Washington Law Review

Volume 40 | Number 4

10-1-1965

Government Contract Disputes—Findings of Fact Not Binding When Breach Alleged

anon

GOVERNMENT CONTRACT DISPUTES—FINDINGS OF FACT NOT BINDING WHEN BREACH ALLEGED

Plaintiff contracted with the Atomic Energy Commission (AEC) to construct a reactor testing station in Idaho. The contract gave the contracting officer and the head of the AEC (or his representative, the Board of Contract Appeals) authority to make findings of fact as to "disputes concerning questions of fact arising under this contract."[1] Plaintiff submitted various claims in accordance with this disputes clause. Dissatisfied with the resulting administrative decisions, plaintiff brought an action in the Court of Claims for damages resulting from alleged breach of contract by defendant. The subjects of the alleged breach were the same as the claims presented under the disputes clause. The case was referred to a trial Commissioner for the taking of testimony and for a report. Defendant contended that the findings of fact of the AEC Board of Contract Appeals were final and binding upon the Court of Claims. Plaintiff maintained that an action for breach was not a dispute "arising under the contract," and hence introduction of de novo evidence before the Court of Claims was permissible. From an order by the Trial Commissioner favorable to plaintiff, defendant appealed. *Held:* Findings of fact by a duly authorized administrative body are not final and binding upon the Court of Claims in an action for breach of contract, even though the alleged breaching conduct was the subject matter of a claim processed under the standard Disputes clause of a government contract, and de novo evidence is admissible in order for the Court of Claims to make an independent judicial decision on the merits of the alleged breach. *Utah Constr. & Mining Co. v. United States,* 339 F.2d 606 (Ct. Cl. 1964), *petition for cert. filed,* 34, U.S.L. WEEK 3072 (U.S. Aug. 9, 1965) (No. 440).

Prior to 1951 the Court of Claims had admitted de novo evidence to determine whether the decision of a contracting officer or head of department had been arbitrary, capricious, or unsupported by substantial evidence.[2] In that year, however, the United States Supreme Court held in *United States v. Wunderlich*[3] that de novo evidence was only admissible to determine whether the decision was fraudulent. Congress

---

[1] Utah Constr. & Mining Co. v. United States, 339 F.2d 606, 609 (Ct. Cl. 1964).
[2] Jaffe, *Judicial Review: Question of Fact,* 69 HARV. L. REV. 1020, 1050-51 (1956).
[3] 342 U.S. 98 (1951).

reacted by passing the Wunderlich Act,[4] which provided that the administrative decision was "final and conclusive unless . . . fraudulent or capricious or arbitrary or so grossly erroneous as necessarily to imply bad faith, or . . . not supported by substantial evidence." The Court of Claims interpreted the legislative intent in passing the Wunderlich Act to authorize restoration of the Court of Claims' prior practice of admitting evidence de novo, and so held.[5] Again the Supreme Court reversed the Court of Claims, holding in *United States v. Carlo Bianchi & Co.*[6] that the lower court was confined to the evidence admitted in the administrative hearing.

The court in the principal case recognized that the findings of fact by the AEC Board of Contract Appeals were relevant to both the claims processed under the disputes clause and the breaches alleged in the action before the court, and that the findings of fact were final and binding upon the parties by the terms of the disputes clause. The court, however, distinguished the situations on the basis of the remedies sought. So long as plaintiff pursued the remedies provided for by the contract it was dealing with questions of fact "arising under" the contract and therefore bound by the contract's terms; a suit for breach of contract, on the other hand, dealt with questions of fact "relating to" the contract, and was not binding upon the parties. The Supreme Court's decision in *Bianchi* was thus distinguishable, as it related only to matters within the disputes clause,[7] *i.e.*, to disputes "arising under" the contract. Therefore *Bianchi* was not controlling, and the Court of Claims concluded that it was "not bound by a finding of fact by the Board of Contract Appeals even though that finding is relevant to 'a dispute arising under the contract'."[8] The Court of Claims' decision to admit de novo evidence was based upon the "compelling reason" that the original arbiter as well as the reviewing body were employees and officers of defendant.

Limitation of the scope of judicial review of administrative decisions, partially evolved to alleviate judicial backlog and to lessen costs of litigation, requires that the reviewing court have confidence in the

---

[4] 68 Stat. 81 (1954), 41 U.S.C. § 321 (1958).
[5] Carlo Bianchi & Co. v. United States, 144 Ct. Cl. 500, 169 F. Supp. 514 (1959).
[6] 373 U.S. 709 (1963).
[7] [A]ll 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 decision shall be final and conclusive upon the parties thereto. 339 F.2d at 610.
[8] *Id.* at 612.

competence of the lower decision-making body. In decisions relating to government contracts, conflicting approaches to the doctrine have been developed by various courts.[9] The general policy of limited review, as laid down by the Supreme Court in *Wunderlich* and *Bianchi* and supplemented by the Wunderlich Act, is followed in the district and circuit courts.[10] However, the Court of Claims has tended to construe its scope of review broadly on the basis that administrative procedures do not afford the contractor "his day in court."[11]

Article 15 of the contract in the principal case provided that "all disputes concerning questions of fact *arising under this contract* shall be decided by the contracting officer subject to . . . appeal . . . to the head of department . . . whose decision shall be final and conclusive upon the parties thereto." (Emphasis added.)[12] Rejecting defendant's contention that the contracting officer has authority to make findings of fact on *all* disputes, the court found that "The contract plainly limits their authority to make such findings to 'disputes concerning questions of fact arising under the contract'. . . . This," said the court, "means a dispute over the rights of the parties given by the contract; it does not mean a dispute over a violation [breach] of the contract."[13] From this the court concluded that adjudication of claims arising from alleged breach of contract, not being within the authority of the contracting officer or AEC Board of Contract Appeals to decide, requires admission of de novo evidence in order to give to the contractor his guaranteed day in court.

The dissenting opinion of Judge Davis repudiates the majority's position, and is based upon a reading of the contract as a complete document. Judge Davis would have the finality of the findings of fact be determined by whether the contract provided for some form of relief in regard to the claim; if relief is available to the contractor within the contract provisions, then the contractor should be bound—in a subsequent suit for breach—by the findings of fact arrived at in the processing of his administrative claim. The dissent found this position inescapable when the terms of the disputes clause, the phraseology of the Wunderlich Act, the principle of *Bianchi*, and the doctrine of

[9] *Compare* cases cited note 10 *infra with* those cited note 17 *infra*.

[10] *E.g.*, Allied Paint & Color Works, Inc. v. United States, 309 F.2d 133 (2d Cir. 1962); Hoffman v. United States, 276 F.2d 199 (10th Cir. 1960); United States Nat'l Bank v. United States, 178 F. Supp. 910 (D. Ore. 1959); Mann Chem. Labs., Inc. v. United States, 174 F. Supp. 563 (D. Mass. 1958).

[11] Utah Constr. & Mining Co. v. United States, 339 F.2d 606, 611 (Ct. Cl. 1964).

[12] *Id.* at 610.

[13] *Id.* at 609-10.

collateral estoppel were viewed in combination as expressing public policy.

The reasoning of the Court of Claims in the principal case permits a complaining contractor to obtain de novo determination of the merits of his claim if exhaustion of his administrative remedies fails to fulfill his expectations.[14] Yet the nature of the claim and its attendant facts would be identical in both the administrative and judicial forums. To allow redetermination of the claim merely by altering the pleadings could hardly have been intended by Congress when it passed the Wunderlich Act.

The decision in the principal case poses a problem for government contractors in areas distant from Washington, D. C. The Court of Claims sits only in the nation's capitol, and the great expense of transporting witnesses and exhibits to Washington for trial de novo before the Court of Claims may often exceed the value of the available reconsideration. In addition, the contractor *must* bring his suit in the Court of Claims if he seeks damages in excess of $10,000.[15]

Despite extensive criticism, it has been said that *Bianchi* would result—by threat of reversal—in improvements in agency procedural standards.[16] The effect of the principal case will be to negative some of that threat. Nevertheless, the decision in the principal case is in accord with past rulings of the Court of Claims,[17] and was anticipated.[18] Given

[14] The ease with which this will be accomplished is demonstrated in a hypothetical situation set forth in the opinion, *id.* at 611.

[15] 28 U.S.C. § 1346(a)(2) (1958). In actions for lesser amounts the Court of Claims and federal district courts have concurrent jurisdiction. 28 U.S.C. § 1491 (1958).

[16] Comment, *United States v. Carlo Bianchi & Co.: Finality Under The Disputes Clause*, 39 N.Y.U.L. REV. 290, 299 (1964).

[17] *E.g.*, Carlo Bianchi & Co. v. United States, 144 Ct. Cl. 500, 169 F. Supp. 514 (1959); Volentine & Littleton v. United States, 136 Ct. Cl. 638, 145 F. Supp. 952 (1956).

[18] Schultz, *Wunderlich Revisited: New Limits on Judicial Review of Administrative Determination of Government Contract Disputes*, 39 LAW & CONTEMP. PROB. 115 (1964). *Cf.* United States v. Holpuch Co., 328 U.S. 234 (1946), in which it was held that the disputes clause applies to all disputes arising under the contract, and that a contractor's claim in the Court of Claims was barred by his failure to appeal from the adverse decision of the contracting officer. One author feels that, in view of the *Holpuch* decision,

> it seems certain that the Supreme Court will not uphold the Court of Claims rule that administrative fact findings are not binding on it in a breach of contract suit when a case is presented under a finality clause clearly expressing an intent that breach of contract claims be subject to such clause.

Shedd, *Disputes and Appeals: The Armed Services Board of Contract Appeals*, 39 LAW & CONTEMP. PROB. 39, 76 (1964). The standard disputes clause used today is substantially the same as that used in *Holpuch*. 68 Stat. 81 (1954), 41 U.S.C. § 322 (1958) does not prohibit the use of the all-disputes clause of *Holpuch*; it merely prohibits finality from attaching to a decision on a question of law made under the disputes clause. *Compare* the disputes clause in *Holpuch*, *supra* at 236, *with* that in *Bianchi*, 373 U.S. 709, 710 (1963).

the premise that the Court of Claims does not wish to extend finality to administrative findings of fact because of fears of lack of due process, the obvious solution is to attack the underlying premise by raising the administrative procedural standards to a level which the Court of Claims will respect.[19]

[19] *Cf.* Schultz, *supra* note 18, at 134.