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**ANALYSIS OF DISPUTES RELATIVE TO
DEPARTMENT OF THE NAVY (DON)
SERVICE AND SUPPORT CONTRACTS**

by

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December 1997

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OF THE NAVY (DON) SERVICE AND SUPPORT CONTRACTS**

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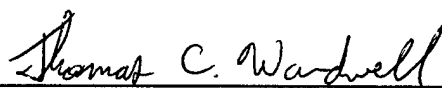
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ABSTRACT

The primary purpose of this thesis is to analyze recent court decisions relating to disputes in Department of the Navy service and support contracts as a means to identify potential weaknesses in Department of the Navy contracting norms and execution practices. This thesis identifies patterns in the formation and administration of those contracts that can be avoided, with the potential effect of reducing the number of litigated service and support contract disputes between the Department of the Navy and commercial service providers. Finally, this thesis offers recommendations to Navy Contracting Officers and contracting activities to help provide for more effective and efficient service and support contracting services within the Department of the Navy.

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I. INTRODUCTION

A. GENERAL INFORMATION

Many initiatives have been implemented in an effort to improve the operations of the Department of the Navy over the past ten years. One of the initiatives was the Defense Base Closure and Realignment Act of 1990, which provided for rounds of base closure and realignment in 1991, 1993, and 1995, in addition to reducing the Department of Defense's extensive base infrastructure. The Act also allowed the Navy to establish an effective process for conducting independent appraisals of the relationship between force structure, resource levels, and base structure; for evaluating the Navy's future requirements; and for developing recommendations for review by the Secretary of the Navy. [Ref. 1: p. 1]

The Secretary of the Navy established an Analysis Team in December 1995, whose charter was to gather and analyze data and to evaluate and recommend opportunities for the Department of the Navy to improve management processes within the Department. The "Team," formally known as "Department of the Navy Organization Management and Infrastructure Team (DONOMIT)," asked the Naval Postgraduate School for assistance in researching and analyzing litigation cases and/or claims associated with Department of the Navy service and support contracts.

B. PURPOSE

The primary objective of this thesis is to identify potential weaknesses in acquisition contracting norms and execution practices that hinder effective service and support contracting within the Department of the Navy. The secondary objective of this study is to identify possible areas for improvement in an effort to help the Navy become more efficient and effective in awarding and administering service and support contracts.

C. RESEARCH QUESTIONS

1. Primary Research Question

Will a review of recently litigated cases involving Department of the Navy service and support contracts reveal patterns in the formation and administration of those contracts that can be avoided, with the potential effect of reducing the number of such cases and provide for more effective and efficient service and support contracting within the Department of the Navy?

2. Subsidiary Research Questions

- a. What are service and support contracts?
- b. What are the bases for and process of bringing a case to a litigation forum in the Government?
- c. What are the main reasons Department of the Navy service and support contracts become the subject of litigation?

d. What weaknesses can be identified in Department of the Navy contracting norms and execution practices in relation to service and support contracts?

e. What conclusions can be drawn about Department of the Navy service and support contracting practices?

f. How can the Department of the Navy potentially reduce the number of service and support contracts that become the subject of litigation?

D. SCOPE

The main thrust of this thesis is to examine a representative sample of Department of the Navy service and support contract claims cases decided within the last five years to identify patterns of causation in contract formation and/or administration that result in litigation. The following criteria will be used to limit the study to appropriate cases:

- Department of the Navy cases.
- Armed Services Board of Contract Appeals and U.S. Court of Federal Claims decisions.
- Cases decided from 1 October 1991 to 1 October 1997.
- Cases relating to service and support contracts.

Use of the above criteria will provide the data necessary for analysis to determine whether patterns of errors exist which can be used to isolate the top problem

areas which result in contract litigation. These lessons learned can then assist Department of the Navy Contracting Officers to become more efficient and effective when awarding and administering service and support contracts.

E. METHODOLOGY

The primary research methodology employed was an extensive review of literature available in the Naval Postgraduate School's acquisition, thesis, and main libraries. The computerized data bases of the Federal Legal Information Through Electronics (FLITE), LEXIS, the Defense Logistics Studies Information Exchange, and the Internet were used as sources of background information and case retrieval relevant to this study.

The FLITE and LEXIS databases were used as sources for obtaining decided cases. These databases not only provided tailored listings and case excerpts, but also provided full case texts which were the main sources of case data. The research attorney for FLITE and the Naval Postgraduate School reference librarian for LEXIS were consulted to suggest search terminology helpful in tailoring the database searches in order to provide cases relevant to this study.

Additionally, the Procurement Management Reporting System (PMRS) Help Desk was queried as a means to obtain the number of total service and support contracts awarded during each year of this study. The researcher also obtained the

total number of all appeals docketed and decided each year by the Armed Services Board of Contract Appeals (ASBCA). The information was collected from the Annual Reports obtained through the ASBCA's Freedom of Information Act Administrator.

F. DEFINITIONS

The following terms are used throughout this thesis. A brief definition for each term is provided as an aid to the reader. Additionally, a listing of selected acronyms relevant to this study is provided in Appendix A as a useful reference tool for the reader.

Administrative Contracting Officer (ACO): The ACO acts on behalf of the PCO in either performing or monitoring assigned contract administrative functions commencing after contract award up through contract completion and closeout. [Ref. 2: p. 218]

Armed Services Board of Contract Appeals (ASBCA): An administrative board with delegated authority from the Secretaries of the Armed Forces to hear and rule on questions of fact in Government contract disputes. [Ref. 3: p. 87]

Claim: A written demand or written assertion by one of the contracting parties seeking, as a matter of right, the payment of money in a sum certain, the adjustment or interpretation of contract terms, or other relief arising under or relating to a contract. [Ref. 4: Sec. 52.233-1(c)]

Commercial Activity: An activity that provides services obtainable from the private sector. Examples of commercial activities include custodial services, grounds maintenance, base supply, vehicle operations and maintenance, etc. Commercial activities may be performed by

military and/or Federal civilian employees, or contract personnel. [Ref. 5]

Contract: A mutually binding legal relationship obligating the seller to furnish the supplies or services and the buyer to pay for them. It includes all types of commitments that obligate the Government to an expenditure of appropriated funds and that, except as otherwise authorized, are in writing. [Ref. 4: Sec. 2.101]

Contracting Officer (CO): A person with the authority to enter into, administer, and/or terminate contracts and make related determinations and findings. [Ref. 6: p. 164]

Contractor: Any individual, corporation, partnership, association, institution or other legal entity that has entered into a contract to supply materials, products or services for an agreed upon consideration. [Ref. 7: p. 61]

Contracting Officer's Technical Representative (COTR): Assists the Contracting Officer in insuring that a contractor's performance proceeds in accordance with the terms of the contract. COTRs provide technical advice and guidance regarding specifications, purchase descriptions and statements of work. They have limited authority and are not authorized to give directions or instructions which exceed the authority appointed to them in writing by the Contracting Officer. [Ref. 2: p. 219]

Dispute: A conflict of claims or rights and/or disagreements concerning the position, legal rights, claims or demands between contracting parties. [Ref. 8: p. 173]

Inherently Governmental Function: A function so intimately related to the public interest that it mandates performance by the Government. Examples of inherently governmental functions include command and control, intelligence operations, foreign relations, directing Federal employees, and accountable officers with discretionary authority to disburse funds. These type functions are retained in-house by the Government and are not in competition with the private sector. [Ref. 5]

Outsourcing: The operation of a commercial activity for the Government by a contractor. Ownership and control over operations in the activity is retained by the Government through surveillance of the contractor. Competition between the Government and the private sector is the primary method used for outsourcing commercial activities. [Ref. 5]

Procuring Contracting Officer (PCO): The Government agent designated by warrant or position, having the authority to obligate the Government, who directs and administers the procurement through acquisition planning, solicitation, selection, negotiation, award, signing of contractual documents, contract administration and contract closeout. Administration of the contract after award may be delegated by the PCO to an Administrative Contracting Officer (ACO). [Ref. 9: p. 83]

Privatization: Privatization is different from outsourcing because the Government divests itself of a commercial activity and purchases goods and/or services from commercial sources. The Government may specify quality, quantity, and timeliness requirements for goods and services; however, it has no control over the activity's operations. [Ref. 5]

Protest: A written objection by an interested party to a Government solicitation, proposed contract award, contract award, or termination or cancellation of an awarded contract. [Ref. 4: Sec. 33.101]

Service Contract: A contract that directly engages the time and effort of a contractor whose primary purpose is to perform an identifiable task rather than to furnish an end item of supply. [Ref. 4: Sec. 37.101]

Support Services: See the above definition for service contract.

G. ORGANIZATION

Chapter I of this thesis sets out the research questions used to investigate the reasons service and support contract disputes result in litigation. Additionally, this Chapter discusses the scope and direction of the research identified and defines relevant terminology used throughout this study.

Chapter II introduces service and support contracts and the regulatory background associated with these contracts. This chapter also presents the history behind contractor dispute remedies and details the current processes contractors use when disputes arise and result in litigation.

Chapter III provides a description of the population from which the data were obtained and outlines the data collection plan used to gather the required cases and data used in this thesis. Chapter III also presents the researcher's collected data in various breakdowns to aid in identifying trends in service and support contract disputes.

Chapter IV presents an analysis of the data collected focusing on potential weaknesses identified in Department of the Navy contracting practices. This chapter also analyzes the trends identified in litigated service and support contract disputes.

Chapter V of this thesis presents the conclusions and recommendations generated by this study along with areas for further research on the topic of litigated service and support contract disputes.

II. BACKGROUND

A. INTRODUCTION

This chapter first provides an introduction to service and support contracts and the regulatory background associated with contracting for services. The chapter then presents the history behind contractor dispute remedies and details the current processes contractors use when disputes arise and result in litigation.

The end of the Cold War has caused the Department of Defense to tailor its budget and force structure to meet the changing global security threats. In response to the perceived reduction in threat to our nation's security and interests, the Department of Defense has reduced its force structure by over 30 percent as compared to the levels reported in the 1980's. Additionally, the Defense budget has been reduced to roughly 60 percent (in real term dollars) of its peak in 1985. The 1997 Defense budget was \$243 billion. Procurement funding levels have also been reduced. The fiscal year (FY) 1996 Department of Defense procurement budget was \$43 billion, which was 68 percent less than the 1985 level. [Ref. 10: pp. 1-3]

The reduced global threat to U.S. interests, a result of the end of the Cold War, and Congress' commitment to reduce the Federal deficit to zero over the next five years, means that the Defense budget cannot expect an increase in

future funding levels (in real terms). To counter this reduction, the Department of the Navy is participating in a series of Department of Defense initiatives designed to increase the efficiency of its operations in order to receive more in return for every tax dollar spent. Specific initiatives include a reduction in infrastructure costs through the base realignment and closure process (BRAC), increased emphasis on acquisition reform, and a review of service and support operations to determine where outsourcing for such services can improve performance while reducing costs. [Ref. 10: p. 3]

The idea of outsourcing for services is not new. The Navy has been procuring services from the private sector for many years. Unfortunately, when the Navy contracts out for services from commercial contractors, disputes between the parties are bound to arise. The focus of this thesis is on litigated disputes between the Navy and those contractors who are providing services to the Navy.

B. SERVICE AND SUPPORT CONTRACTS

The following section will present an introduction to service and support contracts. Additionally, it will provide the regulatory background associated with these type of contracts.

1. Service Contracts Defined

In Government contracting, the terms "service contract," "support contract," and "support services contract" all refer to the same general type of contract -- a service contract. The Federal Acquisition Regulation (FAR) defines a service contract as:

A contract that directly engages the time and effort of a contractor whose primary purpose is to perform an identifiable task rather than to furnish an end item of supply. [Ref. 4: Sec. 37.101]

Service contracts are further broken down into two broad categories: 1) personal services; and 2) nonpersonal services.

Personal services contracts are characterized by the employer-employee relationship they create between the Government and the contractor's personnel. Government agencies are not allowed to award contracts for personal services unless specifically authorized by a statute to do so; for example, "personal services contracts for the services of individual experts or consultants are limited by the Classification Act." [Ref. 4: Sec. 37.104]

When a contractor's personnel become subject to continuous supervision and control of a Government officer or employee, either through the terms of the contract or the manner in which the contract is administered, an employer-employee relationship is deemed to have occurred. Simply

giving an order to a contractor's employee for a specific article or service, and having the right to reject the finished product or result, is not the type of control required to convert the individual into a Government employee and the contract into one for personal services. [Ref. 4: Sec. 37.104]

To determine if a service contract will be for "personal" services, the following question must be answered: "Will the Government exercise relatively continuous supervision and control over the contractor personnel performing the contract?" [Ref. 4: Sec. 37.104] If the answer to the preceding question is "yes," then the contract is most likely for personal services and should not be awarded unless specifically authorized by statute.

Contracts for nonpersonal services are the type of service contracts most widely used by the Navy. Nonpersonal services contracts can be found at all levels of Navy acquisition, from micro purchases through major weapon systems procurements. The Navy does not maintain all of its capabilities in-house, and outsourcing certain services are necessary in order to meet personnel and funding limitations imposed by Congress.

While services contracts may be either of a personal or nonpersonal nature, the use of services contracts in general has become an increasingly important part of the Navy's

support infrastructure. One way the Navy is attempting to reduce the cost of its supporting infrastructure, and free up more funds for modernization, is by outsourcing for more services. The acquisition of services is one of the fastest growing areas of Government procurement. In FY 1992, contracts for services accounted for \$105 billion of the Government's \$200 billion procurement program. [Ref. 11: p. iv]

The Department of the Navy uses service contracts to acquire knowledge and skills that are either not available in the Government, or when it is more cost effective to obtain required support services from the private sector versus performing them in-house. Some of the areas in which service contracts can be found within the Department of the Navy include:

- Maintenance, overhaul, repair, servicing, salvage, rehabilitation, modernization, or modification of supplies, systems, or equipment.
- Routine recurring maintenance of real property.
- Housekeeping and base services.
- Advisory and assistance services.
- Operation of Government-owned facilities, and systems.
- Communications services.
- Architect-Engineering services.

- Transportation and related services.
- Research and development. [Ref. 4: Sec. 37.101]

As the above list shows, service contracts tend to be labor intensive efforts that directly employ the time and effort of a contractor rather than result in an end item of supply, or deliverable. The Navy's service requirements range from repetitive daily activities that can be easily estimated, such as janitorial services, food services, or grounds maintenance, to infrequent or untried efforts that are difficult to estimate such as research and development or engineering work. [Ref. 12: p. 7]

Service and support contracts are not limited to a specific contract type. Services contracts can either be of a fixed-price or cost-type nature, and the contract type can have a significant affect on both contract cost and performance. The Office of Federal Procurement Policy (OFPP) has established guidelines for determining contract type when procuring services contracts. OFPP Policy Letter 91-2 states:

Contract types most likely to motivate contractors to perform at optimal levels shall be chosen. Fixed-price contracts are appropriate for services that can be objectively defined and for which risk of performance is manageable. In most instances, services that are routine, frequently acquired, and require no more than a minimal acceptable level of performance fall into this category. For such acquisitions, performance-based statements of work and measurable performance standards and surveillance plans shall

be developed and fixed-price contracts shall be preferred over cost-reimbursement contracts. Cost-reimbursement contracts are appropriate for services that can only be defined in general terms and for which the risk of performance is not reasonably manageable. Complex or unique services for which quality of performance is paramount frequently fall into this category. Furthermore, to the maximum extent practicable, contracts shall include incentive provisions to ensure that contractors are rewarded for good performance and quality assurance deduction schedules to discourage unsatisfactory performance. These provisions shall be based on measurement against predetermined performance standards and surveillance plans. [Ref. 13: p. 3]

2. Regulatory Guidance

When Contracting Officers procure services for the Navy, they are required to follow certain Federal guidelines and regulations. Some of the more notable regulatory guidelines include:

- Office of Management and Budget (OMB) Circular A-76 ("Performance of Commercial Activities");
- Federal Acquisition Regulation;
- Defense Federal Acquisition Regulation Supplement;
- Department of Defense (DOD) Directive 4205.2 ("DOD Contracted Advisory and Assistance Services"); and
- The Service Contract Act.

A brief description of each of these important regulations is provided below.

a. *OMB Circular A-76*

The authority to procure contracted services dates back to the 1950's when the Bureau of the Budget (BOB) formally promulgated guidelines regarding Government services contracts in their Bulletin 55-4. The policy required all agencies and departments within the Federal Government to review their operations and capabilities to determine if any of the functions they were currently performing should be outsourced or maintained in-house. [Ref. 14: p. 9] Since that time, there have been many changes to that initial policy.

In 1966, the Office of Management and Budget (OMB), formerly the BOB, issued OMB Circular A-76. The Circular established procedures and guidelines for determining whether commercial activities should be performed under contract with commercial sources or in-house using Government facilities and personnel. [Ref. 15: p. 1] The Circular has been amended several times since then, with the last major revision issued in 1983.

The major theme of the Circular is that the Government should not place itself in the position of competing with its citizens, and should rely on commercial sources to supply the services it requires. Basically, all Government services are susceptible to outsourcing except those that are inherently Governmental in nature, are in the

interest of national defense, are not adequately available in the commercial marketplace, or can be performed more economically in-house. [Ref. 15]

b. Federal Acquisition Regulation

The Federal Acquisition Regulation (FAR) Part 37 "prescribes general policy and procedures for acquiring services by contract." [Ref. 4: Sec. 37.000] The FAR encompasses general services contracting and provides general guidance to all Federal Government Contracting Officers.

c. Defense Federal Acquisition Regulation Supplement

The Defense Federal Acquisition Regulation Supplement (DFARS) Part 237 provides DoD specific regulations regarding services contracting that are intended to supplement the policy set forth in the FAR Part 37.

d. Department of Defense (DoD) Directive 4205.2

Specific guidance on Contracted Advisory and Assistance Services (CASS) is provided to Department of Defense Contracting Officers in DoD Directive 4205.2. CASS is defined in the directive as:

Those services acquired directly by the Department of Defense from non-governmental sources to support or improve agency policy development or decision making, or to support or improve the management of organizations or operation of weapon systems, equipment, and components. [Ref. 12: p. 13]

CASS is broken down in the directive into four specific categories: 1) Individual Experts and Consultants; 2) Studies, Analysis, and Evaluations; 3) Management Support Services; and 4) Engineering and Technical Services. [Ref. 12: pp. 13-14]

e. The Service Contract Act

The Service Contract Act of 1965 (as amended):

...creates an environment of prevailing wages and fringe benefits for employers that provide services to the government under a contract (greater than \$2,500) with a federal agency. [Ref. 16: p. 22]

A Navy contract is subject to the Service Contract Act if the principal purpose of the contract is to furnish services within the United States through the use of service employees. The term "service employees," under the Service Contract Act, encompasses laborers who generally perform manual work, and in addition to craftwork, may be skilled or unskilled. [Ref. 17: p. B-1] It does not apply to personnel employed in executive, management, administrative or professional capacities and paid a salary. [Ref. 16: p. 25] Services performed for DoD by management and technical personnel are covered under CASS, as previously mentioned. Types of service contracts covered by the SCA include:

- Cafeteria and food service;
- Carpet cleaning;
- Custodial and housekeeping services;
- Grounds maintenance;
- Laundry services; and
- Trash and garbage removal. [Ref. 17: p. B-5]

The Service Contract Act requires the payment of specified minimum wage rates and fringe benefits to laborers working on service contracts in the United States. [Ref. 17: p. B-1] Navy Contracting Officers need to be aware of the requirement to get a wage determination from the Department of Labor prior to issuing an invitation for bids or request for proposals when contracting for services. [Ref. 16: pp. 22-24]

C. HISTORICAL PERSPECTIVE OF DISPUTES AND LITIGATION

This section presents the history behind contractor dispute remedies and details the current processes contractors can use when disputes arise and ultimately culminating in litigation.

1. Historical Background

Whenever the Department of the Navy procures "services," in particular those that involve complex contractual arrangements and a large expenditure of funds, "disputes" are likely to happen. As previously defined in

Chapter I, a dispute is a disagreement between contracting parties concerning their legal rights and responsibilities. [Ref. 18: p. 1-3] Generally, when an issue is in dispute, both parties are able to reach a mutually satisfactory agreement through informal discussions and negotiations. Unfortunately, not all disputes can be resolved in this manner.

Today, when a dispute occurs that cannot be resolved through mutual agreement, the Contracting Officer has the authority to unilaterally decide the issue. If the contractor is not satisfied with the decision rendered by the Contracting Officer, the contractor has the option of appealing the decision to an agency Board of Contract Appeals or to the U.S. Court of Federal Claims. If still not satisfied, the contractor can appeal to the Court of Appeals for the Federal Circuit and on up to the Supreme Court, if justified. However, Government contractors have not always had these options.

As the Constitution was originally written, contractors who chose to do business with the Government had few rights when a dispute arose. For many years, contractors could only sue the Government if Congress waived the Government's sovereign immunity, which barred all persons from suing the Government. The only recourse a contractor had was to apply to Congress in hopes of introducing a private bill for the

recovery of amounts due under the contract or for breach of contract damages. [Ref. 18: p. 2-2]

An ever increasing number of requests for special bills led Congress to establish the Court of Claims in 1855. At first, the Court of Claims had an advisory role and was only authorized to prepare findings of fact and recommendations upon which Congress could base a private bill for a claim's payment. [Ref. 18: p. 17-2] The Court was later given the authority and power to make decisions and enter judgments against the Government.

The first recorded Disputes Clause was developed after the Civil War for inclusion in shipbuilding contracts, which at the time, were the most sophisticated contracts the Government had. The clause referred any disputes to the Secretariat level whose decisions would be considered final. The Disputes Clause specifically stated that:

If any doubts or disputes arise as to the meaning of anything in the contract, drawings, plans, or specifications...the matter shall be at once referred to the Secretary of the Navy for determination.... [Ref. 18: p. 2-2]

In 1887, Congress enacted the Tucker Act which expanded the jurisdiction of the Court of Claims and allowed it to "render judgment upon any claim against the United States" described in the Act. [Ref. 18: p. 17-3] The Tucker Act essentially gave up the Government's position of sovereignty and gave Government contractors the enforceable legal right

to sue the Government. The current Tucker Act (28 USC Sec. 1491) states:

The United States Claims Court shall have jurisdiction to render judgment upon any claim against the United States founded either upon the Constitution, or any Act of Congress or any regulation of an executive department, or upon any express or implied contract with the United States, or for liquidated damages in cases not sounding in tort. The Claims Court shall have jurisdiction to render judgment upon any claim by or against, or dispute with, a contractor arising under the Contract Disputes Act of 1978.[Ref. 19: Sec. 1491]

The onset of World War I led to a significant increase in the volume and complexity of weapon system acquisitions. This led to a large increase in the number of contractor disputes, and decisions under the Disputes Clause by the executive Secretaries became extremely burdensome. In an effort to mitigate the decision-making burden from the Secretaries during the war, the Government created various boards of appeal. In particular, a Navy Compensation Board was created by the Secretary of the Navy in 1917 to resolve disputes between contractors and the Department of the Navy. [Ref. 18: pp. 2-3 thru 2-4]

The end of the war saw the establishment of a standardized Disputes Clause for use in all Government contracts. Under the provisions of the clause, the Secretary of War could delegate his authority to a Board. As a result, a Board of Contract Adjustment was created to settle

disputes arising under the new Disputes Clause. The decisions of the Board were final and not subject to review by the courts. While the Board may have only remained in existence from 1918 until 1922, it became the precursor for the modern Boards of Contract Appeals. [Ref. 18: p. 2-4]

The standardized Disputes Clause in 1918 stated:

Except as otherwise specifically provided in this contract, any claim, doubts, or disputes which may arise under this contract, or as to its performance, and which are not disposed of by mutual agreement, may be determined, upon petition of the contractor, by the Secretary of War or his duly authorized representative or representatives. The decision of the Secretary of War or such duly authorized representative or representatives shall be final and conclusive on all matters submitted for determination. [Ref. 18: p. 2-4]

The Disputes Clause changed once again in 1926 after the Interdepartmental Board of Contracts and Adjustments was established. As before, the clause was intended for use in all Government contracts. This new version, however, called for the Contracting Officer to make an initial decision on all claims submitted. If not satisfied with the Contracting Officer's decision, the contractor could then appeal the decision to the agency head, or a board designated by the head of the agency, whose decision would then become final.

During World War II, the War Department Board of Contract Appeals was created and staffed by full-time employees who were trained in legal matters. When the Department of Defense was created in 1949, the Board merged

with other various boards to become the Armed Services Board of Contract Appeals. [Ref. 18: p. 2-7] The Wunderlich Act was passed in 1954, changing the Disputes Clause to make agency decisions final only on questions of fact, as long as they were supported by substantial evidence and not fraudulent, arbitrary, capricious or made in bad faith. [Ref. 20: p. 1239]

The Wunderlich Act (41 USC sec. 322) currently states: "No Government contract shall contain a provision making final on a question of law the decision of any administrative official, representative, or board." [Ref. 21: Sec. 322] While, at the time, the Wunderlich Act permitted questions of law to now go before judicial review, it still left contractors, with claims based on fact, subject to final decisions at the agency level or appropriate board.

After World War II, the disputes process continued to change, mostly through gradual refinements of existing procedures through the late 1970's. One of the most significant changes to the process occurred with the passage of the Contract Disputes Act of 1978. Prior to this time, the Contracting Officer's final decision on disputed questions of fact was considered final and conclusive, unless the contractor appealed the decision to the appropriate board within 30 days after receipt of the final

decision. The requirement was strictly enforced by the boards, and careless contractors often lost their chance to appeal. One example states:

An appeal by a mess-attendant services and supply contractor, seeking additional compensation for the expense of moving to a different facility, was held to be untimely, when it was filed more than thirty days after receiving the Contracting Officer's final decision. [Ref. 22: p. C-60]

Also, prior to the Act, Contracting Officers' and Boards of Contract Appeals' authority to resolve disputes depended on the clauses in the contract, the Disputes Clause in particular. Under the clause, Contracting Officers and Boards could only decide disputes arising "under" the contract, or more specifically, disputes that could be resolved by some remedy granting clause of the contract. If the claim in question was not specifically covered by a contract clause, the contractor's only option was to sue the Government in the Court of Claims (now called the U.S. Court of Federal Claims) under the authority of the Tucker Act. [Ref. 18: p. 3-3] For example, the boards did not have the authority to hear breach of contract claims against the Government because they were considered to arise outside the terms of the contract. [Ref. 23: p. 18-4]

The Contract Disputes Act made several important changes to the disputes process. The Act extended coverage to all disputes arising under or relating to a contract.

The Act also required a claim relating to a contract to be subject to a Contracting Officer's final decision before it could be heard in the U.S. Court of Federal Claims or by an agency Board of Contract Appeals. The Act states:

All claims by a contractor against the government relating to a contract shall be in writing and submitted to the contracting officer for a decision. All claims by the government against a contractor relating to a contract shall be the subject of a decision by the contracting officer. [Ref. 21: Sec. 605(a)]

Additionally, the Act now gave contractors the option of appealing a Contracting Officer's final decision to either an agency Board of Contract Appeals or filing a law suit against the Government in the U.S. Court of Federal Claims. The Contract Disputes Act (unless specifically stated otherwise) applies to any express or implied contract entered into by an executive agency for:

- The procurement of property, other than real property in being;
- The procurement of services;
- The procurement of construction, alteration, repair or maintenance of real property; or,
- The disposal of personal property. [Ref. 21: Sec. 602(a)]

"The Contract Disputes Act affects every stage of a Government contract dispute, from the first communication with the Contracting Officer to the final decision on

appeal." [Ref. 18: p. 3-3] The principal features of the Act are summarized below:

- A provision conferring jurisdiction over all claims of the contractor or the Government against one another in the Boards of Contract Appeals. This includes claims for equitable adjustment, breach of contract, and contract reformation or rescission.
- A requirement that the Contracting Officer issue a final decision within a reasonable time regarding claims submitted by the contractor.
- A requirement that the contractors certify the accuracy of the facts asserted in claims over \$100,000 with a stiff penalty provided for fraudulent claims.
- Establishment of a 90-day period to appeal a final decision of the Contracting Officer to a Board of Contract Appeals, and a 12-month period to file a direct suit challenging the decision in the United States Court of Federal Claims.
- Provisions for issuing uniform rules of procedure for the Boards of Contract Appeals under the direction of the Administrator of the Office of Federal Procurement Policy, and providing the Boards with subpoena power.
- A provision permitting the contractor the option of either suing in the Court of Federal Claims or pursuing the normal appeals process in the Boards of contract Appeals after an adverse final decision is received from the Contracting Officer.
- A provision giving the Government the right - for the first time - to appeal an adverse Board of Contract Appeals decision to the Court of Appeals for the Federal Circuit within 120 days of receiving the adverse decision.

- A 120-day time limit on contractor appeals for judicial review of a Board decision in the Court of Appeals for the Federal Circuit, and a 60-day limit to file an appeal of a Court of Federal Claims decision.
- A provision for the payment of interest on claims ultimately decided in the contractor's favor.
- A provision for periodically consolidating or expanding the number of Boards of Contract Appeals depending on workload.
- Improved expedited Board of Contract Appeals procedures for claims under \$10,000 and accelerated procedures for claims under \$50,000. (Currently \$50,000 and \$100,000 respectively) [Ref. 18: pp. 3-4 thru 3-5]

Although the Contract Disputes Act expanded the coverage of the Disputes Clause, it does not make all disagreements between the contractors and the Government subject to the process. To aid the reader in determining applicability of specific issues, the Act's coverage is summarized in chart form in Appendix B.

2. Current Processes For Contract Disputes

In Government contracting, the Contract Disputes Act is implemented through the Disputes Clause prescribed by the Federal Acquisition Regulation (FAR), and is included in all Government contracts. The following section will examine the basic elements of a claim under the Disputes Clause, and discuss the process through which a claim must follow from

its submission up through the point at which a "final" decision is rendered.

The Disputes Clause is contained in FAR 52.233-1 and provides guidance to both the Government and contractors on the procedures that must be followed when a dispute arises. A copy of the current Disputes Clause is provided in Appendix C.

The disputes process begins when a claim is submitted by the contractor to the Contracting Officer or by the Government to the contractor. The Contract Disputes Act requires that a claim be submitted in writing to the Contracting Officer for a decision. However, the Act does not define what constitutes a claim. The Disputes Clause defines a claim as:

Claim, as used in this clause, means a written demand or written assertion by one of the contracting parties seeking, as a matter of right, the payment of money in a sum certain, the adjustment or interpretation of contract terms, or other relief arising under or relating to this contract. A voucher, invoice, or other routine request for payment that is not in dispute when submitted is not a claim under the Act. The submission may be converted to a claim under the Act, by complying with the submission and certification requirements of this clause, if it is disputed either as to liability or amount or is not acted upon in a reasonable time. [Ref. 4: Sec. 52.233-1]

One of the duties of the Contracting Officer is to deal with disagreements between contractors and the Government at the lowest level possible. The Contracting Officer will try

to settle issues such as requests for contract adjustments through negotiated, mutually binding agreements. If negotiations fail, the Contracting Officer has the authority to "decide or settle all claims arising under or relating to a contract subject to the Contract Disputes Act." [Ref. 23: p. 18-8] A flow chart diagramming the remedy routes and time limitations for filing claims and appeals is provided in Appendix D. The charts outline the flow of a claim, from the time of submission until final disposition.

While the submission of a claim, either by a contractor to the Contracting Officer or by the Government to a contractor, is the first step in the disputes process, not all claims are resolved under the Contract Disputes Act. A contractor's initial request for relief is not considered a claim under the Disputes Clause or Contract Disputes Act unless the Government and the contractor are already in dispute over the amount requested. While this requirement holds true for "routine requests for payment," the Federal Circuit has ruled in *Reflectone, Inc. v. Dalton*, 60 F.3d 1572 (Fed. Cir. 1995) that,

...to satisfy the Contract Disputes Act definition of "claim," a nonroutine, written demand for payment need not be in dispute as to either amount or liability when submitted to the Contracting Officer. [Ref. 23: p. S19-2]

This decision could have a significant impact on future rulings made by the lower courts and administrative boards.

A contractor can submit a request for equitable adjustment to the Contracting Officer, and the Contracting Officer will first try to negotiate a mutually agreeable settlement. If the two parties can not agree upon a settlement and negotiations are at an impasse, the Contracting Officer will then make a unilateral decision regarding the amount the contractor is to be compensated. It is at this point the contractor has two general options. First, the contractor can accept the Contracting Officer's decision and live with the terms and conditions set forth by the Government. Second, if the contractor is not satisfied with the decision passed down by the Contracting Officer, the contractor can then submit a written claim for the amount in dispute to the Contracting Officer for further consideration. It is at this point that the contractor's request for compensation becomes a legal "claim" as defined in the Contract Disputes Act.

The Disputes Clause requires all claims to be submitted to the Contracting Officer in writing and, if a monetary claim, must be for a "sum certain" (specific determinable dollar amount). All claims, whether by the contractor against the Government or the Government against a contractor, must be submitted within six years after accrual of the claim. The time limit does not apply, however, on claims involving fraud. [Ref. 21: Sec. 605]

Contractors are currently required to certify the correctness of their claims when submitting claims in excess of \$100,000 or, regardless of the amount claimed, when using alternative means of dispute resolution (ADR). The certification states that the claim is made in good faith and the amount requested is accurate and correct. The claim can be signed by any person authorized to bind the contractor with respect to the claim. [Ref. 4: Sec. 52.233-1]

In addition to the claim being submitted in writing, the contractor must request that the Contracting Officer render a Contracting Officer's final decision. The Contracting Officer's final decision is the first step in the litigation process, and a contractor can not appeal to a Board of Contract Appeals or Federal Court without it. Once a claim is submitted, the Disputes Clause provides guidance on when a Contracting Officer's decision must be rendered. Specifically, the clause states:

For contractor claims of \$100,000 or less, the Contracting Officer must, if requested in writing by the contractor, render a decision within 60 days of the request. For contractor-certified claims over \$100,000, the Contracting Officer must, within 60 days, decide the claim or notify the contractor of the date by which the decision will be made. [Ref. 4: Sec. 52.233-1]

When reviewing a claim, the Contracting Officer shall:

- Review the facts pertinent to the claim;
- Secure assistance from legal and other advisors;
- Coordinate with the contract administration or contracting office; and
- Prepare a written decision that shall include a:
 - Description of the claim or dispute;
 - Reference to the pertinent contract terms;
 - Statement of the factual areas of agreement and disagreement;
 - Statement of the Contracting Officer's decision, with supporting rationale; and
 - Demand for payment in all cases where the decision results in a finding that the contractor is indebted to the Government.
[Ref. 4: Sec. 33.211]

Additionally, the FAR requires the following statement to be included in all final decisions rendered by the Contracting Officer:

This is the final decision of the Contracting Officer. You may appeal to the agency board of contract appeals. If you decide to appeal, you must, within 90 days from the date you receive this decision, mail or otherwise furnish written notice to the agency board of contract appeals and provide a copy to the Contracting Officer from whose decision this appeal is taken. The notice shall indicate that an appeal is intended, reference this decision, and identify the contract by number. With regard to appeals to the agency

board of contract appeals, you may, solely at your election, proceed under the board's small claim procedure for claims of \$50,000 or less or its accelerated procedure for claims of \$100,000 or less. Instead of appealing to the agency board of contract appeals, you may bring an action directly in the United States Court of Federal Claims...within 12 months of the date you receive this decision. [Ref. 4: Sec. 33.101]

The Contracting Officer's decision on all claims is considered "final and conclusive and not subject to review by any forum unless an appeal or suit is timely commenced." [Ref. 21: Sec. 605] Under the Contract Disputes Act, only contractors, not the Government, are given the right to appeal the Contracting Officer's final decision. The Government will be bound to the decision rendered by the Contracting Officer.

The contractor must obtain a written final decision from the Contracting Officer before appealing the decision to the Board of Contract Appeals or U.S. Court of Federal Claims. If the Contracting Officer fails to issue a decision within the required time periods specified, the claim will be deemed to have been denied by the Contracting Officer, and the contractor will then be authorized to file an appeal to the appropriate board or court.

Once a Contracting Officer's final decision is received by a contractor, the Contract Disputes Act allows the contractor to litigate disputes in either the U.S. Court of Federal Claims or the appropriate Board of Contract Appeals.

A contractor can expect to receive a just decision regardless of the forum in which it prefers to litigate its claim. Both forums provide essentially the same jurisdiction and remedies, however, contractors should consider several factors before deciding in which forum to file an appeal. The contractor should consider such factors as: chance of success, disruption of operations, cost of litigation, desire to create a precedent, formality of the proceedings, and the impact of findings and legal conclusions in final decisions on future litigation. [Ref. 20: p. 1305]

The selection of the correct forum is an important decision for the contractor. Once a contractor files an appeal or brings suit against the Government, it is not allowed to change forums. Additionally, there are different time limitations for filing an appeal before a board or bringing suit in the Federal Court. The contractor has 90 days in which to file an appeal of the Contracting Officer's final decision to a Board of Contract Appeals, and has 12 months (one year) in which to file suit in the U.S. Court of Federal Claims.

The contractor must choose one forum or the other, however, a late appeal to a Board of Contract Appeals would not prevent the contractor from filing suit in the U.S. Court of Federal Claims, provided the suit was still filed

within the 12-month time limit. The time clock starts for the contractor on the date the final decision is received from the Contracting Officer. [Ref. 20: pp. 1305-1307] The Government is required to prove when the contractor received the final decision. The FAR requires final decisions to be provided to the contractor "by certified mail, return receipt requested, or by any other method that provides evidence of receipt." [Ref. 4: Sec. 33.211] Untimely submissions of appeals or filing of suits will negate the contractor's option of appeal in the particular board or court.

The appeals process is an expensive and time consuming procedure for both parties involved, and an appeal of a Contracting Officer's final decision is not undertaken lightly or arbitrarily. Department of the Navy contractors appealing Contracting Officers' final decisions may appeal to the Armed Services Board of Contract Appeals or to the U.S. Court of Federal Claims.

The Armed Services Board of Contract Appeals (ASBCA) is an administrative board, designed to be more expeditious, less expensive, and less formal in its proceedings than the U.S. Court of Federal Claims. Appeals before the ASBCA are generally heard before a single administrative judge who then writes the decision. The decision is then adopted by a panel of three to five judges as the decision of the full

Board. While the Boards give full due process to all cases heard, the increase in caseload has had a negative impact on the ASBCA's ability to hear all cases expeditiously. [Ref. 20: p. 1313]

In an effort to improve efficiency in resolving disputes, the Contract Disputes Act requires Boards of Contract Appeals to include accelerated procedures for handling appeals from a decision of a Contracting Officer with a value of \$100,000 or less. It specifically provides:

The rules of each agency board shall include a procedure for the accelerated disposition of any appeal from a decision of a Contracting Officer where the amount in dispute is \$100,000 or less. The accelerated procedure shall be applicable at the sole selection of only the contractor. Appeals under the accelerated procedure shall be resolved, whenever possible, within 180 days from the date the contractor utilizes such procedure. [Ref. 21: Sec. 607(f)]

The Act also provides an expedited procedure for handling "small claims" of \$50,000 or less. Specifically:

The rules of each agency board shall include a procedure for the expedited disposition of any appeal from a decision of a Contracting Officer where the amount in dispute is \$50,000 or less. The small claims procedure shall be at the sole discretion of the contractor. Appeals under the small claims procedure shall be resolved, whenever possible, within 120 days from the date on which the contractor elects to utilize such procedure. [Ref. 21: Sec. 608(a) & (c)]

The small claims procedure expedites the appeals process by using simplified rules and are generally decided by a single designated administrative judge. Additionally,

A decision against the Government or the contractor reached under the small claims procedure shall be final and conclusive and shall not be set aside except in cases of fraud. [Ref. 21: Sec. 608(d)]

While the small claims procedure can be faster and less expensive for contractors with smaller monetary claims, it is important to note that the decision rendered will be final and not subject to further appeal.

All other decisions rendered by the ASBCA will be final, except that:

- A contractor may appeal such a decision to the United States Court of Appeals for the Federal Circuit within 120 days after the date of receipt of a copy of such decision, or
- The agency head, if he determines that an appeal should be taken, and with prior approval of the Attorney General, transmits the decision of the board of contract appeals to the Court of Appeals for the Federal Circuit for judicial review, under section 1295 of title 28, within 120 days from the date of the agency's receipt of a copy of the board's decision. [Ref. 21: Sec. 607(g)(1)]

The Federal Courts Improvement Act of 1982 amended the Contract Disputes Act to give "the Federal Circuit exclusive jurisdiction to hear Government or contractor appeals filed within 120 days of a Board of Contract Appeals decision."

[Ref. 20: p. 1315] Decisions rendered by the ASBCA concerning questions of fact are generally upheld by the Federal Circuit. Review of Board of Contract Appeals decisions is guided by:

In the event of an appeal by a contractor or the Government from a decision of any agency board pursuant to section 9 [41 USC Sec. 607], notwithstanding any contract provision, regulation, or rules of law to the contrary, the decision of the agency board on any question of law shall not be final and conclusive, but the decision on any question of fact shall be final and conclusive and shall not be set aside unless the decision is fraudulent, or arbitrary, or capricious, or so grossly erroneous as to necessarily imply bad faith, or if such decision is not supported by substantial evidence. [Ref. 21: Sec. 609(a)]

Appeals of Contracting Officer's final decisions can also be filed with the U.S. Court of Federal Claims. The U.S. Court of Federal Claims is a formal court composed of 16 independent judges. The judges are appointed by the President and serve 15 year terms. The Court sits in Washington, D.C.; however, it will hold trial at a location convenient to the parties and witnesses involved. Appeals are heard by one of the 16 independent judges who then makes a final decision. The independent judges, however, are not bound by each other's decisions. If conflicts arise regarding decisions of the individual judges, the Court of Appeals for the Federal Circuit resolves the issue. [Ref. 20: p. 1314]

Appeals heard before the U.S. Court of Federal Claims follow formal court procedures. Cases filed with this court generally take longer to be heard and decided than cases before the ASBCA, and are therefore more costly to both parties. Contractors will likely elect this forum when disputes involve matters of law, when a precedence needs to be set or when the time limit for filing with the ASBCA has elapsed.

If either the contractor or the Government is not satisfied with the decision of the U.S. Court of Federal Claims, then the dissatisfied party has the right to appeal the decision to the Court of Appeals for the Federal Circuit. The appeal must be filed within 60 days of receipt of a U.S. Court of Federal Claims decision. The Federal Circuit hears appeals directly from Boards of Contract Appeals and the U.S. Court of Federal Claims. Decisions by the U.S. Court of Federal Claims are difficult to overturn. In accordance with the Federal Rules of Civil Procedure, findings of fact by the U.S. Court of Federal Claims will only be set aside if "clearly erroneous." [Ref. 20: p. 1316]

Decisions rendered by the U.S. Court of Appeals for the Federal Circuit can be appealed to the U.S. Supreme Court. Appeals must be filed within 90 days of receipt of a Federal Circuit decision and will likely only be heard if the issues

will have a significant and far-ranging impact on Federal procurement policies. [Ref. 23: p. 18-2]

D. SUMMARY

The end of the Cold War has caused the Department of Defense to tailor its budget and force structure to meet the perceived reduction in threat to our nation's security and interests. In an effort to increase efficiency and reduce costs, the Navy is outsourcing more of the commercial activities required to support its reduced infrastructure. Service and support contracts are labor intensive efforts with a primary purpose of performing identifiable tasks rather than furnishing end items of supply. Services contracts have rapidly expanded in scope and numbers over the last ten years and accounted for over half of the Department of Defense's procurement budget in FY 1992. In an effort to ensure service contracts are awarded competitively, the Government receives the best value when spending tax payers' dollars, and inherently Governmental functions are retained in-house, Congress and the Federal Government have promulgated regulatory guidelines and statutes specifically addressing service contracts.

Occasionally, when the Navy procures services, disagreements will arise over a contractor's perceived entitlements. Contracting Officers are encouraged to settle disputes at the lowest level possible, preferably at their

level. However, not all disputes can be resolved through mutually agreeable negotiations between the parties involved. When disputes are at an impasse, contractors have the option of taking their claims to a Board of Contract Appeals or the Federal court system. Litigating service and support contract claims is very costly in both time and money and is not undertaken arbitrarily. However, Government contractors have "peace of mind" knowing they have a recourse if not satisfied with the settlement decision handed down to them by Contracting Officers.

III. DATA PRESENTATION

A. INTRODUCTION

This chapter first provides the reader with a description of the population and time period from which the disputed service and support contract cases were taken. Additionally, this chapter presents a detailed description of the methods used to collect relevant case data and the sources from which the cases were drawn. This chapter then displays the collected data in various breakdowns in an effort to identify potential trends in service contract disputes that have become the subject of litigation.

B. POPULATION AND SAMPLE DESCRIPTION

The sample population for this study consisted of 62 service contract disputes which had been decided either by the Armed Services Board of Contract Appeals (ASBCA) or the U.S. Court of Federal Claims during the period 1 October 1992 through 30 September 1997. Neither the ASBCA nor the U.S. Court of Federal Claims kept statistical breakdowns of the reasons appeals were docketed or of the type of contracts involved. Therefore, the researcher was unable to identify the total number of services contracts that were decided during the above time period. The Armed Services Board of Contract Appeals' Fiscal Year (FY) 1996 Annual Report lists the total number of all appeals docketed and

decided by the Armed Services Board of Contract Appeals for each Service component during FY 1992 through FY 1996. A copy of the ASBCA's FY 1996 Annual Report is provided in Appendix E.

C. DATA COLLECTION PLAN

First the Federal Legal Information Through Electronics (FLITE) site was contacted as a source of the desired data. FLITE is an activity of the Department of Defense, operated by the United States Air Force Judge Advocate General's Office. FLITE is a computerized database and legal research service available to all Department of Defense personnel and activities. For the purposes of this thesis, FLITE proved not to be of any substantive value, mainly due to the difficulty of requesting searches over the telephone or through electronic mail. Additionally, the data and court cases that the researcher actually obtained through FLITE were not of significant value and each search had to be submitted separately. The researcher could have obtained a remote access account, however, one was not obtained due to substantial cost of the connection fee and time delay involved in obtaining approval.

A second approach was to search the LEXIS legal database through the library at the Naval Postgraduate School. LEXIS contains full text versions of all ASBCA and U.S. Court of Federal Claims decisions. However, one of the

most significant weaknesses of LEXIS is that the cases contained in the database are not indexed in any way. The researcher tried numerous searches with various search criteria and was able to identify a total of 197 cases relating to Department of the Navy service and support contracts. To keep the search as generic and as encompassing as possible, the researcher did not target any specific buying command, type of activity, or type of service procured.

After a thorough review of all 197 cases originally believed to be applicable, only 62 met all of the researcher's criteria for this study. The remaining 135 cases were either duplicate cases that were not identified in the initial screening process or were cases that turned out to be not relevant to this study. Appendix F summarizes the LEXIS search criteria used by the researcher and identifies the number of cases, by court, originally identified and also the number of cases actually relevant to this study. The 62 individual cases used in this study are listed alphabetically by name in Appendix G.

Once the requisite cases were collected, they were categorized and various data elements were captured for use in analyzing the cases and identifying potential weaknesses in Navy contracting practices. In an effort to standardize the type of data collected from each case, the researcher

developed a data collection form that included the following data fields:

- Case Name
- Case Number
- Date of Court Decision
- Court (ASBCA or U.S. Court of Federal Claims)
- Branch of Service (Navy or Marine Corps)
- Awarding Agency
- Location of Performance
- Period of Performance
- Contract Number
- Contract Award Date
- Method of Award (IFB or RFP)
- Type of Service Performed
- Dollar Value of Contract
- Dollar Value of Dispute
- Reason for Dispute
- Court's Decision
- Weaknesses Identified

The above data elements were collected from the full text versions of the individual cases identified and were ideal for group data analysis. A copy of the full sample

data collection form used by the researcher is provided as Appendix H.

D. PRESENTATION OF DATA

After all of the cases were read, classified, and data collection forms were completed, the researcher summarized and entered all of the collected data into a spreadsheet. A copy of selected case data is provided in Appendix I. The spreadsheet allowed the researcher to sort and view the data in different ways in an attempt to identify potential trends in service contract disputes that have become the subject of litigation. The results of the researcher's data collection efforts are provided below.

1. Number of Services Contracts Awarded

With the assistance of the staff at the Procurement Management Reporting System (PMRS) Help Desk, a contractor hired by the Navy to manage the PMRS system and provide customer assistance on system inquiries and requests for information, the researcher was able to calculate the total number of services contracts awarded each fiscal year beginning with FY 1991. The PMRS database began collecting data in FY 1991 and reflects data input from Individual Contracting Action Reports (DD Form 350) submitted by the various agencies within the Department of the Navy. The numbers reported could possibly be influenced by the fact that Individual Contracting Action Reports are filled out

for each contract action, including contract modifications and delivery orders.

The researcher would also like to point out that many of the litigated cases decided within the time frame of this study (1 October 1991 to 30 September 1997) were actually awarded prior to FY 1991 in which data collection of this type began to be kept electronically and made readily searchable. Therefore, the researcher is unable to make any type of distinct correlation between the number of service and support contracts awarded in a particular year and the number of service and support contract disputes decided through litigation during the time period of this study.

With the above limitations considered, the total number of service and support contracts awarded each fiscal year by Department of the Navy contracting agencies from 1 October 1991 through 30 September 1997 is presented in Table 1 below.

NUMBER OF SERVICES CONTRACTS

Fiscal Year	Total Services Contracts
1991	77,360
1992	83,104
1993	84,525
1994	88,739
1995	91,356
1996	89,632
1997	82,691
TOTAL	597,407

Table 1

Source: Ref. 24

From the figures presented in Table 1, the reader can see that there has been a relative increase in the total number of service and support contracts awarded by Department of the Navy contracting agencies over FY 1991 levels, with peak increases occurring during FY 1994 through FY 1996. The results are also presented graphically in Figure 1 below to illustrate this point.

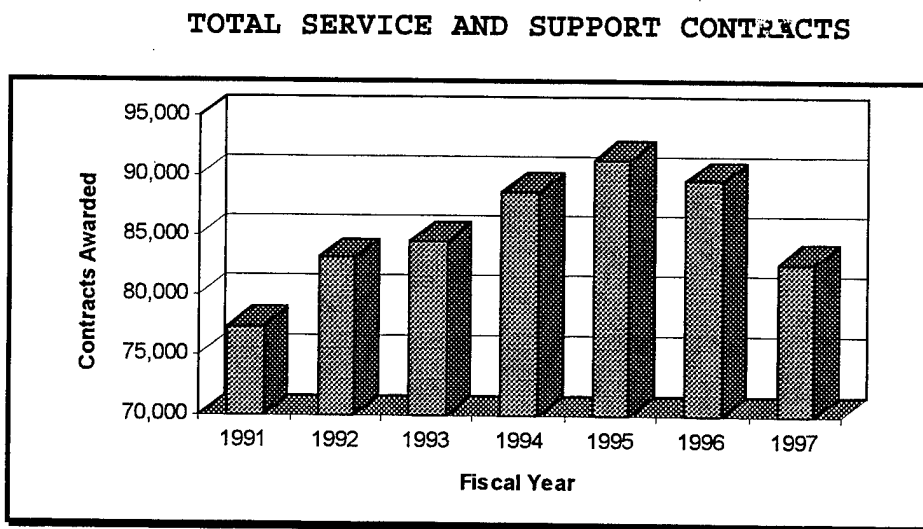


Figure 1
Source: Ref. 24

2. Litigated Service and Support Contracts

After a thorough search of the LEXIS database, in both the ASBCA and U.S. Court of Federal Claims data files, the researcher was able to identify a total of 62 service and support contracts that had items in dispute between the Department of the Navy and the contractor who performed the

service under each contract. All of the 62 cases were litigated either in the ASBCA or U.S. Court of Federal Claims court system.

Of the 62 court cases studied, the researcher found that there were 54 different contractors who had appealed their disputes. Additionally, five of the 54 contractors had two or more different court cases identified within the 62 total cases studied. In other words, 9.26 percent of the contractors had multiple court cases decided within the scope of this study while 90.74 percent of the contractors had only one case decided. Figure 2 provides the reader with a graphical representation of this finding.

DISTRIBUTION OF CONTRACTORS

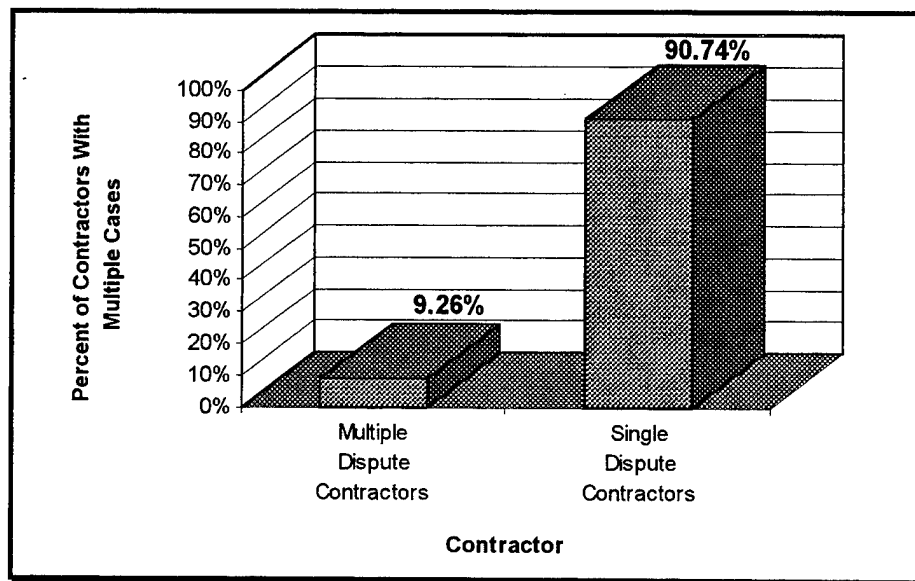


Figure 2

Source: Developed by researcher

The five contractors with multiple cases had 13 of the 62 total cases reviewed. Thus 20.97 percent of the total cases identified were for repeat contractors, while 79.03 percent of the contractors only had one relevant case decided between 1 October 1991 and 1 October 1997. These results are depicted graphically in Figure 3.

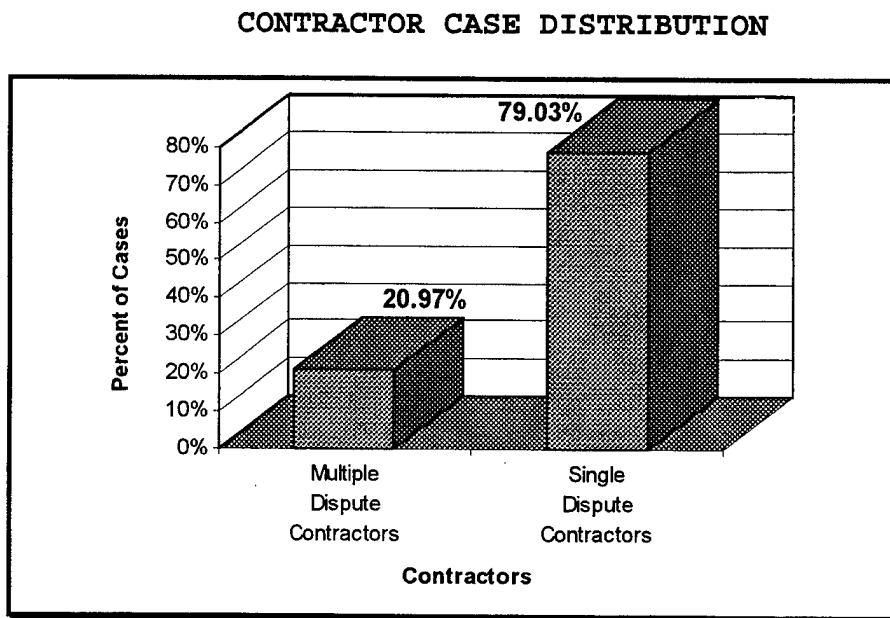


Figure 3
Source: Developed by researcher

3. Case Decision Date Range Data

The cases used in this study were limited to those that were decided either in the ASBCA or U.S. Court of Federal Claims between the period 1 October 1991 (the beginning of

FY 1992) and 30 September 1997 (the end of FY 1997). The oldest case used in this study was decided on 16 October 1991 while the most recent case relevant to this study was decided on 28 August 1997. Additional relevant cases might have been decided after 28 August 1997, but were not available through LEXIS due to the time lag of entering decided court cases into the LEXIS database.

The number of decisions involving service and support contract cases identified by the researcher appear to be declining in each year of the study. Table 2 displays the number and percentage of the 62 cases decided during both the calendar and fiscal years researched in this thesis.

RELEVANT CASES PER FISCAL YEAR

Fiscal Year	Cases Per Fiscal Year	Percent of Cases
1991	N/A	N/A
1992	13	21
1993	11	17.7
1994	10	16.1
1995	9	14.5
1996	7	11.3
1997	12	19.4

Table 2

Source: Developed by researcher

The above data are also presented graphically in Figure 4 below to illustrate the distribution in the number of litigated service and support contracts over the last six fiscal years.

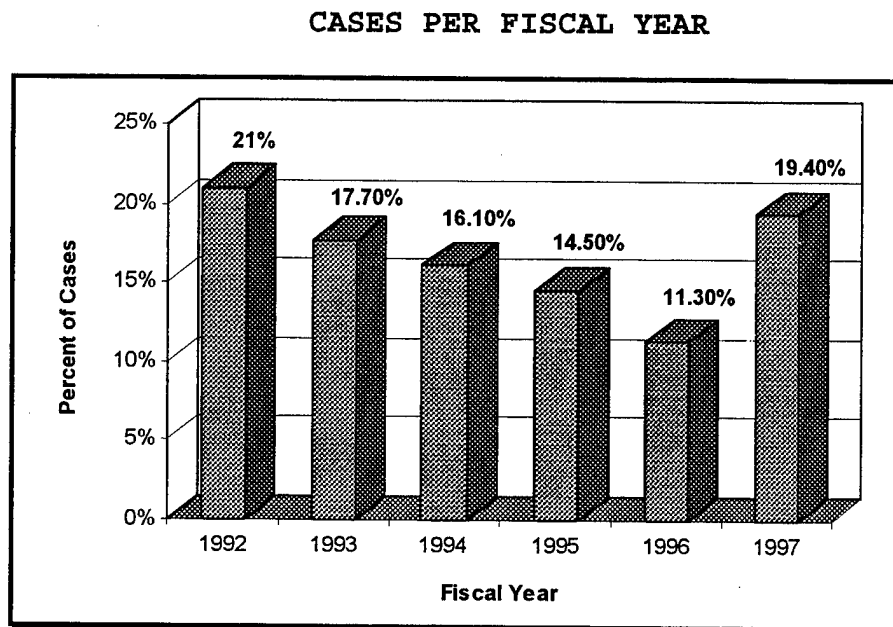


Figure 4
Source: Developed by researcher

4. Court Forums Chosen

When efforts to resolve a claim in dispute have reached an impasse, the Contracting Officer will issue a final decision by the Government regarding the outcome of the claim. When the contractor is dissatisfied with the

Government's ruling on the claim, the contractor can appeal the decision to either the ASBCA or U.S. Court of Federal Claims. The researcher's data collection was limited to decisions appealed to these two forums. The researcher identified 62 total cases meeting all of the search criteria identified in Chapter I.

The majority of the service and support cases identified were appealed to the ASBCA. The researcher determined that 57 of the 62 cases identified in this study, or 92 percent, were appealed to the ASBCA in hope of obtaining a more favorable ruling than the one received from the Contracting Officer. The researcher was only able to identify five cases that had been appealed to the U.S. Court of Federal Claims. This equates to only eight percent of the 62 cases relevant to this study. Table 3 and Figure 5 summarize the above data showing that the majority of the cases researched were decided by the ASBCA.

FREQUENCY OF COURT FORUM CHOSEN

Court Forum Chosen	Number of Cases	Percent
ASBCA	57	92
U.S. Court of Federal Claims	5	8

Table 3

Source: Developed by researcher

COURT FORUM CHOSEN FOR APPEALS

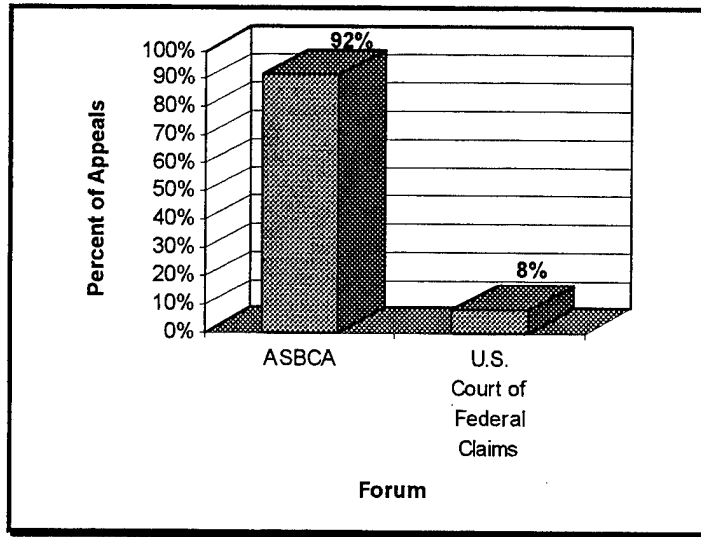


Figure 5

Source: Developed by researcher

5. Types of Services Performed

Service and support contracts are generally labor intensive contracts that utilize the time and effort of a contractor's personnel instead of the contractor producing an end item of supply. As discussed previously in Chapter II, the Department of the Navy routinely procures a large amount of services to support its infrastructure as a means to reduce overall costs. The data collected by the researcher shows that just as there are thousands of different types of services contracted out by the Department of the Navy each year, there are also numerous different types of services that enter into litigation.

The data collected by the researcher distinguished 34 different types of services distributed among the 62 court cases identified in this study. The types of services involved in this study and the frequency with which they appeared are summarized in Table 4. The 34 different types of services indicates that 54.8 percent of the 62 total litigated cases studied were for different types of services.

While more than half of the litigated contract disputes were for different types of services, the data also identified eight particular types of services that were represented in two or more of the total relevant cases. The data indicate 45.2 percent of the court cases were for the same eight types of services involved in multiple disputes. The eight types of services that were involved in more than one litigation case are provided in Table 5. The frequency with which each of the eight types of services appears is presented graphically in Figure 6.

6. Reasons for Dispute/Claim

Due to the nature and complexity of all of the different rules and regulations that apply to contracting with the Government, there are bound to be numerous areas where disputes can arise. The data collected from the 62

TYPES OF SERVICES

Service	Frequency	Percent
Aircraft Maintenance Services	2	3.3
Base Engineering Systems, Technical	1	1.6
Base Maintenance Support	1	1.6
Base Operating Support Services	7	11.3
Collection/Transportation of Lab Samples	1	1.6
Computer Maintenance Services	1	1.6
Dredging Services	1	1.6
Emergency Medical Care Services	1	1.6
Engineering and Technical Services	1	1.6
Engineering Support Services	1	1.6
Facilities Maintenance Services	1	1.6
Fast Food Concession	1	1.6
Housing Maintenance Services	4	6.5
Husbanding Services	1	1.6
Janitorial Services	8	12.9
Maintenance and Repair Services	1	1.6
Marine Decking Repair/Habitability Services	1	1.6
Mess Attendant Services	7	11.3
Moving Services	4	6.5
Morale Welfare and Recreation (MWR) Services	2	3.3
OB/GYN Services	1	1.6
Overhaul Services	1	1.6
Pharmacy Technician Services	1	1.6
Removal of Construction Debris	1	1.6
Repair/Overhaul of Electronic Equipment	1	1.6
Security Guard Services	1	1.6
Shelf Stocking Services	1	1.6
Shipyard Support Services	1	1.6
Telecommunication Services	1	1.6
Time and Materials Services	1	1.6
Training Services	2	3.3
Transportation Services	1	1.6
Vehicle Repair Services	1	1.6
Warehousing Services	1	1.6

Table 4

Source: Developed by researcher

SERVICES INVOLVED IN MULTIPLE CASES

Recurring Service	Frequency	Percent of Total Cases
Aircraft Maintenance Services	2	3.3
Base Operating Support Services	7	11.3
Housing Maintenance Services	4	6.5
Janitorial Services	8	12.9
Mess Attendant Services	7	11.3
Moving Services	4	6.5
Morale Welfare and Recreation Services	2	3.3
Training Services	2	3.3

Table 5

Source: Developed by researcher

cases by the researcher clearly identified 17 different reasons that service and support contracts were disputed and, ultimately, resulted in litigation. This means that 27.4 percent of the cases identified were disputed for different reasons, while 72.6 percent of the litigated cases were disputed for reasons identified in two or more cases. The 17 different reasons the identified service and support contracts were disputed and the frequency with which they appeared are summarized in Table 6.

The data identified ten recurring reasons that service and support contracts were disputed by the parties involved, and ultimately entered into litigation. The data also indicated 88.8 percent of the 62 cases involved one or more of the ten major recurring contract dispute reasons. The

ten recurring contract dispute reasons that appear in the data are summarized in Table 7 for easy identification by the reader. The frequency with which each of the ten recurring contract dispute reasons appear in this study is presented graphically in Figure 7.

RECURRING TYPES OF SERVICES

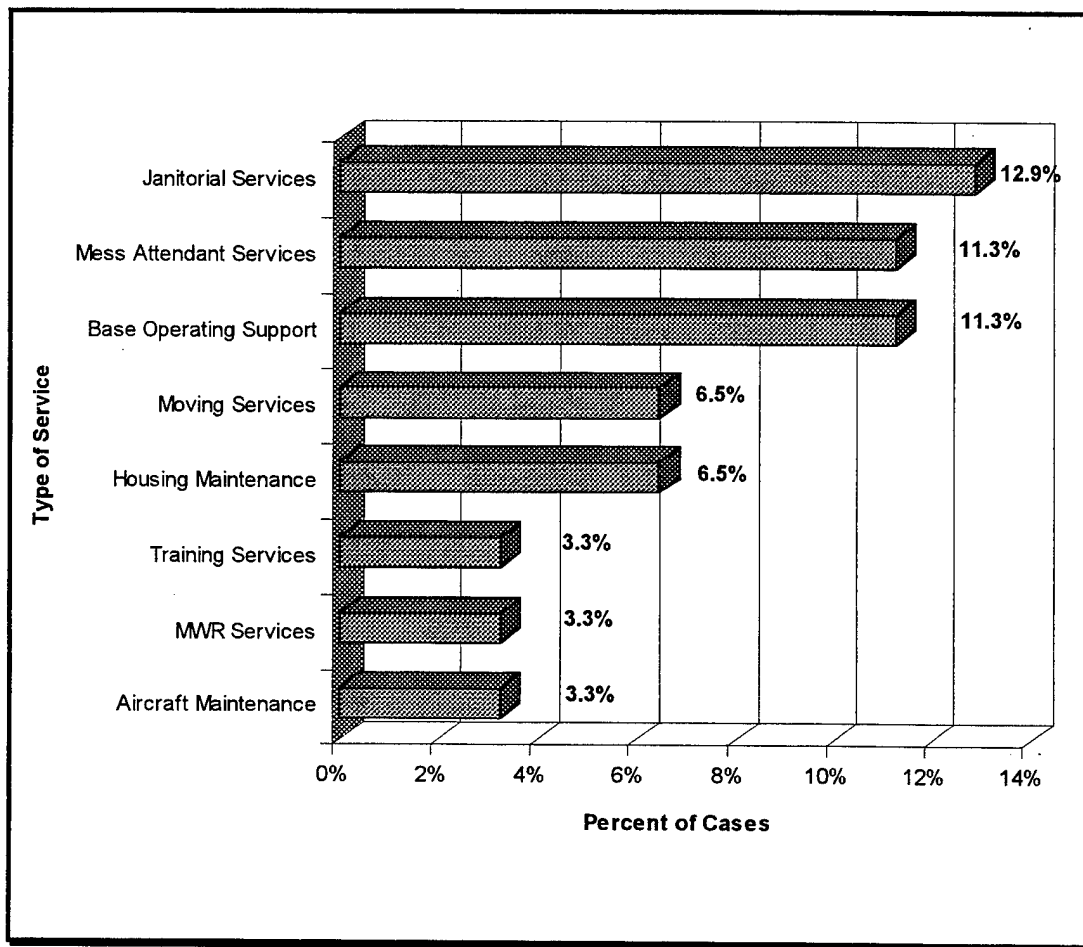


Figure 6
Source: Developed by researcher

REASONS FOR DISPUTE/CLAIM

Reason	Frequency	Percent of Cases
Contract Options Not Exercised Properly	3	4.9
Cost Overrun	2	3.2
Delay Caused by the Government	1	1.6
Demand For Payment by the Government	2	3.2
Disallowed Costs by the Government	1	1.6
Estimated Contract Quantity Not Ordered	3	4.9
Extra Work Performed	15	24.2
Government-Furnished Property (GFP)	1	1.6
Repair Costs		
Inaccurate Government Estimates/Information	5	8.1
Minimum Contract Quantity Not Ordered	1	1.6
Orders Placed Without Funding	1	1.6
Payment of Actual Costs Versus Price Bid	1	1.6
Pre-award Bid Protest to Prevent Prior Termination	1	1.6
Price Reductions	5	8.1
Termination For Convenience (T4C)	2	3.2
Termination For Default (T4D)	6	9.7
Wage Rate Increases/Issues	12	19.3

Table 6

Source: Developed by researcher

RECURRING REASONS FOR DISPUTE/CLAIM

Reason	Frequency	Percent of Cases
Contract Options Not Exercised Properly	3	4.9
Cost Overrun	2	3.2
Demand For Payment by the Government	2	3.2
Estimated Contract Quantity Not Ordered	3	4.9
Extra Work Performed	15	24.2
Inaccurate Government Estimates/Information	5	8.1
Price Reductions	5	8.1
Termination For Convenience (T4C)	2	3.2
Termination For Default (T4D)	6	9.7
Wage Rate Increases/Issues	12	19.3

Table 7

Source: Developed by researcher

RECURRING REASONS FOR DISPUTES

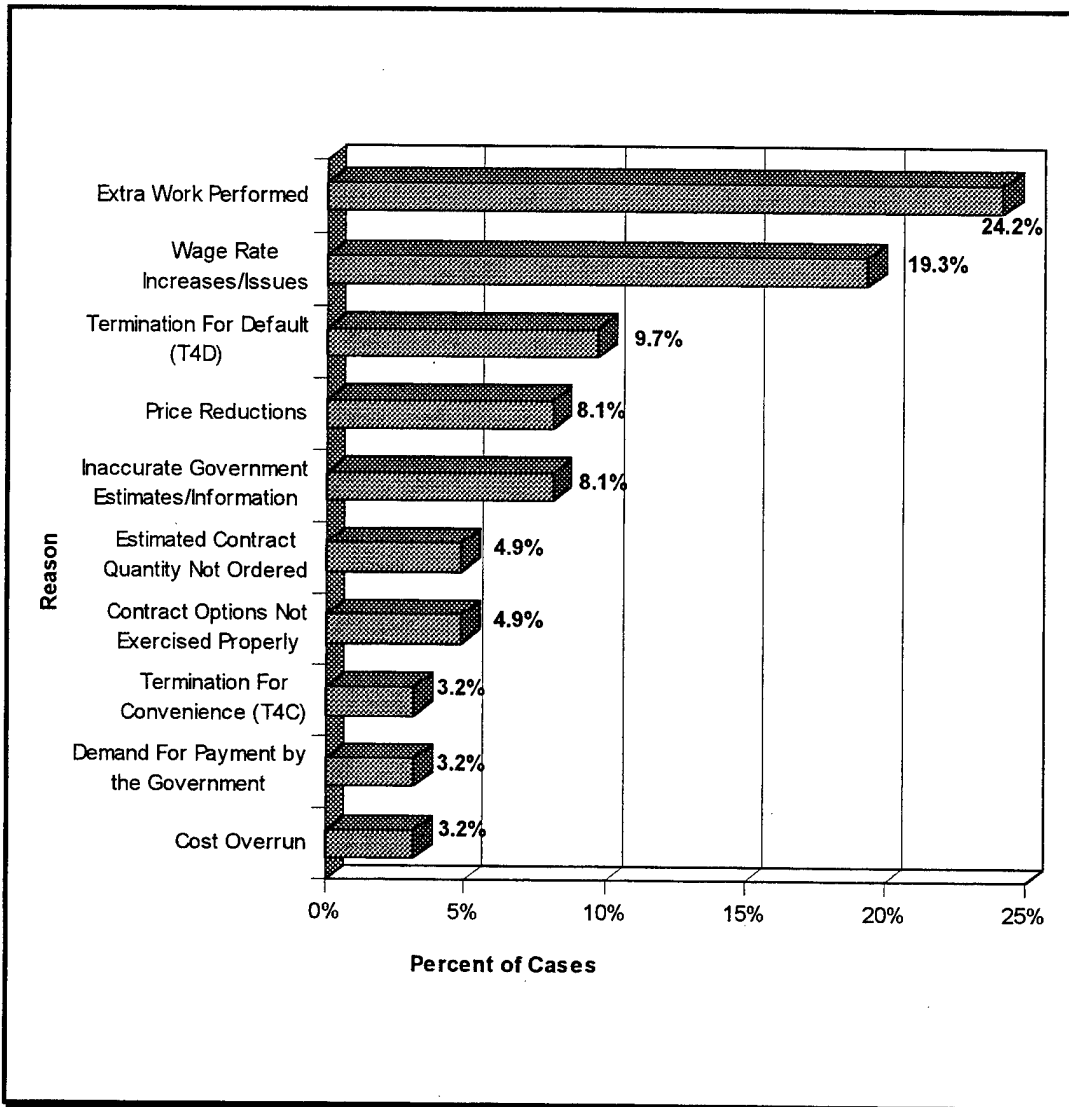


Figure 7

Source: Developed by researcher

7. Sustained versus Denied Court Decisions

When a contractor receives a final decision on a disputed claim from a Contracting Officer that is perceived to be less than fair, the contractor must decide whether or

not to appeal the decision. Appealing the Contracting Officer's final decision to either the ASBCA or U.S. Court of Federal Claims can be costly in both time and money for all parties involved. The contractor must weigh the amount involved in the dispute and the hoped for favorable decision against the costs involved with the appeal and the possibility the appeal will be denied. Even if a contractor wins the appeal, the cost of the appeal could exceed the amount recovered.

The data collected from the 62 litigated Department of the Navy service and support contracts indicated that 47 cases, or 75.8 percent of the appeals, were denied in their entirety. Additionally, another four, or six and one-half percent, of the disputed cases were partially denied and partially sustained. So while the contractor might have been able to recover part of the claim, a portion of the claim was also denied by the court.

While the researcher's data clearly showed that more than three quarters of the appeals were denied, the data also identified seven appeals that were fully sustained in the contractors' favor. This represented 11.2 percent of all Department of the Navy service and support contract litigations identified by the researcher.

The results of the study also identified four cases, or six and one-half percent, which had been stayed, or put on

hold, for various reasons. At the time of this thesis writing, all four cases were still unresolved; therefore, the outcomes were unknown.

A statistical breakdown of the case decisions is presented numerically in Table 8 and graphically in Figure 8.

OUTCOME OF APPEALS

Court Decision	Frequency	Percent of Cases
Denied	47	75.8
Sustained	7	11.2
Partially Sustained	4	6.5
Stayed	4	6.5

Table 8

Source: Developed by researcher

COURT RULING ON APPEALS

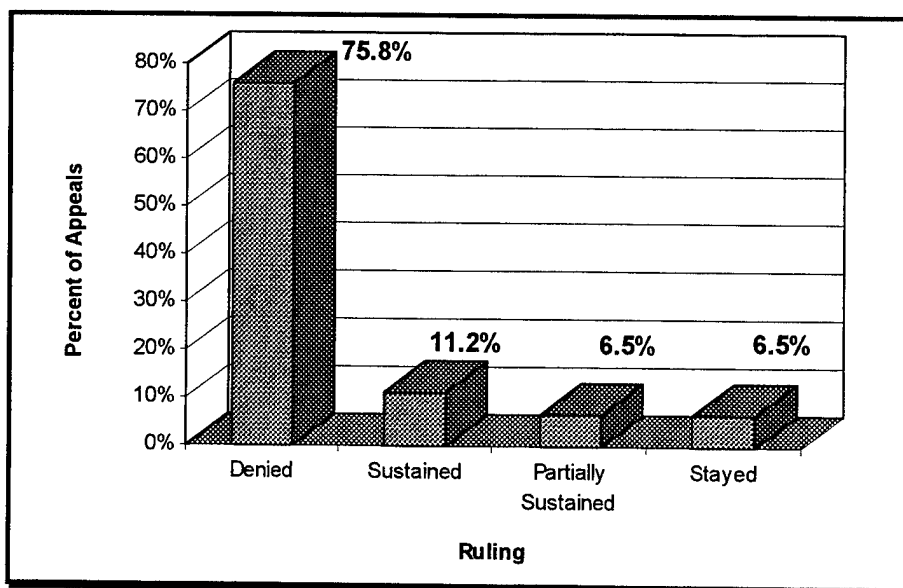


Figure 8

Source: Developed by researcher

8. Type of Service versus Court Decision

a. Aircraft Maintenance Services

Two court cases were identified concerning services for aircraft maintenance. One appeal was heard by the ASBCA while the other appeal was heard by the U.S. Court of Federal Claims. Both appeals (100 percent) were denied.

b. Base Engineering Systems, Technical

One court case concerning base engineering systems, technical service was identified by the researcher. The appeal was heard by the ASBCA and was partially sustained in the contractor's favor, while part of the appeal was also denied. The parties involved were to determine the amount of the sustainment. No data were available on the amount sustained.

c. Base Maintenance Support

The researcher's data identified one court case associated with base maintenance support services. The appeal was heard by the ASBCA and was denied.

d. Base Operating Support Services

Seven litigated contract disputes were identified concerning base operating support services. All appeals were heard by the ASBCA. Two appeals (28.6 percent) were

sustained in the contractor's favor while five of the seven appeals (71.4 percent) were denied in their entirety.

e. Collection and Transportation of Lab Samples

One appeal to the ASBCA was identified for services concerning the collection and transportation of Navy lab samples. The appeal was denied by the Board.

f. Computer Maintenance Services

One case concerning computer maintenance services was identified in the researcher's data. The Contracting officer's final decision was appealed to the U.S. Court of Federal Claims; however, the appeal was denied.

g. Dredging Services

One litigated case concerning dredging services was appealed to the U.S. Court of Federal Claims. The parties wanted a summary judgment by the Court, but the Court wanted a trial hearing. The decision was stayed until after a trial hearing was conducted. The Court's decision has not yet been rendered.

h. Emergency Medical Care Services

One appeal relating to emergency medical care services was found to be relevant to this study. The appeal was heard by the ASBCA. The decision was in the Government's favor and the contractor's appeal was denied.

i. Engineering and Technical Services

One case concerning engineering and technical services procured by the Navy was docketed with the ASBCA. The Board denied the appeal.

j. Engineering Support Services

One appeal to the ASBCA relating to engineering support services was identified. The Government's final decision was upheld and the appeal was denied.

k. Facilities Maintenance Services

The researcher identified one dispute over facilities maintenance services which was appealed to the ASBCA. The appeal, however, was denied.

l. Fast Food Concession

One dispute over services for a fast food concession was identified. The Government's decision was appealed to the ASBCA. A final decision by the board has been stayed, until additional information is presented.

m. Housing Maintenance Services

Four litigated disputes were identified for housing maintenance service contracts. One appeal was filed with the U.S. Court of Federal Claims and three disputes were appealed to the ASBCA. All four disputes were denied.

n. Husbanding Services

One dispute over husbanding services was appealed to the ASBCA and the appeal was denied.

o. Janitorial Services

The collected data identified eight litigated claims associated with janitorial services. All eight claims were appealed by the contractors to the ASBCA. Seven of the eight appeals (87.5 percent) were denied in their entirety. One of the appeals (12.5 percent) was stayed due to a technical error by the contractor. The ruling by the ASBCA had not been made at the time of this study.

p. Maintenance and Repair Services

One dispute relating to services for the maintenance and repair of a hospital fire alarm system was determined to apply to this study. The claim was appealed to the ASBCA by the contractor; however, the Board ultimately denied the appeal.

q. Marine Decking Repair / Habitability Services

One case concerning a dispute over marine decking repair / habitability services was docketed with the ASBCA. The Board denied the appeal and ruled in the Government's favor.

r. Mess Attendant Services

Seven litigated disputes over mess attendant services provided to the Department of the Navy were identified by the researcher. All appeals were made to the ASBCA. Five of the seven appeals (71.4 percent) were denied by the Board. One appeal was sustained in favor of the contractor. The remaining appeal was partially sustained in favor of the contractor and partially denied.

s. Moving Services

Four litigated claims for moving services were identified. All four claims were appealed to the ASBCA. Three of the four appeals (75 percent) were denied in their entirety. One appeal (25 percent), however, was partially sustained in favor of the contractor and partially denied.

t. Morale Welfare and Recreation (MWR) Services

Two cases regarding MWR services were identified. Both claims were appealed to the ASBCA. One appeal was sustained and one claim was denied.

u. OB/GYN Physician Services

One litigated dispute over OB/GYN physician services was identified. The claim was appealed to the ASBCA and was ultimately denied.

v. *Overhaul Services*

One litigated dispute regarding overhaul services was identified. The claim was appealed to the ASBCA and was ultimately denied.

w. *Pharmacy Technician Services*

One litigated dispute over pharmacy technician services was identified. The claim was appealed to the ASBCA and was ultimately denied.

x. *Removal of Construction Debris*

One litigated dispute regarding removal of construction debris was identified. The appeal went before the ASBCA for a decision and was denied in its entirety.

y. *Repair of Electronic Equipment*

One litigated dispute regarding services for the repair of electronic equipment was identified. The contractor appealed to the ASBCA; however, the appeal was denied.

z. *Security Guard services*

One litigated dispute over security guard services was identified. The appeal was made to the ASBCA and was sustained in favor of the contractor by the Board.

aa. Shelf Stocking Services

One litigated dispute over shelf stocking services was identified. The appeal was denied by the ASBCA.

bb. Shipyard Support Services

One litigated dispute over shipyard support services was identified. The appeal went before the ASBCA and was denied in its entirety.

cc. Telecommunication Services

One litigated dispute over telecommunication services was identified. The contractor appealed the Contracting Officer's decision to the U.S. Court of Federal Claims. The Court, however, denied the appeal.

dd. Time and Materials Services

One litigated dispute over a time and materials service contract involving the services of riggers, crane operators, machinists, welders, and shipfitters was identified by the researcher. The appeal was made to the ASBCA and was denied.

ee. Training Services

Two litigated disputes over training services were identified. Both claims were appealed to the ASBCA. One appeal was sustained and one appeal was denied in its entirety.

ff. Transportation Services

One litigated dispute over transportation services was identified. The appeal was made to the ASBCA. The Board partially sustained the appeal and denied the remainder.

gg. Vehicle Repair Services

One litigated dispute over vehicle repair services was identified. The appeal was filed with the ASBCA with both parties requesting a summary judgment. The Board required the case to go to full trial and has not rendered a final decision at this time.

hh. Warehousing Services

One litigated dispute regarding warehousing services was identified. The claim was docketed to the ASBCA and the appeal was denied in its entirety.

9. Reason for Dispute/Claim versus Court Decision

a. Contract Options Not Exercised Properly

Three appeals involving claims against the Government for improperly exercising contract options were identified. Two of these appeals (66.7 percent) were denied and one appeal (33.3 percent) was sustained.

b. Cost Overrun

Two appeals involving cost overruns were identified. Both of the contractors' appeals (100 percent) were denied.

c. Delay Caused by the Government

One appeal for costs due to a Government caused delay was identified. The decision was stayed until after a trial hearing was conducted. A final decision had not been issued at the time of this study.

d. Demand for Payment by CO

Two appeals from the Government's demand for payment were identified. One appeal was denied and one appeal was sustained.

e. Disallowed Costs by the Government

One appeal for disallowed costs was identified and the appeal was denied.

f. Estimated Contract Quantity Not Ordered

Three instances of appeals over estimated contract quantities not being ordered were identified. All three appeals (100 percent) were denied.

g. Extra Work Performed

There were 15 appeals identified regarding extra work claimed by contractors. Twelve of the appeals (80

percent) were denied, one of the appeals (six and two-thirds percent) was sustained, and two of the appeals (13.3 percent) were partially sustained in favor of the contractors and also partially denied.

h. Government-Furnished Property (GFP) Repair Costs

One appeal associated with the cost of GFP repair parts was identified. The appeal was denied.

i. Inaccurate Government Estimates/Information

Five appeals involving inaccurate Government estimates/information were identified. Three of the appeals were denied (60 percent), one appeal was sustained (20 percent), and one appeal was stayed (20 percent) with no final decision available.

j. Minimum Contract Quantity Not Ordered

One appeal involving minimum quantities not being ordered in accordance with the terms of the contract was identified. The appeal was sustained.

k. Orders Placed Without Funding

One appeal involving the placement of orders without appropriate funding was identified. The appeal was partially sustained in favor of the contractor and partially denied.

1. *Payment of Actual Costs Versus Price Bid*

One appeal for the payment of a contractor's actual costs incurred instead of the price the contractor bid was identified. The appeal was denied in its entirety.

m. *Pre-award Bid Protest to Prevent Prior Termination for Convenience (T4C)*

One appeal of the award of a new contract was identified. The appeal was denied.

n. *Price Reductions*

Five appeals involving contract price reductions were identified. Four of the five appeals (80 percent) were denied in their entirety. One of the appeals (20 percent) was partially sustained in favor of the contractor and partially denied.

o. *Termination for Convenience (T4C)*

Two appeals involving the termination of a contract for the Government's convenience were identified. Both of the appeals (100 percent) were denied.

p. *Termination for Default (T4D)*

Six appeals were identified involving the Government terminating contracts for default. Five of the six appeals (83.3 percent) were denied. One of the six appeals (16.7 percent) was stayed with no final decision available at the time of this study.

q. Wage Rate Increases/Issues

There were 12 appeals identified involving Service Contract Act wage rate increases/issues. Eight of the 12 appeals (67 percent) were denied in their entirety; two of the appeals (17 percent) were sustained in favor of the contractor; one appeal (eight percent) was partially sustained in the contractor's favor and also partially denied; and one appeal (eight percent) was stayed with no final decision available at the time of this study.

10. Dollar Value of Claim

The court cases identified by the researcher did not all contain the dollar value of the appeal. The researcher was able to identify the amount in dispute in 46 (74.2 percent) of the 62 cases. As such, the following data are representative of approximately 75 percent of the cases studied.

a. Range of Dollar Values

The range of dollar values involved in the 62 claims studied in this thesis was quite large. The lowest dollar value appealed was \$1,546.60 and involved moving services. The largest dollar value of all the claims was \$14,131,828.00 and was related to aircraft maintenance services. Additionally, 84.7 percent of all claims with a

known dollar value were under \$500,000.00. Tables 9 and 10 and Figures 9 and 10 summarize the dollar range of claims.

b. Average Dollar Value of Claim

The mean value of the appeals involved in this study was \$688,767.62. (These results are slightly skewed due to several multi-million dollar claims included in the available data.)

DOLLAR RANGE OF CLAIMS

Dollar Range	Number of Claims	Percent of Claims	Cumulative Percent
\$0 - \$10,000	4	8.7%	8.7%
\$10,001 - \$25,000	5	10.9%	19.6%
\$25,001 - \$50,000	10	21.7%	41.3%
\$50,001 - \$100,000	10	21.7%	63.0%
\$100,001 - \$500,000	10	21.7%	84.7%
\$500,001 - \$5,000,000	6	13.0%	97.7%
\$5,000,001 - \$15,000,000	1	2.3%	100.0%

Table 9

Source: Developed by researcher

CUMULATIVE DOLLAR RANGE

Dollar Range of Claim	Cumulative Percent
\$0 - \$500,000	84.7%
\$500,001 - \$15,000,000	15.3%

Table 10

Source: Developed by researcher

DOLLAR DISTRIBUTION OF CLAIMS

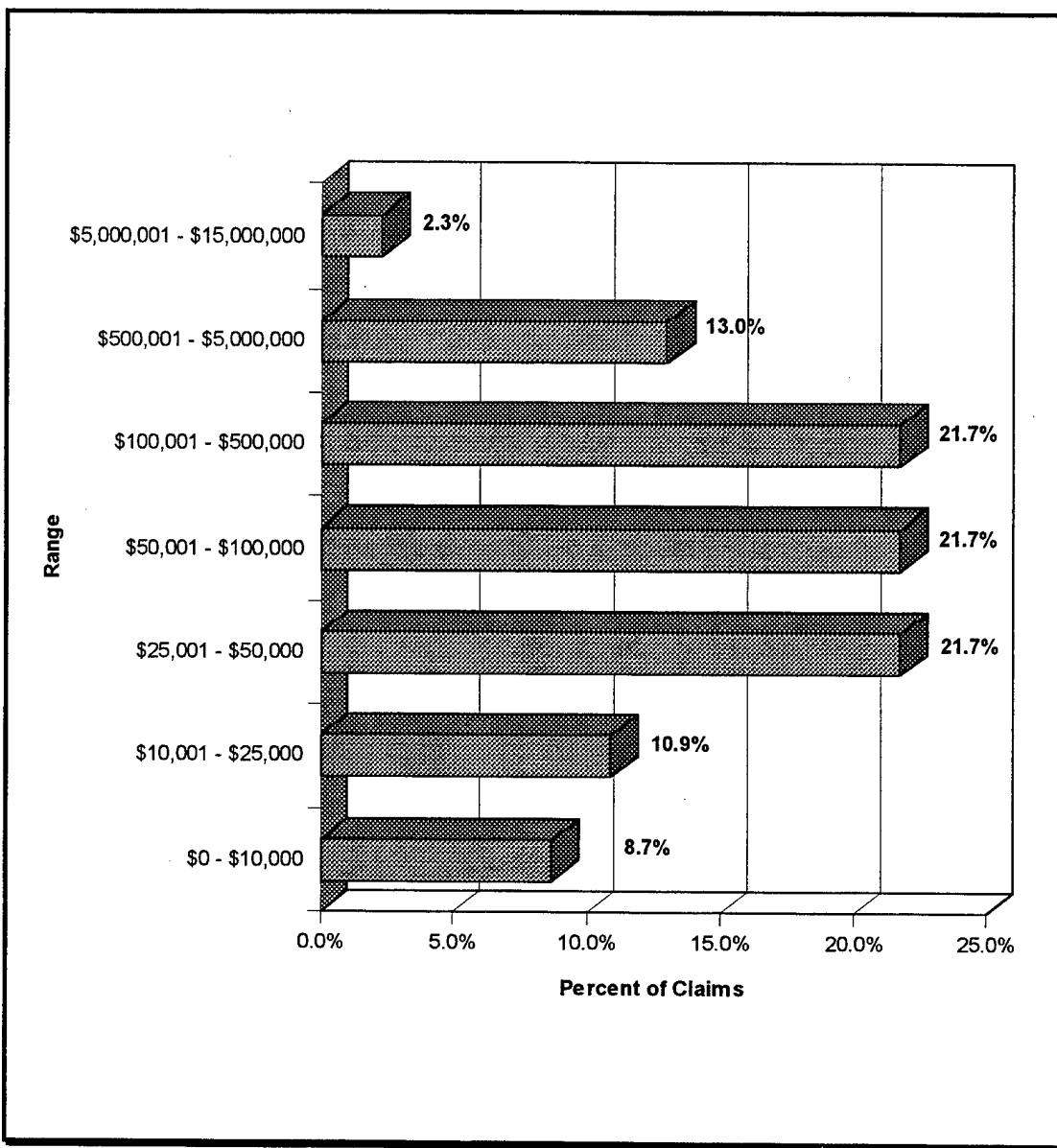


Figure 9

Source: Developed by researcher

CUMULATIVE DOLLAR RANGE OF CLAIMS

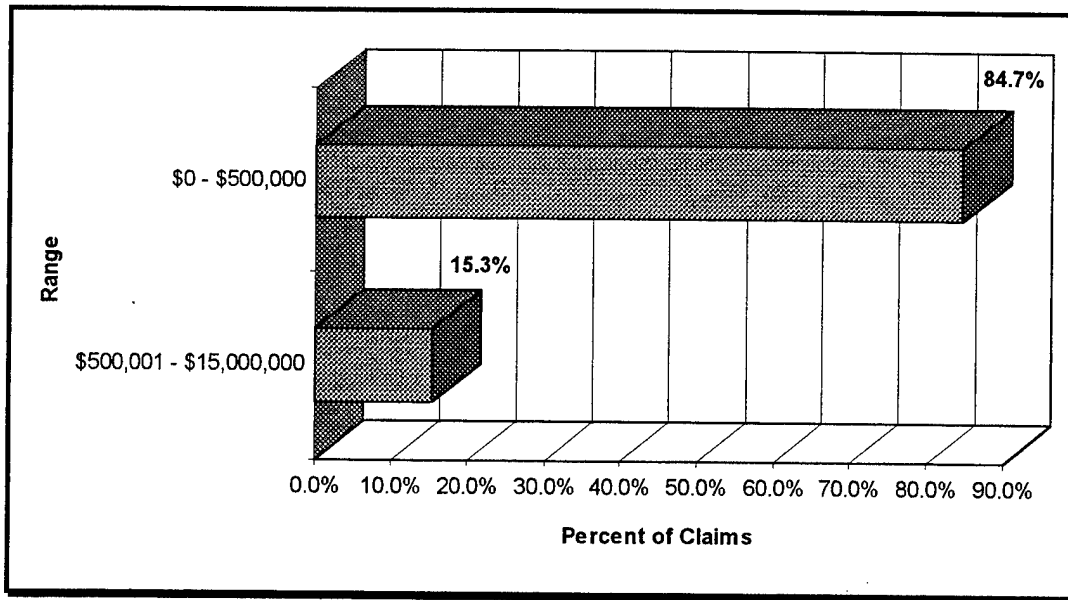


Figure 10

Source: Developed by researcher

E. SUMMARY

This chapter provided the reader with a description of the population and time period from which the researcher's data were collected. The chapter then described the methods used by the researcher in collecting the data for this study. Additionally, this chapter displayed the data collected by the researcher in various breakdowns for ease of understanding by the reader. The data presented thus far will be analyzed in Chapter IV and the researcher will attempt to identify trends and potential weaknesses in Department of the Navy acquisition contracting norms.

IV. DATA ANALYSIS

A. INTRODUCTION

This chapter first provides the reader with a summarized listing of potential weaknesses identified by the researcher relating to Department of the Navy contracting practices. The chapter then provides an in-depth analysis of the top four weaknesses identified in an attempt to provide lessons learned which can assist Department of the Navy Contracting Officers to become more efficient and effective when awarding and administering service and support contracts. This chapter also identifies and analyzes trends identified in the researcher's data regarding litigated service and support contract disputes.

B. POTENTIAL WEAKNESSES

Through an in-depth analysis of the 62 disputed service and support contract cases determined to be relevant to this study, the researcher was able to identify several potential weaknesses in Department of the Navy contracting practices. The potential weaknesses identified by the researcher have been categorized into general groups for easier understanding by the reader, and are listed by frequency of occurrence in Table 11. (Note: More than one potential weakness may relate to a single case and not all cases had an identifiable weakness.)

POTENTIAL CONTRACTING WEAKNESSES

Weakness	Frequency	Percent of Cases
Contracting Officer's confusion over issue	13	21
Contracting Officer's Final Decision (COFD) not issued or was late	13	21
Statement of Work (SOW) ambiguous	8	12.9
Contract ambiguity	6	9.7
Contracting Officer's failure to take correct action	4	6.5
Solicitation data not current/accurate	3	4.8
Numerous changes or delays in awarding contracts	2	3.2
Wrong clause used in contract	2	3.2
Contracting Officers must rely on contractors in remote locations for pre-award information	1	1.6
End users modifying contracts	1	1.6
Faulty source selection process	1	1.6
Government delay after award	1	1.6
Mistake in modifications	1	1.6

Table 11

Source: Developed by researcher

The researcher's analysis in this section focuses on the following top four potential contracting weaknesses identified in litigated service and support contract disputes:

- Contracting Officer's confusion over an issue;
- Contracting Officer's final decision was not issued or was issued after an unreasonable amount of time;

- The Statement of Work was ambiguous; and
- Other contract ambiguities.

The frequency with which the top four most commonly identified weaknesses occurred is presented graphically in Figure 11.

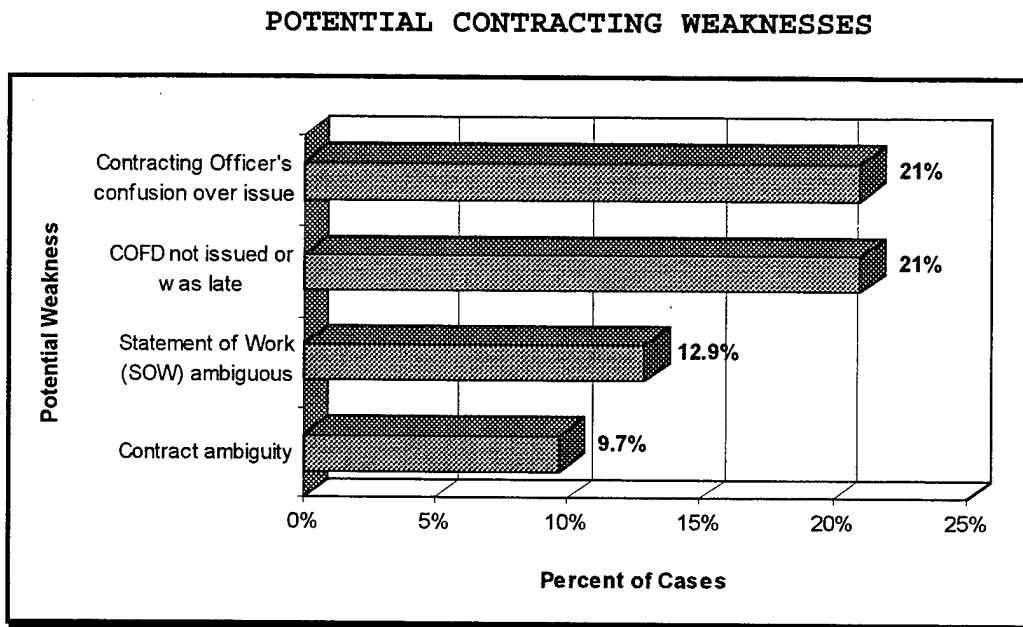


Figure 11
Source: Developed by researcher

1. Contracting Officer's Confusion

The researcher identified 13 service and support contract disputes where it was evident that the Contracting Officer was confused over a contract term or condition. The Contracting Officer's confusion often led to the contractor misunderstanding what was legally required under the terms of the contract or applicable Federal statute. The

misunderstanding can lead to disputes and potentially result in costly litigation.

One recurring area of contracting for services which Contracting Officers appear not to fully understand is the applicability of the Service Contract Act and associated Department of Labor wage rates. The researcher's data identified six service contract disputes where the Contracting Officer either did not fully understand the applicability of the Service Contract Act itself or the correct application of predetermined wage rates from the Department of Labor. All six disputes were unable to be resolved at the Contracting Officer's level and ultimately resulted in litigation. Two of the six cases, or 33.3 percent, were sustained in favor of the contractor. The researcher believes that had the Contracting Officers understood fully the overall implications of the Service Contract Act and the requirement for the contractor to pay Department of Labor specified wages, then some, if not all, of the six identified disputes could have been avoided or resolved at a lower level.

Not all of the blame, however, should be placed on the Contracting Officers. Four of the six contractors' appeals, or 66.7 percent, were denied. Additionally, contract disputes regarding the improper payment of Service Contract Act wage rates were identified in 12 of the 62 cases

studied. The researcher was unable to identify any apparent Government weaknesses in 50 percent of those cases. This leads the researcher to conclude that many of the contractors also do not fully understand their legal obligation to pay specified Department of Labor wage rates to their service employees.

The Service Contract Act requires contractors to pay a certain minimum hourly wage and fringe benefit rate to the contractors' service employees. The Department of Labor, not the Contracting Officer, has the final authority for determining if the Service Contract Act applies to a particular contract and what prevailing wage rates are applicable for each classification of worker. [Ref. 16: p. 22]

Service and support contracts are generally labor intensive contracts that engage a contractor's time and efforts in performing an identifiable task rather than in providing an end item or tangible good. [Ref. 4: Sec. 37.101] However, there are many different categories of services and it is not always easy to determine if the Service Contract Act applies, or even if the contract in question is for services and not for supplies.

The answer lies in the discretion of the Secretary of Labor with respect to the principal purpose of the contract. For example, Title 29 Part 4 of the Code of Federal Regulations uses service contracts for data collection, surveys, and computer services. These activities are within the general coverage of the Service

Contract Act even though the contractor may furnish such tangible items as written reports or computer printouts. The principal purpose of these contracts is to provide services, and the tangible items are secondary to that purpose. [Ref. 16: p. 22]

The researcher believes that as the Department of the Navy continues to increase the level of outsourcing for many of its support functions, it will become even more important to ensure that Contracting Officers (and offerors) fully understand the applicability of wage rates in contracts under the coverage of the Service Contract Act. While the majority of the cases involving wage rate issues were denied (66.7 percent), and the Government prevailed in the decision, neither party "won." The costs in terms of time and money might have been avoided if both parties understood fully the proper application of Department of Labor wage rates under the Service Contract Act at the time the contract was solicited.

The correct application of the Service Contract Act wage rates was not the only area in which the researcher identified where the Contracting Officer, or designated representative, might not have fully understood the task at hand. In two cases, Contracting Officers terminated the contract for default without following all of the correct procedures. [Ref. 25 and Ref. 26] In one of the cases, a small business set-aside contract for moving services, the

Contracting Officer issued a cure notice when not required, failed to issue a cure notice when it was actually required, and then listed several actions in the default determination that were not actually reasons for default. The Board noted that "five (of the thirteen) delinquent moves were excusable and, thus, do not constitute valid, independent bases for the default determination." [Ref. 25] The contractor appealed the default determination as improper; however, the ASBCA ruled in favor of the Government due to the contractor's actual failure to perform on seven percent of the required moves. If the Contracting Officer had understood fully and followed the proper procedures in preparing a termination for default decision, then potentially the contractor would not have appealed the original default decision because the proper procedures had been followed. The researcher believes that the fewer mistakes made by Contracting Officers, the less reasons contractors will have for appealing the Government's final decisions.

Three other cases resulting from Contracting Officers not fully understanding the contracting process were identified. In one case the Contracting Officer and the contractor mistakenly believed the contract was an indefinite-delivery, indefinite-quantity contract. [Ref. 27]

The ASBCA held it was a firm fixed-price and indefinite-delivery type combination contract and denied the claim.

In a second case, the Contracting Officer issued a final decision on an uncertified claim. The appeal went before the ASBCA and was denied because the contractor's required certification was missing. Specifically, the Board stated, "Due to the lack of certification, the decision was not valid under the Contract Disputes Act and is of no legal significance." [Ref. 28] If both the Contracting Officer and the contractor understood the requirements for certifying a claim, then the time and money spent on the appeal would not have been totally wasted. Now the contractor must weigh the expected benefits of another appeal against the cost (in both time and money) of resubmitting a certified claim to the Contracting Officer for another final decision and possible lengthy delay in receiving a decision on the appeal from the chosen forum. Even if the contractor wins the appeal, the costs associated with multiple litigations could potentially outweigh the monetary value of the decision. Additionally, because of the Contracting Officer's confusion over the certification requirements, the costs to the Government will also be increased.

In the third case, the Contracting Officer did not understand what work counted towards the minimum quantity

portion of the contract. [Ref. 29] Because of this confusion, the dispute between the parties could not be resolved and resulted in litigation. The ASBCA sustained the contractor's appeal, ruling that the Government was in breach of contract for failing to order the minimum quantity of training services. If the Contracting Officer fully understood the terms of the contract in the beginning, then the claim could have possibly been avoided altogether.

2. Untimely Contracting Officer's Final Decision

Another recurring potential weakness, identified in 13 of the 62 cases (21 percent), was the Contracting Officer's failure to issue a final decision on a contractor's claim or issued a final decision on a claim in an untimely fashion. By the Contracting Officer not issuing a final decision as required under the Contract Disputes Act, the Federal Acquisition Regulation, and the Disputes Clause, the courts will infer this inaction by the Contracting Officer as a "de-facto" denial of the contractor's claim. Once the claim is "denied," the contractor has the right to appeal the denial to a Board of Contract Appeals or to the U.S. Court of Federal Claims.

Six cases were identified where the Contracting Officer failed to issue a final decision on a contractor's claim. One type of service, mess attendant services, was involved

in two of the cases. [Ref. 30 and Ref. 31] Also, claims involving extra work were represented in two of the cases, though both were not for mess attendant services. [Ref. 32 and Ref. 31] The results of the six appeals were: two of the appeals were denied; one appeal was sustained; two appeals were partially sustained; and one appeal was stayed until further information was received by the court. The data did not appear to show any other trend regarding the type of service performed or outcome of the appeal as a result of the Contracting Officer's failure to issue a final decision.

Additionally, the Board's decisions did not identify the underlying reasons for the Contracting Officers' failure to issue a final decision on the contractors' claims. However, the researcher believes the Government's failure to communicate with the contractors regarding the status of their claims was not a sound business practice. The Contracting Officer's lack of communication by failing to issue a decision could potentially send the incorrect signal to the contractor. The contractor could interpret the Government's inaction as a weakness in the Government's case, and therefore, a "green light" to appeal the claim to an administrative board or judicial court. This signal could potentially give the contractor a false sense of security toward the expected outcome of the appeal. When

the contractors' appeals are denied, both the Government and the contractor have wasted significant time and money in the process. The researcher believes that had the Contracting Officers issued a decision, explaining why the claim was being denied, then potentially some of the appeals could have been avoided. Through effective communications, the Government might have been able to convince the contractor that the claim had no merit and would only be disapproved again if appealed, and at great expense to both parties.

The researcher's data also indicated a potential trend for Contracting Officers to fail to issue final decisions in a timely manner. Seven cases were identified where the Contracting Officer took, on average, over 150 days to issue a final decision on a contractor's claim. A possible trend towards disputes involving extra work claimed by the contractor was identified in four of the seven cases, or 57.1 percent. This appears to be consistent with the same trend identified when Contracting Officers failed to issue final decisions. A trend of this nature is not surprising, considering that 24.2 percent of all cases relevant to this study involved disputes over extra work claimed by Government contractors.

The Federal Acquisition Regulation Part 33 requires Contracting Officers to issue final decisions on claims of \$100,000 or less within 60 days if requested by the

contractor, or "within a reasonable time after receipt of the claim if the contractor does not make such a request."

[Ref. 4: Sec. 32.211(c)(1)] For claims over \$100,000 the same 60-day rule applies. Also, if the Contracting Officer is not able to render a decision within 60 days, the Contracting Officer is required to notify the contractor of the time within which a decision will be made. [Ref. 4: Sec 32.211(c)(2)] Six of the seven claims were for less than \$100,000, and five of these six claims were for less than \$50,000.

The Government's failure to render timely decisions, in the researcher's opinion, unnecessarily delayed the final resolution of the claims. While all seven claims were appealed, and denied by the ASBCA, if an appeal had been sustained, then the Government would have been liable for extra interest that had accrued as a result of the delay in rendering a timely decision. Even though this issue was never specifically brought out in the case summaries, and had no identifiable bearing on the outcome of the appeals, the researcher believes that it significantly reduced the effectiveness and efficiency of Department of the Navy Contracting Officers. Additionally, if this trend continues, it could potentially steer away quality contractors whom the Government depends on for providing the many services that support its infrastructure.

3. Ambiguous Statement of Work

The researcher's data also indicated a trend of ambiguous statements of work as a potential contracting weakness. Contracting Officers have an obligation to ensure the statement of work provided in a solicitation or contract is clearly written. A statement of work that is not clearly understood by the contractor becomes open for misinterpretation and potential claims by the contractor during or after performance of the contract. An ambiguous statement of work was identified in eight, or 12.9 percent, of the 62 cases studied. Additionally, within these eight appeals, six, or 75 percent, of the disputes pertained to the contractors' requests for equitable adjustment for extra work believed to have been accomplished beyond the statement of work in the contract.

The majority of the cases associated with an ambiguous statement of work were awarded through a sealed bidding process. In sealed bidding, the contractor who submits the lowest priced bid, in accordance with the terms of the Invitation for Bids (IFB), will be awarded the contract if determined to be a responsible offeror by the Government. In a sealed bid, negotiations are not held between the contractor and the Government. The contractor generally must rely on the statement of work to determine the scope of the work required and then bid accordingly. If the

statement of work is ambiguous or could be interpreted differently, then the low priced bidder could have mistakenly underbid the true value of the contract by not understanding the actual work expected by the Government. In the cases identified, once the contractors actually started work and fully understood what was intended by the statement of work, they filed claims for the increased costs of performing the extra work. Fortunately for the Government, or unfortunately for the contractors, seven of the eight appeals were denied and only one appeal was partially sustained by the ASBCA.

In the appeal which was partially sustained, a contract for mess attendant services, the ASBCA ruled on one part of the claim that,

Appellant claims it was required "to place on individual dishes/plates salads and desserts, decorate desserts with toppings and wrap desserts in clear plastic wrap." Appellant argues that this exceeded the contract requirements. Respondent concedes that toppings were not covered by the contract....Accordingly we find appellant is entitled to recover \$2,953.82. [Ref. 31]

While the Board ruled that the Government was partially at fault and the required work was not as specified in the statement of work, the contractor was not faultless. Even though ambiguities existed in the statement of work, the Board also held,

Before a contractor can recover based on its interpretation of an ambiguous contract requirement, it must establish that it relied on

that interpretation at the time of the bidding. While the requirement [to clean pass through warmers] was discussed...early in contract performance as something that needed to be clarified or changed, it is not sufficient to infer appellant's reliance at the time of its proposal. Accordingly, we find that appellant has not established that it relied on its interpretation that pass through warmers did not have to be cleaned. Claim 3 is denied. [Ref. 31]

The case also revealed that the Contracting Officer held a preproposal conference and site visit in order to ensure all potential bidders understood the scope of the work being solicited. The low bidder, and winning contractor, chose not to attend the preproposal conference and site visit. The researcher believes that had the winning contractor attended the preproposal conference and site visit, the contractor would have been able to understand fully the requirements in the statement of work and submitted a more realistic bid. Doing so potentially could have avoided all, or part of the claim, providing the contractor remained the low bidder.

In another case, involving extra work claimed under a base operating services contract, the contractor claimed the statement of work was ambiguous regarding light bulb replacement, interpreted the scope of the contract differently than the Government, and priced its bid accordingly. The statement of work in this contract had been rewritten differently from the previous contract for

the same services. The winning contractor was the incumbent from the previous contract, and submitted its proposal knowing that light bulbs were replaced under the terms of the prior contract. During post-award discussions, the contractor, the Contracting Officer's Technical Representative, and the Contracting Officer were not sure what the contract really required. Eventually the Contracting Officer determined the work to be within the scope of the contract, and the contractor appealed the decision. In the ASBCA's denial of the appeal, the Board held that while there was a patent ambiguity in the statement of work, the contractor was obligated to raise the issue prior to submitting its proposal. Specifically,

If a patent ambiguity is found in a contract, the contractor has a duty to inquire of the Contracting Officer the true meaning of the contract before submitting a bid. This prevents contractors from taking advantage of the Government, and it materially aids the administration of Government contracts by requiring that ambiguities be raised before the contract is bid on, thus avoiding costly litigation after the fact. [Ref. 33]

Clear and unambiguous statements of work are essential to ensuring service and support contracts are performed as required. Additionally, Contracting Officers can help ensure contractors fully understand the contents of the solicitation by holding presolicitation conferences or submitting draft solicitations to industry for comment prior

to issuing a formal solicitation. This might not apply to all service and support contracts; however, effective two-way communications between the parties can potentially reduce misunderstandings and costly litigation.

4. Other Contract Ambiguities

In addition to the eight appeals identified relating specifically to an ambiguous statement of work, the researcher identified six disputed service and support contract appeals associated with other contract ambiguities. This was the fourth most recurring potential contracting weakness identified in the 62 Department of the Navy litigated disputes, accounting for 9.7 percent of the total cases studied. Two of the cases (33.3 percent) were contracts for base operating services [Ref. 33 and Ref. 34], while the other four disputes involved services for housing maintenance [Ref. 35], janitorial service [Ref. 36], emergency medical care [Ref. 37], and transportation services [Ref. 38]. Fifty percent of the appeals associated with contract ambiguities involved contractors' claims regarding extra work above what was required in the contract. The other appeals involved a contractor's claim for having a contract wrongfully terminated for default by the Government [Ref. 36]; a dispute over pricing work above the contract estimate [Ref. 37]; and a claim for increased

wages resulting from erroneous documentation in a contract [Ref. 38].

Two-thirds of the contractors' appeals were denied; however, and more importantly, one-third of the appeals were sustained in favor of the contractor. The sustained appeals were associated with claims for increased wage rates or extra work resulting from ambiguities written in the contracts. If contracts are not written clearly, they can often be interpreted differently by the Government and the contractor. If the ambiguity is substantial, the contractor is potentially more likely to have matters in dispute, file a claim, or appeal a Contracting Officer's final decision to a board or court.

The two sustained appeals under this category of contracting weaknesses could have potentially been avoided if the Contracting Officer had ensured that the solicitation/contract was clear and free from possible ambiguities prior to awarding the contract. In one case involving the procurement of transportation services, the solicitation contained conflicting documentation regarding the payload of Government-furnished trucks. Under the contract, the contractor was required to provide drivers for the Government-furnished trucks. Under the Service Contract Act, the contractor was required to pay the drivers the prevailing wage rates set forth in the applicable Department

of Labor wage determination. The wage determination required higher wages and fringe benefits for "heavy" truck drivers than for "medium" truck drivers, and provided a definition of the two terms using rated load capacities. The inventory listing provided to the contractor, and the Navy manual referenced in the solicitation and contract, provided conflicting ratings for the Government-furnished trucks. The contractor bid and paid its drivers the wage rate for a medium rated truck, when the trucks were actually rated as heavy trucks. When the discrepancy was discovered after award of the contract, the contractor submitted a claim to the Contracting Officer for the additional cost of providing drivers for heavy trucks instead of medium trucks as listed in the contract inventory. The Contracting Officer denied the claim, and the contractor appealed the decision to the ASBCA. The Board sustained the contractor's appeal, ruling the contractor

...is entitled to a price adjustment for the three trucks...misrepresented in the inventory and in the [Navy] document as being in the weight class qualifying as medium for driver classification purposes. They were in fact in the weight class qualifying as heavy, and [the contractor]...was required to pay their drivers at the heavy truck rate. [Ref. 38]

The Government was aware that the contractor was required to pay the wage rates associated with the correct driver classification. The Navy clearly was at fault for

misrepresenting the weight classifications in the contract inventory. Knowing that the contractor would be required by the Department of Labor to pay the increased wage rate, the Contracting Officer could have avoided the litigation expense by approving the contractor's request for equitable adjustment on the trucks affected. Additionally, the Contracting Officer is not an expert in every commodity being procured. As such, the Contracting Officer must rely on the accuracy of the documentation provided by the requiring activity, which could hinder the Navy's ability to award unambiguous contracts.

In another claim, involving a contractor's appeal of a termination for default decision, the contractor asserted that it was financially unable to continue performing "due to the Government's failure to make all payments allegedly required by the contract." [Ref. 36] The contract was for janitorial services under a firm fixed-price/indefinite-quantity contract. The contract provided for a minimum guarantee of work under the firm fixed-price portion. The contractor incorrectly believed that monthly payments would be received for the fixed price portion as well as

...the estimated amounts of the indefinite quantity work listed in the contract, regardless of whether any said indefinite-quantity work was actually ordered by the government. [Ref. 36]

The solicitation warned potential offerors that the estimated quantities of the indefinite-delivery portion were provided for bid evaluation purposes and were not guaranteed to be purchased during performance of the contract. Minimum guarantees of work were only provided under the fixed-price portion of the contract. Even with this statement in the solicitation, the contractor believed payments would be received for the full amount of work estimated in the contract, whether or not actually ordered by the Government. The contractor stopped performing when the expected payments were not received. The appeal was denied by the ASBCA and the board held that,

Appellant's argument that the total price for both the firm fixed-price and indefinite quantity work must be accepted as the total contract price...is without merit. Moreover, we note that appellant did not submit invoices based on the estimated contract amounts; rather, it requested payment in its monthly invoices based on the actual indefinite quantity work performed. [Ref. 36]

Even though the contractor's appeal was decided in the Government's favor, the misunderstanding potentially could have been avoided if the Government held a presolicitation conference to explain clearly the contract pricing and ordering procedures. While a presolicitation conference is not a requirement, the small investment up front by the Government could reap larger dividends in the future by avoiding contract ambiguities and misinterpretation of

contracts by offerors. Additionally, the contract clauses were incorporated by reference only, as allowed by the Federal Acquisition Regulation. However, if a copy of the payment clause had been printed in full in the contract, the contractor would have been more likely to have read the clause, thus lessening the potential for further misunderstandings and potential claims based upon an incorrect understanding of the contract type and payment clause. Open lines of communication are essential to ensuring both parties fully understand the requirements of the contract prior to bidding and making an award. The contractor is responsible for understanding the terms of the solicitation; however, it is in the best interest of both parties for the contract to be as clear as possible so as to avoid potential disputes during, or after, contract performance.

C. DATA TRENDS

This section presents various trends identified from the researcher's data and also provides an analysis of the identified trends. The following areas were reviewed and analyzed in an attempt to identify trends in service and support contract disputes that have become the subject of litigation:

- Total number of services contracts awarded;
- Total cases relevant to this study;
- Case decision date range;
- Court forum chosen;
- Types of services;
- Reasons for dispute;
- Outcome of appeals;
- Type of service versus decision;
- Reason for dispute versus decision; and
- Dollar value of dispute/claim.

1. Number of Services Contracts Awarded

The researcher's data indicated an increasing trend in the number of service and support contracts awarded between 1991 and 1995, reaching a peak of 91,356 service contract actions in fiscal year 1995. The number of service and support contracts appeared to decline during fiscal years 1996 and 1997 in relation to the 1995 level; however, the figures were still greater than the 1991 level. The data appears to indicate that, in aggregate, the Department of the Navy has increased the number of service and support contracts awarded over the level reported in 1991 when the Procurement Management Reporting System (PMRS) began collecting data electronically. The fluctuation in total

numbers could be due to variations in the level of modifications made to, or delivery orders made from, yearly services contracts.

2. Litigated Service and Support Contracts

The researcher could not identify any source that could provide all Department of the Navy litigated service and support contract disputes. Neither the Armed Services Board of Contract Appeals nor the U.S. Court of Federal Claims kept track of the type of contract involved in decided appeals. As such, the 62 cases identified in this study can only be assumed to be a representative sample of the total number of Department of the Navy litigated service and support contract disputes, and does not lend itself to further analysis.

It was impossible to compare the number of service and support contracts awarded to the number of service and support contract appeals decided during the time frame of this study. The researcher could not obtain the exact number of services contracts awarded in a particular year nor the total number of service contract appeals decided. Additionally, appeals are generally filed and decided in out years, and some appeals relating to contracts during the time frame of this study have yet to be filed. Also, many of the contracts in dispute were awarded before the

Procurement Management Reporting System began collecting data electronically. As such, the researcher could not get a comparison statistic between the number of service and support contracts awarded and the number of appeals filed under those contracts during a particular year.

3. Case Decision Date Range

Cases used in this study were limited to those decided during fiscal year 1992 through fiscal year 1997 (1 October 1991 through 30 September 1997). The data indicated a decreasing trend in the number of service and support contract appeals decided from 1992 through 1996. This could be due to the increased emphasis by the Department of the Navy to utilize alternative methods for resolving disputes, such as mini-trials or mediation. The number of appeals decided in 1997 increased significantly over the 1996 rate; however, the data were inconclusive as to why this occurred. Understanding the limitations of the data collected, the researcher believes that, in aggregate, there is a favorable decreasing trend in the number of litigated service and support contract disputes at the same time there has been an increase in the number of services contracts awarded.

4. Court Forum Chosen

The researcher's data indicated that 92 percent of the litigated disputes identified in this study, and associated with service and support contracts, were docketed with and decided by the Armed Services Board of Contract Appeals. The tendency for contractors to appeal Contracting Officers' final decisions to the Armed Services Board of Contract Appeals is consistent with the Board's charter. The Armed Services Board of Contract Appeals is intended to be a quicker, less formal, and less expensive alternative for filing appeals than through the U.S. Court of Federal Claims. Additionally, the Armed Service Board of Contract Appeals is only authorized to settle fact-based disputes and does not have jurisdiction over matters of law. All of the cases identified in this study appear to the researcher to be administrative, fact-based disputes, which would support the high use of the Armed Services Board of Contract Appeals for dispute resolution.

The five cases appealed to the U.S. Court of Federal Claims were all based on factual data and none appeared to require a ruling as a matter of law. The case decisions did not identify why the forum was chosen; therefore, further analysis in this area is not warranted.

The denial rate of contractors' appeals was roughly the same in both forums. The denial rate for appeals decided by

the Armed Services Board of Contract Appeals was 75.4 percent and the U.S. Court of Federal Claims was 80 percent. Overall, the denial rate for all appeals studied was 75.8 percent. The available data were not sufficient for the researcher to determine if the expected denial rate had any bearing on a contractor's choice of forum.

5. Types of Services

The Department of the Navy regularly purchases a wide variety of services from the commercial market. Unfortunately, there are also many disputes associated with these services. The researcher's data indicated a recurring trend for eight particular types of services to enter into litigation over contract disputes. The eight types of services represented 45.2 percent of all appeals studied and are listed below:

- Aircraft Maintenance Services;
- Base Operating Support Services;
- Housing Maintenance Services;
- Janitorial Services;
- Mess Attendant Services;
- Moving Services;
- Morale Welfare and Recreation Services; and
- Training Services.

Within these eight types of services, three particular types represented more than one-third (35.5 percent) of all appeals:

- Janitorial Services (12.9 percent);
- Base Operating Support Services (11.3 percent); and
- Mess Attendant Services (11.3 percent).

The researcher believes that Contracting Officers who are, or will be, buying these types of services need to ensure that the statements of work and all contract provisions are clear and unambiguous. Additionally, Contracting Officers might want to consider partnering with these types of suppliers as a means of ensuring better two-way communication and for resolving conflicts before they result in costly litigation. Through partnering, both parties agree to form a working relationship based on teamwork and cooperation in an effort to improve communications and contract performance. [Ref. 39: p. 25]

6. Reasons for Dispute

The researcher's data indicated that there were many different reasons for contract disputes. Two reasons in particular, performance of extra work and correct wage rates, were identified in 24.2 percent and 19.3 percent of all cases, respectively. This indicates that either contractors do not understand the requirements of the

contract and its provisions, or that Contracting Officers are not writing clear and unambiguous statements of work.

In numerous cases studied, the contractors failed to understand the requirement to pay specified Department of Labor wage rates. In other cases, the contractors believed they were performing work above what was agreed to in the contract. The trend for disputes involving extra work and/or wages will likely continue unless Contracting Officers and contractors openly communicate from the onset of the requirement and ensure all requirements are understood by both parties.

7. Outcome of Appeals

The researcher's data indicated a trend for appeals relating to service and support contracts to be denied. The denial rate for the appeals studied was 75.8 percent. This indicates to the researcher that Contracting Officers are generally making correct decisions when denying contractors' claims; however, there is room for improvement. This trend for appeals to be denied also indicates that contractors potentially do not understand the reasoning behind the Contracting Officers' decisions and often file appeals that have little chance of being sustained. Only 11.2 percent of all appeals studied were fully sustained in the contractors' favor.

The researcher believes that effective communication, educating the contractors, and partnering with suppliers from the beginning can help avoid disputes and possibly reduce the number of appeals.

8. Type of Service versus Decision

Due to the limited amount of cases and the wide variety of services involved, the data did not indicate a trend for relating type of service to a particular outcome. The outcomes of services that were involved in multiple appeals roughly paralleled the overall outcome rates identified in this study, with the majority of all appeals being denied.

9. Reason for Dispute versus Decision

Due to the limited amount of cases and the large variety of reasons for disputes involved, the data did not indicate a trend for relating reason for dispute to a particular outcome. The outcomes of appeals involving recurring reasons for dispute roughly paralleled the overall outcome rates identified in this study, with the majority of all appeals being denied, regardless of the reason for dispute.

10. Dollar Value of Claim

As discussed in Chapter III, only 46 (74.2 percent) of the 62 cases in this study identified the dollar amount of ,

the claim. Of these 46 cases, 30 of the claims (65.1 percent) were between \$25,000 and \$500,000. Additionally, 9 (19.6 percent) of the 46 claims were for \$25,000 or less. This leads the researcher to believe that contractors will appeal Contracting Officers' final decisions for relatively small dollar amounts.

The researcher's data indicated that appealing decisions for small dollar amounts has not proven to be a sound business practice for contractors, given the high rate of denials. The researcher identified 19 appeals with a dollar value of less than \$50,000. Only two of the 19 appeals (10.5 percent) in this dollar range were sustained, while 15 out of the 19 appeals (79 percent) were denied. This trend is similar to the overall denial and sustainment rates of 75.8 percent and 11.2 percent, respectively, identified in this study.

The data also indicated that 29 appeals were for dollar values of \$100,000 or less. Twenty-three out of the 29 appeals (79.3 percent) in this range were denied, and 17.2 percent were sustained. The denial rate of 79.3 percent was slightly higher than the overall average of 75.8 percent. The sustainment rate for small dollar value claims (under \$100,000) was much greater than the overall sustainment rate of 11.2 percent.

Given that the data revealed a pattern for a higher sustainment rate of appeals for claims less than \$100,000, as compared to the researcher's data in aggregate, the researcher believes that contractors might not be making sound business judgments by filing appeals for low dollar values. All of the appeals under \$100,000 were filed with the Armed Services Board of Contract Appeals which makes good sense because this forum is intended to be faster and less expensive than appealing to the Federal Court system. However, due to the relatively small dollar amounts involved, the contractors could end up paying out more for court costs and delays than they receive in compensation from a sustained judgment. The researcher believes that it would be in the best interest of both parties to utilize alternative methods of dispute resolution, especially when small dollar claims are involved.

D. SUMMARY

The overall conclusion from the analysis of data collected in service and support contracts appealed from Contracting Officers' final decisions is that a small investment in time up front can potentially help avoid performance delays, estranged business relationships, and costly litigation. A final summary of these conclusions are set out in Chapter V.

V. CONCLUSIONS AND RECOMMENDATIONS

A. INTRODUCTION

This chapter first provides answers to the primary and subsidiary research questions which were the basis of this thesis. This chapter then presents the conclusions and recommendations that were drawn from the analysis presented in Chapter IV. Additionally, recommended areas for further research regarding Department of the Navy service and support contract litigation are provided at the end of this chapter.

B. RESEARCH QUESTIONS

In order to accomplish the objectives of this thesis, fundamental research questions were developed. The responses to the primary and subsidiary research questions are provided in this section.

1. Primary Research Question

Will a review of recently litigated cases involving Department of the Navy service and support contracts reveal patterns in the formation and administration of those contracts that can be avoided, with the potential effect of reducing the number of such cases and provide for more effective and efficient service and support contracting within the Department of the Navy?

An in-depth review of 62 litigated Department of the Navy service and support contract disputes revealed several patterns in contracting for services:

- Contracting Officers not understanding issues arising under or relating to service and support contracting;
- Contracting Officers not issuing final decisions on contractor claims as required under the Contract Disputes Act and Federal Acquisition Regulation;
- Contracts containing ambiguous statements of work or other contract provisions;
- Lack of effective two-way communications or clarifications, before, during, and after contract performance; and
- Contractors not understanding the terms and conditions of the contract or the reasoning behind Contracting Officers' final decisions.

2. Subsidiary Research Questions

a. What are service and support contracts?

Service and support contracts are labor intensive contracts that utilize the time and effort of a contractor whose primary purpose is performing and identifiable task rather than providing and end item of supply. Service

contracts are further divided into two broad categories: 1) personal services; and 2) nonpersonal services. Personal services contracts are characterized by an employer-employee relationship created between the Government and the contractor's personnel, while in nonpersonal services, the contractor retains full control of its employees.

Service contracts greater than \$2,500 fall under the purview of the Service Contract Act. The Service Contract Act requires Government contractors to pay service employees specified minimum wage rates and fringe benefits. The Department of Labor, and not the contractor or Contracting Officer, determines the applicable wage rates and employee classifications based on location of contract performance and type of service performed.

b. What are the bases for and process for bringing a case to a litigation forum in the Government?

Service and support contracts entered into after March 1, 1979, fall under the purview of the Contract Disputes Act. The Contract Disputes Act provides contractors an avenue for appealing Contracting Officers' final decisions on claims arising under or relating to a contract. Contracting Officers have an obligation to try and resolve disagreements with contractors at the lowest level possible, through negotiated, mutually binding agreements. If an agreement cannot be reached, the Contracting Officer will

issue a unilateral decision. If the contractor is not satisfied with the outcome, the contractor can file an appeal to an Administrative Board or formal Federal Court. The Government, however, does not have the option of appealing final decisions rendered by its Contracting Officers. Before an appeal can be made, several requirements must be met. Specifically,

- An issue arising under or relating to a contract must be in dispute between the two parties;
- A claim must be submitted in writing to the Contracting Officer for a decision;
- The claim must be certified if over \$100,000;
- The Contracting Officer must issue a final decision on the contractor's claim. Failure to issue a decision will be construed by a board or court as a "de-facto" denial of the claim.

Department of the Navy contractors can appeal final decisions to either the Armed Services Board of Contract Appeals (ASBCA) or the U.S. Court of Federal Claims. Both forums provide essentially the same jurisdiction and remedies; however, appeals must be filed with the ASBCA within 90 days or with the U.S. Court of Federal Claims within 12 months after receipt of the Contracting Officer's final decision.

c. What are the main reasons Department of the Navy service and support contracts become the subject of litigation?

The researcher identified 17 reasons that service and support contracts entered into dispute. Two reasons in particular, claims for extra work performed above the contract requirements and payment of correct wage rates, were identified in 24.2 percent and 19.3 percent of all cases, respectively. These disputes generally evolved from contractors not understanding the requirements and provisions of the contract and/or from Contracting Officers writing ambiguous contracts or failing to issue final decisions on claims filed by contractors.

The high denial rate of appeals, 75.8 percent, indicates that contractors might not understand the reasons their claims were denied by the Government and file costly appeals based upon misunderstandings instead of hard facts. Additionally, Contracting Officers who fail to issue final decisions often leave contractors believing they have no other recourse for resolving their claims than to file an appeal with the Armed Services Board of Contract Appeals or the U.S. Court of Federal Claims.

d. What weaknesses can be identified in Department of the Navy contracting norms and execution practices in relation to service and support contracts?

Thirteen potential weaknesses in contracting norms and execution practices were identified by the researcher in reviewing litigated service and support contract disputes. To the researcher, the greatest potential weakness was the lack of effective two-way communication between the Government and contractors before, during, and after performance of the contracts.

Certain other potential weaknesses were identified as well:

- Contracting Officers not completely understanding service contract regulations, specifically, the application of the Service Contract Act and appropriate wage rates and adjustments;
- Contracting Officers potentially encouraging contractors to litigate disputes by not issuing final decisions on written claims;
- Contracting Officers writing or approving ambiguous contracts or contracts containing ambiguous statements of work; and

- Contracting Officers not providing current and/or accurate information in service and support contract solicitations and request for proposals.

e. What conclusions can be drawn about Department of the Navy service and support contracting practices?

The researcher's data identified 13 potential weaknesses in contracting practices relating to Department of the Navy service and support contracts that could unintentionally drive contractors to litigate disputes. However, the researcher would like to point out that 75.8 percent of the contractors' appeals were denied, while only 11.2 percent of the appeals were fully sustained in favor of the contractor. This leads the researcher to believe that while some weaknesses do exist in contracting for services, the overall trend is for contractors' appeals to be denied. When appeals of Contracting Officers' final decisions are denied, it shows that the Government acted within its bounds, even though Contracting Officers may not have been as efficient as possible in executing and administering service and support contracts. The researcher believes that Department of the Navy Contracting Officers are generally doing a good job; however, better communications and more attention to detail or training may be warranted when contracting for services.

f. How can the Department of the Navy potentially reduce the number of service and support contracts that become the subject of litigation?

There are many ways in which the Department of the Navy can attempt to reduce the number of service and support contracts that become the subject of litigation. First, and foremost, the researcher believes that effective two-way communications must be established between the Government and industry from the moment the requirement is identified up through contract closeout. In the presolicitation phase, Contracting Officers could issue draft solicitations or draft statements of work for potential offerors to comment on and point out ambiguities. Additionally, presolicitation conferences could be held to ensure potential offerors understand fully the requirements and all terms and conditions in the contract and to identify ambiguities before a contract is awarded. Informative presentations regarding the correct application of the Service Contract Act and associated Department of Labor wage determinations could be given to help potential services contractors become better informed and, therefore, able to submit more accurate bids and proposals.

Another way to help reduce potential litigation is through training. In an effort to reduce costs, more and more services are being procured from commercial activities,

and a greater number of Contracting Officers are being exposed to services contracting. An effective training program tailored for Contracting Officers who are, or could be, buying services can help eliminate ambiguities in contracts and reduce confusion over correct actions to take during contract execution.

The use of performance based service contracting could be used to eliminate ambiguities in statements of work associated with service and support contracts. Performance work statements tell the contractor what is to be performed and what quality level is required, and lets the contractor determine the most efficient and effective process necessary to achieve the required outcome. This could potentially reduce or eliminate litigations associated with ambiguities in statements of work.

Another avenue from which the Department of the Navy could benefit is through the increased use of alternative methods of dispute resolution, such as mediation or mini-trials in resolving service and support contract disputes. Alternative dispute resolution methods can significantly reduce the cost of resolving disputes by avoiding litigation and can help maintain harmonious business relationships between Government and industry.

Partnering is another proven method Contracting Officers can use to avoid or reduce litigation. In the

current era of acquisition reform initiatives and streamlining acquisition processes, the necessity for establishing and maintaining cooperative working relationships is paramount to success in today's global environment. Partnering is built upon a mutual commitment between Government and industry to improve communications and facilitate contract performance. Through partnering, both parties agree to form a working relationship based on teamwork, cooperation, and good-faith performance, focusing on mutual interests rather than individual positions. Partnering is built on trust and encouraging open, honest, and continuous communication in an effort to eliminate surprises that lead to performance delays, increased costs, disputes, claims, and litigation. [Ref. 8: p. 25]

C. CONCLUSIONS

Accordingly in answering the initial research questions, the following conclusions were drawn by the researcher:

- There appeared to be a lack of effective two-way communication between the Contracting Officer and the contractor.
- Contracting Officers did not always understand issues arising under or relating to service and support contracts which often led to litigation.

- Contracting Officers' final decisions were not always rendered within the time limits set by the Contract Disputes Act, increasing the potential for litigation of some claims.
- Service and support contracts are being written with ambiguous statements of work and/or other ambiguous contract provisions.
- Government contractors do not appear to understand fully the Service Contract Act and the requirement to pay specified wage rates as set forth by the Department of Labor.
- The information provided by the Government in solicitations for service and support contracts was not always current, complete and/or accurate, thus leading to potential disputes during contract performance.
- Several types of services were frequently represented in litigated disputes, particularly,
 - Janitorial Services;
 - Base Operating Support Services; and
 - Mess Attendant Services.
- Several reasons for contract disputes were identified most frequently in litigated claims, specifically,

- Performance of extra work; and
- Wage rate adjustments.
- Contracting Officers appear to be awarding and administering service and support contracts in accordance with regulations as evidenced by the Government's high success rate in litigated disputes.

D. RECOMMENDATIONS

To overcome the potential weaknesses identified in this thesis, the following recommendations are provided by the researcher:

- Establish and maintain effective two-way communications between the Government and the contractor during the entire acquisition cycle, from time of initial requirement through final contract closeout.
- Hold training tailored for Contracting Officers who will be associated with service and support contracting.
- Submit draft solicitations and/or draft statements of work to industry for comment prior to formal issuance when time permits.

- Hold presolicitation conferences, especially on high dollar contracts, to ensure all offerors understand the contract as proposed.
- Conduct informative training sessions on the Service Contract Act's requirements for offerors during presolicitation conferences.
- Provide detailed instructions in solicitations regarding the Service Contract Act wage rate applicability and the contractor's requirement to pay specified Department of Labor predetermined wages.
- Hold post-award conferences with the winning contractors to ensure all parties understand the provisions in the contract, who will monitor contract performance, and who can authorize changes.
- Increase the use of performance work statements and performance based service contracting as a means of reducing potential ambiguities in service and support contracts.
- Provide more detailed explanations and better communications when issuing Contracting Officers' final decisions denying contractors' claims, particularly when Service Contract Act wage rates are involved.

- Use partnering whenever possible as a means of establishing and maintaining cooperative working relationships with suppliers, improving contract performance, and reducing costly litigation by resolving differences through alternate methods.
- Use alternate dispute resolution (ADR) methods, such as mediation, arbitration, and mini-trials, whenever possible as an informal and less costly method for resolving service and support contract disputes.

E. AREAS FOR FURTHER RESEARCH

The scope of this research examined Department of the Navy litigated service and support contract disputes decided within the last six years, and identified areas of potential weaknesses in service contracting practices. Attention was focused on service contracting norms and execution practices within the Department of the Navy. Specific areas that merit further research include:

- Continuation of this thesis focusing on a specific type of service performed.
- Further research focusing on similarities and differences between Army, Air Force, and Navy litigated service and support contract disputes.
- Litigation associated with other types of contracts.

- A study examining whether or not performance based service contracting has affected the level of litigated service and support contract disputes.
- A study determining if partnering techniques and practices have affected the level of litigated service and support contract disputes.
- Development of a model training program for training Contracting Officers who will be awarding and/or administering service and support contracts.

APPENDIX A. SELECTED ACRONYMS

ACO	Administrative Contracting Officer
ADR	Alternative Dispute Resolution
ASBCA	Armed Services Board of Contract Appeals
BOB	Bureau of the Budget
BRAC	Base Realignment and Closure
CDA	Contract Disputes Act
CO	Contracting Officer
COFD	Contracting Officer's Final Decision
COTR	Contracting Officer's Technical Representative
DFARS	Defense Federal Acquisition Regulation Supplement
DoD	Department of Defense
DoL	Department of Labor
DoN	Department of the Navy
DONOMIT	Department of the Navy Organization and Infrastructure Team
FAR	Federal Acquisition Regulation
FY	Fiscal Year

GFP	Government-Furnished Property
IFB	Invitation for Bids
MWR	Morale Welfare and Recreation
OFPP	Office of Federal Procurement Policy
OMB	Office of Management and Budget
PCO	Procuring Contracting Officer
PMRS	Procurement Management Reporting System
RFP	Request for Proposals
SCA	Service Contract Act
SOW	Statement of Work
T4C	Termination for Convenience
T4D	Termination for Default

APPENDIX B. CONTRACT DISPUTES ACT (CDA) COVERAGE SUMMARY

COVERAGE OF CONTRACT DISPUTES ACT

CDA Coverage	Mandatory Coverage	Coverage Excluded or Optional
Date of Contract	Contracts entered into after March 1, 1979.	Contracts entered into prior to March 1, 1979 excluded unless contractor elects coverage on final decisions issued after March 1, 1979.
Government Organization	Executive agencies and exchange services.	Nonappropriated fund activities other than exchange services.
Nature of Transaction	Procurement of property; services; construction, alteration, repair or maintenance of real property. Disposal of personal property. Leases of real property.	Procurement of real property in being, contracts with foreign governments or agencies.
Type of Agreement	Express or implied-in-fact contracts.	Implied-in-law contracts and implied contracts to consider bids or proposals fairly.
Type of Claim	Arising under or relating to a contract.	Restitution (quasi-contract) claims not related to a contract, claims involving fraud, statutory penalties or forfeitures under specific jurisdiction of another federal agency
Nature of Relief	Money in a sum certain, adjustment or interpretation of contract terms, or other relief.	Injunctive relief and declaratory judgment.

Table 12
Source: [Ref. 20]

APPENDIX C. DISPUTES CLAUSE

The following is a copy of the current Disputes Clause used in all services contracts:

DISPUTES CLAUSE (FAR 52.233-1)

(a) This contract is subject to the Contract Disputes Act of 1978, as amended (41 U.S.C. 601-613).

(b) Except as provided in the Act, all disputes arising under or relating to this contract shall be resolved under this clause.

(c) "Claim," as used in this clause, means a written demand or written assertion by one of the contracting parties seeking, as a matter of right, the payment of money in a sum certain, the adjustment or interpretation of contract terms, or other relief arising under or relating to this contract. A claim arising under a contract, unlike a claim relating to that contract, is a claim that can be resolved under a contract clause that provided for the relief sought by the claimant. However, a written demand or written assertion by the contractor seeking the payment of money exceeding \$100,000 is not a claim under the Act until certified as required by subparagraph (d)(2) of this clause. A voucher, invoice, or other routine request for payment that is not in dispute when submitted is not a claim under the Act. The submission may be converted to a claim under the Act, by complying with the submission and certification requirements of this clause, if it is disputed either as to liability or amount or is not acted upon in a reasonable time.

(d)(1) A claim by the contractor shall be made in writing and, unless otherwise stated in this contract, submitted within 6 years after accrual of the claim to the Contracting Officer for a written decision. A claim by the Government against the contractor shall be subject to a written decision by the Contracting Officer.

(2)(i) Contractors shall provide the certification specified in subparagraph (d)(2)(iii) of this clause when submitting any claim --

(A) Exceeding \$100,000; or

(B) Regardless of the amount claimed, when using -

(1) Arbitration conducted pursuant to 5 U.S.C. 575-580; or

(2) Any other alternative means of dispute resolution (ADR) technique that the agency elects to handle in accordance with the Administrative Dispute Resolution Act (ADRA).

(ii) The certification requirement does not apply to issues in controversy that have not been submitted as all or part of a claim.

(iii) The certification shall state as follows: "I certify that the claim is made in good faith; that the supporting data are accurate and complete to the best of my knowledge and belief; that the amount requested accurately reflects the contract adjustment for which the contractor believes the Government is liable; and that I am duly authorized to certify the claim on behalf of the contractor."

(3) The certification may be executed by any person duly authorized to bind the contractor with respect to the claim.

(e) For contractor claims of \$100,000 or less, the Contracting Officer must, if requested in writing by the contractor, render a decision within 60 days of the request. For contractor-certified claims over \$100,000, the Contracting Officer must, within 60 days, decide the claim or notify the contractor of the date by which the decision will be made.

(f) The Contracting Officer's decision shall be final unless the contractor appeals or files a suit as provided in the Act.

(g) If the claim by the contractor is submitted to the Contracting Officer or a claim by the Government is presented to the contractor, the parties, by mutual consent, may agree to use ADR. If the contractor refuses an offer for alternate disputes resolution, the contractor shall inform the Contracting Officer, in writing, of the contractor's specific reasons for rejecting the request. When using arbitration pursuant to 5 U.S.C. 575-580, or when using any other ADR technique that the agency elects to handle in accordance with the ADRA, any claim, regardless of amount, shall be accompanied by the certification described in subparagraph (d)(2)(iii) of this clause, and executed in accordance with subparagraph (d)(3) of this clause.

(h) The Government shall pay interest on the amount found due and unpaid from (1) the date the Contracting Officer receives the claim (certified, if required); or (2) the date that payment otherwise would be due, if that date

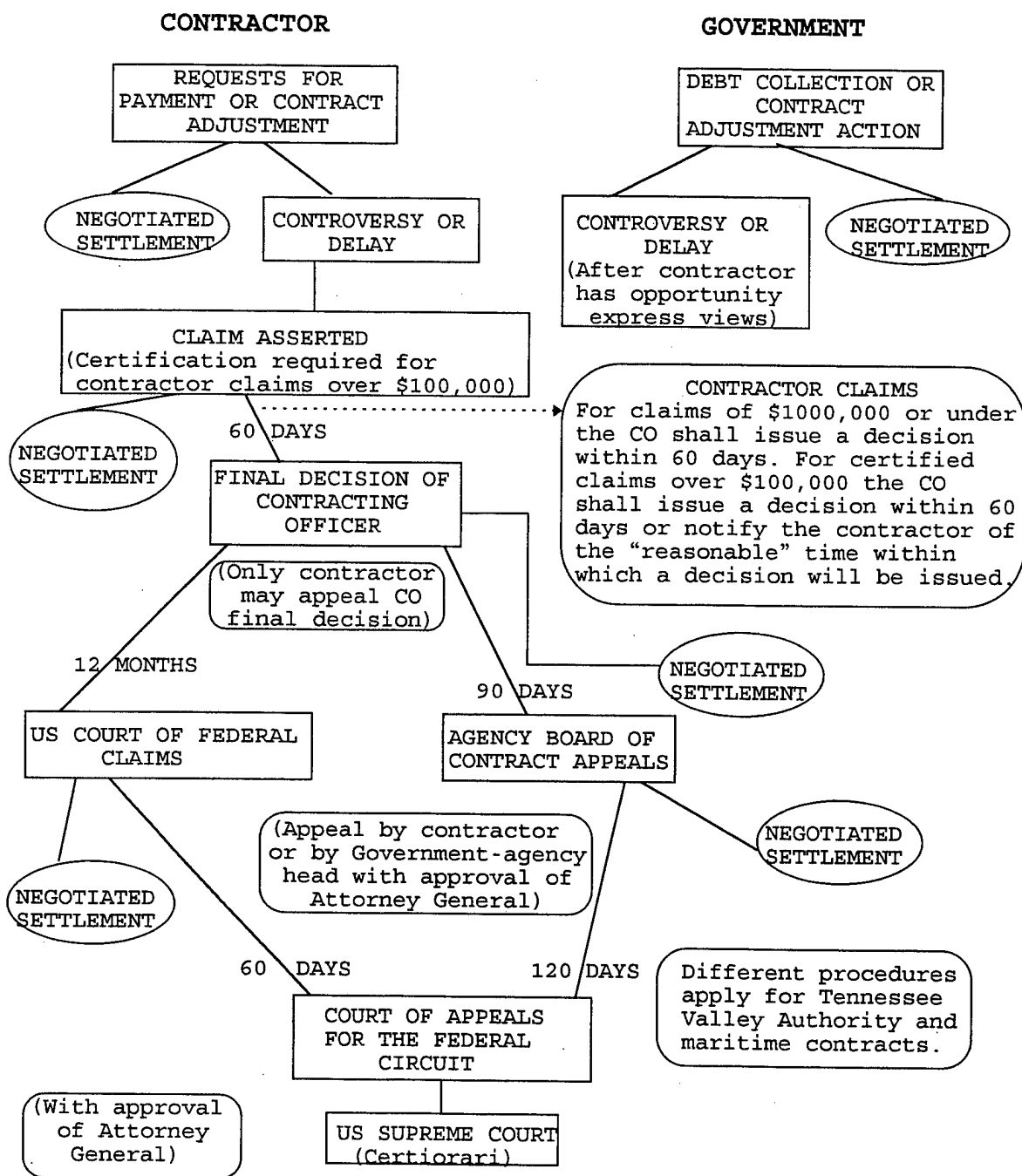
is later, until the date of payment. With regard to claims having defective certifications, as defined in FAR 33.201, interest shall be paid from the date that the Contracting Officer initially receives the claim. Simple interest on claims shall be paid at the rate, fixed by the Secretary of the Treasury as provided in the Act, which is applicable to the period during which the Contracting Officer receives the claim and then at the rate applicable for each 6-month period as fixed by the Treasury Secretary during the pendency of the claim.

(i) The contractor shall proceed diligently with performance of this contract, pending final resolution of any request for relief, claim, appeal, or action arising under the contract, and comply with any decision of the Contracting Officer.

[Ref. 4: Sec. 52.233-1]

APPENDIX D. DISPUTES PROCESS DIAGRAM

DISPUTES PROCESS



Source: Cibinic and Nash, 1995. [Ref. 20: p. 1241]

APPENDIX E. ARMED SERVICES BOARD OF CONTRACT APPEALS FISCAL
YEAR 1996 ANNUAL REPORT

Armed Services Board of Contract Appeals
Skyline Six
5109 Leesburg Pike
Falls Church, VA 22041-3208

1 October 1996

MEMORANDUM FOR: THE SECRETARY OF DEFENSE
THE SECRETARY OF THE ARMY
THE SECRETARY OF THE NAVY
THE SECRETARY OF THE AIR FORCE

SUBJECT: Report of Transactions and Proceedings of the Armed
Services Board of Contract Appeals for the Fiscal Year
Ending 30 September 1996

This report is furnished under paragraph 9 of the Charter of the Armed Services Board of Contract Appeals, revised 1 July 1979. The statistics reflect the adjudication of appeals of the Army, Navy, Air Force, Defense Logistics Agency (DLA), and other defense agencies. Also included are appeals of various executive agencies which have been adjudicated under inter-agency arrangements, as provided in 41 U.S.C. Sec. 607(c).

The following statistics cover activities of the Board during the reporting period and the current reserve of pending matters:

A. Appeals docketed during FY 1996 (includes 96 reinstatements)	1105
B. Appeals disposed of during FY 1996	1384
C. Number of Appeals Pending 1 October 1979	1221
Number of Appeals Pending 1 October 1980	1259
Number of Appeals Pending 1 October 1981	1301
Number of Appeals Pending 1 October 1982	1594
Number of Appeals Pending 1 October 1983	1695
Number of Appeals Pending 1 October 1984	1729
Number of Appeals Pending 1 October 1985	2074
Number of Appeals Pending 1 October 1986	2096
Number of Appeals Pending 1 October 1987	2503
Number of Appeals Pending 1 October 1988	2355
Number of Appeals Pending 1 October 1989	2321
Number of Appeals Pending 1 October 1990	2462
Number of Appeals Pending 1 October 1991	2367
Number of Appeals Pending 1 October 1992	2198
Number of Appeals Pending 1 October 1993	2027
Number of Appeals Pending 1 October 1994	1977
Number of Appeals Pending 1 October 1995	1822
Number of Appeals Pending 1 October 1996	1543
Net Decrease in Docket, FY 1996	279

D. Source of Appeals Docket FYs 1992-1996

	<u>FY 92</u>	<u>FY 93</u>	<u>FY 94</u>	<u>FY 95</u>	<u>FY 96</u>
Air Force	355	266	311	251	169
Army	599	465	472	405	268
Navy	414	481	358	292	229
DLA	116	150	124	101	108
NASA	---	14	3	15	24
Other	67	68	133	149	211
Reinstated	<u>161</u>	<u>107</u>	<u>132</u>	<u>110</u>	<u>96</u>
TOTAL	1712	1551	1533	1323	1105

E. Status of Appeals Pending End of FY 1996:

Complaint Due	151
Answer Due	143
Discovery	745
To Be Set	77
Hearing Set	141
Transcript & Briefs Due	72
Suspense	17
Ready to Write	<u>197</u>
TOTAL	1543
Rule 12	72

F. Appeals Disposed of During FYs 1992-96

1. Origin of Appeals:

	<u>FY 92</u>	<u>FY 93</u>	<u>FY 94</u>	<u>FY 95</u>	<u>FY 96</u>
Air Force	477	374	359	287	305
Army	636	689	450	551	429
Navy	472	393	487	357	349
DLA	170	258	182	97	126
NASA	---	2	9	8	11
Other Agencies	97	60	73	164	126
Admin. Disposals	29	46	23	14	28

2. Rule 12 Proceedings	276	261	238	180	147
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3. Record only Dispositions	364	253	203	182	280
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4. Disposition:

Dismissed	1257	1251	1150	1083	969
Denied	283	262	225	227	216
Sustained	<u>341</u>	<u>209</u>	<u>208</u>	<u>168</u>	<u>199</u>
TOTAL	1881	1722	1583	1478	1384

Of the Board's 1,543 active appeals, the Army has 314 (20.4%), the Corps of Engineers has 175 (11.3%), the Navy has 519 (33.6%), the Air Force has 256 (16.6%), the DLA has 159 (10.3%), NASA has 32 (2.1%), and the remaining 88 appeals (5.7%) are from other sources. At the conclusion of FY 96, 13 of the appeals were court remands, 27 were applications under the Equal Access to Justice Act, 17 were motions for reconsideration, and 72 were processed under Board Rule 12 (36 expedited and 36 accelerated).

At the Close of FY 96, 38 ASBCA decisions were under review by the U.S. Court of Appeals for the Federal Circuit (including one Government appeal) and three maritime appeals were pending before District Courts. No requests have been received from District Courts for an advisory opinion under the Cochran Amendment (see Federal Acquisition Streamlining Act of 1994 (P.L. 103-355, Section 2354)).

During the Fiscal Year, the parties requested the Board's ADR services 42 times, covering 53 appeals and one pre-appeal dispute. The cases varied in amount from a few thousand dollars to tens of millions of dollars. Of the 42 requests, 21 were for binding ADR, 16 for a settlement judge, and 5 requests for minitrials. Our experience reflects that approximately nine out of ten ADR proceedings result in an agreement which resolves the dispute.

With the retirements of Judge Yannello in January and Judge Duvall in April, the number of ASBCA judges has dropped from a high of 37 to 27. The Board continues to struggle with the high-grade freeze and has not been able to hire a replacement judge since the Spring of 1993.

//Signed//
PAUL WILLIAMS
Chairman

[Ref. 40]

APPENDIX F. LEXIS SEARCH RESULTS

SUMMARY OF PRELIMINARY LEXIS SEARCH RESULTS

LEXIS Search Terminology	ASBCA	CLAIMS
Contract for Services (Focus:Navy)	0	1
Contract No. N! and Navy and Date>September 30, 1991	0	0
Contract Support and Navy	2	0
Facilities Maintenance	1	0
Food and Marine Corp! and Navy and Date>September 30, 1991	0	0
Food and Navy and Date>September 30, 1991	12	0
Hous! Maint! and Navy and Date>September 30, 1991	4	0
Janitor and Navy and Date>September 30, 1991	1	0
Janitor! and Navy and Date>September 30, 1991	9	0
Management and Navy and Date>September 30, 1991	0	0
Mess Att! and Navy and Date>September 30, 1991	5	0
Naval and 1995	3	0
Naval and 1996	0	0
Naval and 1997	2	0
Navy and 1995	0	0
Navy and 1996	0	0
Navy and 1997	25	5
Navy and Date>September 30, 1991	0	0
Service Contract Act and Navy	0	0
Service Contract and Navy	0	0
Service Contract and Navy and 1995	0	0
Service Contract and Navy and 1996	0	0
Service Contract and Navy and 1997	0	0
Services and NAVFAC	0	1
Services Contract	5	0
Services Contract (Focus:Navy and Date>September 30, 1991)	0	0
Services Contract and Marine Corps	1	0
Services Contract and Naval	2	0
Services Contract and Navy	58	0
Services W/10 Navy	33	0
Services W/10 Navy and Date>September 30, 1991	0	9
Support Services and Navy	12	6
TOTAL NUMBER OF CASES FOR EACH CATEGORY	175	22
TOTAL NUMBER OF POTENTIAL CASES FOR THIS STUDY	197	

Table 13

Source: Developed by researcher

SUMMARY OF FINAL LEXIS SEARCH RESULTS

LEXIS Search Terminology	ASBCA	CLAIMS
Contract for Services (Focus:Navy)	0	0
Contract No. N! and Navy and Date>September 30, 1991	0	0
Contract Support and Navy	0	0
Facilities Maintenance	1	0
Food and Marine Corp! and Navy and Date>September 30, 1991	0	0
Food and Navy and Date>September 30, 1991	7	0
Hous! Maint! and Navy and Date>September 30, 1991	2	0
Janitor and Navy and Date>September 30, 1991	0	0
Janitor! and Navy and Date>September 30, 1991	7	0
Management and Navy and Date>September 30, 1991	0	0
Mess Att! and Navy and Date>September 30, 1991	5	0
Naval and 1995	0	0
Naval and 1996	0	0
Naval and 1997	0	0
Navy and 1995	0	0
Navy and 1996	0	0
Navy and 1997	3	2
Navy and Date>September 30, 1991	0	0
Service Contract Act and Navy	0	0
Service Contract and Navy	0	0
Service Contract and Navy and 1995	0	0
Service Contract and Navy and 1996	0	0
Service Contract and Navy and 1997	0	0
Services and NAVFAC	0	0
Services Contract	0	0
Services Contract (Focus:Navy and Date>September 30, 1991)	0	0
Services Contract and Marine Corps	0	0
Services Contract and Naval	1	0
Services Contract and Navy	27	0
Services W/10 Navy	4	0
Services W/10 Navy and Date>September 30, 1991	0	3
Support Services and Navy	0	0
TOTAL NUMBER OF CASES FOR EACH CATEGORY	57	5
TOTAL NUMBER OF CASES APPLICABLE TO THIS STUDY	62	

Table 14

Source: Developed by researcher

APPENDIX G. LIST OF CASES

1. American Marine Decking Services, ASBCA No. 44440, February 21, 1997.
2. ANC Group, ASBCA No. 47065, August 12, 1994.
3. ASI Personal Services, Inc., ASBCA No. 42915, October 16, 1991.
4. Azalea Moving and Storage, ASBCA No. 44311, May 5, 1993.
5. BH Services, Inc., ASBCA No. 39460, May 7, 1993.
6. Brown Marine Service, Inc., ASBCA No. 45861, October 7, 1993.
7. Burbank Sanitary Supplies, Inc., ASBCA No. 43477, September 3, 1992.
8. Burnside-Ott Aviation Training Center, Inc., U.S. Court of Federal Claims No. 90-3880C, October 25, 1991.
9. Cal-Tron Systems, Inc., ASBCA No. 49159, March 4, 1997.
10. Capital Services, Inc., ASBCA No. 48876, February 15, 1996.
11. Cessna Aircraft Company, ASBCA No. 43196, March 12, 1993.
12. Chambers-Thompson Moving and Storage, Inc., ASBCA No. 43260, April 19, 1993.
13. Cherokee Electronics Corp., ASBCA No. 39833, October 5, 1992.
14. CleanServ Executive Services, Inc., ASBCA No. 47781, October 30, 1995.
15. Coastal Government Services, Inc., ASBCA No. 49625, April 9, 1997.
16. Contel of California, Inc., U.S. Court of Federal Claims No. 93-594C, December 4, 1996.
17. Contract Automotive Repair & Management, ASBCA No. 45316, November 16, 1993.

18. Control Data Systems, Inc., U.S. Court of Federal Claims No. 94-592C, December 30, 1994.
19. Emerald Maintenance, Inc., ASBCA No. 42908, April 22, 1994.
20. FD Services, Inc., ASBCA No. 46427, January 24, 1995.
21. Food Services, Inc., ASBCA No. 46176, July 20, 1994.
22. Food Services, Inc., ASBCA No. 46176, August 15, 1995.
23. General Engineering & Machine works, ASBCA No. 38788, May 6, 1992.
24. Grumman Technical Services, Inc., ASBCA No. 46040, September 5, 1995.
25. Hellenic Express, ASBCA No. 47129, October 3, 1996.
26. HFS, Inc., ASBCA No. 43748, June 25, 1992.
27. Input Output Computer Services, Inc., ASBCA No. 45063, March 12, 1993.
28. Intram Company, ASBCA No. 44159, September 23, 1993.
29. JL Associates, Inc., ASBCA No. 45941, September 28, 1993.
30. Johnson Controls World Services, Inc., ASBCA No. 48821, December 11, 1995.
31. Johnson Controls World Services, Inc., ASBCA No. 49011, February 2, 1996.
32. Johnson Controls World Services, Inc., ASBCA No. 40233, July 31, 1996.
33. Johnson Controls World Services, Inc., ASBCA No. 46691, October 3, 1996.
34. Johnson Controls World Services, Inc., ASBCA No. 46692, November 12, 1996.
35. Korean Maintenance Co., ASBCA No. 43219, July 15, 1994.
36. Limpiezas Corona S.A., ASBCA No. 45504, January 5, 1996.
37. Logistics Data Research Corp., ASBCA No. 43737, October 18, 1994.

38. Mac's Cleaning and Repair Service, ASBCA No. 49652, January 8, 1997.
39. Melka Marine, Inc., U.S. Court of Federal Claims No. 96-536C, August 4, 1997.
40. Merrimac Management Institute, Inc., ASBCA No. 45291, October 24, 1994.
41. Military Pack and Crate, Inc., ASBCA No. 43581, April 30, 1992.
42. Miller's Moving Company, ASBCA No. 43114, January 14, 1992.
43. Morrison-Knudsen Services, Inc., ASBCA No. 41390, April 24, 1992.
44. National Medical Staffing, Inc., ASBCA No. 40391, February 21, 1992.
45. Ogden-HCI Services, ASBCA No. 32169, June 4, 1993.
46. Ogden-HCI Services, ASBCA No. 32169, October 28, 1993.
47. Phillips National, Inc., ASBCA No. 41654, July 16, 1992.
48. Plum Run, Inc., ASBCA No. 49207, August 26, 1997.
49. Professional Services Unified, Inc., ASBCA No. 45799, December 14, 1993.
50. Professional Services Unified, Inc., ASBCA No. 48883, December 29, 1995.
51. Rice King, ASBCA No. 43352, February 20, 1992.
52. Service Technicians, Inc., ASBCA No. 42084, December 27, 1993.
53. Service Technicians, Inc., U.S. Court of Federal Claims No. 94-647C, February 25, 1997.
54. Services, Inc., ASBCA No. 42929, October 20, 1992.
55. SMS Agora Systems, Inc., ASBCA No. 50451, August 28, 1997.
56. Spectrum Emergency Care, Inc., ASBCA No. 43979, March 17, 1994.

57. Technology Services International, ASBCA No. 46294, February 9, 1995.
58. The Swanson Group, Inc., ASBCA No. 47676, January 30, 1995.
59. Tracor Technology Resources, Inc., ASBCA No. 44759, November 30, 1992.
60. Tumpane Services Corp., ASBCA No. 43655, March 10, 1992.
61. Universal Consolidated Services, ASBCA No. 44973, October 20, 1994.
62. Western States Management Services, Inc., ASBCA No. 41880, September 30, 1992.

APPENDIX H. DATA COLLECTION FORM

Sample Data Collection Form

Case Name:

Case Number:

Case Date:

Court: ASBCA / U.S. Court of Federal Claims

Search Terminology:

Service: Navy / Marine Corps

Awarding Agency:

Location of Performance:

Period of Performance:

Contract Number:

Contract Award Date:

Contract Type:

Method of Award:

Type of Service:

Dollar Value of Contract:

Dollar Value of Claim/Dispute:

Timeline:

Reason(s) for Dispute/Claim:

Court's Decision:

Weaknesses Identified:

Potential Preventers from Problem Occurring:

APPENDIX I. CASE DATA SUMMARY

Case Name	Case Number	Case Date	Court	Contract Award Date	Contract Type	Method of Award	Type of Service	Dollar Value of Contract	Dollar Value of Claim/Dispute
Coastal Government Services, Inc.	49625	9-Apr-97	ASBCA	14-Jun-93	FFP/Indef Qty	RFP	OB/GYN Physician Services	\$2,880,769.04	\$33,669.92
The Swanson Group, Inc.	47676	30-Jan-95	ASBCA	28-Sep-91	FFP/Indef Qty	IFB	Security Guard Services	\$1,959,680.70	\$48,839.76
Cherokee Electronics Corp.	39833	5-Oct-92	ASBCA	22-Aug-86	FFP	RFP (Negotiated)	Repair/Overhaul of Electronic Equipment	\$36,912,159.00	\$4,500,013.02
Johnson Controls World Services, Inc.	40233	31-Jul-96	ASBCA	8-Jul-87	FFP/Indef Qty	RFP	Base Operating Support Services		\$3,951,691.00
ASI Personal Services, Inc.	42915	16-Oct-91	ASBCA	9-Aug-88	FFP		Mess Attendant Services	\$2,988,684.00	\$60,984.00
Military Pack and Crate, Inc.	43581	30-Apr-92	ASBCA	27-Nov-89	FFP	IFB	Moving Services		
Chambers-Thompson Moving and Storage, Inc.	43260	19-Apr-93	ASBCA	21-Mar-91	FFP/Indef Qty	RFP	Moving Services		
Contract Automotive Repair & Management	45316	16-Nov-93	ASBCA	23-Jul-92	FFP		Vehicle Repair Services	\$52,206.00	
Merrimac Management Institute, Inc.	45291	24-Oct-94	ASBCA	16-Sep-91	FFP/Indef Qty	RFP	Training Services	\$75,000.00	\$58,942.06
Control Data Systems, Inc.	94-592C	30-Dec-94	CLAIMS				Computer Maintenance Services		
Miller's Moving Company	43114	14-Jan-92	ASBCA	1-Sep-87			Moving Services (Furniture Relocation Services)		\$18,462.15
Professional Services Unified, Inc.	45799	14-Dec-93	ASBCA	30-Sep-91	FFP	RFP	Mess Attendant Services		\$9,500.00

Case Data Summary (Part 1)

Case Name	Case Number	Case Date	Court	Contract Award Date	Contract Type	Method of Award	Type of Service	Dollar Value of Contract	Dollar Value of Claim/Dispute
Grumman Technical Services, Inc.	46040	5-Sep-95	ASBCA	28-Sep-90	FFP		Aircraft Maintenance Services	\$44,619,024.00	\$14,131,828.00
Ogden-HCI Services	32169	28-Oct-93	ASBCA	14-Sep-84	FFP	RFP (Negotiated)	MWR Services		\$1,097,299.00
Ogden-HCI Services	32169	4-Jun-93	ASBCA	15-Sep-84	FFP	RFP (Negotiated)	MWR Services		\$1,097,299.00
Hellenic Express	47129	3-Oct-96	ASBCA	1-Oct-91	FFP/Indef Qty	RFP (Negotiated)	Husbanding Services	\$1,069,637.00	\$210,080.75
Universal Consolidated Services	44973	20-Oct-94	ASBCA	5-Nov-90	FFP	IFB	Shelf Stocking Services	\$870,000.00	\$92,396.50
Cessna Aircraft Company	43196	12-Mar-93	ASBCA	10-May-83			Training Services (Flight Training)		
HFS, Inc.	43748	25-Jun-92	ASBCA	27-Sep-83	FFP/Indef Qty		Base Engineering Systems, Technical	\$13,090,004.00	\$147,470.44
Rice King	43352	20-Feb-92	ASBCA	14-Jul-89		IFB	Fast Food Concession		
Emerald Maintenance, Inc.	42908	22-Apr-94	ASBCA	2-Dec-85	FFP/Indef Qty and Time and Materials	IFB	Facilities Maintenance Services	\$1,058,877.00	\$75,432.91
Input Output Computer Services, Inc.	45063	12-Mar-93	ASBCA	18-Sep-81	Indef Delivery, Time and Materials, Labor Hour	RFP (Negotiated)	Shipyard Support Services	\$450,453.76	\$38,532.15
Burbank Sanitary Supplies, Inc.	43477	3-Sep-92	ASBCA	17-Nov-88	FFP/Indef Qty	IFB	Janitorial Services	\$218,456.98	\$82,883.33

Case Data Summary (Part 1) continued

Case Name	Case Number	Case Date	Court	Contract Award Date	Contract Type	Method of Award	Type of Service	Dollar Value of Contract	Dollar Value of Claim/Dispute
Capital Services, Inc.	48876	15-Feb-96	ASBCA	14-May-93	FFP/Indef Qty	IFB	Janitorial Services (Custodial)	\$116,112.97	\$16,486.31
Technology Services International	46294	9-Feb-95	ASBCA	15-Oct-90	FFP	RFP (Negotiated)	Warehousing Services	\$2,503,917.00	\$297,317.00
FD Services, Inc.	46427	24-Jan-95	ASBCA		FFP/Indef Qty		Housing Maintenance Services		\$210,416.00
Tumpane Services Corp.	43655	10-Mar-92	ASBCA	23-Aug-90	FFP/Indef Qty		Base Operating Services	\$3,517,500.00	\$13,817.80
JL Associates, Inc.	45941	28-Sep-93	ASBCA	27-Sep-90	FFP		Transportation Services		\$10,560.38
Johnson Controls World Services, Inc.	48821	11-Dec-95	ASBCA	30-May-91	FFP/Indef Qty w/ Award Fee	RFP	Base Operating Support Services	\$30,681,188.00	\$8,423.64
Spectrum Emergency Care, Inc.	43979	17-Mar-94	ASBCA	30-Nov-88	FFP	RFP	Emergency Medical/Ambulatory Care Services		
Mac's Cleaning and Repair Service	49652	8-Jan-97	ASBCA	21-Jul-95	FFP/Indef Qty	IFB	Janitorial Services	\$112,693.74	
Service Technicians, Inc.	42084	27-Dec-93	ASBCA	19-Sep-88	FFP/Indef Qty	IFB	Housing Maintenance Services		
National Medical Staffing, Inc.	40391	21-Feb-92	ASBCA	20-Dec-89		RFP	Pharmacy Technician services		
Melika Marine, Inc.	96-536C	4-Aug-97	CLAIMS	17-Oct-94			Dredging Services		
ANC Group	47065	12-Aug-94	ASBCA	1-Jun-93	FFP/Indef Qty		Removal of Construction Debris	\$50,067.30	\$25,035.00

Case Data Summary (Part 1) continued

Case Name	Case Number	Case Date	Court	Contract Award Date	Contract Type	Method of Award	Type of Service	Dollar Value of Contract	Dollar Value of Claim/Dispute
Contel of California, Inc.	93-594C	4-Dec-96	CLAIMS				Telecommunication Services		\$1,104,554.70
Cal-Tron Systems, Inc.	49159	4-Mar-97	ASBCA	1-Aug-88	CPFF		Engineering and Technical Services	\$1,093,770.00	\$123,668.00
SMS Agora Systems, Inc.	50451	28-Aug-97	ASBCA	30-Sep-86	CPFF		Engineering Support Services	\$1,255,443.60	\$38,179.71
Plum Run, Inc.	49207	26-Aug-87	ASBCA		FFP		Base Maintenance Support		\$2,235,177.00
Limpiezas Corona S.A. Logistics Data Research Corp.	45504 43737	5-Jan-96 18-Oct-94	ASBCA ASBCA	31-Jul-89 7-Dec-87	FFP FFP	RFP (Negotiated) RFP (Negotiated)	Janitorial Services Mess Attendant Services	\$3,000,000.00 \$568,495.00	\$219,916.00 \$80,802.00
Brown Marine Service, Inc.	45861	7-Oct-93	ASBCA	30-Sep-91	FFP	IFB	Overhaul Services	\$107,520.00	\$11,327.55
Professional Services Unified, Inc.	48883	29-Dec-95	ASBCA	11-May-92	FFP	RFP (Negotiated)	Janitorial Services		\$8,666.11
American Marine Decking Services	44440	21-Feb-97	ASBCA	23-Mar-88	FFP (Requirements basis)	RFP	Marine Decking Repair/Habitability Services		
Burnside-Ott Aviation Training Center, Inc.	90-3880C	25-Oct-91	CLAIMS		FFP (Requirements)	RFP	Aircraft Maintenance Services (Helicopter Maintenance)		
Service Technicians, Inc.	94-647C	25-Feb-97	CLAIMS	19-Sep-88	FFP/Indef Qty	IFB	Housing Maintenance Services		

Case Data Summary (Part 1) continued

Case Name	Case Number	Case Date	Court	Contract Award Date	Contract Type	Method of Award	Type of Service	Dollar Value of Contract	Dollar Value of Claim/Dispute
Azalea Moving and Storage	44311	5-May-93	ASBCA		FFP/Indef Qty		Moving Services		\$1,546.60
Food Services, Inc.	46176	20-Jul-94	ASBCA	11-Dec-87	FFP/Indef Qty		Mess Attendant Services (Food Services)		\$347,004.69
CleanServ Executive Services, Inc.	47781	30-Oct-95	ASBCA	25-Sep-90	FFP/Indef Qty	RFP (Negotiated)	Janitorial Services (Custodial)	\$2,359,464.00	\$168,980.50
Morrison-Knudsen Services, Inc.	41390	24-Apr-92	ASBCA	14-Feb-86		RFP (Negotiated)	Base Operating Support	\$29,040,789.31	\$43,392.00
Services, Inc.	42929	20-Oct-92	ASBCA	23-Oct-90	FFP/Indef Qty	IFB	Janitorial Services (Custodial)		
Food Services, Inc.	46176	15-Aug-95	ASBCA	18-Dec-87	FFP	RFP (Negotiated)	Mess Attendant Services (Food Services)		\$81,253.00
Phillips National, Inc.	41654	16-Jul-92	ASBCA	6-May-88	FFP/Indef Qty	IFB	Housing Maintenance Services	\$2,578,745.00	\$86,268.00
Johnson Controls World Services, Inc.	46692	12-Nov-96	ASBCA	2-Jul-92	FFP/Indef Qty w/ Award Fee	RFP	Base Operating Support Services	\$35,241,241.00	\$34,003.00
Korean Maintenance Co.	43219	15-Jul-94	ASBCA	19-Dec-86	FFP		Janitorial Services		
Intram Company	44159	23-Sep-93	ASBCA	30-Sep-88	FFP		Maintenance and Repair Services	\$66,920.00	\$45,000.00
Western States Management Services, Inc.	41880	30-Sep-92	ASBCA	4-Sep-86	FFP	IFB	Mess Attendant Services		\$53,795.43
Johnson Controls World Services, Inc.	49011	2-Feb-96	ASBCA	30-May-91	FFP/Indef Qty w/ Award Fee	RFP	Base Operating Support Services	\$30,681,188.00	\$28,127.22

Case Data Summary (Part 1) continued

Case Name	Case Number	Case Date	Court	Contract Award Date	Contract Type	Method of Award	Type of Service	Dollar Value of Contract	Dollar Value of Claim/Dispute
BH Services, Inc.	39460	7-May-93	ASBCA	27-Sep-88	FFP	IFB	Mess Attendant Services	\$490,723.68	\$184,601.09
Tracor Technology Resources, Inc.	44759	30-Nov-92	ASBCA	25-Jul-90	FFP/Indef Qty	IFB	Collection and Transportation of Lab Specimens	\$50,000.00	\$49,932.00
General Engineering & Machine Works	38788	6-May-92	ASBCA	1-Jul-82	Indef Qty	RFP (Negotiated)	Time and Materials	\$778,345.00	\$86,775.00
Johnson Controls World Services, Inc	46691	3-Oct-96	ASBCA	30-May-91	FFP/Indef Qty w/ Award Fee	RFP	Base Operating Support Services	\$30,681,188.00	\$412,961.00

Case Data Summary (Part 1) continued

Case Name	Reason(s) for Dispute/Claim	Court's Decision	Weaknesses Identified
Coastal Government Services, Inc.	Estimated contract quantity not ordered.	Denied - Gov't did not exercise Indef Qty option so Ktr not entitled.	CO and Ktr not understand contract type. COFD took 6 months.
The Swanson Group, Inc.	Wage rate increase (Collective Bargaining Agreement)(SCA) - Ktr REA. Says part of contract.	Sustained - Ktr correctly applied wage increase.	CO confusion as to when wage adjustments apply. Numerous amendments delayed bid and award.
Cherokee Electronics Corp.	Wage rate increase (DOL SCA) - Ktr REA for SCA wages actually paid plus G&A, O/H & Profit on increase.	Denied - Ktr liable for full SCA wage even if paying workers less.	CO confusion over SCA applicability to contract. CO took 9 months to modify contract to SCA.
Johnson Controls World Services, Inc.	Wage rate increase (DOL SCA) - Ktr REA for actual wages paid vs proposed wages.	Denied - Ktr responsible for ensuring correct classifications approved by DOL.	CO confusion over wage classifications. CO no proof new DOL wages sent to offerors prior to award.
ASI Personal Services, Inc.	Extra work performed above contract estimate - Ktr claims. Ktr appeal COFD award of \$25,583.21 vice total claim.	Denied - Claim not certified	CO confusion. CO issued COFD on uncertified claim
Military Pack and Crate, Inc.	Wage rate underpayment. Difference in SCA wage rates and actual wage rates paid by Ktr.	Denied - Ktr knew SCA applied requiring DOL wage rates.	CO confusion. CO unsure what to do when new SCA rates received.
Chambers-Thompson Moving and Storage, Inc.	Termination for Default (T4D) - Ktr claims improper.	Denied - Ktr failed to timely perform 7% of contract.	CO confusion. COTR telling Ktr not have to perform. CO not fully understand T4D requirements.
Contract Automotive Repair & Management	Termination for Default T4D (partial) prior to end of 10 day cure period.	Stayed - not subject to summary motion	CO confusion. Gov't T4D prior to expiration of 10 day cure period.
Merrimac Management Institute, Inc.	Minimum quantity not ordered as specified in contract.	Sustained - Gov't in breach of minimum quantity obligation.	CO confusion. CO confused over what work counted towards minimum quantity requirements.
Control Data Systems, Inc.	Preaward bid protest to prevent T4C of current contract and award to small business ktr.	Denied - Protest caused contract to continue through base period. Gov't not bound to award option years.	CO failed to get CoC from SBA prior to determining small business unacceptable bid.
Miller's Moving Company	Wage rate underpayment by Ktr. Deductions for DOL SCA wage underpayment.	Denied - Christian doctrine applies. SCA wages apply even if not included in contract.	CO failed to include SCA wage rates in solicitation and contract. Caused confusion for Ktr.
Professional Services Unified, Inc.	Wage rate increase (DOL SCA) - Ktr REA for G&A, O/H & Profit on increase.	Sustained for base year only	CO failed to incorporate current union wage agreement prior to awarding contract. No negotiations held. COFD not issued after claim.

Case Data Summary (Part 2)

Case Name	Reason(s) for Dispute/Claim	Court's Decision	Weaknesses Identified
Grumman Technical Services, Inc.	Contract options not exercised validly. Gov't failure to validly exercise option years.	Sustained - Gov't improperly exercised option years of the contract. Parties to determine dollar amount.	CO failed to properly exercise option years and changed scope of the contract.
Ogden-HCI Services	Inaccurate Gov't information (superior knowledge). Gov't appeal of prior ASBCA decision.	Denied - Prior decision stands	CO failed to share "superior knowledge" to all bidders
Ogden-HCI Services	Inaccurate Gov't information. Gov't failure to provide "superior knowledge" to all bidders. Failure to enforce prior contract.	Sustained - Gov't not shared superior knowledge and failed to properly enforce prior contract terms.	CO failed to share superior knowledge. Gov't not wanting to update RFP to add new cost history. Written negotiations.
Hellenic Express	Payment of actual costs vice price bid. (Ktr overcharging ships for services).	Denied - Ktr knew Greek prices prior to bid. Ktr responsible for paying higher costs than contract price with U.S.	CO must rely on Ktr's expertise when no CO in area of service.
Universal Consolidated Services	Termination for Convenience (T4C) - No Cost. Incorrect worker classification.	Denied - Ktr signed agreement for no cost T4C	CO threatened T4D (violation of SCA) if not agree to no cost T4C (Ktr mistake in bid - DOL conflicting wage determinations).
Cessna Aircraft Company	Contract options not exercised properly (funding issue).	Denied	COFD not issued
HFS, Inc.	Orders placed without funding. Failure to pay hardware maintenance support and software licensing fees.	Sustained - Partial Denied - Partial	COFD not issued. CO failed to discontinue services when funding stopped.
Rice King	Inaccurate Gov't information (data) used in bid.	Stayed - Case to continue	COFD not issued. CO not understanding Ktr's claim.
Emerald Maintenance, Inc.	Extra work performed in excess of historical estimates used in bid.	Denied - Ktr relied on oral discussions with other base Ktrs and believed wouldn't have to do all work specified in contract.	COFD not made by CO. Historical records "grossly inadequate."
Input Output Computer Services, Inc.	Disallowed costs by Gov't.	Denied - Ktr failed to file invoices within one year of contract completion as required by "Payments" clause.	COFD took 5 months
Burbank Sanitary Supplies, Inc.	Extra work performed. Extra labor costs associated with extra hours worked (overtime).	Denied - No proof by Ktr of extra costs/work	COFD took 5 months. Gov't worked lots of overtime and gave no estimate to Ktr.

Case Data Summary (Part 2) continued

Case Name	Reason(s) for Dispute/Claim	Court's Decision	Weaknesses Identified
Capital Services, Inc.	Extra work performed not in SOW and improper adjustment to award price.	Denied - All work performed was listed in the contract. Ktr knew how price would be determined if length shortened.	COFD took 6 months. Gov't notified Ktr by phone how price would be determined and not in writing.
Technology Services International	Extra work performed in excess of contract estimate.	Denied - Ktr still made profit above % bid. Gov't liability not shown.	COFD took 90 days
FD Services, Inc.	Extra work performed (service calls) above estimated quantity in contract.	Denied - Ktr responsible for costs up to 110% of estimate.	Contract ambiguity Ktr responsibility for cost overrun for work above estimate.
Tumpane Services Corp.	Extra work performed. Repair work outside scope of contract's fixed price.	Sustained - Repairs outside fixed price scope.	Contract ambiguity. CO not understanding definitions in contract (facility vs. installed equip)
JL Associates, Inc.	Wage rate increase (SCA) due to GFP truck payload misrepresented in contract.	Sustained - (Partial) 3 Trucks coded wrong in contract. Denied on 5 trucks - Ktr failed to show reliance on conflict.	Contract ambiguity. Conflicting documentation in contract.
Johnson Controls World Services, Inc	Pricing of emergency work (Indef Qty work). Conversion factor used in emergency work request.	Denied - Ktr factor not reasonable.	Contract ambiguity. Conversion rate not listed in contract.
Spectrum Emergency Care, Inc.	Extra work performed above estimated volume in contract. Also, deductions for failure to meet performance requirements.	Denied - (Partial) Gov't acted IAW clauses. Sustained - (Partial) Ktr entitled to \$6,439.20 + interest for one incorrect deduction.	Contract ambiguity. Definition of terms not in contract. Meanings vague.
Mac's Cleaning and Repair Service	Termination for Default (T4D) - Abandonment of performance. Ktr claims Gov't fault for not making full progress payments.	Denied - Ktr not entitled to Indef Qty work not ordered above minimum.	Contract ambiguity. IFB not exactly clear on payments for Indef Qty work (though clear in attached clause)
Service Technicians, Inc.	Inaccurate Gov't information (historical data) used in bid.	Denied - Ktr assumed risk of performing indef qty of work for price bid.	Current data not included in solicitation.
National Medical Staffing, Inc.	Termination for Default (T4D) - Failure to provide services.	Denied - Ktr did not provide services as contracted.	Gov't delay in completing technical evaluations (9 weeks).
Melka Marine, Inc.	Delay caused by Gov't. Costs due to Gov't suspension of work order.	Stayed - Go to trial not summary judgment	Gov't delay. Gov't failed to get required permits.
ANC Group	Estimated contract quantity not ordered and Ktr prepaid subcontractor for work not performed.	Denied - Gov't not obligated for Indef Qty work not ordered.	Mistake in contract modification. Gov't alluded to possible work but never ordered.

Case Data Summary (Part 2) continued

Case Name	Reason(s) for Dispute/Claim	Court's Decision	Weaknesses Identified
Contel of California, Inc.	Termination for Convenience (T4C). Improper settlement. Ktr claims unrecovered investment costs, T4C costs & profit on shutdown.	Denied - No implied-in-fact contract between Ktr and Gov't. Gov't not bound by unauthorized acts of its agents.	Non-contracting officers authorizing equipment installations. Required approval documentation (CSAs) not used.
Cal-Tron Systems, Inc.	Cost overrun. Increased overhead actuals caused Ktr's costs to exceed funding limits.	Denied - Ktr knew actuals would be higher but failed to notify Gov't as required by Limitation of Cost clause.	None
SMS Aggra Systems, Inc.	Cost overrun. Increased overhead actuals caused Ktr's costs to exceed funding limits.	Denied - Ktr knew actuals would be higher but failed to notify Gov't. Monetary Limitation clause bars Ktr from recovering costs in excess of limits imposed.	None
Plum Run, Inc.	Contract options not exercised. Expected overhead and profits due to Gov't failure to exercise contract options.	Denied - Gov't not required to exercise option years. Ktr assumes risk if it priced costs over option years.	None
Limpiezas Corona S.A.	Price reduction due to Defective Cost or Pricing Data.	Denied - Ktr provided defective data during negotiations.	None
Logistics Data Research Corp.	Wage rate (SCA) mistake in bid claimed by Ktr.	Denied - no proof	None
Brown Marine Service, Inc.	Wage rate increase (SCA). Unfair treatment and SCA not applicable.	Denied - Ktr had chance to change bid prior to award. Ktr agreed to include DOL wage rates in contract at no cost to Gov't.	None
Professional Services Unified, Inc.	Wage rate increase (taxes). Increased Ktr costs due to increased state and local taxes after contract award. Ktr says wrong clause used.	Denied - Correct clause used. Ktr not entitled to "after-imposed taxes."	None
American Marine Decking Services	Inaccurate Gov't estimates (negligently prepared - Ktr claims). Claim for O/H for entire estimate.	Denied - Gov't estimate reasonable	None
Burnside-Ott Aviation Training Center, Inc.	Wage rate increase (SCA). Reimbursement for labor category misclassification costs.	Denied - Ktr misclassified aircraft workers as lower wage technicians. Ktr responsible for paying higher wages and for determining correct classifications. Technicians not listed in solicitation.	None
Service Technicians, Inc.	Extra work performed above historical data. Also, inaccurate Gov't estimates.	Denied - Ktr agreed to perform whatever number of service calls required for price bid.	None

Case Data Summary (Part 2) continued

Case Name	Reason(s) for Dispute/Claim	Court's Decision	Weaknesses Identified
Azalea Moving and Storage	Price reduction (assessments) for damages to household goods.	Sustained - (Partial) \$434.60; Denied (Partial) \$1,112	None
Food Services, Inc.	Price reduction due to variation in meal estimates.	Denied	None
CleanServ Executive Services, Inc.	Wage rate increase (DOL SCA) (tax rate increase) - Ktr claims mutual mistake.	Stayed - 30 days. Ktr's claim omits reference to rights. Ktr amend complaint.	None
Morrison-Knudsen Services, Inc.	Price reduction for deleted contract work. Ktr claims incorrect computation.	Denied - Deductions properly taken by Gov't.	None
Services, Inc.	Termination for Default (T4D) - Ktr claims improper T4D.	Denied - Ktr not a true business at time of award. No "claim" filed, so no decision on monetary issues.	Source selection process weak. Responsibility determination faulty.
Food Services, Inc.	GFP repair costs - Ktr wants reimbursement for repair parts bought.	Denied - Bid included cost of replacement parts.	SOW ambiguous
Phillips National, Inc.	Extra work performed (floor waxing was separate cost item and not part of "complete cleaning.")	Denied - Work (floor waxing) was included in "complete cleaning" line item	SOW ambiguous
Johnson Controls World Services, Inc.	Extra work performed. Out of scope work claimed by Ktr.	Denied - Patent ambiguity in contract. Ktr duty to clarify before bidding.	SOW ambiguous (patent ambiguity). Gov't not sure of specs.
Korean Maintenance Co.	Termination for Default (T4D) - Ktr claims improper.	Denied - Ktr was undermanned. Ktr responsible for actions of personnel.	SOW ambiguous. Performance measurement criteria not true picture of work performed. Personality conflict between COTR and Ktr.
Intram Company	Extra work performed. Repair work not included in (outside scope) FFP portion of contract.	Denied - Contract and solicitation called for necessary repair work in FFP portion.	SOW ambiguous. Requirements not easy to understand due to many specs included in contract.
Western States Management Services, Inc.	Extra work performed (claimed not in SOW) - Ktr REA for extra work performed.	Denied - Ktr didn't seek clarification prior to bid (obvious ambiguity) & did work without verifying with CO	SOW ambiguous/poorly written; 6 months to issue COFD
Johnson Controls World Services, Inc.	Extra work performed (outside scope). Repair category difference of opinion between Ktr and CO.	Denied - Repairs fall under category normally performed by Ktr.	SOW ambiguous/vague. CO took over 5 months to issue COFD.

Case Data Summary (Part 2) continued

Case Name	Reason(s) for Dispute/Claim	Court's Decision	Weaknesses Identified
BH Services, Inc.	Extra work performed - Ktr REA	Sustained \$71,121.59 & Denied remainder (Ktr underestimated costs so no claim on profit)	SOW ambiguous; CO failed to issue COFD; COTR(FSO) required additional work from Ktr)
Tracor Technology Resources, Inc.	Estimated contract quantity not ordered.	Denied - Gov't ordered more than contract minimum	Unrealistic estimate of potential work
General Engineering & Machine Works	Demand for payment by CO (overpayment of Ktr's overhead rates).	Denied - Ktr failed to keep separate cost pool.	Wrong clause included for wrong type of contract. Applied Christian Doctrine
Johnson Controls World Services, Inc	Demand for payment by CO. Wrong clause invoked by Gov't in COFD. Gov't demand for payment for Ktr error causing increased costs to Gov't.	Sustained - Gov't invoked wrong clause. Gov't can pursue claim using correct clause.	Wrong clause used by CO. Ktr had to request COFD to determine if liable.

Case Data Summary (Part 2) continued

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