VIA ELECTRONIC MAIL AND FACSIMILE

The Honorable John Warner
Chairman
Senate Armed Services Committee
228 Russell Senate Office Building
Washington, DC 20510

The Honorable Carl Levin
Ranking Member
Senate Armed Services Committee
228 Russell Senate Office Building
Washington, DC 20510

The Honorable Duncan Hunter
Chairman
House Committee on Armed Services
California-52nd, Republican
2265 Rayburn HOB
Washington, DC 20515-0552

The Honorable Ike Skelton
Ranking Member
House Committee on Armed Services
2120 Rayburn House Office Building
Washington, DC 20515


Dear Sirs:

On behalf of the Section of Public Contract Law of the American Bar Association (“the Section”), I am submitting comments on the above-referenced matter. The Section consists of attorneys and associated professionals in private practice, industry, and government service. The Section’s governing Council and substantive committees have members representing these three segments to ensure that all points of view are considered. By presenting their consensus view, the Section seeks to improve the process of public contracting for needed supplies, services, and public works.
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The Honorable Carl Levin
November 18, 2005
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The Section is authorized to submit comments on proposed legislation under special authority granted by the Association’s Board of Governors. The views expressed herein have not been approved by the House of Delegates or the Board of Governors of the American Bar Association and, therefore, should not be construed as representing the policy of the American Bar Association.

The Section wishes to provide brief comments regarding provisions that are presently before the conferees considering the National Defense Authorization Act for Fiscal Year 2006. These provisions, located at H.R. Rep. No. 109-89, 394-398 (2005), deal with proposed consolidation and changes to the Boards of Contract Appeals that hear contract claims and selected other disputes between the agencies of the United States Government and contractors, individuals, and other organizations. These provisions were initially introduced as Title XIV "Contract Dispute Enhancement" of House of Representatives Bill No. 1815 (H.R. 1815), and are now included in the National Defense Authorization Act for Fiscal Year 2006 that is in conference.

The Section’s Contract Claims and Disputes Resolution Committee includes attorneys who practice before the Boards of Contract Appeals in Government agencies, the private bar, and as in-house attorneys for contractors, as well as judges of the Boards of Contract Appeals. The Committee members who are sitting Boards of Contract Appeals judges have recused themselves from drafting these comments.

This Committee has considered the provisions of the Contract Dispute Enhancement Act ("the Act") and shares some of the concerns that the Act’s sponsors entertain regarding the efficiency of Board practice and proceedings. However, the Section believes that the issues implicated by the discussion of efficient practice before the Boards are fairly complex and far-reaching. We believe these issues warrant further study before legislative action is taken that might or might not improve efficiency.

The Section had, independent of its consideration of the Act’s provisions, instituted a comprehensive ad hoc study of Board practice under which the Section is analyzing practice and procedures in all of the Boards of Contract Appeals. The Section intends to determine what, if any, recommendations are warranted regarding possible rule and procedure changes, implementation of best practices guidance, and introduction of legislation. Representatives from nearly all constituents who participate in Board practice have participated in the initial phases of the study, including Government agency attorneys, members of the private bar,
in-house counsel, Board judges and agency attorneys responsible for facilitating alternative dispute resolution (ADR) in connection with Board proceedings. We are very encouraged by the degree of cooperation among the participants and the uniform willingness to examine collectively how Board practice can be made more efficient.

The initial study efforts have identified a number of issues that warrant more detailed examination, including for example, 1) whether greater standardization of rules and procedures among the various Boards would enhance efficiency and process predictability, 2) whether certain procedures or best practices guidance should be implemented to address the length of time that elapses both in relation to certain phases within individual Board proceedings, such as the period between the filing of an appeal and the point at which a judge is assigned to the appeal, and in relation to the average time a Board proceeding consumes from filing through issuance of decision, and 3) whether more explicit procedures should be instituted to guide and control pursuit of discovery and other aspects of Board proceedings. There appears to be nearly uniform agreement among our members that serious study of, attention to and action on issues of this nature may bring the type of enhanced efficiencies to Board practice that the Act’s sponsors articulated as their purpose in introducing the Act.

The Section also entertains concerns that implementation of some of the provisions proposed in the Act would substantially undercut, rather than strengthen, the effectiveness of the Boards. Specifically, a number of provisions raise concerns that the Boards could be deprived of the judicial independence that has historically been one of their principal strengths -- both from the point of view of contractors and the point of view of agency contracting officials. Although the Boards are housed within the agencies they serve, their independence from outside influence has been a strong contributor to the integrity of their decisions and of the overall contract dispute resolution process. These provisions include, for example, Section 1423 that proposes a five-year term limitation for Board Chairpersons, and would require Board Chairpersons to consult with the Administrator of the Office of Federal Procurement Policy regarding implementation and revision of procedural rules and regulations. Another example is Section 1441, which proposes that Board judges be subject to performance reviews of unspecified nature, which could be particularly problematic if the reviews were conducted by agency executives whose agencies could have a stake in the outcome of Board decisions.

We believe that other provisions in the Act deserve analysis as part of our Section’s study prior to enactment of any legislation that is designed to enhance the
efficiency of Board practice. These provisions address for example the new boards’ proposed jurisdiction, the number of boards, and the “Enhanced Access for Small Business.”

Accordingly, the Section respectfully recommends that the conferees do not pass the Act’s provisions, but allow the Section and others to pursue, and share, the studies that have already been initiated to analyze how Board practice can be made more efficient and effective.

We appreciate the opportunity to submit these comments.

Sincerely,

[Signature]

Robert L. Schaefer
Chair

cc: Michael A. Hordell
Patricia A. Meagher
Michael W. Mutek
Carol N. Park-Conroy
Mary Ellen Coster Williams
Patricia H. Wittie
Hubert J. Bell, Jr.
Council Members
Co-Chairs of the Contract Claims and Dispute Resolution Committee
David Kasanow