



THE NEW BOARDS OF CONTRACT APPEALS: Are They Still Predictable?

A Research Report Issued by the
Navigant Construction Forum

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December 2010

NAVIGANT



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Purpose of Research Report

The U.S. Government's Boards of Contract Appeals ("BCA" or "Boards") are not at all new in the government construction and procurement industries. Of the existing Boards, the Armed Services Board of Contract Appeals ("ASBCA") is the oldest. The ASBCA was created some 60 years ago, in 1949 through the merger of two predecessor Boards.¹ As another author pointed out in 1964, "At present there are eleven boards of contract appeals in the various departments and agencies engaged in the procurement of supplies and services."²

Practitioners in the construction bar are familiar with these Boards as well as the legislation and rules under which they operate. Most attorneys who represent contractors working under Federal contracts have spent considerable time studying the Boards and their decisions along with those of the United States Court of Federal Claims ("the CFC"). Thus, this report does not discuss the rules, procedures, deadlines or operations of the Boards or the CFC.

Most attorneys practicing in the government contract arena have formed their own opinions concerning whether a contractor should appeal a Contracting Officer's denial of a claim to a Board or the CFC. It has been generally accepted that the Boards have more specialized knowledge and familiarity with construction issues and disputes than the CFC. Many attorneys have expressed the opinion that issues such as schedule delay, constructive changes, differing site conditions, constructive suspensions of work, and the like are more predictable in the Board forum. Other attorneys have also commented that disputes before the Boards are less expensive and faster (although some attorneys offer an opinion exactly the opposite pointing to the Board tendencies to grant more discovery whenever asked and their failure to enforce trial calendars).

¹ Fletcher H. Etheridge, *Appeals from Administrative Decisions in Government Contract Disputes*, Texas Law Review, May, 1953.

² Joel P. Shedd, Jr., *Disputes and Appeals: The Armed Services Board of Contract Appeals*, 29 Law & Contemporary Problems 39 (1964).



What is now of concern among attorneys involved with construction disputes is that after consolidation of almost all Boards into two – the Armed Services Board and the Civilian Board, whether these new Boards are still the contractor’s “best bet”. That is, since all sitting judges of the previous Boards were moved into the new Boards, the question arises – are these Boards still more knowledgeable of construction and construction-related issues? While judges appointed to the Boards must have at least five years of public contract law experience, there is no assurance that any of their previous experience was in any way related to construction.³

This report provides statistical analysis of Board decisions in an effort to provide food for thought for legal counsel facing the typical client questions: “Now that the Contracting Officer has denied all or a part of my claim, what are my options? What do you recommend and why?”

³ 41 U.S.C. §§ 438(b)(2), 607(b)(1) and 5 U.S.C. § 3105 (2000).



Boards of Contract Appeals and Recent Consolidations

As noted earlier, the Boards are not new creatures in government contracting. As far back as 1964 there were 11 Boards established by Federal agencies. The Contract Disputes Act of 1978 (“CDA”)⁴ authorized an agency head to establish an individual agency Board after consultation with the Office of Federal Procurement Policy (“OFPP”) Administrator

“...when the volume of contract claims justifies a board of at least three members ‘who shall have not other inconsistent duties’. The Act also authorized the agency head to arrange for appeals arising within his or her agency to be decided by a board of contract appeals of another executive agency when he or she determines that the agency’s volume of contract claims is not sufficient to justify establishment of its own board, or if ‘he otherwise considers it appropriate...’.”⁵

Under the CDA, the Boards are independent and quasi-judicial forums that are not intended to act as representatives of the Government. They are “...quite distinct from...” the agencies that establish them.⁶ And, as these authors note, the Boards are not subject to direction or control by procuring agency management authorities.

The Boards are intended and designed to provide “...to the fullest extent practicable, informal, expeditious, and inexpensive resolution of disputes...”⁷ arising from government contracts. The legislative history of the CDA commented that “...the contractor should feel that he is able to obtain his ‘day in court’ at the agency boards and at the same time have saved time and money through the agency board process.”⁸

⁴ 41 U.S.C. §§ 601 – 613 (2000).

⁵ Frederick J. Lees, *Consolidation of Boards of Contract Appeals: An Old Idea Whose Time Has Come?*, Public Contract Journal, Spring, 2004.

⁶ Michael J. Schaengold and Brams, Robert S., *Choice of Forum for Government Contract Claims: Court of Federal Claims vs. Board of Contract Appeals*, 17 The Federal Circuit Bar Journal 279, No. 3, 2008.

⁷ 41 U.S.C. § 607(e).

⁸ Senate Report No. 95-1118, 1978.



Statistics concerning the volume of claims filed with the various Boards are, as numerous authors and attorneys have noted over the years, quite hard to locate. What is generally accepted is that the volume of claims submitted to the Boards rose substantially in the early 1980s, while the late 1980s and early 1990s were a period of steady decline. Later in this report statistics are provided for the reader's review and use concerning the Boards, cases filed, etc. located during the Navigant Construction Forum's research.

Consolidation of Boards, likewise, is not new. As noted earlier, the ASBCA was formed through a consolidation of two previous Boards – the Army (formerly the War Department) and the Navy Boards of Contract Appeals as far back as 1949. Earlier Board consolidations or elections include the following:

- **1984** – The Department of Commerce (“DOC”) elected to have the appeals of their claims denials decided by the General Services Administration Board (“GSBCA”).⁹
- **1993** – Due to the lack of cases being filed with their Board the National Aeronautics and Space Administration (“NASA”) chose to have claim appeals decided by the ASBCA.¹⁰
- **1999** – The GSBCA was appointed the authorized representative of the Secretary of State and the Procurement Executive for the purposes of hearing and resolving disputes related to State Department contracts subject to the CDA.¹¹
- **2000** – Due to the low volume of cases submitted, the U.S. Army Corps of Engineers Board (“ENGBCA”) consolidated with the ASBCA.¹²
- **2003** – The Department of Justice (“DOJ”) elected to have appeals of their contract decisions resolved before the Department of Transportation Board (“DOTBCA”).¹³

⁹ FAR 1333.70-1, 49 Fed. Reg. 12,964 (March 30, 1984).

¹⁰ 58 Fed. Reg. 44,462 (August 23, 1993).

¹¹ 48 C.F.R. § 633.270-2; 64 Fed. Reg. 43,628 (August 17, 1999).

¹² See *ENGBCA to Merge with ASBCA*, 42 Government Contractor ¶ 290, July 26, 2000.

¹³ 48 C.F.R. § 2833.211 (2003).



- **2003** – The Department of Homeland Security (“DHS”) also elected to use the DOTBCA rather than establish its own Board.¹⁴
- **2006** – The Department of Health and Human Services (“DHHS”) elected to have their disputes heard by the ASBCA.¹⁵
- **2006** – The United States Agency for International Development (“AID”) also elected to have their disputes adjudicated by the ASBCA.¹⁶
- **2006** – The Department of the Treasury elected to have the GSBCA handle their contract disputes.¹⁷
- **2006** – The Department of Education also elected to use the GSBCA to resolve appeals of their disputes.¹⁸

The single largest Board consolidation, however, came about with the passage of the National Defense Authorization Act for Fiscal Year (FY) 2006.¹⁹ Section 846 of this Act established the Civilian Board of Contract Appeals (“CBCA”). The new CBCA, which was established within the General Services Administration, consolidated most, but not all, other Boards including the following:

- GSBCA
- DOTBCA
- Department of Agriculture Board (“AGBCA”)
- Department of Veterans Affairs Board (“VABCA”)
- Department of Interior Board (“IBCA”)
- Department of Energy Board (“EBCA”)

¹⁴ See *DOTBCA Will Decide DHS CDA Appeals*, 80 Fed. Contr. Rep. (BNA) No. 9 (September 16, 2003) and 48 C.F.R. § 3033.211 (2006).

¹⁵ 48 C.F.R. § 333.203 (2006).

¹⁶ 48 C.F.R. § 733.270-1 (2006).

¹⁷ 48 C.F.R. § 1033.201 (2006).

¹⁸ 48 C.F.R. § 3433.203 (2006).

¹⁹ Public Law No, 109-163, 119 Stat. 3136, 3391 (January 6, 2006).



- Department of Housing and Urban Development Board (“HUDBCA”)
- Department of Labor Board (“LBCA”)

Additionally, the Act removed the ASBCA’s jurisdiction concerning appeals from decisions related to the Department of Health and Human Services and the Agency for International Development. Jurisdiction over contract disputes with these agencies was transferred to the CBCA.²⁰

As a result, today there remains only four Boards within the Federal procurement structure as follows:

- ASBCA – With jurisdiction over disputes arising from Department of Defense (“DOD”) contracts including those of the Departments of the Army, Navy and Air Force and all other agencies, components and entities within DOD as well as disputes arising from contracts with NASA.
- CBCA – With jurisdiction over disputes arising from all civilian agencies other than NASA, the U.S. Postal Service and the Tennessee Valley Authority.
- Postal Service Board (“PSBCA”) – With jurisdiction over contract disputes with the U.S. Postal Service and the Postal Rate Commission.
- Tennessee Valley Authority Board (“TVABCA”) – With jurisdiction over some of TVA’s contracts.²¹

²⁰ Michael J. Schaengold and Brams, Robert S., *A Guide to the Civilian Board of Contract Appeals*, Thomson/West Briefing Papers, No. 07-8, July 2007.

²¹ The CDA applies to TVA contracts only in certain situations. See 41 U.S.C. §§ 607(a)(2) and (b)(2); 18 C.F.R. § 1308.3 (2005); and 41 U.S.C. 602(b).



Previously Published Boards of Contract Appeals Statistics

As noted earlier, many have lamented the dearth of statistics relating to the Boards, their caseload and their decisions – any or all of which could potentially influence the advice that legal counsel will give their contractor clients when asked, “Which forum do you recommend?”

While performing the research for this report, the Navigant research staff located some previously published statistics that may be helpful to the construction bar. One of the more interesting articles containing summary statistics was authored by Michael J. Schaengold and Robert S. Brams and is entitled *Choice of Forum for Government Contract Claims: Court of Federal Claims vs. Board of Contract Appeals*.²² This article contained the following information.

ASBCA Statistics

FISCAL YEAR	2002	2003	2004	2005	2006
Cases Docketed	435	429	461	476	438
Cases Disposed Of	559	539	481	484	530
Decision Sustained ²³	23%	22%	23%	18%	16%
Pending as of October 1 st	782	672	652	644	552

For FY 2005, the ASBCA reported that, of the 150 decisions on merit, 58% (87) found merit for the contractor while during FY 2006, of the 137 appeals ruled on, 63% (86) determined merit for the contractor. It was noted that the ASBCA caseload had declined significantly in recent times as follows.

²² 17 The Federal Circuit Bar Journal 279, No. 3, (2008).



DATE	PENDING CASES
October 1, 1987	2,503
October 1, 1993	2,027
October 1, 2000	1,088
October 1, 2006	552

The article also offered some statistics on the ASBCA’s alternative dispute resolution (“ADR”) services provided pursuant to the Administrative Dispute Resolution Act of 1996²³ as follows:

FISCAL YEAR	2002	2003	2004	2005	2006
ADR Requests	79	42	39	39	39

In FY 2002, it was reported that 31 of the 33 cases (94%) submitted to their ADR procedures and service were successfully resolved. In FY 2005, 110 of the 111 (99%) were successfully resolved and in FY 2006, 19 of the 21 (90%) cases submitted to ADR were resolved.

GSBCA Statistics

FISCAL YEAR END	2000	2001	2002	2003	2004	2005	2006
CDA Cases Pending	166	150	148	172	154	156	126

This article reported that, of the 31 CDA decisions on the merits of claims issued by the GSBCA in FY 2005, 16 (52%) granted, in whole or in part, the requested relief. In FY 2006, 45 decisions on the merits resulted in 26 (58%) decisions for the contractor.

²³ 5 U.S.C. § 571 – 5841 (2000).



CBCA Statistics

Since the CBCA did not come into existence until January 1, 2007 and the referenced article was published in 2008, the article does not have a great deal of statistical information on the CBCA. However, some information was gathered and is set forth below.

On January 6, 2007 the CBCA had a caseload of 334 CDA appeals and 215 other cases. As of March 31, 2007, this caseload was 300 CDA appeals and 228 other cases. During the first quarter of its existence, the CBCA issued decisions on 81 CDA appeals while 47 new CDA appeals were filed. During this same quarter, the CBCA resolved 36 other cases while 49 other cases were filed. As of July 1, 2007, the CBCA's caseload was 303 CDA appeals and 239 other cases dropping to 262 CDA appeals and 260 other cases as of October 1, 2007. The article also noted that, during the first quarter of its existence, the CBCA issued 29 decisions on the merits on CDA appeals of which 18 (62%) were granted in whole or in part. During the period of July 1 through September 30, 2007, the CBCA decided 35 CDA appeals on the merits, granting relief in whole or in part in 28 (80%) cases.

Another older but still interesting article with some statistical data was authored by Frederick J. Lees and entitled *Consolidation of Boards of Contract Appeals: An Old Idea Whose Time Has Come*.²⁴ It is interesting to note that, despite the fact that from 1974 until 1985 the author was the Chairman of the NASABCA, he also comments that statistical data on the Boards is difficult to find. Mr. Lee's article offers some additional statistics concerning the Boards.

Pro se Appellants – In a study of ASBCA decisions issued during the five-year period ending in 2000, *pro se* appellants won some 43% of the decisions in which they represented themselves.²⁵

²⁴ *Public Contract Law Journal*, Spring, 2004.

²⁵ Mark A. Blevins, *Should You Appeal to the ASBCA?*, *Contract Management* 34 (October 2001).



The author concluded that *pro se* appellants fare neither worse nor any better than appellants represented by legal counsel.

Caseload per Judge – This article also calculated the number of cases per judge on the Boards based upon information obtained from OFPP concerning the number of contract claims closed and the number of judges serving on Boards during those years. OFPP in this workload study determined that, in 1978, 1,859 contract claims were closed by all then existing Boards. The number of judges that year on the Boards was 76. Thus, each judge closed approximately 24.5 contract claims per year. The article reported that, in the 1990 - 1991 timeframe, there were approximately 3,500 pending appeals and 78 Board members giving each a workload of approximately 45 cases. The author noted that the ASBCA had the highest caseload per judge at 65 appeals per judge. In 2004, with only 1,400 appeals pending and 57 judges, the caseload had decreased to approximately 25 each.

The article also offered the following statistics concerning appeals docketed and pending and cases closed per judge.



BOARD	YEAR	APPEALS DOCKETED	APPEALS PENDING	CASES CLOSED PER JUDGE
ASBCA	1987		2,503 (Peak Year)	
	1990	2,218 (Peak Year)		
	1998	796	1,266	
	1999	663	1,223	
	2000	722	1,088	28.6
	2001	539	906	24.0
	2002	435	782	18.6
	GSBCA	1982	593 (Peak Year)	716 (Peak Year)
1998		139	173	
1999		191	186	
2000		199	166	27.4
2001		83	150	12.4
2002		68	148	8.75
AGBCA		1987	311 (Peak Year)	393 (Peak Year)
	2000	79	105	
	2001	77	103	26.3
	2002	55	98	20.0
DOTBCA	1990	245 (Peak Year)	245 (Peak Year)	
	2000	29	87	
	2001	29	66	16.7
	2002	22	56	16.0
VABCA	1994	584 (Peak Year)	568 (Peak Year)	
	2000	401	425	
	2001	314	493	41.0
	2002	205	253	74.2



While these articles present an interesting picture and some quantitative information concerning the Boards, the picture may be misleading to the extent that the reader cannot tell whether these represent construction cases or all cases under contracts subject to the CDA. Based upon a reading of the articles, the Navigant Construction Forum™ believes that these statistics represent all cases before these Boards, not solely construction disputes. Since construction litigators are interested primarily only on dispute results related to construction contracts, the Navigant Construction Forum™ decided to perform our own research focusing on construction-related cases.



Research Methodology

Since the Navigant Construction Forum™ wanted to focus the study on construction disputes, we determined to examine all cases filed with selected Boards for specific timeframes before and after the consolidation of the Boards. The Navigant Construction Forum™ approached this study and the data to be analyzed somewhat like a Measured Mile Study (i.e., comparing before and after results) with the intervening event being the consolidation of the Boards into the ASBCA and the CBCA. Accordingly, the Navigant Construction Forum™ located cases from the following Boards for the following periods of time.

BOARD	TIMEFRAME
ASBCA	1991 - 2000
ASBCA	2001 - 2010
CBCA	2007 - 2010
ENGBCA	1991 - 2000
GSBCA	1991 - 2006
VABCA	1996 - 2006

The Navigant Construction Forum™ determined that the DOTBCA, the AGBCA, the IBCA, the HUDBCA, and the LBCA heard very few construction-related cases and, therefore, excluded them from this study. We also excluded the PSBCA, as it continues to exist today as a separate Board and thus has not been impacted by the recent Board consolidations.

The Navigant research staff utilized Lexis/Nexis to locate all case decisions from the selected Boards for the timeframes listed above. This gave the research team a total of 9,349 case decisions issued by the selected Boards during these years. However, it is recognized that the Boards have jurisdiction over disputes arising under expressed and implied-in-fact contracts entered into by a Federal agency including:



- The procurement of property other than real property,
- The procurement of services,
- The procurement of construction, alteration, repair or maintenance of real property
- The disposal of personal property,
- Cases arising under the Indian Self-Determination Act,
- Disputes between insurance companies and the Department of Agriculture's Risk Management Agency involving actions of the Federal Crop Insurance Corporation,
- Claims by Federal employees for reimbursement of expenses incurred while on official temporary duty travel or in connection with relocation to a new duty station, and
- Claims by carriers or freight forwarders involving actions of the GSA regarding payment for transportation services.

The research team then used keyword search criteria to winnow down the larger number of cases from these Boards and identify cases involving construction-related disputes. The following keyword search terms were used to accomplish this:

- Change
- Delay
- Differing site condition
- Termination
- Civil Engineer
- Construct
- Constructed
- Construction
- Design
- Designed



The key word criteria search reduced the number of decisions listed earlier to those construction disputes appealed to these Boards. This brought the number of decisions to be reviewed down to 1,990 decisions issued by these Boards within the timeframe chosen.²⁶ The research team then manually reviewed each decision to determine how the Boards ruled on each case, classifying each decision into one of the following three categories:

- For the Contractor (the Appellant)²⁷
- For the Government
- Mixed decision.²⁸

During the manual review of these 1,990 decisions, it was determined that an additional 9 decisions were not construction-related despite the search terms used and thus they too were eliminated from the final count in this report.

²⁶ For a listing of the cases included in this study refer to Appendices A – F to this report.

²⁷ It is noted that the Government cannot appeal a decision issued by a Contracting Officer and thus the appellant in case before a Board is the contractor.

²⁸ As the vast majority of decisions issued by the Boards are decisions “on the merits” of a claim, a “Mixed Decision” is one where the Board ruled that some points made by the Contractor are correct while some points raised by the Government are correct. The only way the Forum could deal with such decisions in this report was to classify them as “Mixed Decisions”.



Research Results

OLD BOARDS	YEARS	DECISIONS ISSUED	CONSTR CASES	DECISIONS IN FAVOR OF					
				CONSTR	%	GOV'T	%	MIXED	%
ASBCA	1991 - 2000	3,382	921	199	21.6%	449	48.8%	273	29.6%
ENGBCA	1991 - 2000	224	219	42	19.2%	106	48.4%	71	32.4%
TOTALS		3,606	1,140	241	21.1%	555	48.7%	344	30.2%
NEW BOARD									
ASBCA	2001 - 2010	1,115	412	111	26.9%	195	47.3%	106	25.7%
OLD BOARDS									
GSBCA	1996 - 2006	3,154	212	45	21.2%	102	48.1%	65	30.7%
VABCA	1996 - 2006	285	82	29	35.4%	38	46.3%	15	18.3%
TOTALS		3,439	294	74	25.2%	140	47.6%	80	27.2%
NEW BOARD									
CBCA	2007 - 2010	1,189	135	36	26.7%	55	40.7%	44	32.6%



Conclusion

During the period between 1991 and 2000 when the ASBCA and the ENGBCA operated as independent Boards they found for the contractor 21.6% and 19.2% of the time respectively for a combined average of 21.1%. Likewise, the ASBCA and the ENGBCA issued decisions in favor of the government 48.8% and 48.4% of the time respectively for a combined average of 48.7%. Mixed decisions from the ASBCA and the ENGBCA were 29.6% and 32.4% respectively for a combined average of 30.2%. Since the vast majority of Board decisions are “on the merit” of claims appeals under the CDA and since construction claims rising to the Boards tend to have multiple issues, the percentage of mixed decisions is not at all surprising. Starting in 2001 when the ASBCA and the ENGBCA were merged, the new ASBCA has found for contractors 26.9% of the time and for the government in 47.3% of the decisions issued, while 25.7% of the decisions were mixed.

It appears that there has been a slight increase of 5.8% in decisions favoring the contractor and a small decline of 4.5% of mixed decisions while the decisions for the government have remained relatively constant – 48.7% versus the current 47.3%. It appears that the merger of these two Boards has not impacted significantly the way in which they rule on construction-related cases. This is not surprising as the judges from both the ASBCA and the ENGBCA were well versed in construction issues and this knowledge appears to have carried over to the new ASBCA.

Prior to the creation of the CBCA, the GSBCA and the VABCA ruled for contractors 21.2% and 35.4% of the time respectively. Their combined average of rulings in favor of the contractor equaled 25.2%. Rulings for the government were 48.1% and 46.3% for the GSBCA and the VABCA respectively with a combined average of 47.6%. The GSBCA and the VABCA track record for mixed rulings was 30.7% and 18.3% respectively. This yielded a combined average of 27.2%. The recently created CBCA has ruled for the contractor 26.7% of the time, has decided in favor of the government 40.7% of the time, and issued mixed decisions 32.6% of the time.



Rulings in favor of the contractor have seen a slight increase of 1.5% while decisions favoring the government have declined 6.9% under the new CBCA. Mixed decisions have increased 5.4% of the time. It is probably too early to predict any significant shift in outcome of cases before the CBCA given that they have issued only 135 decisions in construction-related cases during their first three years of operation. However, it is interesting to note that decisions for the government have seen almost a 7% decline and mixed decisions have increased more than 5%. This may result from the fact that judges from previous non-construction-oriented Boards are now sitting on construction-related appeals thus causing them to eschew issuing decisions directly for the Government in favor of issuing mixed decisions.

If legal counsel and a contractor client are going to submit an appeal to the CBCA, one way to “hedge your bet” is to research previous Board decisions of those Boards that were merged into the CBCA to find previous decisions favoring your case as the CBCA has determined that decisions of the predecessor Boards are binding on the CBCA.²⁹

²⁹ *Business Management Research Associates v. General Services Administration*, CBCA No. 464, 07-1 BCA ¶ 33,486.



Future Efforts of the Navigant Construction Forum™

In the third quarter of 2011, the Navigant Construction Forum™ will issue its second report. This report, already underway, will perform the same statistical analysis on the outcome of cases before the United States Court of Federal Claims to determine how often they decide in favor of the government or the contractor or issue mixed decisions. This report will then offer a side-by-side comparison with Boards of Contract Appeals.

Further research will be performed and published by the Navigant Construction Forum™ as we move forward. If any readers of this report have ideas on further construction dispute-related research they believe would be helpful to the industry, they are invited to e-mail suggestions to Jim.Zack@NavigantConsulting.com.



Acknowledgements

The Navigant Construction Forum™ gratefully acknowledges the support of the Navigant Research Services Group headed up by Bill Schoeffler, Director. Without the effort of this Group, it would not have been possible for the Navigant Construction Forum™ to review the massive quantity of data and decisions in a few weeks' time. Specifically, the Navigant Construction Forum™ acknowledges the efforts of the research team assigned to this task and thank them for their diligent work within very tight deadlines.

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This research team made this report possible.



Appendices

Appendix A – ASBCA Cases: 1991 – 2000

Appendix B – ASBCA Cases: 2001 – 2010

Appendix C – CBCA Cases: 2007 – 2010

Appendix D – ENGBCA Cases: 1991 – 2000

Appendix E – GSBCA Cases: 1996 – 2006

Appendix F – VABCA Cases: 1996 - 2006

These appendices are accessible for review and download at:

www.navigantconsulting.com/ASBCAReportAppendices