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GOVERNMENT CONTRACTS: DISPUTES CLAUSES AND THE WUNDERLICH ACT

The power of the government to contract is a recognized incident to its right of sovereignty. However, the government as sovereign is immune to suit upon its contracts in the absence of its consent. The federal government[1] has generally consented to suits against it based on express or implied contracts vesting jurisdiction over such suits in the Court of Claims[2] and in actions not exceeding $10,000.00 concurrent jurisdiction in the appropriate district court.[3] Appeal from the Court of Claims is directly to the Supreme Court[4]

Contracts with the United States government usually contain what is known as a standard disputes clause which provides as follows:

> Disputes—Except as otherwise specifically provided in this contract, all disputes concerning questions of fact arising under this contract shall be decided by the contracting officer subject to written appeal by the contractor within 30 days to the head of the department concerned or his duly authorized representative, whose decisions shall be final and conclusive upon the parties thereto. In the meantime the contractor shall diligently proceed with the work as directed.[5]

Under the procedure of one federal agency,[6] the Atomic Energy Commission, if a dispute arising under a contract cannot be disposed of by mutual agreement, the contracting officer makes findings of fact and renders his decision, An appeal may then be taken within sixty days by serving notice in writing upon the contracting officer. The complaint, if not filed with the notice of appeal, must be served upon the hearing examiner within twenty days after the service of the notice of appeal. Within twenty days after service of the complaint, the contracting officer must serve an answer. The hearing examiner sets the time and place of the hearing and serves a thirty day notice of such upon the parties. The hearing is conducted as a trial *de novo* of the issues of fact and law. After sixty

1. 91 C.J.S. United States § 82 (1955).
2. 28 U.S.C. § 1491 (1958), which provides as follows:
   > The Court of Claims shall have jurisdiction to render judgment upon any claim against the United States founded . . . upon any express or implied contract with the United States, or for liquidated or unliquidated damages in cases not sounding in tort.
3. 28 U.S.C. § 1346 (1958), which confers concurrent jurisdiction in certain cases upon the United States District Courts:
   > The district courts shall have original jurisdiction, concurrent with the Court of Claims, of . . . Any . . . civil action or claim against the the United States, not exceeding $10,000 in amount, founded . . . upon any express or implied contract with the United States, or for liquidated or unliquidated damages in cases not sounding in tort.
4. 28 U.S.C. § 1255 (1958).
5. 41 U.S.C. Appendix (Rules and Regs.) 54.13 (1958).
6. There are contract appeals boards functioning in the following agencies: Department of Defense; Department of the Interior; Army Corps of Engineers; Post Office Department; Veterans Administration; Department of Agriculture; Department of Commerce; General Services Administration; National Aeronautics and Space Administration; and the Atomic Energy Commission.

days the decision of the hearing examiner becomes the final action of the Commission, unless a petition for review and supporting brief are filed within such period with the Secretary of the Commission. The respondent may file an opposing brief within twenty days. If the petition is denied, the decision of the hearing examiner becomes the final action of the Commission. If the petition is granted, the Commission proceeds to a final decision.[7]

In the case of *United States v. Wunderlich*,[8] the Supreme Court construed a standard dispute clause included in a contract entered into by the Bureau of Reclamation with the Martin Wunderlich Company for the construction of the Vallecito Dam, located in the southern part of Colorado. Mr. Justice Minton, writing the majority opinion in a six-three decision held, that judicial review of an administrative decision on a question of fact under the disputes clause is limited to cases in which such decision ". . . was founded on fraud, alleged or proved." Fraud was defined as ". . . conscious wrongdoing, an intention to cheat or be dishonest." Justice Minton went on to expressly invite legislation on the subject: "If the standard of fraud that we adhere to is too limited, that is a matter for Congress."[9]

In *United States v. Moorman*,[10] the Supreme Court upheld the validity of a contract provision giving to government officers the power to determine questions of law arising under such contract. The question here was whether or not the contractor was required under the contract to grade a taxiway shown on the drawings, but not located within the aircraft plant site as described in the specifications. The Supreme Court again expressly invited leglislation: "No Congressional enactment condemns their creation or enforcement."[11]

Three years after the Supreme Court handed down its decision in the *Wunderlich* case, Congress enacted legislation for the purpose of overruling it and the *Moorman* case.[12] The first part of this act deals with the problem of the *Wunderlich* case, i.e., judicial review of an administrative decision as to questions of fact. The second part of the act deals with the problem of the *Moorman* case, i.e., judicial review of an administrative decision as to questions of law. Commonly known as the Wunderlich Act, it provides as follows:

> No provision of any contract entered into by the United States, relating to the finality or conclusiveness of any decision of the head of any department or agency or his duly authorized representative or board in a dispute involving a question arising

7. 10 C.F.R. § 3 (Supp. 1962).
8. 342 U.S. 98 (1951).
9. Wunderlich v. United States, 342 U.S. 98 (1951). Justices Douglas, Reed and Jackson dissenting.
10. 338 U.S. 457 (1950).
11. United States v. Moorman, 338 U.S. 457 (1950).
12. Volentine and Littleton v. United States, 145 F. Supp. 952 (Ct. Cl. 1956); United States v. Lennox Metal Manufacturing Co., Inc., 225 F.2d 302 (2d Cir. 1955).

> under such contract, shall be pleaded in any suit now filed or to be filed as limiting judicial review of any such decision to cases where fraud by such official or his said representative or board is alleged: Provided, however, unless the same is fraudulent or capricious or arbitrary or so grossly erroneous as necessarily to imply bad faith, or is not supported by substantial evidence.[13]
>
> No Government contract shall contain a provision making final on a question of law the decision of any administrative official, representative, or board.[14]

The Congressional purpose of the Wunderlich Act was to reinstate the law to what it was presumed to have been before the Supreme Court decisions in the *Mooreman* and the *Wunderlich* cases. Prior to these decisions it was generally understood, that administrative decisions as to questions of law were not final, but administrative decisions rendered under disputes clauses as to questions of fact were final and would not be reviewed by the courts, unless the decision was fraudulent, or arbitrary, or capricious, or so grossly erroneous as necessarily to imply bad faith.[15] The new law is, however, different in this fundamental respect; the courts must now render their decisions as to the standard disputes clauses in the light of a statute rather than in the light of the prior decisions. Before the Wunderlich Act there was no legislative enactment dealing with government contract disputes clauses. In fact, the authority of the government's contracting officers and the boards of appeal is not statutory, but is derived solely from the disputes clauses in their contracts. Therefore, they are not subject to the Administrative Procedures Act.[16] The boards are administrative in character of course, and their decisions are consistently referred to as such by the courts.

The difficulty is nearly the same as before the *Wunderlich* decision, namely, what sort of judicial review is a contractor with the government entitled to under a disputes clause? How does the act affect the decisions of the courts? Since the passage of the act, a split authority has developed between the Court of Claims, which has allowed the contractor a *de novo* review of every aspect of the case, and the circuit and district courts, which have held as a general rule, that the contractor, in his appeal from an adverse administrative decision, is only entitled to a review of the administrative record.[17]

The Court of Claims position is reflected by *Volentine and Littleton v. United States*.[18] The contractor claimed damages resulting from the closing of a dam on the Brazos River in Texas, thereby inundating the

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13. 41 U.S.C. § 321 (1958).
14. 41 U.S.C. § 322 (1958).
15. Government Contracts—Finality Clauses, H.R. Rep. No. 1380, 83rd Cong., 2nd Sess. 24 (1954).
16. See, 6 Code Fed. Regs. § 400.1 (f) (1956), which provides that, "The provisions of the Administrative Procedure Act (Pub. Law 404, 79th Cong., 5 U.S.C., § 1001-1011) are not applicable to proceedings before the Board (Contract Disputes Board for the Commodity Credit Corporation). . . ."
17. See, H. L. Yoh Co., Inc. v. United States, 288 F.2d 493 (Ct. Cl. 1961).
18. 145 F. Supp. 952 (Ct. Cl. 1956).

lower part of the contractor's work. The contract contained a disputes clause giving the government's contracting officer the power to decide questions of fact subject to the right of the contractor to appeal to the head of the department, whose decision was to be final. Having exhausted the administrative remedies, the contractor appeal to the Court of Claims, alleging that the departmental decision was arbitrary, capricious, fraudulent and not based on substantial evidence. Thus, the contractor brought his case within the provision of the Wunderlich Act.

The government argued, that the derogatory language of the statute could not be applied, unless the administrative record, upon which the departmental decision was based, was considered without the taking of additional information by the court. Judge Madden, in rejecting the government's argument, wrote as follows:

> There is logic in the Government's position. But we do not adopt it. It would require two trials in many cases involving this question. The first trial would include the presentation of the "administrative record" and its study to determine whether, on the basis of what was in it, the administrative decision was tolerable. . . .
>
> The second trial referred to above would be a trial on the merits, with all relevant evidence admissible, whether it was in the "administrative record" or not. That trial would be necessary in every case where we decided, on the first trial, that the departmental decision was not final.[19]

In *Carlo Bianchi and Company v. United States,*[20] a case supporting the rule of the *Volentine* decision, the contractor was allowed to present fifteen witnesses in the Court of Claims although only four witnesses had testified for the contractor in the administrative proceeding. The Court of Claims found that the contracting officer's decision was not supported by substantial evidence. Judge Madden gave the opinion of the Court:

> In our opinion in *Volentine and Littleton v. United States,* . . . holding that the trial in this court should not be limited to the record made before the contracting agency, but should be *de novo,* we recocgnized that there were logical weaknesses in our position. We concluded, however, that the intent of Congress in enacting the Wunderlich Act was in accord with our conclusion, and we adhere to that conclusion in this case.[21]

Several other decisions of the Court of Claims have allowed either a trial completely *de novo* or additional testimony upon an appeal from an administrative decision, all holding, essentially, that the court was not restricted in rendering its decision to the record before the board.[22]

19. Volentine and Littleton v. United States, 145 F. Supp. 952 (Ct. Cl. 1956).
20. 169 F. Supp. 514 (Ct. Cl. 1959).
21. Carlo Bianchi and Company, Inc. v. United States, 169 F. Supp. 514 (Ct. Cl. 1959).
22. Klein v. United States, 285 F.2d 778 (Ct. Cl. 1961); P.L.S. Coat & Suit Corp. v. United States, 180 F. Supp. 400 (Ct. Cl. 1906); Anderson v. United States, 174 F. Supp. 945 (Ct. Cl. 1959); J. W. Bateson v. United States, 163 F. Supp. 871 (Ct. Cl. 1958); Whitlock Corp. v. United States, 159 F. Supp. 602 (Ct. Cl. 1958); Fehhaber Corp. v. United States, 151 F. Supp. 817 (Ct. Cl. 1957).

Judge Laramore, who did not take part in the decision of the *Carlo Bianchi* case, wrote a dissenting opinion in the *Volentine* case[23] in which he stated that:

> . . . a common sense application of the Act of May 11, 1954 supra, (Wunderlich Act) considering the background of the legislation and the administrative procedures available to aggrieved contractors, would be to apply the usual administrative review rule and determine the question of arbitrariness, etc., and lack of substantial evidence on the record made before an appeals board, unless the contractor alleges and proves that because of the procedures available in the Appeals Board as applied to him, he was unable to adequately present his case.[24]

Judge Laramore's dissent is not unlike the position which the district courts and the circuit courts have taken in their decisions as to the sort of review the contractor is entitled to receive in an appeal from the decision of a contracts appeal board.[25] The rationale of these holdings, i.e., that the court's review is limited to the administrative record of the appeals board, is best set out by the decisions in the cases of *Mann Chemical Laboratories, Inc. v. United States*[26] and *United States v. Hamden Co-Operative Creamery Company.*[27]

In the *Mann Chemical Laboratories* case, the government and the contractor requested an order determining whether the contractor was entitled to a trial *de novo* or a trial limited to a review of the administrative record. Chief Judge Sweeney, of the United States District Court of Massachusetts, after holding that the contractor was not entitled to a trial *de novo,* wrote as follows:

> The relevant portion of Section 321 provides that the decision of the agency head or his representative shall be final unless it is "not supported by substantial evidence." First, the only logical way to determine whether the board's decision is supported by substantial evidence is to consider the decision in the light of the evidence before the board. Second, the term "supported by substantial evidence" is a term of art which implies review on the record only. . . . And lastly, the legislative history leaves little doubt that Congress did not intend to provide for a trial *de novo* at this stage of the proceedings.[28]

In *United States v. Hamden Co-Operative Creamery Company,*[29] District Judge Bartels, in holding that the contractor was not entitled to a trial *de novo,* stated:

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23. Volentine and Littleton v. United States, 145 F. Supp. 952, 959 (Ct. Cl. 1956).
24. Ibid, p. 959.
25. United States v. Hamden Co-Operative Creamery Co., Inc., 185 F. Supp. 541 (E.D. New York 1960); Wells & Wells, Inc. v. United States, 269 F.2d 412 (8th Cir. 1959); United States National Bank of Portland v. United States, 178 F. Supp. 910 (D.C. Ore. 1959); Mann Chemical Laboratories, Inc. v. United States, 174 F. Supp. 563 (D.C. Mass. 1958).
26. 174 F. Supp. 563 (D.C. Mass. 1958).
27. 185 F. Supp. 541 (E.D. New York 1960).
28. Mann Chemical Laboratories, Inc. v. United States, 174 F. Supp. 563 (D.C. Mass. 1958).
29. 185 F. Supp. 541 (E.D. New York 1960).

> Hamden having exhausted its remedies before the administrative agency, is not at this stage entitled to a new trial unless the Board's decision is vulnerable. Otherwise the hearing before the Board would be rendered nugatory. . . . No new evidence based on affidavits, interrogatories or other documents can now be considered by the Court, its jurisdiction being limited by the boundaries of the statute setting forth only judicial review to which Hamden is entitled.[30]

Although the reasoning of the two cases is not the same, the conclusion reached by both courts, i.e., that the contractor is not entitled to *de novo* review in an appeal from the administrative decision, is the same. The other districts courts and the circuit courts have to date followed this same rule and the reasoning enunciated in the above cases.[31]

The legislative history of the Wunderlich Act clearly indicates that its purpose was to liberalize the standards for scope of review of the decisions rendered by the government contracting agencies pursuant to a disputes clause.[32] The number of appeals from such administrative decisions, since the passage of the act, would indicate that this objective has been obtained. However, the statute is not specific as to *de novo* review and the legislative history is not clear on this point, (though it seems by implication to favor the position, that the form of review be limited to the administrative record).[33] The Wunderlich Act is specific as to the scope of review: (1) abuse by the administrative agency of its discretion, (2) where the administrative decision is not supported by substantial evidence and (3) when the administrative judgment is on a question of law. In the comparable administrative law situations, it would be clear, that *de novo* review would not be permitted, unless specifically provided by statute. The "substantial evidence" rule, which is a well developed concept in administrative law, is inconsistent with the usual notion of *de novo* review in which a court makes its own determination of the facts. The legislative history has evidently not been sufficiently clear to align judicial thinking as to the proper interpretation of the Wunderlich Act in this respect.

In the case of *H. L. Yoh Co., Inc. v. United States,* the Court of Claims recognized the split of authority, but did not waver from its prior decision in *Volentine and Littleton v. United States.*[34] In his opinion, Judge Laramore stated:

30. United States v. Hamden Co-Operative Creamery, Inc., 185 F. Supp. 541 (E.D. New York 1960).
31. Union Painting Co., Inc. v. United States, 194 F. Supp. 803 (D. Alaska 1961); M. Berger Co. v. United States, 199 F. Supp. 22 (W.D. Penn. 1961); Hoffmann v. United States, 276 F.2d 199 (10th Cir. 1960); Wells & Wells, Inc. v. United States, 269 F.2d 412 (8th Cir. 1959); Lowell O. West Lumber Sales v. United States, 270 F.2d 12 (9th Cir. 1959); United States National Bank of Portland v. United States, 178 F. Supp. 910 (D. Ore. 1959).
32. Government Contracts—Finality Clauses, H.R. Rep. No. 1380, 83rd Cong., 2d Sess. 24 (1954).
33. See, United States v. Hamden Co-Operative Creamery Co., Inc., 185 F. Supp. 541 (E.D. N.Y. 1960).
34. 145 F. Supp. 952 (Ct. Cl. 1956).

> In the District Court it has been held that the review by that court shall consist solely of a review of the administrative record and not a trial *de novo. Mann Chemical Laboratories v. United States,* D.C., 174 F. Supp. 563. However, it has been consistently held in this court that a review of an administrative decision shall not be limited by a review of the record, as it appeared before the agency, but that additional evidence may be presented in a trial *de novo.*[35]

Thus, the Court of Claims is determining whether the administrative agencies decision was based on substantial evidence in the light of evidence that was not before the agency. The decided cases make it apparent that some further clarification is necessary to bring about an alignment of the courts. There are two possible sources from which clarification may emanate—either a Supreme Court ruling or further legislation by Congress.[36] Until resolved, the review to which a government contractor will be entitled (*de novo* review or review limited to the administrative record) will depend upon the court where jurisdiction can be placed.

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35. H. L. Yoh Co., Inc. v. United States, 288 F.2d 493 (Ct. Cl. 1961).
36. See, 28 Geo. Wash. L. Rev. 561 (1960). See generally id. p. 578.