335. ASBCA No. 17342, 73-2 BCA ¶10,107.

336. Id.

337. Supra n. 265 and text accompanying n. 321, supra.

338. Id.; see also Bromley Contracting Co., Inc., VABCA No. 1617, 84-3 BCA ¶17,704; National Bonding and Accident Insurance Company, ENG BCA No. 4586, 83-2 BCA ¶16,863, and The Piracci Corporation, GSBCA No. 6007, 82-2 BCA ¶16,047.

339. See Marine Electric RPD, Inc., ASBCA No. 24142, 84-3 BCA ¶17,541; Santa Fe, Inc., supra n. 331; Steve Nanna, Inc., DOT CAB No. 1343, 83-2 BCA ¶16,692; National Bonding & Accident Ins. Co., supra n. 338; Hartford Accident & Indemnity Co., supra n. 328; Smith & Pittman Construction Co., AGBCA No. 76-131, 77-1 BCA ¶12,381; R.R. Tyler, AGBCA No. 381, 77-1 BCA ¶12,227 (1976); United Baeton International, VACAB No. 1209, 76-2 BCA ¶12,133.

340. Lane-Verdugo, ASBCA Nos. 16327, 16328, 73-2 BCA ¶10,271.

341. GSBCA Nos. 3489, 3490, 73-1 BCA 9928; see also, Science Management Corporation, EBCA No. 289-5-83(OTA), 84-2 BCA ¶17,319.

342. These cases involved the then "new" 1968 versions of the clauses, ASPR (DAR) 7-602.3 and FPR 1-7.602-3.

343. ASBCA No. 19,439, 76-1 BCA ¶11,816.

344. Mil-Pak Company, Inc., supra n. 328; R.R. Tyler, supra n. 339.

345. Weintraub, supra n. 270, at 53-56.

346. ASBCA No. 12149, 70-2 BCA ¶8373.

347. H.L. Yoh Co., Inc. v. U.S., 153 Ct.Cl. 104, 288 F.2d 493 (1961).

348. Colo-Macco, supra n. 315; Skidmore, Owings, & Merrill, ASBCA No. 8346, et al., 1963 BCA ¶3727; G.A. Karnavas Painting Co., NASA BCA No. 28, 1963 BCA ¶3633; Farnsworth & Chambers Co., supra n. 315; Burton-Rodgers, Inc., ASBCA No. 5438, 60-1 BCA ¶2558; Hotpoint Co., ASBCA No. 3745, 57-2 BCA ¶1513; Todd Shipyards Corporation, As Subcontractor, ASBCA Nos. 2911 and 2912, 57-1 BCA ¶1185.

349. Carlin-Atlas, GSBCA No. 2061, 66-2 BCA ¶5872; Meritt-Chapman & Scott Corp., supra n. 315; Milcom Products, Inc., ASBCA No. 9948, 66-1 BCA ¶5371.

350. De Sonia Construction Co., Inc., ENG BCA Nos. 3231, et al., 73-1 BCA ¶9797 (1972); Merando, Inc., GSBCA No. 3513, 72-2 BCA ¶9483; Preferred Contractors, Inc., ASBCA No. 15616, 72-1 BCA ¶9283; Fred McGilvray, Inc., ASBCA Nos. 15741 and 15778, 71-2 BCA ¶9113; Merando, Inc., GSBCA No. 3300, 71-1 BCA ¶8892.

351. U.S. v. Cunningham, 125 F.2d 28 (CA DC 1941), quoted in Merando, Inc., supra n. 350, at 41,327.

352. See Piracci Construction Co., Inc., supra n. 325, aff'g 74-1 BCA ¶10,647; Cameo Bronze, Inc., GSBCA No. 3646, 73-2 BCA ¶10,135; Baltimore Contractors, GSBCA No. 3489, 73-1 BCA ¶9428. In a more recent case involving the latter contractor, the Board reaffirmed its position that there must be some kind of written communication to the contracting officer satisfying the 20-day apprisal notice requirement. Baltimore Contractors, Inc., GSBCA No. 3791, 77-1 BCA ¶12,234 (1976). However, in this particular case the board found a sufficient written communication. It may be that the GSBCA's strictness is more theory than practice if great liberality is used in determining whether a sufficient written notice can be found. Once over this hurdle, this board is just as liberal as the others in applying the prejudice rule to failures to submit claims within the 30-day period.

353. Fischbach & Moore, Inc., EBCA No. 20-1-77, 77-1 BCA ¶12,520; Monmouth Fund, Inc., ASBCA No. 19682, 77-1 BCA ¶12,462; United Baeton International, VACAB No. 1206, 76-2 BCA ¶12,167. In the latter case, the board explained that strict compliance with the written notice requirement of the contract is waived only in cases where the government already has actual knowledge of the facts giving rise to the claim in a timely manner. In the extended discussion on this topic in Hartford Accident & Indemnification Co., supra n. 328, the Interior Department Board left open the issue of whether the 20-day notice period would be strictly applied absent proof of prejudice by the government.

354. Prejudice may be shown somewhat more easily in "Differing Site Conditions" cases. See Chapter 3, below.

355. R.C. Hedreen, supra n. 343; but see Gloe Construction, Inc., ASBCA Nos. 26434, 26814, 84-2 BCA ¶17,289, where prejudice was found because the contractor's conduct and failure to provide notice of an alleged constructive change denied the contracting officer the opportunity to exercise his own judgment.

356. See R.C. Hedreen Company, ASBCA No. 20043, 77-2 BCA ¶12,836; Monmouth Fund Inc., supra n. 353.

357. Hawaiian Airmotive, A Division of Pastushin Industries, Inc., ASBCA Nos. 7231, et al., 65-2 BCA ¶4946.

358. ENG BCA Nos. 3981, 4072, 80-2 BCA ¶14,659.

359. This may be seen as a pure lack of notice case. If the board accepted that the contractor did the work on the basis of direction by a government representative, as opposed to work as a volunteer, then the board could easily have held that the knowledge of the representative who gave the order was imputed to the contracting officer. Given such knowledge, the contracting officer arguably would then have the obligation to act under the Hoel-Steffen line of cases, and the lack of evidence would be the government's fault! Likewise, a rejection of a claim based on the lack of any prior government knowledge may be a straight enforcement of the notice provision. Marine Electric RPD, Inc., supra n. 339.

360. AGBCA No. 79-180-4, 83-2 ¶16,701; see also, Kurtz Construction Co., ASBCA No. 25598, 81-1 BCA ¶15,127; Joseph Morton Co., Inc., GSBCA No. 4815, 81-1 BCA ¶14,980.

361. See E.C. Morris & Son, ASBCA No. 20697, 77-2 BCA ¶12,622.

362. ASBCA No. 20536, 77-1 BCA ¶12,355.

363. See also, Ionics, Inc., ASBCA No. 16094, 71-2 BCA ¶9030.

364. See n. 278, 279, and 280, supra and accompanying text.

365. Samuel S. Palumbo v. U.S., 125 Ct.Cl. 678, 689 (1953); Thompson v. U.S., 91 Ct.Cl. 166 (1940); Allied Repair Service, Inc., IBCA No. 1381-8-80, 83-1 BCA ¶16,204; Human Advancement, Inc., HUD BCA No. 77-125-C15, 81-2 BCA ¶15,317; Hangar One, Inc., ASBCA Nos. 19460, 19461, 76-1 BCA ¶11,830; A.L. Harding, Inc., DCAB No. PR-44, 65-2 BCA ¶5261; Anderson-Nichols & Co., ASBCA No. 6524, 61-2 BCA ¶3204; Wyle Maddox, IBCA No. 248, 61-1 BCA ¶2931; Caribbean Construction Corporation, IBCA No. 90, 57-1 BCA ¶1315.

366. Ardelt-Horn Construction Co. v. U.S., 207 Ct.Cl. 995 (1975), aff'g on other grounds ASBCA No. 14550, 73-1 BCA ¶12,476.

367. John V. Boland Construction Co. v. U.S., _____ Ct.Cl. _____ (No. 26-67, March 1, 1972), (17 CCF ¶81,176).

368. ASBCA No. 5105, 58-2 BCA ¶1989.

369. 156 Ct.Cl. 695, cert. denied 370 U.S. 911 (1962).

370. FAR 52.236-2.

371. Id. This clause is modeled closely on the clause adopted in 1968 for use in both the DAR and FPR. See DAR 7-602.4 and FPR 1-7.602-4. That clause did not substantively change the relevant notice provisions from the standard clause then known as the "Changed Conditions" Clause which had been in use in Standard Form 23A for many years. Thus, case law involving notice requirements in prior clauses will generally still be applicable.

372. Detailed discussions of the application of the "Differing Site Conditions" Clause are beyond the scope of this paper. For further information, see, e.g., Nash & Cibinic, supra n. 19, at pp. 1260-1289; Weintraub, supra n. 270; Laedlein, "Differing Site Conditions", 19 AF Law Rev. 1 (1977); Ellison, "Changed Conditions: An Analysis Based on Recent Court and Board Decisions," 30 Fed. B. J. 13 (1971); Currie, Ansley, Smith, and Abernathy, "Differing Site [Changed] Conditions," Briefing Papers No. 71-5, Federal Publications, Inc., (October 1971); and Greenberg, "Problems Relating to Changes and Changed Conditions on Public Contracts," 3 Pub. Cont. L. J. 135 (August 1970). For a perspective concentrated on changed condition clauses in non-federal contracts, see Currie, Abernathy, and Chambers, "Changed Conditions," Construction Briefings No. 84-12, Fed. Pubs. Inc. (1984).

373. See, e.g., W.C. Shepherd dba W.C. Shepherd Co., War Department BCA No. 857 (1946), 4 CCF ¶60,116.

374. J.J. Welcome Construction Co., Inc., ASBCA No. 19653, 75-1 BCA ¶10,997; Charles T. Parker Construction Co., DCAB No.

PR-41, 65-1 BCA ¶4780; Heppner Engineering Co., Inc., GSBCA No. 871, 65-1 BCA ¶4723, and Layne Texas Co., IBCA No. 362, 65-1 BCA ¶4658.

375. The final payment restriction is identical to that in the "Changes" Clauses and the same rules are applicable. See the discussion in Chapter 2 above.

376. R.R. Tyler, supra n. 339.

377. J.J. Welcome Construction Co., Inc., supra n. 374.

378. Morgan Construction Co., IBCA No. 299, 1963 BCA ¶3855.

379. Farnsworth & Chambers Co., Inc. v. U.S., 171 Ct.Cl. 30, 346 F.2d 577 (1965); Ray D. Bolander Co., IBCA No. 331, 65-2 BCA ¶5224.

380. Allied Contractors, Inc. v. U.S., 149 Ct.Cl. 671, 277 F.2d 464 (1960).

381. T&B Builders, Inc. obo Lee Turzillo Contracting Co., ENG BCA No. 3664, 77-2 BCA ¶12,663.

382. Tecon Corporation, ENG BCA No. 2782, 75-1 BCA ¶11,282.

383. Northeast Construction Co., ASBCA No. 11049, 67-1 BCA ¶6195.

384. ASBCA No. 6005, 60-1 BCA ¶2655.

385. But see Lord Brothers Contractors, Inc., GSBCA No. 1078, 1964 BCA ¶4318, where notice to government representatives other than the contracting officer was deemed inadequate on the theory that the government was prejudiced since the contracting officer, had he been notified, might have adopted a different, less expensive approach.

386. S. Kane & Sons, Inc., VACAB No. 1254, 78-1 BCA ¶13,100; R.R. Tyler, supra n. 339. See also B.J. Lucarelli & Co., ASBCA No. 6107, 1962 BCA ¶3269. Here, notice to the architect-engineer was deemed adequate "substantial compliance" with the notice requirement.

387. Leiden Corporation, ASBCA No. 26136, 83-2 BCA ¶16,612.

388. Klefstad Engineering Co., Inc. and Blackhawk Heating & Plumbing Co., Inc., VACAB No. 522, 66-1 BCA ¶5678.

389. Hiestand, supra n. 268, at 178; 32 Fed. Reg. 16269, 26270 (1967) (the appendix to the publication of the "new" clauses explaining the nature and intent of the changes.

390. Strum Craft Co., Inc., ASBCA No. 27477, 83-2 BCA ¶16,683, aff'g 83-1 BCA ¶16,454.

391. Hiestand, supra n. 268, at 178; William E. Klingensmith, Inc., GSBCA No. 3161, 71-2 BCA ¶9049.

392. DAR 7-602.46; FPR 1-7.602-32. The clause is presently found at FAR 52.212-12.

393. Supra n. 332 and accompanying text. See also, Weintraub, supra n. 270, at 49ff.

394. See, e.g., Roberts, "Changes Conditions Under Government Construction Contracts," 8 AF JAG Law Rev. 29, (Mar-Apr 1966), which cites cases going back to 1953 for this same principle (at p. 30, fn. 3).

395. See Eric Brittain, AGBCA No. 83-251-1, 84-2 BCA ¶17,429; Albert J. Demaris, AGBCA No. 437, 75-2 BCA ¶11,359; M.M. Sundt Construction Co., supra n. 330; McCloskey & Co. Inc. and C.H. Leavell & Co., PSBCA No. 497, 74-1 BCA ¶10,479; Troup Brothers, Inc., ENG BCA No. 3030, 72-2 BCA ¶9491; and Piracci Construction Co., Inc., GSBCA No. 2793, 70-1 BCA ¶8172.

396. 645 F.2d 950, Ct.Cl. No. 128-79C (Ct.Cl. 1981).

397. ASBCA No. 21637, 78-2 BCA ¶13,310.

398. Eric Brittain, supra n. 395.

399. Dayton Construction Company, HUD BCA No. 82-746-C34, 83-2 BCA ¶16,809; Mel Williamson Construction Co., VACAB No. 1199, 76-2 BCA ¶12,168; Klingensmith, supra n. 391.

400. Parcoa, Inc., supra n. 279; R.R. Tyler, supra n. 339.

401. Actual knowledge: see, e.g., Schouten Construction Co., DOT CAB No. 77-4, 79-1 BCA ¶13,360; S. Kane & Sons, Inc., supra n. 386; T&B Builders, Inc, supra n. 381; R.C. Hedreen Co., GSBCA No. 4289, 77-1 BCA ¶12,521; Jack Crawford Construction Corporation, GSBCA Nos. 4089, 4090, 75-2 BCA ¶11,387; M.M. Sundt Construction Co., supra n. 330; Clark F. Cass and Walt Alloway, IBCA No. 813-11-69, 70-1 BCA ¶8270; George A. Fuller, ASBCA No. 8524, 1962 BCA ¶3619; and Peter Kiewit Sons' Company, ASBCA No. 5600, 60-1 BCA ¶2580.

Constructive knowledge: Peabody N.E., Inc., ASBCA No. 26410, 85-1 BCA ¶17,867; J. & J. Paving, Inc., DOT CAB No. 1570, 85-1 BCA ¶17,840; Bohemia, Inc., ENG BCA No. 4305, 84-3 BCA ¶17,650; Roger J. Au & Son, Inc., IBCA No. 1303-9-79, 84-1 BCA ¶17,094; and Leiden Corporation, supra n. 387.

402. Roger J. Au & Son, Inc., supra n. 401; Strum Craft Co., Inc., supra n. 390; Larco Painting Company, supra n. 384; R.C. Hedreen Co., supra n. 401; William F. Klingensmith, supra n. 391.

403. Peterson Sharpe Engineering Corp., ASBCA No. 18780, 77-1 BCA ¶12,299; C.H. Leavell & Co., supra n. 308 and accompanying text.

404. C.E. Wylie Construction Co., ASBCA Nos. 26545, 26600, 85-1 BCA ¶17,933; J. & J. Paving, Inc., supra n. 401; William F. Klingensmith, supra n. 391.

405. Weintraub, supra n. 270, at 54-55.

406. Ct.Cl. No. 221-79c (1980), 28 CCF ¶80,816, aff'g 77-2 BCA ¶12,660.

407. GSBCA No. 4815, 81-1 BCA ¶14,980.

408. ASBCA No. 17029, 77-1 BCA ¶12,511.

409. Other typical cases include: Human Advancement, Inc., supra n. 365; A & M Gregos, Inc., PSBCA No. 632, 81-1 BCA ¶15,083; Powell's General Contracting Co., DOT CAB No. 1088, 80-2 BCA ¶14,680; Maverick Diversified, Inc., NASA BCA No. 874-19, 75-1 BCA ¶11,081; S.S. Mullen Construction, Inc., IBCA No. 860-7-70, 72-1 BCA ¶9227; MSI Corporation, VACAB No. 730, 68-2 BCA ¶7177; Carson Linebaugh, Inc., ASBCA No. 11384, 67-2 BCA ¶6640; Vitro Corporation of America, IBCA No. 376, 67-2 BCA ¶6536; City Electric of Anchorage, Inc., ASBCA Nos. 6505, 6545, 6798, 1962 BCA ¶3512; Coleman Electric Company, ASBCA No. 4895, 58-2 BCA ¶1928.

410. Supra n. 390.

411. Id., at 83,015-83,016.

412. Supra n. 401.

413. See Shepherd Co. v. U.S., 125 Ct.Cl. 724, 730, 113 F.Supp. 648 (1953); Farnsworth & Chambers v. U.S., supra n. 379; Heppner Engineering Co., Inc., supra n. 374.

414. Cf., Ross & Co. v. U.S., 126 Ct.Cl. 323, 115 F. Supp. 187 (1953); Monad Engineering Co. v. U.S., 53 Ct.Cl. 179 (1918).

415. Supra n. 392.

416. FAR 52.232-20.

417. An exception would be the final payment restriction. Tighter definitions would be useful here (see discussion in Chapter 2, Section A.6), but experience with other clauses would indicate that strict application of any such rule would be unlikely, unless Congress added a statutory limitation analogous to the 90-day appeal period included in the CDA.

418. As noted by Mr. Justice Cardozo, "[a] system of procedure is perverted from its proper function when it multiplies impediments to justice without the warrant of clear necessity." Dissenting opinion, Reed v. Allen, 286 U.S. 191, 209 (1932).

419. King and Little, "Critique of Public Construction Contract Remedies With Recommended Changes," 5 Pub. Cont. L. J. 1 (April 1972), at 2 (footnote omitted). The article presents an interesting summary of the Court of Claims efforts to continue an expansive role despite Supreme Court decisions prescribing a more restrictive role in the government contract disputes area. Whether the reorganization implemented by the Federal Courts Improvement Act of 1982 will eliminate this attitude remains to be seen. However, the new USCC is made up of many of the same individuals who previously served as Court of Claims Trial Commissioners. Likewise, many Court of Claims Judges now sit as members of the Court of Appeals for the Federal Circuit. The USCC will continue to fill the unique role of a court dedicated to hearing cases against the U.S. I see no reason to believe that it will change the basic philosophy of its predecessor, except where compelled to do so by statute, the C.A.F.C., or Supreme Court.

420. Supra n. 199.

421. Id., at 72. Obviously, enforcing the clause as written did not strike this judge as rational and workable, and the benefits of finality, contrasted with the minimal burden involved in filing a timely appeal, were not a convincing argument to him. Congress, though it saw fit to extend the appeal period's length in the CDA, did not adopt the broader discretion approach which the Court of Claims had expoused. It would appear that only such affirmative legislation will restrain the court in these types of cases.

422. See Buford, supra n. 270, at 1, alluding to Mr Justice Holmes' famous comment in Rock Island, Arkansas, & Louisiana R.R. v. United States, supra n. 191.

423. Though the government's superior negotiating power is mythical in certain major acquisitions involving hugh corporations, it remains true in the vast majority of cases that contractors deal with the government on its terms, take it or leave it. Even if a contractor voluntarily enters the agreement

with the government, the courts and boards have not felt constrained by that action to refuse to invoke the doctrine of unconscionability. Though notice cases discussed herein have not expressly invoked that doctrine, the theory seems to apply in many cases.

424. See, e.g., Weintraub, supra n. 270, at 61-66.

425. It should be no surprise that courts and boards are reluctant to restrict contractor recovery of equitable adjustment when they perceive that the government's true goal is to protect itself from its own mismanagement.

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