Construction Litigation, U.S. General Services Administration, 1980–2004

J. Cletus Goetz II1 and G. Edward Gibson Jr., F.ASCE2

Abstract: This paper presents results from a study analyzing first time litigation brought against the U.S. General Services Administration for the period 1980–2004. Cases were extracted from the general services board of contract appeals and the U.S. Court of Federal Claims decisions. A total of 606 cases were considered from this time period and are characterized by their primary cause. Trend analyses were performed to determine whether the frequency of litigation has increased or decreased. Comparisons are made with similar data sets of Navy Facilities Command and U.S. Army Corps of Engineers projects, and similarities and differences are given. Conclusions are made based on these evaluations concerning the primary causes of litigation among these three agencies, along with recommendations for practitioners.

DOI: 10.1061/(ASCE)JLAR.1943-4162(2009)1:1(40)

CE Database subject headings: Dispute resolution; Litigation; Claims; Design/build; Construction management.

Purpose of Study

The General Services Administration (GSA) is the U.S. government’s “landlord” whose purpose is to acquire workspace for 1.1 million federal employees. The GSA has 13,000 employees and far reaching responsibilities ranging from acquisitions to supply management. This study concerns itself exclusively with the GSA’s Public Buildings Service (PBS) branch. The PBS managed building inventory totals more than 345 million square feet, 55% of which is government owned. The balance is leased from private owners.

The PBS utilizes private sector architects, construction managers, and engineers to design and build courthouses, border stations, federal office buildings, laboratories, and data processing centers. PBS leases space to other federal agencies and collects rent for their use. Rent is deposited into the federal buildings fund, which is the principal funding mechanism for the PBS. It also repairs, alters, and renovates existing facilities. PBS is also responsible for the disposal of property not only for GSA, but for other federal agencies.

Like other public contracting entities, the primary governing mechanism for acquiring goods and services by the federal government is the federal acquisition regulation (FAR). Specifically, Part F, Subchapter 36 directly covers the acquisition of engineering and construction services. The vision for the FAR is to provide for the timely acquisition of goods and services at best value to the government, and subsequently the taxpayer.

The purpose of this study was to perform a trend analysis of construction litigation brought against the GSA for the period 1980–2004, to determine primary root causes of these disputes, and to compare disputes in GSA to other federal agencies. This work is a follow up study to two previously conducted litigation studies by Kilian (2003) and Kurgan (2005) on the U.S. Naval Facilities Engineering Command (NAVFAC) and the U.S. Army Corps of Engineers (USACE), respectively (Goetz 2006; Kilian and Gibson 2005).

Construction contracts are complex and in many situations can be interpreted differently by the various contracting parties. It is not uncommon for disputes between the owner, designer, and the contractor to arise as the project progresses. Many times these disputes are settled through negotiation at the project level. If a dispute cannot be settled at this level, it can become a claim that is either settled by a level of management higher than the project, or by an administrative panel or court.

A previous study of prelitigation construction claims was conducted by Diekmann and Nelson (1985). They looked at the causes of claims that had been resolved prior to litigation or with the use of alternative dispute resolution. Their study focused on 22 federally administered construction projects that generated a total of 427 claims and found that several causes contributed to the submission of claims, such as design errors, changes, and differing site conditions, among others. Other researchers have identified a large number of causes for construction claims including owner-caused delays, deficiencies in design, owner-initiated changes, performing work more difficult than described in the contract, and external factors such as weather, material delays, and strikes, among others (Adrian 1988; Fenn et al. 1997; Kuma-raswamy 1997; Pena-Mora et al. 2003; Semple et al. 1994).

Disputes and litigation in the construction industry have long been considered a problem, if for any other reason than they cause damage to relationships, delay projects, and cost additional money (Gebken and Gibson 2006). As a major public procurer of construction services, the GSA has an obligation to attempt to deliver high quality capital facilities to the taxpayer with a minimal amount of money being spent on dispute resolution costs.

1Major, Deputy Commander, Buffalo District, U.S. Army Corps of Engineers, 110 Countryside Ln., Grand Island, NY 14072; formerly, Graduate Student, Univ. of Texas. E-mail: joseph.c.goetz@us.army.mil
2Professor, Garry Neil Drummond Endowed Chair, Dept. of Civil, Construction, and Environmental Engineering, Univ. of Alabama, Tuscaloosa, AL 35487. E-mail: egibson@eng.ua.edu

Note. Discussion open until July 1, 2009. Separate discussions must be submitted for individual papers. The manuscript for this paper was submitted for review and possible publication on January 11, 2007; approved on January 28, 2008. This paper is part of the Journal of Legal Affairs and Dispute Resolution in Engineering and Construction, Vol. 1, No. 1, February 1, 2009. ©ASCE, ISSN 1943-4162/2009(11)40/7/$25.00.
The data presented in this study can help to determine if there are possible areas of concern in recent litigation trends against the government. This information can provide a benchmark for improvements to GSA’s contracting methodology and help to foster continuous improvement in the agency if used appropriately.

**Previous Public Sector Organization Studies**

This study is the third in a series of studies analyzing construction litigation brought against the United States Government. Kilian conducted a study to characterize first time construction litigation against the Navy from 1982–2002 using data from the Armed Services Board of Contract Appeal (ABSCA) (Kilian and Gibson 2005). The total number of cases litigated during that period was 666. Kilian first conducted a trend analysis to determine if the number of cases brought against the Navy was increasing or decreasing. He determined that the number of cases were indeed decreasing and suggested that the implementation of partnering and design-build were the contributing factors. As part of this study, Kilian analyzed the primary causes and frequency of each cause including a more detailed root cause analysis of 30 randomly selected cases (Kilian and Gibson 2005). His most frequently cited primary cause was interpretation of contracts.

Kilian and Kurgan conducted a similar study focused on the USACE. His study period broadened to 25 years, from 1980 to 2005. By using Westlaw to research the ASBCA, Engineering Board of Contract Appeals (ENGBCA) and U. S. Court of Federal Claims (USCOFC) databases, he found 1,211 cases of first time litigation against USACE. He too determined through trend analysis that the incidence of litigation against USACE was decreasing. Similar to Kilian, he determined that the foremost cause of litigation against the government was interpretation of contracts, and evaluated in more detail a random sample with 30 cases.

**Data Collection and Research Methodology**

Before the initiation of this study, it was first necessary to determine where first time litigation was brought against the GSA. Through study of Title 41, USC, and the GSA’s website, it was determined that there are two venues where contract disputes litigation are heard for the first time: the General Services Board of Contract Appeals (GSBCA) and USCOFC. All of the USCOFC data were taken from the Westlaw legal database. Of the 606 cases considered, 561 are GSCCA cases and 45 are USCOFC cases. Case data from 1980–1991 were taken from the Westlaw database. Case information from 1992 to the present is available on GSA’s website.

The vast majority of cases used in this study were litigated before the GSBCA. This is probably attributable to the fact that this venue is generally simpler, faster, and cheaper than the USCOFC. Resorting directly to the USCOFC was a much less used option.

The sample (population) of GSA projects was analyzed using traditional statistical methods, including trend analysis and descriptive statistics, as well as analysis of variance (ANOVA) for subsample comparisons (Vardeman 1994). The “primary” cause of litigation for each case as reported by the case citation was recorded and summarized. A complete, comprehensive listing of all causes for each case can be found in supporting research conducted by the writers (Goetz 2006). The “primary” causes listed later in this article were provided by and described in the decision history of each case. The authors characterized these “primary” causes and ranked them accordingly. The categories in the following diagrams and graphs represent GBSCA terminology and self-descriptive.

A subjective analysis of the root cause of 30 cases completed in the last 10 years of the study period was also conducted as part of this effort (these cases were randomly selected out of 129 cases litigated against GSA during the period of 1995 to 2004) but are not presented here. The process used was the same as used by Kilian and Kurgan in their studies as a means of comparison between NAVFAC, USACE, and GSA.

As the federal government’s “landlord,” the GSA lets contracts for several different types of services involving public buildings. New construction, architect/engineer services, maintenance/renovation contracts, leases, and building services contracts (security, custodial, etc.) are all typical services that are contracted by the GSA contracts. For the purposes of this study, only new construction, renovation, and architect/engineer services contracts are considered. The total number of cases selected for this study was 983, of which 606 were considered. The difference in the number of cases included and number considered is due to a large number of cases that were settled out of court or via some alternative dispute resolution (ADR) proceeding. Because these cases were settled short of litigation, they are not included in the litigation forensic assessment. However, their inclusion in the database helps to identify how often the GSA is sued during acquisition of design/construction services.

It is interesting to note that during case research for this study, there were approximately 1,000 or more cases where the complaint was dismissed by the GSBCA for lack of standing or other procedural rule. These instances were not studied because the plaintiff lacked legal standing to sue the government and, thus, the complaint did not constitute litigation.

**Statistical Analysis of the Total Population**

The statistical analysis for this study includes all cases of litigation against the GSA for the period 1980–2004 where the court rendered a decision of appeal granted, appeal granted in part, or appeal denied. This period of analysis was then divided into two subsequent subperiods, 1980–1993 and 1994–2002 for the purpose of evaluating litigation trends. This latest 10 year period corresponds with a more recent history of project performance at the time of this study. It should be noted that the 1980–1993 period also roughly represents a timeframe in which GSA did not extensively use partnering, alternative dispute resolution methods, or design-build bridging as a means of project delivery and to control or prevent disputes. The period 1994–2004 roughly represents the timeframe during which these methods began to emerge significantly during the project delivery process.

Data were analyzed by comparing the mean number of cases, cases heard by the GSBCA and the USCOFC, the final disposition periods, and primary causes. For example, the mean of the total number of cases per year for the period 1980–1993 was compared to the mean of the total number of cases per year for the period 1994–2004. Statistical significance was determined using one way ANOVA with a confidence level of 95%. The null hypothesis is that there is no statistically significant difference between the two periods. For the null to be false, the ANOVA p-value must be below the 0.05 confidence threshold for the 95% confidence level. The p-value is simply the probability of obtaining a mean differ-
ence as extreme as the one obtained, given that the null hypothesis is true. For a $p$-value less than 0.05, the difference between the means is generally considered to be significant in a statistical sense.

**Total Case Litigation**

The total number of considered litigated cases between the years 1980 and 2004 equaled 606. Of these, 561 were decided in the GSBCA and 45 were decided in the USCOFC. The “by year” frequency is given in Fig. 1, showing the total number of case decisions rendered on a year by year basis from 1980–2004. The total number of cases decided from 1980–2004 averaged 24.6 cases per year. The average number of cases decided from 1980–1993 was 32.2 cases per year. The average number of cases decided from 1994–2004 was 14.9 cases per year.

Analysis of variances (ANOVA) was conducted to determine if the difference between these two periods was statistically significant. The null hypothesis was that there was no significant difference between the two periods. Therefore, if ANOVA resulted in a $p$-value greater than 0.05, then the null hypothesis was true for a 95% confidence level. The ANOVA results for the total number of cases litigated against GSA yielded a $p$-value of 0.005. Therefore, there is a statistically significant difference between the number of cases litigated against the GSA for the periods 1980–1993 and 1994–2004.

The number of cases brought against the GSA peaked in 1984 and then generally declined over time, even though the number of cases litigated against it roughly doubled between 1988–1989 and 1990–1991.

**Construction Volume and Case Frequency Comparison**

GSAs Public Buildings Service (PBS) is funded through congressional appropriations. Their appropriations include monies for new construction, renovations, and building services such as security and custodial services. PBS also receives “rent” money from other federal agencies who utilized the facilities that PBS leases for them.

Actual expenditures for capital facilities were taken from the federal budget and are in actual dollars, not estimates. The construction volume figure includes the line items “construction and acquisition of facilities,” “repairs and alterations,” “design and construction services,” and “construction of lease purchase facilities.” These values do not include operations and rental of space or installment acquisition payments. All figures are in 1994 dollars using the Bureau of Labor statistics’ inflation calculator (Bureau of Labor Statistics 2005). The adjusted construction volume information is then plotted concurrently with the number of instances of litigation in that year to attempt to show a trend between construction volume and occurrences of litigation. Note that there is a lag between the construction volume and the litigation occurrences. For instance, it is probable that an occurrence of litigation in 1996 could be related to a project that was funded in 1995 or before. Fig. 2 shows that relationship.

As shown, although GSA’s construction volume has varied from year to year, in general it has consistently ranged from $800 million to $1.2 billion and has experienced a concurrent general decline in litigation (GPO 2006). This helps to support the general observation that claims are decreasing. The addition of more data after 2004 will help to confirm or deny this assertion. The litigation figures in the year shown were most likely from projects begun in previous years.

**Primary Causes of Litigation**

The “primary” cause for each case of litigation was subjectively determined by reading the court’s decision for each case as discussed earlier. All of these “primary” causes for the entire sample are plotted on the Pareto chart in Fig. 3. The “primary” cause of litigation for this analysis differs from the leading primary cause
in the NAVFAC and USACE studies. In those studies, the primary cause of litigation was interpretation of contracts (Kilian 2003; Kurgan 2005). In this study, as shown, the primary cause of litigation is modifications. Interpretation of contracts is the second leading cause of litigation for GSA.

Many of GSA’s litigated projects during this study period involve the renovation of U.S. courthouses. The high number of modification-related litigation is perhaps related to insufficient or incomplete scoping of the work involved prior to requests for proposals from contractors or lack of discipline in building the developed scope. Subsequent changes in quantity or nature of the work to be performed or the cost of such work after it is complete could be the cause of the high number of modifications claims.

In addition to determining whether or not the total incidence of litigation has increased or decreased, this study also analyzed the frequency of each of 19 primary causes. Table 1 lists all 19 primary causes found in this study, the percentage of total litigation that primary cause is responsible for, and whether or not there was a statistically significant difference between the 1980–1993 and 1994–2004 time periods. (Kilian and Gibson (2005) identified 25 primary causes; however, only 19 were identified in the GSA sample.) As shown, only five of the 19 primary causes ex-

![Fig. 2. Construction volume case frequency comparison](image)

![Fig. 3. Primary causes of litigation Pareto chart, 1980–2004](image)
experienced significant reduction in litigation (p-value less than 0.05). However, these five primary causes account for 39% of all litigation brought against the GSA. Additionally, seven of the 19 causes account for 2% of litigated cases or less, which makes it difficult to state that any significant reduction has taken place because of the small subsample size.

Government/Contractor Settlement out of Court

As identified earlier, the total number of cases of litigation against the GSA has decreased since 1994, when the GSA began to use partnering. Although it is not explicitly stated as policy, there appears to be a corresponding increase in the willingness of the government to settle disputes with contractors out of court or via some sort of ADR method. Because these cases are settled before they get to court, they do not constitute litigation and, thus, were not part of the 606 cases included in this study.

However, these cases were briefly evaluated in this study and it is important to show the trend of the government to settle cases out of court.

Fig. 4 shows the annual occurrence of settled cases. To confirm this notion, single factor ANOVA was conducted comparing the period 1980–1993 to the period 1994–2004. The resulting p-value was 0.001. Therefore, the number of total settled cases has increased.

The increase in the number of settled cases is not necessarily unwelcome. When the two contracting parties do not dedicate effort to a dispute resolution strategy, the default dispute resolution method is many times litigation. However, when parties realize that disputes are a part of contracting, they can dedicate time to determining a viable and workable means to settle disputes before they become conflicts.

Comparison with NAVFAC and USACE Studies

One of the primary reasons for using the same methodology as Kilian and Kurgan was the fact that it facilitated direct, side-by-side comparisons of results. Both the results of the NAVFAC and USACE studies concluded that litigation against both those agencies was declining. To compare trends and to provide a common-sized comparison, the annual rate of litigation was divided by the number of cases to show the percentage of litigation brought against the agency in each year of the study. The case frequency comparison is shown in Fig. 5.

As discussed, the primary cause definitions used in this study were the same as those used in the previous two studies. Table 2

<table>
<thead>
<tr>
<th>Primary cause</th>
<th>Litigation (%)</th>
<th>Significant reduction?</th>
</tr>
</thead>
<tbody>
<tr>
<td>Modification</td>
<td>19.0</td>
<td>No</td>
</tr>
<tr>
<td>Interpretation of contracts</td>
<td>13.2</td>
<td>Yes</td>
</tr>
<tr>
<td>Delays</td>
<td>9.9</td>
<td>Yes</td>
</tr>
<tr>
<td>Payment</td>
<td>9.6</td>
<td>No</td>
</tr>
<tr>
<td>Specifications</td>
<td>8.9</td>
<td>No</td>
</tr>
<tr>
<td>Site conditions</td>
<td>8.0</td>
<td>Yes</td>
</tr>
<tr>
<td>Termination for default</td>
<td>6.7</td>
<td>No</td>
</tr>
<tr>
<td>Acceptance</td>
<td>5.4</td>
<td>Yes</td>
</tr>
<tr>
<td>Liquidated damages</td>
<td>3.9</td>
<td>No</td>
</tr>
<tr>
<td>Disputes</td>
<td>3.6</td>
<td>No</td>
</tr>
<tr>
<td>Mistakes</td>
<td>2.6</td>
<td>Yes</td>
</tr>
<tr>
<td>Performance</td>
<td>2.6</td>
<td>No</td>
</tr>
<tr>
<td>Overhead</td>
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<td>No</td>
</tr>
<tr>
<td>Pricing</td>
<td>0.8</td>
<td>No</td>
</tr>
<tr>
<td>Bidding procedures</td>
<td>0.8</td>
<td>No</td>
</tr>
<tr>
<td>Government furnished equipment</td>
<td>0.8</td>
<td>No</td>
</tr>
<tr>
<td>Architect/engineer</td>
<td>0.5</td>
<td>No</td>
</tr>
<tr>
<td>Subcontractor</td>
<td>0.3</td>
<td>No</td>
</tr>
<tr>
<td>Value engineering</td>
<td>0.3</td>
<td>No</td>
</tr>
</tbody>
</table>

**Table 1. Summary of Primary Cause Results**

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**Fig. 4. Total settled cases, 1980–2004**
shows a comparison of primary causes across all three agencies. USACE and NAVFAC listed interpretation of contracts as the number one primary cause. In this study, interpretation of contracts was the second most cited cause. However, it does reinforce the fact that people will interpret contracts in a manner that is advantageous to them. However, contracts should be read with an objective, neutral eye.

GSA’s incidence of modifications as a primary cause is much larger than USACE’s and NAVFAC’s incidence. This is problematic for an agency that engages in numerous building renovations. Incomplete scoping and a lack of knowledge of in situ conditions in its buildings may be a contributing factor to this observation.

Possible Explanations for Decline of Litigation

In 1994, GSA began to use partnering on all projects with a value of $1 million or more. Developed in the late 1980s by the U.S. Army Corps of Engineers, partnering is nothing new on public projects. One feature of partnering is that it establishes a method of solving disputes that usually incorporates a series of methods that escalate in terms of the time, money, and level of hostility.

In addition to partnering, the GSA uses a form of design-build called design-build bridging. Under design-build bridging, GSA hires an architect-engineering firm under their design excellence program and executes the design phase to 30% complete. Once this is complete, requests for proposals are solicited from design builders who use the 30% design to generate construction documents and execute the construction phase. The first project to use design-build bridging was the Las Vegas courthouse, approximately 10 years ago. The use of the method is increasing at the expense of the traditional design-bid build procurement method, however, it is unlikely that it will replace it completely (C. Matta, personal communication, Jan. 9, 2006).

GSA has recognized the value of ADR and a preestablished means of resolving disputes. The members of the GSBCA, in addition to their role as judges, also serve as standing neutrals for GSA projects. They undertook this new role in 1996, during the construction of the National Institutes of Health facility in Washington, D.C. As neutrals, whenever the contracting parties are unable to settle disagreements between themselves, these judges...
will mediate the disputes and make recommendations for reaching accommodations without expensive and lengthy litigation. The recommendations will be made quickly and will not be binding on either party. If a dispute goes on to litigation, the other six members of the GSBCA will be available to serve as judges. The fact that the same judges will adjudicate the litigation if it goes to trial serves as a strong deterrent to prevent further escalation of the dispute, as they have already rendered a nonbinding decision. The GSBCA also serves as a standing neutral for the Department of the Air Force and Federal Aviation Administration projects (Connars 1996).

Each of these methods has the potential for reducing claims. There is a similar trend among all three agencies showing that the occurrence of litigation has decreased after the use of these three methods began. Design-build contracting reduces the number of contracts from two to one, and keeps GSA out of disputes related to design errors in most cases. Partnering sets the stage for successful communication among the various project parties, and has been shown to reduce the incidence of claims (Weston and Gibson 1993). The increased use of (ADR) methods and an increased willingness of the GSA to settle cases out of court have been observed. The data collection and analysis methods used in this study did not allow for direct causal proof of any of these methods leading to reduced litigation, but the writers strongly suspect that they provide the answers for this change.

Conclusions and Recommendations

The purpose of this study was to perform a trend analysis and primary root-cause analysis of construction litigation brought against the GSA for the period 1980–2004. The conventional wisdom within the construction industry is that the amount of litigation is increasing. While this may be true in other sectors of the industry, the data show that at GSA this is not the case. When comparing GSA data to NAVFAC and USACE, similar trends have been occurring. Litigation is decreasing in all three agencies.

During the past 25 years, the primary causes of litigation at GSA in order are modifications, interpretation of contracts, delays, payments, specifications, site conditions, and termination for default, with these seven causes representing approximately 75% of all actions. Of these causes, three, interpretation of contracts, delays, and site conditions, have reduced significantly from 1994–2004.

Comparing GSA, NAVFAC, and USACE, primary causes of litigation are different. Both NAVFAC and USACE have interpretation of contracts as their primary cause of litigation. Modifications are the number one issue at GSA, with interpretation of contracts a distant second. All three agencies are required to use the same acquisition regulations, so the differences must be procedural, cultural, and related to project type and clients. There is great opportunity for discussion and learning to take place between these organizations. GSA, USACE, and NAVFAC have all demonstrated unique organizational skills and challenges and are in a position to benefit each other and ultimately the tax payer through the sharing of information and methods.

All three agencies compared in this paper saw a significant reduction in litigation during the period from around 1993 until the present. This also roughly corresponds to increased use of partnering, design-build, and alternative dispute resolution techniques in these organizations. Although the data do not allow a causal relationship to be drawn, the anecdotal evidence seems to point to a relation. The increased number of claims settled prior to litigation in GSA, studies showing reduced number of claims for partnered projects, the reduction in number of contracts in design-build procurement all seem to indicate a relation to these new methods. Other evidence, such as the reduction of GSA primary causes of litigation including interpretation of contracts, delays, and site conditions, may be related to the increased use of design/build contracting activity and also are compelling. The writers strongly recommend that other public organizations involved with construction of facilities consider adopting these methods.

Finally, it must be recommended that GSA and other agencies track litigation and other disputes in order to continuously improve. Root cause analysis of these issues can lead to procedural changes and training to reduce the number of disputes in the future.

Acknowledgments

The writers would like to express appreciation to the Center for Construction Industry Studies at the University of Texas for its support.

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