

ANNUAL REPORT

UNITED STATES CIVILIAN BOARD OF CONTRACT APPEALS



Fiscal Year 2019

October 1, 2018 – September 30, 2019

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 cases. (CBCA Rule 1). One way the CBCA advances this mission is by traveling to hear cases and conduct mediations and arbitrations at locations convenient to the parties, thereby minimizing the costs to the parties.

CDA Hearings and ADR: CBCA judges travel extensively to conduct CDA hearings and facilitate alternative dispute resolution in locations around the world. In fiscal year (FY) 2019, our judges traveled for six hearings and more than twenty ADRs, a total of ninety travel days. The fact that our judges hold hearings or conduct mediations where the majority of the parties and witnesses are located, whenever possible, enables litigants to realize significant cost savings. Judges enable the parties to save time and expense by permitting the use of telephone or video conferencing to facilitate the presentation of witness testimony.

FEMA Arbitrations: On October 5, 2018, the Stafford Act was amended, designating the CBCA as the forum to arbitrate disputes between applicants for public assistance grants and the Federal Emergency Management Agency (FEMA) for any disaster that occurred after January 1, 2016. The amendment significantly expanded the pool of applicants for arbitration at the CBCA. To implement this new jurisdiction, the Board adopted new rules effective July 22, 2019. These rules allow for the Board to act as a three-judge arbitration panel at the CBCA, or for one judge to travel to a location agreed upon by the parties while the other two judges participate remotely by video or phone. In this past fiscal year, we docketed and arbitrated nine disputes under this new jurisdiction arising from disasters in New York, California, Florida, Ohio, Louisiana, and Puerto Rico. As a result of our willingness to travel at the Board’s expense to fulfill this mission, individual judges have presided over arbitrations in Puerto Rico, South Carolina, and New York, locations close to the disasters, with the other two judges participating from the Board’s offices in Washington, D.C.

Statistics for FY 2019 are provided in the following pages.

Jeri Kaylene Somers

Judge Jeri Kaylene Somers
Chair

DECISIONS OF NOTE

Hof Construction, Inc. v. General Services Administration, CBCA 6306 (Dec. 12, 2018)

Hof appealed two government claims—a default termination and an assessment of liquidated damages after the General Services Administration terminated its construction contract. The presiding judge ordered Hof to show cause regarding the timeliness of its appeal. Hof argued that the Government’s termination letter omitted required information about appeal rights, thereby postponing the start of the appeal period. This claim a split in predecessor board decisions (which have since merged into the CBCA). The CBCA resolved the split, requiring that contractors show “reasonable, detrimental reliance on a defect in the notice of appeal rights” in order to extend the appeal period. In reaching this holding, the CBCA held that where there is a conflict between two or more predecessor boards, and in light of the CBCA’s commitment to “just, informal, expeditious, and inexpensive resolution[s],” the CBCA will apply what it views to be the correct precedent, and this new decision will subsequently serve as precedent. Rule 1(a); 41 U.S.C. § 7105(g)(1).

ImmixTechnology, Inc. on behalf of Software AG Government Solutions, Inc. v. Department of the Interior, CBCA 5866 (Dec. 20, 2018).

The contractor submitted a claim for damages associated with an alleged over-use of software that was procured through a GSA schedule contract. The Government raised two jurisdictional challenges to the Board’s authority to hear the case. The Board first dismissed the Government’s argument that the Copyright Act precluded the CBCA from hearing this licensing dispute under the Contract Disputes Act, holding that the Copyright Act did not preempt the federal statute granting the Board jurisdiction. The Board then turned to the Government’s argument that the contractor did not submit their claim to the correct contracting officer, as there was a contracting officer responsible for the underlying schedule contract and another for the task order. The Board held that a claim involving the interpretation of the schedule contract would require the contractor to appeal to the General Services Administration’s contracting officer. Here, however, the dispute revolved around the interpretation and facts of the task order modification, which was overseen by the agency ordering from the schedule contract. The claim was therefore properly brought to the agency contracting officer.

Soterra Defense Solutions, Inc. v. Department of Agriculture, CBCA 6029, et al. (Apr. 25, 2019).

Soterra Defense Solutions, Inc. (Soterra) was issued task orders by the Department of Agriculture (USDA) under a government-wide acquisition contract (GWAC) awarded by the National Institutes of Health (NIH). Soterra brought its contractual claim to the USDA contracting officer administering the task order, rather than to the GWAC contracting officer at the NIH, raising the issue of whether the claim was (continued)

presented to the correct contracting officer. The Board found that unlike supply schedule contracts administered by the General Services Administration, GWACs do not have specific regulatory guidance on the correct contracting officer to bring claims, leaving the Board with a case of first impression. Therefore, the panel looked to the nature of the contractual dispute between the parties. Because the specific facts leading to the appeal involved the task order, and because the terms of the base contract permitted the USDA contracting officer to bind the Government to the task order, the Board held that the appeal here was properly submitted to the USDA contracting officer.

Two EAJA cases before the Board: *Mare Solutions, Inc. v. Department of Veteran Affairs*, CBCA 6255-C(5540) (May 13, 2019) & *Woolery Timber Management Inc. v. Department of Agriculture*, CBCA 6462-C(6031) (May 9, 2019)

In two decisions issued within four days of each other, the Board expounded upon the “substantial justification” standard of the Equal Access to Justice Act. In *Mare Solutions, Inc.*, the Board determined that the Department of Veterans Affairs (VA) was not substantially justified in defending a contract interpretation that depended entirely on the testimony of an expert witness that the VA failed to introduce. The Board awarded fees at the statutory rate for all of the appellant’s hours, though the appellant prevailed on only one of two consolidated appeals. By contrast, the Board in *Woolery Timber Management, Inc.*, found that the United States Forest Service (USFS) was substantially justified even in defending the sub-issue it had lost, since its position was based on the testimony of a USFS witness “who had worked on-site and had extensive knowledge of the [area].” Though the Board determined that the USFS had made an unreasonable argument on an issue that ultimately was not central to the case and on which the parties spent virtually no time, either in discovery or in proceedings before the Board, the Board found that the agency’s position on that one tangential issue did not negate the substantial justification of the Government’s overall position in the litigation.

Flux Resources, LLC v. Department of Energy, CBCA 6208 (May 16, 2019)

Flux Resources (Flux) filed a claim against the Department of Energy’s Bonneville Power Administration (BPA), alleging that the agency had underpaid a Flux employee for work she had performed for the agency. Simultaneously, the Flux employee filed a civil suit in district court against BPA, alleging that she had been underpaid by the agency because of her sex. BPA motioned to dismiss the claim before the Board for lack of jurisdiction on three separate grounds: litigation was ongoing in district court; the claim was first filed in district court; and under the *Severin* doctrine, the agency’s derivative liability to a subcontractor was extinguished by the subcontractor’s election to pursue direct relief in district court. Though portions of the appeal were dismissed on different grounds, the Board ruled that it had jurisdiction to hear Flux’s claim. The Board addressed each of BPA’s arguments, finding that, unlike the Court of Federal Claims, the Board was not barred by statute from hearing an appeal pending before another court; that the appeal before the Board was between different parties (BPA and Flux) than the appeal before the Court (BPA and Flux’s employee); and that the *Severin* doctrine applied to subcontractors but not to employees of a contractor.

CH2M-WG Idaho, L.L.C. v. Department of Energy, CBCA 6147 (May 20, 2019)

The Department of Energy (DOE) sought to withhold the appellant's receipt of corporate and employee incentive fees that the Board had found owing to the contractor in *CH2M-WG Idaho, LLC v. Department of Energy*, CBCA 3876, 17-1 BCA ¶ 36,849. DOE asserted before the Board that it could require CH2M to pass an audit and submit a payment plan before receiving the Board-ordered employee incentive fees since the Board hadn't explicitly rejected its arguments to that effect in its prior decision. The Board determined that DOE's arguments in support of its withholding mirrored its positions in the prior litigation, and found that "the Board implicitly rejected other arguments made by DOE during the litigation" by "finding the contracting officer's conclusions in the final decision compelling." Concluding that DOE's arguments were previously litigated on the merits and that its claim was therefore precluded, the Board dismissed the appeal.

Avue Technologies Corp. v. Department of Health and Human Services, CBCA 6360 (June 28, 2019)

Avue Technologies Corporation (Avue), a software licensor and subcontractor on a Federal Supply Schedule contract, appealed directly to the Board without the sponsorship of its prime contractor. Respondent, the Food and Drug Administration, moved to dismiss the appeal on the grounds that Avue was not in privity of contract with the Government. Avue acknowledged that it did not have privity through its participation in the Federal Supply Schedule contract, but argued that it had privity by virtue of its end user licensing agreement (EULA), to which each user "clicked" its assent in order to access Avue's software. The Board found that Avue's EULA argument was sufficient to allege a separate contract with the Government and so satisfy the jurisdictional requirements of the Contract Disputes Act, though the Board left open the question of whether Avue had submitted its claim to the proper contracting officer.

Optimum Services, Inc. v. Department of the Interior, CBCA 4968 (July 1, 2019)

Optimum Services, Inc. (OSI) appealed a National Parks Service decision to terminate its indefinite-delivery/indefinite-quantity (IDIQ) contract for convenience after a rival protested the award before the Court of Federal Claims. The Board denied OSI's claim for lost profits, finding the contractor entitled only to its actual costs. The decision is currently on appeal before the Court of Appeals of the Federal Circuit.

United States v. Savannah River Nuclear Solutions, LLC, CBCA 5713 (Aug. 12, 2019)

Pursuant to 41 U.S.C. § 7107(f) (2012) of the Contract Disputes Act (CDA), the United States District Court for the District of South Carolina has requested that this Board issue an advisory opinion on government contract issues in a case pending in that Court. This is the first request for an advisory opinion from a Federal District Court that this Board has received. The case is docketed here as *Advisory Opinion Request, Re: United States of America V. Savannah River Nuclear Solutions, LLC, and Fluor Federal Services, Inc.*, CBCA 5713. To date, the proceedings at this Board have included discovery, a hearing, and post-hearing briefing.

P.K. Management Group v. Department of Housing and Urban Development, CBCA 6185 (Aug. 20, 2019)

Three years into a field service management contract for the maintenance of Housing and Urban Development (HUD) vacant and custodial properties, HUD ceased paying contractor P.K. Management Group (PKMG) for inspecting custodial properties. HUD asserted that the contract terms provided compensation only for the inspection of vacant properties and ascribed the prior two years of payments to an errant computer program. The Board denied PKMG's subsequent appeal, finding the portions of the contract at issue to be clear despite the presence of vague language in other parts of the contract. Because the plain meaning of the contract supported HUD's interpretation, the Board refrained from considering extrinsic evidence that militated in favor of the appellant, such as HUD's history of payment and contract solicitation documents.

Livingston Parish Government, CBCA 6513-FEMA (Sept. 23, 2019).

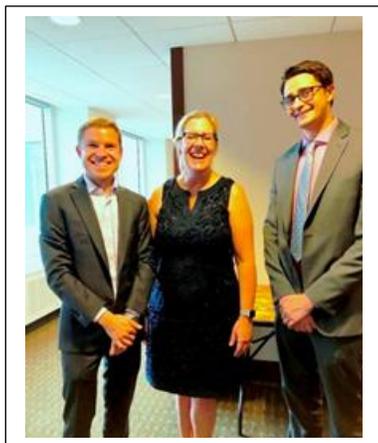
The CBCA reviewed whether road repairs in Livingston Parish were eligible for FEMA disaster relief under the CBCA's recent statutory arbitration authority. In the process of holding that FEMA had neither improperly excluded the disaster funding nor inconsistently applied its policies, the Board held that such arbitrations were not subject to precedential judicial review nor deference under the Administrative Procedure Act, instead holding that the Board would issue impartial and timely judgments based on a fresh review of evidence brought before the Board.

CBCA LAW CLERKS

Our law clerks are an invaluable asset to the Board. They provide input into our decisions, conduct research and prepare draft decisions and research memos. They also check citations in the Board’s decisions and coordinate the spring, summer, and fall law clerk programs.



From left to right, Law Clerks John Nakoneczny, Charles Blanchard, Andrew Current, Matthew Gurr, Ben Phillips, and Nicole Giles at the US Supreme Court, Summer, 2019



Bryan Byrd (2013-2014), Judge Marian Sullivan, and Kevin Mesiner (2015) enjoying a laugh at the first Annual Law Clerk reunion.

CBCA law clerks have successfully taken jobs at large law firms, small law firms, and government agencies based, in part, on the excellent training they receive at the CBCA. For the first time,

Law Clerk Spotlight - *Viviana Lowe*

Viviana Lowe served as a law clerk from 2016—2017 after graduating from GWU Law School. An immigrant from Cuba, Viviana was the first of her family to graduate from college and law school. After landing a job with SPAWAR in San Diego, Viviana felt the calling to a different path. Overcoming many obstacles, Viviana earned a commission as an officer in the U.S. Marine Corps and is currently completing officer training at The Basic School (TBS) at Camp Barrett, Quantico, Virginia. After she completes TBS, Viviana will continue training at the Naval Justice School, located in Newport, Rhode Island, where she will learn the basic aspects of military law.



Viviana’s Swearing In, 2017



2LT Lowe’s Commissioning Ceremony, Summer 2019

the CBCA hosted a law clerk reunion so that former law clerks could reconnect with the judges and employees of the CBCA. At this reunion, we asked our law clerks to comment on their time at the CBCA. Terrius Greene (law clerk from January 2014—September 2016) described his time as “a great learning experience into the substantive area of government contracts, which has served me incredibly well in my fledgling career.” Ioana Cristei (law clerk September 2016—September 2017), said “I loved how welcoming and incredibly supportive every single person was to me. I had so many amazing mentors who genuinely cared about my development as an attorney.” Tom Steinfeldt (law clerk in the summer of 2017) enjoyed “the accessibility to all the judges and their genuine interest in seeing the law clerks learn, grow, and excel made the Board an ideal place for a summer experience while in law school.” Caitlin Crujido (law clerk in the summer of 2016, and from November 2017—September 2018) explained that “the clerkship sparked and solidified my love for government contracts but I value most the friendships I made during my time—the place is full of brilliant, kind and supportive people and I couldn’t have asked for a better time to start my career.”



2019-2020 Full-Time Law Clerks
Samuel Van Kopp and Matthew Lewis

CBCA STAFF SUPPORT DIVISION

As employees retire or move on to other opportunities, the CBCA staff has taken on greater challenges. Our IT experts continually work to improve our case management system, upgrade the Board's website and courtroom systems, and ensure that judges have access to their case files while traveling. With the increase in travel, logistics has become more complicated and our paralegals have gained expertise in Concur, our travel system. Our paralegals also fulfill the important role of coordinating with the litigants, ensuring that teleconferences occur as planned and managing the judges' calendars. Our attorney staff is down from three attorneys to two (James Johnson and Anne Quigley), who, as co-leads, have taken on the additional workload without a hiccup. Our contracting staff is also down from three to two. Despite this reduction in force, Rochelle Achoe and Kenya McPherson have successfully accomplished all of the contracting and budgetary needs of the CBCA. Our paralegals fulfill the important role of coordinating with the litigants, ensuring that teleconferences occur as planned and managing the judges' calendars.

Meet Our Staff:



Scott Sylke,
Clerk of the Board

The Board staff continues to support various charitable campaigns. The employees of the CBCA received the Merit Award in recognition of their support of individuals and communities in need through the 2018 Combined Federal Campaign of the National Capital Region. In addition, CBCA collected donations for various food banks, supporting both the General Service Administrations' food collection drive and local food drives in our neighborhoods.



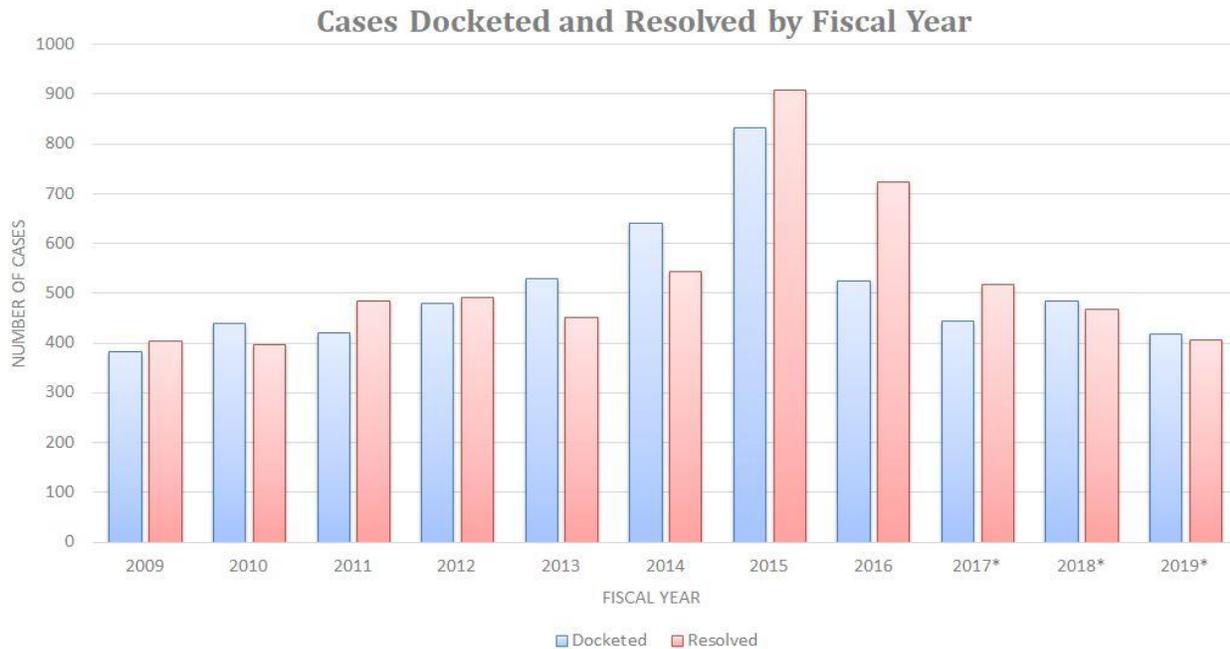
Paralegals Adrienne West, Celisa Moore, Darlene Peebles, Joyce Arthur, Valerie Bland (Scott Sylke, Clerk of the Board, in the back)

Contracting Officers Kenya McPherson and Rochelle Achoe, and IT Specialists Arthur Hawkins and Anthony Graham



STATISTICS

The chart below details the total cases filed and resolved by fiscal year since 2009.



* 2017-2019 include separate ADR cases where there is an underlying docketed appeal.

The chart below shows all electronic filings received by the CBCA during FY 2019. The Board provided electronic filing as an option for parties in 2013, and in this fiscal year approximately 96% 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	321	238	232	791	207	290	320	817	274	363	250	887	316	245	247	808	3303
Not Processed	28	13	8	49	35	8	31	74	36	24	21	81	23	23	16	62	266
Rejected	15	5	4	24	8	2	10	20	14	6	17	37	15	22	14	51	132
Spam/Trash	34	33	40	107	34	24	36	94	29	26	38	93	25	31	34	90	384
TOTAL	398	289	284	971	284	324	397	1005	353	419	326	1098	379	321	311	1011	4085

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.)

STATISTICS

The chart below shows all new cases docketed by the CBCA during FY 2019 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	3	4	5	12	3	3	8	14	14	5	6	25	2	4	2	8	59
Appeal	27	12	17	56	17	11	24	52	11	40	17	68	18	8	15	41	217
Appeal Recon	0	0	0	0	0	0	1	1	0	0	1	1	1	0	1	2	4
Debt	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0
EAJA Cost	0	0	0	0	0	0	0	0	0	1	0	1	0	0	1	1	2
FCIC	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0
FCIC Recon	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0
FEMA	0	0	0	0	0	0	2	2	2	2	2	6	0	3	1	4	12
FMCSA	0	0	1	1	0	1	0	1	0	4	1	5	0	1	1	2	9
ISDA	1	1	4	6	1	3	8	12	1	0	2	3	4	2	0	6	27
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	1	0	0	1	0	0	0	0	0	0	0	0	0	0	0	0	1
Rate	0	0	0	0	0	0	0	0	0	0	0	0	0	1	0	1	1
Rate Recon	0	0	1	1	0	0	0	0	0	0	0	0	0	0	0	0	1
RELO	3	3	0	6	4	5	2	11	6	3	6	15	5	7	3	15	47
RELO Recon	3	1	0	4	0	0	0	0	0	0	1	1	0	0	0	0	5
TRAV	6	1	1	8	3	4	3	10	1	5	0	6	1	1	1	3	27
TRAV Recon	1	1	0	2	0	0	0	0	0	1	3	4	0	0	0	0	6
TOTAL	45	23	29	97	28	27	48	103	35	61	39	135	31	27	25	83	418

ADR	Alternative Dispute Resolution case (includes those with an underlying 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 2019.

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	0	0	1	1	1	0	0	1	0	0	0	0	0	0	0	0	2
Certified List	0	0	0	0	1	1	0	2	0	0	0	0	0	0	0	0	2
Opinion	0	0	0	0	1	1	1	3	0	0	0	0	0	0	0	0	3
Mandate	0	0	0	0	0	1	1	2	0	0	0	0	0	0	0	0	2
TOTAL	0	0	1	1	3	3	2	8	0	9							