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GAO Review of Contract Appeal Board Decisions

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GAO Review of Contract Appeal Board Decisions*

I. INTRODUCTION

Government contract disputes, while posing problems similar in many respects to those of private contracts, are complicated by the fact that one of the parties is the United States Government. While the private contractor wants to insure the availability of a remedy at all times, the Government is concerned with the possibility that a disruption in performance may frustrate the governmental purpose. In response to these often conflicting interests, the administrative settlement procedures have as their goal the resolution of contractors' claims without the disruption of work which often occurs during ordinary breach of contract proceedings.¹

II. ADMINISTRATIVE APPEALS PROCEDURE AND THE GENERAL ACCOUNTING OFFICE

The administrative procedure for settling contract disputes² is contractually established by the standard disputes clause con-

* The author would like to thank the General Accounting Office and the Air Force for their generosity in supplying materials used in writing this Note.

1. See Shedd, *Disputes and Appeals: The Armed Services Board of Contract Appeals*, 29 LAW & CONTEMP. PROB. 39, 39-43 (1964).

2. Such an administrative procedure evolved over an extensive period of time. The Supreme Court, in *United States v. Adams*, 74 U.S. (7 Wall.) 463 (1868), first recognized the authority of an executive created board to decide claims against the Government as a necessary incident to the successful completion of the department's duties. Ten years later, in *Kihlberg v. United States*, 97 U.S. 398 (1878), the Supreme Court upheld the validity of a finality clause. In so holding, the Court observed that general contract law allows parties to agree to be bound by a designated person and that a contract clause may clearly express that intent.

Prior to World War I, no administrative agency had established a formal procedure for appealing decisions under finality clauses. But in 1918, the War Department issued a standard contract form which provided the contractor with an option to appeal to the Secretary of War. Later that year, a board was established as the Secretary's representative in handling the resulting appeals. Since then, a number of appeal boards have been established and abandoned but they now generally have an important role in government contracting. See generally H. PETROWITZ, *OPERATION AND EFFECTIVENESS OF GOVERNMENT BOARDS OF CONTRACT APPEALS*, S. Doc. No. 99, 89th Cong., 2d Sess. (1966) [hereinafter cited as SENATE REPORT].

tained in government contracts.³ The clause by its terms applies only to questions of fact which are "not disposed of by agreement."⁴ This contemplates that some disputes will be informally settled between the private contractor and the Government's contracting officer, thereby eliminating the need to resort to a formal dispute procedure. If agreement cannot be reached on this basis, however, the clause requires that the contracting officer decide the question of fact and furnish a written copy of his decision to the contractor. The contractor must comply with this opinion, even if adverse to him, thereby insuring that performance will be continued. If he believes the government officer's decision is erroneous, the contractor may appeal to the secretary of the department within 30 days. If such an appeal is not initiated, the opinion of the contracting officer becomes final and binding upon both parties.⁵

Appeal to the secretary places the claim before a board of

3. The language of this clause is as follows:

(a) Except as otherwise provided in this contract, any dispute concerning a question of fact arising under this contract which is not disposed of by agreement shall be decided by the Contracting Officer, who shall reduce his decision to writing and mail or otherwise furnish a copy thereof to the Contractor. The decision of the Contracting Officer shall be final and conclusive unless, within 30 days from the date of receipt of such copy, the Contractor mails or otherwise furnishes to the Contracting Officer a written appeal addressed to the Secretary. The decision of the Secretary or his duly authorized representative for the determination of such appeals shall be final and conclusive unless determined by a court of competent jurisdiction to have been fraudulent, or capricious, or arbitrary, or so grossly erroneous as necessarily to imply bad faith, or not supported by substantial evidence. In connection with any appeal proceeding under this clause, the Contractor shall be afforded an opportunity to be heard and to offer evidence in support of its appeal. Pending final decision of a dispute hereunder, the Contractor shall proceed diligently with the performance of the contract and in accordance with the Contracting Officer's decision.

(b) This "Disputes" clause does not preclude consideration of law questions in connection with decisions provided for in paragraph (a) of this section: *Provided*, That nothing in this contract shall be construed as making final the decision of any administrative official, representative, or board on a question of law.

32 C.F.R. § 7.103-12 (1969), cited in *Hearings on Operation and Effectiveness of Government Boards of Contract Appeals Before the Subcomm. of the Select Comm. on Small Business*, 89th Cong., 2d Sess., 16-17 (1966) [hereinafter cited as *1966 Hearings*].

4. *Id.*

5. See generally SENATE REPORT, *supra* note 2.

contract appeals.⁶ While maintaining a procedure which is "sufficiently brief and uncomplicated as to be useful to a small unrepresented contractor,"⁷ contract appeal boards have increasingly sought to function as quasi-judicial bodies affording appellants the procedural safeguards of due process. The procedure of the various boards is by no means uniform, but that used by the Armed Services Board of Contract Appeals is typical.⁸ One of the 25 members of the Armed Services Board presides over an initial hearing on the disputed claim. At this hearing, he examines the past record, attempts to discover de novo the pertinent facts surrounding the disputes, and prepares a report setting forth his findings. On the basis of this report, five members of the board decide the case. Their decision is automatically reviewed by the chairman and two vice-chairmen of the board. If one of the five members disagrees with the majority's disposition of the case, he can request that the dispute be decided by a majority vote of the chairman and two vice-chairmen.⁹

While the effectiveness of contract appeal boards varies among governmental departments, the boards are generally credited with doing an adequate job of equitably settling contract disputes.¹⁰ Appearing before a Senate subcommittee in 1966, Louis Spector, then chairman of the Armed Services Board of Contract Appeals, stated:

Focusing specifically on the Armed Services Board of Contract Appeals, it can appropriately be viewed as an important link in a chain between a multiplicity of contracting officers, at one end of the chain, and an occasional lawsuit at the other end. The board, by furnishing the appellate benefits of these "disputes" procedures, exercises a strong inhibiting influence upon unnecessary contract appeals and litigation, at both ends of this chain.¹¹

Thus, the standard disputes clause provides the private contractor with a relatively efficient and inexpensive method of settlement for contractually waiving his traditional right to stop performance and to bring a suit for breach of contract.¹²

6. Appeal boards are the duly authorized representatives of department secretaries. See generally, SENATE REPORT, *supra* note 2.

7. See 1966 Hearings, *supra* note 3, at 5.

8. 32 C.F.R. § 30.1 (1969) establishes the procedure used by the Board.

9. See 1966 Hearings, *supra* note 3, at 8; SENATE REPORT, *supra* note 2, at 43.

10. See generally SENATE REPORT, *supra* note 2.

11. 1966 Hearings, *supra* note 3, at 3-4.

12. SENATE REPORT, *supra* note 2, at 1.

Within this administrative framework, the United States General Accounting Office (GAO) has consistently maintained its right to review the decisions of the various boards of contract appeals,¹³ despite objections from administrative agencies. Basing its position principally upon two statutes—the Budget and Accounting Act of 1921¹⁴ and the Wunderlich Act¹⁵—the GAO has established itself as an additional level of administrative review.

Reaction by government agencies to GAO review has depended upon the contract appeal board's determination. When the board decision has been unfavorable to the Government, the agency involved, having no standing to sue in the courts,¹⁶ has itself sought GAO review when the decision was thought to be unjust. But when a private contractor unsuccessful at the board level seeks GAO review, the agencies, as may be expected, have usually objected. The agencies assert that the contractors, unlike the agencies, are not barred from seeking relief in court—a step which if taken would bring the issue before a competent judicial body. The agencies also point out that they are bound by GAO decisions,¹⁷ since there is no administrative or judicial means to reinstate the awards won by the agencies at the board level. Recently, the United States Attorney General has supported the agencies' position.¹⁸

13. 46 COMP. GEN. 441 (1966).

14. 31 U.S.C. § 71 (1964):

All claims and demands whatever by the Government of the United States or against it, and all accounts whatever in which the Government of the United States is concerned, either as debtor or creditor, shall be settled and adjusted in the General Accounting Office.

Moreover, section 74 provides that balances certified by the Comptroller General are binding upon the executive branch of the Government.

15. 41 U.S.C. § 321 (1964):

No provision of any contract . . . relating to the finality or conclusiveness of any decision of the head of any department or agency or his duly authorized representative or board in a dispute involving a question arising under such contract, shall be pleaded . . . as limiting judicial review of any such decision to cases where fraud . . . is alleged. *Provided, however,* That any such decision shall be final and conclusive unless the same is fraudulent [sic] or capricious or arbitrary or so grossly erroneous as necessarily to imply bad faith, or is not supported by substantial evidence.

Section 322 provides: "No Government contract shall contain a provision making final on a question of law the decision of any administrative official, representative, or board."

16. A difference of opinion, however, presently exists on this point.

See § IV *infra*.

17. 31 U.S.C. § 74 (1964).

18. OP. ATT'Y GEN. (Jan. 16, 1969).

Thus, the GAO and the agencies have expressed what appear to be irreconcilable positions in regard to the review properly exercisable by the GAO.¹⁹ The conflict, however, could probably be resolved if both sides would confront the policy considerations honestly. This Note will examine the present appeal procedure for contract disputes and the relative merits of the current conflict. It is hoped that the solution which is offered will satisfactorily accommodate the interests of both positions.

III. PRESENT ROLE OF THE GAO IN CONTRACT DISPUTES

A. EXPRESS AUTHORITY OF THE GAO

Created by the Budget and Accounting Act of 1921²⁰ as a legislative, rather than an executive creature,²¹ the GAO exercises extensive control over the financial activities of governmental agencies. Such an overseeing body was believed necessary to aid Congress in maintaining effective financial control over the executive branch.²² The GAO, under the direction of the Comptroller General, performs auditing functions over all federal accounts and is responsible for maintaining uniform federal accounting procedures.²³ It also makes periodic reports to Congress on the financial operation of government agencies.²⁴

To insure that the GAO would be able to accomplish its statutory objectives, Congress granted it broad authority to settle claims against the Government. The Act provided that

[a]ll claims and demands whatever by the Government of the United States or against it, and all accounts whatever in which

19. Some commentators have questioned whether the GAO should exercise any review powers at all. See Spector, *Is It "Bianchi's Ghost" — Or "Much Ado About Nothing"?* 29 LAW & CONTEMP. PROB. 87, 108-13 (1964); Note, *S & E Contractors and The GAO Role in Government Contract Disputes: A Funny Thing Happened on the Way to Finality*, 55 VA. L. REV. 762, 782-83 (1969); Note, *Alice in Wunderlich: The Attorney General's Dream of Limiting the GAO's Claim Settlement Authority*, 18 CATH. U.L. REV. 544 (1969).

20. 31 U.S.C. § 41 (1964).

21. Its status as a legislative agency was reaffirmed in 1950 with the passage of the Accounting and Auditing Act of 1950, 31 U.S.C. § 65 (1964). As a result, the GAO reports, and is accountable, only to Congress and not to the Executive, 31 U.S.C. § 67(c) (1964).

22. See MACHINERY AND ALLIED PRODUCTS INSTITUTE, *THE GOVERNMENT CONTRACTOR AND THE GENERAL ACCOUNTING OFFICER* 17-18 (1966).

23. *Id.* at 8-13.

24. *Id.* at 13.

the Government of the United States is concerned, either as debtor or creditor, shall be settled and adjusted in the General Accounting Office.²⁵

Another section of the Act binds the Executive to the GAO's settlement of public accounts.²⁶ Thus, the Act, literally read, gives the GAO unlimited authority to settle the claims of disgruntled government contractors.²⁷

Consequently, the GAO since 1921 has consistently asserted that its right to review administrative decisions is as extensive as that exercised by the courts. In refusing to overturn the Secretary of Labor's factual finding, the Comptroller General in 1939 stated:

The courts have consistently held that it is proper for parties to a contract to designate a particular person to decide disputed questions and that decisions on such disputed questions by the person so designated are final and conclusive on the parties to the contract in the absence of fraud or of mistake so gross as necessarily to imply bad faith.²⁸

But like the judiciary, the GAO limited the application of this standard to questions of fact, and maintained that a contract appeal board acting pursuant to the contract disputes clause could not give finality to questions of law.²⁹ Rather, the GAO, relying on the 1921 Act,³⁰ specifically reserved that power for itself.

B. THE SCOPE OF JUDICIAL REVIEW

In adopting the same standards for review that were used by courts, the GAO was unaware that the scope of judicial review would eventually be restricted. In 1950, the United States Supreme Court in *United States v. Moorman*³¹ declared that when parties to a government contract provide for a designated party to conclusively settle disputes, such provision should not be frustrated by judicial interpretation even if the designated

25. 31 U.S.C. § 71 (1964).

26. 31 U.S.C. § 74 (1964): "Balances certified by the General Accounting Office, upon the settlement of public accounts, shall be final and conclusive upon the Executive Branch of the Government . . ."

27. For a discussion of this power, see Note, *The Comptroller General of the United States: The Broad Power to Settle and Adjust All Claims and Accounts*, 70 HARV. L. REV. 350 (1956).

28. 19 COMP. GEN. 568, 572 (1939).

29. *E.g.*, 46 COMP. GEN. 441 (1966); 4 COMP. GEN. 404 (1924); COMP. GEN. unpublished opinion B-156192 (Dec. 8, 1966).

30. 31 U.S.C. § 71 (1964).

31. 338 U.S. 457 (1950).

party decided a question of law. Judicial review was further curtailed a year later when the Supreme Court in *United States v. Wunderlich*³² held that decisions of contract appeal boards should not be overturned unless fraud on the part of the contracting officer is alleged and proved. By so holding, the Court overturned the long established principle that court action was justified if the decision was so grossly erroneous that it necessarily implied bad faith.³³ The GAO, which had long tied its review power to that of the courts, was forced to concede that its power fell with that of the courts.³⁴

As a result, the GAO actively sought the passage of legislation which would re-establish judicial review of contract dispute settlements. This effort culminated in the passage of the Wunderlich Act in 1954.³⁵ The first section of the Act restored the pre-*United States v. Wunderlich* standard by providing that questions of fact are final when decided pursuant to the standard disputes clause unless the decision was fraudulent, capricious, arbitrary, so grossly erroneous as to necessarily imply bad faith or not supported by substantial evidence.³⁶ In addition, the Act overturned *Moorman* by providing that the administrative resolution of a government contract dispute is not final with respect to a question of law.³⁷

The House Report³⁸ which accompanied the Wunderlich bill admitted that the purpose of the bill was to overcome the effect of *United States v. Wunderlich*.³⁹ In addition to recognizing the renewed right to judicial review of contract appeal board settlements, the House Report examined the GAO's role within the review framework:

32. 342 U.S. 98 (1951).

33. *E.g.*, *Goltra v. Weeks*, 271 U.S. 536 (1926); *United States v. Mason & Hanger Co.*, 260 U.S. 323 (1922); *Plumley v. United States*, 226 U.S. 545 (1913); *United States v. Gleason*, 175 U.S. 588 (1900).

34. *See Hearings on S. 2487 Before the Subcomm. on Finality Clauses in Government Contracts of the Senate Comm. on the Judiciary*, 82d Cong., 2d Sess., 4-13 (1952); Letter from S.P. Haycock, Assistant General Counsel of the General Accounting Office, to the author, Jan. 10, 1969, on file in the office of *Minnesota Law Review* [hereinafter cited as Haycock].

35. 41 U.S.C. §§ 321, 322 (1964).

36. *Id.* § 321.

37. *Id.* § 322 provides: "No Government contract shall contain a provision making final on a question of law the decision of any administrative official, representative, or board."

38. H.R. REP. NO. 1380, 83d Cong., 2d Sess. 1954, *reprinted in* 1954 U.S. CONG. & AD. NEWS 2191.

39. 342 U.S. 98 (1951).

The proposed legislation, as amended, will not add to, narrow, restrict, or change in any way the present jurisdiction of the General Accounting Office either in the course of a settlement or upon audit, and the language used is not intended either to change the jurisdiction of the General Accounting Office or to grant any new jurisdiction, but simply to recognize the jurisdiction which the General Accounting Office already has.⁴⁰

Thus, while the bill in its final form does not specifically refer to the GAO, the House Report indicates that the bill was not to be construed as limiting the GAO's authority, but rather as allowing the GAO to apply judicial standards as it had prior to *Moorman* and *Wunderlich*.⁴¹

C. REVIEW BY THE GAO

Convinced that the Wunderlich Act restored its right to review,⁴² the GAO has reasserted its earlier scope of review of contract appeal board decisions.⁴³ The GAO has never claimed to possess more authority than that of the courts,⁴⁴ and therefore has followed the judicial construction of the Wunderlich Act.⁴⁵ It has, however, preciously guarded its self-assumed right to review all board decisions to the same extent as the courts.⁴⁶ The Court of Claims, on the basis of the legislative history of the Wunderlich Act, has reinforced the GAO's assumption by stating: "One of the major reasons for the passage of the new Act was to assure to the General Accounting Office a limited right of scrutiny comparable to (though perhaps not precisely the same as) that given to the courts."⁴⁷ The policy behind the GAO's position is that the contract appeal boards can and do make mistakes to the detriment of the Government. Therefore, since the Government's right to seek judicial review is uncertain,⁴⁸ the GAO feels obligated to review either upon its own

40. H.R. REP. NO. 1380, 83d Cong., 2d Sess. 1954, reprinted in 1954 U.S. CODE CONG. & AD. NEWS 2196.

41. *Id.*

42. Haycock, *supra* note 34, at 5.

43. *E.g.*, 47 COMP. GEN. 378 (1968); 46 COMP. GEN. 441 (1966).

44. *E.g.*, 47 COMP. GEN. 378 (1968); 46 COMP. GEN. 441 (1966); 19 COMP. GEN. 568 (1939).

45. *See, e.g.*, 47 COMP. GEN. 378, 383 (1968); 46 COMP. GEN. 441, 454-55 (1966).

46. *Id.*

47. *C.J. Langenfelder & Son, Inc. v. United States*, 341 F.2d 600, 608 (Ct. Cl. 1965).

48. While disgruntled contractors were given the right to appeal unfavorable board decisions by the Tucker Act, 28 U.S.C. § 1491 (1964), there are no such provisions available to government agencies. Though many arguments have been advanced to support the propriety of this

initiative, or that of the contracting agency.⁴⁹

The GAO insists that the right to review decisions which are favorable to the Government is a necessary corollary of its authority to review those against the Government.⁵⁰ The Court of Claims in *C. J. Langenfelder & Son, Incorporated v. United States*⁵¹ appeared to agree:

The present case does not, of course, require us to define the full scope of the Comptroller General's authority, but the fact that he undoubtedly has some role under the Wunderlich Act helps to demonstrate that the statute applies to administrative decisions favoring the contractor, as well as those which are adverse.⁵²

In an unpublished letter,⁵³ S. P. Haycock, Assistant General Counsel of the General Accounting Office, notes that administrative rulings on questions of law are not made final by either the standard disputes clause or the Wunderlich Act. Consequently, he states that the GAO believes that it has a duty to take action if the "facts . . . do not in law justify the . . . disposition of a claim . . ." ⁵⁴ Where the contractor appeals from an adverse board decision, the GAO either allows the claim, thereby binding the Government, or disallows it, thereby forcing the contractor to seek a judicial determination of the dispute.

IV. PRESENT CONFLICT

As mentioned above, the GAO bases its right to review board

disability, the basic one is that the Government would be appealing from its own determination. See, e.g., Spector, *supra* note 19. Such an assertion is misleading since there is no indication that appeal boards are prejudiced in favor of the Government's position. In fact, appeal boards are generally credited with maintaining procedures that protect the interests of both parties. See *1966 Hearings, supra* note 3, at 1-6.

In addition, an American Bar Association subcommittee has recently suggested that a single federal board be formed to hear contract appeals, thereby taking authority away from the particular agency. Under this system, it could not be asserted that the agency is attempting to appeal from its own decision. The proposal was presented for debate at the A.B.A. National Institute, *Mechanics of Sale and Dispute: Facets of the Law of Public Contracts*, Mar. 22, 1969, cited in Note, *Alice in Wunderlich, supra* note 19, at 556 n.60.

49. Haycock, *supra* note 34, at 7-8. See 46 COMP. GEN. 441 (1966).

50. Haycock, *supra* note 34, at 4. See also OP. ATT'Y GEN. (Jan. 16, 1969) at 8.

51. 341 F.2d 600 (Ct. Cl. 1965).

52. *Id.* at 608.

53. Haycock, *supra* note 34, at 9.

54. *Id.*

decisions on statute,⁵⁵ the legislative history to the Wunderlich Act,⁵⁶ and the Court of Claims decision in *Langenfelder*.⁵⁷ Executive agencies have taken the position that the GAO review of a board decision which is favorable to the Government is both unnecessary and improper. They maintain that the contractor can always pursue his remedy in the courts, and should be forced to do so. Furthermore, if the GAO reverses the board decision, the Government is bound⁵⁸ without ever having been to court. The agencies contend that the GAO in reality is just another level of administrative review and therefore is not as well equipped as the Court of Claims to handle dispute cases.⁵⁹

The positions of the GAO and the agencies came into direct conflict in the *Southside Plumbing* case⁶⁰ in 1966. Following a decision favoring the Government by the Armed Services Board of Contract Appeals over an Air Force housing contract, Southside Plumbing requested the GAO to review the board determination.⁶¹ After declaring his jurisdiction to hear the case, the Comptroller General affirmed the board in part, but declared that the one issue which involved a question of law had been handled improperly. The Comptroller General, in a unique move, attempted to remand the case to the contracting officer, but provided that if agreement could not be reached between the parties, the issue should be reconsidered by the Armed Services Board of Contract Appeals.⁶²

The Air Force, however, was unwilling to accede to the Comptroller General's decision, arguing that the GAO should not be allowed to review board decisions which are favorable to the Government. The Air Force asked the United States Attorney General if it should comply with the GAO's decision either as a matter of law or of comity.⁶³ Attorney General Ramsey Clark, assuming authority to decide the issues since they involved the

55. 31 U.S.C. §§ 71, 74 (1964).

56. See H.R. REP. NO. 1380 83d Cong., 2d Sess. 1954, *Reprinted in* 1954 U.S. CODE CONG. & AD. NEWS 2191. See also 46 COMP. GEN. 441 (1966); Haycock, *supra* note 34.

57. 341 F.2d 600 (Ct. Cl. 1965).

58. 31 U.S.C. § 74 (1964).

59. OP. ATT'Y GEN. (Jan. 16, 1969).

60. COMP. GEN. unpublished opinion B-156192 (Dec. 8, 1966). *Accord*, the S & E Contractors case in 46 COMP. GEN. 441 (1966).

61. When the review was initiated, Southside Plumbing was known as Progressive Construction Company.

62. COMP. GEN. unpublished opinion B-156192 at 25 (Dec. 8, 1966).

63. OP. ATT'Y GEN. (Jan. 16, 1969).

"legal relationship between GAO and executive branch agencies in the resolution of disputes arising under Government procurement contracts,"⁶⁴ responded to the Air Force's request on January 16, 1969,⁶⁵ four days before inauguration of the new administration. The Attorney General's opinion raised several controversial issues.

First, the opinion stated that by law the Air Force need not comply with the GAO's opinion. Initially, the Attorney General observed that while the GAO has statutory authority to settle and adjust claims,⁶⁶ it has no authority to remand board decisions to executive agencies for additional consideration. Moreover, the Attorney General implied that since the GAO's review was *ex parte*, the Government's interest had not been sufficiently protected. The opinion further stated that it was not necessary for the Air Force to comply as a matter of comity, since the historical trend "reveals a clear shift of final decision-making power from the accounting officers to the courts."⁶⁷ In so concluding, the Attorney General claimed that while remand is an appropriate disposition for courts because they ultimately can make a decision which is binding upon both parties, a remand by the GAO is inappropriate because its decision is never binding on the contractor, who can seek judicial review.

Rather than concluding the opinion after answering the Air Force's question, the Attorney General went on to disagree with the GAO's interpretation of the Wunderlich Act and to contend that Congress had no intention of establishing the GAO as an additional level of administrative appeal. The Attorney General struck at the heart of the GAO's "corollary" theory by contending that the GAO need not necessarily exercise the right to review decisions adverse to the Government. If the GAO disagrees with a board decision favoring the contractor, said the Attorney General, it may disallow the item. The contracting agency, maintaining the correctness of its position, will then set off that amount on sums due the contractor. "Such an offset will effectively force an ultimate judicial determination of the validity of the disputes clause decision, through suit by the contractor to recover the withheld payment."⁶⁸ By specifically recognizing the GAO's power to disallow government appeals in

64. *Id.* at 2.

65. *Id.* at 1.

66. *Id.* at 4.

67. *Id.* at 5.

68. *Id.* at 7.

this manner, however, the Attorney General, in effect, preserved the area of review that the GAO desires most—the right to review board decisions which are *against* the Government to insure protection of the Government's rights.

The Attorney General also noted that such action by the GAO is not the Government's only means of obtaining relief from unfavorable board decisions.

The contracting agency, acting through the Department of Justice as the Government's counsel in claims litigation, is also able to obtain such review on its own initiative. . . . [T]he executive branch is capable of obtaining judicial review through the very devices—withholding payment or recovery by later set-off—on which GAO must rely.⁶⁹

Thus, the Attorney General maintained that if the agency alone feels that the board has made an improper decision, it may force the issue before the courts independently of any GAO determination.

Finally and most importantly, the Attorney General indicated that if a board decision against the government appears to be erroneous, the Justice Department has the right and responsibility to appeal it to the courts. In support of this, the Attorney General stated: "It is clear . . . from the legislative history of the Wunderlich Act, taken as a whole, that Congress intended board decisions to be no more conclusive against the Government than against a contractor."⁷⁰ If this last contention is in fact true, the basis for the GAO's self-assumed right to review is greatly weakened, since there is another avenue open to an agency which feels the board's decision is erroneous.

Two subsequent developments, however, have increased the complexity of the conflict over the proper role of the GAO. Within a week after the Attorney General's opinion, Louis Spector, former chairman of the Armed Services Board of Contract Appeals and presently commissioner of the Court of Claims, issued a commissioner's opinion directly contradicting the Attorney General's position. Spector stated in part, "there is little doubt that the right to obtain judicial review of board decisions, as provided for in the Wunderlich Act and the current Disputes clause, is solely for the contractor's benefit."⁷¹ Shortly there-

69. *Id.* at 9.

70. *Id.* at 10. See also Note, *S & E Contractors and the GAO Role in Government Contract Disputes: A Funny Thing Happened on the Way to Finality*, 55 VA. L. REV. 762, 772-76 (1969).

71. *J.L. Simmons Co. v. United States*, 37 U.S.L.W. 2424 (Jan. 21, 1969).

after, the Comptroller General informed Attorney General John Mitchell that the GAO did not consider itself bound by the opinion of Attorney General Clark, and therefore would continue to review board decisions.⁷²

V. POSSIBLE RESOLUTION

While functional problems do exist,⁷³ boards of contract appeals have generally proven to be an effective means of settlement for government contract disputes.⁷⁴ Irrespective of the boards' effectiveness, however, it is imperative that the rights of both parties to the contract be protected. Thus, the GAO's ultimate goal of protecting the Government's interest is beyond dispute. But while it is generally agreed that board decisions should be reviewed, the conflict arises over who should conduct the review.

In attempting to maintain a logically consistent scheme, two opposing positions have been presented—the GAO's dogmatic assertion that it has the authority to review all board decisions and the Executive's contention that review of board decisions which are favorable to the Government are unacceptable. Neither position, however, takes account of the significant fact that the policy considerations present after the board decides in favor of the Government are different from those present after it decides in favor of the contractor. In order to protect all of the interests, the appeal procedure should be directly related to the actual board determination.

If the board has rendered a decision in favor of the Government, the GAO should take no further action, even if requested to do so by the contractor. The reasoning behind this position is that the GAO's refusal to review will force the contractor to pursue his case in the Court of Claims, thereby insuring judicial review in compliance with the standards of due process. Moreover, if the GAO did review and decide in favor of the contractor, the Government would be barred from ever having its position before the courts, notwithstanding its success before the

72. Letter from Elmer B. Staats, Comptroller General, to Attorney General, Feb. 7, 1969.

73. See SENATE REPORT, *supra* note 2, at 31-33.

74. See generally Hiestand & Parler, *The Disputes Procedure Under Government Contracts: The Role of Appeal Boards and the Courts*, 8 B.C. IND. & COM. L. REV. 1 (1966); Cuneo & Truit, *Discovery Before the Contract Appeals Boards*, 8 WM. & MARY L. REV. 505 (1967); Shedd, *Disputes and Appeals: The Armed Services Board of Contract Appeals*, 29 LAW & CONTEMP. PROB. 39 (1964).

board.⁷⁵ The GAO, unequipped to handle numerous appeals, should not hear contractor's appeals which would in effect result in the creation of an additional layer of administrative decision-making.

The same policy considerations, however, are not present when the appeal board has rendered a decision in favor of the contractor. Appeal boards do make mistakes; therefore some procedure should be established to insure the protection of the Government's interest. The difficulty exists in what procedure should be used.⁷⁶ Since the GAO in its financial capacity is directly concerned with settlement of disputes, it would seem unwise to eliminate the GAO entirely from the procedure. Thus, upon issuance of a board decision which is unfavorable to the Government, the GAO, on its own initiative or that of the contracting agency, could make a preliminary evaluation of whether the board's decision is meritorious. If the GAO concludes that the board had erred, the GAO could recommend that the Attorney General initiate a suit in the Court of Claims.⁷⁷ Recognizing that this may presently be impossible, specific statutory authority for the Attorney General to bring suit on behalf of the agency should be provided, thereby insuring judicial review under the standards of the Wunderlich Act.

Such a procedure would seem to accomplish all of the objectives sought: (1) elimination of the GAO as an additional level of administrative appeal, while preserving its right to effectively review board decisions which are against the Government; (2) establishment of a procedure which will protect the Government's rights by allowing administrative agencies recourse in the courts, and (3) forcing disgruntled contractors to seek relief in the Court of Claims. Thus, both the private contractor and the Government would be able to obtain judicial review in accordance with the standards of the Wunderlich Act.

75. 31 U.S.C. § 74 (1964). If the GAO should reverse a board decision adverse to the Government's interest, the agencies would find themselves in a difficult position. If the Attorney General is correct in his evaluation, judicial review could be obtained. But if the agency executes a settlement with the contractor in an attempt to comply with the GAO's order, judicial review might be foreclosed entirely.

76. See Commissioner Spector's recent opinion in *J.L. Simmons Co. v. United States*, 37 U.S.L.W. 2424 (Jan. 21, 1969).

77. No attempt is here made to determine the precise procedure that the General Accounting Office should use. Possibly, the claim could be paid first and suit then brought for recovery for improper payment. Another solution might be to offset the payment on another contract, thus forcing the contractor to initiate a suit.