

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.