

Recommendation 83: Raise the monetary threshold to provide agency boards of contract appeals accelerated, small business, and small claims (expedited) procedures to \$250,000 and \$150,000 respectively.

Problem

ASBCA and corresponding agency boards want more cases to use the accelerated and expedited procedures to resolve cases more quickly, necessitating a higher threshold for those procedures.

Background

ASBCA is an independent, quasijudicial DoD agency. ASBCA's mission is to provide impartial, informal, expeditious, and inexpensive resolution of disputes arising from or related to DoD contracts, including the Military Services, Defense Agencies, NASA, and other departments and agencies as permitted by law.

To ensure a timely resolution to small-dollar claim amount contract disputes, ASBCA and the civilian agency boards have both expedited and accelerated procedures. These procedures are not limited to small businesses. If the appeal claim dollar value is \$50,000 or less, the contractor can choose expedited procedures to get a decision within 120 days. If the dollar value is \$100,000 or less, the contractor can choose accelerated procedures for a decision within 180 days. A contractor with a \$50,000 claim can elect either expedited or accelerated procedures, but a contractor with a claim between \$50,001 and \$100,000 can only elect accelerated procedures.¹ These dollar thresholds were established pursuant to the Contract Disputes Act of 1978 (CDA) (41 U.S.C. § 7106). Additionally, the CDA was amended in 2006 to allow that a small business can elect to use the small claims procedures up to \$150,000.²

The difference in the various timelines originates in shortened discovery periods. Under procedures that apply above these thresholds, the parties to the appeal generally dictate the schedule. The decision timeline is extended substantially by conducting discovery and deposing witnesses for 12 to 18 months and the parties may request extensions to briefing deadlines multiple times.³

Discussion

CDA provides the Administrator of the OFPP the authority to review and adjust the threshold amounts "from time to time," in accordance with "economic indexes selected by the Administrator."⁴ The amounts have only been adjusted once during the 40 years since CDA's inception—in 1994 the dollar limit for accelerated appeals was increased from \$50,000 to \$100,000, and the dollar limit for small claims appeals was raised from \$10,000 to \$50,000. No further adjustments to the maximum amounts for applicability have been made since 1994. Adjusted for inflation, the thresholds would be \$172,359 for accelerated procedures, \$86,179 for expedited procedures, and \$190,611 for use by small businesses.⁵ ASBCA indicated for the 2018 case load only 15 percent of claims are eligible for accelerated procedures at \$100,000 and 9 percent at the expedited level of \$50,000. If the thresholds were raised, about 25

¹ ASBCA, email to Section 809 Panel, July 27, 2018.

² Agency Board Procedures for Accelerated and Small Claims, 41 U.S.C. § 7106.

³ ASBCA, email to Section 809 Panel, July 27, 2018.

⁴ Agency Board Procedures for Accelerated and Small Claims, 41 U.S.C. § 7106.

⁵ Calculated using the Bureau of Labor Statistics, Consumer Price Index, accessed October 26, 2018, <https://www.bls.gov/data/>.

percent of cases would be eligible for accelerated procedures at the \$250,000 level and 19 percent would be eligible for expedited procedures at the \$150,000 level.⁶ Although the caseload data would differ for the other agency boards, the thresholds should be the same to maintain consistency and avoid confusion.

It is reasonable to expect that increasing the dollar limits would lead to more contractors (large and small) electing these procedures. Because appeals would be decided in a shorter period, the pendency rate for appeals at the board would be lowered. ASBCA requested the Section 809 Panel review these thresholds, and supports the recommendation of raising these thresholds. Raising these thresholds would accommodate achieving fast resolution of as many claims as possible while balancing increased administrative demands.

Conclusions

Raising the threshold for the expedited and accelerated procedures will allow for additional claims to be treated and closed sooner. To simultaneously simplify the thresholds and raise them, small businesses should be allowed to select the procedures up to \$250,000, and all others be allowed to select accelerated procedures at a threshold of \$250,000. The expedited procedure threshold should be \$150,000. These thresholds should be reviewed along with the other acquisition-related thresholds every 5 years.

Implementation

Legislative Branch

- Revise Title 41, Armed Services Board of Contract Appeals, to reflect the new threshold values.

Executive Branch

- There are no regulatory changes required for this recommendation.

Implications for Other Agencies

- Implementing the recommended changes will affect other agencies, because they will be subject to claims at the higher threshold level.

⁶ ASBCA, email to Section 809 Panel, August 8, 2018.

RECOMMENDED REPORT LANGUAGE

SEC. ____. INCREASE IN THRESHOLDS FOR USE OF ACCELERATED PROCEDURES AND SMALL CLAIM PROCEDURES BY BOARDS OF CONTRACT APPEALS.

This section would amend section 7106, title 41, United States Code, to increase the thresholds for use of expedited case resolution procedures by Department of Defense and agency Boards of Contract Appeals. This section would further amend such section to require periodic adjustments every five years to the thresholds. The committee notes that raising these thresholds would accommodate achieving fast resolution of as many claims as possible while balancing increased administrative demands.

1 **SEC. ____ . INCREASE IN THRESHOLDS FOR USE OF ACCELERATED**
2 **PROCEDURES AND SMALL CLAIM PROCEDURES BY BOARDS OF**
3 **CONTRACT APPEALS.**

4 (a) INCREASED THRESHOLDS.—

5 (1) ACCELERATED PROCEDURE.—Subsection (a) of section 7106 of title 41, United
6 States Code, is amended by striking “\$100,000” in the subsection heading and text and
7 inserting “\$250,000”.

8 (2) SMALL CLAIMS PROCEDURE.—Subsection (b) of such section is amended—

9 (A) by striking “\$50,000” and inserting “\$150,000”; and

10 (B) by striking “\$150,000” and inserting “\$250,000”.

11 (b) PERIODIC ADJUSTMENT OF THRESHOLDS.—Such section is further amended—

12 (1) in subsection (b), by striking paragraph (6); and

13 (2) by adding at the end the following new subsection:

14 “(c) PERIODIC ADJUSTMENT OF THRESHOLD AMOUNTS.—Effective on October 1 of each
15 year that is divisible by 5, each amount set forth in subsection (a) or (b) shall be adjusted in
16 accordance with section 1908 of this title.”.

17 (c) TECHNICAL AMENDMENTS FOR INTERNAL CONSISTENCY.—Subsection (a) of such
18 section, as amended by subsection (a)(1), is further amended—

19 (1) by designating the first and second sentences as paragraph (1) and inserting

20 “IN GENERAL.—” before “The rules of”; and

21 (2) by designating the third sentence as paragraph (2) and inserting “TIME OF
22 DECISION.—” before “An appeal”.

23 (d) SECTION HEADING.—

1 (1) IN GENERAL.—The heading of such section is amended to read as follows:
2 “§7106. Agency board procedures: thresholds for use of accelerated procedure and small
3 claims procedure”.

4 (2) CLERICAL AMENDMENT.—The item relating to such section in the table of
5 sections at the beginning of chapter 71 of such title is amended to read as follows:

“7106. Agency board procedures: thresholds for use of accelerated procedure and small claims procedure.”.

6 (e) EFFECTIVE DATE.—The amendments made by subsection (a) shall apply with respect
7 to appeals from decisions of contracting officers that are filed with a board of contract appeals
8 after the date of the enactment of this Act.

SECTIONS AFFECTED BY THE PROPOSAL

[The material below shows changes proposed to be made by the legislative text above to the text of existing statutes. Matter proposed to be deleted is shown in ~~stricken through~~ text; matter proposed to be inserted is shown in *bold italic*.]

TITLE 41, UNITED STATES CODE

§7106. Agency board procedures ~~for accelerated and small claims~~: *thresholds for use of accelerated procedures and small claims procedures*

(a) ACCELERATED PROCEDURE WHERE ~~\$100,000~~ *\$250,000* OR LESS IN DISPUTE.—

(1) *IN GENERAL*.—The rules of each agency board shall include a procedure for the accelerated disposition of any appeal from a decision of a contracting officer where the amount in dispute is ~~\$100,000~~ *\$250,000* or less. The accelerated procedure is applicable at the sole election of the contractor.

(2) *TIME OF DECISION*.—An appeal under the accelerated procedure shall be resolved, whenever possible, within 180 days from the date the contractor elects to use the procedure.

(b) SMALL CLAIMS PROCEDURE.—

(1) *IN GENERAL*.—The rules of each agency board shall include a procedure for the expedited disposition of any appeal from a decision of a contracting officer where the amount in dispute is ~~\$50,000~~ *\$150,000* or less, or in the case of a small business concern (as defined in the Small Business Act (15 U.S.C. 631 et seq.) and regulations under that Act), ~~\$150,000~~ *\$250,000* or less. The small claims procedure is applicable at the sole election of the contractor.

(2) *SIMPLIFIED RULES OF PROCEDURE*.—The small claims procedure shall provide for simplified rules of procedure to facilitate the decision of any appeal. An appeal under the small

claims procedure may be decided by a single member of the agency board with such concurrences as may be provided by rule or regulation.

(3) TIME OF DECISION.—An appeal under the small claims procedure shall be resolved, whenever possible, within 120 days from the date the contractor elects to use the procedure.

(4) FINALITY OF DECISION.—A decision against the Federal Government or against the contractor reached under the small claims procedure is final and conclusive and may not be set aside except in cases of fraud.

(5) NO PRECEDENT.—Administrative determinations and final decisions under this subsection have no value as precedent for future cases under this chapter.

~~(6) REVIEW OF REQUISITE AMOUNTS IN CONTROVERSY.—The Administrator, from time to time, may review the dollar amounts specified in paragraph (1) and adjust the amounts in accordance with economic indexes selected by the Administrator.~~

(c) PERIODIC ADJUSTMENT OF THRESHOLD AMOUNTS.—Effective on October 1 of each year that is divisible by 5, each amount set forth in subsection (a) or (b) shall be adjusted in accordance with section 1908 of this title.