

ANNUAL REPORT

UNITED STATES CIVILIAN BOARD OF CONTRACT APPEALS



Fiscal Year 2018

October 1, 2017 – September 30, 2018

MESSAGE FROM THE CHAIR

The United States Civilian Board of Contract Appeals (CBCA) is an independent tribunal housed within the General Services Administration. Our mission is to provide a “just, informal, expeditious, and inexpensive resolution of a case” (CBCA Rule 1). We continually look for ways to advance our mission.

Recent developments at the CBCA include:

New Board Rules of Procedure: In proposing our new rules of procedure for Contract Disputes Act (CDA) cases, 83 Fed. Reg. 13,211 (Mar. 28, 2018), we explained that “[t]he proposed rule simplifies and modernizes access to the Board by establishing a preference for electronic filing, increases conformity between the Board’s rules and the Federal Rules of Civil Procedure, and clarifies current rules and practices.” After notice and comment, the new rules took effect September 17, 2018. 83 Fed. Reg. 41,009 (Aug. 17, 2018).

From Electronic Filing to Electronic Case Files: Several years ago, we implemented electronic filing of cases by email. Our staff has been finalizing our internal case management system, which enables our judges to access case files when on travel. We are transitioning from paper and electronic case files to all-electronic case files, saving lots of paper and hole-punching, and allowing for the use of electronic Rule 4 appeal files during hearings. These innovations will serve our ultimate goal of processing cases as efficiently and inexpensively as possible.

Future Increases in Disaster Disputes: In addition to disputes under the CDA, the CBCA presides over other types of cases. Some case types came to us from predecessor boards in the 2007 consolidation. We hear other disputes under memoranda of understanding. In addition, under the Robert T. Stafford Disaster Relief and Emergency Act, we arbitrate disputes between applicants and the Federal Emergency Management Agency (FEMA) regarding applications for public assistance grants to address damage caused by Hurricanes Katrina, Rita, and Gustav.

On October 5, 2018, the Stafford Act was amended, designating us as the arbitrator of choice to adjudicate disputes between applicants for public assistance grants and FEMA for any disaster that occurred after January 1, 2016. The amendment significantly expands the potential pool of applicants for disaster relief arbitration coming before us. What this means for our docket is yet to be determined. Stay tuned!



Judge Jeri Kaylene Somers
Chair

DECISIONS OF NOTE

J.R. Mannes Service Corp. v. Department of Justice, CBCA 5638 (Nov. 12, 2017)

The contractor sought anticipatory profits it claimed it would have earned had the Federal Bureau of Investigation (FBI) not terminated its contract for convenience, which the contractor claimed was done in bad faith. Acting on the agency's motion for summary judgment, the Board recognized that contracting officers have broad discretion to terminate contracts for convenience and that, absent bad faith or a clear abuse of discretion, which was not found here, a termination decision is conclusive. Although the contractor asserted that the FBI abused its discretion by not complying with Office of Management and Budget Circular A-76 before bringing the work at issue "in-house," the Board held that the circular itself provides that noncompliance creates no basis to challenge agency action or inaction, subject to exceptions not relevant to this case.

Alcazar Trades, Inc. v. Nuclear Regulatory Commission, CBCA 5837 (Feb. 27, 2018)

After the Nuclear Regulatory Commission (NRC) awarded a task order for janitorial services to Alcazar Trades, Inc. (ATI), ATI negotiated a new collective bargaining agreement (CBA). ATI submitted the new CBA to the NRC and requested an equitable adjustment for all option years. The contracting officer denied the claim. On appeal, the Board recognized that the task order was subject to the Service Contract Act (SCA), which requires most service contractors to pay their employees not less than the wage rates set forth in a Department of Labor (DOL) wage determination, which may be based on an applicable CBA. DOL, not the contracting agency, decides whether a new wage determination applies to an option year based on a new CBA. Because DOL had not issued a new wage determination under its SCA regulations, the Board ruled it lacked jurisdiction to hear the appeal.

Mayberry Enterprises, LLC v. Department of Energy, CBCA 5961 (March 13, 2018)

Mayberry Enterprises, LLC, was awarded a construction contract by the Western Area Power Agency (WAPA), a component of the Department of Energy (DOE). Two months before WAPA terminated the contract for default, Mayberry Enterprises sent the contracting officer an uncertified claim letter seeking \$88,000 in delay-related costs, the release of \$41,000 in retainage, and payment of an invoice for \$401,000 in extra work. The contracting officer did not respond. After the default termination, the contractor filed an appeal with the CBCA challenging both the termination and the deemed denial of a claim for \$530,000. Granting in part a DOE motion, the CBCA held that the three claim elements were segregable and that the Board had jurisdiction under the Contract Disputes Act to address the delay and retainage issues but not the invoice, which exceeded \$100,000 and was not the subject of a certified claim.

JBG/Federal Center, L.L.C. v. General Services Administration and Department of Transportation, CBCA 5506, 5715, 5849 (March 30, 2018)

Eight years into the term of a lease of Federal Center in Washington, D.C., the General Services Administration (GSA) began withholding some of the annual property tax reimbursement sought by the owner. GSA asserted that it had agreed in the lease to reimburse the taxes on only part of the building's parking lot. The contracting officer also asserted a claim against the owner for past over-reimbursements. The owner disputed GSA's withholding and claim. The owner also submitted a claim to the tenant, the Department of Transportation (DOT), arguing that, to the extent that GSA did not reimburse the property taxes, DOT should do so under a separate parking agreement. The two disputes came before the CBCA and were consolidated. In an interlocutory decision, the Board granted partial summary judgment to GSA and to the owner. The Board agreed with GSA's reading of the lease (despite GSA's eight years of contrary behavior) and agreed in part with the landlord that GSA's claim for payments made more than six years before GSA asserted its claim were time barred. The Board rejected the owner's position that GSA's entire claim was untimely.

ServiTodo LLC v. Small Business Administration, CBCA 6055 (June 4, 2018)

In an earlier appeal, the CBCA had denied a claim by ServiTodo LLC against the Department of Health and Human Services (HHS), on the grounds that ServiTodo and HHS had previously settled the dispute. In 2018, ServiTodo, a small business that had contracted with HHS under section 8(a) of the Small Business Act, refiled substantially the same claim and CBCA appeal against the Small Business Administration (SBA), arguing that SBA had been a party to the contract, pursuant to an SBA-HHS section 8(a) partnership agreement, but was not a party to the settlement. The Board ruled that ServiTodo failed to state a claim for relief in its second appeal, as HHS was the real party in interest in the original dispute, and SBA acts under section 8(a) only as an agent for small businesses, not as a contracting party.

NVS Technologies, Inc. v. Department of Homeland Security, CBCA 4775, 5360 (June 19, 2018)

NVS Technologies, Inc. (NVS) performed a research and development contract, which the Department of Homeland Security (DHS) terminated for convenience after four years. NVS submitted a certified termination settlement proposal for \$3.8 million, which it increased during negotiations with DHS to \$12.8 million without certifying the increased amount. The DHS contracting officer rejected the settlement proposal and decided that NVS owed DHS about \$600,000. NVS appealed. When the Board questioned its jurisdiction over the uncertified portion of NVS's claim, NVS certified and substantially resubmitted its increased termination settlement proposal, including a total of \$10.3 million for "lost opportunity cost" and "cost of bad credit," which the proposal did not describe or itemize in any detail. The contracting officer denied this claim, NVS appealed, and the two appeals were consolidated. In litigation, NVS sought \$282 million in "lost profits." The Board granted DHS's motion to dismiss this part of the case on the grounds that lost profits was a new theory of relief that NVS had not raised in a certified claim.

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B&F Distributors, LLC v. Department of Homeland Security, CBCA 5993 (June 27, 2018)

In May 2010, three years after the contractor completed performance of 157 work orders, a Federal Emergency Management Agency contracting officer issued a decision demanding \$35,087 previously paid under twenty-five of the work orders. The decision did not identify which work orders were at issue. The contractor began paying the debt. In January 2018, after obtaining a copy of an attachment identifying the work orders that was supposed to have accompanied the 2010 decision, and deciding that the refund demand was too high, the contractor appealed, arguing that, because the decision was incomplete and did not explain the basis of the demand, the ninety-day appeal period never started. The Board disagreed. It held that, although the Contract Disputes Act requires that the contracting officer give reasons for a decision, it does not require specific findings of fact, and the 2010 decision sufficed for appeal.

Collecto, Inc. dba EOS CCA v. Department of Education, CBCA 6001, and Transworld Systems Inc. v. Department of Education, CBCA 6049 (July 26, 2018)

The Federal Student Aid Office of the Department of Education (DOE) awarded substantially identical task orders to EOS CCA and Transworld Systems Inc. for debt collection services. A DOE contracting officer later issued final decisions demanding from both contractors amounts that DOE said they were overpaid during DOE's transition to a new data processing system. Both contractors appealed. The appeals were assigned to different CBCA judges. DOE moved to have the cases consolidated. The contractors opposed the motions. In an order, the CBCA judges denied the agency's motions to consolidate their cases but agreed to coordinate the discovery phases. The judges determined that, while the cases were similar, "[w]ith only two appellants . . . in appeals in which only minimal discovery is anticipated, . . . the Board, through the consultation of the two presiding judges, can easily coordinate the development of the appeals through discovery and briefing without the need to combine or consolidate them, at least given their current posture."

Development Alternatives, Inc. v. Agency for International Development, CBCA 5942, et al. (Sept. 27, 2018)

The Agency for International Development (AID) awarded five contracts to Development Alternatives, Inc. (DAI) for security services in Afghanistan. DAI, in turn, subcontracted with another company. The Afghan government assessed fines against the subcontractor, which submitted five certified claims to DAI, each for more than \$100,000. DAI forwarded those claims to the AID contracting officer, with a conditional and defective certification disclaiming knowledge by DAI of the accuracy of the claimed amounts. Here, the AID contracting officer informed DAI on two separate occasions that its certifications did not comply with CDA requirements. DAI elected to roll the dice and filed its appeal without correcting the certification. The Board dismissed DAI's appeals holding that, although a defective certification does not automatically deprive the Board of jurisdiction, the defect must be inadvertent and technical. The Board deemed that DAI's failure to correct the certifications was "reckless" and not salvageable.

CBCA LAW CLERK PROGRAM

The CBCA has had a robust law clerk program for many years. In fact, one of the program's earliest participants is now a CBCA Judge (see sidebar). The law clerk program is active year-round, with part-time Fall and Spring student law clerks, full-time summer law clerks, and full-time, paid, one-year post-graduate law clerks. The law clerks assist board judges by conducting legal research, drafting legal memoranda, preparing analyses of facts, assisting in the preparation of orders and decisions, attending hearings, and taking part in mediations. The summer law clerks also compete in a moot court competition based upon a real CBCA case before a three judge panel (see below). Since the CBCA's mission includes substantial alternative dispute resolution (ADR), the law clerks participate in a mock ADR to learn the key differences between litigation and ADR. The program also brings in speakers and arranges field trips.



CBCA Judges Chadwick, Sullivan and O'Rourke present certificates to summer law clerks Bill Fletcher and Connor Luff for winning the 2017 summer moot court competition.

Recent field trips included a Library of Congress tour, a tour of the U.S. Supreme Court and Q&A session with the Clerk, a visit to the U.S. Court of Appeals for the Federal Circuit, and a visit to the U.S. District Court for the District of Columbia, where one of its judges provided helpful career observations and advice.

Judge Kathleen O'Rourke served as a law clerk while completing her Master of Laws degree in government procurement during the academic year 2007-2008. At the time, she was on active duty in the U. S. Air Force, with the Judge Advocate General Corps. She went on to serve in numerous positions around the world with the Air Force, including a tour in Afghanistan. After retiring from military service, she became a senior procurement attorney for the First Responder Network Authority with the United States Department of Commerce. She came full circle on May 29, 2016, when she was appointed to the CBCA by the Administrator of General Services.



At left: Major O'Rourke during her time as a CBCA law clerk

At right: Judge O'Rourke on the bench as a CBCA Board Judge.



CBCA STAFF SUPPORT DIVISION

In addition to the Judicial Division, which consists of the fourteen Board Judges, the CBCA has a Staff Support Division composed of diverse professionals, including attorneys, the Clerk of the Board, IT experts, and contracting officers, who support the work of the judges in every way. The Staff Support Division oversees everything from budgeting and docketing to the smooth operation of the Board's facilities, audio visual equipment, and electronic services. The staff maintains the Board's website for easy reference by the public, and follows the Board's cases from beginning to end, including arranging for judge travel and court reporting in those cases where a hearing is necessary.



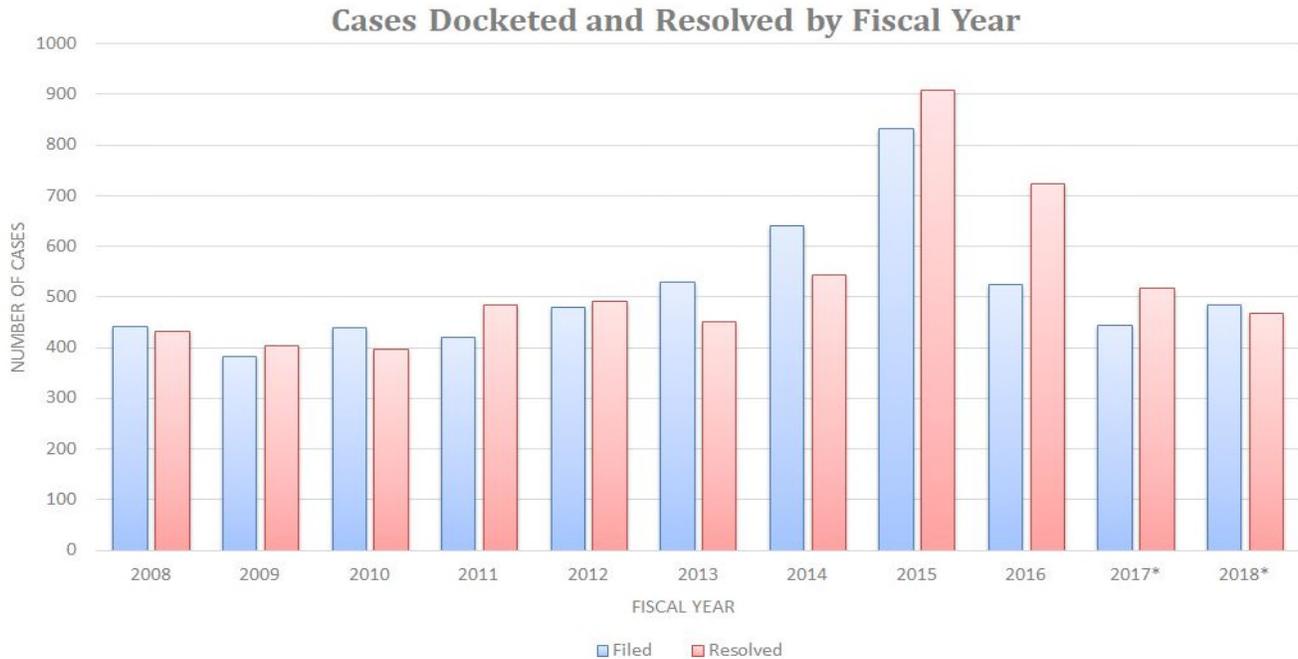
ANTHONY GRAHAM (CBCA), KENYA MCPHERSON (CBCA), DEMI DUNSTON (NCFC), ELIZABETH TAYLOR (NCFC), AND ROCHELLE ACHOE (CBCA)

Our staff also seeks out opportunities to recycle materials for use in the community. Through the Computers for Learning (CFL) program, the Board transferred a total of sixty-nine computer workstations to the New Community for Children (NCFC). The CFL program enables schools and educational nonprofit organizations to obtain excess computer equipment from federal agencies. The Board staff made this transfer possible and seamless.

For several years, the Board has hosted an annual luncheon in conjunction with the ABA Public Contract Law Section Young Lawyers Committee. The staff provides significant support for this event, which, in addition to the lunch, includes a panel discussion by CBCA judges, who provide practice tips for young lawyers appearing before the Board. Board staff also supports various charitable campaigns, including the Combined Federal Campaign, for which the Board met its donation goals this year.

STATISTICS

The chart below details the total cases filed and resolved by fiscal year since 2008.



* 2017-2018 include separate ADR cases where there is an underlying docketed appeal.

The chart below shows all electronic filings received by the CBCA during fiscal year 2018. The Board provided electronic filing as an option for parties in 2013, and in this fiscal year, approximately 93% of all filings were submitted electronically.

ELECTRONIC FILINGS

	Oct.	Nov.	Dec.	1st QTR.	Jan.	Feb.	Mar.	2nd QTR.	Apr.	May	Jun.	3rd QTR.	Jul.	Aug.	Sep.	4th QTR.	FY TOTAL
Processed	285	298	246	829	303	275	303	881	267	282	330	879	271	316	244	831	3420
Not Processed	15	19	20	54	47	9	22	78	25	33	29	87	41	28	12	81	300
Rejected	16	9	21	46	6	12	9	27	10	19	12	41	15	10	13	38	152
Spam/Trash	44	42	58	144	59	53	62	174	39	44	38	121	54	43	50	147	586
TOTAL	360	368	345	1073	415	349	396	1160	341	378	409	1128	381	397	319	1097	4458

- Processed: Submissions found to be compliant with the CBCA's rules and that were included in the case record
- Not Processed: Submissions deemed not proper to include in the case record, such as acknowledgment of receipt emails from one party to the other, duplicate filings, and emails directed to the Clerk's office regarding general questions
- Rejected: Submissions found to be non-compliant with the CBCA's rules and that were not included in the case record, such as filings with attachments that were not in PDF format, filings without the intended attachments, and filings in which the party submitted links in lieu of providing the actual documents
- Spam/Trash: Spam emails, advertisements, etc.

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The chart below shows all new cases docketed by the CBCA during fiscal year 2018 by case type.

CASES DOCKETED

	Oct.	Nov.	Dec.	1st QTR.	Jan.	Feb.	Mar.	2nd QTR.	Apr.	May	Jun.	3rd QTR.	Jul.	Aug.	Sep.	4th QTR.	FY TOTAL
ADR	0	0	0	0	0	0	0	0	0	0	0	0	0	0	1	1	1
Appeal	18	31	11	60	20	25	20	65	6	36	31	73	19	11	9	39	237
Appeal Recon	4	0	0	4	0	0	0	0	0	0	0	0	0	0	0	0	4
Debt	0	0	0	0	0	0	0	0	0	1	0	1	0	0	0	0	1
EAJA Cost	0	0	0	0	1	0	1	2	0	0	2	2	0	0	1	1	5
FCIC	0	0	0	0	0	0	0	0	0	0	0	0	1	0	1	2	2
FCIC Recon	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0
FEMA	15	1	0	16	0	0	0	0	0	1	0	1	1	0	0	1	18
FMCSA	4	6	5	15	2	5	2	9	1	1	0	2	1	3	3	7	33
ISDA	0	2	4	6	1	4	0	5	4	4	1	9	1	5	0	6	26
ISDA Recon	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0
Other	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0
Petition	0	0	0	0	0	1	0	1	0	0	0	0	0	0	0	0	1
Rate	0	0	2	2	0	0	1	1	0	0	0	0	0	0	0	0	3
RELO	2	2	3	7	7	3	2	12	1	1	6	8	5	5	1	11	38
RELO Recon	0	2	0	2	0	1	0	1	0	0	0	0	1	0	0	1	4
TRAV	4	3	2	9	4	4	3	11	2	0	2	4	4	4	3	11	35
TRAV Recon	0	0	0	0	0	0	0	0	1	0	0	1	0	0	0	0	1
TOTAL	47	47	27	121	35	43	29	107	15	44	42	101	33	28	19	80	409

ADR	Alternative Dispute Resolution case (no CDA appeal)	ISDA	Indian Self Determination Act case
Appeal	Contract Disputes Act appeal of a contracting officer's final decision (COFD)	Petition	Requesting an order for a COFD
Debt	Debt collection case	Rate	GSA transportation audit case
EAJA Cost	Equal Access to Justice Act case	RELO	Relocation expenses case
FCIC	Federal Crop Insurance Corp. case	Recon	Reconsideration of any type of case
FEMA	Federal Emergency Management Agency case	TRAV	Travel expenses case
FMCSA	Federal Motor Carrier Safety Administration case		

The chart below shows filings and notices related to appeals of CBCA decisions to the United States Court of Appeals for the Federal Circuit in FY 2018.

**UNITED STATES COURT OF APPEALS FOR THE FEDERAL CIRCUIT
FILINGS/NOTICES**

	Oct.	Nov.	Dec.	1st QTR.	Jan.	Feb.	Mar.	2nd QTR.	Apr.	May	Jun.	3rd QTR.	Jul.	Aug.	Sep.	4th QTR.	FY TOTAL
Docketed	1	1	0	2	2	0	0	2	1	0	0	1	0	0	0	0	5
Certified List	0	1	1	2	0	1	1	2	0	1	0	1	0	0	0	0	5
Opinion	0	0	1	1	2	1	0	3	0	1	0	1	2	0	0	2	7
Mandate	0	0	0	0	1	1	3	5	1	1	1	3	2	0	0	2	10
TOTAL	1	2	2	5	5	3	4	12	2	3	1	6	4	0	0	4	27

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The chart below shows cases in which a separate ADR was docketed in a case in which the parties had already filed an appeal with the CBCA.

ADR OF CASES WITH AN UNDERLYING APPEAL

	Oct.	Nov.	Dec.	1st QTR.	Jan.	Feb.	Mar.	2nd QTR.	Apr.	May	Jun.	3rd QTR.	Jul.	Aug.	Sep.	4th QTR.	FY TOTAL
Carried Forward	57	56	54		56	54	59		50	41	48		28	33	37		
New Requests	4	2	7	13	5	16	4	25	3	17	2	22	8	5	2	15	75
Closed	5	4	5	14	7	11	13	31	12	10	22	44	3	1	2	6	95
Fully Resolved	3	4	5	12	3	8	10	21	6	8	20	34	3	1	2	6	73
Partially Resolved	0	0	0	0	0	0	1	1	0	0	0	0	0	0	0	0	1
Not Resolved	2	0	0	2	4	3	2	9	6	2	2	10	0	0	0	0	21
Active Remaining	56	54	56		54	59	50		41	48	28		33	37	37		
Net Change	-1	-2	2	-1	-2	5	-9	-6	-9	7	-20	-22	5	4	0	9	-20