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[S. 2292, the Contract Disputes Act of 1977, and S. 3178, the Contracts Disputes Act of 1978]. June 20, 1978. 8 pp.

Testimony before the Senate Committee on Governmental Affairs: Federal Spending Practices and Open Government Subcommittee; the Senate Committee on the Judiciary: Citizens and Shareholders Rights and Remedies Subcommittee; by Paul G. Dembling, General Counsel.

Contact: Office of the General Counsel.
Organization Concerned: Commission on Government Procurement.
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Authority: Wunderlich Act (41 U.S.C. 321). Contract Disputes Act of 1977; S. 2292 (95th Cong.). Contracts Disputes Act of 1978; S. 3178 (95th Cong.). P.L. 85-804. 31 U.S.C. 952. 31 U.S.C. 724(a). 4 C.F.R. 101.

S. 2292 and S. 3178 are intended to provide for the resolution of claims and disputes relating to Government contracts awarded by executive agencies. They grew out of recommendations made by the Commission on Government Procurement which were supported by the Comptroller General. The bills would: expand the application of the disputes clause which is contained in most Government contracts; authorize agencies to compromise claims by or against the Government; improve means for review and settlement of contract disputes prior to litigation; allow retention of agency board of contract appeals where the caseload justified a full-time board of at least five members; allow appeals of board decisions by both parties--S. 3179 would allow a longer time for appeals by contractors than by agencies while S. 2292 sets the same time limit for both parties: expedite resolution of small claims; allow the contractors direct access to courts; grant discovery and subpoena powers to boards of contract appeals; and allow awards by a board or court to be paid out of the permanent indefinite appropriation for payment of judgments, with later reimbursement by agencies. Enactment of either bill, with minor revisions, will provide a sound statutory foundation for improving the disputes-resolving system. (HTW)

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Statement of
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Before the

Committee on Governmental Affairs
Subcommittee on Federal Spending Practices and Open Government
United States Senate

and

Committee on Judiciary
Subcommittee on Citizen and Shareholder Rights and Remedies
United States Senate

On

S.2292 - To Provide for the Resolution of Claims and Disputes Relating to Government Contracts Awarded by Executive Agencies

and

S.3178 - To Provide for the Resolution of Claims and Disputes Relating to Government Contracts Awarded by Executive Agencies

Messrs. Chairmen and Members of the Subcommittees:

We appreciate your invitation to appear before your Subcommittees to discuss our views on S.2292 and S.3178. The bills if enacted would be cited as the "Contract Disputes Act of 1977" and the "Contracts Disputes Act of 1978," respectively.

Both bills are intended to provide for the resolution of claims and disputes relating to Government contracts awarded by executive agencies. Each of the bills is an outgrowth of recommendations made by the Commission on Government Procurement (the Commission).

The Commission made 12 recommendations concerning the resolution of disputes arising in connection with contract performance. They are:

1. Make clear to the contractor the identity and authority of the contracting officer, and other designated officials, to act in connection with each contract.

2. Provide for an informal conference to review contracting officer decisions adverse to the contractor.

3. Retain multiple agency boards; establish minimum standards for personnel and caseload; and grant the boards subpoena and discovery powers.

4. Establish a regional small claims boards system to resolve disputes involving $25,000 or less.

5. Empower contracting agencies to settle and pay, and administrative forums to decide, all claims or disputes arising under or growing out of or in connection with the administration or performance of contracts entered into by the United States.

6. Allow contractors direct access to the Court of Claims and district courts.

7. Grant both the Government and contractors judicial review of adverse agency boards of contract appeals decisions.

8. Establish uniform and relatively short time periods within which parties may seek judicial review of adverse decisions of administrative forums.

9. Modify the present court remand practice to allow the reviewing court to take additional evidence and make a final disposition of the case.

10. Increase the monetary jurisdictional limit of the district courts to $100,000.

11. Pay interest on claims awarded by administrative and judicial forums.

12. Pay all court judgments on contract claims from agency appropriations if feasible.

The Comptroller General, as a statutory Commission member, supported these recommendations to improve the Government's dispute-resolving procedure. Our Office believes the recommendations of the Commission are a balanced approach to improving the Government's dispute-resolving process.

We would like to highlight the principal provisions of the bills and comment on them as they relate to each other and to the Commission's recommendations.

Most Government contracts contain a "Disputes" clause. Under the clause factual disputes between the contracting officer and the contractor arising under the contract which cannot be resolved by mutual agreement are decided by the contracting officer. If the contractor disagrees, he may appeal to the agency head or his designated representative, usually a board of contract appeals. The board's decision with respect to an issue of fact is final and conclusive unless it is fraudulent, capricious, arbitrary, so grossly erroneous as necessarily to imply bad faith or not supported by substantial evidence. These standards of finality are those permitted under the Wunderlich Act, 41 U.S.C. §§ 321-32, with respect to factual issues. No finality is permitted with respect to legal questions.

The Disputes clause relates only to questions which arise under a provision of the contract. Therefore, breach of contract disputes currently are not resolved through this process. Section 4, which is the same in both bills, would expand the application of the Disputes clause by including a provision authorizing the executive agencies to settle, compromise, pay or otherwise adjust all claims, including breach of contract claims. This would eliminate the present distinction between disputes arising "under" a contract, which are decided by agency boards of contract appeals, and disputes arising out of an alleged breach of contract, which the boards generally are without jurisdiction to decide. We favor this aspect of Section 4.

Section 4 is based on the Commission's recommendation that agencies be empowered to "settle

and pay, and administrative forums to decide, all claims or disputes" in connection with contracts entered into by the United States. However, it goes further than contemplated by the recommendation. The Commission report indicates an intent to use an "all disputes" clause which would permit the resolution of breach of contract claims under the contracts disputes procedure. The bills, however, would also authorize agencies to compromise claims by or against the Government.

The authority of agencies to compromise claims currently is limited, for the most part, to compromising claims of the United States in amounts not exceeding $20,000, under 31 U.S.C. § 952, and such claims can be compromised only in accordance with the standards developed jointly by the Department of Justice and the General Accounting Office. See 4 C.F.R. 101 et seq. Claims by the United States in excess of $20,000 or claims against the United States must be referred to the Department of Justice before compromise can be effected. This provides consistency in the Government's approach. The bills would eliminate assurance of consistency by giving each agency unlimited authority to compromise all claims relating to Government contracts without providing for the imposition of uniform standards. The Commission did not make this recommendation and we do not believe it is desirable.

In addition, Section 4 of the bills would authorize the settlement of claims for contract reformation and rescission.

To provide an improved means for review and settlement of contract disputes prior to litigation, Section 6 of both bills provides that a contractor may request an informal conference to be held either before or after the decision of the contracting officer. The conference is intended to promote settlements by having both sides of the dispute presented to appropriate agency officials. We agree with the purpose of the procedure--promoting settlement before litigation and increasing the confidence in the procurement process--and also agree that conferences held either before or after the issuance of the contracting officer's decision will serve that purpose. Consistent with the Commission's recommendation, S.3178 requires that the Government conferees be above the contracting officer level. S.2292 provides

that the Administrator of the Office of Federal Procurement Policy (OFPP) will issue regulations to require executive agencies to establish procedures for conferences at "appropriate" levels of authority. The standard Disputes clause, which requires a contractor to appeal a final decision of the contracting officer within 30 days, may have to be modified to allow for the post-decision conference procedure.

Section 8 of the bills allows the retention of agency boards of contract appeals where the caseload justified a full-time board of at least 5 members. In the case of S.3178, the board members may have "no other inconsistent duties." We construe "no other inconsistent duties" to permit board members to consider or decide matters not covered by the bill, such as requests under Pub. L. 85-804. We favor this approach. There are 11 agency-affiliated boards of contract appeals in the executive branch, as well as boards maintained by the House Office Building Commission, the Senate Office Building Commission, the Joint Committee on the Library, the Postal Service, and the Government of the District of Columbia. We agree with the Commission that the agency boards of contract appeals generally have developed into satisfactory forums for the resolution of contract disputes, and, with only relatively minor changes, can be strengthened to continue in this role even more effectively. To this end, the establishment or maintenance of an agency board of contract appeals would be prohibited unless the agency can justify the maintenance of a full-time board with no other primary duties but to hear and decide contract appeals. All members of the board would be selected in a manner that minimizes their ties to the agency head.

S.3178 contains a somewhat different approach for the establishment and operation of a board of contract appeals for the Tennessee Valley Authority (TVA). TVA is one of the agencies that would come within the scope of the bill because it is a "wholly owned Government corporation." The exceptions applicable to TVA, we understand, were formulated so that the TVA procedure would generally conform to its existing procedure. Since the operation of TVA also differs somewhat from the procuring agencies to which the bill is primarily directed, we believe that this separate approach is reasonable.

Section 8 of the bills also allows appeals of board decisions by both parties. The agency boards of contract appeals as they exist today, and as they would be strengthened by other provisions in the bills, function as quasi-judicial bodies. Their members serve as administrative judges in an adversary-type proceeding making findings of fact and interpreting the law. Their decisions contribute heavily to the legal precedents in Government contract law, and often involve substantial sums of money. In performing this function, a board does not act as a representative of the agency, since the agency is contesting the contractor's entitlement to relief. For this reason, the Commission concluded that the Government, as well as contractors, should have a right to judicial review of adverse decisions. We agree with the Commission.

With regard to the filing of appeals, S.3178 allows a contractor to appeal to a United States district court or the Court of Claims within 12 months after receipt of the board decision, final delivery of supplies or completion or acceptance of the contract work, whichever is later. Appeals by agencies, however, must be filed within 120 days of the date of the decision and be approved by both the Attorney General and the Administrator of OFPP. On the other hand, S.2292 allows appeals by both parties to be made within 120 days with the agency appeal approved by the Attorney General.

We believe that the time limit for appeals should be the same for both parties who assume substantially equal roles as adversaries before the boards. Also, the boards as now constituted, and as strengthened by other provisions in the bills, are essentially trial courts and, as the Commission pointed out, there is no apparent reason to treat the time period for "appeal" of their decisions any differently than an appeal from a U.S. district court or U.S. court of appeals. Furthermore, we think the two separate approval levels in S.3178 might hamper the Government's appeal actions. In our opinion approval by the Attorney General is sufficient.

S.3178 further provides for accelerated disposition of appeals from contracting officer decisions where the amount in dispute is $50,000 or less. The accelerated

procedure is applicable at the election of either the Government or the contractor. Under this procedure appeals are to be resolved, whenever possible, within 150 days from the date either party elects to use the procedure.

In addition, Section 9 of both bills provide for the expedited resolution of "small claims" under a small claims procedure applicable at the sole election of the contractor. S.3178 defines a small claim as under $10,000; S.2292 defines a small claim as under $25,000.

Section 10 of the bills allows the contractor the right of direct access to the courts as an alternative to agency boards. Because of judicial interpretation of the Wunderlich Act, agency boards, in effect, have become the final arbiters of fact. The Commission concluded that most disputes would be best resolved in an administrative proceeding. However, it also concluded that the contractor should not be denied a full judicial hearing on a dispute the contractor deems important enough to warrant the maximum due process available under our legal system. This is important in light of the proposed broadening of board jurisdiction to cover all disputes between the Government and the contractor. Support for broadening the boards' jurisdiction might diminish if contractors did not retain the present right of direct access to the courts in what are now breach of contract cases.

Section 10 of S.3178 also implements the Commission's conclusion that the system would further the goals of economy and fair treatment if the courts were allowed discretion to supplement the board record with additional evidence and finally to resolve the dispute as well as remand the case to an agency board of contract appeals. S.2292, however, limits judicial evidentiary proceedings solely to the amount of recovery. The Commission concluded and we agree that a remand procedure, resulting in a "ping-pong" effect between the boards and the courts, does not contribute to a speedy and economical resolution of disputes. Thus, we favor the S.3178 approach..

Both bills grant discovery and subpoena powers to the boards of contract appeals. This will ensure that the tools to make complete and accurate findings are available, and would minimize the need for a court

to supplement the board on review. Finally, the bills provide for the payment of interest on contractor claims. This has already been implemented through changes in the procurement regulations.

Finally, where final judgment is made by a court, the contractor is presently paid out of the permanent indefinite appropriation established under 31 U.S.C. § 724(a) for the payment of judgments, rather than from agency appropriations. The bills provide that awards made by a board or court are to be paid out of that fund, but that the fund shall be reimbursed by the agencies out of available funds or by obtaining additional appropriations. This may decrease an existing incentive for agencies to avoid settlements and to litigate in order to have the claim paid from the permanent indefinite appropriation after entry of a final judgment by a court. Perhaps more importantly, it will point up the true economic cost of the procurement programs.

In summary, we believe that the Commission's recommendations for an improved dispute-resolving system should be implemented. The remedies system is important to good procurement. Enactment of either bill, with the minor revisions we have suggested, will provide a sound statutory foundation and is in the public interest.

This concludes my statement. I will be pleased to reply to questions.