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PROCUREMENT AND SYSTEMS
ACQUISITION DIVISION

RELEASED

JULY 7, 1980

B-198877

The Honorable Max Baucus, Chairman
Subcommittee on Limitations of Contracted
and Delegated Authority
Committee on the Judiciary
United States Senate



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Dear Mr. Chairman:

Subject: Study of the Effects of Changes in the
Contract Appeals Board System under the
Contract Disputes Act of 1978 (PSAD-80-55)

In your September 17, 1979, letter you asked us to study the effects of changes in the contract appeals board system under the Contract Disputes Act of 1978, Public Law 95-563, November 1, 1978.

During our initial audit work, we reviewed Boards of Contract Appeals activities at four executive agencies. We talked to the chairman of each board visited and to officials from the Office of Federal Procurement Policy (OFPP), Office of Management and Budget, and Office of Personnel Management (OPM). We also attempted to get responses to the 14 specific questions in your letter.

On the basis of the results of our initial efforts, we believe it is too soon to analyze how the Contract Disputes Act has affected the board system. Overall, Federal policy is still being developed, and relatively few cases have yet been processed under the new procedures. Therefore, as agreed with your office, we discontinued our audit work and, instead, summarized what has been done to implement the act and identified factors affecting that implementation. We addressed your 14 questions in the enclosure to this letter.

ACT TO RESOLVE
CONTRACT CLAIMS

In 1972 the Commission on Government Procurement reviewed the Federal appeals board process. It noted that

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this process would need substantive changes to effectively resolve contract disputes between contractors and the Government. According to the Commission, the agency boards (1) often failed to provide the necessary procedural safeguards and other elements of due process, (2) did not have adequate discovery and subpoena powers, and (3) did not have the procedural authority or machinery necessary to ensure that all relevant facts and issues were brought before the boards and given adequate consideration. Also, the procedural safeguards to assure board and member independence varied from agency to agency.

A number of measures were introduced in the Congress after 1972 to respond to Commission recommendations. The Contract Disputes Act was passed in November 1978. The act was designed to provide a fair, balanced, and comprehensive statutory system of legal and administrative remedies to resolve Government contract claims. Its provisions were designed to help systemize the Boards of Contract Appeals Government-wide by streamlining the contract appeals board system. This streamlining involved standardizing the selection process of judges and removing appeals boards from the direct control of agency administrators. The act became effective on March 1, 1979.

The act gives several responsibilities to OFPP. Although it assigns no specific responsibilities to OPM, one can reasonably infer that the Congress intended for OPM to develop personnel procedures for the selection and service of board members. It also provides for several changes in the appeals boards structure and operations. Some of the key changes are:

1. The board chairmen are to be compensated at a rate equal to GS-18s, the vice-chairmen at a rate equal to GS-17s, and the members at a rate equal to GS-16s.
2. Appeals of between \$10,000 and \$50,000 may be processed under accelerated procedures at the contractor's option. These appeals should be resolved within 180 days.
3. Appeals of \$10,000 or less may be expedited under simplified rules of procedure at the contractor's option. These appeals should be resolved within 120 days.

4. Boards may administer oaths, authorize depositions and discovery proceedings, and subpoena witnesses and evidence.

OFPP EFFORTS TO IMPLEMENT THE ACT

OFPP's responsibilities under the act include: (1) consulting with agency heads to determine whether they need boards of contract appeals, (2) allocating board positions to agencies, and (3) issuing guidelines relative to the establishment, functions, and procedures of agency boards. Concerned agency heads, and not OFPP, ultimately decide whether to establish or terminate an appeals board; but they are obligated to consult with OFPP before determining from a workload study that the volume of contract claims justifies establishing a full-time board with three or more members.

Between November 1978 and June 1979, OFPP requested caseload data from each agency, conducted workload studies, and consulted with the board chairmen to determine the size and justification for agency boards. OFPP drafted a policy letter in February 1979 which presented the results of its preliminary workload analysis and proposed board allocations. It primarily determined the proposed allocations by applying the 1978 overall Federal average number of cases closed per board member to each agency's 1978 caseload. OFPP's proposal also provided that each agency's caseload would have to justify at least three full-time board members before a board could be established. Based on this analysis, OFPP's proposal allocated 58 full-time board positions among 7 agencies. This allocation would have reduced the total number of appeals board members by 18 and eliminated 6 existing boards.

OFPP issued its final policy allocation letter in June 1979. To date, 69 of the 70 board positions provided under the act have been allocated among 10 different agencies. The remaining position has been reserved for an 11th agency, although that agency has not requested allocation of a position. Agency heads who decided to establish boards but were not allocated at least three positions, therefore, had to use other supergrade positions within their agencies to supplement board staffing. As of February 1980, 12 agency heads had established boards of appeal within their agencies, employing 81 full-time members.

OPM EFFORTS TO IMPLEMENT THE ACT

The Contract Disputes Act requires that board members be selected and serve in the same manner as hearing examiners but does not specify how OPM is to be involved in this process. As a result, OPM was initially uncertain as to its authority to develop board personnel procedures. Subsequently, the Congress informally clarified OPM's responsibilities under the act to entail establishing and administering both selection and removal procedures for board members. These responsibilities include administering a register of prospective board appointees and developing procedures guaranteeing that board members are appointed solely on merit.

Since early 1979, OPM has held several interagency meetings to develop board member personnel procedures. In June 1979 OPM issued interim selection procedures for agencies that needed to fill vacancies quickly. At least two of the four agencies we visited have used these procedures.

According to OPM officials, OPM lacks the staffing and expertise to develop final selection procedures. As a result, it awarded a contract on April 1, 1980, through the Department of Defense to develop final selection criteria and procedures. This contract, for about \$45,000, is to be completed in about 7 months.

Similar interagency efforts have been made to develop procedures covering board member performance appraisal and removal. To date, however, these procedures have not been completed. Considerable disagreement has arisen concerning whether board members should be placed in the competitive or excepted service and whether they should be subject to performance appraisals. OPM officials are aware of the need to avoid personnel procedure problems similar to those we identified for administrative law judges; ¹/ however, they have not yet been able to develop procedures acceptable to the interagency group members. As a result, OPM in March 1980 formally requested assistance from the Department of Justice in resolving these questions.

¹/"Administrative Law Process: Better Management Is Needed,"
FPCD-78-25, May 15, 1978.

OFPP AND OPM EFFORTS
TO IMPLEMENT THE ACT
SLOW AND CONTROVERSIAL

OFPP and OPM actions to implement the act have been slow and controversial, and instructions which may be helpful in setting up and operating boards have not been issued. For instance, 16 months after passage of the act, OFPP had not issued guidelines concerning the establishment or functions of agency boards even though the act provides such authority. Also, OPM still has not developed final board personnel policies and procedures. As a result, both the structure and the personnel procedures adopted for agency boards differ significantly.

The following examples illustrate some of the problems encountered:

- According to the act, each agency head is to consult with the OFPP administrator in deciding whether a full-time board is justified. But, according to the OFPP Associate Administrator, any consultation that took place was mostly between OFPP and the board chairmen. Since board chairmen have an interest in maintaining an appeals board within their agency, their objectivity is questionable.
- OFPP's June 1979 policy allocated less than three full-time positions to some agencies that decided to establish boards. This resulted in these agencies supplementing their allocations with other supergrade positions to reach the three full-time member minimum criteria. This action has increased the number of board members Government-wide.
- Little consolidation of appeals boards has occurred since passage of the act. Under OFPP's proposed policy, 6 of the 13 boards would have been eliminated and the number of persons serving on boards would have been reduced from 76 to 58. OFPP's final policy, however, reduced the emphasis on consolidation. Consequently only one board has been eliminated to date, while the number of full-time board members serving on Federal boards of appeal has actually increased. This increase was due to the development of significant differences of opinion among agency boards, OFPP, and

OPM about how the act is to be implemented. OFPP originally attempted to consolidate the appeals board system through its proposed allocation policy. However, since the authority under the act to decide whether to establish boards of appeal rests with the agency heads, considerable disagreement resulted over this proposal. The final OFPP policy was significantly revised, strictly basing allocations on 1978 caseload statistics.

--The extent to which board members are to be covered by personnel procedures similar to those followed for hearing examiners has not been decided. Differences of opinion have seriously affected each attempt to establish such procedures.

A major cause of problems has been uncertainty over congressional intent. For example, it is unclear to what extent the Congress intended the consolidation of agency boards or whether agencies should be able to supplement board allocations made by OFPP. It is also unclear how closely board members are to follow hearing examiner personnel procedures and, therefore, how performance evaluations are to be made.

CONCLUSIONS

While insufficient time has passed to assess fully how the Contract Disputes Act of 1978 will affect the appeals board system, both OFPP and OPM have acted slowly due to uncertainty and controversy over the act's provisions and the intent of the Congress. Until these uncertainties are resolved and clear policies and procedures established, it is not certain how far the act will go in streamlining the appeals board system.

As requested, we did not obtain written comments from nor discuss its contents with the agencies. Also, as arranged with your office, unless you publicly announce its contents earlier, we plan no further distribution of this report until 30 days from the date of the report. At that

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time we will send copies to interested parties and make copies available to others upon request.

Sincerely yours,



W. H. Sheley, Jr.
Acting Director

Enclosure

QUESTIONS ASKED BY SENATOR BAUCUS CONCERNING
CHANGES IN THE APPEALS BOARD SYSTEM

1. Has the number and size of contract appeals boards been reduced or increased based on actual caseload burden of each agency?

Answer:

Based on agencies caseloads, the number of appeals boards Government-wide has decreased from 13 to 12. However, OFPP has allocated positions to only 10 of the 12 boards. The other two agencies have not requested any allocations, although appeals boards have been established by them. Government-wide, the number of full-time board members has increased from 76 to 81 since the act was passed.

2. Have boards been combined or eliminated in agencies where caseload does not justify a full appeals board?

Answer:

As indicated above, to date, only one appeals board has been eliminated or combined with another board because its caseload did not justify a board.

3. Have any Federal agencies been given partial staffing for an appeals board?

Answer:

Because of their caseloads, OFPP allocated less than 3 full-time board positions to 3 of the 10 boards that received board allocations.

4. How do these partial boards function under the requirement that all appeals boards contain a minimum of a three-judge panel?

Answer:

The three agencies allocated less than three positions by OFPP have supplemented their allocations with other supergrade positions under their control to reach the minimum three full-time judge criteria for their boards.

5. Has creation of supergrade positions (GS-16 and above) for board members and establishment of permanent

appointments caused a significant increase in the cost of the appeals board system, Government-wide?

Answer:

Although we did not review cost information for each board, indications are that the creation of supergrade positions for board members has not significantly increased overall appeals board system costs. Before the act, members at some agencies were already serving at the supergrade level, while others were generally classified as GS-15s, only one grade below the supergrade classification. Board representatives we talked to felt that this change has not significantly increased their board's costs.

6. Do the appeals boards maintain separate, autonomous budgets within each agency?

Answer:

At the four agencies visited, the appeals boards do not maintain separate autonomous budgets within their agencies. Budgeting and funding for these boards are handled by either the administrator, secretary, or general counsel's office.

7. If these budgets remain under the aegis of the administrator or general counsel's office, how is board autonomy assured?

Answer:

According to the board representatives visited, the independence of their board is maintained because (1) the chairmen manage their boards' operations, (2) boards have overall authority for deciding cases, and (3) no one outside of the boards has veto power over board decisions.

8. Has the change from using individual appeals boards to an appeals board system enabled the Government to make any economy-of-scale savings in hiring of support services (court reporters and so forth) for boards?

Answer:

Indications are that there has not been any significant economy-of-scale savings attempted or achieved

under the present appeals board system. Board representatives at the four agencies visited were not aware of any pooling of services. OFPP has not encouraged any such actions.

9. Do agency administrators have control over travel budgets for judges?

Answer:

At three of the four agencies visited, the secretary or administrator's office controls the boards' travel budgets. At the other agency, the board chairman controls the travel budget. All four board chairmen stated that they have not had any problem in getting necessary travel funds.

10. To what extent is policy regarding the boards a discretionary function of agency administrators, and to what extent is such policy systematized Government-wide?

Answer:

Many policy issues remain to be resolved because OFPP and OPM have not yet issued overall Federal guidelines governing the establishment or functions of agency boards and board personnel as required by the act. However, some progress has been made in that Government-wide policy governing procedures for processing cases has been issued by OFPP. According to an OFPP official, however, such guidelines would not be binding on the agencies as a matter of law. Decisions of the boards, of course, are to be made on the facts and the law, rather than policy.

11. Are boards of contract appeals the final authority in deciding debarments and suspensions, or does the administrator have discretionary authority to decide appeals of board decisions regarding noncontract disputes?

Answer:

The finality of board decisions on matters outside the Contract Disputes Act depends on the extent of authority granted the boards. This varies among the agencies. In the case of debarments and suspensions, two of the boards visited have the final authority in deciding administrative debarments and suspensions. The other two agencies have other offices within the agencies to handle these cases.

The act permits contract appeals board members to perform other duties "not inconsistent" with the act. The legislative history of the act indicates that OFPP should decide whether a duty is "inconsistent."

12. Are boards of contract appeals able to conform to the requirement that all disputes under \$50,000 be settled within 60 days?

Answer:

According to the act, any appeals for disputes between \$10,000 and \$50,000 may be processed under accelerated procedures and should be resolved within 180 days; any appeals under \$10,000, within 120 days. At the agencies visited, board members have been able to resolve most disputes meeting this criteria within the 180-day requirement. However, because the act is still new, relatively few such cases have been processed.

13. Has this requirement resulted in policies that would force settlement of all cases below a certain dollar amount without a hearing?

Answer:

Based on our audit work at four agencies, no policies have been established to cause settlement of all cases below a certain dollar amount without a hearing. However, as mentioned above, relatively few cases have been processed.

14. Has the change in the law enabling contractors to seek resolution to their claims directly through the claims court system caused a decrease in the number of cases being filed with appeals boards?

Answer:

According to the board representatives, it is too early to tell if contractors are taking their cases to the U.S. Court of Claims as a result of the act. However, they believe that contractors will file more cases with the appeals boards as a result of the act.