

BOARD OF CONTRACT APPEALS or COURT OF FEDERAL CLAIMS: The Contractor's Irrevocable Choice

A Research Report Issued by the
Navigant Construction Forum™

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Purpose of Research Report

The U.S. Court of Federal Claims (“CFC”) is not new. “The Court traces its origins directly back to 1855, when Congress established the United States Court of Claims to provide for the determination of private claims against the United States. The legislation was signed into law on February 24, 1855, by President Franklin Pierce. Throughout its 150 year history, although it has undergone notable changes in name, size, scope of jurisdiction, and procedures, its purpose has remained the same: In this court the federal government stands as the defendant and may be sued by citizens seeking monetary redress. For this reason, the Court has been referred to as the ‘keeper of the nation’s conscience’ and ‘the People’s Court’.”¹ The Court was reorganized and renamed the U.S. Court of Federal Claims in 1992.²

Practitioners in the Federal construction bar are familiar with the CFC as well as the legislation and the rules under which the Court operates. Most attorneys who represent construction contractors have spent time studying the CFC and its decisions. Thus, this report does not discuss in great detail the rules, procedures, deadlines or operations of the CFC.

Under the Contract Disputes Act of 1978³ (“CDA”), once a Contracting Officer issues a final decision denying a certified claim, the contractor has 90 days to file a notice of appeal to the appropriate Board of Contract Appeals:

- The Armed Services Board of Contract Appeals (“ASBCA”) if the contract dispute arises from a Department of Defense contract (including the Departments of the Army, Navy and Air Force and all other agencies, components and entities within the Defense Department) or a contract with the National Aeronautics and Space Administration; or
- The Civilian Board of Contract Appeals (“CBCA”) if the contract is with any other government agency except for the U.S. Postal Service or the Tennessee Valley Authority.⁴

¹ U.S. Court of Federal Claims, U.S. Court of Federal Claims: The People’s Court, Federal Bar Association, 54-OCT Fed. Law. 28, 2007.

² Federal Courts Administration Act of 1992, Pub. L. No. 102-572, § 907, 106 Stat. 4506, 4518 (1992) (amending 41 U.S.C. § 605).

³ 41 U.S.C. §§ 601 – 613 (2000).



Should the contractor decide to file the notice of appeal, they typically then have 30 days from receipt of notice of docketing of the appeal to file the complaint with the appropriate Board.

In the alternative, the contractor may elect to file their appeal to the CFC, in which case the filing deadline with the Court is 12 months from the date of receipt of the Contracting Officer's final decision.⁵ Under the CDA, only the contractor has the right to appeal a Contracting Officer's final decision.

So the question is which is the better forum for this claim? Most attorneys practicing in the government contract arena have formed their own opinions concerning the advantages of appealing a Contracting Officer's final decision to a Board or the CFC. Some have expressed their opinion in the following manner.

The Construction Lawyer's Primer

“If you have the facts, the contract and the law, go to a judge. If all you have is equity seek out a jury, an arbitration panel or a Board of Contract Appeals.”

Anonymous

The Navigant Construction Forum™ set out to test this opinion. It has been generally accepted that the Boards have more specialized knowledge and familiarity with construction issues and disputes than the CFC. Many attorneys have expressed the opinion that issues such as schedule delay, constructive changes, differing site conditions, constructive suspensions of work, and the like are decided more predictably in the Board forum. While some attorneys have commented that disputes before the Boards are less expensive and faster, others cite the Board's tendency to grant more discovery requests and their failure to enforce trial calendars.

In the Navigant Construction Forum's™ December 2010 research report – “The New Boards of Contract Appeals: Are They Still Predictable?” – the Construction Forum analyzed nearly 2,000 decisions issued during the period of 1991 – 2010 to determine the win/loss percentage of

⁴ See Navigant Construction Forum™ Research Report, The New Boards of Contract Appeals: Are They Still Reliable?, Navigant Consulting, Inc., Chicago, IL, December 2010 for a discussion of the reorganization and current jurisdiction of the Boards of Contract Appeals.

⁵ 41 U.S.C. § 609(a)(3).



contractor claims before the Boards.⁶ In this research report (April 2011) the Navigant Construction Forum™ looked at all CFC decisions issued between October 1992 and December 2010 to determine the win/loss ratio concerning contractor claims before the CFC and how it compares to the Boards.

This report also is intended to further illuminate the decision-making criteria when choosing to appeal an adverse Contracting Officer's final decision to the appropriate Board or to the CFC by comparing and contrasting the Boards and the CFC on a number of issues, at a high level. The comparison provides insight for legal counsel facing the typical client questions: "The Contracting Officer has denied all or a part of my claim. What are my options? What do you recommend? Why?" The Navigant Construction Forum™ hopes contractors and their legal counsel find this report helpful in making their choice – "Board of Contract Appeals or Court of Federal Claims?"

⁶ Ibid, [The New Boards of Contract Appeals: Are They Still Reliable?](#).



Research Methodology

As the objective of this report is to provide a comparison between the CFC and the Boards, the Navigant Construction Forum™ adopted the same fundamental research methodology as employed in the December 2010 research report, The New Boards of Contract Appeals: Are They Still Reliable?

Since the focus is the study of construction disputes, the Navigant Construction Forum™ examined all decisions issued by the CFC between the beginning of October 1992 (the start of FY 2003) and the end of December 2010. Navigant's research staff utilized Lexis/Nexis to locate all case decisions from the CFC for this timeframe. This gave the research team a total of 4,770 decisions. However, as discussed previously, the CFC has jurisdiction over a wide range of disputes arising under expressed and implied-in-fact contracts entered into by the U.S. government. The research team used keyword search criteria to narrow the larger number of decisions issued by the CFC and identify cases involving that appeared to be construction-related disputes. The keyword search core terms were the following –

- | | |
|----------------------------|----------------|
| ➤ Change | ➤ Build |
| ➤ Delay | ➤ Construct |
| ➤ Differing site condition | ➤ Constructed |
| ➤ Termination | ➤ Construction |
| ➤ Civil Engineer | ➤ Design |
| ➤ Engineer | ➤ Designed |

This reduced the number of decisions to 2,616. The research team then narrowed this search using proximity search terms based on miss-hits found in the large results set (i.e., “contract construction” versus “construction contract”). Using a proximity search (such as “constructed or construct or construction or design or designed or build or engineer w/6 of building or project or contracted or facility”) the number of decisions was narrowed further, to 652 decisions. These results were then reviewed individually. Out of both searches, there was a total of only 182 construction cases.



Each of these 182 construction case decisions was manually reviewed to determine the outcome:

- For the Plaintiff (the contractor)
- For the Government
- Mixed decision

A “mixed decision” is one in which the CFC ruled on some points in favor of the contractor and on other points in favor of the government within the same decision.

Research Results

The total number of cases identified in this research report is 182. A review of these decisions indicates the following –

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

By comparison, Board decisions indicate the following –

ASBCA DECISIONS IN FAVOR OF	PERCENTAGE
Plaintiff (contractor)	26.90%
Defendant (government)	47.30%
Mixed Decisions	25.70%

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



Observations

Assuming the dictum highlighted earlier is true and cases going to the CFC have the facts, the contract and the law while cases going to the Boards have equity, one would likely assume that there is a substantial difference in the number of case decisions favoring the contractor versus the government. However, an analysis of the case decisions issued by the CFC and the Boards illustrates that this is not a sound assumption. The conclusion from this research is that the outcome of the CFC's decisions is not substantially different than the average outcome of the decisions issued by the Boards.

- The CFC finds for the plaintiff (the contractor) in approximately 23.6% of their decisions which is only slightly less than the average Board findings for contractors – where the average of the ASBCA and the CBCA decisions for contractors equals 26.8%.
- The CFC finds for the defendant (the government) in approximately 45.1% of their decisions which is marginally more than the average Board decisions for contractors of 44.0%.
- The CFC's mixed decisions equal 31.3% which is slightly more than the average of the Board's mixed decisions, which equal 29.2%.

There is little statistical difference in the outcome of CFC and Board decisions.

Based on these findings the decision on whether to appeal a Contracting Officer's final decision to a Board or the CFC should not be dependent to any significant degree on the statistical outcome of their decisions. Other factors, such as

- availability of accelerated or expedited procedures or ADR,
- filing deadlines,
- who remains in control of potential settlements after an appeal is filed,
- the need for more or less discovery, or
- the potential of government counterclaims or False Claim accusations

may have more significance in making this decision than the statistical likelihood of a favorable decision from a Board or the CFC.



Comparison Between the Boards of Contract Appeals and the U.S. Court of Federal Claims

As initially conceived, the CFC did not have power to issue final judgments; an omission which was corrected in 1861 at President Abraham Lincoln's urging. The Tucker Act⁷ expanded the CFC's jurisdiction to include all claims against the United States other than tort, equitable and admiralty claims. "The Tucker Act provides a strictly construed, limited waiver of sovereign immunity⁸ that grants the CFC jurisdiction over express and implied-in-fact contracts with the United States."⁹

Current Jurisdiction

Subsequent to the passage of the National Childhood Vaccine Injury Act of 1986¹⁰, the Federal Courts Administration Act of 1992 (which included the Court of Federal Claims Technical and Procedural Improvements Act of 1992)¹¹; and the Administrative Dispute Resolution Act of 1996¹² and its amendments¹³; the jurisdiction of the CFC has been expanded to include the following:

- Most suits for monetary claims against the government;
- Claims for just compensation for the taking of private property;
- Refunds of Federal taxes;
- Military and civilian pay and allowance disputes;
- Damages for breaches of contract with the government;
- Claims for patent and copyright infringement against the government;
- Some claims by Indian tribes and those cases transferred from the Indian Claims Commission;

⁷ 28 U.S.C. § 1491.

⁸ *Hart v. United States*, 910 F.2d 815, 817 (Fed. Cir. 1990).

⁹ Schaengold, Michael J. and Robert S. Brams, *Choice of Forum for Government Contract Claims: Court of Federal Claims vs. Board of Contract Appeals*, 17 Federal Circuit Bar Journal 279, Vol. 17, No.3 (2008).

¹⁰ 42 U.S.C. §§ 300aa-1 – 300aa-34.

¹¹ Pub. L. No. 102-572, § 907, 106 Stat. 4506, 4518 (1992) (amending 41 U.S.C. § 605).

¹² Pub. L. No. 104-320, § 12(a)(3), 110 Stat. 3870, 3874 (amending 20 U.S.C. §1491(b)).

¹³ *Id.*, § 12(d), 110 Stat. at 3874-75.



- Non-monetary government contract disputes such as pre- and post-award bid protests (and now is the exclusive judicial forum for the resolution of bid protests); and,
- Petitions for compensation for injuries attributed to specified vaccines.

Additionally, “A unique aspect of the Court’s jurisdiction throughout its history has been the authority to act on Congressional references of legislative proposals for compensation of individual claims. As eventually codified in 28 U.S.C. § 1492, either House of Congress may refer a bill to the Chief Judge of the Court for an investigation and report to Congress. A judge of the Court is assigned to act as the ‘hearing officer’ and preside over the judicial proceedings. Then a three-judge panel submits a report to Congress for its consideration and disposition of such claims for compensation.”¹⁴

Differences between the Boards of Contract Appeals and the CFC¹⁵

In many respects, the jurisdiction of the Boards and the CFC are similar. However, there are differences which should be kept in mind when selecting a forum for appeal.

Accelerated and Expedited Procedures – Both the CFC and the Boards have accelerated procedures for certain cases.

- *CFC*: The Rules of the CFC (“RCFC”) allow either party to request an expedited trial. However, the RCFC state that an expedited trial will be granted only if:
 - Discovery can be completed within a 90-day period;
 - The hearing will not last more than 3 days;
 - No dispositive motions will be filed; and
 - A bench ruling is requested.

¹⁴ *Ibid*, U.S. Court of Federal Claims: The People’s Court.

¹⁵ These observations were abstracted and compiled from the following sources: *Ibid*, U.S. Court of Federal Claims: The People’s Court; *Ibid*, *Choice of Forum for Government Contract Claims: Court of Federal Claims vs. Board of Contract Appeals*; Plager, S. Jay, *Money and Power: Observations on the Jurisdiction of the U.S. Court of Federal Claims*, Federal Bar Circuit Journal, 17 Fed. Circuit B.J. 371; Saunders, Raymond M. and Patrick Butler, *A Timely Reform: Impose Timeliness Rules for Filing Bid Protests at the Court of Federal Claims*, Public Contract Law Journal, 39 Pub. Cont. L.J. 539, Spring, 2010; Zhang, Zhen, *Fictitious Jurisdictional Obstacles to Implied Contract Claims in Federal Court*, Maryland Bar Journal, 43 JUN Md. B.J. 66, May/June, 2010; and Cibinic, John Jr., Ralph C. Nash, Jr. and James F. Nagle, Administration of Government Contracts, 4th Edition, The George Washington University National Law Center, Wolters Kluwer, New York, 2006.



Under the RCFC the decision to grant an expedited procedure is left solely to the discretion of the judge.

- *Boards*: The Boards also provide for an expedited procedure but only at the request of the contractor. For claims of \$100,000 or less, the expedited procedure requires the Board to issue its decision within 180 days. For claims less than \$50,000, the expedited procedure sets forth a 120-day timeframe for the Board to issue its decision. In both cases, the rules of procedure are simplified and only a single judge sits. Decisions issued under the expedited procedure are not subject to appeal and have no precedential value. The CBCA has also adopted a “small claims procedure” for claims less than \$50,000 or less than \$150,000 if the contractor is a small business.

Based on the cited references, the Boards have more structured rules for, and experience with, expedited procedures than the CFC. The Board rules for accelerated and expedited cases usually provide for faster decisions than those of the CFC.

Alternative Dispute Resolution – Both the Boards and the CFC support the use of alternative dispute resolution (“ADR”). ADR in both forums is strictly voluntary and is employed only if both the contractor and the government agree to use ADR.

- *Boards*: The Boards actively participate in ADR, going so far as to have Board judges actively participate in the ADR procedure. The ASBCA supports the use of settlement judges, mini-trials and summary trials with binding decisions, whereas the CBCA rules allow for facilitative mediation, evaluative mediation, mini-trials, non-binding advisory opinions and summary binding decisions.
- *CFC*: The CFC is not as directly engaged in ADR as the Boards. However, when the parties advise the judge of their decision to use ADR, the CFC judge may arrange for a settlement judge or refer the case to a third-party neutral. The RCFC support the use of mediation, mini-trials, early neutral evaluation and non-binding arbitration.

Both the CFC and the Boards have procedures in place to shield the information gathered in the ADR process from the trial judge should ADR fail and the case return to litigation.



Appellate Review – Final decisions of both the CFC and the Boards may be appealed to the Court of Appeals for the Federal Circuit. While contractors are free to appeal any decision from either a Board or the CFC, government agencies may file an appeal only after obtaining approval of both the agency head and the Attorney General.

- *CFC*: Notices of appeal from final CFC decisions must be filed within 60 days from the date the judgment is entered by the Court. The Court of Appeals will review CFC decisions concerning errors of law but will not review findings of fact except under rare circumstances.
- *Boards*: Notice of appeal of a Board decision is required within 120 days after receipt of the decision. (It is noted that, prior to the passage of the CDA, government agencies could not appeal Board decisions.) While the Court of Appeals reviews Board decisions regarding errors at law, it will defer to the Boards on interpretation of the FAR and other relevant regulations. Board decisions on findings of fact are rarely subject to review by the Court of Appeal.

Binding Authority – Both the CFC and the Boards are bound by decisions of the Supreme Court and the published decisions of the Court of Appeals for the Federal Circuit as well as predecessor appellate courts (i.e., the Court of Claims and the Court of Customs and Patent Appeals).

- *CFC*: CFC judges are not bound by decisions of other CFC judges nor are they bound by Board decisions.
- *Boards*: The Boards are not bound by CFC decisions or decisions of other Boards. Typically, Boards are bound to follow previous decisions of their own Board and the CBCA has ruled that they will be bound by decisions of their predecessor Boards.¹⁶

Consolidation of Cases – Although it is an infrequent occurrence, should a contractor file two separate actions on the same contract – one with a Board and the other with the CFC – the CFC has the power to consolidate two or more suits into a single suit and maintain the consolidated suit either before the CFC or assign it to a Board.¹⁷ The contractor will have no choice in the matter in such an instance.

¹⁶*Business Management Research Associates v. General Services Administration*, CBCA NO. 464, 07-1 BCA ¶ 33,486.

¹⁷ 41 U.S.C. § 609(d).



Counterclaims and Fraud – Both the CFC and the Boards have jurisdiction over government counterclaims; however, the government may not assert a counterclaim that has not been the subject of the Contracting Officer’s final decision.

- *CFC*: The CFC may hear government counterclaims based on the False Claims Act¹⁸, the CDA¹⁹, or the Forfeiture of Claims Act²⁰.
- *Board*: The Board’s jurisdiction over government fraud counterclaims is restricted much more under the provisions of the CDA. The Boards have no authority to grant monetary relief to the government nor do they have the authority to issue a decision concerning fraud by a contractor. (Typically, if the government chooses to file a False Claim Act suit, it will do so in Federal District Court and seek a stay concerning the hearings before the Board until the False Claim action is resolved.) However, the Boards are allowed to reject or reduce a contractor claim if the claim is based, in whole or in part, on false information.

Decisions and Opinions – Generally, both the CFC and the Boards issue written decisions.

- *CFC*: CFC trials are presided over by a single judge and decisions are not reviewed by other judges nor are they reviewed for consistency with previous CFC decisions. CFC decisions are published in the Federal Claims Reporter. However, CFC judges may issue oral opinions from the bench especially in expedited cases and unpublished decisions.
- *Board*: Almost all Board decisions are written and published. Unlike CFC cases, Board decisions (except in the case of the expedited or small claims cases) are reviewed by two or more Board judges. This process includes a review of each decision to see that it is consistent with previous Board decisions.

Some practitioners have suggested that, since CFC decisions are written by a single judge, the CFC issues decisions faster than the Boards. However, there is also an accompanying opinion that Board decisions are less likely to be overturned on appeal to the Court of Appeals for the Federal Circuit because they are reviewed by two or more judges and tested for consistency with previous decisions. During preparation of this report the Navigant Construction Forum™ did not

¹⁸ 31 U.S.C. § 3729(a).

¹⁹ 41 U.S.C. § 604.

²⁰ 28 U.S.C. § 2514.



find data to support the contention that CFC decisions are rendered more quickly than Board decisions but did locate some data regarding how often the Court of Appeals for the Federal Circuit reverses Board and CFC decisions. The data is shown later in this report.

Discovery – Discovery, whether in the CFC or a Board case, will be allowed and depends upon the size and complexity of the case. The CFC rules concerning discovery are more detailed than those of the Boards and generally follow the Federal Rules of Civil Procedure. The CFC discovery rules are more rigid than the Board rules and the Boards apparently allow the contractor to engage in more discovery than the CFC.

- *CFC*: The CFC discovery rules limit the number of depositions; the length of each deposition; the number of interrogatories; and may limit the number of requests for admission.
- *Board*: Under Board rules, the government must produce a Rule 4 file, consisting of all documents relevant to the case, within 30 days of receiving the notice of appeal, which the contractor is then allowed to supplement. While the Boards may limit discovery in some ways, there are no formal rules governing such a decision and it is frequently left to the parties and the Board to determine what discovery is proper on a case-by-case basis.

Election Doctrine – The choice of forum to appeal a Contracting Officer’s final decision is exclusively the prerogative of the contractor since the government has no right to appeal such a decision. The CDA prevents a contractor from filing an appeal in both the CFC and a Board and the contractor’s choice of forum is irrevocable. However, given the difference in the amount of time to file an appeal with a Board or the CFC (discussed below), if a contractor files an appeal with a Board and that Board determines they do not have jurisdiction, the contractor may refile with the CFC given the longer timeframe within which to file an appeal to the CFC.

Filing Time Limits – Under the provisions of the CDA, a contractor has only 90 days from receipt of a Contracting Officer’s final decision denying a certified claim to file an appeal to a Board. However, a contractor has 12 months from receipt of the final decision to file a complaint with the CFC.²¹ Neither the Boards nor the CFC have the authority to waive late filing.

²¹ 41 U.S.C. § 609(a)(3).



Judges – Judges sitting on the CFC are not required to have any government contracting experience²². Judges appointed to either the ASBCA or the CBCA are required to have a minimum of five years experience in public contract law²³.

Pretrial Procedures – While it is not the intent of this report to outline in detail all of the procedures involved with a CFC or Board appeal neither process appears to offer rapid resolution unless the expedited or small claims procedures are employed.

- *CFC*: The CFC's pretrial procedures, if the timeframes are followed, add up to an approximate two year timeframe from filing of a complaint until a decision is rendered.²⁴ The timing may be further impacted if discovery or other delays arise during the process.
- *Board*: The Boards' rules are not as complex so the speed with which the case proceeds is left to the discretion of the judge. However, in discussion of the CBCA process with one client recently, the Navigant Construction Forum™ was advised that the CBCA may take up to one year after the final hearing date to issue a decision.

Relief Available – The issue of what relief a contractor can request is a complex one. A summary of what relief can and cannot be granted by the CFC and the Boards follows –

²² 41 U.S.C. §§ 438(b)(1)(B), 607(b)(1).

²³ 41 U.S.C. §§ 438(b)(2), 607(b)(1). However, with the consolidation of eight Boards into the new CBCA, for the foreseeable future it is possible that a contractor appealing a final decision to the CBCA will have a judge(s) who have no construction claims experience.

²⁴ RCFC Appendix G and The United States Court of Federal Claims: Handbook and Procedures Manual.



TYPE OF RELIEF	CFC	BOARDS
Consequential damage awards	Yes	Yes
Contract nullification	Yes	Yes
Declaratory relief for non-monetary damages ²⁵	Yes	Yes
Declaring a contract invalid	Yes	Yes
Dictate Contracting Officer's final decision	No	No
Direct Contracting Officer to issue final decision	Yes	Yes
Direct performance of specific acts	No	No
Discipline government personnel for noncompliance with instructions related to Congressional oversight	No	No
Injunctive, mandamus or specific performance relief concerning contract administration	No	No
Monetary damages	Yes	Yes
Quantum meruit claims and awards	Yes	Yes
Order assignment of new Contracting Officer	No	No
Order award of contract or task orders	No	No
Order Contracting Officer to exercise option	No	No
Order Contracting Officer to enter into negotiations of equitable adjustment	No	No
Order resignation of government personnel	No	No
Prevailing attorney fee award under EAJA ²⁶	Yes	Yes
Promissory estoppel disputes ²⁷	Yes	No
Punitive damage awards ²⁸	No	No
Reformation of contract	Yes	Yes
Reinstate contract	No	No
Rescission of contract	Yes	Yes
Restitution of contract	Yes	Yes
Stay proceedings until Contracting Officer final decision issued	Yes	Yes
Void a contract	Yes	Yes

²⁵ Such as termination of contracts; rights in property; and compliance with Cost Accounting Standards.

²⁶ Equal Access to Justice Act, 28 U.S.C. § 2412(b).

²⁷ The CBCA has stated that while they cannot rule on disputes related to promissory estoppel they do have the jurisdiction to rule on equitable estoppel disputes against the government. *P.J. Dick, Inc. v. General Services Administration*, CBCA No. 461, 07-1 BCA ¶33,534.

²⁸ Absent express Congressional consent.



The CDA also authorizes Boards to grant the same relief available to a contractor as if the contractor were before the CFC.

Representation and Settlement – In cases before the Boards, the government agencies use their own attorneys to represent them whereas in cases before the CFC, Department of Justice attorneys represent the government (assisted by agency attorneys). The Boards permit contractors to represent themselves *pro se*. As noted in the Navigant Construction Forum's™ December 2010 research report, "... a study of ASBCA decisions issued during the five-year period ending in 2000, *pro se* appellants won some 43% of the decisions in which they represented themselves. The author concluded that *pro se* appellants fare neither worse nor any better than appellants represented by legal counsel.²⁹" However, with respect to settlement authority there is a distinct difference.

- *CFC*: In the CFC, only the Department of Justice attorney has the authority to settle a case and may do so even over the objection of the government agency.³⁰ The Contracting Officer has no authority to settle once the case is before the CFC.
- *Boards*: In a case before a Board, the Contracting Officer retains the sole authority to settle; the agency's lawyers have no settlement authority unless it is delegated to them by the Contracting Officer.

If the Contracting Officer or Justice Department attorney does reach a settlement, it appears unlikely that either the Board or the CFC would reject the settlement.

CFC Statistics

A review of the annual report of the Administrative Office of the United States Courts, entitled Judicial Business of the United States Courts provides the following picture of business before the CFC.³¹

²⁹ Blevins, Mark A., *Should You Appeal to the ASBCA?*, Contract Management, 34 (October 2001).

³⁰ 28 U.S.C. §§ 516, 519.

³¹ The CFC statistics can be compared to the BCA statistics presented in the December 2010 research report The New Boards of Contract Appeals: Are They Still Predictable?



CFC “Contract” Caseload History – Fiscal Years 1991 – 2010³²

FISCAL YEAR	CASES AT START	NEW CASES FILED	REOPENED CASES	CASES TERMINATED OR DISPOSED OF	PENDING CASES AT END OF YEAR	PERCENT OF TOTAL CFC CASES PENDING
1993		247		327	589	
1994		299		326	567	
1995		279		290	554	31%
1996		285		291	543	28%
1997	544	280		203	621	21%
1998	616	264		255	625	22%
1999	625	266		229	662	23%
2000	665	225		255	635	22%
2001	637	211		234	614	24%
2002	605	193		245	553	17%
2003	553	168		256	459	8%
2004	438	420	7	181	684	10%
2005	682	385	6	303	770	10%
2006	765	296	4	190	875	11%
2007	875	236	5	298	846	11%
2008	805	132	9	218	728	10%
2009	728	128	1	362	495	7%
2010	495	108	3	307	299	4%

It is important to note the following when reviewing this data. The Administrative Office of the United States Court reports the CFC caseload by category – Military Pay, Civilian Pay, Contract, Native American, INCC, Patent, Property, Tax, etc. The figures above represent the category “Contract”. A reading of the literature concerning the CFC demonstrates that anyone who holds a contract with the U.S. government and files a complaint with the CFC ends up in the Contract category. Complaints arising from contracts with food service suppliers, aircraft or vehicle parts suppliers, grounds maintenance contractors, construction contractors all are compiled into this category. The Administrative Office does not disaggregate contract disputes by type of contract when filing their annual reports to Congress.

³² The data reported on and the manner in which that data was reported changed several times during this period which is why this chart is not uniform for all reporting years.



Contract Cases as a Percentage of Total CFC Cases

It is noted that the category of contract cases as a percentage of all cases pending before the CFC is substantially lower than the reported peak of 42% at the end of FY 1991.³³ While this is a substantial decline as a percentage of the total cases pending, the Navigant Construction Forum™ does not believe this indicates that fewer contract disputes are being submitted to the CFC. Rather, it appears that the percentage decline is the result of a much larger number of other types of cases. Set forth below is an example to illustrate this point.

CFC Case Backlog

FISCAL YEAR	TOTAL CASES PENDING	VACCINE COMPENSATION CASES	CONTRACT CASES
1997	2,948	786 (27%)	621 (21%)
2010	6,920	5,544 (80%)	299 (4%)

Board and CFC Decisions Overturned by Court of Appeals for the Federal Circuit

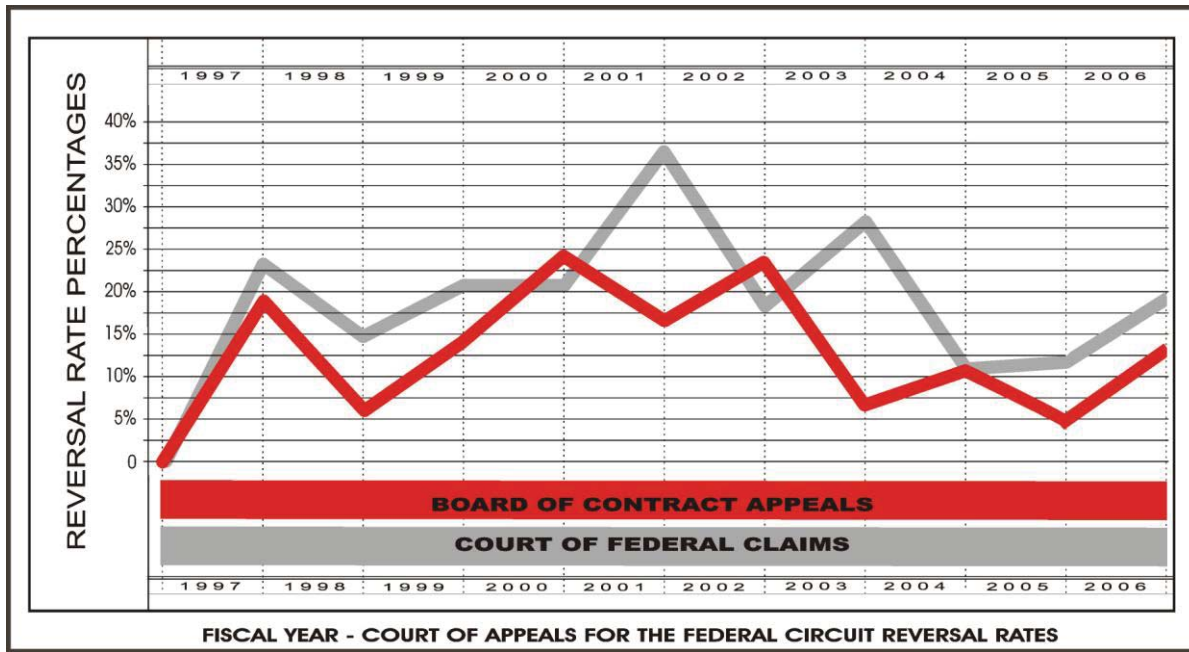
It was earlier related that some practitioners believe the Court of Appeals for the Federal Circuit is more likely to overturn a CFC decision (rendered by a single judge) than a BCA decision (reviewed by two or three judges and checked for conformity with previous Board decisions). The data set forth below indicates this is not the case or at least not by a significant margin. It appears that while the percentage of reversals is higher on CFC cases for seven of the 10 years for which data was available, there is only a wide divergence during two of the ten years surveyed (FY 2001 and 2003). Reversals are, on average, 5.7% higher during seven of the 10 years for which data was found; lower in 2 years; and exactly the same in 1 year.³⁴

³³ Schooner, Steven L., *Disputes and Protect Procedures*, Federal Publications Year End Review, Federal Publications, Washington, D.C. 1995.

³⁴ *Supra*, *Choice of Forum for Government Contract Claims: Court of Federal Claims vs. Board of Contract Appeals*.



Court of Appeals for the Federal Circuit Reversal Rates of BCA and CFC Decisions



It appears that the Court of Appeals for the Federal Circuit upholds both CFC and BCA decisions much more often than they reverse these decisions.

Board and CFC Caseloads per Judge

It was earlier reported that some practitioners believe CFC decisions are issued more quickly than Board decisions since only one judge issues the decision. The Navigant Construction Forum™ did not unearth any data to confirm or deny this belief. However, if the number of cases per judge is any indicator of speedy decision making, it seems unlikely that cases are decided more quickly in the CFC.



Caseload per Judge

FORUM	NUMBER OF CASES PENDING ³⁵	NUMBER OF SITTING JUDGES ³⁶	CASES PER JUDGE
ASBCA	576	23	25
CBCA	522	15	35
CFC	6,920	24 ³⁷	288

The substantial discrepancy in cases per CFC judge must be offset somewhat by the fact that all judges on the CFC are assigned two law clerks whereas BCA judges have none. Additionally, subsequent to the passage of the National Childhood Vaccine Injury Act in 1987, the CFC created the Office of Special Masters whose function it is to rule on petitions for compensation due to injuries attributed to specified vaccines.³⁸ The combination of these two factors should somewhat mitigate delay based on the caseload per CFC judge.

³⁵ The number of cases pending as of December 31, 2010 for the ASBCA and the CFC as taken from the ASBCA Quarterly Report and the Annual Judicial Business of the United States Courts for the CFC. The figures for the CBCA were extracted from *Choice of Forum for Government Contract Claims: Court of Federal Claims vs. Board of Contract Appeals* and are current as of October 1, 2007.

³⁶ The number of sitting judges on the Boards was taken from the ASBCA and CBCA websites – www.asbca.mil and www.cbca.gsa.gov respectively. The number of sitting judges on the CFC was found on the CFC website – www.uscfc.uscourts.gov.

³⁷ This number includes the statutorily authorized 16 judges plus 8 senior judges, judges who have served their initial 15-year term and been reappointed in a different status as senior judges.

³⁸ *Ibid*, U.S. Court of Federal Claims: The People’s Court.



Future Efforts of the Navigant Construction Forum™

In the second quarter of 2011, the Navigant Construction Forum™ will continue its analysis of decisions issued by the Boards and the CFC. The third report, currently in development, will analyze all of the cases identified in the first two reports, dividing each case into four claim entitlement issues:

- Changes
- Delays
- Differing Site Conditions, and
- Terminations.

The object of this next report will be to determine whether there is consistency among the Board and the CFC on specific claims issues. The result may help further refine the thinking of contractors and their legal counsel on whether to take a specific set of issues to a Board or the CFC.

Further research will be performed and published by the Navigant Construction Forum™ as we move forward. If any readers of this report have ideas on further construction dispute-related research they believe would be helpful to the industry, they are invited to e-mail suggestions to Jim.Zack@Navigant.com.



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This research team made this report possible.

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