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BY THE U.S. GENERAL ACCOUNTING OFFICE

Report To The Chairman, Committee
On Governmental Affairs
United States Senate

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The Armed Services Board Of Contract
Appeals Has Operated Independently

Although the Board is not organizationally independent of the Department of Defense, no centralized control over the Board's activities is exercised within the Department. Further, the Board is perceived by members of the contracting community to be independent in its decision-making process.

However, members of contract appeal boards are not as insulated as they could be from agency control. Members are appointed and the Office of Personnel Management maintains can be removed by the agencies which bring disputes before the boards. Other employees who perform quasi-judicial functions like board members are selected from a government-wide register and can be removed only by the Merit Systems Protection Board. Legislation should be considered if the Congress wants to insulate board members from agency control to the same degree as other quasi-judicial employees.



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UNITED STATES GENERAL ACCOUNTING OFFICE
WASHINGTON, D.C. 20548

NATIONAL SECURITY AND
INTERNATIONAL AFFAIRS DIVISION

B-198620

The Honorable William V. Roth, Jr.
Chairman, Committee on Governmental Affairs
United States Senate

Dear Mr. Chairman:

This report, prepared in response to your request of May 6, 1983, presents the results of our review of the Armed Services Board of Contract Appeals. The report discusses the independence of the Board and suggests that Congress consider the need for legislation to ensure Board members the same degree of independence as administrative law judges.

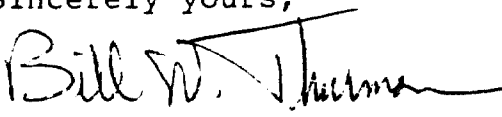
During the final processing of the report, we obtained information that at a recent private meeting with Board members, a key DOD official allegedly indicated DOD planned to change the selection procedures for Board members and the new chairman, and was unhappy with Board decisions. Since such information, if accurate, raises concern for the Board's continued independence, we decided to delay issuance of the report until we could ascertain what occurred at the meeting.

Based on discussions with Board members and the DOD official involved, we found no evidence that the Department has taken or plans to take any actions which would impair the independence of the Board. Specifically, we learned that (1) DOD currently plans no fundamental changes in the process used for the selection of Board members, although improvements to the process may be considered in the future; (2) the selection procedure for the new chairman is virtually the same as that which the Department used to select the previous chairman--the first appointed under the Contract Disputes Act; and (3) while no particular board decisions were mentioned, DOD management is concerned about the length of some decisions and the time taken to issue decisions. To address this concern, DOD has made management experience in a complex organization a key factor for the selection of a new chairman.

B-198620

As arranged with your office, unless you publicly announce its contents earlier, we plan no further distribution of this report for 30 days. At that time, we will send copies to interested parties and make copies available to others upon request.

Sincerely yours,


for Frank C. Conahan
Director

D I G E S T

The Armed Services Board of Contract Appeals is the oldest and largest government contract appeals board. It operates under the statutory authority of the Contract Disputes Act of 1978 and is chartered by the Secretaries of Defense and the Armed Services to decide military contract disputes. Board members are lawyers with a background in public contract law and are selected and appointed by the Department of Defense (DOD).

The Chairman, Senate Committee on Governmental Affairs, requested that GAO undertake a study of the Board addressing the following questions:

- Are there impairments to organizational and individual independence in the Board's charter, structure, and operating practices?
- Does the Board have sufficient knowledge and understanding of generally accepted accounting and cost principles?
- Are Board members selected, appointed, and removed in the manner prescribed for administrative law judges by the Administrative Procedure Act?

In addition, the Chairman requested that GAO study the Board's decisions to determine their effect, and the options available to the government and contractors to respond to the decisions.

THE BOARD'S ROLE AND PURPOSE

Generally, if a DOD contracting officer determines that a contractor has not complied with the terms of a contract, or with procurement regulations, standards, and laws, the contractor may appeal this decision to the Armed Services Board of Contract Appeals. The Board acts as the representative of the Secretaries of Defense and Armed Services in hearing and deciding contract disputes. The

purpose of the Board is to provide the parties to a contract dispute a fair and relatively fast resolution, which serves to avoid the great expense involved in court cases. To maintain its credibility, the Board must have a reputation of independence among contractors and government officials.

The Board has 33 members appointed by DOD and a support staff of 22. One member is appointed by DOD as the Chairman and 2 as Vice Chairmen, and the other 30 members are assigned to 10 three member divisions, with 1 member designated as division head. (See p. 2.)

NO EVIDENCE THAT THE BOARD'S
INDEPENDENCE HAS BEEN IMPAIRED

GAO found that no centralized control over the Board's activities has been exercised within DOD. The Board's charter has been approved by the Deputy Secretary of Defense and the Secretaries of the Armed Services. Board members (including the Chairman and Vice Chairmen) are appointed by an Under Secretary of Defense and three Assistant Secretaries of the Armed Services. (See p. 7.). The internal organizational structure of the Board is determined by the Board's Chairman, and authority to control day-to-day operations is vested in the Chairman. The supervisory duties of the Chairman, Vice Chairmen, and division heads are mainly administrative.

Reports on the Board's activities are furnished to nine different DOD executives. The Armed Services and the Defense Logistics Agency each contribute to paying for the operation of the Board. Administrative support is supplied by the Secretary of the Army.

GAO discussed the Board's independence with a number of attorneys and contracting officials, both government and private, and all believe the Board decides disputes independent of external pressure. (See p. 11.)

The Chairman has delegated the authority to assign disputes to the Board's Recorder (a member of the staff) and division heads. Upon being assigned a dispute, a member hears the evidence presented by the parties.

The Board member may encourage the government and contractor to settle the dispute informally. If the parties do not settle, then the Board will decide the dispute. The Board member who heard the case then writes an opinion. Up to four other members also review the evidence and either agree with the opinion or write another opinion. The majority opinion of these members becomes the Board's decision. (See p. 10.)

The Board's Chairman and a Vice Chairman participate in most decisions issued by the Board, and through this process monitor the work of individual members. The Chairman conducts Board members' annual appraisals using standards similar to those established for the Senior Executive Service. GAO did not find that Board members' independence had been impaired by the Chairman, Vice Chairmen, or division heads in carrying out their supervisory duties. (See p. 9.)

THE BOARD'S ACCOUNTING KNOWLEDGE

During fiscal years 1980 through 1983, about 5 percent of the disputes disposed of by the Board involved accounting principles. While expertise and experience in accounting are not requisites for Board membership, and it is debatable whether or not they should be, GAO found that six Board members have some level of training or experience in accounting, and the Chairman's legal advisor, who can hear appeals, is a certified public accountant. (See p. 22.)

OPTIONS ARE AVAILABLE TO RESPOND TO BOARD DECISIONS

When the Board issues a decision on a contract dispute, this is not necessarily the final step in the dispute process. There are four options a contractor or the government can pursue when they disagree with a Board decision.

--Either party may ask the Board to reconsider its decision.

--The contractor can appeal the decision to a federal court, and the government can appeal decisions on contracts awarded after March 1, 1979, and decisions on previously awarded contracts if the contractor elects to proceed under the Contract Disputes Act.

--The government can change its regulations so that the Board's decision does not affect future contracts.

--Either party can request the Congress to enact legislation.

GAO found that over a 3-year period, the Board reconsidered about 4 percent of its 3,067 dispositions of disputes. During fiscal years 1980-1983 contractors appealed 70 decisions to federal court and the government appealed 7. GAO found examples of other actions which were taken to respond to Board decisions, and concluded that adequate remedies were available to contractors and the government. (See p. 25.)

BOARD MEMBERS ARE NOT FULLY
INSULATED FROM AGENCY CONTROL

Members of boards of contract appeals are selected, appointed and, according to the Office of Personnel Management (OPM), may be summarily removed by the agencies that are parties to contract disputes on which the boards issue decisions. The agency procedures for the selection and appointment of board members are not inconsistent with the Contract Disputes Act of 1978; the act is unclear regarding any removal protections afforded members; thus, board members are not as insulated from agency control as are administrative law judges appointed under the Administrative Procedure Act.

In 1972, the Commission on Government Procurement highlighted the need to insulate board members from agency control, and Congress sought to satisfy the need by enacting the Contract Disputes Act of 1978. The act called for Board members to be selected and appointed to serve in the same manner as administrative law judges, who are

provided certain protections against agency control under the Administrative Procedure Act. Under this act, OPM and the Merit Systems Protection Board have developed and implemented procedures to select, appoint, and remove administrative law judges.

The procedures for board members were developed and implemented by the agencies which have boards of contract appeals. The selection and appointment procedures are demonstrably similar to the OPM procedures for administrative law judges. However, removal procedures for board members are not similar. Because members are attorneys, OPM has determined that they may be removed without the right to appeal the removal action to the Merit Systems Protection Board. Administrative law judges may be removed only for good cause established and determined by the Protection Board.

Since passage of the act, continuous efforts have been made by the boards, DOD, OPM, and private interest groups to establish procedures that would insulate board members and safeguard their independence. However, the draft procedures have not been implemented because OPM believes the act did not provide it authority to establish procedures for the selection, appointment, and removal of board members. (See p. 12.)

MATTER FOR CONSIDERATION
BY THE CONGRESS

To assure that members of boards of contract appeals are insulated from agency control in their selection and removal, to the same degree as administrative law judges, Congress may want to consider amending the Contract Disputes Act of 1978 and the Administrative Procedure Act to give OPM and the Merit Systems Protection Board roles in these processes.

AGENCY COMMENTS AND
GAO'S EVALUATION

Comments on a draft of this report were received from the Board, DOD, OPM, General Services Administration, General Services Board of Contract Appeals, Section of Public

Contract Law of the American Bar Association, and the National Conference of Boards of Contract Appeals Members.

DOD concurred with the report's findings and conclusions. OPM reaffirmed its interpretation of the Contract Disputes Act; i.e., that the act did not authorize it to establish selection, appointment, and removal procedures for members of boards of contract appeals. OPM also stated it saw no need to assume such a role. OPM's comments also reflected its opinion that board members can be removed by the agency head because they serve in attorney positions.

The Board, General Services Administration, General Services Board, and the National Conference of Boards of Contract Appeals Members disagreed with OPM's interpretation. The Board stated that the act authorized OPM to establish a system of safeguards for board members similar to the system OPM developed for administrative law judges, and that OPM should reevaluate its position. The General Services Administration and its board expressed the view that the act was intended to fully safeguard the independence of board members, and board members cannot be summarily removed. Similarly the National Conference of Boards of Contract Appeals Members believes the courts would construe the act as assuring members' independence. The Section of Public Contract Law suggested that safeguards be implemented by the Executive Branch without involving OPM. GAO notes, however, that an agency head does not have authority to grant employees the right to appeal an adverse action to the Merit Systems Protection Board. The Board and the National Conference would support legislation to remove any ambiguity in the act.

In the absence of statutory requirements concerning independent selection of Board members, and the lack of clarity regarding removal protections afforded board members, GAO believes board members are not as insulated from agency control as administrative law judges in their selection and removal. Thus, if Congress wants to assure board members such insulation, legislation will be needed.

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ABBREVIATIONS

ALJ	Administrative Law Judge
DOD	Department of Defense
GAO	General Accounting Office
OPM	Office of Personnel Management

CHAPTER 1

INTRODUCTION

The Armed Services Board of Contract Appeals (Board) is the oldest and largest government contract appeals board. It is chartered to decide disputes involving contracts made by the Department of Defense (DOD), its components, and several civil agencies and departments that do not have boards. Like the other 11 contract appeals boards, the Board operates under the statutory authority of the Contract Disputes Act of 1978 (Public Law 95-563; 41 U.S.C. 601-613). Its decisions are based on evidence presented by the parties to a dispute, applicable contract provisions, regulations, and laws.

BACKGROUND

A former member of the Board traced the origins of boards of contract appeals to an 1868 Supreme Court decision,¹ upholding the authority of executive department heads to appoint boards to decide contract disputes. However, the predecessors to the Board were not established until World War I when the Navy and the War Department appointed boards of contract disputes.

The Navy Compensation Board was composed entirely of military personnel chosen for their expertise in such fields as engineering and accounting. Compensation board members decided disputes based on evidence presented by the parties and on their individual knowledge and experience.

In contrast, members of the War Department Board of Contract Appeals were attorneys recruited from civilian life and commissioned as Army officers. As the War Board's work load increased, new members who were attorneys were added, but they were not commissioned military officers. The War Department Board decided disputes on the evidence presented by the parties of a dispute.

The War Department dissolved its board after World War I, but the concept was revived during the national defense buildup associated with World War II. In 1942, the Secretary of War established a new War Department Board of Contract Appeals similar to the World War I predecessor. The president and recorder were required to be attorneys, and while the qualifications for other members were left open, only attorneys were appointed.

¹United States v. Adams, 74 U.S. 463 (1868).

The Navy Compensation Board, meanwhile, remained in existence during the period between the two world wars. In 1944, it was replaced by the Navy Department Board of Contract Appeals. Attorneys were appointed as new members by the Acting Secretary of the Navy, and the Board evolved from a panel of experts to a quasi-judicial body.

These two boards were merged in 1949 to create the Armed Services Board of Contract Appeals. During its first 13 years of existence, the Board was divided into Army, Navy, and Air Force panels, each with its own chairman, staff, and docket management functions. The Congress and DOD acted in the late 1950s to improve the Board's docket management and to expedite disposition of disputes involving small dollar amounts. In 1962, the Deputy Secretary of Defense and armed services secretaries eliminated separate panels for each service and established a unified board chartered by DOD and administered by a single chairman.

The Board's basic management, structure, and operating procedures have remained unchanged since 1962. Minor changes to the charter were made in 1969 and 1973. In 1979, the charter was amended to comply with the Contract Disputes Act of 1978, which, among other changes, required (1) the boards to expedite the processing of claims involving \$50,000 or less, (2) new members to have a minimum of 5 years of public contract law experience, and (3) uniform rules and procedures for processing claims. The changes required by the act were intended to correct problems with the boards that were identified in the 1972 Report of the Commission on Government Procurement. The act's aim was to make contract appeal boards independent, quasi-judicial entities with safeguards to ensure the independence and objectivity of board members.

The Board is composed of 33 members appointed by DOD, with 1 serving as Chairman, 2 as Vice Chairmen, and the remaining 30 assigned to 10 three-person divisions. One member of each division is selected as division head by the Chairman. The Chairman and Vice Chairmen are appointed for renewable 2-year terms by the Under Secretary of Defense for Research and Engineering and the assistant secretaries of the military services responsible for procurement. Board members are also appointed by these same DOD officials upon the recommendation of the Chairman. The Chairman, with the assistance and advice of the Vice Chairmen, administers the Board.

The Board has a staff of 22 support personnel consisting of the following:

- 1 legal assistant (attorney)
- 4 commissioners (attorneys-military officers)

- 1 paralegal
- 1 board recorder (attorney)
- 6 records management clerks
- 8 clerical staff (secretaries and stenographers)
- 1 computer specialist

An organizational chart for the Board is shown in appendix I.

Generally, contract disputes occur after a government contracting officer issues a decision involving a requirement of the contract with which the contractor does not agree. On DOD contracts, these disputed decisions can be appealed by the contractor to the Board. Upon reaching the Board, disputes are assigned to a member who hears evidence presented by the parties. The Board member may encourage the government and contractor to settle the dispute informally. If the parties do not settle, then the Board will decide the dispute.

The Board member who heard the case then writes an opinion. Up to four other members also review the evidence and either agree with the opinion or write another opinion. The majority opinion of these members becomes the Board's decision.

The number of disputes filed with the Board and the number pending have been increasing during the past few years. In 1983, 1,256 disputes were filed with the Board, and in 1982, 1,273, compared with 974 disputes in 1981. The number of disputes pending at year-end for fiscal years 1974-1983 is shown below.

<u>Fiscal year</u>	<u>Disputes pending</u>
1974	1,127
1975	1,065
1976	1,031
1977	1,134
1978	1,163
1979	1,221
1980	1,259
1981	1,301
1982	1,594
1983	1,695

The Board's Chairman was concerned about the increases in disputes and the growing backlog, and in 1983 DOD awarded a contract to a consulting firm to conduct a management analysis of the Board. The contractor was tasked to suggest methods for more efficient and expeditious handling of disputes. Highlights of the contractor's report are included in appendix II.

OBJECTIVES, SCOPE, AND METHODOLOGY

The Chairman, Senate Committee on Governmental Affairs, requested that we do a comprehensive study of the Board with the following objectives:

- Examine the Board's charter, management structure, and operating practices to determine whether any significant impairments exist in organizational and individual independence and whether the Board has sufficient knowledge and understanding of generally accepted accounting and cost principles.
- Examine the Defense Department's policies and practices under the Contract Disputes Act of 1978 regarding the selection, appointment, and removal of Board members to determine whether such actions are done in the manner prescribed for administrative law judges (ALJs) by the Administrative Procedure Act.
- Examine the availability of checks and balances to the parties involved in disputes, such as appeals or mechanisms for modifying laws, regulations, and standards.
- Determine the effect of Board decisions on the acquisition process and, if negative, suggest remedies to correct it.

We reviewed applicable laws, regulations, and official documents of the Board. We examined the qualifications of Board members and key support personnel, and studied the disposition of disputes over 4 fiscal years (1980-83). We also made a limited study of other contract appeal boards and the administrative procedures and practices concerning ALJs.

We performed our audit work during the period June 1983 to May 1984 at the Board's headquarters, Alexandria, Virginia, and at OPM, Washington, D.C. We contacted government attorneys, contract management, and other DOD officials at the Pentagon and government offices in the Washington, D.C., area; at Kirtland Air Force Base, Albuquerque, New Mexico; and Wright-Patterson Air Force Base, Dayton, Ohio. We contacted private and contractor attorneys in Minneapolis, Minnesota; Boston, Massachusetts; Seattle, Washington; Washington, D.C.; Dallas, Texas; and Los Angeles and San Francisco, California.

In assessing the independence of the Board and its members, we examined the Board's organization, management, and operating procedures, the past and present charters, its budget over 5

fiscal years, and the oversight exercised by DOD. We also compared the independence of the Board and its members to that of the General Services Board of Contract Appeals and ALJs.

To assess the Board's accounting knowledge and background, we examined the education and employment backgrounds of Board members and determined the number of accounting disputes heard by the Board. (See app. III.) We reviewed published material concerning this issue and discussed the issue with members of the contracting community.

We examined appointment and removal procedures for the Board and ALJs. Also, we compared the procedures of the Board to those of the General Services Board of Contract Appeals.

We researched options available to the government and contractors to respond to Board decisions. We could not determine the full extent of the Board's influence on the acquisition process because data are not systematically maintained on the events prompting a change in the acquisition process. However, we identified examples of changes resulting, at least in part, from Board decisions which are illustrative of the Board's influence.

We examined disputes disposed of by the Board during fiscal years 1980-83. We gathered data on the key issues associated with the disputes, length of time they stayed on the Board's docket, and how the Board disposed of them. We gathered these data from computerized and noncomputerized records and a card index system maintained by the Board. (See app. III.) Our review was performed in accordance with generally accepted government auditing standards.

CHAPTER 2

WE FOUND NO EVIDENCE THAT THE BOARD'S INDEPENDENCE HAS BEEN IMPAIRED

Because of its location within DOD, we examined the organizational influences of DOD on the Board. While DOD appoints the Chairman, Vice Chairmen, and board members, we found no evidence that the Board was pressured or influenced in its decisionmaking. Furthermore, the Board is perceived to be independent by both private and government attorneys and contracting officials. The Secretary of Defense and the Secretaries of the Army, Navy, and Air Force have delegated authority over the Board's functions and activities to many officials in several DOD agencies. The Board's decisions are not made by its supervisors but by a majority vote based on opinions of the members deciding a dispute. The limited authority of government officials and the Board's decisionmaking process would make it difficult for anyone to influence a Board decision.

ORGANIZATIONAL LINKS TO DOD HAVE NOT IMPAIRED INDEPENDENCE

The Contract Disputes Act of 1978 provided a statutory base for boards of contract appeals.¹ The act provides that the head of an agency may establish a board within the agency. DOD approves and issues the Board's charter and approves amendments to it; appoints members to the Board and its Chairman and Vice Chairmen; funds the Board; provides personnel and administrative support for the Board; approves the Board's policies, procedures, rules, and regulations; and receives quarterly and yearly reports on the Board's activities. The following chart identifies the departments, agencies, and offices in DOD which are linked to the Board, and their oversight roles.

¹Prior to 1978, agency boards of contract appeals were established by agency regulations.

LINKS BETWEEN THE BOARD AND DOD

<u>Charter approval</u>	Deputy Secretary of Defense Secretary of the Army Secretary of the Navy Secretary of the Air Force
<u>Appoints Board members, Chairman, and Vice Chairmen</u>	Under Secretary of Defense (Research and Engineering) Assistant Secretary of the Army (Research, Development, and Acquisition) Assistant Secretary of the Navy (Shipbuilding and Logistics) Assistant Secretary of the Air Force (Research, Development, and Logistics)
<u>Funds the operations of the Board</u>	Office of the Secretary of Defense (Defense Logistics Agency) Assistant Secretary of Defense (Comptroller) Department of the Army Department of the Navy Department of the Air Force
<u>Provides personnel and administrative support to the Board</u>	Department of the Army (Administrative Assistant, Office of the Secretary of the Army) The Judge Advocate General of the Army
<u>Establishes or approves policies of the Board</u>	Under Secretary of Defense (Research and Engineering)
<u>Approves the procedures, rules, and regulations adopted by the Board</u>	Under Secretary of Defense (Research and Engineering) Assistant Secretary of the Army (Research, Development, and Acquisition) Assistant Secretary of the Navy (Shipbuilding and Logistics) Assistant Secretary of the Air Force (Research, Development, and Logistics)
<u>Receives quarterly reports on activities of the Board</u>	Under Secretary of Defense (Research and Engineering) Assistant Secretary of the Army (Research, Development, and Acquisition) Assistant Secretary of the Navy (Shipbuilding and Logistics) Assistant Secretary of the Air Force (Research, Development, and Logistics) Director, Defense Logistics Agency
<u>Receives yearly reports on activities of the Board</u>	Secretary of Defense Secretary of the Army Secretary of the Navy Secretary of the Air Force

We reviewed how these oversight and support functions were performed by the above officials since implementation of the Contract Disputes Act. We found no indication that DOD's oversight authority was used to pressure or influence the Board. Our findings for each function are described below.

Charter changes

The Board's charter was issued in 1962 and has been revised three times--1969, 1973, and 1979--with each revision approved by the Deputy Secretary of Defense and the Secretaries of the Army, Navy, and Air Force. The Board's basic management, structure, and operating procedures have remained unchanged since 1962. Minor changes to the charter were made in 1969 and 1973. In 1979, the charter was amended to comply with the Contract Disputes Act of 1978 which required (1) the boards to expedite the processing of claims involving \$50,000 or less, (2) new members to have a minimum of 5 years of public contract law experience, and (3) uniform rules and procedures for processing claims. We found no evidence that the changes have adversely affected the Board's independence.

DOD appointment authority

Candidates for membership are recommended for appointment by the Chairman to the DOD officials shown in the chart on page 7. The Chairman told us that DOD has appointed all the candidates he has recommended. The Chairman and two Vice Chairmen are chosen from among Board members and serve for a 2-year term unless removed sooner or reappointed for an additional term or terms. The previous Chairman served from 1979 to 1985.² DOD is in the process of selecting a new Chairman.

Funding for the board

The Departments of Army, Navy, Air Force, and the Defense Logistics Agency participate in financing the Board's operations on an equal basis and to the extent determined by the Assistant Secretary of Defense (Comptroller). During the past 5 fiscal years, with adjustments for inflation and a computer purchase, the Board's funding has been stable.

Administrative service requirements

The Chairman determines the number of personnel needed to support the Board's operation subject to approval of the Under Secretary of Defense (Research and Engineering). The Department of the Army provides administrative support, which includes budgeting, funding, fiscal control, manpower control and utilization, personnel and security administration, supplies,

²In chapter 3 we discuss the procedures which are used by DOD and other agencies for appointing and removing board members.

and other administrative services. The Army has satisfied the Board's staffing and administrative needs in a consistent manner since 1979.

Board policies

There have been no changes to the Board's policies since the implementation of the Contract Disputes Act; therefore, the Board's objectives and working environment have remained relatively stable.

Reporting requirements

The Chairman furnishes a report of the Board's activities, on a quarterly or yearly basis, to nine DOD officials. The reports contain data on the number of disputes filed with the Board, which military service or agency contracts generated the appeals, the number of disputes disposed of during the period, the number and status of pending disputes, and a narrative discussion highlighting some of the data. These reports provide the Chairman a forum for his assessment of the Board and of changes needed to improve the Board. We found no evidence that this requirement has adversely affected the Board's independence.

ADMINISTRATIVE SUPERVISION OF THE BOARD

The Board's supervisory officials are the Chairman, two Vice Chairmen, and 10 division heads. The Chairman is authorized to establish the internal organization of the Board and assign disputes. Each Vice Chairman oversees the operations of 5 of the Board's 10 divisions, and each division has a division head designated by the Chairman.

The Chairman is responsible for obtaining adequate administrative and clerical support personnel, responding to inquiries about the Board, appointing the Board's Recorder, informing Board members of legislation affecting the Board, and reporting to specified DOD officials on Board activities. The Vice Chairmen assist the Chairman in the above duties and represent the Board when the Chairman is absent. Their supervisory duties are administrative in nature, and we do not believe the members' independence has been impaired by the performance of the duties.

Assignment of disputes

Theoretically, the authority to assign disputes could be used to impair the independence of Board members. If a dispute was assigned to a member based on the member's past opinions on similar disputes, then the Board's objectivity could be considered by a party involved in the dispute to be compromised. Our study indicated the above situation has not happened at the Board.

Neither the Chairman nor the Vice Chairmen determine if a specific dispute is or is not heard by a specific member. The Chairman has delegated authority to assign disputes to the Recorder, who assigns disputes among the divisions based on caseload. The division head will hear the dispute or assign it to one of the other two members with the smallest caseload. The Chairman stated that on rare occasions, such as when a member becomes overloaded or a prompt decision is needed, he would assign or reassign a dispute.

The possibility that a division head will impair a member's independence is diminished by an informal practice by Board members. We found that Board members exchange disputes based on the geographic location and/or dates for hearings. This practice reduces travel time and costs for the Board and its members. According to the Board, 73 percent of its hearings were held outside of the Washington, D.C., area during fiscal year 1983.

Members manage the dispute process

The Board's supervisory officials do not control the processing of disputes. Each member, including the Chairman and Vice Chairmen, has a caseload of disputes for which the member is responsible to move from receipt to decision. Members are guided by the Board's rules and procedures, which are very general and discretionary, and each employs distinct methods to move a dispute along.

Opinions of Chairman and Vice Chairmen do not outweigh other members' opinions in the Board's decisions

In contract disputes involving more than \$50,000 the Board's decisions consist of the opinions of the member who heard the dispute and the Chairman and a Vice Chairman.³ If these members do not reach agreement, two additional Board members become involved in the decisionmaking process. The majority opinion of the five Board members will become the Board's decision. If one of the five members disagrees with the majority opinion, that member can write a dissenting opinion, but the majority cannot be overruled. The disputes heard by the Chairman and Vice Chairman go through the same decisionmaking process in which other Board members either concur or write dissenting opinions.

³At the election of the appellant, disputes involving \$50,000 or less are processed under expedited or accelerated procedures. Expedited disputes, those involving \$10,000 or less, are decided within 120 days by the member hearing the case. Accelerated disputes are decided within 180 days by the member with the concurrence of a Vice Chairman and possibly the Chairman.

Annual appraisal of Board members

The Board's Chairman and a Vice Chairman participate in most decisions issued by the Board and through this process monitor the work of individual members. The Chairman conducts Board members' annual appraisals using standards similar to those established for the Senior Executive Service. The appraisals are used to counsel members and then are forwarded to the personnel office to be filed in members' personnel files. The Chairman and the Assistant Deputy Under Secretary of Defense (Acquisition) stated that these appraisals have not been reviewed by DOD officials.

CONTRACTING COMMUNITY CONSIDERS BOARD INDEPENDENT

During our study we interviewed a number of attorneys and contracting officials, both private and government, to obtain their views about the Board. Our selection criterion was that the attorneys and contracting officials be experienced in presenting disputes before the Board.

Several respondents stated that the location of the Board within DOD and the fact that DOD controls the Board's budget detract from the appearance of the Board's independence. One respondent proposed the creation of a single board of contract appeals to hear and decide government contract disputes, and another expressed concern about the appearance of the Board's independence because most members were previously employed by the government in other capacities. However, it was the perception of all whom we interviewed that the Board and its members have maintained their independence, and that they had never seen any evidence of attempts to impair the Board's independence.

CONCLUSIONS

We found no evidence that the Board has operated with impairments to its independence. DOD has sufficiently divided oversight responsibility for the Board among its officials and agencies so that any attempt to apply pressure or impair the Board's independence would probably require the concerted efforts of several individuals. In addition, any external pressure would probably have to be applied to more than one member to be successful.

Likewise, we found no evidence that the independence of individual members had been impaired. The supervisory duties of the Chairman, Vice Chairmen, and division heads are mainly administrative. The Chairman has delegated the authority to assign disputes to the Recorder and division heads, and the authority to manage disputes from start to finish rests with individual Board members.

CHAPTER 3

BOARD MEMBERS ARE NOT FULLY INSULATED FROM AGENCY CONTROL

Although we found no evidence that the Board's independence had been impaired, DOD, as well as other agencies, selects and appoints its board members. We determined that the process the agencies use to select and appoint board members is not inconsistent with the Contract Disputes Act of 1978. Also, OPM has determined that agencies can remove members from their boards, and that members generally cannot appeal their removal to an independent body, like the Merit Systems Protection Board, for an objective review.¹

Because no independent body, like OPM, issues government-wide regulations for the selection and appointment of board members, and because the act is unclear concerning any removal protections, members of boards of contract appeals are not as insulated as they could be from agency control. Other employees who serve the federal government in a quasi-judicial role are more insulated. The selection and appointment of ALJs is covered by uniform, government-wide regulations developed and issued by OPM pursuant to the Administrative Procedure Act. Also, under this act, ALJs may only be removed after a hearing before the Merit Systems Protection Board.

SELECTION AND APPOINTMENT OF MEMBERS ARE NOT INCONSISTENT WITH THE CONTRACT DISPUTES ACT

The Commission on Government Procurement recommended that members of boards of contract appeals be selected in the same manner as ALJs to minimize the members' ties to the agency. The Contract Disputes Act of 1978 contains language which implemented the Commission's recommendation. It does not explicitly address the removal of members.

Selection and appointment of board members

During our review we looked at DOD's selection and appointment procedures for board members and compared those with the procedures used in the selection and appointment of ALJs. The following chart presents the comparison.

¹Preference eligible members, essentially those who are veterans as defined by 5 U.S.C. § 2108, have the right to appeal a removal action to the Merit Systems Protection Board under the provisions of 5 U.S.C. § 7701.

COMPARISON OF SELECTION AND APPOINTMENT
PROCEDURES FOR ALJs AND BOARD MEMBERS

ALJs	BOARD MEMBERS
OPM disseminates job announcement.	DOD disseminates job announcement.
Standard Form 171.	Standard Form 171.
List of 20 references who may be contacted.	List of 12 references who may be contacted.
Proof of veteran preference.	Proof of veteran preference.
Two most important administrative law cases and detailed description of applicant's involvement.	Two written work products related to public contract law with which the applicant was involved.
Requires 7 years experience in administrative law.	Requires 5 years experience in public contract law.
Must be duly licensed and authorized to practice law.	Must be duly licensed and authorized to practice law.
Applicant must demonstrate the ability to write a decision by undergoing a 6-hour written "examination" administered by OPM.	Written examination not required.
Applicant is interviewed by a three-person panel designated by OPM.	Applicant is interviewed by a three-person panel designated by DOD.
Applicant's eligibility (rating) for position is determined by OPM.	Applicant's eligibility (rating) for position is determined by DOD.
Selection of applicants to be placed on the register is made by OPM.	Selection of applicants to be placed on the register is made by DOD.
ALJs are appointed by the agency head.	Board members appointed by Secretaries of Defense and Armed Services (see illustration on page 7).

Section 8(b)(1) of the Contract Disputes Act provides that board members shall be "selected and appointed to serve in the same manner" as ALJs appointed pursuant to 5 U.S.C. 3105. Under 5 U.S.C. 3105, OPM screens ALJ candidates and subjects them to a written examination. It then selects the best qualified candidates for ALJ vacancies. Each agency appoints its own ALJs from those selected by OPM. The issue is whether the language of section 8(b)(1) requires that OPM, rather than the appointing agency, select the candidates qualified for appointment. We think it does not.

The act contains no mention of OPM. Nor do the remarks of the Committees reporting on similar bills passed by each House. Nor, in this context, does the Report of the Committee on Government Procurement, a report widely regarded as the genesis of the Contract Disputes Act. The proposition that Congress nevertheless imposed a new responsibility on OPM by inference must be regarded as a tenuous one, in view of the consistent reticence of all the sources from which such an inference could be drawn. To insist the reticence was mere inadvertence could prove mischievous where, as here, OPM chose years ago not to draw the inference, and the contracting agencies proceeded to select and appoint new board members. In the intervening years, to our knowledge, the validity of these appointments without OPM involvement has not been challenged either in court or by Congress.

The literal language of the act does not provide that board members be qualified in the same manner as ALJs; it provides that they be qualified to serve in the same manner. The use of the infinitive "to serve" may signal a congressional reliance more upon the manner of service, e.g., the rendering of quasi-judicial opinions without threat of the member being summarily removed, than upon the manner by which the member is selected and appointed.² In this regard, the House of Representatives, when it first passed H.R. 11002, the bill ultimately enacted as the Contract Disputes Act, provided that board members be "examined, selected, and appointed in the same manner" as ALJs. It had deleted the words "to serve" from earlier similar bills it was then considering "so that the section will not be interpreted as providing that board members are 'to serve' in the same manner as hearing examiners."³ Upon substitution of the language of the companion Senate bill (S. 3178), H.R. 11002 was amended to reincorporate the words "to serve."

²The consequences of OPM's position that board members must be licensed attorneys are discussed in detail in connection with the removal of board members on page 15.

³H. Rep. No. 95-1556, 95th Cong., 2nd Sess., pg. 2 (1978).

The Senate Report on the bill,⁴ the language of which was enacted into law, introduces more uncertainty about the phrase "selected and appointed to serve in the same manner." The report states that the principal purpose of section 8(b)(1) is to ensure the independence of the candidates for board membership. Whether that purpose was to be achieved primarily by the process incident to service or incident to selection is not stated. Instead, the report declares that "[in] other words, the method of appointment, a method which strictly speaking is neither selection nor service, is intended to guarantee that * * * [members] would be appointed strictly on the basis of merit." Presumably the report's association of independence with the concept of appointment on merit alone assumes that those properly appointed would exhibit the virtue of an independent character, or at least not the absence of it. What is still murkier, and most pertinent to the issue, is whether Congress considered that the selection of independently minded members was attainable only if OPM, or some agency other than the appointing agency, did the selecting. The Senate report provides no answer. However, it does refer to the ALJ "system" as one "perceived as a model" to assure a "comparable" corps of board members, thus intimating [if not suggesting] something short of an exact replica of OPM's selection of ALJs.

The act's omission of any reference to OPM, together with what we draw from the sparse legislative history, implies to us that Congress imposed on the executive agencies generally and not on OPM specifically a duty to create an approximation, not a facsimile, of the ALJ system of selection and appointment. By employing the passive voice in mandating an approximation of the ALJ system, Congress did not address which executive agencies--OPM, the various appointing agencies and their boards, or still some other agency--would manage the prequalification list of candidates for board membership. In our opinion, section 8(b)(1) permits the agencies to appoint board members from candidates the agencies select, using procedures similar to those employed in the selection of ALJs.

CONTRACT DISPUTES ACT IS UNCLEAR
REGARDING REMOVAL OF BOARD MEMBERS

Generally, the Contract Disputes Act of 1978 was thought to implement the recommendations of the 1972 Commission on Government Procurement. The Commission observed that agency boards would be more objective if its members were chosen in the same manner as ALJs. It did not discuss whether they would be more objective if, like ALJs, they could be removed only for cause. Similarly, nothing in the act or its legislative history

⁴S. Rep. No. 95-1118, 95th Cong., 2nd Sess. (1978).

addresses members' removal. However, the Senate report does indicate Congress' intent to ensure the independence of board members so "that in conducting proceedings and deciding cases they would not be subject to direction or control by procurement agency management authorities."⁵ This is to be achieved by what the report refers to as "the method of appointment," or more precisely, in the language of the act itself, the method by which members are "selected and appointed to serve." Arguably the Congress intended that assuring members' independence from agency control, over the manner in which they decided cases, was to be achieved by the selection and appointment process. One may question whether relying upon the selection and appointment of those who show promise of acting independently, in order to assure that they are not later subject to the power of officials who may remove them, is as effective as relying on the obvious vehicle of constraining the removal power of the appointing official, but the notion that Congress did rely solely on selection and appointment is not implausible in light of Congress' complete silence concerning removal.

The National Conference of Boards of Contract Appeals Members dismisses the significance of this silence and the act's omission of any reference to OPM. Also, in its view, the issue of whether the Contract Disputes Act provides protection against removal is independent of the question regarding OPM's involvement in appointing and selecting board members. Even if Congress did not require OPM to be involved in the appointment and selection, it provided that board members would "serve in the same manner" as ALJ's, and in the Conference's view, board members cannot serve independently of agency influence over their decisions if they may be removed without cause.

OPM attaches great importance to the act's not specifying a role for it, and additionally maintains that members of boards of contract appeals serve in the excepted service because they are and must be attorneys and therefore may be dismissed without the protections available to federal employees who serve in the competitive service.⁶ OPM regulations authorize each agency

⁵S. Rep. No. 95-1118, 95th Cong., 2nd Sess. (1978).

⁶The qualification and dismissal of employees in the excepted service is controlled by the agencies that hire them (see footnote 1, page 12, for exception). The rules concerning qualifications and dismissal of employees in the competitive service are controlled by OPM.

head to establish rules governing the removal of excepted service employees (5 C.F.R. 302.102(a)). DOD's regulations on removing excepted service employees provide that such an employee be given written notice of the proposed action, which shall contain a brief statement of reasons for removal and the effective date of the action.

In our study of removal procedures, we found that DOD had not removed a member of its board since passage of the Contract Disputes Act, and, within DOD, uncertainties exist about the removal process. For example, DOD is uncertain whether or not a removal action would require the unanimous approval of all appointing officers (see illustration on page 7) because the act and the Board's charter do not address the removal of Board members.

Certain officials of the General Services Administration told us during our field work that the removal procedures governing excepted service employees apply to its board members.⁷ In December 1978, the Chairman and Vice Chairman were removed as part of the Administrator's plans for the agency. No reason was given in the letter notifying the members of their removal, and the Deputy Administrator did not give one in response to the Vice Chairman's inquiry about what he had done wrong. No one challenged the agency's authority to remove the board members, but the removals were protested by the American Bar Association and the Federal Bar Association. These actions took place before the effective date, March 1, 1979, of the Contract Disputes Act, and protective procedures have not been implemented to prevent the recurrence of similar removals.

PRESENT PROCEDURES DO NOT INSULATE
MEMBERS FROM AGENCY CONTROL

During our review, we found that DOD and the General Services Administration have developed their own procedures for the selection and appointment of members on their boards of contract appeals. These agencies solicit applicants, review and evaluate their educational and vocational experience, contact background references, rate the applicants to determine the most qualified, maintain a register of selected candidates qualified for appointment, and appoint candidates for board membership. DOD and GSA have developed and administer procedures for the selection and appointment of members, and both maintain

⁷The General Services Administration in commenting on a draft of this report disavowed this position. See page 20 for further discussion.

registers of candidates qualified for appointment from which all other agencies can select and appoint their members. Thus, while we found virtually uniform, government-wide practices in the selection and appointment of board members, they are not administered by an independent agency like OPM.

In contrast we noted that ALJs, who like board members serve the federal government in a quasi-judicial role, are more insulated from agency control in the selection and appointment process. Under 5 U.S.C. § 3105 the agency is authorized to appoint ALJs for proceedings under the Administrative Procedure Act. The selection and appointment process, however, is covered by uniform, government-wide regulations developed and implemented by OPM pursuant to the Administrative Procedure Act (see 5 C.F.R. § 930.201, et seq.). Also, the act placed ALJs in a special category separate from other federal employees, insulating them from agency control to prevent agencies from influencing their decisions. This insulation was achieved by vesting control over ALJs in the Civil Service Commission (now OPM).⁸

While the legislative history of the Contract Disputes Act indicates the ALJ system was considered a model for the development and implementation of a system to assure the independence of board members,⁹ the act does not require that an independent agency such as OPM select, administer, and maintain a register of persons qualified for appointment to agency boards of contract appeals. For this reason members are not as insulated from agency control in the selection and appointment process as are ALJs under the Administrative Procedure Act.

The removal process for board members is not addressed by the 1972 Report of the Commission on Government Procurement, or explicitly by the Contract Disputes Act (including the legislative history). OPM has determined that agencies can remove members from their boards of contract appeals generally without the review of an independent body like the Merit Systems Protection Board. ALJs are clearly insulated from agency control in the removal process. Under the Administrative Procedure Act (5 U.S.C. 7521), an ALJ can be removed only for "good cause" established and determined by the Merit Systems Protection Board after a hearing before the board.

⁸Ramspeck v. Federal Trial Examiners Conference, 345 U.S. 128, 73 S. Ct. 570, 97 L. Ed. 872 (1953).

⁹ S. Rep. No. 95-1118, 95th Cong., 2nd Sess. (1978).

NEED FOR SAFEGUARDS IS
RECOGNIZED AND SUPPORTED

Beyond the recognition of the need to safeguard the independence of board members by the Commission on Government Procurement and Congress in passing the Contract Disputes Act, government agencies and other groups have supported the establishment of safeguards.

A former Chairman of the American Bar Association's Section of Public Contract Law has declared that for boards to function honestly, fairly, and efficiently and to have public confidence, board members must be protected against summary removal by the agency. This statement reflects a 1983 American Bar Association resolution that board members be discharged only for cause, after appropriate hearing procedures.

In 1979, an interagency task group and OPM developed a draft resolution which provided safeguards covering performance evaluations and adverse actions against and removal of board members. In 1980, DOD and OPM developed a government-wide system for selecting and appointing candidates for board memberships. In 1981, the National Conference of Boards of Contract Appeals Members urged the Director, OPM, to implement the proposed regulations to safeguard board members' independence. However, OPM believes specific authority from Congress to implement the regulations is necessary.

CONCLUSIONS

The current procedures used by agencies to select and appoint members of boards of contract appeals do not provide board members the same degree of insulation from agency control as afforded ALJs under the Administrative Procedure Act. Further, board members are classified in the excepted service by OPM; thus procedures for their removal are at least initially within agency control, and arguably do not extend beyond it. Support for procedures to provide full insulation from agency control to members is long-standing, and has been expressed by both government and private groups within the contracting community. OPM states that it is not authorized to administer a system, as it presently does for ALJs, which would insulate board members and safeguard their independence to the same degree provided ALJs.

MATTER FOR CONSIDERATION
BY THE CONGRESS

If Congress wants to assure that members of boards of contracts appeals are insulated from agency control to the same

degree as ALJs in their selection and removal, the Congress may want to consider amending the Contract Disputes Act of 1978 and the Administrative Procedure Act to give the Office of Personnel Management and the Merit Systems Protection Board roles in these processes.

AGENCY COMMENTS AND GAO'S EVALUATION

The General Services Administration and its Board of Contract Appeals believe that its board members may be removed only in accordance with the same procedures applicable to ALJs and that procedures governing the removal of members of the excepted service are not pertinent. They therefore contend that the example of the removal of two board members which we used to illustrate the procedures applicable to excepted service employees is not relevant to the current status of board members under the Contract Disputes Act.

Our statement accurately reflects what we were told during our field work, and we believe the example is relevant. OPM classifies board members in the excepted service because they occupy attorney positions, and maintains that they are subject to removal in accordance with procedures established by the agency head. While the agency head may establish removal procedures for board members similar to those which apply to ALJs, the agency head has no authority to grant an employee appeal rights on adverse actions to the Merit Systems Protection Board (outside of that currently provided under 5 U.S.C. § 7701, which defines who may take an appeal to the Protection Board). See Schwartz v. Department of Transportation, 714 F.2d 1581 (1983).

In discussing the removal of two board members, the report stated that this occurred prior to enactment of the Contract Disputes Act in 1978. However, we believe the example is useful to show the last time a removal occurred and that since the passage of the act no mechanism has been established to prevent similar action.

In addition to comments on specific segments of this chapter, the commentators provided opinions on our conclusions and matter for consideration by Congress. Most of the commenting parties agree with our conclusions, but their comments on the need for legislation reflect a disparity of opinion concerning the safeguards provided board members by the Contract Disputes Act of 1978. Some believe the act provides sufficient authority to fully provide for the independence of board members. Three parties indicated legislation was not necessary, and the remaining five either supported legislation or did not comment.

In its comments, OPM reaffirmed its interpretation that the act did not establish a role for it in establishing selection, appointment, and removal procedures for board members similar to those for administrative law judges. Because board members are already being "selected and appointed" by the agencies using procedures similar to those used for administrative law judges, OPM sees no need for it to assume such a role. OPM's comments reflect its opinion that board members can be removed by the agency head because they occupy attorney positions and thus, are classified in the excepted service.

Several agencies commenting on the report disagreed with OPM. The Armed Services Board believes, contrary to OPM, that the act authorizes OPM to establish a system of safeguards for board members similar to the system it developed for ALJs and that OPM should reevaluate its position. However, in the event OPM does not, the Board thinks amendatory legislation may have merit.

The National Conference of Boards of Contract Appeals Members believes the courts would construe the act to assure members' objectivity and independence, despite the absence of OPM promulgated protective procedures. However, to remove any ambiguity in the act, the conference would support an amendment to safeguard the independence of board members.

The General Services Administration and the General Services Board believe, contrary to the view of OPM, that the act does not require board members to be attorneys and that the act was intended to fully safeguard the independence of board members, and that board members, like ALJs, cannot be summarily removed by their agency.

The Section of Public Contract Law believes Congress has expressed its intent regarding the independence of board members in the act and that authority exists for adoption of an adverse action procedure. Because OPM has determined that it does not have authority to establish a system for members, the Section suggested that some other means within the executive branch, for example, a presidential directive, may be appropriate to execute the congressional mandate contained in the act concerning the independence of board members.

Given the absence of statutory requirements concerning independent selection of board members and the lack of clarity regarding any removal protections afforded members, GAO believes that members of boards are not as insulated from agency control as ALJ's. Thus, if Congress wants to assure that members of boards of contract appeals are insulated from agency control to the same degree as ALJs, then legislation will be needed.

CHAPTER 4

THE BOARD'S ACCOUNTING KNOWLEDGE

Board members are required to have at least 5 years of experience in public contract law. Potential Board members are also required to demonstrate the ability to grasp matters of science, engineering, budgeting, or cost accounting. While only a small percentage of the disputes heard by the Board have an accounting principle as their key issue, the Board has several members with vocational or educational backgrounds in accounting.

BACKGROUND

Should a special accounting court be established to hear and decide disputes on accounting principles? The proposal implicit in this question is not a new one. It was put forth in 1957 by the chairman of a major accounting firm, and recently, variations of the proposal were suggested by two members of the government contracting community. These members of the government contracting community believe that disputes which involve cost allowability and allocation of costs on government contracts would be better decided by a court consisting of members with knowledge or training in the standards and principles governing these costs. These standards and principles are the Cost Accounting Standards and the Contract Cost Principles (Federal Acquisition Regulation, parts 30 and 31, respectively) which are applicable to negotiated national defense contracts.

The Cost Accounting Standards are designed to achieve uniformity and consistency in cost accounting practices among government contractors. The standards were developed by the government because it considered other methods--generally accepted accounting principles, regulations of the Internal Revenue Service and the Securities and Exchange Commission, and rules of the Renegotiation Board--inadequate for contract costing because they were designed for different purposes.¹ The Contract Cost Principles govern the pricing of contracts and the determination, negotiation, or allowance of costs. Their purpose is to identify costs which represent the government's equitable share of a contractor's operating costs relative to a specific contract.

¹Report on The Feasibility of Applying Uniform Cost-Accounting Standards to Negotiated Defense Contracts, Committee on Banking and Currency, House of Representatives, 91st Congress, Second Session, January 1970, pp. 4 through 8.

Advocates of an accounting court argue the following benefits would result from the decisions of such a court. The court would not need to be educated or assisted in understanding cost accounting principles; the court would not need an interpreter of accounting terminology; the parties to the dispute would not need to hire expert witnesses; the expenses involved in such disputes would decrease; the court would be capable of issuing more timely decisions; and its decisions would be more readily acceptable to the contracting community.

There are many arguments against the proposal to establish a special court to hear and decide disputes containing accounting issues. For example, if an accounting court is established, then should not there also be engineering and medical courts? Would the decisions of these courts be subject to appeal, and, if so, which court would hear them? Would accounting issues be decided separately from the legal issues of a contract dispute?

In our discussions on this issue with members of the contracting community, the majority response to the proposal was negative. The members stressed the danger that a court composed of specialists would issue opinions based on its knowledge, rather than a decision based on facts presented by the parties of the dispute. Most believe that any Board member is capable of hearing and deciding all contract disputes, no matter what issue is involved. Their preference of qualifications for Board membership was high intelligence and a judicial temperament.

LEGISLATION SETS QUALIFICATIONS FOR BOARD MEMBERSHIP

No statute requires that Board members have accounting knowledge. The Contract Disputes Act requires members to have at least 5 years experience in public contract law; agency heads may set additional requirements. DOD's charter for the Board requires members to be attorneys at law with at least 5 years experience in public contract law.

We found no additional qualification requirements in our review of the selection and appointment process used by DOD. However, DOD's application process for screening potential Board members requires candidates to demonstrate the ability to grasp matters of science, engineering, budgeting, or cost accounting.

BOARD HAS ACCOUNTING KNOWLEDGE

The number of disputes dealing with an accounting issue which the Board hears during a year is low. We studied the issues involved in disputes the Board heard during 4 fiscal

years (1980 through 1983). Our study showed that about 5 percent of the disputes were determined by the Board to have accounting or cost principles as the primary issue in dispute.²

Although disputes involving accounting issues are not necessarily assigned to members with specific accounting backgrounds, a number of members do have accounting experience. At the time of our review 3 of the Board's 32 members had some college level training in accounting principles. One member had a specialized practice as a tax attorney, and another two had jobs involving accounting and bookkeeping while attending college. In addition, the Chairman's legal advisor, who can be assigned to hear disputes, is a certified public accountant. Moreover, in our discussions with members of the contracting community, several commented that an attorney with 5 years experience in contract law would acquire some background in accounting principles.

CONCLUSIONS

While it is not required that Board members have accounting backgrounds, several of the current members have some educational or vocational background in accounting. This would appear to provide the Board with sufficient knowledge to deal with the relatively small number of disputes that have accounting principles as the primary issue. Most members of the contracting community that we interviewed do not believe that expertise in a particular field, such as accounting, should be a prerequisite for Board membership.

²The Committee requested that we identify appeals involving DOD's contract cost principles, the Cost Accounting Standards, and defective cost and pricing data. The Board Chairman pointed out that most defective pricing data appeals do not involve accounting issues; thus, the percentage would be about 4 percent if these disputes were not counted. Also, the Chairman has warned readers of the Board's annual report, from which the 5 percent was derived, that the identification of key issues is not reliable.

CHAPTER 5

BOARD'S INFLUENCE ON ACQUISITION PROCESS

AND OPTIONS AVAILABLE WHEN THERE

IS DISAGREEMENT WITH A BOARD DECISION

The Board plays a significant role in the acquisition process. Its decisions are one of several factors that influence and shape the formulation of DOD's acquisition policies and procedures. Most Board decisions are implemented by the parties to a dispute; however, when the government or a contractor disagrees with a decision, options are available to respond to it. These options appear adequate to protect the interests of all parties.

It is not possible to quantify explicitly the Board's influence on the acquisition process because data is not available which clearly identifies the causes for change in acquisition policies. It is clear, however, that the Board plays a significant role. For example, Board decisions are followed closely by DOD procurement activities. The Defense Logistics Agency, Defense Contract Audit Agency, and the Defense Contract Administration Service constantly monitor contract disputes heard by the Board, the issues involved in the disputes, and the Board's treatment of the issues in its disposition of disputes. A network of employees in these agencies maintains an active interest in contract disputes, the Board's dispositions, and their effect on contract costs and administration.

The Defense Contract Audit Agency has held seminars for headquarters and regional personnel, as well as contracting personnel and trial attorneys, to exchange ideas and views on necessary changes in contract administration to comply with Board decisions. Agency notices are sent to employees explaining which costs the Board has decided are allowable or allocable based on cost principles and standards. The agencies' objectives are to improve their presentations on disputes before the Board and assure uniform and consistent treatment of contract costs.

In addition, DOD makes changes to bring its acquisition system into compliance with Board decisions. For example, on August 4, 1982, the Board issued a decision in a contract dispute between the Air Force and a food service contractor. The contract contained a long-used standard clause which granted the Air Force an option to renew the contract before the end of the first year. The contractual period overlapped fiscal years, so when the contracting officer notified the contractor that the

Air Force intended to exercise this option, the contracting officer included a notice that the government's obligation to pay for the extension was contingent upon the availability of appropriated funds. This contingency was not a part of the contract, thus the contractor appealed to the Board that this was a contract change for which it should receive an equitable adjustment.

The Board decided the contingency requirement was a change to the contract, and the contractor was entitled to an equitable adjustment. To avoid future disputes over this procedure, the Air Force changed its contracts to include a contingency clause along with the option clause.

OPTIONS AVAILABLE TO THE PARTIES OF A DISPUTE

Four options are available for the government or contractors to pursue when they disagree with a Board decision.

- Either party may petition the Board to reconsider its decision.
- The contractor can appeal the Board's decision to the Court of Appeals for the Federal Circuit. The government can appeal decisions involving contracts awarded after March 1, 1979, and decisions on previously awarded contracts if the contractor elects to proceed under the Contract Disputes Act.
- The government can change its regulations so that the Board's decision has no effect on future contracts.
- Either party can request Congress to (1) amend a law in response to a Board interpretation of that law or (2) pass new legislation.

Request for the board to reconsider its decision

Rule 29 of the Uniform Rules of Procedure for the Board (32 C.F.R. Pts. 1-39, App. A) provides either party the right to file a motion for reconsideration with the Board. "The motion shall be filed within 30 days from the date of the receipt of a copy of the decision of the Board"

The motioning party can request the Board to reconsider its decision based on the existing record or ask the Board to allow submission of additional evidence. The party must explain why the evidence was not submitted or available at the time of the hearing. During a 3-year period, fiscal years 1981-1983, the Board reconsidered approximately 4 percent of 3,067 contract disputes.

Example of reconsideration

On February 2, 1983, the Board reversed one of its decisions based on a motion for reconsideration by the government (83-1, BCA §16, 265). The Board's original decision (ASBCA No. 22833, 82-1 BCA §15, 762, April 9, 1982) found that the government improperly withheld a portion of a contract price when a contractor failed to reveal its true overhead costs during price negotiations because there was no effect on the contract price. The Board stated that while the government might have shown that the contractor failed to disclose cost and pricing data required by the Truth in Negotiations Act, it failed to show that the nondisclosure resulted in an overstated contract price because the record established that the contractor offered his overhead rate on a take or leave it basis. One Board member involved in the disposition of this dispute issued a dissenting opinion stating the legal presumption that a contractor's failure to disclose cost and pricing data would result in lower prices is necessary for effective enforcement of the Truth in Negotiations Act. In this case he did not believe the facts overcame the presumption. Upon reconsideration, a majority of Board members agreed with the dissenting opinion and decided for the government.

Appealing decisions of the Board

An appeal of a Board decision is limited to questions of law unless the appellant can show on questions of fact that the Board's decision

"is fraudulent, or arbitrary, or capricious, or so grossly erroneous as to necessarily imply bad faith, or if such decision is not supported by substantial evidence" (41 U.S.C. §609(b) (1982)).

The appellant is granted 120 days from the date of receipt of a copy of the Board's decision to file an appeal with the Court of Appeals for the Federal Circuit.

A Board decision on a dispute where the appellant elects to proceed under the small claims procedures--limited to disputes amounting to \$10,000 or less--cannot be appealed except in cases of fraud (41 U.S.C. §608(d)).

During the 4-year period, fiscal years 1980-1983, contractors appealed approximately 70 of the Board's decisions. This is not a significant number, since during this period the Board has disposed of over 4,000 disputes. We were told in discussions with private and contractor attorneys that the decision to appeal the Board's disposition of a dispute is based primarily on the costs involved. Our analysis of the courts'

treatment of Board decisions shows the decisions are more often upheld than reversed. The courts have decided 41 of the 70 appeals and have upheld 35 and overruled only 6 Board decisions. The issues involved in the appeals covered a wide range of subjects, such as specifications, terminations, and equitable adjustments.

Contractors have long had the right to appeal Board decisions; however, the government has only had this option since enactment of the Contract Disputes Act of 1978. A DOD decision to appeal needs the approval of the Attorney General of the United States and, within DOD, is reviewed at several levels. For example, under the Air Force's appeal process the Chief Trial Attorney reviews the decision and recommends appeal to the Air Force General Counsel. The General Counsel reviews the dispute and, if in agreement, recommends to the Assistant Secretary of the Air Force (Research, Development and Logistics) that an appeal be pursued. The Assistant Secretary then reviews the Board's decision and determines whether the appeals process is the proper course of action. If the Assistant Secretary approves, an appeal will be recommended to the Attorney General. This final review of the dispute will determine if the Board's decision will be appealed. The appeal approval process for the Army and Navy is similar.

This multiple review process has produced seven appeals of Board decisions by the government since the effective date of the Contract Disputes Act. The Chief Trial Attorney for one of the services stated that the decision to pursue an appeal is based on maintaining the integrity of the procurement system and the costs involved.

Example of an appeal

The first appeal of a Board decision (ASBCA No. 24043, 80-1 BCA 14,247, December 31, 1979) filed by the government involved the awarding of interest on money which a contractor claimed the government owed it. The Board awarded the contractor interest (on most of the claim) starting as of October 1977 and continuing until the government paid the debt. The government's position was that interest on the debt should start on the effective date of the Contract Disputes Act, which was March 1, 1979, since the contractor elected to have its appeal processed under the accelerated procedures of the act. The Court decided for the government and reversed the Board's award of interest starting in October 1977 (229 Ct. Cl. 513 (1982)).

Changing regulations

In addition to requesting that the Board reconsider its decision, and appealing a decision to the Court of Appeals for

the Federal Circuit, DOD can change its procurement regulations to ensure that a Board decision has no effect on future contracts.

The Defense Acquisition Regulatory Council monitors the implementation of DOD regulations and makes necessary changes. The armed services and the Defense Logistics Agency each have a representative on the Council. The Council studies and acts on suggestions and recommendations to change or clarify regulations. These proposals are received from members of DOD's contracting community and from contractors doing business with DOD.

We attempted to identify changes in regulations which the Council had made in response to Board decisions, but the data were not available to totally document this connection. However, a recent decision of the Board, which interpreted a contract cost principle, illustrates that there is a connection.

Example of changing a regulation

This dispute resulted from the merger of two companies in which one purchased the other. The purchasing company paid more for the company than the value of the company's assets. The amount of the purchase price above the assets' value is commonly termed goodwill. The purchaser was a DOD contractor that allocated the goodwill among its divisions in the computation of the cost of facilities capital for the purpose of negotiating a government contract. The contracting officer stated that goodwill was not an allowable cost, and the contractor appealed this decision to the Board.

The Board ruled that amortization of goodwill was an allowable contract cost and could be included in calculating facilities capital because the regulations did not specifically disallow it, and the practice was in accordance with generally accepted accounting principles. As a result of this ruling, DOD decided to draft a cost principle specifying goodwill costs as unallowable. This was published in January 1984 in Defense Acquisition Circular No. 76-48.

Seeking remedies through legislation

Another option is to seek changes in existing legislation or the passing of new legislation by Congress. This course of action is usually taken after a series of decisions by the Board or courts. Some decisions disclose the need to update the law or inequities in the law which need to be corrected.

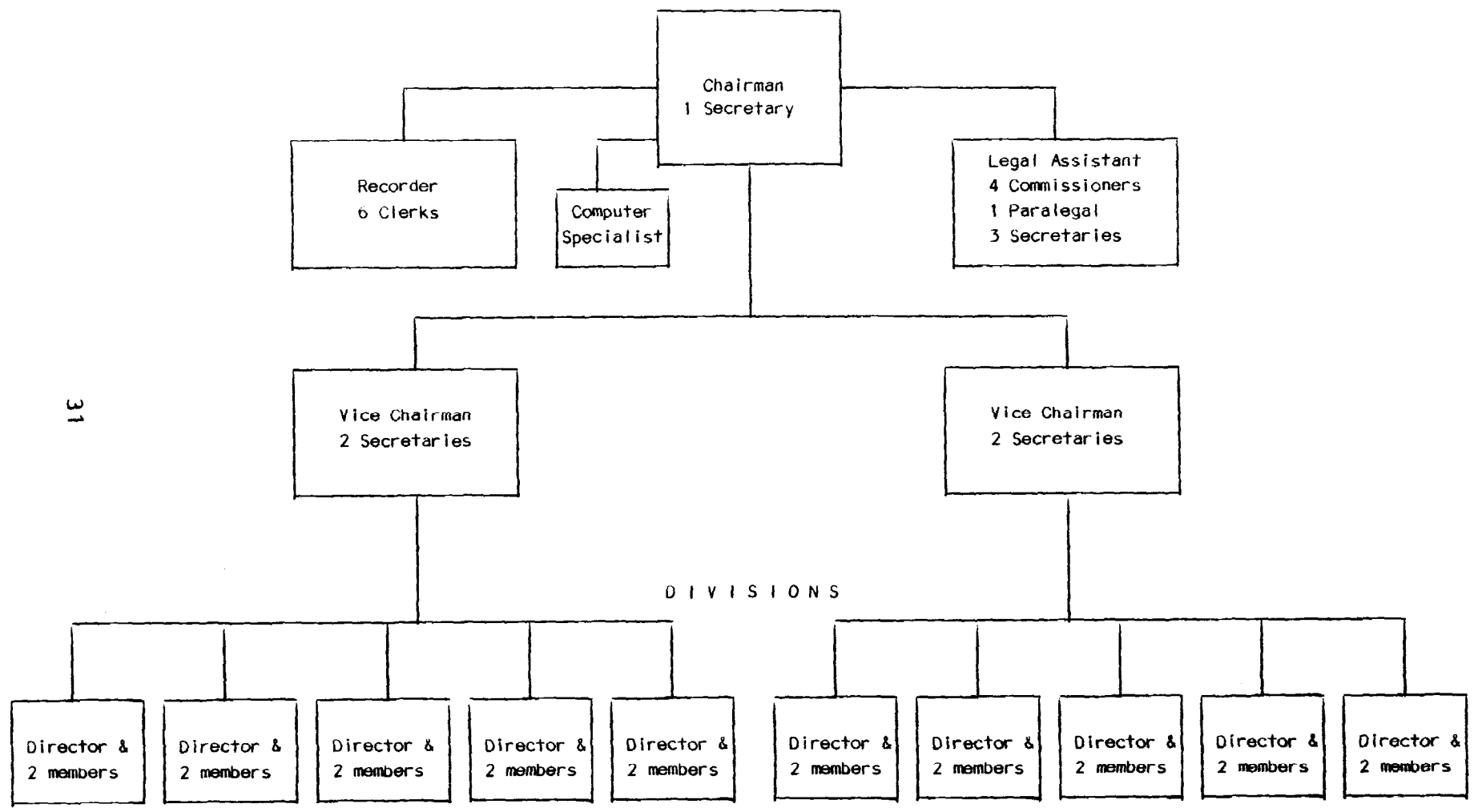
An example of the above is the effort to reinstate the Cost Accounting Standards Board. In 1983 and 1984, hearings were held by the Senate and House on the subject of reinstating the Cost Accounting Standards Board. At these hearings, several witnesses listed decisions by the Board and Appeals Courts interpreting the cost accounting standards to illustrate the need to reinstate the Accounting Board. They stated that there is a continuing need to update, amend, and clarify the cost accounting standards, and that this function should be done by an independent board and not through the disputes process.

This is not the first attempt to reinstate the Accounting Board. In 1982, the Senate passed an amendment to the Defense Production Act of 1950, which placed certain responsibilities for the standards with the Office of Management and Budget; however, the House did not pass the amendment. The latest legislative effort concerning the standards was a proposed amendment to the Defense Production Act of 1950, H.R. 5480, dated April 12, 1984.

This bill would have reinstated the Cost Accounting Standards Board, which ceased operating in 1980, to perform the functions of the original Standards Board. These functions include authority to modify and amend the standards, to interpret them, and grant exemptions and waivers. The supporters of this bill have sought such legislation for the past 4 years. This bill was not enacted into law before the end of the 98th Congress.

CONCLUSIONS

The options available to a contractor and the government when disagreeing with a Board decision appear to be adequate. Both parties to the dispute can request the Board to reconsider its decision and appeal the decision to a federal court. Both parties can request changes to contracting regulations and practices which have been affected by Board decisions. And finally, both parties can request amendments to legislation or new legislation to resolve problems resulting from Board decisions.



31

Total Personnel:
33 Board Members
22 Support Staff

CONSULTANT FIRM HAS RECOMMENDED CHANGESTO PROCEDURES AND ADDITIONAL SUPPORT STAFF

In 1983, DOD awarded a contract to a consultant firm experienced in court management for the purpose of examining the Board's organization, operations, and procedures. The objective of the study was to determine if the Board could be more efficient and expeditious in disposing of appeals without increasing the Board's size. The consultant recommended changes in prehearing procedures, posthearing procedures, Board structure and management, and the number of support personnel and their duties.

At the time of our review, one of the recommendations concerning Board structure was being seriously considered by the Chairman, who planned to reorganize the Board into three 10-member divisions, each headed by a Vice Chairman, and have the recorder assign appeals directly to individual members. To make these changes, an additional supergrade position will have to be granted by DOD for the third Vice Chairman, and the new appeals assignment procedure will require a change to the Board's charter.

The Chairman implemented a change in the decisionmaking process based on the consultant's study. A Board decision no longer requires the opinions of five Board members. Under the new procedure, the Chairman, a Vice Chairman, and the member that heard the dispute will consider all relevant data, and if unanimous agreement exists, a decision will be published. If agreement is not possible, then the current procedure requiring a majority decision of five Board members will be followed.

The consultant found that the Board had a 6-month backlog of cases which were ready for decision but for which none has been written, and that writing consumes a majority of the Board members' time. It is this part of the appeals process for which the consultant recommended additional staff. The Board's Chairman was seeking to add 12 law clerks to the support staff.

Hearing procedures are being reviewed and modifications being proposed by committees of Board members to expedite the appeals process. Any modifications will require DOD's approval. However, these changes are not expected to directly reduce the Board's backlog of cases.

ANALYSES OF THE BOARD'S WORKLOAD
COVERING FISCAL YEARS 1980-1983

We believe the data presented here represent a general overview of the Board's efforts to handle an increasing work load. Pursuant to the Committee Chairman's request, we have included information on disputes involving Cost Accounting Standards, Defective Cost or Pricing Data, and Allowable Cost Principles contained in parts 30 and 31, respectively, of the Federal Acquisition Regulation.

We caution the reader not to form any firm conclusions from these analyses because the data base is not precisely maintained. For example, in the Board's 1983 annual report the Chairman stated that the identification of a dispute's key issue using the Board's old classification system may not correctly represent the subject matter of the dispute.

OVERALL CASELOAD

Table 1

Disputes Docketed, Disposed of, and Pending
Fiscal Years 1980-83

<u>Fiscal year</u>	<u>Disputes docketed</u>	<u>Disputes disposed of</u>	<u>Disputes pending</u>
1980	1,170	1,115	1,259
1981	974	914	1,301
1982	1,273	938	1,594
1983	<u>1,256</u>	<u>1,131</u>	1,695
Total	<u>4,673</u>	<u>4,098</u>	

Docket--The number of appeals filed with the Board has increased during the past 2 years.

Dispositions--The Board disposed of an average of 33 disputes per member during the above 4 years. During 1983, the Board disposed of an average of 36 disputes per Board member. Of the 1,131 dispositions, 689 were on the Board's docket for less than one year, 353 were on the docket for about 2 years, and 89 were on the docket for more than 3 years.

Pending--Despite the increased number of dispositions in 1983, the number of pending disputes increased. Between fiscal years 1980 and 1983 the number of pending disputes increased by 436. The Board Chairman has estimated a 25 percent improvement in dispositions if new staff are approved for the Board.

ACCOUNTING CASELOAD

To be responsive to the Committee's request we separated the disputes involving cost accounting standards, defective cost or pricing data, and allowable cost principles from other contract disputes. During fiscal years 1980-1983, the Board disposed of 197 disputes involving the above three issues. These represented about 5 percent of the Board's caseload.

Table 2

Disposition of Disputes Involving Accounting Fiscal Years 1980-83

	<u>1980</u>	<u>1981</u>	<u>1982</u>	<u>1983</u>	<u>Subtotals</u>
Cost accounting standards	3	0	6	4	13
Defective cost and pricing data	6	10	14	17	47
Allowable cost principles	<u>28</u>	<u>37</u>	<u>34</u>	<u>38</u>	<u>137</u>
Totals	<u>37</u>	<u>47</u>	<u>54</u>	<u>59</u>	<u>197</u>

ACCOUNTING VERSUS OTHER DISPOSITIONS

Tables 3 and 4 show the types of Board dispositions during the 4 fiscal years that we studied. They provide a comparison between the 197 accounting disputes and the 3,901 other disputes. The percentage of disputes which the Board decided in favor of the appellant (sustained) was about the same for accounting as for other dispositions. However, a lower percentage of appellant claims involving accounting issues were denied. Another significant difference that can be seen from the tables is that a higher percentage of accounting disputes were settled.

Table 3

Accounting Dispute Dispositions^a

Fiscal year	Sustained		Denied		Sust./Den.		Dismissed		Settled		Total Disputes
	No.	%	No.	%	No.	%	No.	%	No.	%	
1980	8	22	3	8	2	5	7	19	17	46	37
1981	6	13	3	6	-	-	3	6	35	75	47
1982	5	9	-	-	1	2	7	13	41	76	54
1983	4	7	2	3	3	5	10	17	40	68	59
Totals	<u>23</u>	<u>12</u>	<u>8</u>	<u>4</u>	<u>6</u>	<u>3</u>	<u>27</u>	<u>14</u>	<u>133</u>	<u>68</u>	<u>197</u>

Table 4

Other Dispute Dispositions^b

Fiscal year	Sustained		Denied		Sust./Den.		Dismissed		Settled		Total Disputes
	No.	%	No.	%	No.	%	No.	%	No.	%	
1980	81	8	194	18	6	1	191	18	605	56	1,077
1981	107	12	165	19	21	2	134	16	439	51	866
1982	96	11	168	19	26	3	176	20	419	47	885
1983	106	10	189	18	49	5	278	26	450	42	1,072
Totals	<u>390</u>	<u>10</u>	<u>716</u>	<u>18</u>	<u>102</u>	<u>3</u>	<u>779</u>	<u>20</u>	<u>1,913</u>	<u>49</u>	<u>3,900</u>

^aThe terms used in Tables 3 and 4 have the following meanings:

- Sustained - The Board upheld the appellant's claim.
- Denied - The Board did not uphold appellant's claim.
- Sust./Den. - A portion of appellant's claim was upheld.
- Dismissed - The appellant's claim was dismissed for lack of action by appellant, lack of jurisdiction by the Board, etc.
- Settled - The parties in dispute resolved their differences before the Board disposed of the dispute.

^bThere were two disputes for which the Board's records did not indicate their disposition.

PROCESSING TIME

We were able to determine the length of time that disputes were on the Board's docket for only 2 of the 4 years we studied. The comparison below shows that disputes involving cost accounting standards, defective cost or pricing data, and allowable cost principles were on the Board's docket for more time than other types of contract disputes.

Table 5

Processing Time for Disputes Disposed
of During Fiscal Years 1982-83

<u>Fiscal year</u>	<u>Type of dispute</u>	<u>Less than 1 year</u>	<u>More than 1 year</u>	<u>More than 3 years</u>
		----- (percent) -----		
1982	Accounting	30	55	15
	Other	60	32	8
1983	Accounting	47	41	12
	Other	62	30	8

EXCERPT FROM FISCAL YEAR 1984 ANNUAL REPORT
OF THE ARMED SERVICES BOARD OF CONTRACT APPEALS

<u>Principal contract clause or issue in dispute^a</u>	<u>FY-80</u>	<u>FY-81</u>	<u>FY-82</u>	<u>FY-83</u>	<u>FY-84</u>
Actual Damages					
(Gov't claim)	3	1	4	-	8
All Disputes	1	-	-	-	1
Allowable Costs	-	29	53	55	33
Basic Agreement				1	-
Bid Protest			9	8	3
Breach			8	6	6
Changes	374	266	236	285	243
Contract Disputes Act			18	13	93
Cost Acctg Standards			6	4	2
Cost or Pricing Data	4	9	14	17	19
Cost Principles	22	20	15	3	9
Default	283	235	210	250	253
Delivery	2	1	-	2	8
Differing Site Conditions	18	33	27	25	38
Discounts	1	-	1	-	1
Disputes (Juris.)	69	6	1	-	1
Economic Price Adj.				11	1
Equal Access to Justice				18	1
Estimated Quantity			6	3	9
Excess Costs	14	21	28	21	16
Excusable Delay	-	2	1	1	7
First Article	1	1	-	4	10
Freight Charges	2	3	1	-	1
G.F.P.	5	8	5	8	6
General Average	-	1	-	-	-
Government Delay	-	12	12	18	17
Guaranteed Descriptions	-	7	14	12	5
Inspection	10	11	19	20	19
Insurance	3	2	-	-	-
Intellectual Properties			3	-	-
Interest	3	5	9	5	6
Labor	10	8	5	7	5
Liability for HHG					
Damages	-	6	7	2	14
Limitation of Costs				9	8
Liquidated Damages	11	18	17	15	29
Miller Act	1	1	-	-	-
Mistake in Bid	-	12	11	11	15
Mutual Mistake			1	1	4
Option to Renew			2	2	2

EXCERPT FROM FISCAL YEAR 1984 ANNUAL REPORT
OF THE ARMED SERVICES BOARD OF CONTRACT APPEALS

<u>Principal contract clause or issue in dispute^a</u> (continued)	<u>FY-80</u>	<u>FY-81</u>	<u>FY-82</u>	<u>FY-83</u>	<u>FY-84</u>
Payments	25	25	22	36	24
Price Escalation	9	6	2	1	4
Progress Payments			6	6	13
Property Disposal	3	7	1	1	1
Requirements	4	4	6	3	4
Risk of Loss			5	6	4
Shipment	1	1	-	-	-
Specifications	54	81	97	152	160
Storage	2	-	-	-	-
Suspension of Work	4	3	2	4	10
Taxes	4	2	3	7	6
Termination for Convenience	13	14	17	18	21
Value Engineering	-	5	6	6	4
Warranty	11	12	13	10	49
Other	145	37	15	10	32
Unknown				34	82

^aThis excerpt illustrates the variety of subjects in the disputes heard by the Board and is included as requested by the Committee staff. If the reader wishes to use this excerpt for a statistical study we draw your attention to the caution on page 33.



ARMED SERVICES BOARD OF CONTRACT APPEALS
200 STOVALL STREET
ALEXANDRIA, VIRGINIA 22332-0700

1 April 1985

Mr. Frank C. Conahan, Director
National Security and International
Affairs Division
U.S. General Accounting Office
Washington, D. C. 20548

Re: Draft GAO Report No. 942289 dated February 22, 1985

Dear Mr. Conahan:

Your letter dated March 26, 1985 requested ASBCA comments on the above draft report entitled "The Armed Services Board of Contract Appeals Has Operated Independently."

Except for a few minor matters — which are addressed below following our comment regarding FY 84 data — we concur in the findings recited in the draft.

We do observe that GAO would recommend legislation "If the Congress wants members of boards of contract appeals to be qualified, appointed, evaluated, and removed in a manner similar to ALJ's." We understand this recommendation to be based on the position taken by the Office of Personnel Management that OPM lacks authority under the Contract Disputes Act of 1978 and/or the Civil Service Reform Act to issue regulations addressing the qualifications, appointment, evaluation and suspension or removal of contract appeals board members. Perhaps the recommendation for legislation has merit so long as OPM advocates the position reflected in the draft report. However, the legal position taken by OPM is not correct.

Admittedly, section 8(b)(1) of the Contract Disputes Act could have been better worded. But the intent is explicated in the pre-enactment legislative history, particularly on page 24 of Senate Report No. 95-1118 dated August 15, 1978, where among other things, it is stated that section 8(b)(1) is intended to establish guarantees of independence for contract appeals board members comparable to those applicable to administrative law judges. This intent is further reflected in a letter from Congressman Danielson to the OPM Director dated January 15, 1979 (copy attached), who further stated that the Act intended the OPM role which OPM now denies. Indeed, in 1979 OPM apparently agreed that it was responsible for taking some role in issuing adverse action regulations as evidenced by its draft regulations which were never issued.

Conceivably agencies could issue their own regulations governing the selection, evaluation and removal of contract appeals board members employed in those agencies. However, contract appeals board members perform the same quasi-judicial functions in all of the agencies in which they serve which is a principal reason for the similarity with the administrative law judge system mandated by the Contract Disputes Act. Thus by clear implication if not express wording OPM was intended to implement administratively section 8(b)(1). As an alternative to legislation OPM might be invited to reevaluate its legal position, particularly its refusal to issue the adverse action regulations drafted in 1979.

We have noted that the draft report does not take into account data applicable to fiscal year 1984. Mr. Fain of your office has a copy of the ASBCA annual report covering fiscal year 1984 which includes several pages of statistics. We do not believe that the FY 84 data would substantially affect any of your findings made in the draft report.

Turning to comments on minor matters:

a. On introductory page v and again on page 30 of the main text, it is stated that the government can only appeal decisions involving contracts awarded after March 1, 1979. We would add that the government may also appeal a decision involving a contract awarded prior to March 1, 1979 if the contractor has elected to proceed before the Board under the Contract Disputes Act pursuant to section 16 of the Act.

b. The first sentence of the second paragraph on page 11 would be more accurate if it were to state: The Chairman determines the number of personnel needed to support the Board's operation subject to approval by departmental officials responsible for authorizing allocation of personnel positions to the Board.

c. In the last paragraph on page 31 it is stated that an appeal of a Board decision to a federal court is limited to questions of law. We would add that a court may also review Board fact findings to the extent permitted by 41 U.S.C. sec. 609(b) which is partially quoted at the bottom of page 31.

d. In the second line of the second paragraph on page 37 the words "were ready for decision" should be substituted for "have been heard."

If you have any specific questions relating to the above or otherwise concerning the draft report we would do our best to answer them.

Sincerely,



DANIEL M. ARONS
Acting Chairman

Enclosure

Board of Contract AppealsGeneral Services Administration
Washington DC 20405

April 5, 1985

William J. Anderson
Director, General Government Division
General Accounting Office
Washington, DC 20548

Dear Mr. Anderson:

The following comments and recommendations constitute the response by the General Services Administration Board of Contract Appeals to the draft report entitled, The Armed Services Board of Contract Appeals Has Operated Independently (Code 942289), which you requested in your letter of March 26, 1985. Although the draft report deals primarily with the Armed Services Board of Contract Appeals, it does refer to policies and procedures of the GSA Board of Contract Appeals and discusses matters of great importance to all the boards of contract appeals. We have some strong disagreements with selected draft conclusions reached and inferences made by the GAO auditors. We recommend a thorough analysis of OPM's position on the employment status of agency board members. We believe that such an analysis will lead you to recommend in your final report that OPM reconsider and change its position.

Independence of Board Members

We agree with the overall conclusion reached by the auditors that "members of boards of contract appeals are not as insulated as they could be from agency control." The matter of the appearance of undue influence is one of continuing concern to GSA. The agency has acted to eliminate the appearance of any influence over the Board and to make the Board more independent in its functioning. Among the more significant measures are the establishment of special standards of conduct applicable to Board members, persons appearing before the Board, members of the public, and GSA personnel. Additional special standards have been established for employees of the Board. It is also the view of the agency that Board members should not be subject to performance appraisals. Additionally, the agency has delegated authority to the Chairman of the Board to appoint board members and to issue, amend, and cancel Board rules of procedure. The Board is autonomous and operates as a staff office. This arrangement allows the Board to control the selection and management of its staff, in contrast to the procedure at the Armed Services Board and the procedure previously existing at the U.S. Court of Military Appeals. See Mundy v. Weinberger, Civil Action No. 80-2096 (D.D.C. Dec. 23, 1982) (copy enclosed). Support staff are selected directly by the Board and are paid from the Board's funds. As a staff office we are responsible for all our own day-to-day

operations, including formulation and execution of operational policy, administration of travel, and other matters necessary to the independent and efficient functioning of the Board. We note with approval that Appendix II of the draft report summarizes a consultant's recommendations regarding improving operations at the Armed Services Board. One recommendation is that law clerks be added to support staff there to aid in the reduction of case backlog. We endorse that recommendation as applicable to all the boards of contract appeals, but in particular we believe that the augmentation of support staff--attorneys, law clerks, and legal staff assistants--at this Board will be a cost effective way for us to maintain our independence as well as increase our productivity.

Despite our general agreement with the auditors' overall conclusion, we take strong exception to various statements in the draft report regarding the ability of the agency to remove administrative judges. First, administrative judges who are veterans do have a right to appeal to the Merit Systems Protection Board (MSPB) whether or not they may be in the excepted service. Furthermore, applicable statutes may be construed to provide an administrative judge who is not a veteran with recourse to the MSPB.

We agree with the first two sentences of the third paragraph on page 17:

The Commission on Government Procurement recommended that members of boards of contract appeals be selected and appointed in the same manner as ALJs to minimize the members' ties to the agency head. The Contract Disputes Act contains language which was intended to implement the Commission's recommendation.

We think the third sentence of the paragraph is misleading:

However, the Contract Disputes Act did not specifically address the removal of members, nor identify the government agency responsible for developing and implementing procedures that would insulate members of boards of contract appeals from the agencies which employ them.

Quite to the contrary, we believe that the Contract Disputes Act (CDA) did in fact implement the recommendation of the Commission on Government Procurement that board members be selected and appointed to serve in the same manner as ALJs, and in so doing also addressed the subject of the removal of members and their insulation from the influence of the agencies they serve. The fact that the CDA does not identify any government agency--such as OPM--as responsible for developing and implementing protective procedures is not significant. Indeed, OPM on a number of

occasions has attempted to develop government-wide regulations governing the appointment and removal of agency board members.

The statement on page 20, that "[n]o government-wide procedure exists to determine the qualifications for membership, such as those developed by OPM for ALJs," is inaccurate. Currently, DOD maintains a competitive register of applicants for positions on the Armed Services and Corps of Engineers Boards. The General Services Administration maintains a similar interagency register for applicants who wish to be considered for positions on the "civilian" boards. With minor exceptions, these two systems require the same qualifications of applicants who apply to be listed on the registers. Furthermore, both systems are based upon initial guidelines developed in accordance with the CDA and issued by OPM. A government-wide procedure does exist to determine qualifications for board membership, and it is similar to that developed by OPM for ALJs.

The draft report refers to a December 1978 letter from OPM's General Counsel to that agency's Executive Director. We agree with the General Counsel's statement in that letter (not quoted in the draft report) that Congress intended the ALJ system to be a "separate model to emulate when it [Congress] sought to devise a similar selection procedure for contract board members." As he went on to say: "Congress must have had a parallel system in mind." The language "selected and appointed . . . in the same manner as" was used in the CDA because Congress understood the significant differences between ALJs and agency board members, e.g., that ALJs ordinarily issue only recommended decisions while agency board decisions are always final, and that the CDA prescribes statutory rates of compensation (SR category) which is not the case with ALJs. That it recognized the differences between these two kinds of quasi-judicial officers does not point inexorably to the conclusion that Congress intended one kind to be in the competitive service (ALJs) and the other (agency board members) to be in the excepted service.

The draft audit report relies incorrectly on the OPM General Counsel's statement as to a purported requirement of the CDA that board members must be licensed attorneys. This is the linchpin of OPM's argument that board member positions are properly placed in the excepted service because OPM's appropriation acts prohibit that agency from expending funds for the examination of attorneys.

The CDA itself includes no requirement that board members be attorneys. See 41 U.S.C § 607(b)(1) (1982). The draft report fails to mention this fact, and on page 26 the auditors appear to adopt the OPM position. The General Counsel of OPM pointed out in his December 1978 letter that this so-called "requirement" is found in the House Report on the legislation, but in fact, it is found only in DOD comments on the bill that are attached to the report. Moreover, an administrative judge on an agency board cannot and does not serve as an attorney; to the contrary, the judicial nature of board member positions is clearly established in court decisions. See, e.g., Gulf

& Western Industries, Inc. v. United States, 671 F.2d 1322 (Ct. Cl. 1982). Consequently, the determination by OPM (in letters of both December 1978 and April 1979) that agency board members must be in the excepted service because they must be attorneys is wrong.

OPM's determination is wrong on one other count as well. The CDA prescribes statutory rates of pay for board members. By concluding that board members should be placed in the excepted service, OPM would subject the determination of the amount of their pay to the Classification Act, in contravention of the CDA.

The fact that Congress intended board members to be independent decision-makers, "selected and appointed to serve in the same manner as" ALJs, means that despite what OPM may believe, board members, like ALJs, may not be summarily removed by their agencies. The position of GSA is not, as stated on page 21 of the draft report, that "the removal procedures governing excepted service employees apply to its board members." The report should be corrected to state the true position of this agency, that is, they may be removed only in accordance with the same procedures applicable to ALJs.

The example on page 21, referring to the removal of two GSA board members in December 1978, is irrelevant to any discussion of the current status of board members under the CDA, since those actions occurred prior to the effective date of the CDA, which was March 1, 1979. We believe, contrary to the auditors' statement in their draft report, that the CDA itself will effectively prevent the recurrence of similar removals.

We strongly disagree with the final sentence on page 19, to the effect that Congress "did not succeed in safeguarding the independence of board members" when it passed the CDA. This remains to be seen should the question ever be tested in the courts; the fact that it has not been tested suggests that agencies other than OPM are adhering to the dictates of the CDA. The problem that the draft audit report identifies was created by OPM. This agency and Board believe that OPM should place agency board member positions in a statutory rate category, as the CDA provides. We urge you to explore and evaluate this matter further in your report. We believe that a thorough analysis of OPM's position will lead you to recommend that OPM reconsider and change that position.

Independence of a board is a many-faceted issue. Even the appearance of undue influence is one of continuing concern. This can include such matters as evaluation of judicial performance by line supervisors, the degree to which the board is permitted to operate on its own within the agency, and the applicability of specific provisions in the agency's standards of conduct that protect the independence, impartiality, and integrity of the board. Therefore, we believe that every opportunity should be taken to enhance the independence of a board within its agency. The

measures this agency has already taken to achieve this goal are discussed below.

An entire section of the GSA Standards of Conduct is devoted to the issue of Board independence. GSA Standards of Conduct, GSPMR ADM 7900.9, Subpart 105.735-7 (July 12, 1983), Special Provisions Relating to the GSA Board of Contract Appeals states:

The purpose of this subpart is to ensure that standards of conduct are observed, enforced, and maintained with regard to persons appearing before the Board, members of the public, and GSA personnel so that the integrity, impartiality, and independence of the Board are preserved.

The conduct of agency personnel toward the Board is addressed:

The agency is a party before the Board. Accordingly, GSA personnel must at all times preserve and uphold the integrity, impartiality, and independence of the Board, and are prohibited from making ex parte communications to administrative judges and employees of the Board that may be relevant to the merits of a proceeding that is or may come before the Board.

The necessity for maintaining the integrity, impartiality, and independence of the Board as an adjudicative forum is emphasized:

The integrity, impartiality, and independence of the board are indispensable to its function of adjudicating disputes between the United States Government and its contractors. The administrative judges of the Board must participate in establishing, maintaining, and enforcing, and must observe high standards of conduct so that integrity, impartiality, and independence may be preserved. The provisions of this subpart are to be construed and applied to further that objective.

Both impropriety and the appearance of impropriety are prohibited. The Board has also supplemented the Standards of Conduct by issuing an order applicable to its employees. GSA Order BCA 7900.1 (October 19, 1983). Among other things, this order prohibits impropriety as well as the appearance of impropriety.

The General Services Administration Statement of Organization and Functions reiterates the independence of the Board and identifies the adversarial role of the agency as a party before the Board:

(a) Creation and authority. The GSA Board of Contract Appeals (GSBCA) headed by the Chairman, GSA Board of Contract Appeals, was established on February 28, 1979, by the Administrator of General Services Administration as an independent administrative/judicial tribunal under the provisions of the Contract Disputes Act of 1978 (Pub. L. 95-563).

(b) Functions. The GSBCA hears, considers and decides disputes between contractors and GSA and other executive departments, agencies, and commissions. . . .

41 CFR 105-53.132 (1984). The Office of General Counsel is specifically excluded from all legal activities of the Board:

Functions. The Office of General Counsel (OGC), headed by the General Counsel, is responsible for providing all legal services to the services, programs offices, staff offices, and regions of GSA with the exception of certain legal activities of the Office of Inspector General and legal activities of the Board of Contract Appeals; drafts legislation proposed by GSA; furnishes legal advice required in connection with reports on legislation proposed by other agencies; provides liaison on legal matters with other Federal agencies; coordinates with the Department of Justice in litigation matters; and reviews and gives advice on matters of contract policy and contract operations.

41 CFR 105-53.138 (1984).

The delegation of authority from the agency head to the general counsel specifically excludes any authority to affect or impair the independence of the Board adjudication process. GSA Delegations of Authority Manual, Chapter 6, GSA Order ADM P 5450.39A (April 20, 1984). For this reason the Board has its own Office of Board Counsel that deals with all legal matters affecting the organization, operations, and procedures of the Board. GSA Organization Manual, Chapter 3, GSA Order OHR P 5440.1 (January 13, 1984).

The legislative history of the Contract Disputes Act of 1978, 41 U.S.C. §§ 601-613 (1982) (CDA), cites the need to preserve Board independence and to prevent undue agency influence on the Board adjudication process as a major rationale for that Act. Senate Report No. 95-1118, 95th Cong. 2d Sess., 1978 U.S. Code Cong. & Ad. News at 5236 states:

III BACKGROUND AND NEED FOR LEGISLATION

. . . .

Basically the [pre-CDA] methods and forums for handling [Government contract disputes] exist by executive branch fiat -- that is by insertion of contract terms specifying how disputes in specific areas will be resolved and by agency regulations governing the procedural and substantive adjudication of disputes. The agency boards of contract appeals are appointed by, report to, and are paid by the agency involved in the dispute. . . . Often they must decide cases concerning action by high-level agency officials.

The need for a quasi-judicial, independent, objective Board adjudication process which is fair to contractors as well as the Government is repeatedly addressed in the legislative history:

[The pre-CDA system] often fails to provide the procedural safeguards and other elements of due process that should be the right of litigants.

. . . .

Key elements of [the CDA] system would be agency boards of contract appeals acting as quasi judicial forums and strengthened by adding additional safeguards to assure objectivity and independence.

. . . .

The contractor should feel he is able to obtain his "day in court" at the agency board. . . .

The independence from agency influence required by the Board for the effective adjudication of disputes is somewhat similar to the independence required by an agency Office of Inspector General. In the case of both the Board and the Inspector General, agency control results in an inherent conflict. The legislative history of the Inspector General Act of 1978, 5 U.S.C. App. (1982), clearly recognizes this inherent conflict and cites the need to protect the various Inspectors General from agency influence. Senate Report No. 95-1071, 95th Cong., 2d Sess., 1978 U.S. Code Cong. & Ad. News at 2682 states:

This legislation accomplishes that, removing the inherent conflict of interest which exists when audit and investigative operations are under the authority of an individual whose programs are being audited Even the agency head would have no authority to prevent

the [Inspector General] from initiating and completing . . . investigations he believes necessary.

Without adequate resources and independence, the Inspectors General would be hamstrung and their failure preordained. This conclusion is equally applicable to the Board.

If one party to Board litigation, the agency-respondent, has the unilateral capacity to assert its influence through indirect pressure, the other party, the contractor-appellant, must accept the potential disadvantage of litigating on its adversary's terms. It is precisely to discourage any such invidious influence and to encourage parties to seek redress before the Board that this agency has adopted administrative measures aimed at preserving the Board's independence.

In view of the participation by the agency as a party before the Board, it is difficult for the agency, no matter how well-intentioned, to deal with the Board in other unrelated matters as if in a vacuum. It is there that the potential for abuse exists since subtle agency pressure has been and could again be applied in areas of perceived Board vulnerability. As Judge Harold Greene put it:

Executive encroachment on the judicial power is to be no more permitted when that power is being exercised by an Article I tribunal than by one created under Article III What the Court holds today should be no more surprising than the observation that it is human nature not to bite the hand that feeds. Congress wanted a military court of last resort composed of civilians who could administer the military code evenhandedly, free from command influence. Objectivity cannot last long, however, when the very people being judged by the court are in turn judging the court and its personnel. Our notions of separation of power simply will not tolerate such encroachment by officials over a tribunal that Congress intended to be independent

Mundy v. Weinberger, Slip op. at 18-19. What Judge Greene wrote about the Court of Military Appeals is equally applicable to the boards of contract appeals.

The Board's proposed budget is submitted to Congress only after agency approval and is included as one element within the amounts requested for the general management and administration appropriation. Since the agency distributes reductions made through the appropriations to each individual account, the Board theoretically may be subject to agency pressures through the implicit threat of reduced funding. Board independence in the area of funding might be enhanced if the agency's appropriation language stated the minimum level of funding to be made available to the Board.

Our recommendations for the enhancement of Board independence notwithstanding, we believe that GSA, under the aegis of all its Administrators and Acting Administrators since 1979, has made tremendous strides toward maintaining and insuring Board independence within the overall framework of the agency. GSA's efforts in this regard should be recognized and applauded.

Other Technical Discrepancies

The chapter entitled BOARD'S INFLUENCE ON ACQUISITION PROCESS AND OPTIONS AVAILABLE WHEN THERE IS DISAGREEMENT WITH A BOARD DECISION contains several inaccuracies. At page 30 there appears the following:

The contractor can appeal the Board's decision to the Court of Appeals for the Federal Circuit. The government can only appeal decisions involving contracts awarded after March 1, 1979.

This is incorrect. The Government can appeal the board's decision on a contract awarded before March 1, 1979, if the contractor has rightfully elected to proceed under the CDA.

Another inaccuracy appears on page 31. The draft states that an appeal of a Board decision to a federal court is limited to questions of law. Parties can appeal to the courts on questions of fact, but in doing so they must satisfy a strict standard of review.

On page 32, the draft says:

A Board decision issued under the small claims procedures--disputes which amount to \$10,000 or less--cannot be appealed except in cases of fraud. (41 U.S.C. § 608(d).)

Not every dispute involving \$10,000 or less is, as the paragraph suggests, a small claim. Rather, an appellant may elect the small claims procedure if the amount of the claim is \$10,000 or less. In addition, the footnote on page 14 says:

At the election of the appellant, disputes involving \$50,000 or less are processed under expedited or accelerated procedures. Expedited disputes are decided within 120 days by the member hearing the case. Accelerated disputes are decided within 180 days by the member with the concurrence of a Vice Chairman, and possibly the Chairman.

The footnote implies that a contractor can elect the accelerated or the expedited small claims procedure in disputes involving \$50,000 or less. The latter procedure may be elected only if the dispute involves \$10,000 or less. It is further suggested that the term "small claims" be substituted for the term "expedited." Both the small claims procedure and the accelerated procedure utilize an expedited decision process. Under the small claims procedure the Board renders its decision where practicable within 120 days after receipt of the appellant's election.

Thank you for the opportunity to comment on this important matter.

Sincerely,



LEONARD J. SUCHANEK
Chief Judge and Chairman, Board of
Contract Appeals

Enclosure



United States
**Office of
Personnel Management**

Washington, D.C. 20415

In Reply Refer To:

Your Reference

APR 4 1985

Mr. William J. Anderson
Director
General Government Division
U.S. General Accounting Office
Washington, D. C. 20548

Dear Mr. Anderson:

This is in reply to your letter of February 28 to the Honorable Donald J. Devine, Director, U.S. Office of Personnel Management (OPM), requesting that comments be provided on a February 22 draft report entitled, "The Armed Services Board of Contract Appeals Has Operated Independently". The Director has asked me to reply directly to you.

As Chapter 3 of the draft report recognizes, the Contract Disputes Act of 1978 did not establish a role for OPM in establishing "selection", "appointment", and "removal" procedures for contract appeals board members which were similar to those for Administrative Law Judges (ALJs). We see no need for OPM to assume such a role.

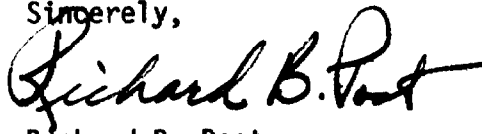
Contract appeals board members are already being "selected and appointed" in a manner similar to that for ALJs by the agencies which have established them without the need for any administrative role by OPM. In fact contract appeals boards in both the Department of Defense and the General Services Administration have developed and administer an examination which identifies attorneys who are interested in and qualified for hearing disputes involving government contract law. Both boards make lists or registers of eligibles under these examinations available to other agencies for use in selecting contract appeals board members.

Removal procedures for ALJs are established by 5 U.S.C. 7521 which provides that agencies may remove ALJs only for good cause established and determined by the Merit Systems Protection Board (MSPB) on the record after opportunity for hearing before MSPB. This statutory provision is not applicable to contract appeals board members and even if it were it would be up to MSPB and not OPM to review agency removal actions.

In the absence of a specific statutory provision such as 5 U.S.C. 7521, contract board members are still subject to certain removal procedures. Preference eligible members have the right to appeal a removal action to MSPB and such an appeal is under the provisions of 5 U.S.C. 7701 rather than 5 U.S.C. 7521. In addition, non-preference eligible members may be subject to such removal procedures as the employing agency has chosen to provide as a matter of agency policy.

Thank you for the opportunity to comment on this draft report. I hope that you will find the comments helpful.

Sincerely,

A handwritten signature in black ink that reads "Richard B. Post". The signature is written in a cursive style with a large, prominent initial "R".

Richard B. Post
Associate Director
for Staffing



General
Services
Administration

Washington, DC 20405

173332

APR 10 1985

Honorable Charles A. Bowsher
Comptroller General of the United States
U.S. General Accounting Office
Washington, DC 20548

Dear Mr. Bowsher:

This is in response to the General Accounting Office (GAO) draft audit report, "The Armed Services Board of Contract Appeals Has Operated Independently," assignment code #942289. The draft report deals primarily with the Armed Services Board of Contract Appeals, but does refer to policies and procedures of the General Services Administration (GSA) Board of Contract Appeals and discusses matters of great importance to all the boards of contract appeals.

We agree with the overall conclusion reached by the auditors that "members of boards of contract appeals are not as insulated as they could be from agency control." The attached paper prepared by the General Services Board of Contract Appeals and Office of Personnel reflects our strong disagreements with selected draft conclusions reached and inferences made by the GAO auditors and recommends thorough analysis of the Office of Personnel Management's (OPM) position on the employment status of agency board members.

If you have any questions concerning these written comments and recommendations, please contact Judge Vincent LaBella at 523-0402.

Sincerely,

A handwritten signature in cursive script that reads "Patricia Q. Sullivan". The signature is written in dark ink and is positioned above the typed name and title.

Patricia Q. Sullivan
Acting Administrator

Enclosure

Comments of
GENERAL SERVICES ADMINISTRATION
BOARD OF CONTRACT APPEALS AND
OFFICE OF PERSONNEL

AGENCIES APPOINT AND
CAN REMOVE BOARD MEMBERS
(Chapter 3)

The General Services Administration Board of Contract Appeals and the Office of Personnel agree with the overall conclusion reached by the auditors that "members of boards of contract appeals are not as insulated as they could be from agency control." The matter of the appearance of undue influence is one of continuing concern to this agency. This agency has taken steps to eliminate the appearance of any influence over the Board and to make the Board as independent in its functioning as it can be. For example, the Board is subject to special standards of conduct applicable to its members and employees. These standards are in addition to those that apply agency-wide. Additionally, the agency has delegated authority to the Chairman of the Board to appoint board members and to issue, amend and cancel Board rules of procedure. Moreover, the Board is autonomous and operates as a staff office.

Despite our general agreement with the auditors' overall conclusion, we take strong exception to various statements in the draft report regarding the ability of the agency to remove administrative judges. First, administrative judges who are veterans do have a right to appeal to the

Merit Systems Protection Board (MSPB) whether or not they may be in the excepted service. Furthermore, applicable statutes may be construed to provide an administrative judge who is not a veteran with recourse to the MSPB.

We agree with the first two sentences of the third paragraph on page 17:

The Commission on Government Procurement recommended that members of boards of contract appeals be selected and appointed in the same manner as ALJs to minimize the members' ties to the agency head. The Contract Disputes Act contains language which was intended to implement the Commission's recommendation.

We think the third sentence of the paragraph is misleading:

However, the Contract Disputes Act did not specifically address the removal of members, nor identify the government agency responsible for developing and implementing procedures that would insulate members of boards of contract appeals from the agencies which employ them.

Quite to the contrary, we believe that the Contract Disputes Act (CDA) did in fact implement the recommendation of the Commission on Government Procurement that board members be selected and appointed to serve in the same manner as ALJ's, and in so doing also addressed the subject of the removal of members and their insulation from the influence of the agencies they serve. The fact that the CDA does not identify any government agency--such as OPM--as responsible for developing and implementing protective procedures is not significant. Indeed, OPM on a number of

occasions has attempted to develop government-wide regulations governing the appointment and removal of agency board members.

The statement on page 20, that "[n]o government-wide procedure exists to determine the qualifications for membership, such as those developed by OPM for ALJ's," is inaccurate. Currently, DOD maintains a competitive register of applicants for positions on the Armed Services and Corps of Engineers Boards. The General Services Administration maintains a similar interagency register for applicants who wish to be considered for positions on the "civilian" boards. With minor exceptions, these two systems require the same qualifications of applicants who apply to be listed on the registers. Furthermore, both systems are based upon initial guidelines developed in accordance with the CDA and issued by OPM. A government-wide procedure does exist to determine qualifications for board membership, and it is similar to that developed by OPM for ALJ's.

The draft report refers to a December 1978 letter from OPM's General Counsel to that agency's Executive Director. We agree with the General Counsel's statement in that letter (not quoted in the draft report) that Congress intended the ALJ system to be a "separate model to emulate when it [Congress] sought to devise a similar selection procedure for contract board members." As he went on to say: "Congress must have had a parallel system in mind." The language "selected and appointed . . . in the same manner as" was used in the CDA because Congress understood the significant differences

between ALJ's and agency board members, e.g., that ALJ's ordinarily issue only recommended decisions while agency board decisions are always final, and that the CDA prescribes statutory rates of compensation (SR category) which is not the case with ALJ's. That it recognized the differences between these two kinds of quasi-judicial officers does not point inexorably to the conclusion that Congress intended one kind to be in the competitive service (ALJ's) and the other (agency board members) to be in the excepted service.

The draft audit report relies incorrectly on the OPM General Counsel's statement as to a purported requirement of the CDA that board members must be licensed attorneys. This is the linchpin of OPM's argument that board member positions are properly placed in the excepted service because OPM's appropriation acts prohibit that agency from expending funds for the examination of attorneys.

The CDA itself includes no requirement that board members be attorneys. See 41 U.S.C § 607(b)(1) (1982). The draft report fails to mention this fact, and on page 26 the auditors appear to adopt the OPM position. The General Counsel of OPM pointed out in his December 1978 letter that this so-called "requirement" is found in the House Report on the legislation, but in fact, it is found only in DOD comments on the bill that are attached to the report. Moreover, an administrative judge on an agency board cannot and does not serve as an attorney; to the contrary, the judicial nature of board

member positions is clearly established in court decisions. See, e.g., Gulf & Western Industries, Inc. v. United States, 671 F.2d 1322 (Ct. Cl. 1982). Consequently, the determination by OPM (in letters of both December 1978 and April 1979) that agency board members must be in the excepted service because they must be attorneys is wrong.

OPM's determination is wrong on one other count as well. The CDA prescribes statutory rates of pay for board members. By concluding that board members should be placed in the excepted service, OPM would subject the determination of the amount of their pay to the Classification Act, in contravention of the CDA.

The fact that Congress intended board members to be independent decision-makers, "selected and appointed to serve in the same manner as" ALJ's, means that despite what OPM may believe, board members, like ALJ's, may not be summarily removed by their agencies. The position of GSA is not, as stated on page 21 of the draft report, that "the removal procedures governing excepted service employees apply to its board members." The report should be corrected to state the true position of this agency, that is, they may be removed only in accordance with the same procedures applicable to ALJ's.


The example on page 21, referring to the removal of two GSA board members in December 1978, is irrelevant to any discussion of the current

status of board members under the CDA, since those actions occurred prior to the effective date of the CDA, which was March 1, 1979. We believe, contrary to the auditors' statement in their draft report, that the CDA itself will effectively prevent the recurrence of similar removals.

We strongly disagree with the final sentence on page 19, to the effect that Congress "did not succeed in safeguarding the independence of board members" when it passed the CDA. This remains to be seen should the question ever be tested in the courts; the fact that it has not been tested suggests that agencies other than OPM are adhering to the dictates of the CDA. The problem that the draft audit report identifies was created by OPM. This agency believes that OPM should place agency board member positions in a statutory rate category, as the CDA provides. We urge you to explore and evaluate this matter further in your report. We believe that a thorough analysis of OPM's position will lead you to recommend that OPM reconsider and change that position.

Independence of a board is a many-faceted issue. Even the appearance of undue influence is one of continuing concern. This can include such matters as evaluation of judicial performance by line supervisors, the degree that the board is permitted to operate on its own within the agency, and the applicability of specific provisions in the agency's standards of conduct code that protect the independence, impartiality and integrity of

the board. Therefore, we believe that every opportunity should be taken to enhance the independence of a board within its agency.


VINCENT A. LaBELLA
Administrative Judge

Date APR 3 1985



THE UNDER SECRETARY OF DEFENSE

WASHINGTON, DC 20301-3010

RESEARCH AND
ENGINEERING
(AM/CPF)

18 APR 1985

Mr. Frank C. Conahan
Director, National Security and
International Affairs Division
U. S. General Accounting Office
441 G Street, N. W.
Washington, D. C. 20548

Dear Mr. Conahan:

This is the Department of Defense (DoD) response to the General Accounting Office (GAO) draft report entitled, "The Armed Services Board of Contract Appeals Has Operated Independently," dated February 22, 1985 (GAO Code No. 942289/OSD Case No. 6703). As the report indicates, the Chairman, Senate Committee on Governmental Affairs, requested that GAO undertake a study of the Board addressing the following questions:

- Are there impairments to organizational and individual independence in the Board's charter, structure, and operating practices?
- Does the Board have sufficient knowledge and understanding of generally accepted accounting and cost principles?
- Are Board members selected, appointed, and removed using procedures similar to those prescribed for administrative law judges by the Administrative Procedures Act?

In addition, the Chairman requested that GAO study the Board's decisions to determine their effect, and the options available to the government and contractors to respond to the decisions.

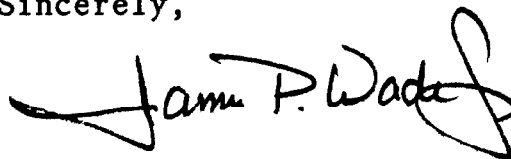
There were no recommendations contained in the GAO Report. The Department of Defense concurs with the findings and conclusions, which are briefly summarized below:

- The GAO found that the Armed Services Board of Contract Appeals has operated independently. No impairments to organizational and individual independence in the Board's charter, structure, and operating practices were reported.

- While there are no requirements that Board members have accounting backgrounds, GAO found that several of the current members have some educational or vocational background in accounting. GAO concluded that this would appear to provide the Board with sufficient knowledge to deal with the relatively small number of disputes that have accounting principles as the primary issue.
- GAO found that members of boards of contract appeals are not insulated from control by agencies that are parties to contract disputes on which the boards issue decisions. GAO concluded, however, that if the Congress wants members of such boards to be qualified, appointed, evaluated, and removed in a manner similar to administrative law judges, then legislation will be needed. GAO reported that under the current arrangements, the DoD, the General Services Administration, and the Veterans Administration have developed their own requirements to qualify applicants for membership on their boards of contract appeals.
- GAO found that, although difficult to quantify, the Board nonetheless plays a significant role in the acquisition process. The GAO concluded that its decisions are one of several factors that influence and shape the formulation of DoD's acquisition policies and procedures.
- GAO found that, while most Board decisions are implemented by the parties to a dispute, when the Government or a contractor disagrees with a decision, there are several options available to respond to it. GAO concluded that these options appear adequate to protect the interests of all parties.

A few technical changes for purposes of accuracy were also provided to your staff. The Department of Defense appreciates the opportunity to comment on this draft report.

Sincerely,



James P. Wade, Jr.
Acting



EXECUTIVE OFFICE OF THE PRESIDENT
OFFICE OF MANAGEMENT AND BUDGET
WASHINGTON, D.C. 20503

OFFICE OF FEDERAL
PROCUREMENT
POLICY

MAR 25 1985

Mr. William J. Anderson
Director, General Government Division
U.S. General Accounting Office
Washington, DC 20548

Dear Mr. Anderson:

This is in response to your request for comments on the draft GAO report on the Armed Services Board of Contract Appeals (Code 942289), dated February 22, 1985. The Office of Federal Procurement Policy and the Office of Management and Budget have no objection to and no comments on the draft report.

Thank you for the opportunity to review the report.

Sincerely,

William E. Mathis
William E. Mathis
Acting Administrator

American Bar Association

WRITER'S ADDRESS AND TELEPHONE

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April 1, 1985

Mr. Frank C. Conahan
Director
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441 G Street, N.W.
Washington, D.C. 20548

Dear Mr. Conahan:

We appreciate your forwarding copies of your draft report on the Armed Services Board of Contract Appeals to the Section of Public Contract Law of the American Bar Association for review and comment. Inasmuch as the Section's present Chairperson has recused herself from any consideration of this Report therefore, as Vice-Chairman of the Section, I am forwarding these comments on behalf of the Section:

We commend the GAO's thorough, objective and professional approach in its research, preparation and writing of this report.

The Public Contract Law Section concurs with the GAO's well reasoned conclusion that the independence of the ASBCA has not been impaired by its charter, structure or operating practices, even though the character and structure of the ASBCA leave it vulnerable to agency pressure.

We further concur with both the reasoning and the conclusion expressed in the Draft Report that specified expertise in the accounting field should not be a prerequisite for Board membership. (As a procedural comment we suggest that the substance of this conclusion expressed on page 27 be included in the helpful digest at the beginning of the report.)

1984-85

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We concur with the conclusions expressed in the report regarding insulation of Board members from agency control. Board members have done a remarkable job of remaining independent in their decision-making functions, even though the character and structure of the Board permit theoretical agency control.

We believe, as you have stated, that the available rights of appeal of both parties to Board decisions are adequate, and both parties have access to the legislative process to attempt to remedy what they might consider adverse long term effects of particular Board decisions.

In summary, we agree with the GAO's conclusions and urge you to include these conclusions in your final report.

The GAO did find that the Board members were not completely insulated from agency control, since the members are appointed and can be removed by the agencies that are parties to the contract disputes on which the Board issues decisions. The draft cites the Report of the Commission on Government Procurement which highlighted the need to insulate Board members from agency pressures. The Congress sought to satisfy this need by providing in Section 8(b)(1) of The Contract Disputes Act of 1978 that the members of agency boards of contract appeals shall be selected and appointed in the same manner as Administrative Law Judges are appointed pursuant to Section 3105 of Title 5 of the United States Code. The ALJ system, as pointed out in your draft Report, was considered a model on which to base the development and implementation of a system to provide the independence of Board members.

The Office of Personnel Management ("OPM") has denied that it has jurisdiction to establish a system for Board members similar to that which it developed and implemented to qualify, appoint, evaluate, and remove Administrative Law Judges. Board members are licensed attorneys and in the "excepted service." OPM is prohibited to examine for attorneys. Hence, OPM argues that it is prohibited from establishing a system similar to the one established for ALJs.

Consequently, the draft Report concludes that if a system for Board members is to be established, legislation is needed. It appears, however, if the OPM has determined that it does not have authority to establish such a system, some other means within the Executive Branch may be the road to travel - perhaps by Presidential directive. The Congress has expressed its intent in this regard in the Contract Disputes Act and authority exists for, at least, an "adverse action" procedure to be adopted for members of boards of contract appeals. Therefore, we question whether the conclusion stated in the draft Report on Page 23 is completely accurate. This states that "If the Congress wants members of boards of contract

appeals to be qualified, appointed, evaluated, and removed in a manner similar to ALJs, then legislation will be needed". This statement appears to be too general when the prohibition as interpreted by OPM only refers to that organization. The Executive Branch can find alternative ways to execute the Congressional mandate contained in the Contract Disputes Act.

The analysis of the Board's case load (on Page 40) shows that there were more disputes docketed than were disposed of at the end of the four-year period, 1980-1983. This is true for each of those intervening years. Appendix II states that the consultant that analyzed the management of the Board recommended that there be a reorganization of the Board together with additional staff, both in members and support staff. From our review of your Report and our independent knowledge it would appear that such an increase in staff would be not only justified, but required.

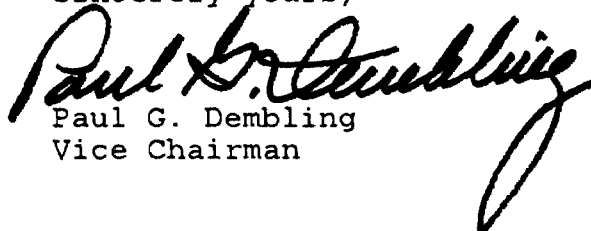
We note that the Board has a staff of support personnel including eight secretaries and stenographers for its 33 members. It is obvious that this is not a sufficient number for the Board to operate efficiently. We also note that for the Fiscal Year 1983 there were 1,695 disputes pending which translates into an average of 52 cases pending with each Board member. In this connection, on Page 11 of the Report it is stated that the Department of the Army provides administrative support to the Board. It continues by stating "the Army has satisfied the Board's staffing and administrative needs in a consistent manner since 1979". We believe that the word "satisfy" is ambiguous. Does this mean that the Army has provided all that was asked for or that it has merely handled the Board's staffing and administrative matters?

In our view, the staffing has not been adequate to meet the requirements of the Board.

There is one minor addition which we would suggest on page 22 in the first sentence at the top of the page: insert the word "former" between "A" and "chairman", to reflect that it was "A former Chairman of American Bar Association's Section of Public Contract Law..."

We commend your office for this Report and particularly Robert Fain, Evaluator in Charge and Gary Burton, attorney, for their careful reporting and analysis.

Sincerely yours,


Paul G. Dembling
Vice Chairman

**NATIONAL CONFERENCE
OF
BOARDS OF CONTRACT APPEALS MEMBERS**

March 26, 1985

Paul F. Math
Associate Director
National Security and International
Affairs Division
U.S. General Accounting Office
Washington, D.C. 20548

Dear Mr. Math:

Thank you for the opportunity to review and respond to the draft report entitled, "The Armed Services Board has Operated Independently." The National Conference of Boards of Contract Appeals Members (NCBCAM) is composed of Administrative Judges who, as members of the 12 Agency Boards of Contract Appeals, hear and decide disputes under the Contract Disputes Act of 1978. Because our organization consists of 112 active (and retired) Administrative Judges who handle the majority of federal contract disputes, we welcome the opportunity to express our views on the operation and independence of the Boards in the handling of these tasks.

At the outset, we are gratified that GAO found in its interviews with affected parties, a general perception that "the [ASBCA] Board and its members have maintained their independence," and further, that there was no "evidence of attempts to impair the Board's independence." We believe these observations are equally valid with respect to all other Boards operating under the Contract Disputes Act.

We are disturbed, however, by the assertion that "Board members are not insulated from Agency control." This conclusion is apparently based on the fact that because Board members are classified as attorneys they "serve in the excepted service and can be dismissed without the protections available to federal employees who serve in the competitive service." Under such reasoning Board members serve at the will of the Agency head and presumably may be dismissed without cause if, for example, an Agency head disagrees with a Board opinion.

Such a construction would be in our view totally contrary to the intent of the Contract Disputes Act. While it is true that all current members of the Boards of Contract Appeals are attorneys, our status is directly dependent upon the Contract Disputes Act which creates the new category of "member" who is "selected and appointed to serve in the same manner as hearing examiners [Administrative Law Judges] appointed pursuant to section 3105 of title 5" (Emphasis added.)

To "serve in the same manner" would, in our view, mean that Board members, just as hearing examiners, may be removed only for "good cause."

The legislative history of the Contract Disputes Act reflects a central concern to assure both the independence and the appearance of independence of the Appeals Boards in deciding disputes between contractors and Agencies.

Section 8 was intended, in part, to accomplish this objective by eliminating the possibility of arbitrary removal of Board members by Agency heads who might be displeased with Board decisions. See, for example, Senate Report No. 95-1118, 95th Cong. 2nd Ses. at 13: "Key elements of this system would be agency boards of contract appeals, acting as quasi-judicial forums and strengthened by adding additional safeguards to assure objectivity and independence." (Emphasis added.)

There can be no independence, in appearance, or in fact, if Board members may be removed without good cause. We thus construe Section 8 of the Act to confer the same "good cause" requirements currently applicable in adverse actions against Administrative Law Judges under 5 U.S.C. § 7521. This was implicitly acknowledged by the Director of the Office of Personnel Management in a July 25, 1979 letter to agency heads in which he stated that the Contract Dispute Act "mandates the development of procedures guaranteeing that board members are appointed strictly on the basis of merit and ensuring that they will not be subject, either directly or indirectly, to conditions that might interfere with their independence in conducting proceedings and in deciding cases." (Emphasis added.)

Nor do we believe that these basic rights intended by Congress are in any way abrogated by the failure, to date, of the Office of Personnel Management to either establish centralized appointment procedures for Administrative Judges or to promulgate adverse action regulations. Whatever merit there may be to OPM's position concerning its authority to establish centralized appointment procedures, we view the independence of those who serve as Board members as a separate issue.

In this connection we believe that Agencies have acted in a manner which recognizes the independent status conferred upon Board members by the Contract Disputes Act. We do not serve in the Senior Executive Service, no ratings or appraisals of our members occur outside of the Boards themselves, and no adverse action has ever been attempted against any Administrative Judge since the effective date of the Contract Disputes Act of 1978.

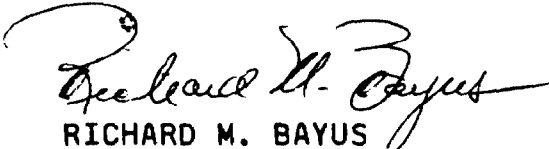
While we are confident that judicial bodies would so construe the Act, the possibility nevertheless remains that an adverse action might be attempted in which it would be argued that

Administrative Judges may be removed without cause. Therefore we would support an amendment which would remove any ambiguity which may possibly exist.

Congress may also wish to clarify its intentions with respect to the qualification, selection and appointment of members if it is dissatisfied in any manner with current decentralized procedures.

Finally, we note that Appendix II to the draft report summarizes a consultant's report which recommends the addition of law clerks as support staff to aid in the reduction of case backlog. We believe the augmentation of support staff offers a cost effective way for all Boards to cope with growing work loads and endorse this recommendation.

Sincerely,



RICHARD M. BAYUS
Acting President
NCBCAM

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