

ASBCA Appeal Statistics: A Full and Backlogged Docket

Winter 2014

Many of us are familiar with the reports the U.S. Government Accountability Office (GAO) issues on its bid protest statistics. But, fewer people may be aware that the Armed Services Board of Contract Appeals (ASBCA or Board) also reports on its docket and caseload. On October 22, 2013, the ASBCA released its annual report on adjudication of matters for the 2013 Fiscal Year (FY), and on January 3, 2014, it released its quarterly report for the last quarter of 2013 (October 1-December 31).

The ASBCA hears appeals from the U.S. Department of Defense (DOD) (e.g., Army, Navy, Air Force, Army Corps of Engineers, Defense Logistics Agency, Defense Contract Management Agency (DCMA)) as well as the Central Intelligence Agency, National Aeronautics and Space Administration, and the Washington Metropolitan Area Transit Authority. The Board's most recent reports show a robust caseload in FY2013. For example, the Board docketed 672 new appeals in FY13; in the last quarter of calendar-year 2013 alone, it docketed 177 appeals (a rate that, if sustained over four quarters, would yield over 700 appeals). Since FY09, the Army has been the greatest source of appeals before the Board, with the Army and the Army Corps of Engineers responsible for 223 appeals in FY09, 254 in FY10, 221 in FY11, 271 in FY12, and 344 in FY13.

Of the 459 dispositions in FY13, most were dismissals (319). Of the 140 appeals decided on the merits, more appeals were sustained (80) than denied (60), resulting in 57.1% of the decisions finding some merit in the appeal. Most of the dismissals were the result of the parties reaching settlement. The Board's annual report also notes that eight Board decisions were appealed to the United States Court of Appeals for the Federal Circuit. The Federal Circuit also disposed

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of eight appeals during the fiscal year, with six of the Board's decisions affirmed and two dismissed. Thus, at least based on FY13 statistics the Federal Circuit tends to uphold Board decisions tend to be upheld at the Federal Circuit.

Along with the Board's heavy intake of appeals, there is a substantial increase in the number of pending appeals. For example, as of end-of-year 2008, the ASBCA had 542 cases pending before it. By year-end 2013, in contrast, the Board's load of pending cases was almost double, with 934 appeals pending. While these figures indicate a fairly substantial backlog of cases, the Board's FY13 annual report notes that several of the Board's hearings and alternative dispute resolution (ADR) proceedings were delayed due to sequestration and furloughs. Presumably, these two events also prevented the Board from disposing of as many cases as it might otherwise have.

During FY13, the Board received 34 requests for ADR assistance, covering 99 docketed appeals and two undocketed disputes. Sixteen requests were still pending at the end of the fiscal year. Twenty-seven matters, not exclusive of the requests made in FY13, were resolved primarily with non-binding ADR. All of them were resolved successfully.

What can contractors take from these statistics? First, the Board's pending caseload is substantial, indicating that appeals will take considerable time to proceed from notice of appeal to hearing and ultimate resolution. Second, the Board hears substantially more appeals from the Army, Army Corps of Engineers, and DCMA and DLA than from the other DOD components. Presumably, therefore, those components will have the most experience with Board procedures and adjudications, which may or may not be a positive factor for any given appeal. Third, contractors who wish to resolve a matter more quickly should consider ADR, as the Board was able to successfully resolve all the ADR proceedings that it concluded last year.