



Board of Contract Appeals or Court of Federal Claims: What Type of Claim Do You Have?

A Research Report Issued by the
Navigant Construction Forum™

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Navigant Construction Forum™

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Purpose of Research Report

The purpose of this research report is to continue to compare and contrast the decisions of Boards of Contract Appeals and the U.S. Court of Federal Claims relative to the outcome of construction disputes. The objective of this research is to provide further information that may be helpful in the decision-making process when choosing to appeal a Contracting Officer’s final adverse decision to one of the Boards of Contract Appeals or to the Court of Federal Claims.

In the first research report in this series, The New Boards of Contract Appeals: Are They Still Reliable?¹, the Navigant Construction Forum™ examined construction dispute-related decisions of the pre-merger Boards of Contract Appeals from the following Boards –

BOARD	TIME FRAME
Armed Services BCA	1991 - 2000
Corps of Engineers BCA	1991 - 2000
General Services Administration BCA	1996 - 2006
Veterans Affairs BCA	1996 - 2006

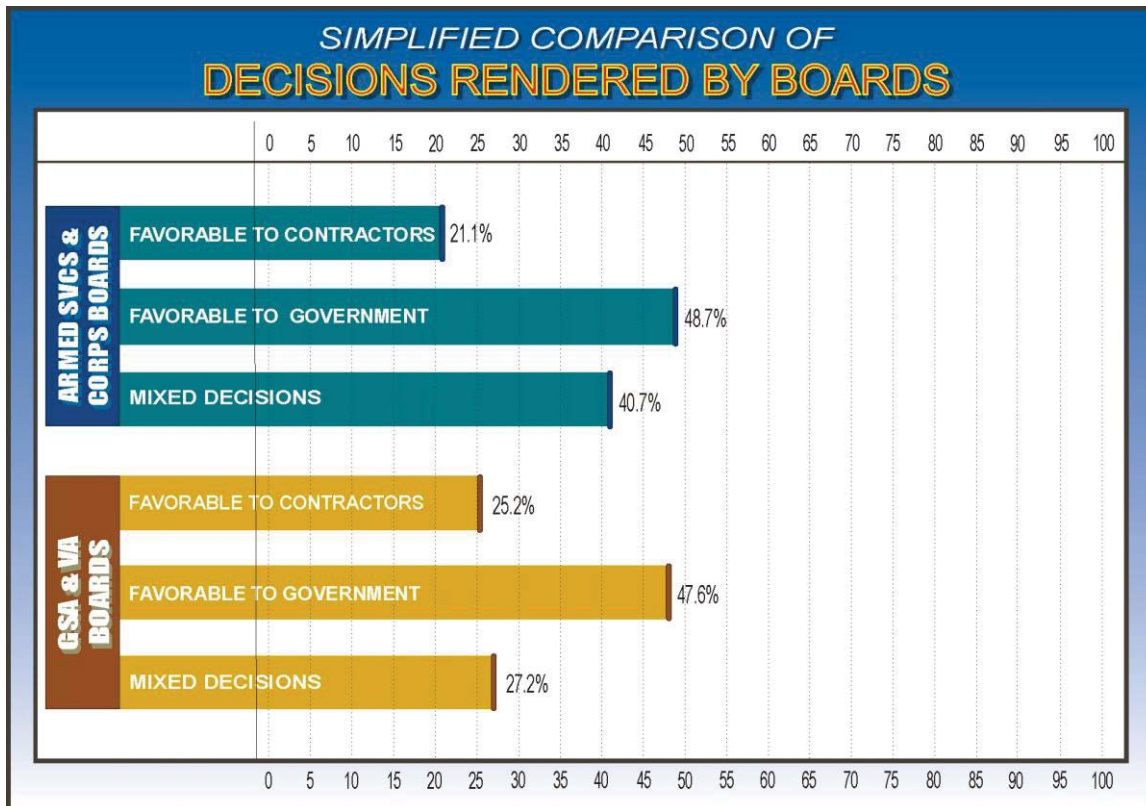
The Navigant Construction Forum™ determined that the Boards of Contract Appeals of the Departments of Transportation, Agriculture, Interior, Housing and Urban Development and Labor heard very few construction-related cases and therefore these Boards were excluded from this research study. Also excluded from this research was the Postal Service Board of Contract Appeals, as it continues to exist today as a separate Board and has not been impacted by the recent Board consolidations. The Navigant Construction Forum™ located some 1,990 construction-related decisions issued by the four Boards listed above and the two new consolidated Boards.

Of all the decisions rendered by the Armed Services and the Corps of Engineers Boards, it was determined that 21.1% found in favor of the contractor while those decisions favoring the government was 48.7%. The remaining decisions, 40.7%, were classified as Mixed Decisions².

¹ Navigant Construction Forum™ Research Report, The New Board of Contract Appeals: Are They Still Reliable?, Navigant Consulting, Inc., Chicago, IL, December, 2010.



Of those decisions issued by the General Services Administration and the Veterans Affairs Boards, approximately 25.2% were in favor of the contractor, 47.6% in favor of the government and the remaining 27.2% of their decisions were mixed.



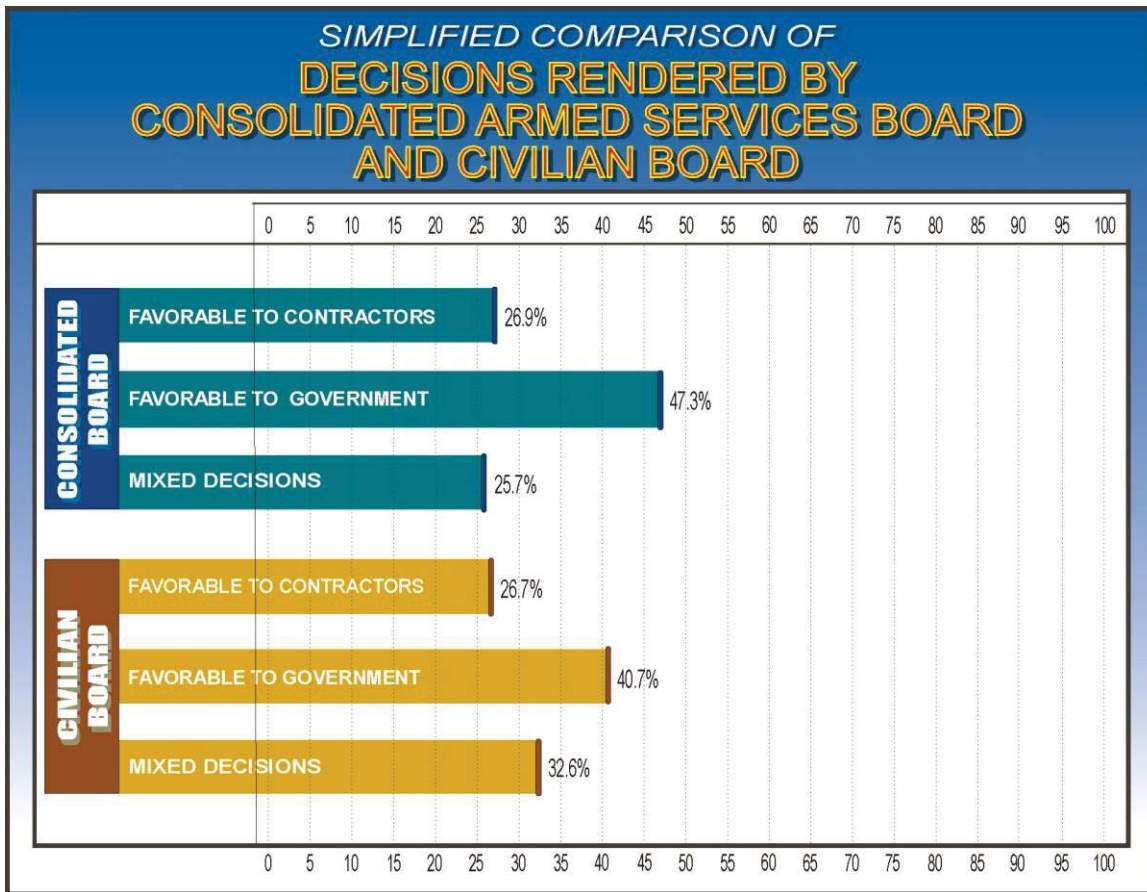
The Navigant Construction Forum™ then surveyed the construction-related decisions issued by the consolidated Boards. These are –

BOARD	TIME FRAME
Armed Services BCA	2001 - 2010
Civilian BCA	2007 - 2010

² As the vast majority of decisions rendered by the Boards are decisions “on the merits” of a claim, a “mixed decision” is defined herein as one where a Board rules that some arguments advanced by the contractor have merit while, at the same time, some of the arguments raised by the government also have merit. Thus, the Board decision on the merits is deemed to be a “mixed decision”.



The Navigant Construction Forum™ determined that the consolidated Armed Services Board has issued 26.9% of their decisions in favor of the contractor, 47.3% in favor of the government, while the remaining 25.7% were mixed decisions. This finding was compared to the decisions issued by the Civilian Board during the first three years of this new Board’s life. It was determined that the Civilian Board has issued 26.7% of their decisions in favor of the contractor, 40.7% in favor of the government, and 32.6% of their decisions were mixed.



The initial report concluded that –

1. The merger of the Armed Services and Engineers Boards has not significantly impacted the outcome of construction-related cases appealed to the new Armed Services Board. The percentage of decisions for the contractor or for the government remains relatively consistent with the percentages of the previous separate Boards, as have the percentage of mixed decisions.



2. The recently created Civilian Board has issued decisions in which the percentage in favor of the contractor has increased 1.5%; the percentage of decisions favoring the government has decreased some 6.9%; and the percentage of mixed decisions has increased 5.4% when compared to the decisions of its predecessor Boards.

The second research report released by the Navigant Construction Forum™ was entitled Board of Contract Appeals or Court of Federal Claims: The Contractor’s Irrevocable Choice³. The Navigant Construction Forum™ examined all 4,770 decisions issued by the Court of Federal Claims between October 1992 and December 2010. Using key word search terminology the number of decisions related to construction disputes was reduced to 652. An eyes-on review of this tranche of decisions concluded that only 182 of the Court of Federal Claims decisions were actually construction-related. These decisions were reviewed to determine the percentage of outcomes in favor of the contractor versus those in favor of the government, with the following results.

DECISIONS IN FAVOR OF	PERCENTAGE
Plaintiff (contractor)	23.60%
Defendant (government)	45.10%
Mixed Decisions	31.30%

The Navigant Construction Forum™ then went back to the December 2010 research data to obtain comparison data for the consolidated Boards of Contract Appeals, with the following result.

ASBCA DECISIONS IN FAVOR OF	PERCENTAGE
Plaintiff (contractor)	26.90%
Defendant (government)	45.10%
Mixed Decisions	31.30%
CBCA DECISIONS IN FAVOR OF	PERCENTAGE
Plaintiff (contractor)	26.70%
Defendant (government)	40.70%
Mixed Decisions	32.60%

³ Navigant Construction Forum™ Research Report, Board of Contract Appeals or Court of Federal Claims: The Contractor’s Irrevocable Choice, Navigant Consulting, Inc., Chicago, IL, April, 2011.



The Navigant Construction Forum™ determined that there is little statistical difference in the outcome of cases before the Court of Federal Claims or the Boards of Contract Appeals. Therefore, we concluded that the decision of whether to appeal a Contracting Officer's final decision to a Board or the Court should not depend, to any significant degree, on the statistical outcome of past decisions. Other factors may have more significance on this decision-making process than the statistical likelihood of a favorable decision from either a Board or the Court. Those factors include:

- Availability of accelerated or expedited procedures or ADR
- Filing deadlines
- Who remains in control of potential settlement discussions and decisions subsequent to filing of an appeal
- The need for more or less discovery
- The potential of government counterclaims or False Claims accusations

Subsequent to the preparation and release of the second research report, we determined the next logical question was whether these statistical outcomes were consistent regardless of the type of claim. The Navigant Construction Forum™ decided to prepare a third research report. This report examines the outcome of Board and Court of Federal Claims decisions by claim type.



Research Methodology

As the objective of this report is to provide a comparison between the current Boards of Contract Appeals and the Court of Federal Claims by type of claim, the Navigant Construction Forum™ sought to determine whether the percentages of wins versus losses on the part of the contractor remained constant despite the type of claim.

In typical North American contracts, there are 11 basic types of claims – based on the equitable relief clauses common in contracts. They are claims arising from –

1. Directed Changes
2. Constructive Changes
3. Differing Site Conditions
4. Directed Suspension of Work
5. Constructive Suspension of Work
6. Force Majeure
7. Delays
8. Directed Acceleration/Deceleration
9. Constructive Acceleration
10. Termination for Convenience
11. Termination for Default

In the previous two research reports, the Navigant Construction Forum™ had identified and gathered some 2,172 construction-related cases. Examination of all cases for each of the 11 types of claims was not feasible given time and staff limitations. Therefore, we decided to break down the 11 types of claims into the following four categories.

<u>CATEGORY</u>	<u>CLAIM TYPE</u>
Changes	Directed Changes Constructive Changes Directed Acceleration/Deceleration
Differing Site Conditions	Differing Site Conditions



CATEGORY

CLAIM TYPE

Delays

Directed Suspension of Work
 Constructive Suspension of Work
 Force Majeure
 Delays
 Constructive Acceleration

Terminations

Termination for Convenience
 Termination for Default

These are logical categories under most contracts since they are sorted by causation. That is Change claims are caused when the owner directs or somehow causes a change to the work, which is typically treated under the Changes clause of most contracts. If a differing site condition is encountered, it is disposed of under the Differing Site Condition or Changed Site Condition clause. Suspensions of Work (both Directed and Constructive), Force Majeure events, Delays and Constructive Acceleration all typically cause or arise from project delays and thus are schedule-oriented and handled under one of the clauses dealing with delay – the Delay, Suspension of Work or Force Majeure clauses. Finally, termination actions are dealt with under one of the two typical Termination clauses.

The Navigant Construction Forum™ started this research project with the following assumptions in mind.

- Claims appealed to either of the Boards or to the Court of Federal Claims are generally well documented claims. We made this assumption on the basis that claims that are not well documented are almost certain to fail. A contractor and their legal counsel know this and are probably reluctant to invest the money necessary to prosecute an appeal in the face of an almost certain loss.
- Contractors determined to appeal a Contracting Officer’s final decision are generally very serious about pursuing their claims in light of the time, money and effort necessary to do so. And those who are not all that serious at the outset will be appropriately advised by their legal counsel and are likely to drop their claim prior to commencing trial.



- Legal counsel representing contractors who have decided to appeal a Contracting Officer's denial to a Board or the Court are generally skilled in representing contractors in these forums and are well experienced. The basis for this thinking is that a contractor serious about pursuing its claim to either forum will seek legal counsel who has a great deal of experience representing contractors before the Boards or the Court.
- The typical construction claim being appealed to one of the Boards of Contract Appeals or the Court of Federal Claims is probably quite complicated. That is, very well documented, straightforward and/or single issue claims tend, in the experience of the Navigant Construction Forum™, to be settled on the project between the contractor and the government leaving only the more complicated claims to continue into a formal legal dispute.

With these assumptions in mind, the Navigant Construction Forum™ started this research project with the idea that the variances in the decisions issued on these four categories of claims do not arise from lack of documentation or poor legal representation. Rather, variances in decisions arise from something else. The Navigant Construction Forum™ established the two working hypotheses set forth below at the outset.

1. The first working hypothesis was that the outcome of Change and Termination claims should be fairly consistent across the Boards of Contract Appeals and the Court of Federal Claims. The assumption underlying this hypothesis was that these two types of claims tend to be more “legal” in nature in that they focus on whether a contract was somehow modified by action of the owner or whether the owner followed all contractual procedures when terminating a contractor. Additionally, when termination is contemplated by a contracting officer, contracting officers typically seek legal advice from attorneys within their agency or department and thus are most often carefully guided by these attorneys. Thus, the hypothesis went, judges (who are generally well experienced attorneys) should consistently determine the outcome of these two categories of claims based on their own legal training and experience.
2. The second hypothesis continued with the thought that Differing Site Conditions and Delay claims are much more technical than legal and little in the training or experience of the typical attorney/judge prepares them for understanding geotechnical issues or forensic scheduling. As a result, it was hypothesized that the outcome of the decisions concerning



these two categories of claims would be much less consistent across the Boards and the Court.

The research team manually reviewed all 2,172 cases decisions to categorize each decision into one of the four categories – Changes, Differing Site Conditions, Delays or Terminations. The research team was able to categorize 1,654 cases into one of these categories. The team found that the decisions in the remaining 518 cases were unclear as to the predominant cause of the claim. Thus, it was not possible to place these cases into one of these categories.



Research Results

The results of the preliminary analysis are set forth below.

➤ Change Claims

PRE-MERGER BOARDS OF CONTRACT APPEALS

BOARD	CONTRACTOR	PERCENTAGE	GOVERNMENT	PERCENTAGE	MIXED	PERCENTAGE	TOTAL
ASBCA	76	24.60%	193	62.46%	40	12.94%	309
COEBCA	20	30.77%	41	63.08%	4	6.15%	65
GSBCA	8	16.00%	35	70.00%	7	14.00%	50
VABCA	4	10.53%	8	21.05%	26	68.42%	38
Totals	108	23.38%	277	59.96%	77	16.67%	462

CONSOLIDATED BOARDS OF CONTRACT APPEALS

BOARD	CONTRACTOR	PERCENTAGE	GOVERNMENT	PERCENTAGE	MIXED	PERCENTAGE	TOTAL
ASBCA	41	28.08%	85	58.22%	20	13.70%	146
CBCA	3	75.00%	1	25.00%	0	0.00%	4
Totals	44	29.33%	86	57.33%	20	13.33%	150

COURT OF FEDERAL CLAIMS

	CONTRACTOR	PERCENTAGE	GOVERNMENT	PERCENTAGE	MIXED	PERCENTAGE	TOTAL
	10	25.64%	27	69.23%	2	5.13%	39

➤ Delay Claims

PRE-MERGER BOARDS OF CONTRACT APPEALS

BOARD	CONTRACTOR	PERCENTAGE	GOVERNMENT	PERCENTAGE	MIXED	PERCENTAGE	TOTAL
ASBCA	55	22.92%	138	57.50%	47	19.58%	240
COEBCA	4	9.30%	29	67.44%	10	23.26%	43
GSBCA	7	28.00%	10	40.00%	8	32.00%	25
VABCA	3	21.43%	8	57.14%	3	21.43%	14
Totals	69	21.43%	185	57.45%	68	21.12%	322



CONSOLIDATED BOARDS OF CONTRACT APPEALS

BOARD	CONTRACTOR	PERCENTAGE	GOVERNMENT	PERCENTAGE	MIXED	PERCENTAGE	TOTAL
ASBCA	29	24.17%	58	48.33%	33	27.50%	120
CBCA	2	25.00%	5	62.50%	1	12.50%	8
Totals	31	24.22%	63	49.22%	34	26.56%	128

COURT OF FEDERAL CLAIMS

CONTRACTOR	PERCENTAGE	GOVERNMENT	PERCENTAGE	MIXED	PERCENTAGE	TOTAL
24	40.00%	30	50.00%	6	10.00%	60

➤ Differing Site Condition Claims

PRE-MERGER BOARDS OF CONTRACT APPEALS

BOARD	CONTRACTOR	PERCENTAGE	GOVERNMENT	PERCENTAGE	MIXED	PERCENTAGE	TOTAL
ASBCA	24	27.91%	44	51.16%	18	20.93%	86
COEBCA	12	25.53%	30	63.83%	5	10.64%	47
GSBCA	3	42.86%	1	14.29%	3	42.86%	7
VABCA	3	21.43%	8	57.14%	3	21.43%	14
Totals	42	27.27%	83	53.90%	29	18.83%	154

CONSOLIDATED BOARDS OF CONTRACT APPEALS

BOARD	CONTRACTOR	PERCENTAGE	GOVERNMENT	PERCENTAGE	MIXED	PERCENTAGE	TOTAL
ASBCA	20	38.46%	22	42.31%	10	19.23%	52
CBCA	0	0.00%	0	0.00%	0	0.00%	0
Totals	20	38.46%	22	42.31%	10	19.23%	52

COURT OF FEDERAL CLAIMS

CONTRACTOR	PERCENTAGE	GOVERNMENT	PERCENTAGE	MIXED	PERCENTAGE	TOTAL
5	19.23%	18	69.23%	3	11.54%	26



➤ Termination Claims

PRE-MERGER BOARDS OF CONTRACT APPEALS

BOARD	CONTRACTOR	PERCENTAGE	GOVERNMENT	PERCENTAGE	MIXED	PERCENTAGE	TOTAL
ASBCA	29	25.00%	74	63.79%	13	11.21%	116
COEBCA	7	41.18%	10	58.82%	0	0.00%	17
GSBCA	7	46.67%	7	46.67%	1	6.67%	15
VABCA	4	40.00%	5	50.00%	1	10.00%	10
Totals	47	29.75%	96	60.76%	15	9.49%	158

CONSOLIDATED BOARDS OF CONTRACT APPEALS

BOARD	CONTRACTOR	PERCENTAGE	GOVERNMENT	PERCENTAGE	MIXED	PERCENTAGE	TOTAL
ASBCA	23	31.94%	43	59.72%	6	8.33%	72
CBCA	2	25.00%	6	75.00%	0	0.00%	8
Totals	25	31.25%	49	61.25%	6	7.50%	80

COURT OF FEDERAL CLAIMS

	CONTRACTOR	PERCENTAGE	GOVERNMENT	PERCENTAGE	MIXED	PERCENTAGE	TOTAL
	5	21.74%	17	73.91%	1	4.35%	23



**Summary Analysis of Board and Court of Federal Claims Decisions
by Type of Claim**

The Navigant Construction Forum™ then summarized the results of the current rulings of the consolidated Boards – the Armed Services and the Civilian Boards of Contract Appeals – and the Court of Federal Claims in order to test the earlier stated hypotheses. The summary comparison and commentary is set forth below⁴.

Change Claims

BOARD	CONTRACTOR	GOVERNMENT	MIXED
ASBCA	28%	58%	14%
CBCA	75%	25%	0%
CFC	26%	69%	5%

This comparison indicates that, if the contractor is appealing a Contracting Officer’s adverse final decision related to a change claim on a contract with a civilian agency, it is substantially more likely to prevail if it appeals to the Civilian Board of Contract Appeals than to the Court of Federal Claims. However, this statistic is based on a very small number of cases. Had one Civilian Board decision gone the other way, the percentage in favor of the contractor could have increased to 100% or dropped to 50%. The influence of a single case, given the small number decided to date, is inordinately influential. The case decisions from the Civilian Board concerning Change claims bear watching in the future to see if the high rate of sustaining contractor claims continues. As between the Armed Services Board of Contract Appeals and the Court of Federal Claims, there is little statistical difference in decisions ruling in favor of the contractor. However, it is noted that the Armed Services Board issues approximately 2.8 times the number of Mixed Decisions than the Court of Federal Claims.

⁴ The percentages may not add up to 100% in all cases due to rounding.



Delay Claims

BOARD	CONTRACTOR	GOVERNMENT	MIXED
ASBCA	24%	48%	28%
CBCA	25%	63%	13%
CFC	40%	50%	10%

This comparison shows that decisions concerning Delay claims in favor of the contractor are substantially higher out of the Court of Federal Claims than either the Armed Services or the Civilian Boards of Contract Appeals. This percentage is based on a fairly large sample of cases and represents a significant difference between the Court and the Boards. Again, it is noted that percentage of decisions in favor of the contractor appears fairly consistent between the two Boards of Contract Appeals. However, there is a good deal of difference concerning the decisions in favor of the government between these two Boards which is reflected in the percentage of Mixed Decisions issued by the Armed Services Board when compared to the Civilian Board.

Differing Site Condition Claims

BOARD	CONTRACTOR	GOVERNMENT	MIXED
ASBCA	38%	42%	19%
CBCA	0%	0%	0%
CFC	19%	69%	12%

As of the time the data was collected, at the end of 2010, the Civilian Board of Contract Appeals had issued no decisions on a Differing Site Condition claim. Thus no data was available for this research report. However, as between the Armed Services Board and the Court of Federal Claims, the Armed Services Board found in favor of contractors twice as often as the Court of Federal Claims on decisions related to differing site conditions. Of interest to the Navigant Construction Forum™ also was the fact that the Armed Service Board found for the government 26% less of the time than the Court of Federal Claims on decisions related to this type of claim. It is also noted that the Armed Services Board issued Mixed Decisions 7% more of the time than Court of Federal Claims.



Termination Claims

BOARD	CONTRACTOR	GOVERNMENT	MIXED
ASBCA	32%	60%	8%
CBCA	25%	75%	0%
CFC	22%	74%	4%

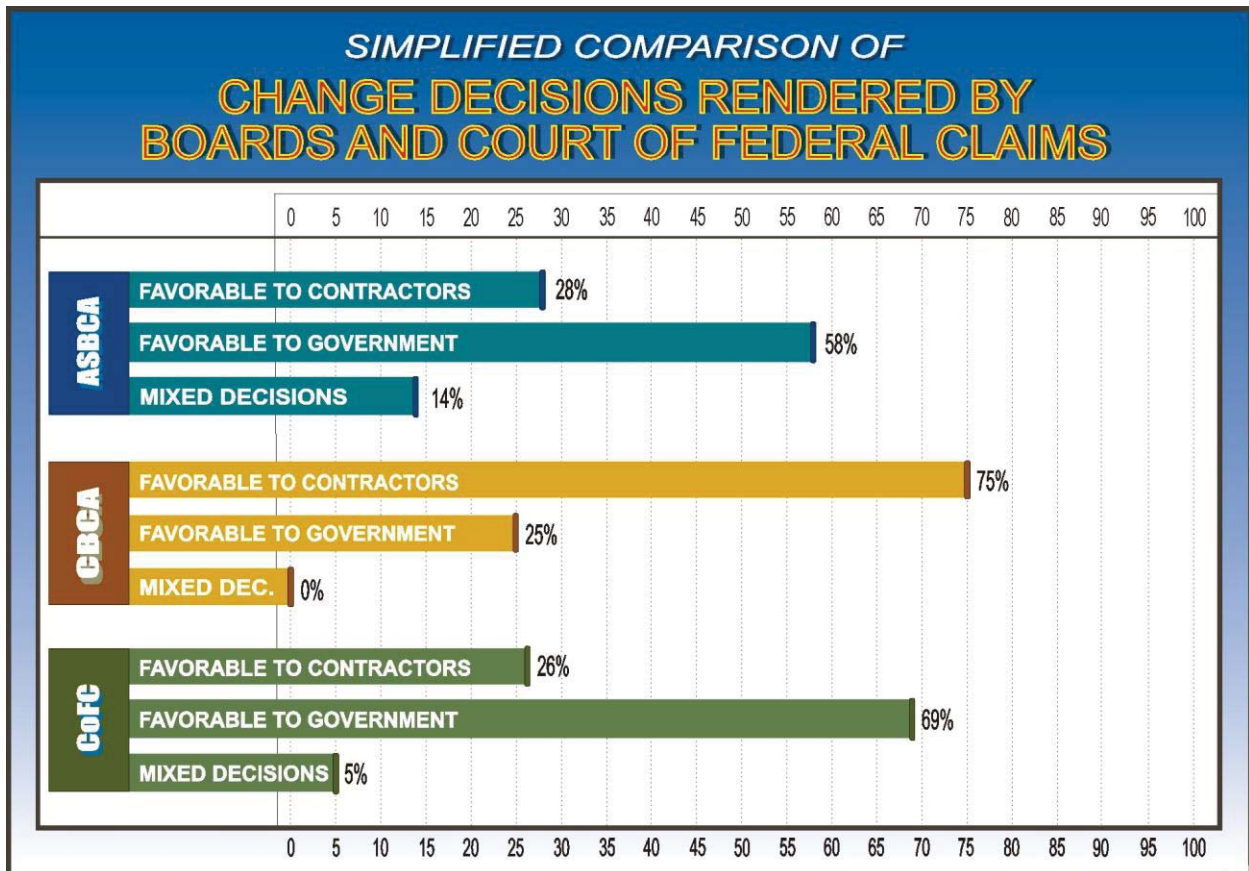
In the case of decisions related to termination claims, both the Armed Services and the Civilian Board ruled for the contractor more frequently than the Court of Federal Claims by margins of 10 and 3 percentage points respectively. It is noted also that the Armed Services Board rules for the government approximately 14% less of the time than the Court of Claims and doubles the percentage of Mixed Decisions when compared to the Court of Federal Claims.



Conclusions

The Navigant Construction Forum™ has concluded that the two hypotheses posited at the outset of this research study were not borne out by the research. The first hypothesis was that the outcome of Change and Termination claims would be fairly consistent across the Boards of Contract Appeals and the Court of Federal Claims. But, as the research showed, decisions related to Change and Termination claims were not consistent between the remaining Boards of Contract Appeals and the Court of Federal Claims with respect to Change claims or Termination claims, as shown below, contrary to what was expected.

Change Claims Range of Decisions

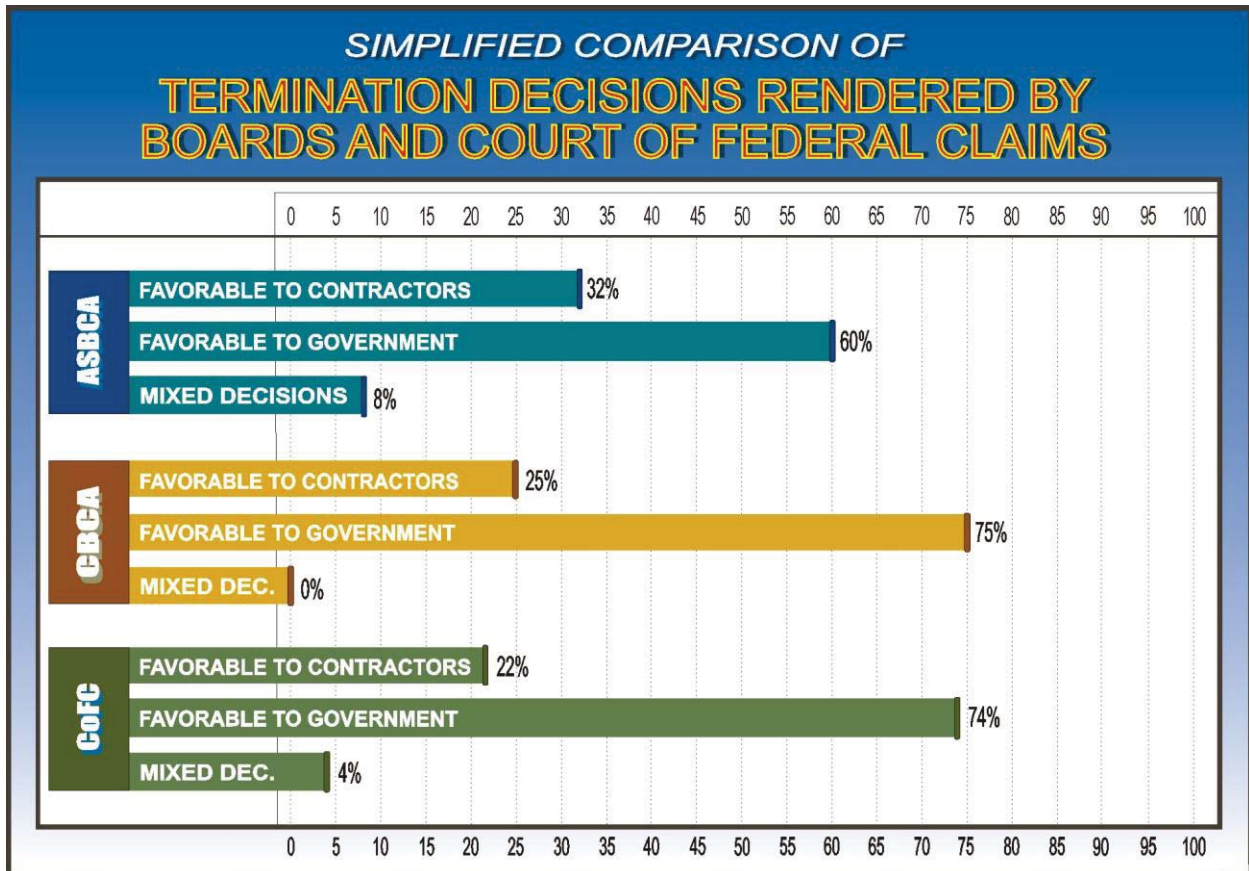


Decisions favorable to the contractor range from a low of 26% (CoFC) to a high of 75% (CBCA), a spread of 49 percentage points, while decisions for the government range from 25% (CBCA) to 69%



(CoFC), a 44% differential; and mixed decisions range from 5% (CoFC) to 14% (ASBCA), a 9 percentage point split.

Termination Claims Range of Decisions



Decisions for the contractor range from a low of 22% (CoFC) to a high of 32% (ASBCA), a range of 10 percentage points, while decisions favoring the government are in the range of 60% (ASBCA) to 75% (CBCA), a spread of 15 percentage points; and mixed decisions run from 4% (CoFC) to 8% (ASBCA), a 4 percentage point range (discounting the fact that the CBCA has, as of the end of 2010, not issued any mixed decisions on Termination claims).

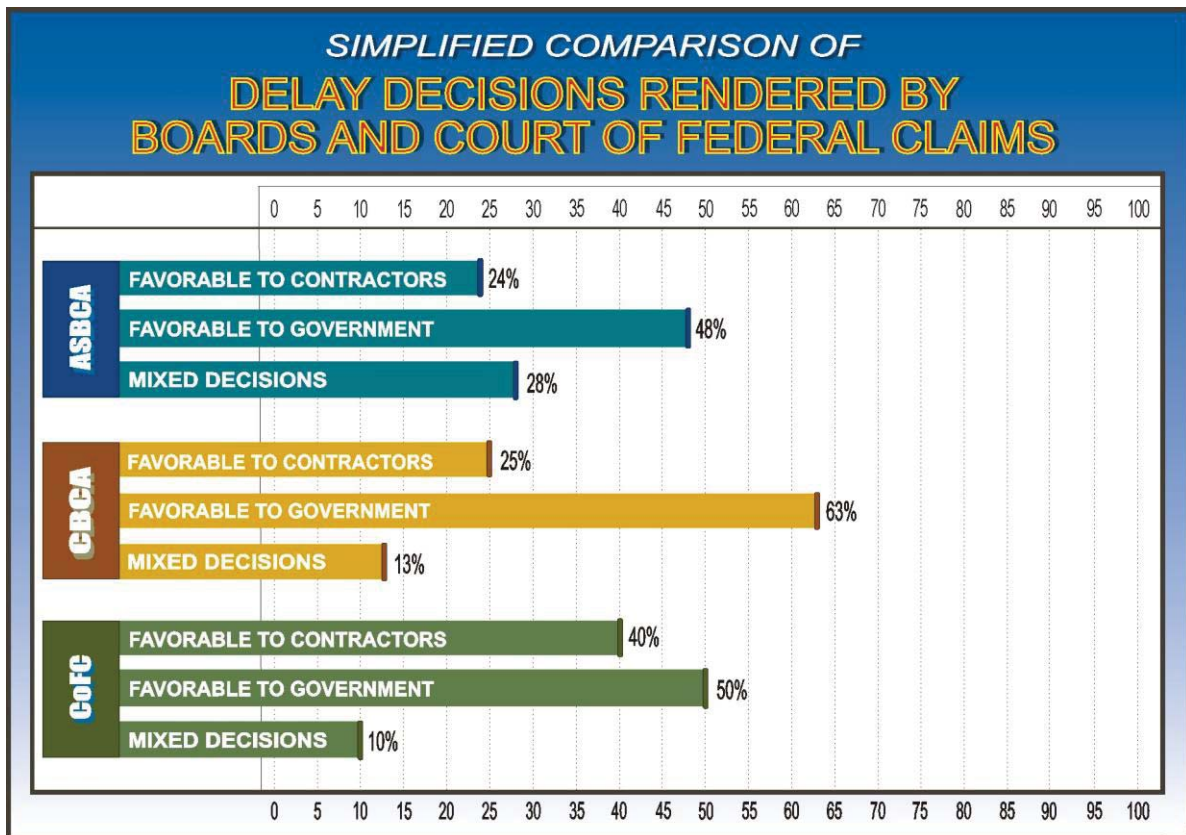


While the Board and Court decisions are more consistent with respect to Termination claims than they are concerning Change claims, they are above what the Navigant Construction Forum™ expected to find when this research began. Decisions on Change claims favoring the contractor

varied by a great deal and there was a wide variance with respect to decisions supporting the government. Regardless of the fact that these two types of claims are more legal in nature than technical, all other things being equal, the judges sitting on the Boards and the Court do not decide these types of cases consistently.

The second hypothesis established at the outset of this research report was that there would be a much wider variation in decisions between the Boards and the Court with respect to the two more technical claims – Delays and Differing Side Conditions. This, too, turned out to be incorrect. In fact, the variations in decisions on Delays and Differing Site Conditions are closer than the variations concerning Change and Termination claims.

Delay Claims Range of Decisions

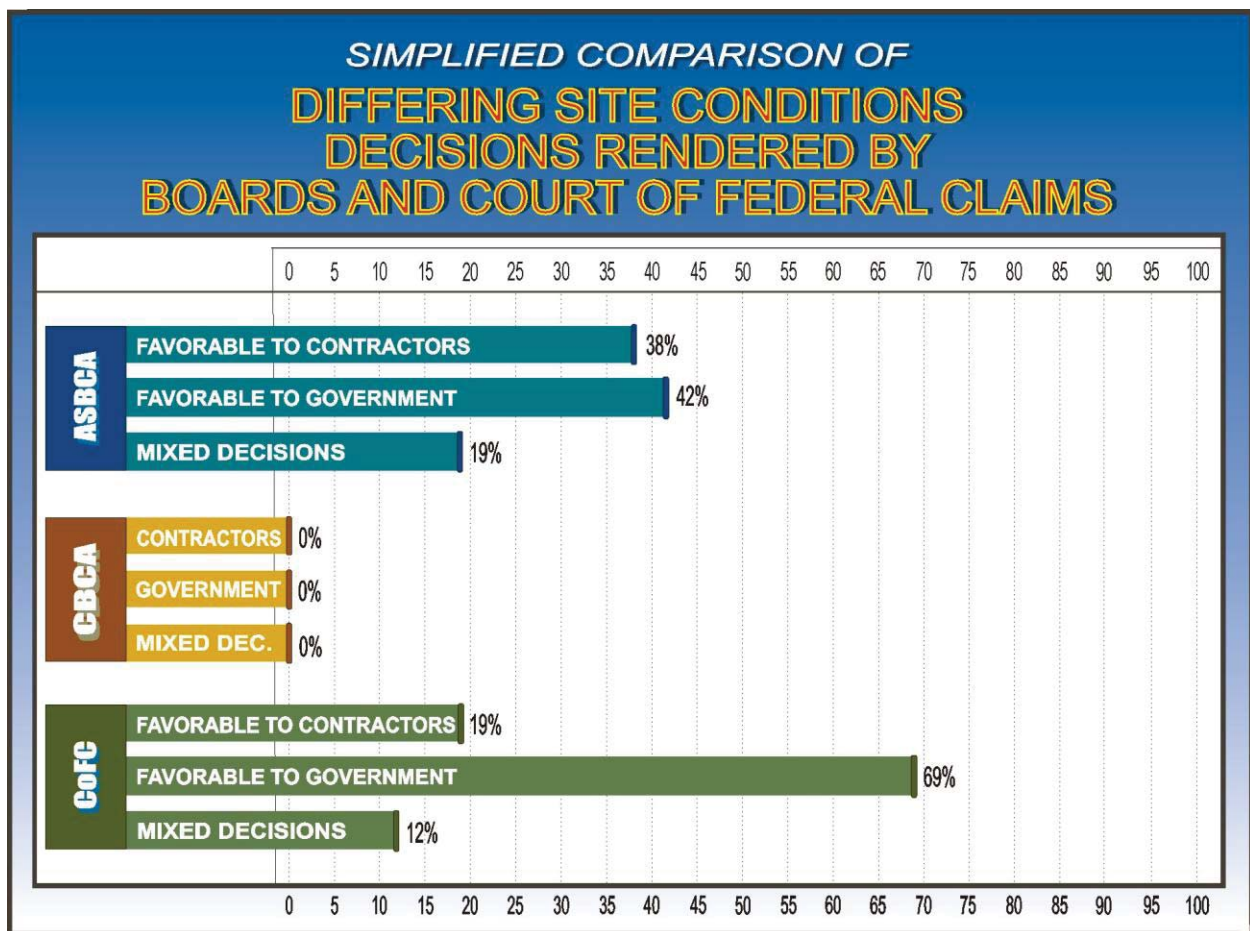




Decisions for the contractor range from a low of 24% (ASBCA) to a high of 40% (CoFC), a range of 16 percentage points, while decisions favoring the government are in the range of 48%

(ASBCA) to 63% (CBCA), a spread of 15 percentage points; and mixed decisions run from 10% (CoFC) to 28% (ASBCA), an 18 percentage point variation.

Differing Site Condition Claims Range of Decisions



Decisions for the contractor range from a low of 19% (CoFC) to a high of 38% (ASBCA), a range of 19 percentage points, while decisions favoring the government are in the range of 42% (ASBCA) to 69% (CoFC), a spread of 27 percentage points; and mixed decisions run from 12% (CoFC) to 19% (ASBCA), a 7 percentage point range.



Again, the variations in decisions of the Boards and the Courts were not nearly as great as the Navigant Construction Forum™ anticipated finding when this research started. Apparently the more technical nature of these two types of claims does not lead to a much wider variation in decisions as was expected.

As the Civilian Board of Contract Appeals issues more decisions, perhaps these ranges will narrow, but it will take some years before this occurs.

Despite the fact that the hypotheses set forth by the Navigant Construction Forum™ were not supported by the research data, it is believed that the data developed in this research report will still be helpful to legal counsel trying to answer the question frequently posed by their clients –

“Now that the contracting officer has denied the claim, do you think we should appeal it to the Board of Contract Appeals or the Court of Federal Claims?”



Future Efforts of the Navigant Construction Forum™

In the fourth quarter of 2011, the Navigant Construction Forum™ will continue its analysis of construction industry issues. Navigant Consulting has partnered with McGraw Hill and the law firm of Pepper Hamilton in the preparation of a groundbreaking survey of the drivers of risk on construction projects. The results of this survey will enable construction industry participants to become better leveraged to manage risk and learn about best practices related to risk management going forward.

The research reports scheduled for release in the first two quarters of 2012 and will be oriented toward current trends in the area of construction claims and disputes. Further research will continue to 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@navigant.com.



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This research team made this report possible.

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