ADMINISTRATIVE AND JUDICIAL MACHINERY†

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The number and dollar amounts of Government prime and subcontracts have reached fantastic figures as judged by pre-war standards. Terminations cannot be efficiently handled unless administrative agencies are well organized and coordinated. Present administrative machinery and practices are now being overhauled with an eye to speeding settlement. A single agency would be ideal but the size and complexity of the problem makes this simplicity impossible. The situation calls for close cooperation between numerous Government agencies which of necessity have overlapping functions. Discussion by agency consequently would be repetitious and for this reason a functional approach is taken. Administrative and judicial machinery connected with contract termination resolves itself into four major phases: determination of policy; administration of settlements; review of settlements; and disposal of disputes, claims and suits. While these various aspects of the termination problem indirectly may involve almost every arm of the Government, the following at the present writing hold the center of the stage although alterations can be expected in view of pending legislation: The Office of War Mobilization, the Joint Contract Termination Board, the War Production Board, the War Manpower Commission, the several procurement agencies, the Comptroller General, the District Court and the Court of Claims.

DETERMINATION OF POLICY

The Office of War Mobilization has coordinated termination with other problems. The Office of War Mobilization was established within the Office of Emergency Management on May 27, 1943, to coordinate the activities of the various war agencies and to arbitrate any disputes which may arise between them. All Federal agencies and departments must comply with OWM directives. This applies to termination as well as other war problems. The Office is headed by the Director of War Mobilization through whom its powers are exercised. Technically all decisions are made by the Director but he first consults with the War Mobilization Com-

† This article was written in June 1944, before the passage of any of the various bills before Congress, some of which (probably, S. 1718, the Murray-George Bill), with modifications, may have been passed by the time this symposium is on the reader's desk. It is hoped that a survey of the administrative problems at this stage, supplemented by commentaries in this and other articles in this symposium on aspects of pending or enacted legislation, will contribute to understanding of the eventual administrative set-up.

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mittee, of which he is chairman. In addition to the Director, the Committee consists of the Secretary of War, the Secretary of the Navy, the Chairman of the Munitions Assignments Board, the Chairman of the War Production Board, and the Director of Economic Stabilization. At the request of the chairman heads of other agencies or departments may participate in the deliberations of the Committee whenever matters specially affecting them are under consideration.

Executive Order No. 9347 setting up the Office of War Mobilization empowers it: (a) to develop unified programs and to establish policies for the maximum use of the nation's natural and industrial resources for military and civilian needs, for the effective use of the national manpower not in the armed forces, for the maintenance and stabilization of the civilian economy, and for the adjustment of such economy to war needs and conditions; (b) to unify the activities of Federal agencies and departments engaged in or concerned with production, procurement, distribution or transportation of military or civilian supplies, materials and products, and to resolve and determine controversies between such agencies or departments except those to be resolved by the Director of Economic Stabilization under Executive Order No. 9250; and (c) to issue such directives on policy or operations to the Federal agencies and departments as may be necessary to carry out the programs developed, the policies established and the decisions made under the Executive Order.

Advisory Unit for War and Post-war Adjustment Policies. On November 6, 1943, a new unit was established in the Office of War Mobilization under the direction of Bernard M. Baruch to deal with war and post-war adjustment problems and to develop unified programs and policies for the various Government agencies. Primary attention has been given to the changing requirements of war strategy, but with a view also to post-war problems. While many aspects of both problems are identical, those pertaining to post-war often are much more complex. Consequently, consideration of many purely post-war problems has been postponed until those immediately concerned with the war effort have been solved.

Actual administration of termination and other post-war problems has been and probably will continue to be left to the present administrative agencies. The Office of War Mobilization and the Post-war Adjustment Unit have exercised a coordinating function only.

Joint Contract Termination Board. The first problem with which the Post-war Adjustment Unit was faced was that of bringing some semblance of order to the termination of Government contracts. Prior to that time Congressional hearings had shown that every department was proceeding independently in developing procedure and policy. Immediately following his appointment, Mr. Baruch set up the Joint Contract Termination Board to assist and advise him in formulating broad uniform policies and procedures. This Board, established on November 12, 1943, consists of representatives from the major war procurement agencies—War, Navy, Treasury, Maritime Commission, the RFC subsidiaries, and the Foreign Economic

Administration. In order to facilitate coordination of termination with other phases of reconversion and to strengthen the authority of the Board, the Director of War Mobilization ordered on February 21, 1944, that the Joint Contract Termination Board be enlarged by representatives of the following agencies: The Department of Justice, the War Production Board, the Smaller War Plants Corporation, and the Comptroller General. Both the Contract Termination Board and the Post-war Adjustment Unit have since been preoccupied solely with the termination problem.

Mr. John Hancock, Mr. Baruch's right-hand assistant, is Chairman of the Joint Contract Termination Board. The uniform termination clause for fixed-price supply contracts, adopted on January 8, 1944, by directive of Mr. Byrnes, was the result of the concentrated efforts of Mr. Baruch and the Board. This termination clause and the accompanying cost statement deal with only two of the many aspects of contract termination, however. They are intended to fill the long-felt need for (1) uniformity, and (2) a clear definition of the rights of the Government and contractors.

The statement of cost determination principles is incomplete in several important respects.¹ A number of controversial issues are left for future decision and clarification. For example, the status of costs incurred in anticipation of war orders and severance pay for discharged war workers is left up in the air. Probably the Board feels that policy in connection with such unusual items should properly be determined by Congress.

The letter of transmittal from Messrs. Baruch and Hancock to Mr. Byrnes was far more significant than the clause itself since the letter specifically pointed out that the clause and statement of cost principles were only a minor start towards the solution of the major termination problem. This is borne out by the subsequent Baruch-Hancock Report of February 15, 1944. Most of the problems outlined in the earlier report of January 8 are covered in more detail. These include payments and loans, settlement procedure, keeping of adequate records and protection of the public interest, special problems of subcontractors, and the disposal of property. Blind spots include appellate organization; company settlements; direct settlement of subcontractors' claims; a standard termination article for subcontracts; a similar article for cost-plus-fixed-fee contracts; settlements to contractors with special facilities; administrative safeguards against fraud; and the issuance of cost interpretations and manuals of instruction. All of these matters require further study and will be dealt with in subsequent reports. A variety of other administrative measures are also under study in the way of advance payments and pre-termination preparation, simplification and unification of procedures, education and other assistance for contractors. Progress has since been made toward a solution of all these problems. A major step was taken with issuance of the uniform subcontractors' clause on June 5, 1944.

¹ For a detailed discussion from the accounting angle see, in this symposium, Peacock, *Accounting Problems in Termination*, *supra* at 594.

Other agencies involved. The Baruch-Hancock Report had hardly come off the press when the President took action to initiate some of the major steps which it advocated. The Surplus War Property Administration headed by Will Clayton was established in the Office of War Mobilization by Executive Order No. 9425 issued on February 19, 1944. This was followed on February 24 by Executive Order No. 9427 establishing the Retraining and Reemployment Administration. While these agencies are not directly connected with termination settlements, they will have much to say concerning policy as far as the handling of surplus properties and the reemployment of discharged war workers are concerned. Likewise, established agencies such as the War Production Board, the War Manpower Commission, and the Office of Price Administration will have a place in these determinations.

It is recognized that curtailment of the war procurement program must be carried on with an eye to the economic implications of an inadequate program. When the procurement agencies have selected the items, production of which is to be cut back or terminated, the next question is which firms shall continue manufacturing the item, which shall be closed down, and which shall be permitted to reconvert to peace-time production.² Obviously the procurement agencies are not equipped to make these decisions. All the war agencies will have to collaborate and pool their information. For some time to come the manpower situation will be the controlling factor and consequently all other factors being equal, terminations will probably hit firms situated in areas which the War Manpower Commission designates as critical labor areas earlier than those situated where an easy labor market prevails. Another aspect of this intricate and complex problem concerns reconversion and the use of critical materials. WPB will not permit terminated firms to reconvert if the material required in their peace-time activities are needed in war production. Again, if war-time subcontractor relationships are unravelled with no eye to the peace-time activities of the companies concerned, serious snarls may develop in trying to reestablish pre-war supply and subcontractor relationships. Consequently WPB will determine such questions as which firms in an industry are to be reconverted first and direct the reshuffling of war production so as to free subcontractors tied up in unrelated war production.

The Office of War Mobilization, Surplus War Property Administration, OPA, and the Joint Contract Termination Board should work in close cooperation with respect to the disposal of Government and contractor-owned inventory and equipment. Controls will be exercised over the time of sale and price so as to avoid (1) inflationary price increases resulting from competitive bidding; and (2) sharp price recessions by reason of flooded markets.

This maze is now presided over by OWM which is the final arbitrator of the clashes which inevitably arise between these various agencies in deciding such intricate matters of policy.

² For fuller discussion see, in the recently published Part I of this symposium, Fraser, *The War Adjustment Problem* (1944) 10 LAW AND CONT. PROB. 429.

Procurement agencies supplement policy. The latest Baruch-Hancock Report as well as the earlier uniform fixed-price termination clause and accompanying statement of cost determination principles are confined to broad workable policies with details left to be covered in administrative regulations, manuals, and instructions. Many points involving questions of detail were not included since they will require constant refinement in the light of experience. The procurement agencies are best equipped to deal with these matters by regulations. Departmental regulations can be revised readily and are more easily adjusted to special cases.

Within the broad policy framework established by the Office of War Mobilization, operations of procurement agencies may differ to some extent. Furthermore, the coverage of the regulations will vary substantially with the particular department. For example, the Army has the most decentralized procurement organization and consequently Army regulations must be extensive and precise so as to give termination officers in the field a reliable guide. Contrast this with such agencies as the Navy, Treasury Procurement Division and Maritime Commission which are more centralized in Washington. In most cases, terminating officers will have direct access to the policy-determining boards and consequently no extensive regulations are necessary. Most policies will be enunciated by very general regulations supplemented by specific instructions.

Congressional proposals. On February 11th and 22nd, 1944, Senators George and Murray introduced two bills both of which are based upon the "Preliminary Report on Contract Termination Legislation" issued on December 23, 1943, by the War Contracts Subcommittee of the Senate Military Affairs Committee, of which Senator Murray is Chairman, and on the "Contract Termination, Demobilization and Reconversion Report" of February 9, 1944, issued by the Special Committee on Post-war Economic Policy and Planning, headed by Senator George. The War Contracts Subcommittee sat with the Post-war Committee in joint consideration of contract termination problems.

As far as termination settlement procedures are concerned, the two bills were originally identical, but the second bill contained surplus property provisions and established an Office of Demobilization instead of an Office of Contract Settlement. The Baruch-Hancock Report came out in strong opposition to the proposal to create this Office of Demobilization. Subsequently business pressed the Senate Military Affairs Committee to report out the first Murray-George bill (S. 1718). Business feels that controversial issues such as the proposed Demobilization Board and surplus property administration should not be tacked on to termination legislation. On March 15 at a hearing before the House Special Committee on Post-war Economic Policy and Planning, Mr. Hancock threw the weight of the Joint Contract Termination Board behind S. 1718. Then on March 29, Senator Kilgore introduced S. 1823. This bill contained no termination provisions since it was intended to supplement S. 1718. Provisions relating to surplus property and the so-called Office of Demobilization differed radically from S. 1730. In addition,

S. 1823 contained unemployment provisions—S. 1730 did not. As a consequence, it was decided to push S. 1718 and hold S. 1730 and S. 1823 for further hearings. S. 1718 passed the Senate on May 4 and was reported out by the House Judiciary Committee on June 1st with early passage expected. The termination provisions were dropped from S. 1730 and that bill, together with S. 1823, was referred to the War Contracts Subcommittee of the Senate Military Affairs Committee. Subsequently, Senator Kilgore killed S. 1823, substituting S. 1893. Both S. 1730 and S. 1893 have undergone several revisions in subcommittee. One or the other will be reported out to the full Senate Military Affairs Committee shortly.

Quick action was given S. 1718 by the Senate to offset HR. 3022, reported out by the House Military Affairs Committee on March 14. While HR. 3022 borrowed many features from S. 1718, there also were many deviations, the most important of which would have placed termination under the control of the Comptroller General and discarded company settlements.

A more subtle but fundamental difference between S. 1718 and HR. 3022 was in their approach. S. 1718 takes a positive approach as contrasted with the negative approach of HR. 3022. The Senate bill lays down broad principles and charges the Director of Contract Settlement with the duty of working toward those ends. In devising procedures, for example, the Director is instructed to seek quick, equitable settlement. Again, he is told to be as liberal as possible in making advance payments to contractors. Not only does the Act authorize company settlements; it also instructs the Director to experiment with them and put them on a practical basis. On the other hand, HR. 3022 did not lay down any such broad policies for the guidance of the Comptroller General and his Board but confined itself to establishing statutory authorization for advance payments, etc.

This as well as the Vinson bill (HR. 4469) is now dead. The House Judiciary Committee reported out S. 1718 with modifications on June 1, 1944. This House version of S. 1718 makes several changes. Most important is that relating to the Comptroller General (see below). The House may recede on this point when the bill goes to joint conference. Since the Senate and House versions of S. 1718 are treated in a separate article in this symposium,³ further comment is omitted except to point out the following features of the bill, which are of particular significance to matters of administrative and judicial machinery:

(a) Settlements would be final and conclusive except for fraud. Subject to the regulations of the Director of Contract Settlement, the contracting agencies may settle termination claims by agreements which are final, except for fraud. However, these agreements would be subject to renegotiation for excessive profits under the Renegotiation Act. Where no agreement is reached, the contracting agencies are to make unilateral findings as to the amount due, which may be appealed to an Appeal Board or constitute the basis for legal action.

(b) Appeals from a unilateral determination by a contracting agency would take

³ See in this symposium, Murray, *The Contract Settlement Act of 1944*, *infra*, p. 683.

the form of administrative review or court action. Under both versions of the bill findings of fact by contracting agencies pursuant to present disputes clauses would be made, as a matter of law, not binding upon the administrative Appeal Board, umpires, arbitrators, or the courts. Under the Senate bill the contractor, once he has elected to go to the Appeal Board, would be prevented from going to court. The House bill, on the other hand, provides for resort to the courts where the contractor might be aggrieved by the decision of the Appeal Board.

(c) The bases for settlement would be determined by the Director who is called upon to prescribe policies to govern the settlement of termination claims and to establish methods suitable to the conditions of various classes of war contractors for determining fair compensation. Settlements would be on the basis of actual, standard, average or estimated costs, or of a percentage of the contract price based on the percentage of completion of work under the terminated contract, or of other methods which he deems appropriate.

(d) Settlements with subcontractors made by prime and intermediate subcontractors would be approved by the contracting agencies, subject to regulations of the Director. Review of such settlements would depend upon the reliability of the war contractors, the amount or nature of the claim, and other circumstances. The contracting agencies would exercise controls over payments to prime contractors so as to insure that subcontractors are paid.

(e) Company-wide and direct settlements would be authorized to the extent that the Director deems necessary. Where a subcontractor fails to receive fair compensation because of insolvency or bankruptcy of an intermediate contractor, the contracting agency would be permitted to reimburse his loss.

(f) The General Accounting Office would be authorized to examine all records of the contracting agencies relating to settlements in order to establish whether settlement payments have been made in accordance with the termination settlement or whether the settlement has been induced by fraud. In case any fraud is found by the Comptroller General, he is directed to report to Congress, the Director and the Department of Justice. The Senate would not permit him to suspend or withhold any payments; but, under the House version, the contracting agency is required to withhold the amount involved in any settlement where the Comptroller General certifies to the Department of Justice his belief that it was induced by fraud. The money would not be released until the Justice Department notifies the contracting agency that, in its opinion, the facts do not support the belief of the Comptroller General.

ADMINISTRATION OF SETTLEMENT

Procurement agencies handle settlement. It is only logical that the agency which makes the contract should handle the termination settlement. Consequently, the Office of War Mobilization and the Joint Contract Termination Board leave the actual settlement to the procurement agencies. None of the termination bills now before Congress would disturb this arrangement. Because every procurement agency

is a separate and distinct entity with equal powers to carry out its respective functions, this article must necessarily be confined to the important features common to all agencies. Each has developed independently its own administrative organization to meet its own peculiar problem. Broad uniformity does not exist even in general organization, let alone the field of contract termination.

Generally speaking, each procurement agency has a single policy-forming unit. Within the framework of the principles established by the Joint Contract Termination Board, this unit sets up broad policies and procedures to be followed by the various departmental arms in making settlement. Then, if necessary, a similar unit is established in each one of the departmental arms to govern the activities of its terminating officers. These terminating officers cannot exceed the authority granted by the regulations.

The extent and complexity of this organization depends in large part upon the general administrative problem with which the particular department is faced. The vast volume of materials and supplies which are required by the Army demands that its procurement activities be decentralized to the greatest possible extent. Consequently, each one of the eight services has purchasing depots all over the country. Because of this each service has a termination section. Each of these sections issues instructions to contracting officers which adapt the procurement regulations issued by the Readjustment Division, Headquarters, Army Service Forces, to the problems of the particular service. Both of course must conform with the broad policies of the Joint Contract Termination Board.

The Navy has a similar set-up. Broad general policy is laid down by the Industrial Readjustment Branch in the Office of Procurement and Material. As in the case of the Army these policies must be in conformance with those of the Joint Contract Termination Board. Operational sub-sections have been established in each of the Navy bureaus such as the Bureau of Ships, Bureau of Aeronautics, etc. Terminating officers within each of these bureaus must comply with all instructions issued by the Readjustment Branch and their respective Bureau. Navy regulations will not be as complete or as extensive as Army regulations and instructions because terminating officers have closer access to policy-making officials.

Because the Maritime Commission's emergency program is so intimately connected with its long-range program, the final form of its administrative set-up for handling terminations will have to await basic determinations of policy by the Joint Contract Termination Board (or its statutory successor). In the meanwhile, current termination problems and policy are being passed on by a central termination committee in Washington. At present the Maritime Commission's terminations are comparatively few. In the event of any termination where a claim is likely to result the contractor is supplied with instructions and necessary forms for filing the claim. In one or two major situations the adjustments of claims and disposition of materials, etc., are handled by a special committee.

No great termination problem is foreseen for the Treasury Procurement Division.

since most of its defense aid contracts are for a specified number of units to be delivered within 30 to 60 days. The Director of the Procurement Division decides all matters of policy. The termination is initiated by the Commodity Chief handling the particular item. From the Commodity Chief it then goes to the Chief of the Contract Division and from him to the contracting officer for approval. When the termination is effected the contractor submits his settlement proposal to a committee of three for consideration. In the event no agreement can be reached, the matter goes to the Director of Procurement for further negotiation and for decision. As in the case of all the other procurement agencies, settlement will be by formula in the event negotiated settlement breaks down.

Army contracting officers and representatives. Since the War Department presently is the most important procurement agency, it serves as the best example. Contractors dealing with contracting officers or their representatives should assure themselves that these officers do not exceed their authority. Otherwise the termination settlement may later be subject to question. In making termination settlements, contracting officers must conform with (1) the uniform principles and policies established by the Baruch Unit (or its statutory successor); (2) the War Department's Procurement Regulation No. 15; and (3) the termination instructions issued by the particular branch of which they are officers. Consequently, Army contractors should familiarize themselves with these three documents.

A peculiar situation exists with respect to the so-called contracting officer's representative. Experience has shown the War Department that settlements sometimes are hindered by the administrative burden placed upon contracting officers. In order to relieve them of routine detail, the appointment of a representative is authorized. No authority is granted to conclude the final settlement, however. Any supplemental agreements effecting a final settlement can be made only by the contracting officer. Army regulations restrict the authority of the representative to general or limited powers (1) to approve disposition of property, (2) to approve settlements with subcontractors up to some stated amount, and (3) to pass upon the miscellaneous minor questions which inevitably arise in connection with the settlement. Contractors should insist that the authority of the contracting officer's representative be reduced to writing and a copy furnished him.

Congressional proposals. Under S. 1718, actual settlement will continue to be made by the procurement agencies. The Comptroller General's powers will be limited to cases involving fraud. If HR. 3022 had succeeded, however, the picture would have been quite different. While actual settlement would not have been taken away from the procurement agencies, HR. 3022 would have severely hamstrung them in administering their functions. Present practice is to make settlement by negotiation rather than by formula wherever possible. If settlement agreements made by procurement agencies were made tentative and subject to approval by the Comptroller General's Board, as was proposed by HR. 3022, the practical effect would be to kill the negotiated settlement device. The minority report sub-

mitted by thirteen members of the House Military Affairs Committee makes this point clearly and concisely as follows:

"Under these rules, there will be no negotiated settlements. For a contractor would know, when he sat down across the table from a contracting officer to trade out the points on which they disagreed, that the negotiation was all to be one way. Whatever concessions the contractor might make would be final; but whatever corresponding concessions the contracting officer might make could be taken back to the Review Board. In these circumstances, unless the contractor was desperate for immediate payment on any terms, there could be no advantage in negotiation; he would stand on his legal rights, and seek to prove to the Government's auditors that his entire claim had a valid basis. The result would be to substitute long-drawn-out auditing arguments for quick, final negotiations. Disposition of property would be held up until the Board had reviewed the case, because no prospective purchaser could be sure what price it would approve; and stagnation would result.

"It is no answer to these arguments to say that HR. 3022 provides for quick payment to the contractor, on a tentative basis, of a high percentage of what the Government owes him. Even this may be doubtful, because of the extreme administrative difficulty of making direct payments to all prime contractors and subcontractors. But, assuming that quick tentative payments can be made, they are insufficient to meet the need. Prompt finality of transactions is also essential.

"Property has to be sold in contract terminations. Buyers will not buy unless they can know the price with finality. If the price is subject to change six months later by a review board, prospective buyers will go elsewhere. Many contractors who finish their war production will have to reconvert their plants to reenter the peacetime market. They cannot and will not do this until they know finally where they stand, and how much of the money paid to them is theirs and how much the Government's. The bill does not make it clear how far prime contractors are to go in settling with their subcontractors. If this is to be done at all, a prime contractor may be able to get quick final approval of a proposed subcontract settlement; otherwise he will let his subcontractors wait for their money until the Board finishes with his case. Finality is just as important to contract termination as speed; and the system proposed by HR. 3022 utterly fails to provide for it."

REVIEW OF SETTLEMENTS

Within procurement agencies. On May 12, 1944, the Joint Contract Termination Board tightened up settlement review practices. Every proposed settlement involving more than \$50,000 must be reviewed and approved by a departmental review board before it becomes binding upon the Government. Amounts credited on account of property disposition cannot be deducted in making this computation, but payments for completed work and those connected with subcontractors' claims must be excluded. In the event the Review Board disapproves, the contractor may appeal to the head of the procurement agency or his representative.

On June 7, 1944, the Army revised Procurement Regulation 15 to comply. Settlement Review Boards and Settlement Advisory Sections are to be reorganized and combined. There will be regional settlement review boards in each technical service. If the Review Board disapproves any proposed settlement the only recourse is to the Chief of the Technical Service who appointed the Board.

Each proposed settlement involving more than \$25,000 must be submitted to the appropriate Board for approval. This includes settlements made by prime and subcontractors with their suppliers. The Chief of any Technical Service may require that settlements of \$25,000 or less also be submitted for review, but even if no such directive is issued, contracting officers may submit these smaller settlements if they so desire. Such action is advised when any novel or special problem arises upon which he needs the Board's advice.

Approval by a Review Board is not final if the settlement involves more than \$500,000. After the Review Board has approved such a settlement, it must be submitted to such higher authority as the Chief of the Technical Service designates for approval.

The Review Board's function is to determine the overall reasonableness of the proposed settlement; but this does not mean that every element entering into the negotiated settlement must be examined in detail. As before, the scope and intensity of the review may be varied according to the reliability of the contractor, the size and complexity of the proposed settlement and any other relevant factors. If a review is required for subcontractors' settlements of \$25,000 or less, the review generally will be limited to an inquiry as to whether the prime or intermediate subcontractor has made an adequate examination of the claim.

This new review procedure applies to cost-plus-fixed-fee prime contracts and fixed-price and cost-plus-fixed-fee subcontracts thereunder as well as to fixed-price prime and subcontracts, to the extent that settlement is by negotiated agreement. However, costs which are not settled by negotiation but which are reimbursed after appropriate audit need not be reviewed. If completely terminated, all supplemental agreements adjusting fixed fees must be submitted for approval prior to execution. As for partial terminations, however, this review is required only where the estimated cost of the work terminated exceeds \$50,000. If the fixed-fee adjustment is made pursuant to formula rather than by negotiated agreement, the Review Board's function is to advise the contracting officer with respect to the reasonableness of the proposed settlement.

By the General Accounting Office. The extent of the General Accounting Office's review of fixed-price settlements varies depending upon whether the settlement is effected by negotiation or by formula. If settlement is by formula, the General Accounting Office may do a fly-spot audit and then apply the formula to the verified figures so as to make its own computation. In the event that the General Accounting Office determines that the contractor has been overpaid, the disbursing officer's accounts will be surcharged the amount of overpayment. Review of negotiated settle-

ments is on an altogether different basis. While the formula is a guide contracting officers need not follow it rigidly. The settlement agreement is short and simply states the amount of the agreed settlement. This leaves the General Accounting Office with no measuring rod. Consequently in the absence of fraud the Comptroller General cannot impose his opinion as to the reasonableness of the settlement upon the procurement agencies. The extent of his audit, therefore, is to disclose fraud and to determine that the contractor is paid no more than is called for by the settlement agreement. The explanation of this paradox lies in the legal history of the General Accounting Office.

The General Accounting Office, of which the Comptroller General is the head, was created by Title III of the Budget and Accounting Act of 1921 (42 Stat. 20, 23). As a representative of the legislative branch of the Government, it audits the accounts of the executive branches to assure that expenditures conform to Congressional appropriations and that no fraud is practiced upon the Government. The wisdom of such a check is unchallenged but in practice many questions have arisen as to the extent of the Comptroller General's powers. Almost since its creation, a dispute has existed between the Comptroller General on the one side and the Attorney General and the various procurement agencies on the other as to just how far the Comptroller General may go in administering his functions. The fundamental basis of the controversy is who shall construe legislation. The executive arm of the Government claims that various departments are obliged under the law to follow the Attorney General's rulings and interpretations in making expenditures. The Comptroller General, on the other hand, asserts that he need not honor the Attorney General's decisions but can construe the law independently.

This controversy has been felt most in war procurement. Disbursing officers for procurement agencies may rely on decisions of the Attorney General only to find their accounts surcharged subsequently upon audit by the General Accounting Office. Consequently, they often hesitate to take necessary action. Submission of specific questions to the Comptroller General for advance decision alleviates the situation to some extent but delay is involved in obtaining such a ruling. Especially in war time, procurement agencies must make decisions quickly with assurance of their validity. Otherwise, industry will be tied up in red tape and fettered by fear that payments may subsequently be held invalid by the Comptroller General.

This becomes especially troublesome when the Comptroller General goes so far as to impose his judgment upon the procurement agencies in matters involving accounting policy and practice. In the past on cost-plus-fixed-fee work, the Comptroller General has often differed with the procurement agencies concerning the allocation of indirect costs to contracts and the validity of certain controversial cost allowances. In a large percentage of cases, he has been overruled by the courts. Fixed-price contracts do not involve this problem, however. When the contract is for a fixed-price the Comptroller General's only concern is whether: (1) the contract exceeds the appropriation; (2) all other conditions and requirements of

the appropriation have been complied with; (3) compliance has been given all statutes concerning the contract award, performance, and payment; and (4) the voucher conforms with the contract price. No audit is made—the General Accounting Office only checks the amount of the voucher against the contract to assure that no more than the contract price is paid. Certification by the contractor and procurement officials is considered sufficient to establish compliance with the other requirements.

This difference between fixed-price and cost-plus-fixed-fee contracts must be kept in mind for a clear understanding of the comparatively new negotiated settlement basis for handling terminations. If settlement is by formula, termination in effect converts the contract from a fixed-price to a cost-plus-a-percentage basis, and the Comptroller General can impose his item-by-item audit with all the attendant delays upon the procurement agencies. If all settlements were by formula, an epidemic of business failures might result. Streamlined "selective" or commercial audits would be outlawed and a 100% Government audit done on every settlement. This would spell months and possibly years of delay. The procurement agency would first do a complete audit of every item in the contractor's settlement proposal. When this was finally completed and payment made, the General Accounting Office would step in and do another 100% audit. In the meanwhile, the contractor would be subject to a contingent liability. The General Accounting Office might find that he had been overpaid and institute proceedings for recovery of the excess. As a result, bank and investment houses might hesitate to become involved in the contractor's financial operations. Most war producers are handling greatly expanded war production with no increase in pre-war capitalization. Many firms are in a position where working capital is sufficient to meet payrolls and other expenses for a period of no more than three weeks. Consequently, any delay may be disastrous.

As terminations became more frequent, a method was sought by which the Comptroller General and the General Accounting Office could be cut out of the picture. Negotiated settlement was the answer. The negotiated settlement is an adaptation of the fixed-price concept to termination. By means of the negotiated settlement, the contractor and the contracting officer simply get together and agree upon an adjusted termination price in the same manner as was done when the contract was originally let. As a practical matter the formula is followed as a guide but the settlement itself is effected simply by means of an agreement establishing the amount.

Some such device as negotiated settlement was absolutely necessary. Even now if settlement is by formula, disbursing officers probably will refuse to pay out termination claims until full clearance has been obtained from the Comptroller General—thus tying up the contractor's money in red tape and delay. Termination involves even more difficult cost and allocation problems than do CPFF contracts. On formula settlements, many cost items may be disallowed as illegal on post-audit by

the General Accounting Office. Separation allowances for workers, allowance for inventory processed in anticipation of orders, and the allocation of overhead are a few examples. The inclusion of inventory processed in anticipation of orders may be ruled out on the ground that no Government contract exists for the purchase. Separation allowances and expenditures to promote morale also may be disallowed as not incident to the contract. Likewise, overhead costs may be challenged on the ground that improper amounts are charged to the contract. While these items would be challenged from a technical viewpoint on grounds of illegality, as a matter of fact the Comptroller General would be imposing his ultra-conservative accounting theories on the services and industry.

At its inception there was some doubt as to the validity of negotiated settlements. This fear was magnified by the Comptroller General's letter of September 20, 1943, to Senator Murray Chairman of the War Contracts Subcommittee of the Senate Military Affairs Committee, in which he attacked the device. All doubts were resolved finally on October 19, 1943, when the Comptroller General admitted the legality of the negotiated settlement while testifying before the Committee. Since that time, however, an active campaign has been conducted to give him control of termination policies and procedures.

Congressional proposals. The Murray-George bill (S. 1718) will remove the Comptroller General from the scene as far as policy and procedure are concerned, at the same time continuing his check on frauds. No one, including the procurement services, disputes the wisdom of an audit by the General Accounting Office for the purpose of disclosing "fraud" and to assure that expenditures do not exceed Congressional appropriations, but this is the point at which the General Accounting Office should halt. The reluctance of the services to submit negotiated settlement records to the General Accounting Office is due to that agency's conservative attitude concerning cost allowances.

If the House Military Affairs Committee had succeeded with HR. 3022, thus making negotiated settlement subject to the General Accounting Office, reconversion would have been greatly slowed and many businessmen financially embarrassed. Although the personal liability of disbursing officers would have been curtailed, terminations would have been supervised and passed upon by a War Contracts Settlement Board in the General Accounting Office which would have consisted of not less than 3 and not more than 9 members to be appointed by the Comptroller General. Policy and procedure would have been prescribed by this Board. Also it would have reviewed so-called "tentative" agreements made by the procurement agencies. Tentative agreements would not become final until the expiration of 6 months from the date of submission to the Board. Cost items and allocations might be disallowed on the General Accounting Office's post audit on the ground that they were not chargeable to the terminated contract and were as a consequence illegal. Again the Comptroller General would have been imposing his business and accounting opinions upon the services. Contractors and contracting officers

would hesitate to act until all controversial questions were ruled upon by the Comptroller General. Settlements would be greatly delayed and business capital tied up in termination claims. Many firms, over-expanded during the war, could not stand the pressure. Even those with adequate capital would be delayed in reconverting since banks and investment houses probably would refuse to become involved unless the settlement had been fully cleared by the Comptroller General.

DISPOSAL OF DISAGREEMENTS

Dispute clauses control. Disputes concerning the inclusion of costs and computation of the termination settlement are handled in exactly the same manner as any other disagreement. The standard dispute clauses apply. There are no special provisions. This is true both of fixed-price and cost-plus-fixed-fee contracts. Under existing dispute clauses questions of fact are determined by the contracting officer with right of appeal from his findings within 30 days. Formal contracts contain the full text of the clause and it is incorporated in letter contracts by reference. Of importance to the contractor are judicial limitations upon the extent of the contracting officer's determinations. Cases have repeatedly held that administrative agencies such as the Army and Navy, etc., cannot deprive the contractor of his right to a day in court. Consequently questions of law may not be decided by these agencies. If there is no fraud, misrepresentation, or arbitrary action on the part of the Government, the contractor is bound as to questions of fact but he can take legal questions into court.

Inception of dispute. The dispute provisions, of course, apply only where negotiation has broken down and computation by formula is substituted. No dispute can arise on a negotiated settlement since it is a matter of agreement between the contractor and contracting officer. The question is solely one of reaching a mutually satisfactory agreement or resorting to settlement by formula. As a practical matter, however, if the contracting officer and the contractor reach an impasse on negotiation, the officer will substitute settlement by formula and then decide the dispute his way.

Claims and suits distinguished from disputes. Disagreements may be classified in many ways. The broadest categories are: (1) disputes, (2) claims, and (3) suits. The category into which a particular disagreement falls depends upon the type of disagreement and when it arises. A *dispute* is a *factual* disagreement arising before final determination of the claim by the procurement agency and is subject to determination only by the contracting officer or other departmental authorities. After final determination by the procurement agency, the dispute may become a claim or a suit depending upon the action taken by the contractor. A disagreement of law or fact arising after final administrative determination is a *claim* if it is presented to the General Accounting Office for settlement. If the contractor resorts to the courts on a question of law or fact after settlement, the disagreement is a *suit*.

From the above it will be observed that disagreements may also be classified as to either (1) questions of fact, (2) questions of law, or (3) questions of mixed law

and fact. Questions of fact are always *disputes* to be determined initially by the contracting officer or departmental authorities. Disagreements involving questions of law or of mixed law and fact become either *claims* or *suits* depending upon the action the contractor takes. Questions of *fact* likewise may become the basis of the claim or suit if the contracting officer or the designated appeal agent or board is arbitrary or prejudiced in making a decision, or if there is fraud or bad faith or an error so gross that it amounts to bad faith on his or its part.

Questions of fact and law. Interpretations of the contract are questions of law or questions of mixed law and fact which the contracting officer and department head cannot finally determine. Such questions are for the Comptroller General and the courts to decide. Applying this general principle specifically to contract termination, the amount paid for labor or material is a question of fact as to which the departmental determination is final in the absence of arbitrary or capricious action. On the other hand, whether an item is to be allowed as cost is either a question of law or a question of mixed law and fact which the contracting officer cannot decide and which may be taken to the Comptroller General and the courts. When a dispute arises, the contractor must make certain decisions. He must decide whether the conflict is of a purely factual or of a legal nature. After final administrative determination, he must decide whether to file claim or institute suit. If termination is only partial, the contractor must proceed with the unterminated portion of the contract.

Procurement agencies handle disputes. Army standard forms provide that questions of fact are to be decided by the contracting officer subject to written appeal by the contractor within 30 days to the designated appeal officer or board. Under Navy contracts factual disputes are determined by the Bureau concerned with right of appeal to the Compensation Board. Treasury Department contracts provide for determination by the contracting officer with appeal to the Secretary of the Treasury. Disputes under Maritime Commission contracts are handled directly by the Commission.

The findings of fact made by the designated officer, Board, or Commission are considered final and conclusive. The Comptroller General and the courts refuse to review these findings unless evidence is presented of fraud or bad faith or a mistake so gross that it amounts to bad faith. After final administrative determination, the contracting officer has no authority over the dispute since the matter then becomes subject to the Comptroller General or the courts. In handling disputes under formula settlements, the contracting officer or department head, before allowing or disallowing a claim, usually will request the Comptroller General to rule on any disputed question of law or question of mixed law and fact.

The contractor must protect his rights by filing all notices or protests required by the contract. If the contractor thus initially protects his rights by giving timely and proper notice or protest, he is entitled to the contracting officer's decision, but otherwise that official is under no obligation to act. Even though notice or protest

is not timely, disagreements may be considered if consent is obtained from the department head.

In submitting his argument to the contracting officer, the contractor should present his case fully and in detail supported by all available documentary evidence. It is better to concede a point or two in the first instance than to attempt to "throw the book" at the Government later unsupported by facts. Insufficient evidence, which may elicit a favorable decision from the contracting officer, may not always be so acted upon by the Board or other official representative of the department head.

A conference with the contracting officer or the members of his staff who are handling the termination will be granted the contractor upon request. In preparing for such a conference it must be remembered that the contracting officer is interested primarily in facts and not argument. If the contracting officer renders a decision upon a misunderstanding, an incomplete statement of the facts, or through error, a conference will serve to effect mutual understanding and reconsideration through the submission of additional evidence. Adjustments can very often be worked out in this manner.

The contractor should submit only those disputes which he honestly believes have merit. Most departments will go out of their way to assist a cooperative contractor but if a number of unsound disputes are submitted, even those which are sound will be treated skeptically. If necessary information is not available at the time of filing the protest, the contractor should include a statement that information will be supplied when it becomes available.

Prerequisites to filing claim or bringing suit. Neither decision of the contracting officer nor decision on departmental appeal is prerequisite to consideration of a claim by the General Accounting Office. The only prerequisites are: (1) that proper and seasonable notice and/or protest, as required under the contract, be given as to the circumstances forming the basis of the dispute; (2) that decision be solicited from the contracting officer if required by the contract; and (3) that appeal be taken from the contracting officer's decision to the designated appeal officer or board if required.

The exhaustion of all administrative remedies is also prerequisite to legal action whether it be in the Court of Claims or the Federal District Courts, but consideration by the General Accounting Office is not. This may seem paradoxical, but the contractor has exhausted his administrative remedies when final settlement is rendered.

From a practical point of view, this means that, under the contractual provisions above discussed, the contractor must obtain an administrative decision by this officer and a decision from the designated appeal officer or board before he can go into court on factual questions.⁴ Even if this is done, however, a review by the courts of these administrative fact findings can only be had by introducing evidence that the contracting officer acted arbitrarily. Strictly speaking, these fact

⁴United States v. Callahan-Walker Const. Co., 317 U. S. 56 (1942).

findings by the contracting officer and department head should not be called "administrative remedies." They are conditions, set up by the contract, precedent to court action.

General Accounting Office handles claims. If the Government requires the contractor to execute a "release of claims" upon acceptance of final payment, he is thereafter precluded from asserting any claim not specifically excepted from the release. Provided no such release is given, the contractor may file claim with the General Accounting Office if final determination by the procurement agency is unfavorable. If that office disallows the claim, the contractor has no vested right of appeal to the Comptroller General. No statute makes consideration by the Comptroller General mandatory, but as head of the General Accounting Office he will review a claim upon recommendation from that office.

A claim may be submitted in any one of the following three ways: (1) to the contracting officer or head of the department; (2) to the disbursing officer; and (3) to the General Accounting Office. The result is the same no matter which of the three methods of submission is selected. The claim eventually goes to the Claims Division of the General Accounting Office. If submitted to the contracting officer or the head of the department, the claim will be referred to the General Accounting Office with a recommendation. If submitted to a disbursing officer, the claim will be referred through his immediate superior to the contracting officer for recommendation and thence to the General Accounting Office. If submitted to the General Accounting Office, the claim will be referred to the contracting officer for recommendation and return.

The first method, that of submission to the contracting officer, is preferable since administrative action may still be possible. The question as to whether "final settlement" has taken place is often open to argument. The contractor usually does not know definitely whether final settlement has occurred. If administrative consideration is still possible, it is desirable because procurement officials are more inclined to be lenient and one additional opportunity for a hearing is had. The United States Supreme Court has defined final settlement as the administrative determination of the amount due the contractor.⁵ In practical application this definition is so vague that sometimes neither the department involved nor the General Accounting Office can say definitely whether final settlement has taken place. Therefore, whichever office first receives the case usually takes jurisdiction. If the contractor is dissatisfied with the settlement as determined by the Claims Division he has one year within which to request a review by the Comptroller General.

Settlement of a claim is known as a "direct settlement." The claimant is advised of the decision by a letter known as a settlement certificate. On important or controversial questions, the Comptroller General rather than an official of the Claims Division frequently signs the settlement certificate himself.

⁵ *Ibid.*

If the General Accounting Office gives the claimant reasonable notice and an opportunity to be heard, there is no denial of an adequate hearing such as is contemplated by the due process clause of the Constitution. The statute under which the General Accounting Office is authorized to settle and adjust claims by and against the United States does not provide for any particular pattern of hearings and prescribes no definite form of procedure for the presentation and settlement of claims.

Review by Comptroller General. No statute gives any person a vested right to have a settlement of the General Accounting Office reviewed by the Comptroller General. If a claim against the United States has been disallowed by the General Accounting Office, the refusal of the Comptroller General to grant a review is not a denial of the "due process of law" contemplated by the Fifth Amendment to the Constitution.⁶

Nevertheless, the Comptroller General, as head of the General Accounting Office, will review claims and render decisions where a question of law is concerned. Doubtful cases, which involve difficulty in determining whether the disagreement is one of law or of fact are also handled by the Comptroller General. If a claim is not allowed by the Comptroller General, the contractor may resort to the courts.

The Comptroller General, in his own discretion, will review claims upon the written application of (1) a claimant whose claim has been settled; (2) a disbursing officer whose accounts have been settled; (3) the head of the department or Government establishment to which the claim or account relates; or (4) upon the motion of the Comptroller General himself. The Comptroller General will only review final settlement on his own motion where important or controversial questions are involved.

Advance decisions may also be requested by contracting and disbursing officers. Whenever, during the life of the contract, the disbursing officer refuses payment of a voucher, the contractor should request that such officer transmit the voucher with supporting papers to the Comptroller General for "advance decision." This is a prerogative of any Government disbursing officer. Advance decisions rendered by the Comptroller General are precedents as to future cases before him or the Claims Division. Direct settlement decisions are not precedents.

If this is not done and final settlement takes place, the contractor may obtain review by filing claim. Application for review of a final settlement must be received in the Comptroller General's office within one year from the date of the settlement to be reviewed.⁷ The Comptroller General, upon request, will have the documents forwarded by the department concerned. His decisions as well as proceedings before him are based on the written record. Because of the importance of the record, the contractor must always be sure to notify the contracting officer of the items in the computation with which he differs. The application for review should state the error or incorrectness of the settlement specifically. An application

⁶ 21 COMP. GEN. 244 (1941).

⁷ 4 CODE OF FED. REGS., §2.1 (1939).

in general terms will not be sufficient ordinarily to induce the discretion to review, and particularly not where the claimant is represented by an attorney or agent.⁸ The warrant or check issued upon a settlement must not be cashed where its amount includes any item as to which review is applied for, but should accompany the application for review.⁹

The contractor may request an interview, but such interviews are not determinative. The contractor may state his side of the claim in a letter or in a brief or both. While no particular form is required, his statement should give all the facts carefully, accurately and concisely. The contractor's statement will be checked against the record.

The Comptroller General may consider so-called moral obligations or equitable claims against the Government. If he considers such a claim favorably, he may report the facts to Congress and recommend that an approximation be made for payment. This recommendation may be made on his own volition or at the request of a department.¹⁰ Such claims are reviewed by the Claims Committee of the House of Representatives, and if acted upon favorably, a private bill will be introduced in Congress providing for payment of the sum. As a matter of fact he has made such a recommendation only three times during the fifteen years the Act has been in existence.

Claims as basis for court action. A claimant who is dissatisfied with the decision of the contracting officer, or the appellate board or official, or the Comptroller General may institute action against the United States either in the Court of Claims or a Federal District Court. The United States has consented to suit in cases based on contract, express or implied, by giving the Court of Claims and the Federal District Courts jurisdiction of such claims. The statutes authorizing suit are construed strictly in favor of the Government, however, since suits are confined to those for which statutory consent exists. Action may be brought in the Court of Claims regardless of amount, but the Tucker Act¹¹ restricts the jurisdiction of District courts to suits involving \$10,000 or less. Neither consideration of a claim by the General Accounting Office nor decision of the Comptroller General is prerequisite to suit, but all administrative remedies must be exhausted. The contractor must have obtained an administrative decision by the contracting officer and a decision on appeal from the head of the department as to all questions of fact before he can go into court on those questions. Note that the courts at present have no jurisdiction to consider so-called "equitable" claims in which technicalities bar recovery.

It is worth while to note that claims may also be referred to the Court of Claims by the various departments¹² or by Congress.¹³ The head of any executive depart-

⁸ *Ibid.*

⁹ *Ibid.* See citations therein of statutory bases.

¹⁰ 45 STAT. 413 (1928), 31 U.S.C. 1940 ed. §236.

¹¹ 24 STAT. 505 (1887), 28 U.S.C. 1940 ed. §§41(20), 250.

¹² 36 STAT. 1137 (1911), 28 U.S.C. 1940 ed. §254.

¹³ 36 STAT. 1138 (1911), 28 U.S.C. 1940 ed. §257.

ment may transmit to the Court any claim or matter pending in the department which involves controverted questions of fact or law. It must be accompanied by the vouchers, papers, documents and proof. When the Court makes its findings of facts and conclusions of law, it reports them to the transmitting department for its guidance and action. If transmitted with the claimant's consent, or if the Court is satisfied upon the established facts that it has jurisdiction to render judgment or decree, it may do so, referring its findings to the transmitting department. In this event, either party will be given such further opportunity for hearing as, in the Court's judgment, justice requires. Upon the certificate of the Comptroller General, furthermore, the Secretary of the Treasury may transmit any claim or matter of which the Court might take jurisdiction on the voluntary action of the claimant, with all the vouchers, papers, documents and proofs pertaining thereto, to the Court for trial and adjudication.¹⁴

Likewise, either House of Congress may refer a bill for payment of a claim to the Court for investigation and determination of the facts. After a hearing and investigation, the Court informs Congress of the nature of the claim. The Court reports the facts and the amount (where the claim can be liquidated), together with its conclusions. The finding of facts always includes: (1) any facts bearing upon the question of delay or laches in presenting the claim, (2) any facts bearing upon the question of removal of the bar of any statute of limitation, and (3) any facts alleged by the claimant as an excuse for not having resorted to any established legal remedy. If the Court is satisfied upon the facts that the subject matter of the bill is such that it has jurisdiction to render judgment or decree thereon, it may proceed to do so, giving to either party such further hearing as in its judgment justice requires, and reporting its proceedings to the House of Congress by which the matter was referred.¹⁵

Congress last resort for relief. If the contractor cannot obtain satisfaction in the General Accounting Office, from the Comptroller General, or in the courts, his last remedy is an appeal to Congress itself. The Comptroller General may recommend to Congress that an appropriation be made for the contractor's relief in certain cases but if he refuses to do so and the courts afford no remedy, the contractor may make a personal appeal to Congress.

Should it be necessary to attempt to secure relief through a private bill, the member of Congress who is to introduce the bill should be furnished with a summarized statement of the facts. This summary should be supported by copies of such documents concerning the claim as the contractor may have available since the bill when introduced will be sent to the departments or establishment in which the claim arose and to the Comptroller General for their reports and recommendations. Either House of Congress, furthermore, may refer the bill to the Court of Claims for investigation, hearing, and recommendation before taking action. This procedure has been fully discussed in the preceding paragraph.

¹⁴ *Supra* note 12.

¹⁵ *Supra* note 13.

Congressional proposals. Present dispute clauses are unfair to contractors. All disputes concerning fact are decided by the contracting officer with right of appeal within 30 days to the departmental appeal board or agent. Government agencies assert that these boards are impartial, and it is true that they try to be, but it is difficult to see how anyone can serve two masters. Contractors feel that the members of these boards may be swayed by loyalty to the service which they serve. A lawyer knows that he has little chance of winning a case where his adversary is deciding the facts. Several proposals have been made to change this situation.

One proposal would authorize arbitration as an alternative to determination under the dispute clause (HR. 3665). Substitution would not be made mandatory, however. The American Arbitration Society has fought hard for such a provision since early in the defense effort. Unquestionably arbitration would be preferable to the dispute clause in settling ordinary disputes involving such matters as excusable delay, etc. With respect to termination, however, its practicality is doubtful. The size of the job is such that arbitration might soon prove administratively impossible. Even without arbitration there may be insufficient engineers, accountants and lawyers to do the job. If two or possibly three such men are placed on an arbitration board every time a dispute arises there may be an insufficient number to go around. An additional objection is the advantage which the Government would hold with respect to the caliber of their arbitrators. The Government probably would set up a permanent panel of arbitrators, all of whom would be experienced technicians. Contractors probably would be forced to pick comparatively inexperienced men because individually they would have few disputes. These men might be company lawyers or accountants but they would not have the everyday experience possessed by Government arbitrators.

The Senate version of S. 1718 would establish a special appeals procedure for terminations. Provisions for arbitration have been dropped. At his election, the contractor could (1) take an administrative appeal to an Appeal Board; or (2) bring action for the claim in the Court of Claims or in the District Court. If proceedings were instituted by either of these methods, the contractor would be precluded from subsequently initiating proceedings by the other.

The Court of Claims now has a normal calendar of approximately 300 cases with which it is up-to-date. In the first year after the termination of hostilities it is expected that this calendar will jump 1000%. With a calendar of 3000 cases the Court will be hopelessly swamped unless relief is extended by providing more judges. Consequently S. 1718 would authorize the Court of Claims to appoint not more than 20 commissioners in addition to those provided by existent statutes.

Subcontractors receive special treatment. If the Government deals with a subcontractor directly by "company settlement" or by taking an assignment of a particular subcontract from a prime contractor or intermediate subcontractor, disputes between the Government and the subcontractor concerned would be decided by the methods above discussed. But disputes between prime contractors and sub-

contractors, or between higher and lower tier subcontractors do not fall within this category. By agreement, however, they may be submitted (1) to the Appeal Board or an umpire, or (2) to a contracting agency for mediation or arbitration in accord with regulations to be prescribed by the Director.

The major objection to the Senate bill is the fact that the contractor would be barred from court action if he resorted to administrative appeal. The House version of this bill is preferable to the Senate bill, as far as the appeal provision is concerned. Otherwise, the same as the Senate bill, it would permit contractors to institute court action after final administrative determination. The primary objective of the administrative appeal is a quick equitable settlement. By precluding court action the Senate bill would defeat the purpose of the administrative appeal and cut across the established principle that a litigant must exhaust his administrative remedies before he goes into court; here is an administrative remedy which, if exhausted, prevents him from going into court. The purpose of administrative procedure is to settle differences without court action. The Senate proposal offers an aggrieved contractor a blind alley and no sensible contractor is going up that alley. Most attorneys would advise clients to begin court action in the first instance and forget about administrative appeal. Even though court action were begun, they might still work out a settlement with the contracting agency. Thus they could protect their right to a day in court and at the same time leave the way open for an informal offer from the administrative agency or Appeal Board.

Establishment of the proposed Appeal Board would to some extent mitigate the present arbitrary nature of administrative appeals under the standard disputes clause, but it is this writer's belief that fundamentally the situation would remain unchanged. All important appeals would be heard by the Appeal Board which probably would consist of representatives from the procurement agencies.

To this writer, preclusion from court action in the event of administrative appeal seems unfair. By indirection, through the Appeal Board, the Senate bill would continue the present practice by which administrative agencies making the contract are charged both with the duty of representing the Government and judging the merits of the contractor's case. The Appeal Board would have the dual functions of judging controversies and of establishing "disputes" policy as a representative of the procurement agencies. Fairness demands that contractors have a right to court trial *de novo* to assure them against arbitrary treatment.

Advocates point to other administrative tribunals such as the National Labor Relations Board, OPA's Emergency Court of Appeals, and the Interstate Commerce Commission as precedent for this action. Ignoring the larger question as to the wisdom of past encroachments on the judiciary by administrative agencies, it is submitted that termination appeals present an altogether different situation. True, the Government may be a party to actions before NLRB, the Emergency Court of Appeals or the Interstate Commerce Commission, but it has no proprietary interest. Through these agencies, the Government in its *sovereign* capacity is adjusting con-

trroversies between groups of citizens; in practical effect, NLRB adjusts controversies between employers and employees; the Emergency Court of Appeals fixes prices between sellers and buyers; and the Interstate Commerce Commission settles rate disputes between railroads and the public. This is a far cry from termination and other contractual matters where the Government has a direct monetary interest. In these cases the Government has a moral duty to see to it that its sovereign judicial powers are not exercised by procurement agencies which make contracts and have a close monetary interest in the proceedings.

Nevertheless these bills are an improvement over existing practice under the disputes clause in one respect. Of importance to contractors is the provision that the Appeal Board and court are not bound by the contracting agency's findings of fact. This means that the courts may make their own findings *de novo*. Findings of the procurement agencies are to be treated as *prima facie* correct, however, and the burden is on the contractor to establish that the amount due on his claim exceeds the amount allowed by the contracting agency. Because of the close relationship between the Appeal Board and the procurement agencies, this provision probably will prove of little benefit if the contractor elects an administrative appeal.

The administrative appeal or legal action must be instituted within ninety days after delivery of the contracting agency's findings or in the event that agency fails to deliver such findings, within one year after the contractor makes demand. These time limitations must be complied with. After the stipulated time has elapsed, the findings of the contracting agency become final and conclusive, or if no findings have been made, the contractor is deemed to have waived his termination claim. The Appeal Board or court may increase or decrease the amount allowed by the contracting agency.

The Appeal Board would sit in panels of one or more members in localities throughout the country. The Director of Contract Settlement would designate the members, and fix their term of office and compensation. Practice and procedure before the appellate board would be prescribed by the Director, or by the Appeal Board if the Director delegates this authority to it. The Appeal Board may demand the attendance of witnesses and the production of evidence in accordance with the Director's regulations.