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LAWYER/NON-LAWYER DECISIONS IN ADJUDICATION OF PUBLIC CONTRACT CLAIMS: A STUDY OF ADMINISTRATIVE PROCESS

Dov M. Grunschlag*

I. INTRODUCTION

Large throngs of attorneys populate today's vast governmental preserves, but in no officialdom are attorneys sole inhabitants. Always there are others, of all professional coats and non-professional hues. Attorneys in government do not normally have formal authority within the executive branch to determine with finality rights and obligations arising out of the performance of official functions. This paper examines some of the ramifications of the presence of non-lawyers in the domain of legal rights and obligations. The particular preserve chosen for observation is the Department of Water Resources of the State of California.

II. THE SETTING FOR CONTRACT DISPUTES

A primary task of the Department in recent years has been to administer an extensive governmental undertaking, the State Water Project. The Project was designed to deliver water to dry areas of the state. Work has been performed by private enterprise pursuant to contracts with the Department, a classic method for

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1 The government departments of the State of California, for example, employ some 520 attorneys, not counting approximately 190 lawyers on the staff of the Attorney General. There are 28 attorneys on the staff of the Department of Water Resources, with which this paper is primarily concerned. DEPARTMENT OF WATER RESOURCES, ANNUAL REPORT OF THE OFFICE OF THE CHIEF COUNSEL 2 (1969) (hereinafter cited as 1969 Report).

2 The term State Water Project is extensively used by the Department in various charts and documents, but there appears to be no statutory use of that term. The State Water Project is a conglomerate of several "projects" pertaining to water or dams that the Department is designated as having authority to construct pursuant to CAL. WATER CODE § 123 (West 1971). The Central Valley Project Act, codified in Part 3 of Division 6 of the Water Code, contains the authorization for much of the Department's construction. These various projects are part of the California Water Plan, described in Bulletin No. 3 of the Department (1957).
the discharge of official duties requiring large construction efforts.\(^3\) The standard four-article contract\(^4\) incorporates by reference several key documents that embody the rights and obligations of the parties: the private party’s bid, including not only the bid schedule but also a Bidder’s Agreement and Bidding Requirements and Conditions; Standard Provisions running to some forty pages and governing all Department contracts; and Special Provisions, typically a longer document detailing the technical specifications for the work covered by the particular contract. In addition to signatures of the contracting parties, the contract bears the signature of a representative of the Attorney General of the State, who certifies that the contract is “in accordance with the provisions of the State Contract Act”\(^5\)—a reminder that the Department derives its powers, and limitations thereon, from the Legislature.

*The Sources of Contract Disputes*

Not surprisingly, the embodiment of the parties’ rights and obligations in formal legal documents does not ensure eternally peaceful co-existence between them. The complexity of much of the construction for the State Water Project, and the large financial stakes involved, naturally give rise to disputes between the Department and its private contractors. The Department might demand that the contractor perform particular work or proceed in a particular manner, which the contractor contends he did not undertake to do. Ordered to perform as demanded, the contractor might do so, but claim additional compensation. If the Department’s representatives persist in their contention that the private party merely was ordered to perform the work as originally required by the contract, a formal dispute about the meaning of the contract may be at hand. Such disputes can arise in other ways as well: the private party might perform work that the Department’s representatives contend was not required by the contract, and hence that no payment therefor should be made; or, the Department’s representatives might order deletion of work, an action that the private party contends the contract precludes; or,

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\(^3\) Private industry has built dams, pipelines, power plants, and other paraphernalia of water delivery and storage. The technical specifications governing conduct of the particular work are prepared by the Department, in a document that embodies the requirements to which the private contractor must adhere. The work is awarded to the successful bidder who undertakes to perform it according to the specifications at a particular price to the State, “acting by and through” the Department.

\(^4\) See a copy of the standard contract in Appendix A.

the Department's representatives might order a change in the work that the private party contends the contract does not contemplate.

Whenever, regardless of its precise origin, a dispute of this kind reaches the status of a claim by the private party against the Department, the administrative process for its resolution is set in motion. The Department is now no longer merely a party to the dispute. It now becomes its arbiter as well. This article specifically concerns this process taking place within the confines of the Department, for it is here that the Department's lawyers must share responsibility for the determination of legal rights and obligations with the Department's engineers.

III. AN OVER-ALL VIEW OF THE DECISION-MAKING PROCESS

Before examining the roles of lawyers and engineers in the Department's decision-making process, it is useful to observe the over-all structure of that process.

As will be seen below, it is the decision of the Department's Deputy Director that constitutes the Department's decision of a

CAL. GOV'T CODE § 14378 (West Supp. 1971) provides as follows:
Every contract subject to this chapter ... shall provide that monetary claims totaling in the aggregate twenty-five thousand dollars ($25,000) or less on any contract and filed in accordance with procedures set forth in such contract may, at the option of the contractor or the department, be subject to determination of rights under the contract in accordance with Section 14379.

CAL. GOV'T CODE § 14379 (West 1971) provides as follows:
(a) Determination of rights pursuant to Section 14378 shall be by a hearing officer appointed for that purpose from the staff of the Officer of Administrative Procedure. (b) The party seeking a determination of rights shall give notice in writing of the claim setting forth the facts on which the claim is based to the other party and to the Office of Administrative Procedure. The Office of Administrative Procedure shall appoint a hearing officer to hear such claim. The hearing officer shall be appointed within 60 days after such notice, but not before completion of the contract, unless the department consents to earlier appointment, and the hearing officer shall hear and determine the controversy and render his decision in writing within 60 days after his appointment, unless otherwise agreed by the parties, provided, however, that for good cause, the hearing officer may extend such time. Each party shall bear its own costs and shall pay one-half of the costs of the hearing. (c) The decision of the hearing officer shall be final if supported by law and by substantial evidence.

As of this writing, neither the Department nor a private contractor has elected to proceed in accordance with the "determination of rights" procedure. The Department's abstention is easily understood as evidence of preference for, and satisfaction with, its internal processes for resolving claims. The failure of contractors to elect the new procedure may be explained on several grounds: the financial unattractiveness of the cost-sharing provision, particularly in light of the monetary limit on the claim; satisfaction with the fairness of the Department's process; a judgment that the chances of winning are better in a particular case through the Department's process; reluctance to learn new formalities of procedure; or, reluctance to engage in expected initial arguments concerning the nature and scope of the hearing officer's authority.

7 See Appendix B and C.
claim. In some instances, however, the decision can be made by the field engineer in charge of the project with which the claim is associated. Decisions of field engineers are typically made pursuant to consultation with a member of the Department's legal staff.¹⁰

Should the dispute continue, it will be presented for a decision by the Chief of the Construction Branch.¹¹ Until July 1, 1971, the initial decision within the Department (excluding field level decisions) was lodged in the Division Engineer, Division of Design and Construction. A vacancy in that position resulted in a transfer of the Division Engineer's claims decision authority to the Chief of the Construction Branch.¹² At this level of Departmental decision-making, legal advice is again obtained.

Finally, an appeal from the decision of the Chief of the Construction Branch may be lodged by the contractor with the Deputy Director.¹³ Acting in an advisory capacity to the Deputy Director is a Claims Appeal Board, consisting of two engineers and one attorney.

The decision of the Deputy Director is the final one within the Department; it is the decision that is subject to review by the courts, as will be seen below.

**Engineer Authority in Dispute Resolution**

In his contract with the Department, the private contractor promises to perform the work "in accordance with the drawings, specifications and all other parts of this contract, and to the satisfaction of the Engineer..." (Article II). The Engineer is defined in Section 1 of the Standard Provisions (Definitions) as "The Deputy Director, acting either directly or through authorized representatives..."). Section 6(a) of the Standard Provisions (Control of the Work) confers upon the Engineer "authority to decide all questions as to interpretation and fulfillment of contract requirements...") when "exercising the specific authority granted him under other provisions of the contract and in any case not covered by such specific authority...." Section 8(c) of the Stan-

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8 See Appendix B.
9 Id.
10 Id.
11 Memorandum from Chief Counsel to the Director of the Department, re: Modification of Construction Contract Procedures, dated June 30, 1971, and approved by the Director July 1, 1971, with respect to the change in decision making authority.
12 See Appendix B.
13 See Appendix A (emphasis added).
Standard Provision (Claims) is the critical provision governing the Engineer's role in the resolution of contract disputes:

The Engineer shall decide all claims of the Contractor arising under and by virtue of the contract, and his decision, whether on the merits of the claim or on its timeliness, shall be final and conclusive unless it is fraudulent, capricious, arbitrary, or so grossly erroneous as necessarily to imply bad faith.

The foregoing authority of the Engineer will be administered as follows, unless another procedure, uniform in application, is adopted for Department contracts and the Contractor is notified thereof in writing.

Claims will be decided by a designated representative of the Deputy Director, who will furnish his decisions to the Contractor in writing. The representative's decision on a claim shall be final and conclusive, as provided above, unless within 30 days after receipt thereof the Contractor makes written request for review and decision of the claim by the Deputy Director. Following such request, the Deputy Director will consider the entire claim, as submitted to his representative, and issue his decision to the Contractor in writing, which shall be final and conclusive as provided above.

**Engineer Authority and Judicial Review**

The primacy of the Engineer in the resolution of contract claims is recognized by the courts, which may review the Engineer's decision at the instance of the Contractor following exhaustion of the administrative process within the Department and by the State Board of Control. Judicial utterances about the scope of the Engineer's authority and about the nature of evidence necessary to overturn his exercise of it generally echo the Department's contractual provisions. The courts recognize the Engineer's authority to make a decision that "may entail interpretation of the contract language or specifications; application of a rule of law, or of contract interpretation, to agreed facts; or a resolution of disputed facts." The court will not disturb the Engineer's decisions upon

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15 The State Board of Control consists of the Controller and the Director of Finance, acting ex-officio, and an appointed member. It handles the particular claims against the State whose settlement has been provided by statute. In disputes against the Department of Water Resources, the Board merely serves to review Department decisions. It is not an alternative method of dispute settlement in this instance. See Cal. Gov't Code §§ 13901-13926 (West Supp. 1971), defining the nature of the Board and its general functions. See also Cal. Gov't Code § 905.2 (West 1970), detailing the Board's function in money claims.
16 Clack v. State, 275 Cal. App. 2d 743, 747, 80 Cal. Rptr. 274, 276 (1969). The references in this and subsequent footnotes are not derived from cases reviewing decisions of the Department of Water Resources. There appear to be no such reported decisions. The cases cited, however, involve closely analogous situations. Significantly, these are the decisions that the Department's legal staff deems to govern review of the
a showing that it is against "the weight of the evidence," but only upon a showing of "gross error" or "arbitrariness" in decision. Without placing undue stress on the importance of these formulations as the efficient causes for particular judicial decisions, it is possible to derive two general observations from them. First, they suggest that the courts may be disinclined to engage in a thorough review of a technical record upon which the Engineer has exercised a professional judgment, even though the ultimate decision by the Engineer is phrased in terms of rights and duties under a contract. Second, the courts may utilize their power of review to promote the rationality and fairness of the administrative process involved in the Engineer's decision. Thus, the courts will review the decision for "fraud, constructive fraud, bad faith, or a failure to exercise honest judgment." The process of decision must be a rational one: if no "reasoning arbiter would agree" with the decision, it cannot stand. The decision must be made by an impartial arbiter:

[1]n determinations under this type of contract, the high point in the architect's practice of his profession lies in those instances when, in order to do justice to the contractor, he has to oppose the desire of his employer. . . . When he acts under a contract as the official interpreter of its conditions and the judge of its performance, he should favor neither side, but exercise impartial judgement.

The more rational the process of decision, the less need there will be to scrutinize each decision for error. Put another way, the more rational and fair the process, the more reliable will be the decisions emanating from it.

IV. THE LEGAL STAFF AND DISPUTE RESOLUTION

The existence of a legal staff is obviously founded on the assumption that the work of lawyers is at least useful and at most indispensable to the attainment of fairness and rationality. It is now time to examine the role of the Department's lawyers with an eye to ascertaining the ways in which that assumption assumes practical dimensions.

Attorney Liaison with Field Engineers

The lawyer's work begins at field level even prior to the institution of a formal claim against the Department. The field
engineer in charge of a particular construction project has authority to issue change orders, requiring the contractor to do additional work for which he will receive additional compensation. Limited by a monetary amount of $25,000, the authority to issue such change orders is a useful device for aborting incipient disputes. The Department's attorneys' function is to insure that there is an adequate legal basis for the issuance of a change order pursuant to which the contractor receives additional compensation. In 1967, the Department eliminated the requirement of mandatory legal review of such orders. In its place, the program of attorney liaison with construction project offices was initiated in the summer of 1967. Emphasizing personal communication between attorneys and field engineers, the program is designed to bring attorneys into early stages of incipient problems. Engineers thereby receive legal advice at an opportune time, and that advice is in turn improved by familiarity with the local physical situation. In the view of the Department's Chief Counsel, the liaison program also usefully reduces the incidence of change orders justified by project engineers with such "meaningless recitals" as that the order was "not illegal" or was "within the scope of the work."

Legal Advice to Division Engineer

The liaison program signifies that in many cases, legal advice has been furnished prior to the actual occurrence of a claim by the private contractor against the Department. The fact that a claim is presented for resolution by the Division Engineer, Design and Construction, means that it has been denied by the project engineer, whose action in many cases was probably taken in at least partial reliance on the liaison attorney's legal advice. The Depart-

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21 The authority is embodied in Delegation Order 202(g) by the Deputy Director, entitled "Approval of Contract Change Orders." The pertinent provisions are:

IT IS HEREBY ORDERED: That the Chief of the Construction Branch is authorized to sign and approve all change orders issued to the Department's contractors under applicable sections of Standard Provisions for Construction Contracts, and Standard Provisions for Procurement Contracts, and is authorized to make or cause to be made all findings, determinations, and orders in connection therewith; IT IS FURTHER ORDERED: That authority may be redelegated to the Chief of the Equipment and Materials Section and to Project Engineers to sign and approve change orders that are not in excess of $25,000 and/or 30 days time extension.

22 Memo from Director, Department of Water Resources, to the Deputy Director, State Water Project, Chief Counsel, and Chief, Construction Branch, dated Aug. 1, 1967, Re: Administration and Legal Review of Construction Contract Change Orders.


25 See note 11 and accompanying text, supra.
ment's legal role, however, does not cease at this point. The division engineer, who is the representative designated by the Deputy Director to resolve a contested claim in the first instance, customarily makes his decision only after consultation with the legal staff. Departmental orders require that he "refer all decisions or recommendations on claims estimated to be in excess of $10,000 . . . to the Chief Counsel for legal review prior to release." As a matter of practice, the Division Engineer refers all matters to the legal staff.

**Lawyers and the Claims Appeal Board**

The private contractor may seek review of the entire claim by the Deputy Director, State Water Project, whose decision is the final one within the Department. The Deputy Director's judgment is based upon not only the legal opinions given at the Division Engineer level and perhaps at the liaison attorney-project engineer level, but also by the report of a Claims Appeal Board. The Board, consisting of two engineers and one attorney, reviews the claim and recommends a decision in a report made to the Deputy Director. Chaired by an engineer, the Board views

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26 See Standard Provisions (Claims) § 8C.
27 Delegation Order 200(d), entitled "Contractor Claims," provides in pertinent part:

**IT IS HEREBY ORDERED:** That the Division Engineer, Design and Construction, is authorized to act on claims submitted by the Department's contractors as follows:
1. Decide those claims submitted under applicable sections of Standard Provisions for Construction Contracts under the State Contract Act;
2. Decide those claims submitted under applicable sections of Standard Provisions for Purchasing Contracts under Sections 14780 through 14824 of the Government Code;
3. Decide those claims submitted under Standard Agreements (Form 2);

**IT IS FURTHER ORDERED:** That the Division Engineer is authorized to make or cause to be made all investigations, findings, determinations, requests and notices in connection with such claims;

**IT IS FURTHER ORDERED:** That in exercising this authority the Division Engineer will refer all decisions or recommendations on claims estimated to be in excess of $10,000 and/or additional time in excess of 10 days to the Chief Counsel for legal review prior to release.

28 Conversation with H. G. Dewey, then Division Engineer, January 27, 1970; conversation with Robert W. James, Assistant Chief Counsel, October 6, 1970.
29 See note 26, supra.
30 See note 11 and accompanying text, supra.
31 The Claims Appeal Board is established pursuant to delegation of authority by the Deputy Director. Water Resources Directorate Delegation Order No. 206(b), Authorities of Chairman, Claims Appeal Board, June 8, 1971. (Previous delegation orders conferring the authority to "review, investigate, and conduct hearings on claims on construction contracts" were dated April 25, 1967, and June 24, 1969. The Deputy Director's authority was in turn derived from the Department Director's Delegation Order No. 4, dated April 10, 1967, which has been revoked and replaced by Delegation Order No. 12, dated July 16, 1971).
32 See Appendix B.
its function chiefly as an "investigational" one. In the course of investigation, the Board, whose members have had no prior connection with the contract or the claim in question, generally holds an informal hearing. The adversarial relationship between the Department and the private contractor reflects itself in the hearing. A representative of the Department—possibly the project engineer whose disagreement with the contractor initially gave rise to the claim—presents the case for denying the claim.

At a hearing observed by this writer, no Department attorney was present to assist the project engineer in the defense of his position. The contractor's case was guided by an attorney for the firm, who functioned primarily to harness the technical presentations by two of the firm's engineers into the framework of his legal position. The hearing was a mixture of factual investigation and legal argument, without the formal trappings associated with either. Thus, the field engineers for both parties made factual assertions about events and understandings that occurred during the claim's gestative period, but neither gave formal testimony about these matters. The legal argument was a none-too-neat orchestration in which the Department's representative, the private contractor's delegates, and members of the Board engaged in freewheeling contrapuntal discussion.

Following the hearing, Board members discuss the case in an effort to refine the issues involved in the claim and facilitate their presentation to the Deputy Director. If Board members disagree about the proposed disposition of the claim, conflicting reports may be forwarded to the Deputy Director. The Board's views are not communicated to the private contractor. The Deputy Director might confer informally with the contractor prior to making the final Departmental decision. Should the matter be further contested before the State Board of Control, the Department's lawyers will represent its interests in upholding the Deputy Director's decision. If the case reaches judicial review, however, the Attorney General's office assumes the responsibility for representing the State's interests, with the Department's attorneys the background personalities providing necessary liaison.

33 Id.
34 Id.
35 Hearing held in Sacramento, Calif., March 20, 1970. The author is under an obligation not to disclose the name of the private party, or that of the project involved. The same limitation applies to the other cases discussed in the text below.
36 "The department is authorized to employ legal counsel who . . . may, when authorized by the Attorney General, represent the department and the State in litigation concerning affairs of the department. In any event, the legal counsel of the department may, with the approval of the director and with the consent of the court
A closer examination of the work of the private firm's attorney at the hearing before the Claims Appeal Board affords valuable insights into the work of his Departmental counterpart. The dispute between the engineers representing the contracting parties arose when the Department's Resident Engineer ordered the performance of certain work in the construction of a power plant. The contractor contended that the work was not required by the contract, and that the Department must therefore award some $11,000 in additional compensation for the additional work. The Resident Engineer disagreed, and following denial of the claim by the Division Engineer, the matter was heard before the Claims Appeal Board. Stripped of its technical complexity, the dispute between the engineers consisted of this question: Did the contract require that the contractor install, as well as furnish, a particular unit necessary to the complete functioning of an electrical output system? In his opening statement, the Department's engineer argued for an affirmative answer.

The private attorney's role became evident at the outset of his presentation. His first and most significant move was to reshape the question itself. Rather than arguing in terms of certainty about what the contract did or did not require, the attorney addressed himself to a substantially different question: Does the contract, reasonably interpreted, require the contractor merely to furnish but not to install the unit in question? If so, he argued, it is of no consequence that it would be equally reasonable to interpret the contract in the contrary manner: The Department, as drafter of the contract provisions, must bear the risk of contract ambiguity. To avoid the application of a provision of the Bidding Requirements and Conditions that imposes a duty upon the bidder to notify the Department in writing of any ambiguity he discovers prior to bidding

before which the action is pending, present to the court the views of the department with respect to the action." CAL. WATER CODE § 127 (West 1971). The Department, like 125 of California's 135 government agencies, thus depends on the permission of the Attorney General if it wishes to represent its interests in court. That permission is almost never given, if indeed it is currently ever requested. The Department's lawyers are considered "administrative advisers." From conversations with several Department attorneys, the writer has the sense that their strictly in-house status appears to affect the performance of their duties, but it seems nearly impossible to identify such effects with any precision.

37 See A. Corbin, CONTRACTS § 559 (Student ed. 1952). But see CAL. CIV. CODE § 1654, (West 1970): "In cases of uncertainty not removed by the preceding rules, the language of a contract should be interpreted most strongly against the party who caused the uncertainty to exist. The promisor is presumed to be such party; except in a contract between a public officer or body, as such, and a private party, in which it is presumed that all uncertainty was caused by the private party." (emphasis added).
for the contract, the contractor's attorney contended that at the time of the bid his client had no wind of any contract ambiguity. In preparing his bid and cost items the contractor made every effort to understand the contract requirements, and believed that his interpretation matched the drafter's intentions. Thus, the argument concluded, the contractor cannot be faulted for any failure to call attention to what only now appears to be an ambiguity in the language of the contract.

Having cast the question in this form, the attorney next utilized the firm's two engineers in the service of the proposition that his client's contract interpretation was a reasonable one. To establish this proposition, the contractor set up a structure consisting of several technical contract provisions, drawings accompanying the technical specifications, and "academic" definitions of technical terms involved in the controversy. Although the firm's engineering representatives were not witnesses in a strict sense, in fact the attorney utilized them as though they were, attempting to circumscribe their "testimony" within the bounds of his legal argument.

The private attorney's performance, it should be recognized, was a characteristic one for a lawyer representing his client's interests in an adjudicatory setting. The role he assumed was that of an advocate for his client's position, and he employed the skills typical of that role: framing the question for decision in a manner most conducive to producing an answer favorable to his case; constructing a scheme bringing together sources of authoritative principles and rules; and channelling the available information into that scheme.

One might suppose that the attorney for the Department would assume much the same role in the process of claim resolution, the role of advocate for the client Department's interests. But there is a fundamental obstacle to the facile analogy between the private and government attorneys in this process. The Department is only initially an adversary of the private contractor. It is later his arbiter, the judge of his claim. In the performance of its adjudicatory function, it is expected to exercise honest and impartial judgment. The Department's attorney thus has a client with a unique

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88 "If a bidder discovers any ambiguity, conflict, discrepancy, omission, or other error in the bid documents, he shall immediately notify the Department's Office Engineer of such error in writing and request modification or clarification of the documents. . . . If a bidder fails to notify the Office Engineer, prior to the opening of bids, of an error in the bid documents known to him, or an error that reasonably should have been known to him, he shall bid at his own risk and if he is awarded the contract, he shall not be entitled to additional compensation or time by reason of the error or its later correction." Bidding Requirements and Conditions, Section (e).
interest—an interest in the disinterested resolution of disputes to which it is a party. Differences of opinion that arise within the Department during the claim resolution process probably have their frequent origin in this difficult posture unusual in human experience. It should surprise no one, for example, if an attorney incurs the displeasure of a field engineer when the former delivers legal advice that negates a course of action preferred by the latter. Nor would it seem unexpected that an attorney, upon whose advice or that of a colleague a claim was rejected by the field engineer, might support the denial in a memorandum to the Division Engineer that constitutes essentially a legal brief for sustaining the denial. As a brief, the memorandum would tend to support only one position in the best traditions of legal advocacy. Valuable though one-sided presentations might be for sharpening issues, an inflexible position on the part of the Department’s attorneys would not generally promote the impartiality desired of the dispute arbiter. To the extent that difficulties of this kind exist in the claim resolution process—and there is no evidence that they are of serious magnitude—the process would benefit from strategic use of personnel and timing of advice to minimize the likelihood of hardened positions.\textsuperscript{39}

V. DIVISION OF FUNCTIONS BETWEEN LAWYERS AND ENGINEERS IN CLAIM ADJUDICATION

The roles of attorneys and engineers in the claim resolution process may be viewed from another perspective as well: which issues arising in the course of the process are best suited for resolution by engineers in the exercise of their professional judgment, and which by lawyers in the exercise of theirs? A division of labor that takes account of the spheres of expertise properly attributable to the two staffs would promote the rationality of the process. It would naturally serve a fundamental objective of any decision-making process—to insure that decisions are made by those most qualified to make them. A clear division along lines of professional expertise would also facilitate the administration of the governmental task, by minimizing the time and energy spent on intradepartmental jurisdictional worries.

\textsuperscript{39} Under current practice, the attorney assigned as liaison with the field engineer will ordinarily continue to work on the claim should it reach the Division Engineer. The rationale for the practice is that the clear benefit of familiarity with the case outweighs the possible costs of a hardened position. Conversations with, and supervision by other members of the legal staff may also reduce the possibility of such hardening. Finally, because of turnover in the staff, it happens that the liaison attorney will no longer be employed with the Department by the time the case progresses upwards. Conversation with Robert W. James, Assistant Chief Counsel, October 6, 1970.
As might be expected, the realities of public administration do not allow for a surgical division of authority along lines of professional expertise or any others. There are some questions that call most clearly for resolution by engineers, and others that call just as clearly for resolution by attorneys. But there is a vast middle ground in which (1) both groups must share authority because both may possess expertise that is relevant to the disposition of the issues, or (2) both groups must disclaim authority because the disposition is made on the basis of a judgment to which neither group's professional background is of special relevance.

Questions Clearly to be Resolved by Reference to Professional Judgment of Lawyers or Engineers

No reasonable attorney would claim any expertise that would assist him in answering the question whether the discoloration or chemical deterioration of concrete surfaces resulted from the application of wood sheathing. The example is taken from specifications for one of the Department's projects, and it could be multiplied ad infinitum without further amplifying the basic truth it embodies, to wit: the question, were it to arise in the context of a disputed claim, must be answered by reference to technical expertise. By the same token, no sensible engineer would presume to answer the question whether, under applicable statutory provisions and judicial interpretations thereof, the Department has the power to terminate an entire project for reasons of "convenience." The materials that must be consulted in order to arrive at an intelligent answer to such a question are peculiarly those lawyers are trained to analyze, construe, and predict upon.40

40 As previously noted, the powers of the Department to enter into contracts on behalf of the State are governed by statutory provisions. When the Department discovers that it lacks the power to take certain action in the course of contract administration, it might seek legislative authorization to include a contract provision that would enable it to take that action in the interests of what it judges to be better policy. The Department relies on its attorneys not only to determine whether it lacks the power in question, but also to draft and promote legislation to bestow it. In the 1969 session of the Legislature, the Department sought authority to terminate a contract whenever the Department's "convenience" would be served thereby. Senate Bill 593. On at least two prior occasions, in 1964 and 1967, the Department was advised by its lawyers that in the absence of such legislation, it lacked the power to order the termination of work for which it had contracted. There are practical reasons why on occasion the entire termination of work already under way may be advisable. Technological developments may make a planned facility obsolete; changing requirements of other agencies may undermine the utility of a planned facility; or circumstances may suggest that construction would be better deferred to a later date, beyond the time the present contractor could be held on the job. "Termination for convenience" is a principle long recognized in federal contracting practice. See, e.g., 41 C.F.R. §§ 1-8.701.

The Department's attorneys concluded, however, that it was not a principle
Questions Requiring Resolution by Reference to Lawyer-Engineer Collaborative Judgment

It is no doubt obvious that the two questions chosen to exemplify the areas in which engineering or legal judgment is peculiarly pertinent correspond to the conventional distinction between questions of fact and questions of law. The former do not require for their resolution any reference to legal materials or standards. The latter do not require cognizance of any factual components whatsoever. But the distinction is no more secure in public administration than in any other enterprise in which it is put to use. Problems in the determination of legal rights and obligations do not typically arrange themselves in the neat categories of the wholly concrete and the wholly abstract. For purposes of determining whether to seek additional power from the Legislature, the Department may wish to have its lawyers answer the “abstract” question concerning the present existence of the authority to terminate an entire project for reasons of convenience. But the question may arise in quite a different fashion in the context of a particular claim. Section 7(b) of the Standard Provisions empowers the Engineer, inter alia, to order the “elimination of any portion of the work no longer required for its proper completion,” and also “the elimination of a portion of the work, even though required for proper completion, if, due to unforeseen causes, . . . performance thereof would . . . be adverse to the Department’s interests, and if its elimination will not materially change the nature and extent of the work.” (emphasis added).

This authority may be warranted by the power conferred upon the Department “to make changes in the plans and specifications.”41 In the course of contract administration, however, a Contractor may challenge a Department order to eliminate a portion of the work; the change, he might argue, “materially” changes the “nature and extent of the work,” and therefore falls outside the Department’s authority. In determining the validity of the argument, it

recognized in state legislation and judicial decisions construing contractual provisions written pursuant to that legislation. If the Department were to avoid the consequences of unauthorized termination of “integral” portions of work, new legislation was needed. Because those consequences could be serious ones—recovery for anticipated profits, or a decree for specific performance of the terminated contract, or a writ of mandate to compel withdrawal of the unauthorized termination order—the Department in 1969 sought the authority to terminate for convenience. The Department’s legal staff not only drafted the bill initially, but also designed amendments to meet objections of legislators concerned about the possible impact of the Department’s use of its new power. The bill was not enacted into law, despite unanimous passage in the State Senate.

may well be important to compare the change with those that the courts have upheld or set aside as within or outside an agency's authority to order even in the absence of legislative authority to terminate entire projects for reasons of convenience. But the issue cannot be resolved purely by reference to such precedents. The Contractor's argument must ultimately succeed or fail on the basis of the circumstances of his case, and technical engineering judgment is indispensable in any evaluation of the effect of the particular change on the "nature and extent of the work." In sum, whether the change constitutes a "material" alteration of the work can only be determined by measuring its practical effect in the particular case against some articulated statutory and judicial conceptions of the type of case to which the Department's change-order authority extends. The nature of the question therefore dictates a collaborative legal-engineering effort for intelligent resolution.

Matters Not Involving Professional Legal or Engineering Judgment

In addition to circumstances that call exclusively for engineering judgment, exclusively for legal judgment, and collaboratively for both kinds of judgment, there are also circumstances in which neither kind is peculiarly pertinent.

In one of the cases studied by the writer, the Department ordered the deletion of some work involving the "damp-proofing" of certain exterior walls in a pumping plant. In the exercise of technical judgment, the Department concluded that the work was not necessary to secure wall strength. The Contractor did not challenge the Department's authority to order that no such work be done. Rather, he contested the Department's decision to delete from the contract payment of the amount of money at which the work was valued. The dampproofing, he argued, was not called for by the contract specifications, and therefore no payment for it was contemplated in the first place; indeed, should the Department wish the work to be done, it would be liable for additional compensation. The Department's contention was that the work was included in the contract and its cost was therefore included in the Contractor's bid. Thus the Department would be justified in deleting that cost from the payment for the contract.

Upon the Contractor's claim for remission of the amount of deletion (approximately $11,000), the Division Engineer denied it with the concurrence of the legal staff. The decision was further

approved by the Claims Appeal Board. The Specifications stated that “[t]wo coats of dampproofing shall be applied to the exterior walls of the pumping plant from the elevation shown on the drawings to an elevation six inches below finished grade on back-filled walls, and one foot above normal water surface on flooded walls.” (emphasis added). The drawings, however, made no reference to dampproofing at all. The Contractor therefore contended that he could not determine the lower level from which dampproofing was to proceed upwards to the specified elevations. The Department’s response was two-fold: one, that the specifications clearly called for dampproofing, and that the drawings, even without specific notation, provided a definitive means of reasonably computing the full extent of the contemplated dampproofing; two, that if an ambiguity existed, the Contractor must bear its cost for his failure to seek clarification prior to bid.43

Despite the unanimous position of the staff to deny the claim, the Deputy Director determined that it be granted. The failure of the drawings to show areas of dampproofing at all was regarded as an “oversight or error by the Department.” The Contractor should not bear the cost of the error notwithstanding his failure to seek clarification prior to bid, because the value of the work was \(\frac{1}{4}\) of 1 percent of the total value of the job. Thus, “any Contractor working on a job of this magnitude is not going to waste any time on checking out an item this small and of such minor importance to the overall bid estimate. The argument [that he should have sought clarification] . . . is unreasonable and inconsistent with industry practice.”

Fit into the legal scheme, the Deputy Director’s determination was that because of the small monetary value of the item, the error was not “an error that reasonably should have been known” to the Contractor, and therefore his failure to seek pre-bidding clarification did not defeat his claim.44 This determination does not, however, dispose of the staff’s contention that the requirement of some dampproofing was set forth in the specifications with sufficient clarity that a bidder would reasonably have included its cost in his bid; even assuming that the bidder could not have reasonably discovered the error or ambiguity, the Department might conclude that a reasonable bidder would have supposed that some dampproofing was contemplated by the contract, and that he computed his bid on the basis of that supposition. This apparent defect in the “legal logic” underlying the Deputy Director’s decision merely under-

43 See note 38 and accompanying text, supra.
44 See note 38, supra.
scores its relative unimportance as a determinant of that decision. Having recognized that the Department erred in the preparation and drafting of the specifications and drawings for the particular project, the Deputy Director apparently determined that the Department ought to pay for its mistake, even if in consequence the Contractor was to receive a windfall. The determination may be criticized or approved, but the basis on which it was made should be recognized. It is a decision made on the basis of considerations of administration or management. A decision in favor of the Department might have induced greater care in reading specifications on the part of at least the particular contractor, and readier resort to pre-bid clarifications in future cases. On the other hand, a decision in favor of the Contractor would seem to induce greater care in drafting specifications on the part of the Department in future cases. From the perspective of administration or management, the agency’s top officer in charge of the claim resolution process could reasonably determine that the benefits of increased attention in drafting specifications outweigh the benefits of increased attention in reading them. Given another claim, at another time or for a larger monetary award, he might reach a different result: circumstances may be present that would make another case an inauspicious occasion for delivering a reprimand to the drafting staff. The decision, however, would expectedly again be rooted in considerations of administration or management—to which technical legal or engineering expertise are of little, if any, relevance.

The incidence of decisions neatly explainable on grounds of administration or management should not be exaggerated. More typically, factors of policy of this sort melt into legal issues with little stir, through the interpretation given to such terms as “reasonable” or “material.” “Matters of policy grow downward into roots of legal interpretation, and matters of legal interpretation reach upward, without a break, into matters of policy.” Policy factors might also operate to dissolve a claim before it reaches the boil of dispute. Nevertheless, whenever management objectives appear to influence the decision of particular controversies, the agency lawyer finds himself in a difficult position. If he views the process of claim resolution as essentially a legal process, the intrusion of seemingly non-legal influences of policy is likely to disturb him. He might criticize the intrusion on the ground that if it results

in an award that has at best a shaky legal foundation, the Department would be making a "grant or donation of property" to a private person in violation of the State Constitution. Or he might criticize the management decision on the ground that policy objectives can be better promoted through internal means other than the Department's adjudicatory function. The almost instinctive rebellion of lawyers at the exertion of non-legal influences on an adjudicatory process is indeed one of the costs from a management perspective of a decision that has management benefits as its goal.

VI. SOME TENTATIVE GENERALIZATIONS ABOUT THE ROLE OF LAWYERS IN CLAIM ADJUDICATION

The foregoing study has focused on the role of government attorneys in the specialized context of administrative adjudication of claims arising from public contracts, with particular attention to the interplay between attorneys and engineers in that process. Given the complexity of formal organization and human relations within it, and the stubborn tendency of adjudicatory issues to reject the facile affixation of labels upon them, it is impossible to formulate with precision the nature of the attorney's contribution and to measure its influence. Several generalizations do emerge, however, and these appear applicable to other settings in which lawyers and non-lawyers are brought together for that purpose of discharging public functions.

The difficulty in arriving at a neat division of authority along lines of professional expertise, although undoubtedly not fully remediable, nevertheless appears to be a source of some disquietude and possibly friction between lawyers and non-lawyers in the course of the claim resolution process. It may be desirable that each contested claim be analyzed, as sharply as possible, into factual, legal, and policy components, in an effort to ascertain whose professional judgment is most likely to result in a correct disposition of the claim. When, as often happens, a collaborative enterprise is necessary to define terms or apply them to a given set of facts, the collaborative nature of the enterprise ought to be clearly understood, with the participants conscious of the distinctive contribution to be made by each of them. This sort of analytical breakdown should be assayed as early in the process as possible, but it should be subject to revision as the nature of the claim and of the dispositive considerations change over time and through the administrative process.

46 CAL. CONST. § 21.
A conscious, articulated analysis along the lines of professional expertise may have its drawbacks. For one thing, friction may be generated in the course of articulating such an analysis, a process that in itself requires collaborative effort. Moreover, if areas of professional expertise are carved out with some precision, it may prove easier to detect invasion by one group of another's domain; although detection may lead to correction, some may view it as productive of still another new source of friction. Finally, it may be objected that professional insulation might discourage the development and recognition of multi-talented personnel having thoroughgoing acquaintance with the modes of thought of more than one discipline, and would instead require the development of brokers or middlemen going between one staff and another.

If the avoidance of friction were the ultimate desideratum of public administration, it may well be that a state of relative confusion about the division of authority is not less attractive than a state of relative clarity. It would appear, however, that analytical distinctions—if drawable and drawn along functional lines—would probably promote the reliability of decisions emanating from an adjudicatory process within an administrative agency. The public that supports the agency by its funds, and the private parties affected by the agency's disbursement of these public funds, are entitled to expect dispositions that are made by qualified persons utilizing relevant expertise. This is indeed one measure of the fairness of these dispositions.

When the individual contributions to the resolution of issues have been made, it becomes the attorney's function to assemble the various components in the course of coherent legal analysis containing the recommended decision. This function, no less than that of answering so-called pure questions of law, represents the attorney's distinctive contribution to the decision-making process. Personalities aside, the attorney's influence in that process probably depends on his ability first to obtain the expertise of relevant disciplines, and then to integrate these in a manner that takes account of the relationship among them. The effective legal memorandum reflects an ethos of teamwork prevailing alongside identification of specialties. The strength of the lawyer's advice is directly proportional to the quality of the synthesis of expertise that supports it.

A final word concerns top-level decisions made on the basis of considerations of management or administration. From the viewpoint of the government lawyer, it is crucial that when decisions are made on such a basis, they be perceptible as such. Although the ultimate decision-maker within the agency is not strictly ac-
countable to his legal staff for the propriety of such decisions, he ought to acknowledge the basis on which they are made. Disagreement would then be healthier, and criticism more constructive, than the estrangement a legal specialist must experience on the occasion of reversal on "legal" grounds by a non-lawyer. The relationship between legal work and department policy-making lies at the heart of any analysis of the government lawyer's role, although its significance is muted in the context of administrative adjudication. A thorough study of the expectations and self-perceptions of government lawyers would greatly improve our understanding of that relationship, and could assist in the development of conditions conducive to the exercise of professional legal expertise in accordance with the professional precepts of lawyers, without obscuring other legitimate objectives of public administration.

APPENDIX A

CONTRACT FORM
STATE OF CALIFORNIA
THE RESOURCES AGENCY
DEPARTMENT OF WATER RESOURCES

CONTRACT FOR
TEHACHAPI AFTERBAY
STATE WATER FACILITIES
CALIFORNIA AQUEDUCT
TEHACHAPI DIVISION
LOS ANGELES AND KERN COUNTIES
CALIFORNIA
SPECIFICATION NO. 69-29
CONTRACT NO. 358842

THIS CONTRACT, made in duplicate this __________ day of __________, 19__, in accordance with the provisions of the State Contract Act and other applicable laws of the State of California, between the State of California, acting by and through its Department of Water Resources, hereinafter called the Department, and __________,

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test
hereinafter called the Contractor;

WITNESSETH, That the Department and the Contractor mutually agree as follows:

ARTICLE I.—This contract includes and incorporates by this reference the notice to contractors and Contractor's bid for the above named project, the contract bonds and certificate of liability insurance furnished by the Contractor pursuant to his bid and attached hereto, the drawings and specifications for such project, all addenda to the above documents, and all authorized changes therein. All definitions stated in the Standard Provisions of the specifications shall apply herein.

ARTICLE II.—The Contractor shall provide and furnish, except as otherwise expressly provided in the specifications, all materials, equipment, labor, methods, processes, construction materials and equipment, tools, plants, supplies, power, water, transportation and other things necessary to complete in a good and workmanlike manner, in accordance with the drawings, specifications and all other parts of this contract, and all of the facilities specified, indicated, shown, or contemplated by the drawings, specifications and other parts of this contract as comprising and necessary for completion of the above-named project, and shall perform all other obligations imposed upon him by this contract.

ARTICLE III.—The Department shall pay to the Contractor, and the Contractor shall accept, as full compensation for performance of his obligations under ARTICLE II and for all risks and liabilities in connection therewith, the prices set forth in the Contractor's bid, all in accordance with and subject to the express terms and conditions of the specifications, the Contractor's bid, and other parts of this contract, and the Department shall perform all other obligations imposed upon it by this contract.

ARTICLE IV.—This contract shall apply to and bind the successors and assigns of the parties hereto.

IN WITNESS WHEREOF, the parties hereto have executed this contract as of the date first above written.

I hereby certify that I have examined the within contract and find it to be in accordance with the provisions of the State Contract Act.

Attorney General of the State of California

By ____________________________________________
    Deputy Attorney General

Dated ____________________
APPENDIX B

STATE OF CALIFORNIA
THE RESOURCES AGENCY
DEPARTMENT OF WATER RESOURCES

PROCEDURES FOR PROCESSING CLAIMS ON
CONSTRUCTION CONTRACTS

The Department's administrative procedures for the consideration and
determination of contract claims are set forth below. These procedures supple-
ment, and do not change or qualify, any of the requirements of the specifications
pertaining to the submission and decision of contract claims.

Following submission by the Contractor of a Notice of Potential Claim in
accordance with the specifications, the Project Engineer will discuss the matter
as appropriate with the Contractor in an attempt to resolve the issue.

Following submission by the Contractor of a formal contract claim in
accordance with the specifications, there will be a thorough investigation by
project office and Construction Branch headquarters representatives, including
review of additional information and data as may be furnished by the Con-
tractor. When this investigation is concluded, the Chief, Construction Branch or
his designated representative and the Project Engineer will confer with the
Contractor on the claim. If agreement as to the disposition of the claim cannot
be reached, the claim will be referred to the Division Engineer, Design and
Construction, for decision. Claims excepted from the release on contract, unless
subsequently withdrawn by the Contractor, require a decision by the Division
Engineer.

In reaching his decision, the Division Engineer, Design and Construction,
will meet with the Contractor, as appropriate, to discuss the claim. He will
notify the Contractor by letter of his decision on the claim, stating any adjust-
ment of prices and/or extensions of time due under the claim. The decision of
the Division Engineer, Design and Construction, shall be final and conclusive,
unless within 30 days after receipt thereof the Contractor makes written request
for review and decision by the Deputy Director, State Water Project. Such
request shall be addressed to the Deputy Director, State Water Project.

The Deputy Director, State Water Project, will consider the entire claim
as submitted to the Division Engineer, Design and Construction. He will
normally refer the claim to the Department's Claims Appeal Board for detailed
review and recommendation. The Contractor will be given an opportunity to
meet with the Claims Appeal Board and submit additional information. The
Board will make its recommendations to the Deputy Director, State Water
Project, who will issue his decision to the Contractor. The written decision of
the Deputy Director, State Water Project, will be final and conclusive under
the contract.

Revised
June 1968
To: __________________________
   (Contractor)

Reference is made to your claim filed on ________ for ________,
   (date)  (amount)

involving ____________________, Specification ________________, which was re-
ferred to the Division Engineer, Division of Design and Construction, for
decision, and to Section 8 of the specifications.

The Department has been reorganized in an area affecting the claims handl-
ing process. In the future, our first level of claims decision will be the Chief,
Construction Branch, as the designated representative of the Deputy Director.
Since your claim has not yet been decided by the former Division Engineer, it is being transferred to our Chief, Construction Branch, for decision. If you
are dissatisfied with his decision, you will, as in the past, have the right of
appeal to the Deputy Director who will utilize the assistance of a Claims
Appeal Board.

Let me assure you that your claim will receive the same careful attention
that it would have received with the Division Engineer and that you will be
given the same opportunity to present your position on the claim as he would
have given you.

The Chief, Construction Branch, will be in contact with you shortly re-
garding your claim(s). If you have any comments on this revised procedure, we
would sincerely appreciate your early advice.

Sincerely yours,
Deputy Director