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# What Next? A Heuristic Approach to Revitalizing the Contract Disputes Act of 1978

Steven L. Schooner

*George Washington University Law School, [sschooner@law.gwu.edu](mailto:sschooner@law.gwu.edu)*

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**DRAFT**

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**Steven L. Schooner**

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**What Next?**  
**A Heuristic Approach to Revitalizing the Contract Disputes Act of 1978**

Steven L. Schooner<sup>1</sup>

**I. Introduction: Is It Time For A Change?**

For twenty years, government contractors, the public contracts bar, judicial and administrative benches, and Executive agencies have criticized various aspects of the Contract Disputes Act of 1978 (CDA).<sup>2</sup> Two decades of experience have produced little consensus as to whether the CDA has proven an effective vehicle for the resolution of contractor claims permitted by this statutory waiver of government's immunity. To the contrary, the unmistakable decline in board litigation may imply a fundamental dissatisfaction with a complex, slow, expensive, inefficient, process-oriented system that has failed to evolve from its well intentioned, but arguably ill-conceived, roots.

Because comfort with the status quo effectively stifles wholesale change,<sup>3</sup> the basic

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<sup>1</sup> Associate Professor of Government Contracts Law, George Washington University Law School. This essay's catalyst was a series of discussions leading up to a panel presentation entitled *The Contract Disputes Act - A Look to the Future*, at the American Bar Association Section of Public Contract Program, *The CDA at Twenty: How's It Going? Where To Now?*, in Colorado Springs, Colorado, on November 6, 1998. The discourse involved Chief Judge Loren A. Smith of the Court of Federal Claims, C. Stanley Dees, Frank Carr, Donald J. Kinlin, and Richard P. Rector, who deserves special thanks for facilitating these stimulating discussions. The author thanks Fred Lees and Heidi Schooner for their helpful comments and Sophia Zetterlund for her research assistance.

<sup>2</sup> 41 U.S.C. §§ 601-613.

<sup>3</sup> In general, "path dependence" impedes change. Professor Mark Roe poses the example of our continued use of the QWERTY keyboard as an example of path dependent behavior. (The name refers to the keyboard's upper left hand keys.) The frequency with which weaker fingers type common letters -- for example, the letter "a" -- was advantageous a century ago when keys jammed easily. Mark J. Roe, *Commentary: Chaos and Evolution in Law and Economics*, 109 HARVARD L. REV. 641, 643, 648 (1996). See also, Marcel Kahan & Michael Klausner, *Path Dependence in Corporate Contracting: Increasing Returns, Herd Behavior and Cognitive Biases*, 74 WASH. U. L. Q. 347 (1996) (arguing, among other things, that contract standardization is a "species of herd behavior" and querying whether "conformity bias leads to standardization of contract terms").

structure of the 1978 Act remains.<sup>4</sup> Surely, the known quantity appears to pose less risk (for all parties) than the unknown alternative. As a result, despite frequent efforts to improve the statute, no universally accepted alternative theory, framework, system, or rubric has developed.

If the statute's critics have valid reason to perceive that the CDA fails to provide a "fair and balanced system of administrative and judicial procedures for the settlement of claims and disputes[,]”<sup>5</sup> we should confront that reality.<sup>6</sup> In that spirit, this essay suggests a framework for a meaningful debate over what an improved and invigorated CDA *should* look like. This essay raises more questions than it answers. Its purpose is heuristic; to frame a debate (which many feel is long overdue) as to what the CDA *should* do and how it should do so. In doing so, I introduce a recent effort to articulate core principles for government procurement dispute resolution, then deem the effort an unsatisfactory platform for heuristic analysis. I next attempt to determine the necessity for a dispute resolution statute and suggest that the fundamental purpose for such legislation is no more than to waive the Federal Government's immunity from suit. I then turn to the breadth of an appropriate waiver. Finally, I examine a number of issues, such as the nature of judicial and administrative fora and the certification requirement, that permeate our present system. I conclude by suggesting, at very least, that we should ask the difficult questions.

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<sup>4</sup> Minor tweaks have improved, or at least altered, the Act. After unacceptable delay, a number of archaic dollar thresholds were addressed in the Federal Acquisition Streamlining Act of 1994 (FASA), Pub. L. No. 103-355. FASA increased the certification threshold from \$50,000 to \$100,000. Pub. L. No. 103-355, § 2531, 108 Stat. 3243 (Oct. 13 1994), amending 41 U.S.C. § 605(a)(1). Similarly, the threshold for accelerated procedures (which require resolution within 180 days) increased from \$50,000 to \$100,000, while the expedited procedures (which require, whenever possible, resolution within 120 days) threshold grew from \$10,000 to \$50,000. 41 U.S.C. § 607(f), 608(a). Although the Administrator of the Office of Federal Procurement Policy may, every three years, review and adjust the expedited small claims threshold, 41 U.S.C. § 608(f), this authority has never been exercised. Other changes (e.g., such as permitting referrals from District Courts, 41 U.S.C. § 609(f)) have not proved useful.

<sup>5</sup> ROBERT T. PEACOCK AND PETER D. TING, *CONTRACT DISPUTES ACT: ANNOTATED* (Federal Publications, Inc., 1998), at 1-2, citing H. Rep. No. 1556, 95<sup>th</sup> Cong., 2d Sess., 5 (1978). For a review of this book and a related discussion of the CDA, see Steven L. Schooner, *Book Review, CONTRACTS DISPUTES ACT: ANNOTATED*, by Robert T. Peacock and Peter D. Ting, 28 PUB. CONT. L.J. 117 (1998).

<sup>6</sup> Some assert that our current system simply has become too judicialized - that the system unduly favors due process over speed and cost-effectiveness. Before the CDA, the system was less expensive and faster, yet judicial review was available only on appeal for the small percentage of cases where such proceedings were deemed appropriate. Perhaps the current system unduly sacrifices overall efficiency in the interest of due process.

## II. The ABA Principles: A Starting Point, But Not a Compass

A convenient starting point may be the public contracts bar's recent effort to lay cornerstones for such a discussion. Last year, the American Bar Association Section of Public Contract Law approved a number of "Principles for Resolving Controversies in Public Procurements."<sup>7</sup> The ABA "urges all parties to any public acquisition . . . to adhere to the following principles regarding the resolution of controversies and the availability of remedies at all stages of the process [and] supports . . . legislation and regulations to implement [them]."<sup>8</sup> The six brief principles recommend that: (1) parties have an obligation to act fairly and in good faith to resolve controversies and exercise available remedies; (2) the contracting process should be sufficiently open and well-articulated so as to permit review of both the process and the reasonableness of decisions; (3) parties have a responsibility to seek resolution of controversies informally by mutual agreement; (4) parties may agree to resolve controversies through alternative dispute resolution (ADR) processes according to lawful terms established by the parties; (5) parties must have available adequate administrative and judicial processes and remedies that provide for the independent, impartial, efficient, and just resolution of controversies; and (6) to provide an adequate remedy when entering into a contract, a government waives sovereign immunity with regard to controversies arising under or related to such a contract, except in extraordinary circumstances.<sup>9</sup>

While these recommendations offer some aspirational guidance, they fall short of suggesting a foundation for a significant revision to the CDA. A compelling case can be made that, under the existing statutory framework, all of the recommendations can be achieved without Congressional intervention.<sup>10</sup> Beyond that, the principles do not offer a useful basis for devising an optimal structure, because they fail to adequately address the fundamental trade-offs that frame the debate.

For example, as articulated below, I sense that the last principle – that a waiver of sovereign immunity is a condition precedent to the existence of a meaningful adversarial system – must be addressed first. Absent such a waiver, the preceding principles are rendered moot. Similarly, it seems strange to pose alternative dispute resolution (principle four) before defining

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<sup>7</sup> Approved at the August 4, 1998 Council Meeting and available on the Section's web page at <http://www.abanet.org/contract/admin/roc.html>.

<sup>8</sup> American Bar Association Section of Public Contract Law, "Principles for Resolving Controversies in Public Procurements," at <http://www.abanet.org/contract/admin/roc.html>.

<sup>9</sup> American Bar Association Section of Public Contract Law, "Principles for Resolving Controversies in Public Procurements," at <http://www.abanet.org/contract/admin/roc.html>.

<sup>10</sup> Some might argue that these principles merely reflect the best attributes of our existing system.

the disputes resolution mechanism(s) (principle five). Further, as discussed below, I challenge the premise that, as a fundamental principle or assumption, a system must offer *both* “administrative *and* judicial processes and remedies.”<sup>11</sup> As a result, while I applaud the ABA effort, I find it inadequate as a platform for rigorous analysis. Yet, the ABA principles - both for what they include and exclude - demonstrate the complexity of the task ahead.<sup>12</sup>

### III. Laying A Foundation, Or Why Is the CDA Necessary?

Before commencing a reform endeavor, achieving consensus for the need for any change is imperative.<sup>13</sup> With the CDA, Congress injected order, replacing a “Government contract remedies system [that had] developed in an unplanned manner.”<sup>14</sup> Although the CDA’s drafters expected their structure to facilitate settlement,<sup>15</sup> the statute is no longer perceived as an effective

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<sup>11</sup> The ABA baldly asserts that “it is essential that the parties have recourse to adequate administrative and judicial remedies.” American Bar Association Section of Public Contract Law, *Report to Accompany Principles for Resolving Controversies in Public Procurements*, August 1998 (copy on file with author) (emphasis added). Surprisingly, the drafters offer no defense for the need for multiple fora. The supporting text leaves open the possibility that the drafters may have deemed essential only recourse to *either* an administrative *or* judicial remedy, so long as what is available proves adequate. Nonetheless, the ABA holds forth the CDA, with its election of forum, as a model.

<sup>12</sup> Looking ahead, the Section of Public Contract Law recently announced the reactivation of the CDA Task Force to generate “concrete recommendations on CDA reform.” David A. Churchill, *News From the Chair*, 34 *PROC. LAW.* 2, 14 (Winter 1999).

<sup>13</sup> It may seem unduly conservative to suggest that we should avoid change for change’s sake or ensure that first, we do no harm. For example, much of the literature of change management suggests that, at least in the context of competitive business, change is a good unto itself. See, e.g., Steven L. Schooner, *Book Review: Change, Change Leadership, and Acquisition Reform*, 26 *PUB. CONT. L. J.* 467 (1997) (discussing three widely read books on change management).

<sup>14</sup> S. REP. NO. 95-1118, at 3 (1978), *reprinted in* 1978 USCCAN 5235, 5237. For a more extensive discussion of the legislative history of the CDA, see the Kipps/Kindness essay \_\_\_ in this issue.

<sup>15</sup> See generally, S. REP. NO. 95-1118, at 1 (1978), *reprinted in* USCCAN 5235. Specifically, the Senate Report’s purpose statement asserted that the Act:

provides a fair, balanced, and comprehensive statutory system of legal and administrative remedies in resolving Government contract claims. The Act’s

(continued...)

catalyst to negotiation.<sup>16</sup> Rather, the CDA today serves as a structured adversarial dispute resolution edifice. Litigation, ever more complex and formal, is the statute's keystone and legacy. In any such system, both parties rarely achieve complete, long-term satisfaction. Dissatisfaction grows for a host of reasons.<sup>17</sup> Parties may complain that they do not "win" all (or enough) of their disputes, or when they do "win," the costs of achieving the victory are too great. Non-litigants may criticize the system if, for example, it promotes disruptive litigation, or creates uncertainty by failing to provide clear, uniform precedent. Others may focus on externalities, such as the cost to taxpayers associated with creating and sustaining adjudicative institutions.

These different perspectives demonstrate the difficulty in pleasing all affected parties. Our current system involves a complex juxtaposition of judicial, administrative, and alternative dispute resolution options, each with strong proponents. For example, the most aggressive ADR advocates<sup>18</sup> may see little need for reform. Indeed, ADR proponents may resist reform if it

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<sup>15</sup>(...continued)

provisions help to induce resolution of more contract disputes by negotiation prior to litigation; equalize the bargaining power of the parties when a dispute exists; provide alternate forums suitable to handle the different types of disputes; and insure fair and equitable treatment to contractors and Government agencies.

<sup>16</sup> Indeed, the statutory structure seems almost inconsistent with the elegantly simple regulatory policy statement at FAR 33.204: "The Government's policy is to try to resolve all contractual issues in controversy by mutual agreement at the contracting officer's level. Reasonable efforts should be made to resolve controversies prior to the submission of a claim."

<sup>17</sup> As one critical piece recently exclaimed:

In matter relating to contracting . . . , the sovereign has waived its immunity and agreed to be sued. However, it has placed some limitations and conditions on this waiver that have engendered continuing controversy. Those limitations and conditions relate both to the extent of the waiver and the courts to which jurisdiction is assigned. The subject is a colossal mess, made far worse by the Government's unceasing efforts to invoke vestigial sovereign immunity in nearly every contract-related action not seeking specific dollar damages and not brought in a forum of the Government's choosing.

Herbert L. Fenster & Stephen E. Ruscus, *Feature Comment: The Blue Fox Enigma: Closing the Controversy Over the Availability of U.S. District Courts in Contract Cases*, 41 GOV'T CONTRACTOR ¶ 64 (February 10, 1999).

<sup>18</sup> See generally, David P. Metzger & Christopher R. Yukins, *Using Alternative Dispute Resolution to Streamline Contract Claims*, 39 CONT. MGMT. 5 (January 1999); Joseph McDade, (continued...)

requires abdication of the broad flexibilities to pursue resolution (within or outside of the existing fora) that they now enjoy under the existing regime.<sup>19</sup> Such resistance cannot be reconciled with advocates engaged in a quest for uniformity in precedent (who assert that ADR dilutes the pool of disputes which generate published decisions or precedential guidance) or procedure (who recognize that the flip-side of flexibility is the absence of clarity or guidance for new entrants or less experienced players). Any examination, therefore, must determine whether the primary reasons for reform can be satisfied.

Further, without a clear articulation of umbrella or over-arching goals, it is difficult to keep the debate focused. In other words, certain assumptions must be made regarding the priority of chickens and eggs, before analyzing or attempting to identify the most important components of the chicken or the definitive elements of the egg. For example, one minor, yet long overdue, improvement in the CDA would be establishment of consistent jurisdictional filing deadlines and procedures at the boards of contract appeals (BCAs) and the Court of Federal Claims (CFC).<sup>20</sup> Conversely, if no compelling case is made for parallel judicial and administrative fora (leaving a single adjudicative body), issues of consistency between fora dissipate.

It is reasonable, therefore, if not merely responsible, to determine whether we need the CDA at all. If we cannot articulate the need for special rules for government contract disputes, why maintain them? So long as some judicial or quasi-judicial remedy is deemed necessary, some mechanism is required, under our current legal regime, to circumvent the otherwise valid

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<sup>18</sup>(...continued)

*Resolving Contract Disputes Through the Use of ADR: Filling the Information Void*, 33 PROC. LAW. 7 (Winter 1998); Frank Carr, et al., *The Untapped Potential of ADR in the Construction Industry*, 42 FED. LAW. 32 (June 1995).

<sup>19</sup> Granted, these options are chosen primarily to avoid the worst aspects of the existing statutory structure and/or the judicial and administrative fora.

<sup>20</sup> BCAs require that a notice of appeal be *postmarked* within 90 days of receipt of the contracting officer's decision; the Court of Federal Claims requires that a complaint be *received* within twelve months of receipt of the contracting officer's decision. See generally, PEACOCK & TING, CDA ANNOTATED, *supra*, at 7-18 (discussing the date of filing of an appeal or a suit); page 7-26 (distinguishing a notice of appeal and a complaint). It is a disgrace that our Federal Court system serves as a forum for contractors or counsel to litigate claims for which they failed to commence administrative actions in a timely fashion. In a revised statute, assuming multiple fora survive, Congress should: (1) simplify the CDA by mandating a uniform filing period (e.g., double the BCA period and halve the CFC period - setting a uniform deadline of six months after receipt of the contracting officer's final decision); and (2) define a consistent method of filing for timeliness purposes (e.g., receipt, rather than mailing, of the appropriate pleading) and a single initial pleading type or form (e.g., a complaint, rather than notice of appeal).

defense of sovereign immunity. That topic is addressed below. Other than that threshold issue – creating the mechanism that permits contractors to bring suit against the Government – no other vestige of the existing system should be perceived as sacrosanct.<sup>21</sup>

#### **IV. Divining a Purpose of the Statutory Scheme: Waiving Sovereign Immunity To What End?**

I submit that the fundamental purpose of a contract dispute statute should be to provide a fair and rational process for contractors to raise and resolve problems associated with their contractual relations with the Government. To some extent, this goal underlies the original passage of the CDA, which significantly broadened the Government’s waiver of its sovereign immunity against suits brought by its contractors. While the pre-CDA “Disputes” Clause merely permitted suits “arising under” contracts,<sup>22</sup> the CDA permitted suits arising under or “relating to”

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<sup>21</sup> I regard this issue as sacrosanct solely for the purpose of completing this essay within the PCLJ’s space constraints. I reserve for another day discussion of less conventional, and thus more controversial, alternative solutions. (For example, I am intrigued by the concept of a private or public insurance fund, into which either contractors or the government could pay, directly or indirectly, based upon a risk schedule. Claims, as we currently know them, could then be brought against the fund, removing fiscal and funding issues from the settlement or risk analysis.) In any event, I remain unpersuaded that the integrity and success of our government contracting process depends upon a broad contractor right – whether statutory or contractual -- to sue the Government. Rather, I suggest that we lack empirical evidence to conclude that the absence of the right to sue would serve as a fatal deterrent to participation in Federal Government procurement. By analogy, despite a wealth of literature suggesting that the False Claims Act, coupled with burdensome statutory and regulatory compliance requirements, deters commercial firms from participating in government procurement, numerous firms continue to aggressively pursue the Federal Government’s procurement dollars. See, e.g., William E. Kovacic, *The Civil False Claims Act as a Deterrent to Participation in Government Procurement Markets*, 6 SUP. CT. ECON. REV. 201, 205, 235 (1998) (suggesting that contractors regard this “oversight as a costly, substantial burden of doing business with the government”). As Professor Kovacic concedes “it would be an exaggeration to say that . . . oversight, standing alone, commonly induces firms to deal solely in the commercial arena. *It is doubtful that any single attribute of the procurement regulatory system has that discouraging effect.*” 6 SUP. CT. ECON. REV. at 239 (emphasis added).

<sup>22</sup> This language was interpreted to permit actions based upon “remedy granting clauses” found in the contract. See, e.g., *United States v. Utah Constr. & Mining Co.*, 384 U.S. 394, 403-418, 412 (1966). Absent such a remedy granting clause, no judicial or administrative remedy was available to a contractor.

the contract.<sup>23</sup> As a result, the “all disputes” statutory scheme currently permits actions claiming breach<sup>24</sup> or post-award (but not pre-award) mistake.<sup>25</sup>

Conversely, certain contractors, certain types of contractual vehicles,<sup>26</sup> and a number of disputes involving the Government and its contractors remain outside of the CDA. The CDA applies only to Executive Agencies.<sup>27</sup> Contractor fraud actions remain particularly vexing. The

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<sup>23</sup> 41 U.S.C. § 605; FAR 33.203(c). Accordingly, the current Disputes clause, at FAR 52.233-1, covers “all disputes arising under or relating to a contract. . . .” FAR 52.233-1(b).

<sup>24</sup> See, e.g., *Essex Electro Engineering v. United States*, 702 F.2d 998, 1002 (Fed. Cir. 1983) (“The CDA to a certain extent unified this process.”).

<sup>25</sup> See, e.g., FAR 33.205(b) (“contractor's allegation that it is entitled to rescission or reformation of its contract in order to correct or mitigate the effect of a mistake shall be treated as a claim under the Act”); *Paragon Energy Corp., v. United States*, 227 Ct. Cl. 176, 645 F.2d 966 (1981) (contract reformation claim constitutes a valid, cognizable claim; “equitable reformation to rectify mistakes is covered” by the CDA). Although Federal Courts now have expanded jurisdiction under 28 U.S.C. § 1491, the CDA does not permit challenges to the award of a contract or actions taken during the process leading up to award of the contract. *Coastal Corp. v. United States*, 713 F.2d 728 (Fed. Cir. 1983).

<sup>26</sup> See, generally, Thomas L. McGovern III, *Is the CDA Becoming Irrelevant to “Reinvented Government”?*, paper included in the American Bar Association Section of Public Contract Program Course-book, *The CDA at Twenty: How’s It Going? Where To Now?*, Colorado Springs, Colorado, on November 6, 1998.

<sup>27</sup> 41 U.S.C. § 602. Contrast, for example, 41 U.S.C. § 603 and its special treatment of maritime cases; the Postal Service exclusion in 41 U.S.C. § 601(2); and certain Tennessee Valley Authority contracts, covered by 41 U.S.C. §§ 602(b), 609(a)(2). See also the Federal Aviation Administration’s Office of Dispute Resolution for Acquisition (ODRA), at <http://www.faa.gov/agc/OFFICEOF.HTM>, and ODRA’s Guide to the Conduct of Protests and Contract Disputes, at <http://www.faa.gov/agc/INTRO.htm>.

Protests concerning FAA . . . contract disputes arising under or related to FAA contracts, shall be resolved at the agency level through the FAA Dispute Resolution System. Judicial review, where available, will be in accordance with 49 U.S.C. 46110 and shall apply only to final agency decisions. The decision of the FAA shall be considered a final agency decision only after [a . . .] contractor has exhausted its administrative remedies for . . . a contract dispute under the FAA Dispute Resolution System.

(continued...)

Government can initiate fraud proceedings in Federal courts or assert fraud counter-claims when a contractor seeks contractual relief in the Court of Federal Claims. More often, however, fraud issues derail garden-variety contract disputes before the boards because: (1) the administrative fora lack jurisdiction over fraud matters and (2) the contracting officer, with whom settlement authority resides in BCA litigation, lacks authorization to settle claims involving fraud.<sup>28</sup> This inefficient jurisdictional inconsistency could easily be remedied by: (1) eliminating BCA jurisdiction; (2) requiring mandatory transfer and/or consolidation from the BCA to a court (effectively denying the contractor its “right” to election of forum);<sup>29</sup> or (3) granting the boards jurisdiction to resolve controversies involving fraud (which, under the current system, might entail vesting contracting officers with some level of fraud settlement authority).

Similarly, a jurisdictional dichotomy exists with regard to tort claims. The CDA permits the litigation of tort allegations that arise out of or relate to either express or implied contractual duties.<sup>30</sup> The Act, however, bars suits where a contractor fails to “demonstrate a direct nexus

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<sup>27</sup>(...continued)

Acquisition Management System (AMS) § 3.9, [http://www.faa.gov/agc/AMS3\\_9.HTM](http://www.faa.gov/agc/AMS3_9.HTM).

<sup>28</sup> Martin J. Simko Construction, Inc. v. United States, 852 F.2d 540, 542, 545 (Fed. Cir. 1988) (discussing 41 U.S.C. §§ 604, 605(a); the CDA “specifically removes from the CO’s authority certain claims or disputes”; legislative history “indicates quite clearly that Congress never intended fraud claims to be part of the ‘all disputes’ provision” and “specifically states that the Department of Justice would be ‘solely’ responsible for these actions). See also, generally, Thomas P. Barletta & Barbara A. Pollack, *Civil Litigation of Allegations of Fraud in Connection with Government Contract Claims*, 18 PUB. CONT. L. J. 235 (1988); J. Cal McCastlain & Steven L. Schooner, *To Stay or Not to Stay: Difficult Decisions for Boards of Contract Appeals Confronted with Parallel Proceedings*, 16 PUB. CONT. L. J. 418 (1987). See, e.g., the discussion of claims tainted by fraud and the stay of proceedings pending resolution of the fraud issue, at PEACOCK & TING, CDA ANNOTATED, *supra*, at 2-10, 2-13. The authors note that “[a]lthough fraud claims or counterclaims by the Government are excluded from agency [board] jurisdiction . . . , they may be heard by the Court of Federal Claims under its counterclaim jurisdiction. . . .” *Id.* at 2-11. As a result, “[a]gency boards are frequently requested to stay their CDA proceedings so as not to interfere with pending or ongoing criminal or civil fraud investigations or proceedings.” *Id.* at 2-13.

<sup>29</sup> For a discussion of the existing (permissive) transfer and consolidation provisions, see Dorn C. McGrath III, *The Transfer and Consolidation Provision of the Contract Disputes Act*, 15 PUB. CONT. L. J. 256 (1985) (discussing 41 U.S.C. § 609(d)).

<sup>30</sup> See, e.g., Chain Belt v. United States, 127 Ct. Cl. 38, 54, 115 F. Supp. 701, 702 (1953) (“tortious breach of contract . . . was not a tort independent of the contract so as to preclude the action”); Western Pine Industries, Inc. v. United States, 231 Ct. Cl. 885 (1982) (finding that a  
(continued...)

between the . . . alleged tortious conduct” and the Government’s contractual obligations.<sup>31</sup> What policy (other than mandated inefficiency or the fragmentation of remedies) is served by forcing an aggrieved contractor into multiple fora to be made whole? To the extent that Federal Courts have extensive experience dealing with the Federal Torts Claims Act, what compelling public interest justifies this jurisdictional machination?

To what extent, then, should the statutory scheme waive the sovereign’s immunity to suit?<sup>32</sup> Should the remedies available against the Government include *all* of those available

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<sup>30</sup>(...continued)

contracting officer’s decision should have been issued, thus permitting a tort suit that arose in connection with timber sale contracts).

<sup>31</sup> *Asfaltos Panamenos, S.A.*, ASBCA No. 39425, 91-1 BCA ¶ 23,315 at 116,919. See also, *L’Enfant Plaza Properties, Inc. v. United States*, 227 Ct. Cl. 1, 645 F.2d 886 (1981) (“[T]here must be a ‘tortious’ breach of contract rather than a tort independent of the contract. . . . It is not sufficient to argue . . . that the alleged tortious conduct is ‘related’ in some general sense to the contractual relationship. . . .”).

<sup>32</sup> This essay poses questions regarding the form and breadth of the waiver of sovereign immunity; it does *not* dissect the premises of the sovereign immunity doctrine in the United States. For reading that opens a gateway into the morass of literature on this topic, see, generally, *Kawanakoa v. Polyblank*, 205 U.S. 348, 353 (1907) (“sovereign is exempt from suit, not because of any formal conception or obsolete theory, but on the logical and practical ground that there can be no legal right as against the authority that makes the law on which the right depends.”); KENNETH CULP DAVIS, *ADMINISTRATIVE LAW*, 797-98 (1951), citing Paul H. Sanders, *Foreword*, 9 *LAW & CONTEMP. PROB.* 179 (1942) (sovereign immunity “has persisted in modern law to a degree which would astonish most citizens”); ALFRED C. AMAN, JR. & WILLIAM T. MAYTON, *ADMINISTRATIVE LAW*, 342, 525, 532 (West, 1993), discussing, inter alia, *United States v. Lee*, 106 U.S. 196, 207 (1882) (The principle of sovereign immunity “has never been discussed or the reasons for it given, but it has always been treated as an established doctrine.”), and citing Roger C. Cramton, *Non-Statutory Review of Federal Administrative Action: The Need for Statutory Reform of Sovereign Immunity, Subject Matter Jurisdiction, and Parties Defendant*, 68 *MICH. L. REV.* 387, 389, 397 (1970). For an extensive discussion of sovereign immunity applied to government contracts, see Richard H. Seamon, *Separation of Powers and the Separate Treatment of Contract Claims Against the Federal Government for Specific Performance*, 43 *VILLANOVA L. REV.* 155, 160 (1998). For a discussion of the broad-based, large-scale assault upon immunity relating to sovereign acts of the Government, see, generally, Joshua I. Schwartz, *Assembling WINSTAR: Triumph of the Ideal of Congruence in Government Contract Law*, 26 *PUB. CONT. L. J.* 481 (1997); Michael Grunwald, *Lawsuit Surge May Cost U.S. Billions*, *Wash. Post*, A1 (Aug. 10, 1998); see also Edward A. Fitzgerald, *Conoco, Inc. v. United States: Sovereign Authority Undermined by Contractual Obligations on the Outer Continental Shelf*, 27 (continued...)

in private suits, including damages, restitution, specific performance, and declaratory judgments? Why should a government contractor be denied such concurrent remedies? Or, should the waiver remain limited, such that tangential issues (whether fraud, tort, replevin, takings, etc.) must be plead and prosecuted under distinct waivers and, potentially, in different fora?

At the risk of stereotyping, contractors and the private bar would be expected to favor the former, broad approach; government agencies, policy-makers, and counsel might favor the latter, restrictive approach.<sup>33</sup> If these bi-polar positions have a basis in fact,<sup>34</sup> there is little room for compromise. Prototyping each interested parties' position, however, involves more complex analysis. If one party (e.g., the Government) favors a limited waiver and aspires to keep CDA jurisdiction only in specialized fora (e.g., the CFC and the BCAs), the former position tends to erode the latter. The fewer remedies available to contractors (or plaintiffs) under the statute, the

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<sup>32</sup>(...continued)

PUB. CONT. L.J. 755 (1998); Ronald G. Morgan, *Identifying Protected Government Acts under the Sovereign Acts Doctrine: A Question of Acts and Actors*, 22 PUB. CONT. L.J. 223 (1993). For a broader examination of this issue in the context of the CDA, see C. Stanley Dees' essay \_\_\_\_\_ in this issue.

<sup>33</sup> “[I]ndividuals are egoistic, rational utility maximizers, who pursue their own self-interest whether they are acting in private markets . . . or in public markets, voting or serving as public officials.” RICHARD J. PIERCE, JR., SIDNEY A. SHAPIRO, & PAUL R. VERKUIL, *ADMINISTRATIVE LAW AND PROCESS*, at 16 (2d ed. 1992) (citations omitted). See also, Cheryl D. Block, *Truth and Probability – Ironies in the Evolution of Social Choice Theory*, 76 WASH. U. L.Q. 975, 975 at n.5 (1998) (comparing and distinguishing public choice theory, social choice theory, and rational choice theory). One major gap in the public choice theory is that “public behavior can be influenced by the existence of *organizational norms*. Organizations are structured so that decision-makers will consider whether [their actions] will serve the purposes of the organization. . . . [D]ecision-makers will defend their actions in terms of the public interest because that is the purpose of those organizations. . . . Decision-makers are often trained as lawyers, . . . public administrators, or economists, where the emphasis is to solve problems by the use of rational analysis rather than by political negotiation and accomodation.” RICHARD J. PIERCE, JR., SIDNEY A. SHAPIRO, & PAUL R. VERKUIL, *ADMINISTRATIVE LAW AND PROCESS*, at 20-21 (2d ed. 1992) (emphasis in the original; citations omitted).

<sup>34</sup> In stereotyping government preferences, a distinction should be drawn between the various (procuring) agencies, which tend to favor limited, specialized, administrative fora (for a host of reasons, including the ability to better control both process and outcome), and the Justice Department, which (for both parochial and intellectual reasons) is more inclined to tolerate, if not favor, court options (where the agencies cede the lion's share of their authority and control to the Attorney General and the Federal Judiciary).

higher the incentive to pursue and/or create non-CDA remedies in courts of general jurisdiction.<sup>35</sup> The end result entails less governmental control over the negotiation and settlement process, less certainty in precedent, and increased hostility and frustration among contractors (the Government's contracting "partners").

An important caution is appropriate here. Discussions of sovereign immunity must not confuse ultimate remedies with procedural options or litigation-related remedies. Issues related to the latter class of remedies - whether they involve discovery, contempt, subpoena power, etc. - fit better in the examination of process alternatives, addressed below.

## **V. Breaking The Mold: What Vestiges Need Remain?**

### **A. Of Specialized Courts and Multiple Fora: Optimal Solution, Path Dependent Behavior, or Bad Habit?**

At least four judicial and administrative bodies (or categories of fora) are currently implicated in our statutory system: (1) the boards of contracts appeals; (2) the Court of Federal Claims; (3) the Federal District Courts (which, for example, retain CDA jurisdiction over maritime cases); and (3) the Federal appellate courts. As board practice has evolved to resemble court practice, many question the wisdom of the current system. Few believe that it remains true that board proceedings tend to be less formal, and are accordingly less expensive, than court proceedings. Election of forum today is a complex decision rarely dependent solely upon cost or time savings.<sup>36</sup> Is election necessary for reasons other than familiarity and comfort with the status quo? What benefit - other than the obvious gamesmanship of forum shopping - derives from inconsistent CFC and BCA precedent?<sup>37</sup> Does concurrent jurisdiction provide salutary

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<sup>35</sup> An analogy to the last thirty years of experience with bid protests or disappointed offeror litigation may prove instructive. Some level of dissatisfaction with existing fora (deriving, for example, from an absence of available remedies or an unlikelihood of success obtaining an existing remedy or, in some cases, the opposite) have led to a constantly evolving menu of forum choices including the Federal District Courts, the Court of Federal Claims (and its predecessor courts), the General Services Board of Contract Appeals, the General Accounting Office, agency competition advocates and ombudsmen, quasi-judicial internal agency procedures, and, of course, the contracting officer.

<sup>36</sup> For a more extensive discussion of these issues, see Thomas \_\_. Wheeler's essay \_\_\_ in this issue.

<sup>37</sup> For example, in *Malone v. United States*, 849 F.2d 1441, 1444-45 (1988), the U.S. Court of Appeals for the Federal Circuit sanctioned a significant (problematic) jurisdictional distinction between the BCAs and the (then) Claims Court. In *Malone*, the Government contended that, because the Claims Court lacked jurisdiction over the validity of a default

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competition between the fora?<sup>38</sup> Is the competition useful if it is limited to process issues, as opposed to substantive distinctions, such as the presence or absence of precedent on key issues? If so, does competition within the dispute resolution market lead to higher quality decision-making, more efficient or user-friendly litigation procedures, or quicker decisions?

Has experience demonstrated a need for specialized courts,<sup>39</sup> such as the Court of Federal Claims?<sup>40</sup> How convincing is the literature that opposes specialized fora (whether judicial or

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<sup>37</sup>(...continued)

termination absent a claim for money, the ASBCA similarly lacked jurisdiction. Without considering the validity of the Claims Court precedent (related to the Tucker Act), the Court concluded that the CDA granted the BCAs jurisdiction over default terminations absent a monetary claim by the parties. See, generally, Steven L. Schooner, *More Bites of Red Herring: Claims Court/BCA Differences In Handling Default Terminations*, 2 NASH & CIBINIC REP. ¶ 21 (April 1988). The Tucker Act, 28 U.S.C. § 1491(a)(2), was later amended to remedy this distinction. Pub. L. No. 102-572, § 907(b)(1) (1992).

<sup>38</sup> Many in the public contracts bar believe that competition amongst the fora that resolve disappointed offeror suits led to improvements, or at very least, changes at the General Accounting Office. For a recent discussion supportive of the “multiforum regime” in disappointed offeror litigation, see, Jonathan R. Cantor, *Note: Bid Protests and Procurement Reform: The Case for Leaving Well Enough Alone*, 27 PUB. CONT. L.J. 155, 157 (1997).

<sup>39</sup> This issue is by no means novel, nor is it limited to the courts in which the public contracts bar routinely appears. See, e.g., Rochelle Cooper Dreyfuss, *The Federal Circuit: A Case Study in Specialized Courts*, 64 N.Y.U. L. REV. 1 (1989); S. Jay Plager, *The United States Courts of Appeals, the Federal Circuit, and the Non-Regional Subject Matter Concept: Reflections on the Search for a Model*, 39 AM. U. L. REV. 853 (1990). For a more broad analysis on this issue, see Rochelle C. Dreyfuss, *Forums of the Future: The Role of Specialized Courts in Resolving Business Disputes*, 61 BROOK. L. REV. 1 (1995); Jeffrey W. Stempel, *Two Cheers for Specialization*, 61 BROOK. L. REV. 67 (1995). For an extensive discussion advocating the creation of a new, separate national criminal court system, see Victor Williams, *A Constitutional Charge and a Comparative Vision to Substantially Expand and Subject Matter Specialize the Federal Judiciary: A Preliminary Blueprint for Remodeling our National Houses of Justice and Establishing a Separate System of Federal Criminal Courts*, 37 WM. & MARY L. REV. 535 (1996). Among other things, Professor Williams points to Germany and France’s large, specialized judicial systems and advocates primarily for a severing of the civil and criminal courts.

<sup>40</sup> For this essay, I use the term “specialized” in a comparative or relative, rather than an absolute, sense. The CFC is more specialized than the Federal District Courts. Nonetheless, its jurisdiction implicates various specialities, such that Chief Judge Loren Smith asserts that the  
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administrative)?<sup>41</sup> Can the public contracts bar realistically assert that contract disputes are more difficult than antitrust or securities regulation issues, which are tried in courts of general jurisdiction? In defending specialized adjudication of public contract disputes, does the putative need derive from the arcane complexity of the procurement laws, regulations, policies, and practices or the density and intricacy of fact-specific disputes that would numb the minds of mortal jurors and common judges?

If no convincing thesis supports specialized courts, one obvious solution is to permit contract litigation in the Federal District Courts.<sup>42</sup> Another option would be to give Federal district courts concurrent jurisdiction over contract disputes,<sup>43</sup> as Congress, at least temporarily, has done for disappointed offeror litigation in codifying an expanded *Scanwell* jurisdiction.<sup>44</sup>

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<sup>40</sup>(...continued)

court “is neither specialized nor general.” Loren A. Smith, *Alan E. Peterson Lecture: The Role of the Courts, What Would Sherlock Holmes Say?*, 34 PROC. LAW. 1, 28 (Winter 1999). Conversely, the CFC neither juggles a criminal docket nor empanels juries.

<sup>41</sup> Richard L. Revesz, *Specialized Courts and the Administrative Lawmaking System*, 138 U. PA. L. REV. 1111, 1120 (1990), citing Justice Antonin Scalia’s remarks that “the disadvantage of inexperience is often more than made up for by the advantage of a fresh outlook and broad viewpoint”); Harold H. Bruff, *Specialized Courts in Administrative Law*, 43 ADMIN. L. REV. 329, 331 (1991) (“A primary cost of specialization is loss of the generalist perspective . . . a wider perspective aids judgment by forestalling the exaggerated importance that long immersion may lend to some social problem. . .”); Richard Posner, *Will the Federal Courts Survive Until 1984: An Essay on Delegation and Specialization of the Judicial Function*, 56 S. CAL. L. REV. 761, 783 (1983). See also, generally, Richard H. Fallon, Jr., *Of Legislative Courts, Administrative Agencies, and Article III*, 101 HARV. L. REV. 916 (1988).

<sup>42</sup> As a practical matter, some may oppose such an approach because federal district courts currently bear a heavy workload. For the purposes of this examination, however, one should assume that: (a) the total CDA workload would not be statistically significant to the Federal District Courts and (b) Congress is capable of objectively equating and/or transferring saved resources associated with the elimination of the boards or reduced workload at the CFC. Obviously, this issue also implicates issues related to the availability of jury trials, which would be a dramatic change in government contract litigation.

<sup>43</sup> For an argument supportive of a multiple court system, which permits a choice of judicial fora, see Ellen R. Jordan, *Should Litigants Have a Choice Between Specialized Courts and Courts of General Jurisdiction?*, 66 JUDICATURE 14 (1982).

<sup>44</sup> See 28 U.S.C. § 1491(b); Pub. L. No. 104-320, § 12, 110 Stat. 3874 (Oct. 19, 1996). *Scanwell Laboratories, Inc. v. Shaffer*, 424 F.2d 859 (D.C. Cir. 1970). Congress has already

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The examination of specialized versus general *courts* leads to the larger issue of multiple fora.<sup>45</sup> What compelling need is there for *both* an administrative and a judicial specialized forum? If election of forum is deemed desirable, a much more compelling case could be made for a specialized administrative fora *in addition* to a court of *general* jurisdiction. Who, if anyone, is served by our current semi-parallel system of BCAs and the Court of Federal Claims (CFC)? Whose interests were protected or served by (implicitly) vesting settlement authority in the Contracting Officer in board proceedings, while reserving settlement authority for the

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<sup>44</sup>(...continued)

demonstrated that it perceives the Federal District Courts sufficiently competent to handle these issues, at least for a trial period. Pursuant to Pub. L. No. 104-320, § 12(c), GAO is conducting “a study regarding the concurrent jurisdiction of the district courts . . . and the Court of Federal Claims over bid protests to determine whether concurrent jurisdiction is necessary.” Perhaps a similar experiment is warranted with regard to contract disputes. For a summary of these arguments in the context of support for concurrent disappointed offeror (or protest) litigation jurisdiction in the CFC and the district courts, see Michael S. Mason, *Bid Protests and the U.S. District Courts – Why Congress Should Not Allow the Sun to Set on This Effective Relationship*, 26 PUB. CONT. L.J. 567 (1997); William Kovacic, *Procurement Reform and the Choice of Forum in Bid Protest Disputes*, 9 ADMIN. L. J. AM. U. 461 (1995).

<sup>45</sup> The number of potential options highlights the complexity of this issue. The statute could: (1) maintain the status quo, permitting contractors to elect between an administrative fora (the BCAs) and a judicial fora (the CFC or, in limited cases, the Federal District Courts); (2) broaden the election even further, permitting contractors to elect between an administrative fora and a specialized judicial fora (the CFC) and a court of general jurisdiction (the Federal District Courts); (3) eliminate the boards of contract appeals, remove contract disputes from the Tucker Act, and permit contractors to sue the government only in the Federal District Courts; (4) maintain an administrative fora, such as the current boards of contract appeals, remove contract disputes from the Tucker Act, and, if election of forum is deemed desirable, permit contractors to sue the government in the Federal District Courts; (5) maintain an administrative fora (whether or not to be called BCAs) solely for limited purposes (such as permitting pro se contract disputes, resolving lower dollar threshold (e.g., under \$1 million), nonprecedential, expedited decisions, or providing non-judicial alternative dispute resolution (ADR) neutrals, mediators, and/or settlement judges, or even providing a binding arbitration option, see, e.g., Robin J. Evans, *Note: The Administrative Dispute Resolution Act of 1996: Improving Federal Agency Use of Alternative Dispute Resolution Process*, 50 ADMIN. L. REV. 217, 228-230 (1998)); remove contract disputes from the Tucker Act, and permit contractors to sue the government in the Federal District Courts for larger disputes; (6) maintain an administrative fora solely for limited purposes (see above), and permit contractors to sue the government in the CFC for larger disputes; (7) eliminate the boards of contract appeals and sever the link between the CDA and the Tucker Act, which would permit litigation only in the Federal District Courts.

Attorney General in CFC litigation?<sup>46</sup>

All issues regarding *what type* of administrative fora is appropriate must be deferred until a compelling case for a need for *any* administrative fora is made. Only if an articulated, achievable purpose for the boards<sup>47</sup> or any administrative fora – other than choice for choice’s sake – can be articulated, should the BCAs remain an option. Only at that time, need the nature of the existing boards be addressed.

If a need for administrative fora (whether or not like the current BCAs) is established, have we learned enough during twenty years of CDA practice, and innumerable suggested organizational schemes, to formulate an efficient plan for the consolidation of agency tribunals? Is a single administrative forum sufficient (e.g., a government-wide board of contract appeals, vested with independence similar to the Merit Systems Protection Board), or does the civilian-military distinction mandate at least two boards (e.g., a defense BCA, combining the Armed Services and Corps of Engineers BCAs, and a civilian BCA, merging the GSBCA with the remaining civilian agency boards)? Do we need fewer small boards or more? What conclusions should we draw from the inexorable reduction in BCA dockets?<sup>48</sup> Does the historical failure,

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<sup>46</sup> The Senate Report initially explains that the CDA “empowers contracting officers to settle on their legal and contractual merits all disputes arising in connection with the contract[.]” S. REP. NO. 95-1118, 95<sup>th</sup> Cong., 2d Sess., 1 (1978), *reprinted in* 1978 USCCAN 5235. Conversely, the report later articulates that: “It is not the intent of this section to change the current procedures for settlement of claims by the Justice Department once the claim has been turned over to that body or litigation has commenced in court.” S. REP. NO. 95-1118, 95<sup>th</sup> Cong., 2d Sess., 19 (1978), *reprinted in* 1978 USCCAN 5235, 5253. This rubric made sense when the boards – as instrumentalities acting with authority delegated by the head of the agency – provided, in effect, a decision *of the agency*, rather than the current scenario where a quasi-judicial decision is available through an alternative, optional forum created and staffed by the agency.

<sup>47</sup> An almost inexplicable chasm exists between the boards’ current role (as a parallel alternative to the Court of Federal Claims) and their original purpose, resolving contract matters delegated by the head of the agency head. See, generally, RALPH C. NASH, JR. & JOHN CIBINIC, JR. *FEDERAL PROCUREMENT LAW* (VOL. II) 2037 (3d. ed. 1980), citing Joel P. Shedd, Jr., *Disputes and Appeals: The Armed Services Board of Contract Appeals*, 29 *LAW & CONTEMP. PROBS.* 39, (1964). Shedd, then a member of the Armed Services Board of Contract Appeals, articulated purposes such as: (a) ensuring that accomplishment of the military mission “not be frustrated by a dispute with [a] contractor”; (b) providing “a means of settling disputes fairly and expeditiously without the expense of an action at law[.]” and (c) furthering “harmonious relations with its contractors”). *Id.* at 39-40.

<sup>48</sup> Last year, the ASBCA reported a decrease in appeal activity for the seventh  
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inability, or unwillingness of the Office of Federal Procurement Policy to exercise its statutory management authority with regard to the BCAs mandate an alternative management scheme?<sup>49</sup>

All assumptions based upon the current structure must be discarded. The dense web of vested interests, derived from a well-entrenched structure built to service the existing system, must not constrain the debate.<sup>50</sup> Little progress can be expected if self-interest or self-perpetuation motivates any of the following, or other related, groups: government procurement policy makers; contractors (individually, collectively, or through trade associations); administrative judges (collectively or individually) of the agency boards of contract appeals (again, collectively or individually); agency counsel that litigate exclusively before boards; the judges of the Court of Federal Claims; the judges of the Court of Appeals for the Federal Circuit; private practitioners (amongst which some favor the boards, some the courts); the Department of Justice (in which a faction, such as the Commercial Litigation Branch, might favor specialized courts, while the United States Attorneys likely would prefer courts of general jurisdiction); and proponents of alternative dispute resolution alternatives (including, e.g., the American Arbitration Association (AAA) or private dispute resolution specialists).

#### **B. Resolving the Certification Morass; Confronting the Last Vestige of an Anachronistic Model**

A surprising level of complacency currently surrounds issues related to the certification of claims. To the extent that the current certification requirements “shall not deprive a court or

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<sup>48</sup>(...continued)

consecutive year. In fiscal year (FY) 1998, the ASBCA docketed 796 appeals, compared to 2218 new appeals in FY 1990. The General Services Administration’s board, the second largest BCA reported that it docketed 139 appeals during the same fiscal year, down ten percent since the prior fiscal year. The volume of contract litigation in the Court of Federal Claims has remained more steady during that period (and may have increased slightly in FY 1998). In FY 1997, the CFC docketed 280 contract cases compared to 291 in FY 1992. See, CONFERENCE BRIEFS: THE FEDERAL PUBLICATIONS GOVERNMENT CONTRACTS YEAR IN REVIEW CONFERENCE, COVERING 1998, Chapter 6, Disputes (1999); Ralph C. Nash & John Cibinic, *Dateline January 1999*, 13 NASH & CIBINIC REP. 1 (January 1999).

<sup>49</sup> See, generally, 41 U.S.C. §§ 601(5), 607(a)(1), 607(c), 607(h), 608(f). For a more extensive discussion of this topic, see John Howell’s essay \_\_\_ in this issue.

<sup>50</sup> Assembling and empowering a proper group poses a daunting challenge. Nonetheless, examples such as the Commission on Government Procurement, the President’s Blue Ribbon Commission on Defense Management (“Packard Commission”), and the Section 800 Panel suggest potential models.

[BCA] of jurisdiction[.]”<sup>51</sup> do they serve a legitimate purpose, or have they outlived their usefulness? Do we maintain the certification requirement to encourage settlement? Does the requirement persist because, historically, “contractors often submitted unsupported and inflated claims[?]” How valid today is the need “to insure that complete clear and honest claims are presented to Federal contracting officers[?]”<sup>52</sup> Has the requirement survived simply because it is advantageous to “trigger a contractor’s potential liability for a fraudulent claim[?]”<sup>53</sup> Now that the certification threshold no longer serves as a jurisdictional impediment, have we come full circle? Arguably, the certification requirement today is deemed *advantageous* by contractors because it triggers the CDA’s pre-judgment interest recovery provision. Consider the irony that the ABA, historically entrenched opponents of certification requirements, recently debated encouraging the Federal Aviation Administration to mandate certification procedures in promulgating its dispute procedures.<sup>54</sup> I suggest that, in the spirit of objective investigation, any effort should proceed based upon the assumption that certification – as we know it -- is unnecessary, yet permit certification proponents to articulate a legitimate purpose for such a requirement.

### **C. Addressing Procedural Issues: Distinguishing Deference, Housekeeping, and Micro-Management**

Twenty years of experience have exposed the difficulty associated with legislatively mandating “expeditious” and “inexpensive” dispute resolution. Concerns, studies, and recommendations related to the (apparent, or at least perceived) decrease in speed of board resolution are not new.<sup>55</sup> Nor do they seem to have succeeded. The absence of progress could be

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<sup>51</sup> 41 U.S.C. § 605(c)(6).

<sup>52</sup> S. Rep. No. 1118, 95<sup>th</sup> Cong., 2d Sess. 8 (1978); H. Rep. No. 1006, pt. 1, at 28, (1992), *reprinted in* USCCAN 3921, 3937, accompanying Pub. L. No. 102-572, 106 Stat. 4506 (1992); *Skelly & Loy v. United States*, 685 F.2d 414, 418 (Ct. Cl. 1983). Professor Roe’s description of path dependence as “the history of problems that had to be solved in the past but that may be irrelevant today” seems apt. See, Roe, *supra*, 109 HARVARD L. REV. at 668.

<sup>53</sup> *Skelly & Loy v. United States*, 685 F.2d 414, 418 (Ct. Cl. 1983); see also, S. Rep. No. 1118, 95<sup>th</sup> Cong., 2d Sess. 8 (1978); H. Rep. No. 1006, 102d Cong., 2d Sess., at 28, accompanying Pub. L. No. 102-572, 106 Stat. 4506 (1992).

<sup>54</sup> Discussion at the American Bar Association Section of Public Contract Law Fall Council Meeting, November 7, 1998, The Broadmoor, Colorado Springs, Colorado.

<sup>55</sup> See, e.g., *Report of the Federal Contract Claims and Remedies Committee on Ways of Expediting Appeals Before the Boards of Contract Appeals*, 16 PUB. CONT. L. J. 161 (1986), recommending: (1) better use of prehearing conferences; (2) greater stipulation of uncontested  
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correlated to obsessive focus upon the trees rather than the forest. Progress is unlikely if the effort bogs down with attempts to resolve specific concerns; real reform likely would render many of the existing problems moot.

Only in the event that a global solution cannot be achieved, therefore, should the ever-increasing number of minor frustrations gain the forefront. Given our experience, Congress has proven more adept at addressing limited, specific (and, at times, trivial) issues than resolving global controversies implicated by complex statutory schemes. Nonetheless, including seemingly small, specific items in the debate may ensure that the broadest collection of interests are heard.<sup>56</sup> Moreover, it seems irresponsible for any reform effort not to consider issues that could promote clarity, consistency, efficiency, speed, or satisfaction of the affected parties. Conversely, the best hope for improving process aspects of dispute resolution may lie in modification of practices (taking advantage of the existing flexibility in the legislative regime) rather than initiating further legislation.

This essay does not permit space for examination of the litany of discrete issues ripe for consideration. A sampling, however, demonstrates the breadth of the pressing issues. It seems logical to ask whether the uniform rules for board procedures, published in 1979, require revision to permit the boards to provide “informal, expeditious, and inexpensive resolution of disputes.”<sup>57</sup> Is the so-called “Rule 4 file,” arguably analogous to the administrative record in Administrative

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<sup>55</sup>(...continued)

facts; (3) more settlement conferences; (4) shorter, less detailed written opinions; (5) fewer post-trial briefs; (6) more single-judge decisions; (7) more bench decisions; (8) expanded thresholds for accelerated procedures; and (9) greater innovation and flexibility in overall approach.

<sup>56</sup> Engaging in the debate at the fundamental level described in this essay may render the issues too remote for many affected parties. Moreover, although it is unlikely that Congress would adopt any broad scale suggestion, however rational, the likelihood of *some* legislative initiative resulting in legislation is far greater. Once Congress turns its attention to the issue, interest groups undoubtedly will seek specific provisions that promote their agenda. For example, despite recent Congressional debate over a significant overhaul of the income tax system (implicating broad sweeping concepts such as the elimination of the current tax code, flat tax schemes, etc.), only discrete legislative changes to the code prevailed.

<sup>57</sup> 41 U.S.C. § 607(e). The Senate Report was prescient in identifying a paradox. “The aim of any remedial system is to give the parties what is due them as determined by a thorough, impartial, speedy, and economical adjudication. However, it is difficult to be economical, yet thorough; thorough, yet speedy.” S. Rep. No. 95-1118, 95<sup>th</sup> Cong., 2d Sess., 13 (1978), *reprinted in* 1978 U.S.C.C.A.N. 5235, 5247.

Procedure Act<sup>58</sup> litigation, an anachronism or an efficient process for reducing discovery costs and evidentiary squabbling? Are there obvious solutions responsive to periodic complaints - by contractors, the bar, government agencies, and private industry - regarding the length of time certain appeals languish at boards of contract appeals? Is it appropriate to set - by statute or administrative rule - maximum time periods for decision after filing or, at very least, the time at which hearings and briefings have concluded and the decision is “ready to write?”<sup>59</sup> Should administrative fora provide multiple-judge collegial decisions (e.g., utilizing three-judge or, in the case of the ASBCA, constructive five-judge decisions)? Are these collegial decisions necessary? What are the relative costs (in money, in time) and benefits (in terms of accuracy, consistency)? Is there an appropriate, expanded role for more non-precedential decisional alternatives?<sup>60</sup> To the extent that bifurcation of entitlement and quantum has proven effective in BCA litigation,<sup>61</sup> should the CDA permit the United States Court of Appeals for the Federal Circuit to hear appeals of entitlement decisions?<sup>62</sup> As demands for ADR expand, can the disputes process encourage alternative options without mandating them?<sup>63</sup> To enhance consistency and clarity, why not make the pre-judgment interest provisions parallel? (Currently,

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<sup>58</sup> 5 U.S.C. §§ 551-706.

<sup>59</sup> While the CDA provides for 180-day and 120-day periods for resolution by the BCAs of accelerated (under \$100,000) and expedited (under \$50,000) appeals, 41 U.S.C. §§ 607(f), 608(a), few sustained efforts have attempted to address the resolution period for large, complex matters.

<sup>60</sup> For example, our panel discussion, *supra* note 1 (biographical footnote), led to a suggestion that BCAs voluntarily offer parties, in cases not to exceed \$1 million, the option of jointly electing a “streamlined process,” which could entail: (a) a twelve- or eighteen-month decisional deadline; (b) streamlined and accordingly limited discovery; and (c) a one-judge, non-precedential, unpublished, but binding decision.

<sup>61</sup> See generally, RALPH C. NASH, JR., STEVEN L. SCHOONER & KAREN R. O’BRIEN, *THE GOVERNMENT CONTRACTS REFERENCE BOOK*, 62 (2d ed., Geo. Wash. Univ. 1998).

<sup>62</sup> See generally, PEACOCK & TING, *CDA ANNOTATED*, *supra*, at 8-14, 8-15 (“there is no final appealable decision where the board remands a case to the parties for determination of ‘quantum’”). BCAs lack authority to certify interlocutory decision. *Id.* at 8-15. See also, John Cibinic, *Federal Circuit Review of Bifurcated Appeals?: Why Not?*, 12 NASH & CIBINIC REP. ¶ 33 (June 1988) (describing bifurcation as the “very sensible practice of limiting trials to entitlement issues”).

<sup>63</sup> Must ADR be voluntary (or “alternative”) in order to succeed? Is it ADR if it denies a party access to full due process in certain cases where appropriate?

contractors recover interest pursuant to statute,<sup>64</sup> while the Government enjoys an identical remedy as a matter of regulation and remedy-granting contract clause.<sup>65</sup>) Can revised procedures prompt more efficient proceedings and streamlined procedures through the use of presumptive discovery limits (or constraints on the size of briefs) mirroring those adopted in the Federal Rules or effectively employed in specific jurisdictions? For our purposes, prioritizing, rather than attempting to resolve, these issues is necessary to remain focused upon meaningful reform.

## **VI. Conclusion: The Need For a Clean Slate**

Does the current CDA work? Has it outlived its usefulness? Does it provide an efficient mechanism for resolving disputes between the Federal Government and its contractors? Does it promote consistency in the administration and performance of Federal government contracts? Does the statutory scheme (alone, or in conjunction with other statutory requirements) deter the best non-governmental entities from offering the Government the best value for the supplies, construction, and services it procures? Are the individual or collective criticisms of the CDA sufficient to merit the significant upheaval a statutory alternative would entail? Should Congress scrap the CDA and start over, or should it merely continue to tweak?

Let the debate begin. For the discussion to succeed, the fewer preconceived notions regarding the end of the journey, the better. To guide the journey, I suggest examination of the following questions, primarily in the following order.

Is there an articulated need for change that only can be addressed by legislation? If so, is a wholesale revision required, or will further tweaking suffice? (The latter alternative, to a great extent, obviates the need for further analysis.) If dramatic changes are sought, what fundamental aspirations for the system or overarching goals will serve as a touchstone? How broadly should the statutory scheme waive the sovereign's immunity to suit? Which adjudicative forum, what type of fora, or which options available to the parties will most likely provide dispute resolution service most consistent with the aspirations and goals articulated above? What jurisdictional prerequisites are necessary to ensure that actions covered by the statutory regime remain consistent with the identified aspirations and goals? What specific statutory authorities are required to ensure that various fundamental tenets of the system are available?

Agreement seems unlikely. Nonetheless, there's no harm in asking the questions. We cannot know where the quest will lead unless and until we embark.

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<sup>64</sup> 41 U.S.C. § 611.

<sup>65</sup> FAR 32.614-1, 32.617(a); Interest Clause, FAR 52.232-17.