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The Clause

A Quarterly Publication of the Boards of Contract Appeals Bar Association

The President's Column J. Michael Littlejohn

Dear BCABA Members:

The CBCA issued its final rules on May 12, 2008 after taking comments from six commentators – two federal agencies, one law firm, one non-profit association, one group of attorneys, and *one bar association*. I assume that the one bar association was the BCABA, given that we filed our comments on September 28, 2007. While the CBCA did not adopt many of the suggestions offered by the BCABA, we should be proud of our contribution and efforts. The BCABA Rules Committee, headed by Bob Brown and Jim McCullough, took on yeoman's service to pore through the proposed rules, analyze, and provide suggestions to improve them. The fact that only one bar association – the BCABA – submitted comments is a true testament to the connection we have to board practice, as well as the flexibility we have as an organization to become involved in these types of important policy and practice issues.

As you may all remember, the Rules Committee also provided input to the CBCA on a set of draft rules that were circulated by the board in 2006 before official publication in the Federal Register. Several of the Rules Committee comments were adopted by the CBCA in the subsequent proposed rule. I tend to believe that the committee of government and private practice attorneys provided real benefit to the board, and may help to improve board practice overall at the CBCA. If nothing else, this exercise allowed counsel to discuss some of the issues that trouble both sides and try to find ways to make board practice more efficient, effective, and fair.

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President's Column (cont'd):

I commend Bob Brown and Jim McCullough for all of their hard work in pulling the comments together. I also want to take this opportunity to thank the following individuals who served on or assisted the BCABA Rules Committee: Michele Brown, Tom Gourlay, David Black, Richard Conway, John Dietrich, Chris Haile, Robert Korroch, Judge Richard Walters, and Jason Workmaster. The comments could not have been put together without the hard work, insight, and commitment of these individuals.

The challenge ahead for the BCABA is to continue to provide input on these types of issues. As an organization, we are poised and able to provide timely and substantive comment or assistance on these types of issues to help make the acquisition process (including dispute resolution) work more effectively. I hope that all of us will consider this both a benefit of membership in the BCABA as well as a responsibility.

Have a great summer!.

Best Regards,

J. Michael Littlejohn
President

MARK YOUR CALENDARS

- The next meeting of the **Board of Governors** will be Thursday, June 19th, from noon until 1:30pm at the CBCA, 1800 M Street, NW, Washington, DC, Conference Room B. Lunch will be served for a contribution of \$7 per person.
- The **Executive Policy Forum** will be held at the offices of Arnold & Porter on September 18, 2008. The topic of the forum will be provided shortly.
- The **BCABA Annual Meeting** will be held on Thursday, October 16, 2008 at the Renaissance M Street Hotel, 1143 New Hampshire Avenue, Washington, DC.
- All members wishing to obtain the new user name and password for the member portion of the **BCABA website** can contact Mike Littlejohn at michael.littlejohn@akerman.com.
- **REMINDER: Annual dues notices** will be sent on or about **August 1st**. Dues are \$30 for government employees, and \$45 for all others. Dues are payable by September 30th.

BCABA
Young Attorney Writing Award

The Boards of Contract Appeals Bar Association (BCABA) is sponsoring a Young Attorney Writing Award to be presented at our Annual Meeting on October 16, 2008 in Washington, DC. The writing award is open to law clerks, summer associates, and any young lawyers within three years of passing the bar exam. Submissions can be made any time this summer before September 1st. There is no minimum or maximum page limit for articles. The article should be related to an issue concerning government contracts or board practice -- just make it interesting, readable, and timely. The winner will be selected by the Editor of *The Clause* and a panel of past BCABA Writing Award recipients. The winner of the award will receive a cash prize of \$500.

Individuals interested in the writing contest may contact either Anne Donohue at (anne_donohue@sra.com), Pete McDonald (pete.mcdonald@navigantconsulting.com), or Michael Littlejohn (michael.littlejohn@akerman.com) for more details. In order to be considered for this year's inaugural award, individuals must submit their articles in final form to Pete McDonald no later than **September 1, 2008** for publication in *The Clause* before the Annual Meeting.

Bored of Contract Appeals
(a.k.a. The Editor's Column)

by
Peter A. McDonald
C.P.A., Esq.
(A nice guy . . . basically.)

In this issue, Judge Shackleford provides much needed advice on handling Rule 11 cases, which even experienced trial attorneys will find well worthwhile. Doris Hollingsworth Gray insightfully reviews the more common misperceptions about commercial items acquisitions. And (and long last), we have the CBCA Final Rules and forms.

The Clause is not copyrighted and will reprint, with permission, previously published and copyrighted articles that warrant further exposure. Of course, we are receptive to original articles that may be of interest to government contracts practitioners. Remember people: Try not to take all this government contract stuff too seriously. As usual, we received some articles that, to be candid, were simply not suitable for publication, such as: "Demi: 'I Want Pete Back!'", "BCABA Hosts 1st Annual CDA Smackdown!!"; and "DOJ Enforces Board Subpoena *Against DOJ!!*"

Effective Practice Under ASBCA Rule 11, Submission Without a Hearing

by
Administrative Judge Richard Shackleford*

[Note: “Effective Practice Under ASBCA Rule 11,” by Administrative Judge Richard Shackleford, published in Procurement Lawyer, Volume 43, No. 3, Spring 2008. Copyright © 2008 by the American Bar Association. Reprinted with permission.]

The Armed Services Board of Contract Appeals (ASBCA) Rule 11¹ provides for the submission of an appeal without a hearing. Along with Rule 12.2, Small Claims (Expedited) Procedure, and Rule 12.3, Accelerated Procedure, Rule 11 helps to ensure compliance with the requirements of 8(e) of the Contract Disputes Act of 1978 to “provide to the fullest extent practicable, informal, expeditious, and inexpensive resolution of disputes.”² But does Rule 11 as a practical matter deliver a fair and equitable result? Although it probably does, there are some ways to improve a party’s chances of success when submitting a case on the record without a hearing under board Rule 11.

1. Ask for a judge if one is not assigned. When the pleadings and the Rule 4 file have been submitted, the ASBCA recorder sends a standard election letter to the parties, which, among other things, asks if they want a hearing or a record submission under board Rule 11. If Rule 11 is chosen, then a proposed schedule may be submitted.

In some cases, Rule 11 appeals reside under the docket of a staff attorney at the ASBCA until the evidentiary submissions and briefs are filed, after which they are transferred to a judge for decision. In other cases, the Rule 11 appeal may get to the judge earlier in the process, as for example, when a hearing election is changed to a record submission or when an appeal is related to another one already on a judge’s docket. In the latter circumstance, the judge has the opportunity to create a record with which he or she is comfortable for deciding the case. In the former, that opportunity is either lost or the case is delayed while the judge seeks additional evidence or argument from the parties. If your case is not assigned to a judge, ask for one so that you can fashion your submission to suit the judge’s preferences.

2. Select your cases carefully. Some cases are better suited for Rule 11 submission than others. Generally, cases with smaller dollar values, or small records, or cases where the documents substantially tell the story are best suited for Rule 11 submission. If a case turns on witness credibility, it may not be a good candidate for record submission. Large cases and cases in which the board is asked to determine the quality of contract work are particularly troublesome. For example, I once had a case on my docket that was set for a two-week hearing involving four claims. Inexplicably, prior to the trial the parties advised me that they wished to submit the appeals on the record pursuant to board Rule 11 and offered a schedule for such submission, which I adopted. The record consisted of more than 270 documents in six Rule 4 volumes, 12 depositions, and more than 280 deposition exhibits. A total of 10 briefs were filed.

Navigating an extensive record with which I lacked the familiarity that comes from

Effective Practice Under ASBCA Rule 11 (cont'd):

hearing a large case was a daunting and time-consuming task. It was similar to deciding a case heard by another judge. The issues to be decided in those four claims ranged from contract interpretation to judging the quality of certain contract installations and whether the color of a component of the work met contract requirements. It was difficult to discern witness credibility and to judge the relative importance of all the documents. This may not have been the optimum case to submit on the record.

One colleague suggests that parties considering cross-motions for summary judgment might be better served by a record submission since the decision on a record submission is not limited to undisputed material facts, and the board is allowed to consider all of the evidence. In the past, others have suggested that record submissions are analogous to cross-motions for summary judgment, but warned that the analogy only went so far since the standards for the board's decision would not be the same. The distinction is significant. The merits of a case submitted on the record are decided by a preponderance of the evidence, while on cross-motions for summary judgment, the decision is granted only if there are no genuine issues of material fact and the moving party is entitled to judgment as a matter of law.³

Practitioners should carefully consider a record submission when a case is clearly appropriate for cross-motions for summary judgment, as there may be some cost savings in using the former approach. A decision on the merits after a record submission precludes continuing litigation at the trial level as compared to the situation where summary judgment is denied. In either instance your rights on appeal are preserved.

3. Submit discovery requests when needed. Just because your case is a record submission does not mean that you forego discovery. You may not know all you want or need to know about your opponent's case. However, you should consider some limitations on discovery consistent with the size and complexity of the case in order to minimize time and expense. Do not hesitate to ask the judge, either in writing or in a conference call, to limit the amount of discovery.

4. Remember that you must prove your case. As Rule 11 clearly provides, submitting a case on the record does not relieve a party from the necessity of proving the facts to support its allegations or defenses. Although the initial record for decision will always include a Rule 4 file, Rule 11 suggests other possible additions to the evidentiary record, including affidavits, depositions, admissions, answers to interrogatories, and stipulations. All of the foregoing are acceptable for proving your case.

However, do not burden the record unnecessarily. Make sure your submissions are relevant and make sure you specify in your brief the parts of the documents on which you rely. Your affidavits should be properly executed under penalty of perjury or sworn to before a notary. Moreover, make sure the affidavits are those with the most first-hand knowledge of the facts. For example, an affidavit obtained from the contracting officer is fine, but an affidavit from a contracting officer's representative who interacted directly with the contractor may be
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Effective Practice Under ASBCA Rule 11 (cont'd):

better.

Finally, review your opponent's submissions and, if necessary and possible, file additional evidence to rebut the.

5. Participate in a hearing if the other side requests one. Although either party may waive a hearing, the other still has a right to one. In that event, the waiving party still has a right to participate in that hearing. While the waiving party may not present witnesses at the hearing, it may attend and cross-examine witnesses presented by the other side. The best practice, of course, is to fully participate in the hearing if at all possible. That will give the judge the opportunity to assess your witnesses in the same light in which the opposite party's witnesses are assessed.

6. Make sure the judge understands your position. It is extremely important that the judge understand your position. The best place to ensure that happens is in your brief. Briefs should be as succinct as possible, considering the nature of the case, and should fully explain why you are entitled to prevail on the facts, as you see them, and on the law, as you understand it. Do not avoid facts or law that are contrary to your position. Judges do not like to find gaping holes in the briefs that avoid unpleasant facts or law because they support the other party's position. Make an attempt to distinguish or explain contrary facts or law — at a minimum, tell us why we should ignore them.

In the rare circumstances that briefs are not filed, you should request oral argument, by telephone if necessary. Carefully and systematically explain your position to the judge.

Final Thoughts

A colleague recently commented that there seemed to be an inordinate number of motions for reconsideration under Rule 11 appeals. That is probably an accurate observation, particularly where one of the parties is pro se. Perhaps better submission the first time would prevent the need for some of those motions.

Although the ASBCA maintains statistical records on many aspects of the appeals that are filed, statistics with respect to record submissions are not easily segregated because they are mixed with other categories of cases that do not go to trial. In any event, it is apparent that record submissions are not very popular among practitioners. Record submissions under Rule 11 at the ASBCA and at other boards are a unique procedure, not available in the Court of Federal Claims. That is one more factor to consider when selecting a forum for contract appeals. A record submission is an excellent way to quickly get a case ready for decision, and along with a Rule 12 election (small claims and accelerated procedures), decided in a relatively short amount of time.

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Effective Practice Under ASBCA Rule 11 (cont'd):

Endnotes

- ¹ - The full text of Rule 11 is:
Either party may elect to waive a hearing and to submit its case upon the record before the Board, as settled pursuant to Rule 13. Submission of a case without a hearing does not relieve the parties of the necessity of proving the facts supporting their allegations or defenses. Affidavits, depositions, admissions, answers to interrogatories, and stipulations may be employed to supplement other documentary evidence in the Board record. The Board may permit such submissions to be supplemented by oral argument (transcribed if requested), and by briefs arranged in accordance with Rule 23.
- ² - 41 U.S.C. §607(e).
- ³ - *Manual for Practice Before Boards of Contract Appeals*, BCA Committee, Federal Bar Association (1981) IV-1.

Seven Popular Fallacies Concerning the Acquisition of Commercial Items

by
Doris Hollingsworth Gray*

[Note: © National Contract Management Association, *Contract Management*, Vol. 48, Issue No.5, May 2008. Reprinted with permission.]

During the Revolutionary War, the Continental Army wore civilian clothing and fought with their personal weapons. The same was true of the War of 1812. It was not until the American Civil War that military-unique equipment began to replace commercially available equipment. By World Wars I and II, standardized military equipment became the norm. During the Vietnam and Gulf wars, the Department of defense (DOD) realized that while military parts may provide the assurance of quality and performance, some commercially available products outperformed the standardized military products on the battlefield.¹

Slowly, the preference for military-unique parts and equipment began to revert back to the desire for commercially available parts and equipment. The basis for this shift to a preference for commercial items rests on the rate of advances in technology, the declining DOD industrial base, DOD's need for the latest technology,² and the ability of commercially developed components and subsystems to better satisfy the governments requirements in many instances. Numerous studies have been conducted and acquisition panels formed since the 1970s that have advocated greater use of commercial items and practices by the military complex in order to reduce defense acquisition costs and lead times.³

There is increasingly less and less that is uniquely military in weapons at the subsystem and component level today. New weapons systems are composed of major electronic, computer, and software subsystems that closely parallel those in commercial use.⁴

The Section 800 Panel was established by the DOD in response to Congress's direction to establish an advisory panel to recommend measures to streamline the procurement laws and regulations. The Section 800 Panel issued a nine-volume report on January 12, 1993 that recommended numerous procurement reforms in the area of the acquisition of commercial items. Many of the recommendations were adopted, resulting in the Federal Acquisition Streamlining Act (FASA) of 1994, Public Law 103-355.⁵

Since FASA, there have been some rather promising examples where the government and contractors have collaborated in applying the policies and procedures of *Federal Acquisition Regulation* (FAR Part 12 — Acquisition of Commercial Items).⁶ Yet, there are still some widespread misconceptions concerning the acquisition of commercial items among procurement personnel. The following is a list of seven common fallacies that continue to hamper the acquisition of commercial items. The purpose of this list is to generate open-minded dialogue between the buyers and sellers of commercial items.

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Seven Popular Fallacies (cont'd):

1. A product has to be developed at private expense in order to be a commercial item.⁷

Except for a non-developmental item, an item does not have to be developed at private expense in order to be commercial.⁸ A commercial market may subsequently develop for a product that the government paid for, or that has a military origin. Conversely, the commercial market may not ever develop for a product developed at private expense. Yet, the same product is embraced by the military, or is exclusively used for governmental purposes. “the issue of who paid for it is not part of the commercial item determination. Furthermore, the offered price is not part of the commercial item determination. The commerciality determination precedes and is separate from the price reasonableness determination.”⁹

2. When a modification to an item meets the definition of a commercial item, as defined by FAR Part 12, the only way that price reasonableness can be substantiated is to ask for cost or pricing data.

Procurement personnel should obtain multiple quotes from suppliers who can perform the modification. If competition is not adequate, then price analysis should be used to determine the reasonableness of the price. Price analysis is “the process of examining and evaluating the supplier’s price without evaluating its separate cost elements and proposed profit.”¹⁰ Market research can also be used to assist in determining price reasonableness.

3. Contractors must flow down the FAR clauses in the prime contract.

Even though FAR 52.212-5, Contract Terms and Conditions—Commercial Items, includes terms that are to the maximum extent practicable consistent with customary commercial practice, prime contractors should not automatically flow down these provisions to their lower tier subcontractors. This provision was intended to be used at the prime contractor level. Depending on the end product being supplied to the government, some of these provisions may be necessary to satisfy the prime’s contractual obligations. However, in many instances, FAR 52.244-6, Subcontracts for commercial items, will suffice. The U.S. Air Force determined that the electronic modules for the Air Force F-22 Raptor fighter and the Army RAH-66 Comanche helicopter could be produced as a commercial item by TRW’s commercial division, Automotive Electronics Group — North America (AEN). However, AEN objected to the numerous flow-down clauses from its government division, Avionics Systems Division (ASD). The result of the Air Force’s decision allowed ASD to reduce the number of flow-downs from 30 clauses to only three applicable clauses! “A precedent has been set that facilitates the ability of a defense prime contractor to go to a purely commercial subcontractor.”¹¹

4. A product that is being procured in order to meet unique government requirements or contractor specifications is a government unique item that is a noncommercial item.

Well-intentioned and otherwise savvy procurement officials make this common mistake since it is the hardest concept in commercial acquisitions to grasp. Just because an item is
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Seven Popular Fallacies (cont'd):

being procured to meet government requirements does not automatically make it a government unique item if it is closely related to items available commercially.¹³ “Of a type” was meant to give the government flexibility to purchase custom items from commercial suppliers like a commercial business would be able to do. In order to maintain its commerciality, the government-unique item must be sufficiently like other items that the supplier sells or offers for sale to the general public. In the example cited in fallacy number 3, the electronic modules manufactured by TRW AEN division were government-unique items. The Air Force decided that these government-unique modules were “of a type customarily used for nongovernmental purposes” because these electronic modules would be manufactured using the same processes, equipment, and workforce as the commercial products being manufactured by AEN.

5. Commercial items should be tested and inspected prior to acceptance.

Contracts for commercial items should rely on a contractor’s (or subcontractor’s) existing quality assurance systems in lieu of the government’s (or prime contractor’s) inspection and testing prior to acceptance unless customary market practices for the item being procured include in-process inspection. Yet, commercial suppliers are requested to conduct verification testing to prove that the products will meet the manufacturer’s specifications prior to shipment despite the requirement of FAR 12.208. Often, commercial suppliers are not even compensated for these additional costs for pre-acceptance testing of its commercial-off-the-shelf (COTS) products. In such cases, selling to the government actually lowers the suppliers’ margins.

6. The price of a “modification that is of a type customarily performed in a marketplace” is a factor that should be considered in determining whether a modified item is “commercial.”

If a modification is of a type that the contractor customarily performs for commercial customers, the price of the modification has no bearing on whether the modification is considered to be a commercial item. The price charged by the supplier need only be fair and reasonable. However, price is a consideration, but is not conclusive, when determining whether a minor modification is deemed to be a commercial item.¹⁴

7. If the contractor is supplying a noncommercial item (or military end item), then the contractor has to flow down noncommercial terms to its subcontractors.

There appears to be an unwritten rule among procurement personnel that the subcontracts must mirror the prime, regardless of whether the acquisition is for a commercial item. FAR 44.402(a)(2)(i) and (ii) states that contractors and subcontractors at all tiers shall not be required, to the maximum extent practicable, to apply to any of its divisions, subsidiaries, affiliates, subcontractors, or suppliers that are furnishing commercial components any clause except those: (1) required to implement provisions of law or executive orders applicable to subcontractors furnishing commercial items or commercial components, or (2) determined to be
(continued on next page)

Seven Popular Fallacies (cont'd):

consistent with customary commercial practice for the item being acquired. The FAR makes it clear that FAR 52.244-6 is to be included in contracts other than for commercial items.¹⁵ The purpose is to implement FASA's preference for commercial items at every level of the procurement chain. There are even more opportunities to procure commercial items from contractors and their lower tier subcontractors at the component and subassembly level. However, FAR 52.244-6 does permit the contractor to flow down a "minimal number of additional clauses necessary to satisfy its contractual obligations." The type of end item the contractor is supplying the government may impact the type of FAR clauses that are needed in order for the contractor to satisfy its contractual obligations, but this clause does not open the floodgates to flow down every FAR clause in the prime contract.

* - Doris Hollingsworth Gray, J.D, Fellow, is a senior contracts manager for Avnet, Inc., one of the world's largest distributors of electronic components and computers. She has more than 20 years of experience in commercial, international, and government (federal, state, and local) contracts and subcontracts with Westinghouse, Martin Marietta, General Electric, and Motorola. She is also an active member of the Phoenix Thunderbird Chapter of NCMA.

Endnotes

¹ - Gregory Saunders, director of the Defense Standardization Program Office, presented at the Military Aerospace Electronics East 2004 Conference and Exhibition in Baltimore, Maryland.

² - *Ibid.*

³ - Michael E. Heberling and Tracy J. Houpt, "What is and What is not a Commercial Item," *Contract Management*, August 1995, p. 10.

⁴ - *Ibid.*, 11.

⁵ - Lynda Troutman O'Sullivan and Douglas Perry, "Commercial Items Acquisitions," *97-05 Briefing Papers* 1, April 1997, 1.

⁶ - Ralph C. Nash and John Cibinic, "Buying Commercial Items: Signs of Progress," *Nash & Cibinic Report*, May 1999.

⁷ - Office of the Secretary of Defense Acquisition, Technology and Logistics (Acquisitions Initiatives), *Commercial Item Handbook*, (Version 1.0), November 2001, 10.

⁸ - An NDI is defined in FAR 2.101 as any previously developed item of supply used exclusively for governmental purposes by a federal agency, state or local government, or a foreign government with which the United States has a mutual defense cooperation agreement.

⁹ - *Commercial Item Handbook*, 10.

¹⁰ - FAR 15.404-1(b).

¹¹ - Michael E. Heberling and Mary E. Kinsella, "Commercial Item Definition Facilitates Affordable Products," *Contract Management*, November 1998, 22.

¹² - *Commercial Item Handbook*, 10.

¹³ - *Ibid.*

¹⁴ - See FAR 2.102, definition of "commercial item."

¹⁵ - FAR 44.403.

Final Rules of the Civilian Agency Board of Contract Appeals

26947 **Federal Register** / Vol. 73, No. 92 / Monday, May 12, 2008 / Rules and Regulations Report” and adding, in its place, “MPCR”. [FR Doc. E8-10488 Filed 5-9-08; 8:45 am]

GENERAL SERVICES ADMINISTRATION

48 CFR Parts 6101, 6102, 6103, 6104, and 6105

[GSA BCA Amendment 2006-01; BCA Case 2006-61-1] RIN 3090-AI29

Board of Contract Appeals; BCA Case 2006-61-1; Rules of Procedure of the Civilian Board of Contract Appeals

AGENCIES: General Services Administration (GSA), Civilian Board of Contract Appeals.

ACTION: Final rule.

SUMMARY: This document contains final revisions to the interim rules of procedure of the Civilian Board of Contract Appeals (Board), which was published in the **Federal Register** at 72 FR 36794, July 5, 2007. These rules will govern all proceedings before the Board, and will be contained in 48 CFR parts 6101 through 6105. These rules of procedure supersede the current interim rules of the Board.

DATES: Effective Date: May 12, 2008.

FOR FURTHER INFORMATION CONTACT: Margaret S. Pfunder, Chief Counsel, Civilian Board of Contract Appeals, telephone (202) 606-8800, e-mail address Margaret.Pfunder@gsa.gov for clarification of content. For information pertaining to status or publication schedules, contact the Regulatory Secretariat at (202) 501-4755. Please cite BCA Case 2006-61-1.

SUPPLEMENTARY INFORMATION:

A. Executive Summary

Part 6101 contains the rules governing proceedings involving contract disputes - both standard proceedings of the Board and expedited proceedings, including alternative dispute resolution. Part 6102 contains the rules governing the resolution of disputes between insurance companies and the Department of Agriculture’s Risk Management Agency (RMA) involving actions of the Federal Crop Insurance Corporation (FCIC). Part 6103 contains rules governing proceedings involving requests by carriers or freight forwarders to review actions taken by the Audit Division of the General Services Administration’s Office of Transportation and Property Management. Part 6104 contains the rules governing the Board’s resolution of claims by Federal civilian employees for certain travel or relocation expenses. And part 6105 governs the Board’s issuance of decisions, upon the request of an agency disbursing or certifying official, or an agency head, on questions involving payment of certain travel or relocation expenses. The Board has adopted these rules pursuant to its authority contained in the Contract Disputes Act of 1978 (41 U.S.C. §§601-613).

B. Background

The Civilian Board of Contract Appeals (Board) published in the **Federal Register** at 72 FR 36794, July 5, 2007, interim rules of procedure along with a notice inviting comments on those rules. This notice announced the intention to promulgate final rules of procedure, following the *(continued on next page)*

Final CBCA Rules (cont'd):

Board's review and consideration of all comments, to govern all proceedings before the Board. The period for comments closed on September 28, 2007. The Board has considered all comments received, revising the interim rules, in part, as explained in part D below, and now promulgates its final rules of procedure.

C. Summary of Comments and Changes:

The Board received comments from six commentators. Commentators included two federal agencies, one law firm, one non-profit association, one bar association, and one group of attorneys. The Board carefully considered each comment and adopted several of the suggestions made by the commentators. All comments received by the Board pertained specifically to part 6101 of the Rules. The more significant of those comments are discussed below.

Part 6101

General. In response to one commentator's suggestion, the Board amends the Rules throughout to change all references to "panel chair" to "presiding judge" in order to maintain a consistent terminology. Similarly, the Board accepts the suggestion of another commentator and amends the Rules to substitute the term "electronically stored information" for "electronic records" in order to conform to the language in the Federal Rules of Civil Procedure. Several of the rules which pertain to contract disputes (sections 6101.1(a), 6101.2(a) and (b), 6101.4(a), 6101.5(a), 6101.12(a), and 6101.54(a)) use the term "contracting officer". Cases which arise under the Indian Self-Determination Act, 25 U.S.C. 450m-1, are heard and decided in the same manner as contract disputes, but the agency decisions from which these appeals are taken may have been made by someone other than a contracting officer. For these cases, the term "contracting officer" refers to the individual who rendered the decision at issue.

The Board also received comments from a bar association, a non-profit association, and a law firm suggesting that electronic filing of cases and submissions be permitted. The Board agrees that electronic filing would be beneficial in that it would permit parties—wherever they are in the world—to transmit pleadings and other submissions quickly, easily, economically, and reliably. We are exploring means of instituting electronic filing and anticipate that before long we will be able to adopt one of them. At the present time, however, we are unable to accept filings electronically (other than by facsimile transmission). As soon as we are able to do so, we expect to propose amendments to the rules which explain how such filings may be made.

6101.1 [Scope of rules; definitions; construction; rulings, orders, and directions; panels; location and address]. Two commentators suggested changes to the definition of when a document is "filed" with the Board. Section 6101.1(b)(5)(i) provides: "Any document, other than a notice of appeal or an application for award of fees and other expenses, is filed when it is received by the Office of the Clerk of the Board during the Board's working hours. A notice of appeal or an application for award of fees and other expenses is filed upon the earlier of its receipt by the Office of the Clerk of the Board or if mailed, the date on which it is mailed." One commentator suggested expanding the definition to provide that any document is considered "filed" when delivered to the Office of the Clerk or, if mailed or to be delivered by a delivery service, when deposited with the United States Postal Service or delivery service. A
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Final CBCA Rules (cont'd):

second commentator suggested that the closing time for receipt of a document by the Office of the Clerk be 4:30 local time of the party's representative rather than 4:30 Eastern Time. The Board declines to make either proposed change. The Board's practice concerning the filing of documents other than a notice of appeal or an application for award of fees and other expenses is consistent with the practice of courts which consider documents "filed" only when they are in the hands of the clerk. As for the second suggestion, it would place an undue burden on the clerk and the judges to allow filing times to vary according to the time zone of a party's

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representative. Section 6101.1(b)(5) is revised, however, to clarify that filing by facsimile occurs only once the Office of the Clerk has received the entire document, and for a mailed notice of appeal or application for award of fees and other expenses, that the date of filing is the date the notice or application is mailed to the Board. In addition, one commentator recommended revising the rules for filing a notice of appeal to allow for delivery of the notice to the contracting officer, rather than the Clerk of the Board, arguing that appellants may experience confusion because of different practices among the Board's predecessor boards. The commentator noted that our predecessor boards at the Department of Labor and the Department of the Interior, along with the current Armed Services Board, would allow for service of notice on the contracting officer. The Board rejects the recommendation, however, finding that the current section 6101.1(b)(5) is consistent with the practice of the majority of our predecessor boards; section 6101.1(b)(5) as stated is sufficiently clear that appellants should experience no confusion; and allowing the submittal of appeals to contracting officers would unnecessarily delay proceedings at the Board. Although there may be occasions when misdirecting a notice of appeal would not bar a claim, such unusual circumstances would best be dealt with as they arise. Finally, one commentator suggested that section 6101.1(e), concerning panels, be amended to provide that all panel judges must attend the hearings in cases not subject to the small claims or accelerated procedures of sections 6101.52 and 6101.53. The longstanding practice of all our predecessor boards was to have only one presiding judge attend the hearing. That practice is efficient, has posed no problems, and will continue here.

6101.2 [Filing cases; time limits for filing; notice of docketing; consolidation]. One commentator suggested changes to section 6101.2(c) to require that the notice of docketing include information concerning the designation of the presiding judge and the availability of alternative dispute resolution (ADR) services. The Board believes that the content of the notice of docketing would be more appropriately addressed through the Board's internal procedures, so no change to the section is warranted.

6101.4 [Appeal file]. One commentator suggested several amendments to section 6101.4 to clarify when the Government must file its appeal file and what documents must be contained in the appeal file. Section 6101.4(a) is revised to provide that the Government must submit its appeal file "within 30 calendar days from receipt of the Board's docketing notice or within such time as the Board may allow." In addition, section 6101.4(a) is revised, as suggested by *(continued on next page)*

Final CBCA Rules (cont'd):

the commentator, to make clear that affidavits and witness statements are not necessarily required in an appeal file. The final sentence of section 6101.4(a) now begins: “Exhibits will be numbered as required by section 6101.4(b) and will include, if any:” and the phrase “if any” is deleted from subsections (1), (2), and (3). The Board rejects as unnecessarily restrictive and burdensome suggestions that (1) the appellant must provide notice of its intent to supplement the appeal file prior to the Government’s filing of an answer, and (2) specific time frames be established for objections to exhibits and for the Board to rule on those objections in advance of a hearing. Section 6101.4(g) is revised, however, to clarify that the Board may shorten or enlarge time frames for objections.

6101.5 [Appearances; notice of appearance]. One commentator suggested amending section 6101.5 to provide for permissive intervention in a case. Whether someone who is not a contractor can be a party to an appeal is a debatable point, however, and cannot be resolved by procedural rule. Section 6101.5(a)(3) allows nonparties to appear in a case as permitted by the presiding judge, and this will permit the Board to hear from anyone who can assist in resolving a case without the Board conferring “party” status.

6101.6 [Pleadings and amendment of pleadings]. One commentator suggested deleting the second sentence of section 6101.6(c), arguing that one-word responses stating an allegation is denied may be appropriate and therefore should not be specifically discouraged. The Board agrees and the sentence is deleted from section 6101.6(c).

6101.7 [Service of papers other than subpoenas]. In response to the suggestions of three commentators, the Board amends section 6101.7(a) in order (1) to clarify that the service of papers between parties must be by a means of transmittal that is no less expeditious than that used to send the document to the Board and (2) to provide that the parties will confer and agree upon a method to serve papers on each other, which method may be by electronic mail, facsimile, overnight courier, hand delivery, or any other method that will accomplish service promptly and efficiently. The commentators noted that, due to increased security requirements in recent years, service of papers by mail, particularly to government offices, may be delayed by weeks, prejudicing the receiving party and ultimately delaying processing of the case.

6101.8 [Motions]. One commentator suggested revising section 6101.8(e), which addresses the raising of jurisdictional questions, to require resolution of such questions prior to any briefing or hearing on the merits. Although the Board declines to adopt the suggested revision, given that jurisdictional questions may not always be timely recognized, the Board agrees that such questions should be resolved as early as possible in a case. To avoid encouraging litigants to delay raising jurisdictional issues, the second sentence of section 6101.8(e) is deleted.

6101.10 [Admissibility of evidence]. One commentator suggested revising section 6101.10(b) to acknowledge that the Board may determine the credibility as well as the weight of evidence. The Board has now determined, however, that section 6101.1 (b) is unnecessary and more properly a rule of substantive law rather than procedure, so that section is deleted.

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Final CBCA Rules (cont'd):

6101.16 [Subpoenas]. The Board received comments from a group of lawyers, a non-profit association, and a government agency regarding section 6101.16. The Board believes section 6101.16 as proposed is appropriate and has not made any modification to it (other than substituting the phrase “electronically stored information” for the phrase “electronic records”).

6101.17 [Exhibits]. The Board rejects one commentator’s suggestion that parties be required to include printed versions of electronic documents in the record. Such a requirement might not always be feasible or necessary, and section 6101.17 already provides that the Board may order a party to provide printed versions of electronically stored information to be included in the record. In addition, section 6101.4(e) similarly provides that the Board may require a party to file either copies or printed versions of electronically stored information.

6101.18 [Election of hearing or record submission]. One commentator suggested that if one party has elected to submit its case on the record and has included affidavits or depositions with its submittal, that party should be required to present at the hearing, for cross-examination by the opposing party, those witnesses for whom it has submitted affidavits or depositions. The Board rejects the suggestion, finding not only that it would not serve the purpose of section 6101.18, which is to permit

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submittal of a case on the written record, but also that the opposing party may still call to testify those individuals for whom affidavits or depositions were submitted.

6101.21 [Hearing procedures]. One commentator suggested that section 6101.21(a)(4) be amended to restrict the Board’s ability to limit a hearing to issues of entitlement, while reserving the determination of damages, if any, for later proceedings. The commentator argued that bifurcation often results in inefficiency, duplication of efforts, and delay. While this may be true in many cases, it has been the Board’s experience that, when parties receive a decision on entitlement, they are usually able to settle the quantum portion of the case without the need for a hearing. In addition, the practice of the Board is to notify the parties of its decision to bifurcate as early as possible before the hearing in order to relieve the parties from unnecessary costs they might incur in preparing to address the issue of damages. The Board believes that bifurcation is a matter best left to the presiding judge’s discretion. A second commentator suggested that section 6101.21(a)(2), which allows the Board to order a joint hearing on matters in separate cases that involve common questions of law or fact, be limited to cases in which the parties or the underlying transaction or occurrence are the same. The Board believes that this, too, is a matter best left to the presiding judge’s discretion. The same commentator also suggested that section 6101.21(g) be revised to require, rather than merely allow, the presiding judge to state for the record the inferences drawn from the refusal of a witness to answer. The commentator argues that the parties should then be permitted to provide additional testimony or evidence to support or rebut those inferences. The Board rejects the suggested change as
(continued on next page)

Final CBCA Rules (cont'd):

impractical, given that proper inferences may not be clear until the hearing has been completed and the judge has reviewed all of the evidence.

6101.23 [Briefs and memoranda of law]. A commentator suggested that section 6101.23(b) be revised to require the filing of post-hearing reply briefs in 21 rather than 15 days, given the complexity of many cases before the Board. If needed, a party may request an enlargement of time, and no change in the rule is necessary. Section 6101.23(a) is amended, however, to clarify its intent to permit the presiding judge to request pre-hearing and post-hearing briefs and, at any point in the proceedings, memoranda of law.

6101.30 [Award of fees and other expenses]. The Board has revised section 6101.30(b), in response to one commentator's concerns, to add the following sentence: "An application for fees or other expenses may not be filed before the Board's decision is final; a request for fees or other expenses made before the Board's decision is final does not constitute an application." The Board rejected the commentator's suggestion, however, that section 6101.30 include a requirement that an applicant seeking recovery of fees and expenses under the Equal Access to Justice Act (EAJA), 5 U.S.C. §504, file a net worth exhibit. The agency often agrees that the applicant meets the net worth qualification for EAJA recovery, and such an exhibit would therefore be unnecessary.

6101.31 [Payment of Board awards]. To be consistent with the definitions provided at section 6101.1(b), section 6101.31(c) is revised to change "government agency" to "respondent".

6101.51 [Variation from standard proceedings]. Section 6101.51 has been revised in response to a comment that the initial paragraph of the section may be misconstrued to limit the availability of the alternative procedures in sections 6101.51 through 6101.54 to individuals and small businesses. The penultimate sentence of that paragraph is revised to read: "Although any party may ask the Board to vary from standard proceedings, individuals and small businesses may find such variations to be especially useful."

6101.52 [Small claims procedure]. To be consistent with the definitions provided at section 6101.1(b), section 6101.52 is revised to change "Government" to "respondent".

6101.53 [Accelerated procedure]. To be consistent with the definitions provided at section 6101.1(b), section 6101.53 is revised to change "Government" to "respondent".

6101.54 [Alternative dispute resolution]. Several comments were received concerning section 6101.54. One commentator suggested that, to avoid the appearance of judicial pressure on the parties to participate in alternative dispute resolution (ADR) proceedings, section 6101.54 be amended to prohibit the presiding judge or a panel judge in a case from serving as an ADR neutral. The Board notes that no party should ever feel pressured to participate in ADR or to select the presiding judge to conduct ADR proceedings. There may, however, be good reasons for the parties to request the presiding judge to serve as an ADR neutral, such as the judge's
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Final CBCA Rules (cont'd):

familiarity with the facts and issues of the case. The Board therefore has not amended the section as suggested. Similarly, the Board declines the suggestion of another commentator that a judge who has participated as a neutral in an unsuccessful ADR proceeding may not continue with the case in subsequent proceedings before the Board. As with the selection of a presiding or panel judge to serve as ADR neutral, there may be good reasons for the parties to want the ADR neutral to continue to serve on the panel or as the presiding judge, such as familiarity with the facts and issues of the case. The same commentator also suggested that section 6101.54(c) (1) and (2) be amended to preclude any judge who has participated in discussions about mediation in a case from participating in a Board decision of the case if the ADR is unsuccessful. The suggested prohibition is overly broad, encompassing even casual conversations between judges, and therefore is not adopted.

D. Regulatory Flexibility Act

The General Services Administration certifies that this final rule will not have a significant economic impact on a substantial number of small entities within the meaning of the Regulatory Flexibility Act, 5 U.S.C. §601, *et seq.*, because the rule does not impose any additional costs on large or small businesses.

E. Paperwork Reduction Act

The Paperwork Reduction Act does not apply because the changes do not impose recordkeeping or information collection requirements, or otherwise collect information from offerors, contractors, or members of the public that require approval of the Office of Management and Budget under 44 U.S.C. §3501, *et seq.*

List of Subjects in 48 CFR Parts 6101, 6102, 6103, 6104, and 6105

Administrative practice and procedure, Agriculture, Freight forwarders, Government procurement, Travel and relocation expenses.

Dated: February 7, 2008.

Stephen M. Daniels,

Chairman, Civilian Board of Contract Appeals, General Services Administration.

□ Accordingly, the interim rule amending 48 CFR Chapter 61 which was published in the **Federal Register** at 72 FR 36794, July 5, 2007, is adopted as a final rule with changes to Part 6101.

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CHAPTER 61—RULES OF PROCEDURE OF THE CIVILIAN BOARD OF CONTRACT APPEALS

□ 1. The authority citation for 48 CFR Part 6101 continues to read as follows:

Authority: 41 U.S.C. §§601–613.

□ 2. Amend Chapter 61 by revising the Chapter heading as set forth above.

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Final CBCA Rules (cont'd):

PART 6101—CONTRACT DISPUTE CASES

- 3. Amend Part 6101 by revising the Part heading as set forth above.
- 4. Amend section 6101.1 by revising paragraphs (b)(5) and (e) to read as follows:

6101.1 Scope of rules; definitions; construction; rulings, orders, and directions; panels; location and address [Rule 1].

* * * * *

(b) * * *

(5) *Filing.* (i) Any document, other than a notice of appeal or an application for award of fees and other expenses, is filed when it is received by the Office of the Clerk of the Board during the Board's working hours. A notice of appeal or an application for award of fees and other expenses is filed upon the earlier of its receipt by the Office of the Clerk of the Board or if mailed, the date on which it is mailed to the Board. A United States Postal Service postmark shall be prima facie evidence that the document with which it is associated was mailed on the date of the postmark.

(ii) Facsimile transmissions to the Board and the parties are permitted. The filing of a document by facsimile transmission occurs upon receipt by the Board of the entire submission by facsimile. Parties are specifically cautioned that a deadline for filing will not be extended merely because the Board's facsimile machine is busy or otherwise unavailable when a filing is due. Parties are expected to submit their facsimile machine numbers with their filings.

* * * * *

(e) *Panels.* Each case will be assigned to a panel consisting of three judges, with one member designated as the presiding judge, in accordance with such procedures as may be established by the Board. The presiding judge is responsible for processing the case, including scheduling and conducting proceedings and hearings. In addition, the presiding judge may, without participation by other panel members, decide an appeal under the small claims procedure in 6101.52 [Rule 52], rule on nondispositive motions (except for amounts in controversy under 6101.52(a)(2) [Rule 52(a)(2)] and 6101.53(a)(2) [Rule 53(a)(2)]), and dismiss a case as permitted by 6101.12(e) [Rule 12(e)]. All other matters, except for those before the full Board under 6101.28 [Rule 28], are decided for the Board by a majority of the panel.

* * * * *

- 5. Amend section 6101.4 by revising the introductory text of paragraph (a), and paragraphs (a)(1) thru (a)(3), (e), and (g) to read as follows:

6101.4 Appeal file [Rule 4].

(a) *Submission to the Board by the respondent.* Within 30 calendar days from receipt of the Board's docketing notice or within such time as the Board may allow, the respondent shall file with the Board appeal file exhibits consisting of all documents and other tangible things relevant to the claim and to the contracting officer's decision which has been appealed. Exhibits will be numbered as required by 6101.4(b) [Rule 4(b)] and will include, if any: (1) The contracting officer's decision from which the appeal is taken; (2) The contract, including
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Final CBCA Rules (cont'd):

amendments, specifications, plans, and drawings; (3) All correspondence between the parties that is relevant to the appeal, including the written claim or claims that are the subject of the appeal, and evidence of their certification;

* * * * *

(e) *Submissions on order of the Board.* The Board may, at any time during the pendency of the appeal, require any party to file other documents and tangible things as additional exhibits. The Board may also require a party to file either copies of electronically stored information or printed versions of electronically stored information.

* * * * *

(g) *Use of appeal file as evidence.* All exhibits in the appeal file, except for those as to which an objection has been sustained, are part of the evidentiary record upon which the Board will render its decision. Unless otherwise ordered by the Board, objection to any exhibit may be made at any time before the first witness is sworn or, if the appeal is submitted on the record without a hearing pursuant to 6101.19 [Rule 19], at any time prior to or concurrent with the first record submission. The Board may shorten or enlarge the time for such objections and will consider an objection made during a hearing if the ground for objection could not reasonably have been earlier known to the objecting party. If an objection is sustained, the Board will so note in the record.

* * * * *

6. Amend section 6101.6 by revising paragraph (c) to read as follows:

6101.6 Pleadings and amendment of pleadings [Rule 6].

* * * * *

(c) *Answer.* No later than 30 calendar days after the filing of the complaint or of the Board's designation of a complaint, the respondent shall file with the Board an answer setting forth simple, concise, and direct statements of its defenses to the claim or claims asserted in the complaint, as well as any affirmative defenses it chooses to assert. A dispositive motion or a motion for a more definite statement may be filed in lieu of the answer only with the permission of the Board. If no answer is timely filed, the Board may enter a general denial, in which case the respondent may thereafter amend the answer to assert affirmative defenses only by leave of the Board and as otherwise prescribed by paragraph (e) of this section. The Board will inform the parties when it enters a general denial on behalf of the respondent.

* * * * *

7. Amend section 6101.7 by revising paragraph (a) to read as follows:

6101.7 Service of papers other than subpoenas [Rule 7].

On whom and when service must be made. Except for subpoenas (6101.16 [Rule 16]) and documents filed *in camera* (6101.9(c) [Rule 9(c)]), when a party sends a document to the Board it must at the same time send a copy to the other party by an equally or more expeditious means of transmittal. The parties will confer and agree upon the method they will use to serve one another. They may agree to use electronic mail, facsimile, overnight courier, hand delivery, or
(continued on next page)

Final CBCA Rules (cont'd):

any other mutually acceptable method for accomplishing service promptly and efficiently.

* * * * *

8. Amend section 6101.8 by revising paragraph (e) to read as follows:

6101.8 Motions [Rule 8].

* * * * *

(e) *Jurisdictional questions.* The Board may at any time consider the issue of its jurisdiction to decide a case.

* * * * *

9. Revise section 6101.10 to read as follows:

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6101.10 Admissibility of evidence [Rule 10].

In general, any relevant and material evidence will be admitted into the record. The Board may exclude evidence to avoid unfair prejudice, confusion of the issues, undue delay, waste of time, or needless presentation of cumulative evidence. Hearsay evidence is admissible unless the Board finds it unreliable or untrustworthy. As a general matter, and subject to the other provisions of 6101.10 [Rule 10], the Board will look to the Federal Rules of Evidence for guidance when it makes evidentiary rulings.

10. Amend section 6101.12 by revising paragraph (e) to read as follows:

6101.12 Suspensions and dismissals [Rule 12].

* * * * *

(e) *Issuance of order.* The presiding judge alone may issue an order suspending proceedings. An order of dismissal shall be issued by the panel of judges to which the case has been assigned if the motion is contested or if the Board is acting consequent to its own show cause order. An order of dismissal may be issued by the presiding judge alone if the motion to dismiss is not contested.

11. Amend section 6101.13 by revising paragraphs (a)(3), (b), and (g) to read as follows:

6101.13 General provisions governing discovery [Rule 13].

(a) * * *

(3) Requests for production of documents, electronically stored information, or other tangible or intangible things; and

* * * * *

(b) *Scope of discovery.* Except as otherwise limited by order of the Board, the parties may obtain discovery regarding any matter, not privileged, which is relevant to the subject matter involved in the pending case, whether it relates to the claim or defense of a party, including the
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Final CBCA Rules (cont'd):

existence, description, nature, custody, condition, and location of any books, documents, electronically stored information, or other tangible or intangible things, and the identity and location of persons having knowledge of any discoverable matter. It is not a ground for objection that the information sought will be inadmissible if the information sought appears reasonably calculated to lead to the discovery of admissible evidence.

* * * * *

(g) *Failure to make or cooperate in discovery.* If a party fails to appear for a deposition, after being served with a proper notice; to serve answers or objections to interrogatories submitted under 6101.14 [Rule 14], after proper service of interrogatories; or to serve a written response to a request for inspection, production, and copying of any documents, electronically stored information, and things under 6101.14 [Rule 14], the party seeking discovery may move the Board to impose appropriate sanctions under 6101.33 [Rule 33].

* * * * *

□ 12. Amend section 6101.14 by revising paragraphs (c), (d), and (f) to read as follows:

6101.14 Interrogatories to parties; requests for admission; requests for production [Rule 14].

* * * * *

(c) *Written requests for admission.* A written request for the admission of the truth of any matter, within the proper scope of discovery, that relates to statements or opinions of fact or of the application of law to fact, including the genuineness of any documents or electronically stored information, is to be answered in writing and signed within 30 calendar days after service. Objections shall be filed within the time limits set forth in 6101.13(f)(2) [Rule 13(f)(2)]. Otherwise, the matter therein may be deemed to be admitted. Any matter admitted is conclusively established for the purpose of the pending action, unless the Board on motion permits withdrawal or amendment of the admission. Any admission made by a party under this paragraph (c) is for the purpose of the pending action only and is not an admission for any other purpose, nor may it be used against the party in any other proceeding.

(d) *Written requests for production.* A written request for the production, inspection, and copying of any documents, electronically stored information, or things shall be answered within 30 calendar days after service. Objections shall be filed within the time limits set forth in 6101.13(f)(2) [Rule 13(f)(2)].

* * * * *

(f) *Responses.* A party that has responded to written interrogatories, requests for admission, or requests for production of documents, electronically stored information, or things, upon becoming aware of deficiencies or inaccuracies in its original responses, or upon acquiring additional information or additional documents, electronically stored information, or things relevant thereto, shall, as quickly as practicable, and as often as necessary, supplement its responses to the requesting party with correct and sufficient additional information and such additional documents, electronically stored information, and things as are necessary to give a complete and accurate response to the request.

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Final CBCA Rules (cont'd):

13. Amend section 6101.16 by revising paragraph (b)(3) to read as follows:

6101.16 Subpoenas [Rule 16].

* * * * *

(b) * * *

(3) Produce the books, papers, documents, electronically stored information, and other tangible and intangible things designated in the subpoena.

* * * * *

14. Amend section 6101.17 by revising paragraph (b) to read as follows:

6101.17 Exhibits [Rule 17].

* * * * *

(b) *Copies as exhibits.* Except upon objection sustained by the Board for good cause shown, copies of documents may be offered and received into evidence as exhibits, provided they are of equal legibility and quality as the originals, and such copies shall have the same force and effect as if they were the originals. If the Board directs, a party offering a copy of a document as an exhibit shall have the original available at the hearing for examination by the Board and any other party. When the original of a document has been received into evidence as an exhibit, an accurate copy may be substituted in evidence for the original by leave of the Board at any time. The Board may require a party to provide either copies of electronically stored information or printed versions of electronically stored information to be included in the record.

* * * * *

15. Amend section 6101.23 by revising the introductory text of paragraph (a) to read as follows:

6101.23 Briefs and memoranda of law [Rule 23].

(a) *Form and content of briefs and memoranda of law.* Briefs and memoranda of law shall be on standard size 8 1/2 by 11-inch paper. They shall be double-spaced with text in the body and in the footnotes no smaller than 12 point. Otherwise, no particular form or organization is prescribed. The presiding judge may request pre-hearing and post-hearing briefs and may also request, at any point in the proceedings, memoranda of law. Pre-hearing and post-hearing briefs should, at a minimum, succinctly set forth:

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16. Amend section 6101.30 by revising paragraph (b) to read as follows:

6101.30 Award of fees and other expenses [Rule 30].

* * * * *

(b) *Time for filing.* A party seeking an award may submit an application no later than 30
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Final CBCA Rules (cont'd):

calendar days after a final disposition in the underlying appeal. The Board's decision becomes final (for purposes of 6101.30 [Rule 30]) when it is not appealed to the United States Court of Appeals for the Federal Circuit within the time permitted for appeal or, if the decision is appealed, when the time for petitioning the Supreme Court for certiorari has expired. An application for fees or other expenses may not be filed before the Board's decision is final; a request for fees or other expenses made before the Board's decision is final does not constitute an application.

* * * *

□ 17. Amend section 6101.31 by revising paragraph (c) to read as follows:

6101.31 Payment of Board awards [Rule 31].

* * * * *

(c) *Procedure.* Whenever the Board issues a decision or an order awarding an appellant any amount of money, it will attach to the copy of the decision sent to each party forms such as those contained in the Appendix to the rules of this chapter. Unless the appellant files a timely appeal from the decision, the appellant will complete the Certificate of Finality, sign it, and forward it to the person or persons who entered an appearance in the appeal on behalf of the respondent. Upon receipt of a completed and executed Certificate of Finality, unless the respondent files a timely appeal from the decision, the person or persons who entered an appearance in the appeal on behalf of the respondent will promptly transmit the appellant's Certificate of Finality, along with a certified copy of the Board's decision and any other necessary documentation, to the United States Department of the Treasury for payment.

□ 18. Amend section 6101.51 by revising the introductory paragraph and paragraph (d) to read as follows:

6101.51 Variation from standard proceedings [Rule 51].

The ultimate purpose of any Board proceeding is to resolve fairly and expeditiously any dispute properly before the Board. When, during the normal course of a Board proceeding, the parties agree that a change in established procedure will promote this purpose, the Board will make that change if it is deemed to be feasible and in the best interest of the parties, the Board, and the resolution of the issue(s) in controversy. Although any party may ask the Board to vary from standard proceedings, individuals and small businesses may find such variations to be especially useful. The following are examples of these changes:

* * * * *

(d) Developing a record regarding relevant facts through an on-the-record round-table discussion with sworn witnesses, counsel, and the presiding judge rather than through formal direct and cross-examination of each of these same witnesses. This discussion shall be controlled by the presiding judge. It may be conducted, for example, through the presentation of narrative statements of witnesses or on an issue by issue basis. The presiding judge may also request that the parties' counsel or representatives present opening and/or closing statements in
(continued on next page)

Final CBCA Rules (cont'd):

lieu of written briefs.

□ 19. Amend section 6101.52 by revising the introductory text of paragraph (a)(1), and paragraphs (a)(2), (b), and (d) to read as follows:

6101.52 Small claims procedure [Rule 52].

(a) *Election.* (1) The small claims procedure is available solely at the appellant's election. Such election shall be made no later than 30 calendar days after the appellant's receipt of the agency answer, unless the presiding judge enlarges the time for good cause shown. The appellant may elect this procedure when:

* * * * *

(2) At the request of the respondent, or on its own initiative, the Board may determine whether the amount in dispute and/or the appellant's status makes the election inappropriate. The respondent shall raise any objection to the election no later than 10 working days after receipt of a notice of election.

(b) *Decision.* The presiding judge may issue a decision, which may be in summary form, orally or in writing. A decision which is issued orally shall be reduced to writing; however, such a decision takes effect at the time it is rendered, prior to being reduced to writing. A decision shall be final and conclusive and shall not be set aside except in case of fraud. A decision shall have no value as precedent.

* * * * *

(d) *Time of decision.* Whenever possible, the presiding judge shall resolve an appeal under this procedure within 120 calendar days from the Board's receipt of the election. The time for processing an appeal under this procedure may be extended if the appellant has not adhered to the established schedule. Either party's failure to abide by the Board's schedule may result in the Board drawing evidentiary inferences adverse to the party at fault.

□ 20. Amend section 6101.53 by revising paragraphs (a) and (b) to read as follows:

6101.53 Accelerated procedure [Rule 53].

(a) *Election.* (1) The accelerated procedure is available solely at the appellant's election, and only when there is a monetary amount in dispute and that amount is \$100,000 or less. Such election shall be made no later than 30 calendar days after the appellant's receipt of the agency answer, unless the presiding judge enlarges the time for good cause shown.

(2) At the request of the respondent, or on its own initiative, the Board may determine whether the amount in dispute is greater than \$100,000, such that the election is inappropriate. The respondent shall raise any objection to the election no later than 10 working days after receipt of a notice of election.

(b) *Decision.* Each decision shall be rendered by the presiding judge with the concurrence of one of the other judges assigned to the panel; in the event the two judges disagree, the third judge assigned to the panel will participate in the decision.

* * * * *

[FR Doc. E8-10484 Filed 5-9-08; 8:45 am]

**United States
Civilian Board of Contract Appeals
Rules of Procedure**

May 12, 2008

**RULES OF PROCEDURE
OF THE
CIVILIAN BOARD OF CONTRACT APPEALS**

CONTRACT APPEALS CASES

Part I -- Contract Dispute Cases

Rule 1: Scope of rules; definitions; construction; rulings, orders, and directions; panels; location and address

- (a) Scope
- (b) Definitions
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CONTRACT APPEALS CASES

PART I – CONTRACT DISPUTE CASES

RULE 1

SCOPE OF RULES; DEFINITIONS; CONSTRUCTION; RULINGS, ORDERS, AND DIRECTIONS; PANELS; LOCATION AND ADDRESS

(a) Scope. The rules of this chapter govern proceedings in all cases filed with the Board on or after January 6, 2007, and all further proceedings in cases then pending, except to the extent that, in the opinion of the Board, their use in a particular case pending on the effective date would be infeasible or would work an injustice. The Board will look to the rules of this chapter for guidance in conducting other proceedings authorized by law.

(b) Definitions.

(1) Appeal; appellant. The term “appeal” means a contract dispute filed with the Board. The term “appellant” means a party filing an appeal.

(2) Application; applicant. The term “application” means a submission to the Board of a request for award of fees and other expenses, under the Equal Access to Justice Act, 5 U.S.C. §504, pursuant to Rule 30. The term “applicant” means a party filing an application.

(3) Board judge; judge. The term “Board judge” or “judge” means a member of the Board.

(4) Case. The term “case” means an appeal, petition, or application.

(5) Filing.

(i) Any document, other than a notice of appeal or an application for award of fees and other expenses, is filed when it is received by the Office of the Clerk of the Board during the Board’s working hours. A notice of appeal or an application for award of fees and other expenses is filed upon the earlier of its receipt by the Office of the Clerk of the Board or if mailed, the date on which it is mailed to the Board. A United States Postal Service postmark shall be prima facie evidence that the document with which it is associated was mailed on the date of the postmark.

(ii) Facsimile transmissions to the Board and the parties are permitted. The filing of a document by facsimile transmission occurs upon receipt by the Board of the entire submission by facsimile. Parties are specifically cautioned that a deadline for filing will not be extended merely because the Board’s facsimile machine is busy or otherwise unavailable when a filing is due. Parties are expected to submit their facsimile machine numbers with their filings.

(6) Party. The term “party” means an appellant, applicant, petitioner, or respondent.

(7) Petition; petitioner. The term “petition” means a request filed under 41 U.S.C. §605(c)(4) that the Board direct a contracting officer to issue a written decision on a claim. The term “petitioner” means a party submitting a petition.

(8) Respondent. The term “respondent” means the government agency whose decision, action, or inaction is the subject of an appeal, petition, or application.

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CBCA Rules of Procedure (cont'd):

(9) Working day. The term “working day” means any day other than a Saturday, Sunday, federal holiday, day on which the Office of the Clerk is required to close earlier than 4:30 p.m., or day on which the Office of the Clerk does not open at all, as in the event of inclement weather.

(10) Working hours. The Board's working hours are 8:00 a.m. to 4:30 p.m., Eastern Time, on each working day.

(c) Construction. The rules of this chapter shall be construed to secure the just, informal, expeditious, and inexpensive resolution of every case. The Board looks to the Federal Rules of Civil Procedure for guidance in construing those Board rules which are similar to Federal Rules.

(d) Rulings, orders, and directions. The Board may apply the rules of this chapter and make such rulings and issue such orders and directions as are necessary to secure the just, informal, expeditious, and inexpensive resolution of every case before the Board. Any ruling, order, or direction that the Board may make or issue pursuant to the rules of this chapter may be made on the motion or request of any party or on the initiative of the Board. The Board may also amend, alter, or vacate a ruling, order, or direction upon such terms as it deems just. In making rulings and issuing orders and directions pursuant to the rules of this chapter, the Board takes into consideration those Federal Rules of Civil Procedure which address matters not specifically covered herein.

(e) Panels. Each case will be assigned to a panel consisting of three judges, with one member designated as the presiding judge, in accordance with such procedures as may be established by the Board. The presiding judge is responsible for processing the case, including scheduling and conducting proceedings and hearings. In addition, the presiding judge may, without participation by other panel members, decide an appeal under the small claims procedure in Rule 52, rule on nondispositive motions (except for amounts in controversy under Rule 52(a)(2) and Rule 53(a)(2)), and dismiss a case as permitted by Rule 12(e). All other matter, except for those before the full Board under Rule 28, are decided for the Board by a majority of the panel.

(f) Location and address. The location of the Office of the Clerk of the Board is: 1800 M Street, NW, 6th Floor, Washington, DC 20036. The mailing address of the Office of the Clerk of the Board is: 1800 F Street, NW, Washington, DC 20405. The Clerk's telephone number is: (202) 606-8800. The Clerk's facsimile machine number is: (202) 606-0019.

RULE 2

FILING CASES; TIME LIMITS FOR FILING; NOTICE OF DOCKETING; CONSOLIDATION

(a) Filing cases. Filing of a case occurs as provided in Rule 1(b)(5).

(1) Notice of appeal.

(i) A notice of appeal shall be in writing and shall be signed by the appellant or by the appellant's attorney or authorized representative. If the appeal is from a contracting officer's decision, the notice of appeal should describe the decision in enough detail to enable

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CBCA Rules of Procedure (cont'd):

the Board to differentiate that decision from any other; the appellant can satisfy this requirement by attaching to the notice of appeal a copy of the contracting officer's decision. If an appeal is taken from the failure of a contracting officer to issue a decision, the notice of appeal should describe in detail the claim that the contracting officer has failed to decide; the appellant can satisfy this requirement by attaching a copy of the written claim submission to the notice of appeal.

(ii) A written notice in any form, including the one specified in the Appendix to the rules of this chapter, is sufficient to initiate an appeal. The notice of appeal should include the following information:

- (A) The number and date of the contract;
- (B) The name of the government agency and the component thereof against which the claim has been asserted;
- (C) The name, address, and telephone number of the contracting officer whose decision is appealed and the date of the decision;
- (D) If the appeal is from the failure of the contracting officer to decide a claim, the name, address, and telephone number of the contracting officer who received the claim;
- (E) A brief account of the circumstances giving rise to the appeal; and
- (F) An estimate of the amount of money in controversy, if any and if known.

(iii) The appellant must send a copy of the notice of appeal to the contracting officer whose decision is appealed or, if there has been no decision, to the contracting officer before whom the appellant's claim is pending.

(2) Petition.

(i) A petition shall be in writing and signed by the petitioner or by the petitioner's attorney or authorized representative. The petition should describe in detail the claim that the contracting officer has failed to decide; the contractor can satisfy this requirement by attaching to the petition a copy of the written claim submission.

(ii) The petition should include the following information:

- (A) The number and date of the contract;
- (B) The name of the government agency and the component thereof against which the claim has been asserted; and
- (C) The name, address, and telephone number of the contracting officer whose decision is sought.

(3) Application. An application for fees and other expenses shall meet all requirements specified in Rule 30.

(b) Time limits for filing.

(1) Appeals.

(i) An appeal from a decision of a contracting officer shall be filed no later than 90 calendar days after the date the appellant receives that decision.

(ii) An appeal may be filed with the Board if the contracting officer fails or refuses to issue a timely decision on a claim submitted in writing, properly certified if required.

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CBCA Rules of Procedure (cont'd):

(2) Applications. An application for fees and other expenses shall be filed within 30 calendar days of a final disposition in the underlying appeal, as provided in Rule 30.

(c) Notice of docketing. Notices of appeal, petitions, and applications will be docketed by the Office of the Clerk of the Board, and a written notice of docketing will be sent promptly to all parties.

(d) Consolidation. When cases involving common questions of law or fact are filed, the Board may:

(1) Order the cases consolidated; or

(2) Make such other orders concerning the proceedings as are needed to avoid unnecessary costs or delay.

RULE 3**TIME: ENLARGEMENT; COMPUTATION**

(a) Time for performing required actions. All time limitations prescribed in the rules of this chapter or in any order or direction given by the Board are maximums, and the action required should be accomplished in less time whenever possible.

(b) Enlarging time. Upon request of a party for good cause shown, the Board may enlarge any time prescribed by the rules of this chapter or by an order or direction of the Board except the time limit for filing appeals (Rule 2(b)(1)). A written request is required, but in exigent circumstances an oral request may be made and followed by a written request. An enlargement of time may be granted even though the request was filed after the time for taking the required action expired, but the party requesting the enlargement must show good cause for its inability to make the request before that time expired.

(c) Computing time. Except as otherwise required by law, in computing a period of time prescribed by the rules of this chapter or by order of the Board, the day from which the designated period of time begins to run shall not be counted, but the last day of the period shall be counted unless that day is a Saturday, a Sunday, or a federal holiday, or a day on which the Office of the Clerk of the Board is required to close earlier than 4:30 p.m., or does not open at all, as in the case of inclement weather, in which event the period shall include the next working day. Except as otherwise provided in this paragraph, when the period of time prescribed or allowed is less than 11 days, any intervening Saturday, Sunday, or federal holiday shall not be counted. When the period of time prescribed or allowed is 11 days or more, intervening Saturdays, Sundays, and federal holidays shall be counted. Time for filing any document or copy thereof with the Board expires when the Office of the Clerk of the Board closes on the last day on which such filing may be made.

RULE 4**APPEAL FILE**

(a) Submission to the Board by the respondent. Within 30 calendar days from receipt of the Board's docketing notice or within such time as the Board may allow, the respondent shall file with the Board appeal file exhibits consisting of all documents and other tangible things

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CBCA Rules of Procedure (cont'd):

relevant to the claim and to the contracting officer's decision which has been appealed.

Exhibits will be numbered as required by Rule 4(b) and will include, if any:

- (1) The contracting officer's decision from which the appeal is taken;
- (2) The contract, including amendments, specifications, plans, and drawings;
- (3) All correspondence between the parties that is relevant to the appeal, including the written claim or claims that are the subject of the appeal, and evidence of their certification;
- (4) Affidavits or statements of any witnesses concerning the matter in dispute and transcripts of any testimony taken before the filing of the notice of appeal;
- (5) All documents and other tangible things on which the contracting officer relied in making the decision, and any related correspondence;
- (6) The abstract of bids, if relevant; and
- (7) Any additional existing evidence or information necessary to determine the merits of the appeal, such as internal memoranda and notes to the file.

(b) Organization of the appeal file. Appeal file exhibits may be originals or true, legible, and complete copies. They shall be arranged in chronological order, earliest documents first; bound in a loose-leaf binder on the left margin except where size or shape makes such binding impracticable; numbered; tabbed; and indexed. The loose-leaf binders cannot exceed four inches in depth. The numbering shall be consecutive, in whole Arabic numerals (no letters, decimals, or fractions), and continuous from one submission to the next, so that the complete file, after all submissions, will consist of one set of consecutively numbered exhibits. In addition, the pages within each exhibit containing more than three pages shall be numbered consecutively unless the exhibit already is paginated in a logical manner. Consecutive pagination of the entire file is not required. The index shall include the date and a brief description of each exhibit and shall identify which exhibits, if any, have been filed with the Board in camera or under protective order or otherwise have not been served on the other party.

(c) Service. The respondent shall serve a copy of the appeal file on the appellant at the same time that the respondent files it with the Board, except that the respondent need not serve on the appellant those documents furnished the Board in camera pursuant to Rule 9(c), and the respondent shall serve documents submitted under protective order only on those individuals who have been granted access to such documents by the Board. However, the respondent must serve on the appellant a list identifying the specific documents filed in camera or under protective order with the Board, giving sufficient details necessary for their recognition. This list must also be filed with the Board as an exhibit to the appeal file.

(d) Submission to the Board by the appellant. Within 30 calendar days after the respondent files its appeal file exhibits, or within such time as the Board may allow, the appellant shall file with the Board for inclusion in the appeal file documents or other tangible things relevant to the appeal that have not been submitted by the respondent. The appellant shall serve a copy of its additional exhibits upon the respondent at the same time as it files them with the Board, and shall organize the file as required by Rule 4(b).

(e) Submissions on order of the Board. The Board may, at any time during the pendency of the appeal, require any party to file other documents and tangible things as additional exhibits. The Board may also require a party to file either copies of electronically stored information or printed versions of electronically stored information.

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CBCA Rules of Procedure (cont'd):

(f) Lengthy or bulky materials. The Board may waive the requirement to furnish the other party copies or duplicates of bulky, lengthy, or outsized materials submitted to the Board as exhibits if furnishing copies would impose an undue burden, so long as the materials are available to the opposing party for inspection.

(g) Use of appeal file as evidence. All exhibits in the appeal file, except for those as to which an objection has been sustained, are part of the evidentiary record upon which the Board will render its decision. Unless otherwise ordered by the Board, objection to any exhibit may be made at any time before the first witness is sworn or, if the appeal is submitted on the record without a hearing pursuant to Rule 19, at any time prior to or concurrent with the first record submission. The Board may shorten or enlarge the time for such objections and will consider an objection made during a hearing if the ground for objection could not reasonably have been earlier known to the objecting party. If an objection is sustained, the Board will so note in the record.

(h) When appeal file not required. Upon motion of a party, the Board may postpone or dispense with the submission of any or all appeal file exhibits.

RULE 5 APPEARANCES; NOTICE OF APPEARANCE

(a) Appearances before the Board. (1) Appellant; petitioner; applicant. Any appellant, petitioner, or applicant may appear before the Board by an attorney-at-law licensed to practice in a state, commonwealth, or territory of the United States, or in the District of Columbia. An individual appellant, petitioner, or applicant may appear in his or her own behalf; a corporation, trust, or association may appear by one of its officers; and a partnership may appear by one of its members.

(2) Respondent. The respondent may appear before the Board by an attorney-at-law licensed to practice in a state, commonwealth, or territory of the United States, or in the District of Columbia. Alternatively, if not prohibited by agency regulation or otherwise, the respondent may appear by the contracting officer or by the contracting officer's authorized representative.

(3) Others. The Board may, on motion, in its discretion, permit a special or limited appearance, such as by an amicus curiae. Permission to appear, if granted, will be for such purposes and in such manner as allowed by the presiding judge.

(b) Notice of appearance. Unless a notice of appearance is filed by some other person, the person signing the notice of appeal, petition, or application shall be deemed to have appeared on behalf of the appellant, petitioner, or applicant, and the head of the respondent agency's litigation office shall be deemed to have appeared on behalf of the respondent. Other attorneys actively participating in the proceedings before the Board must file notices of appearance. A notice of appearance in the form specified in the Appendix to the rules of this chapter is sufficient. Attorneys representing parties before the Board are required to list the state bars to which they are admitted and their state bar numbers or other bar identifiers.

(c) Withdrawal of appearance. Any person who has filed a notice of appearance and who wishes to withdraw from a case must file a motion which includes the name, address, telephone number, and facsimile machine number of the person who will assume responsibility for
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CBCA Rules of Procedure (cont'd):

representation of the party in question. The motion shall state the grounds for withdrawal unless it is accompanied by a representation from the successor representative or existing co-counsel that the established case schedule will be met.

**RULE 6
PLEADINGS AND AMENDMENT OF PLEADINGS**

(a) Pleadings required and permitted. Except as the Board may otherwise order, the Board requires the submission of a complaint and an answer. In appropriate circumstances, the Board may order or permit a reply to an answer.

(b) Complaint. No later than 30 calendar days after the docketing of the appeal, the appellant shall file with the Board a complaint setting forth its claim or claims in simple, concise, and direct terms. The complaint should set forth the factual basis of the claim or claims, with appropriate reference to the contract provisions, and should state the amount in controversy, or an estimate thereof, if any and if known. No particular form is prescribed for a complaint, and the Board may designate the notice of appeal, a claim submission, or any other document as the complaint, either on its own initiative or on request of the appellant, if such document sufficiently states the factual basis and amount of the claim.

(c) Answer. No later than 30 calendar days after the filing of the complaint or of the Board's designation of a complaint, the respondent shall file with the Board an answer setting forth simple, concise, and direct statements of its defenses to the claim or claims asserted in the complaint, as well as any affirmative defenses it chooses to assert. A dispositive motion or a motion for a more definite statement may be filed in lieu of the answer only with the permission of the Board. If no answer is timely filed, the Board may enter a general denial, in which case the respondent may thereafter amend the answer to assert affirmative defenses only by leave of the Board and as otherwise prescribed by paragraph (e) of this section. The Board will inform the parties when it enters a general denial on behalf of the respondent.

(d) Small claims and accelerated procedures. When an appellant elects to use the small claims or accelerated procedures described in Rule 52 and Rule 53, the Board may shorten the time for filing the complaint and the answer.

(e) Amendment of pleadings. Each party to an appeal may amend its pleadings once without leave of the Board at any time before a responsive pleading is filed. The Board may permit other amendments on conditions fair to both parties. A response to an amended pleading will be filed within the time set by the Board.

(f) Amendments to conform to the evidence. When issues within the proper scope of a case, but not raised in the pleadings, have been raised without objection or with permission of the Board at a hearing or in record submissions, they shall be treated in all respects as if they had been raised in the pleadings. The Board may order the parties to amend the pleadings to conform to the proof or may order that the record be deemed to contain amended pleadings.

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CBCA Rules of Procedure (cont'd):

RULE 7 SERVICE OF PAPERS OTHER THAN SUBPOENAS

(a) On whom and when service must be made. Except for subpoenas (Rule 16) and documents filed in camera (Rule 9(c)), when a party sends a document to the Board it must at the same time send a copy to the other party by an equally or more expeditious means of transmittal. The parties will confer and agree upon the method they will use to serve one another. They may agree to use electronic mail, facsimile, overnight courier, hand delivery, or any other mutually acceptable method for accomplishing service promptly and efficiently.

(b) Proof of service. A party sending a document to the Board must represent to the Board that a copy has also been sent to the other party. This may be done by certificate of service, by the notation of a photostatic copy (cc:), or by any other means that can reasonably be expected to show the Board that the other party has been provided a copy.

(c) Failure to make service. If a document sent to the Board by a party does not show that a copy has been served on the other party, the Board may return the document to the party that submitted it with such directions as it considers appropriate, or the Board may inquire whether a party has received a copy and note on the record the fact of inquiry and the response, and may also direct the party that submitted the document to serve a copy on the other party. In the absence of proof of service a document may be treated by the Board as not properly filed.

RULE 8 MOTIONS

(a) How motions are made. Motions may be oral or written. A written motion shall state the relief sought and, either in the text of the motion or in an accompanying legal memorandum, the grounds therefor. In addition, a motion for summary relief shall comply with the requirements of paragraph (g) of this section. Rule 23 prescribes the form and content of legal memoranda. Oral motions shall be made on the record and in the presence of the other party. Except for joint motions by the parties, all motions must represent that the moving party has attempted to discuss the grounds for the motion with the non-moving party and tried to resolve the matter informally.

(b) When motions may be made. A motion filed in lieu of an answer pursuant to Rule 6(c) shall be filed no later than the date on which the answer is required to be filed or such later date as may be established by the Board. Any other dispositive motion shall be made as soon as practicable after the grounds therefor are known. Any other motion shall be made promptly or as required by the rules of this chapter.

(c) Dispositive motions. The following dispositive motions may properly be made before the Board:

- (1) Motions to dismiss for lack of jurisdiction or for failure to state a claim upon which relief can be granted;
- (2) Motions to dismiss for failure to prosecute;
- (3) Motions for summary relief (analogous to summary judgment); and
- (4) Any other motion to dismiss.

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CBCA Rules of Procedure (cont'd):

(d) Other motions. Other motions may be made in good faith and in proper form. When filing a motion for an enlargement of time, the moving party shall state that it has contacted the opposing party about the request and shall inform the Board whether the opposing party consents to the request or will file an opposition.

(e) Jurisdictional questions. The Board may at any time consider the issue of its jurisdiction to decide a case.

(f) Procedure. Unless otherwise directed by the Board, a party may respond to a written motion other than a motion pursuant to Rules 26, 27, 28, or 29 at any time within 20 calendar days after the filing of the motion. Responses to motions pursuant to Rule 26, Rule 27, Rule 28, or Rule 29 may be made only as permitted or directed by the Board. The Board may permit hearing or oral argument on written motions and may require additional submissions from any of the parties.

(g) Motions for summary relief. (1) A motion for summary relief should be filed only when a party believes that, based upon uncontested material facts, it is entitled to relief in whole or in part as a matter of law. A motion for summary relief should be filed as soon as feasible, to allow the Board to rule on the motion in advance of a scheduled hearing date.

(2) With each motion for summary relief, there shall be served and filed a separate document titled Statement of Uncontested Facts, which shall contain in separately numbered paragraphs all of the material facts upon which the moving party bases its motion and as to which it contends there is no genuine issue. This statement shall include references to the supporting affidavits or declarations and documents, if any, and to the Rule 4 appeal file exhibits relied upon to support such statement.

(3) An opposing party shall file with its opposition (or cross-motion) a separate document titled Statement of Genuine Issues. This document shall identify, by reference to specific paragraph numbers in the moving party's Statement of Uncontested Facts, those facts as to which the opposing party claims there is a genuine issue necessary to be litigated. An opposing party shall state the precise nature of its disagreement and give its version of the facts. This statement shall include references to the supporting affidavits or declarations and documents, if any, and to Rule 4 appeal file exhibits that demonstrate the existence of a genuine dispute. An opposing party may also file a Statement of Uncontested Facts as to any relevant matters not covered by the moving party's statement.

(4) When a motion for summary relief is made and supported as provided in Rule 8, an opposing party may not rest upon the mere allegations or denials of its pleadings. The opposing party's response, by affidavits or as otherwise provided by Rule 8, must set forth specific facts showing that there is a genuine issue of material fact. If the opposing party does not so respond, summary relief, if appropriate, shall be entered against that party. For good cause shown, if an opposing party cannot present facts essential to justify its opposition, the Board may defer ruling on the motion to permit affidavits to be obtained or depositions to be taken or other discovery to be conducted, or may make such other order as is just.

(h) Effect of pending motion. Except as the rules of this chapter provide or the Board may order, a pending motion shall not excuse the parties from proceeding with the case in accordance with the rules of this chapter and the orders and directions of the Board.

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CBCA Rules of Procedure (cont'd):

RULE 9 RECORD OF BOARD PROCEEDINGS; REVIEW AND COPYING

(a) Composition of the record for decision. The record upon which any decision of the Board will be rendered consists of:

- (1) The notice of appeal, petition, or application;
- (2) Appeal file exhibits other than those as to which an objection has been sustained;
- (3) Hearing exhibits other than those as to which an objection has been sustained;
- (4) Pleadings;
- (5) Motions and responses thereto;
- (6) Memoranda, orders, rulings, and directions to the parties issued by the Board;
- (7) Documents and other tangible things admitted in evidence by the Board;
- (8) Written transcripts or electronic recordings of proceedings;
- (9) Stipulations and admissions by the parties;
- (10) Depositions, or parts thereof, received in evidence;
- (11) Written interrogatories and responses received in evidence;
- (12) Briefs and memoranda of law; and
- (13) Anything else that the Board may designate. All other papers and documents are part of the administrative record of the proceedings and are not included in the record upon which the Board's decision will be rendered.

(b) Enlargement of the record. The Board may at any time require or permit enlargement of the record with additional evidence and briefs. It may reopen the record to receive additional evidence and oral argument at a hearing.

(c) Protected and in camera submissions. (1) A party may by motion request that the Board receive and hold materials under conditions that would limit access to them on the ground that such documents are privileged or confidential, or sensitive in some other way. The moving party must state the grounds for such limited access. The Board may also determine on its own initiative to hold materials under such conditions. The manner in which such materials will be held, the persons who shall have access to them, and the conditions (if any) under which such access will be allowed will be specified in an order of the Board. If the materials are held under such an order, they will be part of the record of the case. If the Board denies the motion, the materials may be returned to the party that submitted them. If the moving party asks, however, that the materials be placed in the administrative record, in camera, for the purpose of possible later review of the Board's denial, the Board will comply with the request.

(2) A party may also ask, or the Board may direct, that testimony be received under protective order or in camera. The procedures under paragraph (c)(1) of this section shall be followed with respect to such request or direction.

(d) Review and copying. Except for any part thereof that is subject to a protective order or deemed an in camera submission, the record in a Board proceeding shall be made available for
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CBCA Rules of Procedure (cont'd):

review at the Office of the Clerk of the Board during the Board's normal working hours, as soon as practicable given the demands on the Board of processing the subject case and other cases. If a request is made for copies of documents, and if making such copies involves more than minimal costs to the Board, reimbursement will be required. If a request is made for a copy of a transcript which was prepared pursuant to a contract with the Board, the fee charged by the Board for a copy of the transcript will be at the rate established by the contract. When required, the Office of the Clerk will certify copies of papers and documents as a true record of the Board. Except as provided in Rules 17 and 32, the Office of the Clerk will not release any part of the record in its possession to anyone.

RULE 10 ADMISSIBILITY OF EVIDENCE

In general, any relevant and material evidence will be admitted into the record. The Board may exclude evidence to avoid unfair prejudice, confusion of the issues, undue delay, waste of time, or needless presentation of cumulative evidence. Hearsay evidence is admissible unless the Board finds it unreliable or untrustworthy. As a general matter, and subject to the other provisions of Rule 10, the Board will look to the Federal Rules of Evidence for guidance when it makes evidentiary rulings.

RULE 11 CONFERENCES; CONFERENCE MEMORANDUM

(a) Conferences. The Board may convene the parties in conference, either by telephone or in person, for any purpose. The conference may be stenographically or electronically recorded, at the discretion of the Board. Matters to be considered and actions to be taken at a conference may include:

- (1) Simplifying, clarifying, or severing the issues;
- (2) Stipulations, admissions, agreements, and rulings to govern the admissibility of evidence, understandings on matters already of record, or other similar means of avoiding unnecessary proof;
- (3) Plans, schedules, and rulings to facilitate discovery;
- (4) Limiting the number of witnesses and other means of avoiding cumulative evidence;
- (5) Stipulations or agreements disposing of matters in dispute; or
- (6) Ways to expedite disposition of the case or to facilitate settlement of the dispute, including, if the parties and the Board agree, the use of alternative dispute resolution techniques, as provided in Rules 51 and 54.

(b) Conference memorandum. The Board may issue a memorandum of the results of a conference, an order reflecting any actions taken, or both. A memorandum or order so issued shall be placed in the record of the case and sent to each party. Each party shall have 5 working days after receipt of a memorandum to object to the substance of it.

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CBCA Rules of Procedure (cont'd):

RULE 12 SUSPENSIONS AND DISMISSALS

- (a) Suspension of proceedings to obtain contracting officer's decision. The Board may in its discretion suspend proceedings to permit a contracting officer to issue a decision when an appeal has been taken from the contracting officer's alleged failure to render a timely decision.
- (b) Suspension for other cause. The Board may suspend proceedings in a case for good cause, such as to permit the parties to finalize a settlement. The order suspending proceedings will prescribe the duration of the suspension or the conditions on which it will expire. The order may also prescribe actions to be taken by the parties during the period of suspension or following its expiration.
- (c) Dismissal, generally. A case may be dismissed by the Board on motion of either party. A case may also be dismissed for reasons cited by the Board in a show cause order to which a response has been permitted. Every dismissal shall be with prejudice to reinstatement of the case except as specified in paragraph (d) of this section.
- (d) Dismissal without prejudice. When circumstances beyond the control of the Board prevent the continuation of proceedings in a case, the Board may, in lieu of issuing an order suspending proceedings, dismiss the case without prejudice to reinstatement within 180 calendar days after the date of the dismissal. When a case has been dismissed without prejudice and neither party has timely requested that the case be reinstated, the case shall be deemed to be dismissed with prejudice on the last day such a request could have been made.
- (e) Issuance of order. The presiding judge alone may issue an order suspending proceedings. An order of dismissal shall be issued by the panel of judges to which the case has been assigned if the motion is contested or if the Board is acting consequent to its own show cause order. An order of dismissal may be issued by the presiding judge alone if the motion to dismiss is not contested.

RULE 13 GENERAL PROVISIONS GOVERNING DISCOVERY

- (a) Discovery methods. The parties are encouraged to exchange documents and other information voluntarily. In addition, the parties may obtain discovery by one or more of the following methods:
- (1) Depositions upon oral examination or written questions;
 - (2) Written interrogatories;
 - (3) Requests for production of documents, electronically stored information, or other tangible or intangible things; and
 - (4) Requests for admission.
- (b) Scope of discovery. Except as otherwise limited by order of the Board, the parties may obtain discovery regarding any matter, not privileged, which is relevant to the subject matter involved in the pending case, whether it relates to the claim or defense of a party, including the existence, description, nature, custody, condition, and location of any books, documents, electronically stored information, or other tangible or intangible things, and the identity and
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CBCA Rules of Procedure (cont'd):

location of persons having knowledge of any discoverable matter. It is not a ground for objection that the information sought will be inadmissible if the information sought appears reasonably calculated to lead to the discovery of admissible evidence.

(c) Discovery limits. The Board may limit the frequency or extent of use of the discovery methods set forth in Rule 13 if it determines that:

- (1) The discovery sought is unreasonably cumulative or duplicative, or is obtainable from some other source that is more convenient, less burdensome, or less expensive;
- (2) The party seeking discovery has had ample opportunity by discovery in the case to obtain the information sought; or
- (3) The discovery is unduly burdensome and expensive, taking into account the needs of the case, the amount in controversy, limitations on the parties' resources, and the importance of the issues at stake.

(d) Conduct of discovery. Parties may engage in discovery only to the extent the Board enters an order which either incorporates an agreed plan and schedule acceptable to the Board or otherwise permits such discovery as the moving party can demonstrate is required for the expeditious, fair, and reasonable resolution of the case.

(e) Discovery conference. Upon request of a party or on its own initiative, the Board may at any time hold an informal meeting or telephone conference with the parties to identify the issues for discovery purposes; establish a plan and schedule for discovery; set limitations on discovery, if any; and determine such other matters as are necessary for the proper management of discovery. The Board may include in the conference such other matters as it deems appropriate in accordance with Rule 11.

(f) Discovery objections. (1) In connection with any discovery procedure, the Board, on motion or on its own initiative, may make any order which justice requires to protect a party or person from annoyance, embarrassment, oppression, or undue burden or expense, including, but not limited to, one or more of the following:

- (i) That the discovery not be had;
- (ii) That the discovery be had only on specified terms and conditions, including a designation of the time and place, or that the scope of discovery be limited to certain matters;
- (iii) That the discovery be conducted with no one present except persons designated by the Board; and
- (iv) That confidential information not be disclosed or that it be disclosed only in a designated way.

(2) Unless otherwise ordered by the Board, any objection to a discovery request must be filed within 15 calendar days after receipt. A party shall fully respond to any discovery request to which it does not file a timely objection. The parties are required to make a good faith effort to resolve objections to discovery requests informally.

(3) A party receiving an objection to a discovery request, or a party which believes that another party's response to a discovery request is incomplete or entirely absent, may file a motion to compel a response, but such a motion must include a representation that the moving party has tried in good faith, prior to filing the motion, to resolve the matter informally. The

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CBCA Rules of Procedure (cont'd):

motion to compel shall include a copy of each discovery request at issue and the response, if any.

(g) Failure to make or cooperate in discovery. If a party fails to appear for a deposition, after being served with a proper notice; to serve answers or objections to interrogatories submitted under Rule 14, after proper service of interrogatories; or to serve a written response to a request for inspection, production, and copying of any documents, electronically stored information, and things under Rule 14, the party seeking discovery may move the Board to impose appropriate sanctions under Rule 33.

(h) Subpoenas. A party may request the issuance of a subpoena in aid of discovery under the provisions of Rule 16.

RULE 14

INTERROGATORIES TO PARTIES; REQUESTS FOR ADMISSION; REQUESTS FOR PRODUCTION

Upon order from the Board permitting such discovery, a party may serve on another party written interrogatories, requests for admission, and requests for production.

(a) Written interrogatories. Written interrogatories shall be answered separately in writing, signed under oath or accompanied by a declaration under penalty of perjury, and answered within 30 calendar days after service. Objections shall be filed within the time limits set forth in Rule 13(f)(2).

(b) Option to produce business records. Where the answer to an interrogatory may be derived or ascertained from the business records of the party upon which the interrogatory has been served, or from an examination, audit, or inspection of such business records, including a compilation, abstract, or summary thereof, and the burden of deriving or ascertaining the answer is substantially the same for the party serving the interrogatory as for the party served, it is a sufficient answer to such interrogatory to specify the records from which the answer may be derived or ascertained and to afford to the party serving the interrogatory reasonable opportunity to examine, audit, or inspect such records and to make copies, compilations, abstracts, or summaries thereof. Such specification shall be in sufficient detail to permit the interrogating party to locate and to identify, as readily as can the party served, the records from which the answer may be ascertained.

(c) Written requests for admission. A written request for the admission of the truth of any matter, within the proper scope of discovery, that relates to statements or opinions of fact or of the application of law to fact, including the genuineness of any documents or electronically stored information, is to be answered in writing and signed within 30 calendar days after service. Objections shall be filed within the time limits set forth in Rule 13(f)(2). Otherwise, the matter therein may be deemed to be admitted. Any matter admitted is conclusively established for the purpose of the pending action, unless the Board on motion permits withdrawal or amendment of the admission. Any admission made by a party under this paragraph (c) is for the purpose of the pending action only and is not an admission for any other

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CBCA Rules of Procedure (cont'd):

purpose, nor may it be used against the party in any other proceeding.

(d) Written requests for production. A written request for the production, inspection, and copying of any documents, electronically stored information, or things shall be answered within 30 calendar days after service. Objections shall be filed within the time limits set forth in Rule 13(f)(2).

(e) Change in time for response. Upon request of a party, or on its own initiative, the Board may prescribe a period of time other than that specified in Rule 14.

(f) Responses. A party that has responded to written interrogatories, requests for admission, or requests for production of documents, electronically stored information, or things, upon becoming aware of deficiencies or inaccuracies in its original responses, or upon acquiring additional information or additional documents, electronically stored information, or things relevant thereto, shall, as quickly as practicable, and as often as necessary, supplement its responses to the requesting party with correct and sufficient additional information and such additional documents, electronically stored information, and things as are necessary to give a complete and accurate response to the request.

RULE 15 DEPOSITIONS

(a) When depositions may be taken. Upon request of a party, the Board may order the taking of testimony of any person by deposition upon oral examination or written questions before an officer authorized to administer oaths at the place of examination. Attendance of witnesses may be compelled by subpoena as provided in Rule 16, and the Board may upon motion order that the testimony at a deposition be recorded by other than stenographic means, in which event the order may designate the manner of recording, preserving, and filing the deposition and may include other provisions to ensure that the recorded testimony will be accurate and trustworthy. In addition, if the Board orders deposition testimony to be recorded by other than stenographic means, the Board will also determine who shall bear the burden of the cost of such recording, and shall permit the non-moving party to arrange to have a stenographic transcription made at its own expense.

(b) Depositions: time; place; manner of taking. The time, place, and manner of taking depositions, including the taking of depositions by telephone, shall be as agreed upon by the parties or, failing such agreement, as ordered by the Board. A deposition taken by telephone is taken at the place where the deponent is to answer questions.

(c) Use of depositions. At a hearing on the merits or upon a motion or interlocutory proceeding, any part or all of a deposition, so far as admissible and as though the witness were then present and testifying, may be used against a party who was present or represented at the taking of the deposition or who had reasonable notice thereof, in accordance with any of the following provisions:

- (1) Any deposition may be used by a party for the purpose of contradicting or impeaching the testimony of the deponent as a witness.
- (2) The deposition of a party or of anyone who at the time of taking the deposition was an officer, director, or managing agent, or a person designated to testify on

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CBCA Rules of Procedure (cont'd):

behalf of a corporation, partnership, association, or government agency which is a party may be used by an adverse party for any purpose.

(3) The deposition of a witness, whether or not a party, may be used by a party for any purpose in its own behalf if the Board finds that:

- (i) The witness is dead;
- (ii) The attendance of the witness at the place of hearing cannot be reasonably obtained, unless it appears that the absence of the witness was procured by the party offering the deposition;
- (iii) The witness is unable to attend or testify because of illness, infirmity, age, or imprisonment;
- (iv) The party offering the deposition has been unable to procure the attendance of the witness by subpoena; or
- (v) Upon request and notice, exceptional circumstances exist which make it desirable in the interest of justice and with due regard to the importance of presenting the testimony of witnesses orally in open hearing, to allow the deposition to be used.

(4) If only part of a deposition is offered in evidence by a party, an adverse party may require the offering party to introduce any other part which in fairness ought to be considered with the part introduced.

(d) Depositions pending appeal from a decision of the Board. If an appeal has been taken from a decision of the Board, or before the taking of an appeal if the time therefor has not expired, the Board may allow the taking of depositions of witnesses to perpetuate their testimony for use in the event of further proceedings before the Board. In such case, the party that desires to perpetuate testimony may make a motion before the Board for leave to take the depositions as if the action were pending before the Board. The motion shall show:

- (1) The names and addresses of the persons to be examined and the substance of the testimony which the moving party expects to elicit from each; and
- (2) The reasons for perpetuating the testimony of the persons named. If the Board finds that the perpetuation of testimony is proper to avoid a failure or a delay of justice, it may order the depositions to be taken and may make orders of the character provided for in Rule 13 and in Rule 15. Thereupon, the depositions may be taken and used as prescribed in the rules of this chapter for depositions taken in actions pending before the Board. Upon request and for good cause shown, a judge may issue or obtain a subpoena, in accordance with Rule 16, for the purpose of perpetuating testimony by deposition during the pendency of an appeal from a Board decision.

**RULE 16
SUBPOENAS**

(a) Voluntary cooperation in lieu of subpoena. Each party is expected to:

- (1) Cooperate by making available witnesses and evidence under its control, when requested by another party, without issuance of a subpoena; and

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CBCA Rules of Procedure (cont'd):

- (2) Secure the cooperation of third-party witnesses and production of evidence by third parties, when practicable, without issuance of a subpoena.
- (b) General. Upon the written request of any party filed with the Office of the Clerk of the Board, or upon the initiative of a judge, a subpoena may be issued that commands the person to whom it is directed to:
- (1) Attend and give testimony at a deposition in a city or county where that person resides or is employed or transacts business in person, or at another location convenient to that person that is specifically determined by the Board;
 - (2) Attend and give testimony at a hearing; and
 - (3) Produce the books, papers, documents, electronically stored information, and other tangible and intangible things designated in the subpoena.
- (c) Request for subpoena. A request for a subpoena shall contain the name of the assigned judge, the name of the case, and the docket number of the case. It shall state the reasonable scope and general relevance to the case of the testimony and of any evidence sought. A request for a subpoena shall be filed at least 15 calendar days before the testimony of a witness or evidence is to be provided. The Board may, in its discretion, honor requests for subpoenas not made within this time limitation.
- (d) Form; issuance. (1) Every subpoena shall be in the form specified in the Appendix to the rules of this chapter and this form shall not be altered. Unless a party has the approval of a judge to submit a subpoena in blank (in whole or in part), a party shall submit to the judge a completed subpoena (save the "Return on Service" portion). In issuing a subpoena to a requesting party, the judge shall sign the subpoena. The party to whom the subpoena is issued shall complete the subpoena before service.
- (2) If the person subpoenaed is located in a foreign country, a letter rogatory or a subpoena may be issued and served under the circumstances and in the manner provided in 28 U.S.C. §§1781, 1784.
- (e) Service. (1) The party requesting a subpoena shall arrange for service. Service shall be made as soon as practicable after the subpoena has been issued.
- (2) A subpoena requiring the attendance of a witness at a deposition or hearing may be served at any place. A subpoena may be served by a United States marshal or deputy marshal, or by any other person who is not a party and not less than 18 years of age. Service of a subpoena upon a person named therein shall be made by personal delivery of a copy to that person and tender of the fees for one day's attendance and the mileage allowed by 28 U.S.C. §1821 or other applicable law; however, where the subpoena is issued on behalf of the Government, money payments need not be tendered in advance of attendance.
- (f) Proof of service. The person serving the subpoena shall make proof of service thereof to the Board promptly and in any event before the date on which the person served must respond to the subpoena. Proof of service shall be made by completion and execution and submission to the Board of the "Return on Service" portion of a duplicate copy of the subpoena issued by a judge. If service is made by a person other than a United States marshal or his deputy, that person shall make an affidavit as proof by executing the "Return on Service" in the presence of a notary.

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CBCA Rules of Procedure (cont'd):

(g) Motion to quash or to modify. Upon written motion by the person subpoenaed or by a party, made within 14 calendar days after service, but in any event not later than the time specified in the subpoena for compliance, the Board may quash or modify the subpoena if it is unreasonable and oppressive or for other good cause shown, or require the party in whose behalf the subpoena was issued to advance the reasonable cost of producing subpoenaed evidence. Where circumstances require, the Board may act upon such a motion at any time after a copy has been served upon opposing parties.

(h) Contumacy or refusal to obey a subpoena. In a case of contumacy or refusal to obey a subpoena by a person who resides, is found, or transacts business within the jurisdiction of a United States district court, the Board shall apply to the court through the Attorney General of the United States for an order requiring the person to appear before the Board to give testimony, produce evidence, or both.

RULE 17 EXHIBITS

(a) Marking of exhibits. (1) Documents and other tangible things offered in evidence by a party will be marked for identification by the Board during the hearing or, if ordered by the Board, will be added to the appeal file as exhibits before the commencement of the hearing in order, for example, to eliminate the introduction of additional exhibits at the hearing.

(2) If a party elects to proceed on the record without a hearing pursuant to Rule 19, documentary evidence submitted by that party will be numbered consecutively as appeal file exhibits.

(b) Copies as exhibits. Except upon objection sustained by the Board for good cause shown, copies of documents may be offered and received into evidence as exhibits, provided they are of equal legibility and quality as the originals, and such copies shall have the same force and effect as if they were the originals. If the Board directs, a party offering a copy of a document as an exhibit shall have the original available at the hearing for examination by the Board and any other party. When the original of a document has been received into evidence as an exhibit, an accurate copy may be substituted in evidence for the original by leave of the Board at any time. The Board may require a party to provide either copies of electronically stored information or printed versions of electronically stored information to be included in the record.

(c) Withdrawal of exhibits and other items. With the permission of the Board, a party that submits an exhibit or any other item may withdraw the exhibit or item from the record during the course of a proceeding.

(d) Disposition of physical exhibits. Any physical (as opposed to documentary) exhibit may be disposed of by the Board at any time more than 90 calendar days after the expiration of the period for appeal from the decision of the Board.

RULE 18 ELECTION OF HEARING OR RECORD SUBMISSION

Each party shall inform the Board, in writing, whether it elects a hearing or submission
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CBCA Rules of Procedure (cont'd):

of its case on the record pursuant to Rule 19. Such an election may be filed at any time unless a time for filing is prescribed by the Board. In most cases, the Board will require the parties to make an election soon after discovery closes. A party electing to submit its case on the record pursuant to Rule 19 may also elect to appear at a hearing solely to cross-examine any witness presented by the opposing party, provided that the Board is informed of that party's intention within 10 working days of its receipt of notice of the election of hearing by the other party. If a hearing is elected, the election should state where and when the electing party desires the hearing to be held and should explain the reasons for its choices. A hearing will be held if either party elects one. If a party's decision whether to elect a hearing is dependent upon the intentions of the other party, it shall consult with the other party before filing its election. If there is to be a hearing, it will be held at a time and place prescribed by the Board after consultation with the party or parties electing the hearing. The record submissions from a party that has elected to submit its case on the record shall be due as provided in Rule 19.

RULE 19
SUBMISSION ON THE RECORD WITHOUT A HEARING

(a) Submission on the record. A party may elect to submit its case on the record without a hearing. A party submitting its case on the record may include in its written record submission or submissions:

- (1) Any relevant documents or other tangible things it wishes the Board to admit into evidence;
- (2) Affidavits, depositions, and other discovery materials that set forth relevant evidence; and
- (3) A brief or memorandum of law. The Board may require the submission of additional evidence or briefs and may order oral argument in a case submitted on the record.

(b) Time for submission. (1) If both parties have elected to submit the case on the record, the Board will issue an order prescribing the time for initial and, if appropriate, reply record submissions.

- (2) If one party has elected a hearing and the other party has elected to submit its case on the record, the party submitting on the record shall make its initial submission no later than the commencement of the hearing or at an earlier date if the Board so orders, and a further submission in the form of a brief at the time for submission of posthearing briefs.

(c) Objections to evidence. Unless otherwise directed by the Board, objections to evidence (other than the appeal file and supplements thereto) in a record submission may be made within 10 working days after the filing of the submission, and replies to such objections, if any, may be made within 10 working days after the filing of the objection. The Board may rule on such objections either before it issues its decision or at the time it issues its decision.

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CBCA Rules of Procedure (cont'd):

RULE 20

HEARINGS: SCHEDULING; NOTICE; UNEXCUSED ABSENCES

(a) Scheduling of hearings. Hearings will be held at the time and place ordered by the Board and will be scheduled at the discretion of the Board. In scheduling hearings, the Board will consider the requirements of the rules of this chapter, the need for orderly management of the Board's caseload, and the stated desires of the parties as expressed in their elections filed pursuant to Rule 18 or otherwise. The time or place for hearing may be changed by the Board at any time.

(b) Notice of hearing. Notice of hearing will be by written order of the Board. Notice of changes in the hearing schedule will also be by written order when practicable but may be oral in exigent circumstances. Except as the Board may otherwise order, each party that plans to attend the hearing shall, within 10 working days of receipt of a written notice of hearing or any notice of a change in hearing schedule stating that an acknowledgment is required, notify the Board in writing that it will attend the hearing. If a party fails to acknowledge a notice of hearing as required, the Board will deem the party to have consented to the time and place of hearing.

(c) Unexcused absence from hearing. In the event of the unexcused absence of a party from a hearing, the hearing will proceed, and the absent party will be deemed to have elected to submit its case on the record pursuant to Rule 19.

RULE 21

HEARING PROCEDURES

(a) Nature and conduct of hearings. (1) Except when necessary to maintain the confidentiality of protected material or testimony, or material submitted in camera, all hearings on the merits of cases shall be open to the public and conducted insofar as is convenient in regular hearing rooms. All other acts or proceedings may be done or conducted by the Board either in its offices or at other places.

(2) When cases involving common questions of law or fact are pending, the Board may order a joint hearing of any or all of the matters, claims, or issues in the cases.

(3) The Board may order a separate hearing of any matters, claims, or issues pending in any case. The Board may enter appropriate orders or decisions with respect to any matters, claims, or issues that are heard separately.

(4) Upon the agreement of the parties or upon its own initiative, the Board may notify the parties before a hearing begins that it will limit the hearing to those issues of law and fact relating to the right of a party to recover, reserving the determination of the amount of recovery, if any, for other proceedings.

(5) Before the hearing begins, the Board may prescribe a time within which the presentation of evidence must be concluded, and may establish time limits on the direct and cross-examination of witnesses.

(6) Upon the request of either party or if the Board deems it advisable, the Board will order witnesses to be excluded from the hearing room so they cannot hear the

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CBCA Rules of Procedure (cont'd):

testimony of other witnesses. The Board will not exclude a party who is an individual, the designated representative of a party which is an entity, a person whose presence is essential to the presentation of a party's case, or someone authorized by statute to be present.

(b) Continuances; change of location. Whenever practicable, a hearing will be conducted in one continuous session or a series of consecutive sessions at a single location. However, the Board may at any time continue the hearing to a future date and may arrange to conduct the hearing in more than one location. The Board may also continue a hearing to permit a party to conduct additional discovery on conditions established by the Board. In exercising its discretion to continue a hearing or to change its location, the Board will give due consideration to the same elements (set forth in Rule 20(a) that it considers in scheduling hearings.

(c) Availability of witnesses, documents, and other tangible things. It is the responsibility of a party desiring to call any witness, or to use any document or other tangible thing as an exhibit in the course of a hearing, to ensure that whomever it wishes to call and whatever it wishes to use is available at the hearing. If a witness cannot be made available at the site of the hearing, the party who wishes to call the witness may file a motion that the witness be allowed to testify remotely, whether by telephone, video conference, or some other method.

(d) Enlargement of the record. The Board may at any time during the conduct of a hearing require evidence or argument in addition to that put forth by the parties.

(e) Examination of witnesses. Witnesses before the Board will testify under oath or affirmation. A party or the Board may obtain an answer from any witness to any question that is not the subject of an objection that the Board sustains.

(f) Refusal to be sworn. If a person called as a witness refuses to be sworn or to affirm before testifying, the Board may direct that witness to be sworn or to affirm and, in the event of continued refusal, the Board may permit the taking of testimony without oath or affirmation. If the Board permits a witness to testify without oath or affirmation, the Board will explain that statements made during the hearing are subject to provisions of federal law imposing penalties, including criminal penalties, for knowingly making false representations. Alternatively, the Board may refuse to permit the examination of that witness, in which event it may state for the record the inferences it draws from the witness's refusal to testify under oath or affirmation. Alternatively, the Board may issue a subpoena to compel that witness to testify under oath or affirmation and, in the event of the witness's continued refusal to be sworn or to affirm, may seek enforcement of that subpoena pursuant to Rule 16(h).

(g) Refusal to answer. If a witness refuses to answer a question put to him in the course of his testimony, the Board may direct that witness to answer and, in the event of continued refusal, the Board may state for the record the inferences it draws from the refusal to answer. Alternatively, the Board may issue a subpoena to compel that witness to testify and, in the event of the witness's continued refusal to testify, may seek enforcement of that subpoena pursuant to Rule 16(h).

(h) Issues not raised by pleadings. If evidence is objected to at a hearing on the ground that it is not within the issues raised by the pleadings, it may nevertheless be admitted by the Board if it is within the proper scope of the case. If such evidence is admitted, the Board may grant the objecting party a continuance to enable it to meet such evidence. If such evidence is admitted,
(continued on next page)

CBCA Rules of Procedure (cont'd):

the pleadings may be amended to conform to the evidence, as provided by Rule 6(f).

(i) Delay by parties. If the Board determines that the hearing is being unreasonably delayed by the failure of a party to produce evidence, or by the undue prolongation of the presentation of evidence, it may, during the hearing, prescribe a time or times within which the presentation of evidence must be concluded, establish time limits on the direct or cross-examination of witnesses, and enforce such order or ruling by appropriate sanctions.

RULE 22

TRANSCRIPTS OF PROCEEDINGS; CORRECTIONS

(a) Transcripts. Except as the Board may otherwise order, all hearings, other than those under the small claims procedure prescribed by Rule 52, will be stenographically or electronically recorded and transcribed. Any other hearing or conference will be recorded or transcribed only by order of the Board. Each party is responsible for obtaining its own copy of the transcript if one is prepared.

(b) Corrections. Corrections to an official transcript will be made only when they involve errors affecting its substance. The Board may order such corrections on motion or on its own initiative, and only after notice to the parties giving them opportunity to object. Such corrections will ordinarily be made either by hand with pen and ink or by the appending of an errata sheet, but when no other method of correction is practicable the Board may require the reporter to provide substitute or additional pages.

RULE 23

BRIEFS AND MEMORANDA OF LAW

(a) Form and content of briefs and memoranda of law. Briefs and memoranda of law shall be on standard size 8 1/2 by 11 inch paper. They shall be double-spaced with text in the body and in the footnotes no smaller than 12 point. Otherwise, no particular form or organization is prescribed. The presiding judge may request prehearing and posthearing briefs and may also request, at any point in the proceedings, memoranda of law. Prehearing and posthearing briefs should, at a minimum, succinctly set forth:

- (1) The facts of the case with citations to those places in the record where supporting evidence can be found; and
- (2) Argument with citations to supporting legal authorities.

(b) Submission of posthearing briefs. Except as the Board may otherwise order, posthearing briefs shall be filed 30 calendar days after the Board's receipt of the transcript; reply briefs, if filed, shall be filed 15 calendar days after the parties' receipt of the initial posthearing briefs. The Board will notify the parties of the date of its receipt of the transcript. In the event one party has elected a hearing and the other party has elected to submit its case on the record pursuant to Rule 19, the filing of record submissions in the form of briefs shall be governed by Rule 23.

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CBCA Rules of Procedure (cont'd):**RULE 24
CLOSING THE RECORD**

(a) Closing of the record. Except as the Board may otherwise order, no proof shall be received in evidence after a hearing is completed or, in cases submitted on the record without a hearing, after notice by the Board to the parties that the record is closed and that the case is ready for decision.

(b) Notice that the case is ready for decision. The Board will give written notice to the parties when the record is closed and the case is ready for decision.

**RULE 25
DECISIONS; SETTLEMENTS**

(a) Decisions. (1) Except as provided in Rule 52 (small claims procedure), decisions of the Board will be made in writing upon the record as prescribed in Rule 9. The Board may also take notice of any fact or law of which a court could take judicial notice. Each of the parties will be furnished a copy of the decision certified by the Office of the Clerk of the Board, and the date of the receipt thereof by each party will be established in the record.

(2) In its decision, the Board may reserve determination of the amount of recovery for other proceedings, regardless of whether there is evidence in the record concerning the amount of recovery, provided the Board notified the parties before the hearing began that its decision would not address the amount of any recovery. In any instance in which the Board has reserved its determination of the amount of recovery for other proceedings, as provided in Rule 21(a)(4), its decision on the question of the right to recover shall be final so far as proceedings at the Board are concerned, subject to the provisions of Rules 26 through 28.

(b) Settlements. When an appeal or application is settled, the parties may file with the Board a stipulation setting forth the amount of the award. The Board will adopt the parties' stipulation by decision, provided the stipulation states the parties will not seek reconsideration of, or relief from, the Board's decision, and they will not appeal the decision. The Board's decision under this paragraph (b) is an adjudication of the case on the merits.

**RULE 26
RECONSIDERATION; AMENDMENT OF DECISIONS; NEW HEARINGS**

(a) Grounds. Reconsideration may be granted, a decision or order may be altered or amended, or a new hearing may be granted, for any of the reasons stated in Rule 27(a) and the reasons established by the rules of common law or equity applicable as between private parties in the courts of the United States. Reconsideration or a new hearing may be granted on all or any of the issues. Arguments already made and reinterpretations of old evidence are not sufficient grounds for granting reconsideration, for altering or amending a decision, or for granting a new hearing. Upon granting a motion for a new hearing, the Board will take additional testimony and, if a decision has been issued, either amend its findings of fact and conclusions or law or
(continued on next page)

CBCA Rules of Procedure (cont'd):

issue a new decision.

(b) Procedure. Any motion under Rule 26 shall comply with the provisions of Rule 8 and shall set forth:

- (1) The reason or reasons why the Board should consider the motion; and
- (2) The relief sought and the grounds therefor. If the Board concludes that the reasons asserted for its consideration of the motion are insufficient, it may deny the motion without considering the relief sought and the grounds asserted therefor. If the Board grants the motion, it will issue an appropriate order which may include directions to the parties for further proceedings.

(c) Time for filing. In an appeal or petition, a motion for reconsideration, to alter or amend a decision or order, or for a new hearing shall be filed within 30 calendar days after the date the moving party receives the decision or order. In an application, such a motion shall be filed within 7 working days after the date the moving party receives the decision or order. Not later than 30 calendar days after issuance of a decision or order, the Board may, on its own initiative, order reconsideration or a new hearing or alter or amend a decision or order for any reason that would justify such action on motion of a party.

(d) Effect of motion. A motion pending under Rule 26 does not affect the finality of a decision or suspend its operation.

RULE 27
RELIEF FROM DECISION OR ORDER

(a) Grounds. The Board may relieve a party from the operation of a final decision or order for any of the following reasons:

- (1) Newly discovered evidence which could not have been earlier discovered, even through due diligence;
- (2) Justifiable or excusable mistake, inadvertence, surprise, or neglect;
- (3) Fraud, misrepresentation, or other misconduct of an adverse party;
- (4) The decision has been satisfied, released, or discharged, or a prior decision upon which it is based has been reversed or otherwise vacated, and it is no longer equitable that the decision should have prospective application;
- (5) The decision is void, whether for lack of jurisdiction or otherwise; or
- (6) Any other ground justifying relief from the operation of the decision or order.

(b) Procedure. Any motion under Rule 27 shall comply with the provisions of Rules 8 and 26(b) and will be considered and ruled upon by the Board as provided in Rule 26.

(c) Time for filing. Any motion under Rule 27 shall be filed as soon as practicable after the discovery of the reasons therefor, but in any event no later than 120 calendar days after the date of the moving party's receipt of the decision or order from which relief is sought. In considering the timeliness of a motion filed under Rule 27, the Board may consider when the grounds therefor should reasonably have been known to the moving party.

(d) Effect of motion. A motion pending under Rule 27 does not affect the finality of a decision or suspend its operation.

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CBCA Rules of Procedure (cont'd):**RULE 28
FULL BOARD CONSIDERATION**

(a) Requests by parties. (1) A request for full Board consideration is not favored. Ordinarily, full Board consideration will be ordered only when it is necessary to secure or maintain uniformity of Board decisions, or the matter to be referred is one of exceptional importance.

(2) A request for full Board consideration may be made by either party on any date which is both after the panel to which the case is assigned has issued its decision on a motion for reconsideration or relief from decision and within 10 working days after the date on which that party receives that decision. Any party making a request for full Board consideration shall state concisely in the motion the precise grounds on which the request is based.

(3) Promptly after such a request is made, a ballot will be taken among the judges; if a majority of them favors the request, the request will be granted. The result of the vote will promptly be reported by the Board through an order. The concurring or dissenting view of any judge who wishes to express such a view may issue at the time of such order or at any time thereafter.

(b) Initiation by Board. A majority of the judges may initiate full Board consideration of a matter at any time while the case is before the Board, no later than the last date on which any party may file a motion for reconsideration or relief from decision or order, or if such a motion is filed by a party, within ten days after a panel has resolved it. The parties will be informed promptly, through an order, of the matter to be considered by the full Board. The concurring or dissenting view of any judge who wishes to express such a view may issue at the time of such order or at any time thereafter.

(c) Decisions. If full Board consideration is granted at the request of a party or initiated by the Board, a vote shall be taken promptly on the pending matter. After this vote is taken, the Board shall promptly, by order, issue its determination, which shall include the concurring or dissenting view of any judge who wishes to express such a view.

(d) Effect of motion. A pending request for full Board consideration, whether initiated by a party or by the Board, does not affect the finality of a decision or suspend its operation.

**RULE 29
CLERICAL MISTAKES; HARMLESS ERROR**

(a) Clerical mistakes. Clerical mistakes in decisions, orders, or other parts of the record, and errors arising therein through oversight or inadvertence, may be corrected by the Board at any time on its own initiative or upon motion of a party on such terms, if any, as the Board may prescribe. During the pendency of an appeal to another tribunal, such mistakes may be corrected only with leave of the appellate tribunal.

(b) Harmless error. No error in the admission or exclusion of evidence, and no error or defect in any ruling, order, or decision of the Board, and no other error in anything done or not done by the Board will be a ground for granting a new hearing or for vacating, reconsidering,

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CBCA Rules of Procedure (cont'd):

modifying, or otherwise disturbing a decision or order of the Board unless refusal to act upon such error will prejudice a party or work a substantial injustice. At every stage of the proceedings the Board will disregard any error or defect that does not affect the substantial rights of the parties.

RULE 30
AWARD OF FEES AND OTHER EXPENSES

(a) Applications for fees and other expenses. An appropriate party in a proceeding before the Board may apply for an award of fees and other expenses, including if applicable an award of attorney fees, under the Equal Access to Justice Act, 5 U.S.C. §504, or any other provision that may entitle that party to such an award, subsequent to the Board's decision in the proceeding. Until it issues a decision, the Board will not consider a request for fees and other expenses.

(b) Time for filing. A party seeking an award may submit an application no later than 30 calendar days after a final disposition in the underlying appeal. The Board's decision becomes final (for purposes of Rule 30) when it is not appealed to the United States Court of Appeals for the Federal Circuit within the time permitted for appeal or, if the decision is appealed, when the time for petitioning the Supreme Court for certiorari has expired. An application for fees or other expenses may not be filed before the Board's decision is final; a request for fees or other expenses made before the Board's decision is final does not constitute an application.

(c) Application requirements. An application for fees and other expenses shall:

- (1) Identify the applicant and the appeal for which fees and other expenses are sought, and the amount being sought;
- (2) Establish that all applicable prerequisites for an award have been satisfied, including a succinct statement of why the applicant is eligible for an award of fees and other expenses;
- (3) Be accompanied by an exhibit fully documenting any fees or expenses being sought, including the cost of any study, analysis, engineering report, test, project, or similar matter. The date and a description of all services rendered or costs incurred shall be submitted for each professional firm or individual whose services are covered by the application, showing the hours spent in connection with the proceeding by each individual, a description of the particular services performed by specific date, the rate at which each fee has been computed, any expenses for which reimbursement is sought, and the total amount paid or payable by the applicant. Except in exceptional circumstances, all exhibits supporting applications for fees or expenses sought shall be publicly available. The Board may require the applicant to provide vouchers, receipts, or other substantiation for any fees and other expenses claimed and/or to submit to an audit by the Government of the claimed fees and other expenses;
- (4) Be signed by the applicant or an authorized officer, employee, or attorney of the applicant;
- (5) Contain or be accompanied by a written verification under oath or affirmation, or declaration under penalty of perjury, that the information provided in the application is true and correct;

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CBCA Rules of Procedure (cont'd):

(6) If the applicant asserts that it is a qualifying small business concern, contain evidence thereof; and

(7) If the application requests reimbursement of attorney fees that exceed the statutory rate, explain why an increase in the cost of living or a special factor, such as the limited availability of qualified attorneys for the proceedings involved, justifies such fees.

(d) Proceedings. (1) Within 30 calendar days after receipt by the respondent of an application under Rule 30, the respondent may file an answer. The answer shall explain in detail any objections to the award requested and set out the legal and factual bases supporting the respondent's position. If the respondent contends that any fees for consultants or expert witnesses for which reimbursement is sought in the application exceed the highest rate of compensation for expert witnesses paid by the agency, the respondent shall include in the answer evidence of such highest rate.

(2) Further proceedings shall be held only by order of the Board and only when necessary for full and fair resolution of the issues arising from the application. Such proceedings shall be minimized to the extent possible and shall not include relitigation of the case on the merits. A request that the Board order further proceedings under Rule 30 shall describe the disputed issues and explain why additional proceedings are necessary to resolve those issues.

(e) Decision. Any award ordered by the Board shall be paid pursuant to Rule 31.

RULE 31 PAYMENT OF BOARD AWARDS

(a) Generally. When permitted by law, payment of Board awards may be made in accordance with 31 U.S.C. §1304. Awards by the Board pursuant to the Equal Access to Justice Act shall be directly payable by the respondent agency over which the applicant has prevailed in the underlying appeal.

(b) Conditions for payment. Before a party may obtain payment of a Board award pursuant to 31 U.S.C. §1304, one of the following must occur:

(1) Both parties must, by execution of a Certificate of Finality, waive their rights to relief under Rules 26 and 27 and also their rights to appeal the decision of the Board; or

(2) The time for filing an appeal must expire.

(c) Procedure. Whenever the Board issues a decision or an order awarding an appellant any amount of money, it will attach to the copy of the decision sent to each party forms such as those contained in the Appendix to the rules of this chapter. Unless the appellant files a timely appeal from the decision, the appellant will complete the Certificate of Finality, sign it, and forward it to the person or persons who entered an appearance in the appeal on behalf of the respondent. Upon receipt of a completed and executed Certificate of Finality, unless the respondent files a timely appeal from the decision, the person or persons who entered an appearance in the appeal on behalf of the respondent will promptly transmit the appellant's Certificate of Finality, along with a certified copy of the Board's decision and any other necessary documentation, to the United States Department of the Treasury for payment.

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CBCA Rules of Procedure (cont'd):

RULE 32 APPEAL FROM A BOARD DECISION

- (a) Record on review. When a party has appealed a Board decision to the United States Court of Appeals for the Federal Circuit, the record on review shall consist of the decision sought to be reviewed, the record before the Board as described in Rule 9(a)(1) through (a)(13), and such other material contained in the Board's file as may be required by the Court of Appeals.
- (b) Notice. At the same time a party seeking review of a Board decision files a notice of appeal, that party shall provide a copy of the notice to the Board.
- (c) Filing of certified list of record materials. Promptly after service upon the Board of a copy of the notice of appeal of a Board decision, the Office of the Clerk of the Board shall file with the Clerk of the United States Court of Appeals for the Federal Circuit a certified list of all documents, transcripts of testimony, exhibits, and other materials constituting the record, or a list of such parts thereof as the parties may designate, adequately describing each. The Board will retain the record and transmit any part thereof to the Court upon the Court's order during the pendency of the appeal.
- (d) Request by attorney of record to review record. When a case is on appeal, an attorney of record may request permission from the Board to sign out for a reasonable period of time the record on appeal to review and to copy if the attorney is unable to gain access to the record from another source.

RULE 33 EX PARTE CONTACT; SANCTIONS AND OTHER PROCEEDINGS

- (a) Standards. All parties and their representatives, attorneys, and any expert/consultant retained by them or their attorneys, must obey directions and orders prescribed by the Board and adhere to standards of conduct applicable to such parties and persons. As to an attorney, the standards include the rules of professional conduct and ethics of the jurisdictions in which that attorney is licensed to practice, to the extent that those rules are relevant to conduct affecting the integrity of the Board, its process, or its proceedings. The Board will also look to voluntary professional guidelines in evaluating an individual's conduct.
- (b) Ex parte communications. No member of the Board or of the Board's staff shall entertain, nor shall any person directly or indirectly involved in an appeal submit to the Board or the Board's staff, off the record, any evidence, explanation, analysis, or advice, whether written or oral, without the knowledge and consent of the adverse party, regarding any matter at issue in that appeal. This provision does not apply to consultation among Board members or to ex parte communications concerning the Board's administrative functions or procedures.
- (c) Sanctions. When a party or its representative or attorney or any expert/consultant fails to comply with any direction or order issued by the Board (including an order to provide or permit discovery), or engages in misconduct affecting the Board, its process, or its proceedings, the Board may make such orders as are just, including the imposition of appropriate sanctions. The sanctions may include:

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CBCA Rules of Procedure (cont'd):

- (1) Taking the facts pertaining to the matter in dispute to be established for the purpose of the case in accordance with the contention of the party submitting the discovery request;
- (2) Forbidding challenge of the accuracy of any evidence;
- (3) Refusing to allow the disobedient party to support or oppose designated claims or defenses;
- (4) Prohibiting the disobedient party from introducing in evidence designated documents or items of testimony;
- (5) Striking pleadings or parts thereof, or staying further proceedings until the order is obeyed;
- (6) Dismissing the case or any part thereof;
- (7) Enforcing the protective order and disciplining individuals subject to such order for violation thereof, including disqualifying a party's representative, attorney, or expert/consultant from further participation in the case; or
- (8) Imposing such other sanctions as the Board deems appropriate.

(d) Denial of access to protected material for prior violations of protective orders. The Board may in its discretion deny access to protected material to any person found to have previously violated a protective order, regardless of who issued the order.

(e) Disciplinary proceedings. (1) In addition to the procedures in this Rule 33, the Board may discipline individual party representatives, attorneys, and experts/consultants for a violation of any Board order or direction or standard of conduct applicable to such individual where the violation seriously affects the integrity of the Board, its process, or its proceedings. Sanctions may be public or private, and may include admonishment, disqualification from a particular matter, referral to an appropriate licensing authority, or such other action as circumstances may warrant.

- (2) The Board in its discretion may suspend an individual from appearing before the Board as a party representative, attorney, or expert/consultant if, after affording such individual notice and an opportunity to be heard, a majority of the members of the full Board determines such a sanction is warranted.

**RULE 34
SEAL OF THE BOARD**

The Seal of the Board shall be a circular boss, the outer margin of which shall bear the legend "Civilian Board of Contract Appeals." The Seal shall be the means of authentication of all records, notices, orders, dismissals, opinions, subpoenas, and certificates issued by the Board.

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CBCA Rules of Procedure (cont'd):

PART II – EXPEDITED PROCEEDINGS

RULE 51 VARIATION FROM STANDARD PROCEEDINGS

The ultimate purpose of any Board proceeding is to resolve fairly and expeditiously any dispute properly before the Board. When, during the normal course of a Board proceeding, the parties agree that a change in established procedure will promote this purpose, the Board will make that change if it is deemed to be feasible and in the best interest of the parties, the Board, and the resolution of the issue(s) in controversy. Although any party may ask the Board to vary from standard proceedings, individuals and small businesses may find variations to be especially useful. The following are examples of these changes:

- (a) Establishing an expedited schedule of proceedings, such as by limiting the times provided in Rules 1 through 34 for various filings, to facilitate a prompt resolution of the case;
- (b) Developing a record and rendering a decision on the issue of entitlement prior to reviewing the issue of quantum in a party's claim;
- (c) Developing a record and rendering a decision on any legal or factual issue in advance of others when that issue is deemed critical to resolving the case or effecting a settlement of any items in dispute; and
- (d) Developing a record regarding relevant facts through an on-the-record round-table discussion with sworn witnesses, counsel, and the presiding judge rather than through formal direct and cross-examination of each of these same witnesses. This discussion shall be controlled by the presiding judge. It may be conducted, for example, through the presentation of narrative statements of witnesses or on an issue by issue basis. The presiding judge may also request that the parties' counsel or representatives present opening and/or closing statements in lieu of written briefs.

RULE 52 SMALL CLAIMS PROCEDURE

- (a) Election. (1) The small claims procedure is available solely at the appellant's election. Such election shall be made no later than 30 calendar days after the appellant's receipt of the agency answer, unless the presiding judge enlarges the time for good cause shown. The appellant may elect this procedure when
 - (i) There is a monetary amount in dispute and that amount is \$50,000 or less, or
 - (ii) (A) There is a monetary amount in dispute and that amount is \$150,000 or less, and
 - (B) The appellant is a small business concern (as that term is defined in the Small Business Act and regulations promulgated under that Act).
- (2) At the request of the respondent, or on its own initiative, the Board may determine whether the amount in dispute and/or the appellant's status makes the

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CBCA Rules of Procedure (cont'd):

election inappropriate. The respondent shall raise any objection to the election no later than 10 working days after receipt of a notice of election.

(b) Decision. The presiding judge may issue a decision, which may be in summary form, orally or in writing. A decision which is issued orally shall be reduced to writing; however, such a decision takes effect at the time it is rendered, prior to being reduced to writing. A decision shall be final and conclusive and shall not be set aside except in case of fraud. A decision shall have no value as precedent.

(c) Procedure. Promptly after receipt of the appellant's election of the small claims procedure, the Board shall establish a schedule of proceedings that will allow for the timely resolution of the appeal. Pleadings, discovery, and other prehearing activities may be restricted or eliminated.

(d) Time of decision. Whenever possible, the presiding judge shall resolve an appeal under this procedure within 120 calendar days from the Board's receipt of the election. The time for processing an appeal under this procedure may be extended if the appellant has not adhered to the established schedule. Either party's failure to abide by the Board's schedule may result in the Board drawing evidentiary inferences adverse to the party at fault.

RULE 53 ACCELERATED PROCEDURE

(a) Election. (1) The accelerated procedure is available solely at the appellant's election, and only when there is a monetary amount in dispute and that amount is \$100,000 or less. Such election shall be made no later than 30 calendar days after the appellant's receipt of the agency answer, unless the presiding judge enlarges the time for good cause shown.

(2) At the request of the respondent, or on its own initiative, the Board may determine whether the amount in dispute is greater than \$100,000, such that the election is inappropriate. The respondent shall raise any objection to the election no later than 10 working days after receipt of a notice of election.

(b) Decision. Each decision shall be rendered by the presiding judge with the concurrence of one of the other judges assigned to the panel; in the event the two judges disagree, the third judge assigned to the panel will participate in the decision.

(c) Procedure. Promptly after receipt of the appellant's election of the accelerated procedure, the Board shall establish a schedule of proceedings that will allow for the timely resolution of the appeal. Pleadings may be simplified, and discovery and other prehearing activities may be restricted or eliminated.

(d) Time of decision. Whenever possible, the Board shall resolve an appeal under this procedure within 180 calendar days from the Board's receipt of the election. The time for processing an appeal under this procedure may be extended if the appellant has not adhered to the established schedule. Either party's failure to abide by the Board's schedule may result in the Board drawing evidentiary inferences adverse to the party at fault.

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CBCA Rules of Procedure (cont'd):**RULE 54
ALTERNATIVE DISPUTE RESOLUTION**

(a) Availability of alternative dispute resolution (ADR) procedures at the Board. The Board will make its services available for ADR proceedings to help resolve issues in controversy and claims involving procurements, contracts (including interagency agreements), and grants. The use of ADR will not toll any relevant statutory time limitations.

(1) Matters not on Board's Contract Disputes Act (CDA) docket. Upon request, the Board will make an ADR Neutral available for an ADR proceeding, even if a contracting officer's decision has not been issued or is not contemplated. To initiate an ADR proceeding for all matters other than docketed CDA appeals, the parties shall jointly request ADR in writing and direct such a request to the Board Chairman. For agencies whose issues in controversy do not fall within the Board's jurisdiction, the Board may provide ADR services on a reimbursable basis.

(2) Docketed CDA appeals. Parties are encouraged to consider the advantages of using ADR techniques at any stage of an appeal. Joint requests for ADR services for docketed appeals should be addressed to the Board Chairman, with a copy to the presiding judge. ADR may be used concurrently with standard litigation proceedings such as the filing of pleadings and discovery, or the presiding judge may suspend such proceedings for a reasonable period of time while the parties attempt to resolve the appeal using ADR.

(b) Conduct of ADR. (1) Selection of ADR Neutral. The parties may ask the Board Chairman to appoint a judge(s) to serve as the ADR Neutral(s). If desired, the parties may request the appointment of a particular judge(s). In a docketed appeal, the parties may also request that the presiding judge serve as the ADR Neutral for the ADR proceeding. If the parties elect a non-binding ADR procedure and the implementation of the procedure does not result in a settlement, where the procedure has involved ex parte contact, the ADR Neutral may retain the case for adjudication as the presiding judge, but only if the parties and the presiding judge all agree to such retention. If the procedure has not involved ex parte contact, the ADR Neutral, after considering the parties' views, may retain the case as the presiding judge at his/her discretion.

(2) The ADR agreement. Before an ADR proceeding can occur, the parties must execute a written ADR agreement. This agreement should set forth, among other things, the identity of the ADR Neutral to be used, the role and authority of the Neutral, the ADR techniques to be employed, the scope and extent of any discovery relating to ADR, the location and schedule for the ADR proceeding, and the extent to which dispute resolution communications in conjunction with the ADR proceeding are to be kept confidential (Rule 54(b)(3)).

(3) Confidentiality of ADR communications and materials. Written material prepared specifically for use in an ADR proceeding, oral presentations made at an ADR proceeding, and all discussions in connection with such proceedings are considered "dispute resolution communications" as defined in 5 U.S.C. §571(5) and are subject to the confidentiality requirements of 5 U.S.C. §574. Unless otherwise specifically agreed

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CBCA Rules of Procedure (cont'd):

by the parties, confidential dispute resolution communications shall be inadmissible as evidence in any pending or future Board proceeding involving the parties or the issue in controversy which is the subject of the ADR proceeding. However, evidence otherwise admissible before the Board is not rendered inadmissible because of its use in an ADR proceeding. The Board will not retain written materials used in an ADR proceeding after the proceeding is concluded or otherwise terminated. Parties may request a protective order in an ADR proceeding in the manner provided in Rule 9(c).

(c) **Types of ADR.** ADR is not defined by any single procedure or set of procedures. Board judges, when engaged as ADR Neutrals, most commonly use a combination of facilitative and evaluative mediation approaches, as explained in paragraphs (c)(1) through (c)(7) of this section. However, the Board will consider the use of any ADR technique or combination of techniques proposed by the parties in their ADR agreement which is deemed to be fair, reasonable, and in the best interest of the parties, the Board, and the resolution of the issue(s) in controversy. The following are descriptions of some available techniques:

(1) **Facilitative mediation.** Facilitative mediations usually begin with a joint session, where the parties each make informal presentations to one another and the ADR Neutral regarding the facts and circumstances giving rise to the issues in controversy as well as an explanation of their respective legal positions. The ADR Neutral, as a mediator, aids the parties in settling their dispute, frequently by meeting with each party separately in confidential sessions and engaging in *ex parte* discussions with each of the parties, for the purpose of facilitating the formulation and transmission of settlement offers.

(2) **Evaluative mediation.** In addition to engaging in facilitative mediation, if authorized under the terms of the parties' ADR agreement, the ADR Neutral may also discuss informally the strengths and weaknesses of the parties' respective positions in either joint sessions or confidential sessions.

(3) **Mini-trial.** The parties make abbreviated presentations to an ADR Neutral who sits with the parties' designated principal representatives as a mini-trial panel to hear and evaluate evidence relating to an issue in controversy. The ADR Neutral may thereafter meet with the principal representatives to attempt to mediate a settlement. The mini-trial process may also be a prelude to the Neutral's provision of a non-binding advisory opinion (Rule 54(c)(4)) or to the Neutral's rendering of a binding decision (Rule 54(c)(5)).

(4) **Non-binding advisory opinion.** The parties present to the ADR Neutral information upon which the Neutral bases a non-binding, advisory opinion regarding the merits of the dispute. The opinion may be delivered to the parties jointly, either orally or in writing. The manner in which the information is presented will vary, depending upon the circumstances of the dispute and the terms of the parties' ADR agreement. Presentations may range from an informal proffer of evidence together with limited argument from the parties, to a more formal presentation, with oral testimony, exchange of documentary evidence, and argument from counsel.

(5) **Summary binding decision.** This is a binding ADR procedure similar to binding arbitration under which, by prior agreement of the parties, the ADR Neutral renders a

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CBCA Rules of Procedure (cont'd):

brief written decision which is binding, non-precedential, and non-appealable. As in a procedure under which the Neutral provides a non-binding advisory opinion, the manner in which information is presented for a summary binding decision may vary depending on the circumstances of the particular dispute and the wishes of the parties as set out in their ADR agreement.

(6) Other procedures. In addition to other ADR techniques, including modifications to those listed in paragraphs (c)(1) through (c)(5) of this section, the parties may use ADR neutrals outside the Board and techniques which do not require direct Board involvement.

(7) Selective use of standard procedures. Parties considering ADR proceedings are encouraged to adapt for their purposes any provisions in Rules 1 through 34 of the Board's rules which they believe will be useful.

APPENDIX TO PART I — FORM NOS. 1-5

- Form 1 — GSA Form 2465, Notice of Appeal
- Form 2 — Notice of Appearance
- Form 3 — GSA Form 9534, Subpoena
- Form 4 — Government Certificate of Finality
- Form 5 — Appellant/Applicant Certificate of Finality

NOTICE OF APPEAL	DATE	OMB APPROVAL NO. 3090-0221
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TO: Civilian Board of Contract Appeals

I/We hereby appeal the final decision of _____ issued _____.
(Name of Contracting Officer) (Date)
 in connection with a dispute under Contract No. _____. This contract was awarded _____
(Date)
 for _____
(Type of commodity, service, or construction)
 by _____,
(Name of agency and organizational unit) (City and State)

1. DESCRIBE THE NATURE OF THE DISPUTE INVOLVED IN THE FINAL DECISION AND ANY OTHER CIRCUMSTANCES GIVING RISE TO THIS APPEAL:

2. DESCRIBE THE RELIEF WHICH YOU SEEK INCLUDING AN ESTIMATE OF THE AMOUNT OF MONEY IN CONTROVERSY, IF ANY, AND IF KNOWN:

APPELLANT			ATTORNEY FOR APPELLANT		
NAME			NAME		
TITLE			FIRM		
STREET			STREET		
CITY			CITY		
STATE	ZIP CODE	TELEPHONE NUMBER ()	STATE	ZIP CODE	TELEPHONE NUMBER ()
APPELLANT'S SIGNATURE			ATTORNEY'S SIGNATURE		



UNITED STATES
CIVILIAN BOARD OF CONTRACT APPEALS

_____ :
 _____ : CBCA _____
 _____ :
 _____ :
 Contract/Solicitation No. _____ :
 _____ :

NOTICE OF APPEARANCE

To: _____
 Board Judge
 Civilian Board of Contract Appeals

Please enter my appearance as counsel for / representative of _____
 _____ in the above captioned case.

_____ (Name)	_____ (Date)
_____ (Title)	_____ (Phone)
_____ (Address)	_____ (Facsimile)

CERTIFICATE OF SERVICE

I hereby certify that a copy of the foregoing Notice of Appearance was mailed postage paid/delivered this _____ day of _____, 20__, to _____.

 Signature

Note: This format shall be used only as a guide for individual preparation.



UNITED STATES
CIVILIAN BOARD OF CONTRACT APPEALS

_____ :
 _____ :
 _____ : CBCA _____
 _____ :
 _____ :
 Contract/Solicitation No. :
 _____ :

GOVERNMENT CERTIFICATE OF FINALITY

- A. Date claim(s) filed with the contracting officer:
- B. Amount to be paid: \$ _____.
- C. Agency address (regional office if other than central office):
- D. Agency Certification

_____ hereby certifies that:

- (1) it has not initiated and will not initiate any proceeding at the Board for the reconsideration of, or relief from, this award;
- (2) it has not initiated and will not initiate any appeal of this award to the United States Court of Appeals for the Federal Circuit.

Government Agency

Date

By _____
Signature and Title

Note: This format shall be used only as a guide for individual preparation.



UNITED STATES
CIVILIAN BOARD OF CONTRACT APPEALS

_____ :
 _____ : CBCA _____
 _____ :
 Contract/Solicitation No. :
 _____ :

APPELLANT/APPLICANT CERTIFICATE OF FINALITY

- A. Address to which check should be sent (if check is to be sent to counsel, enclose a power of attorney):
- B. Appellant/Applicant Certification

_____ hereby certifies that:

- (1) it has not initiated and will not initiate any proceeding at the Board for the reconsideration of, or relief from, this award;
- (2) it has not initiated and will not initiate any appeal of this award to the United States Court of Appeals for the Federal Circuit; and
- (3) it agrees to accept the amount awarded, plus any interest awarded, in accordance with the Board's decision in this case, in full and final satisfaction of its case.

Appellant/Applicant

Date

By _____
Signature and Title

Note: This format shall be used only as a guide for individual preparation.

CBCA Rules of Procedure (cont'd):

CROP INSURANCE CASES

RULE 201 SCOPE OF RULES

These procedures govern the Board's resolution of disputes between insurance companies and the Department of Agriculture's Risk Management Agency (RMA) involving actions of the Federal Crop Insurance Corporation (FCIC). Prior to the creation of this Board, the Department of Agriculture Board of Contract Appeals resolved this variety of dispute pursuant to statute, 7 U.S.C. §1501 *et seq.* (the Federal Crop Insurance Act), and regulation, 7 CFR 24.4(b) and 400.169. The Board has this authority under an agreement with the Secretary of Agriculture, as permitted under section 42(c)(2) of the Office of Federal Procurement Policy Act, 41 U.S.C. §438(c)(2).

RULE 202 RULES FOR CROP INSURANCE CASES

The rules of procedure for these cases are the same as the rules of procedure for Contract Disputes Act appeals, with these exceptions:

(a) **Rule 1.** (1) In Rule 1(b)(1), the term "appeal" means a dispute between an insurance company that is a party to a Standard Reinsurance Agreement (or other reinsurance agreement) and the RMA, and the term "appellant" means the insurance company filing an appeal.

(2) In Rule 1(b)(5)(i), a notice of appeal is filed upon its receipt by the Office of the Clerk of the Board, not when it is mailed.

(3) Rule 1(b)(7) does not apply to FCIC cases.

(b) **Rule 2.** (1) Rule 2(a)(1)(i) is replaced with the following for FCIC cases: A notice of appeal shall be in writing and shall be signed by the appellant or by the appellant's attorney or authorized representative. If the appeal is from a determination by the Deputy Administrator of Insurance Services regarding an action alleged not to be in accordance with the provisions of a Standard Reinsurance Agreement (or other reinsurance agreement), or if the appeal is from a determination by the Deputy Administrator of Compliance concerning a determination regarding a compliance matter, the notice of appeal should describe the determination in enough detail to enable the Board to differentiate that decision from any other; the appellant can satisfy this requirement by attaching to the notice of appeal a copy of the Deputy Administrator's determination. If an appeal is taken from the failure of the Deputy Administrator to make a timely determination (see Rule 2(b)(1)(ii)), the notice of appeal should describe in detail the matter that the Deputy Administrator has failed to determine; the appellant can satisfy this requirement by attaching to the notice of appeal a copy of the written request for a determination it sent to the Deputy Administrator.

(2) In Rule 2(a)(1)(ii) and (iii), the references to "contracting officer" are references to "Deputy Administrator."

(3) Rule 2(a)(2) does not apply to FCIC cases.

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CBCA Rules of Procedure (cont'd):

- (4) In Rule 2(b)(1)(i), an appeal from a determination of a Deputy Administrator shall be filed no later than 90 calendar days after the date the appellant receives that determination. The Board is authorized to resolve only those appeals that are timely filed.
- (5) In Rule 2(b)(1)(ii), an appeal may be filed with the Board if the Deputy Administrator fails or refuses to issue a determination within 90 days after the appellant submits a request for a determination.
- (c) **Rule 4.** (1) In Rule 4, the references to “contracting officer” are references to “Deputy Administrator.”
- (2) In Rule 4(a), paragraphs (1) through (7), describing materials included in the appeal file, are replaced by the following:
- (i) The determination of the Deputy Administrator that is the subject of the dispute;
 - (ii) The reinsurance agreement (with amendments or modifications) at issue in the dispute;
 - (iii) Pertinent correspondence between the parties that is relevant to the dispute, including prior administrative determinations and related submissions;
 - (iv) Documents and other tangible materials on which the Deputy Administrator relied in making the underlying determination; and
 - (v) Any additional material pertinent to the authority of the Board or the resolution of the dispute.
- (3) The following subsection is added to Rule 4: Media on which appeal file is to be submitted. All appeal file submissions, including the index, shall be submitted in two forms: paper and in a text or .pdf format submitted on a compact disk. Each compact disk shall be labeled with the name and docket number of the case. The judge may delay the submission of the compact disk copy of the appeal file until the close of the evidentiary record.
- (d) **Rule 5.** In Rule 5(a)(2), the references to “contracting officer” are references to “Deputy Administrator.”
- (e) **Rule 6.** Rule 6(d) does not apply to FCIC cases.
- (f) **Rule 12.** In Rule 12(a), the references to “contracting officer” are references to “Deputy Administrator.”
- (g) **Rule 15.** In Rule 15(d), the final sentence does not apply to FCIC cases.
- (h) **Rule 16.** In Rule 16, (b) through (h) do not apply to FCIC cases. Instead, upon the written request of any party filed with the Office of the Clerk of the Board, or upon the initiative of a judge, a judge is authorized by delegation from the Secretary of Agriculture to request the appropriate United States Attorney to apply to the appropriate United States District Court for the issuance of subpoenas pursuant to 5 U.S.C. §304.
- (i) **Rule 21.** (1) In Rule 21(f), the final sentence does not apply to FCIC cases.
- (2) In Rule 21(g), the final sentence does not apply to FCIC cases.
- (j) **Rule 25.** In Rule 25(a), the initial phrase, “Except as provided in Rule 52 (small claims procedure),” does not apply to FCIC cases.

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CBCA Rules of Procedure (cont'd):

- k) Rule 32. In Rule 32, (a) through (c) are replaced with the following for FCIC cases:
- (1) Finality of Board decision. A decision of the Board is a final administrative decision.
 - (2) Appeal permitted. An appellant may file suit in the appropriate United States District Court to challenge the Board's decision. An appellant which files such a suit shall provide the Board with a copy of the complaint.
- (l) Rule 52. Rule 52 does not apply to FCIC cases.
- (m) Rule 53. Rule 53 does not apply to FCIC cases.

TRANSPORTATION RATE CASES

RULE 301 SCOPE

- (a) Authority. 31 U.S.C. §3726(i)(1) provides that a carrier or freight forwarder may request the Administrator of General Services to review an action taken by the Audit Division of the General Services Administration's Office of Transportation and Property Management (the Audit Division). The Administrator has redelegated those functions to the Civilian Board of Contract Appeals.
- (b) Type of claim; review of claim. These procedures are applicable to the review of claims made by a carrier or freight forwarder pursuant to 31 U.S.C. §3726(i)(1). The Board will issue the final agency decision on a claim based on the information submitted by the claimant, the Audit Division, and the department or agency (the agency) for which the services were provided. The burden is on the claimant to establish the timeliness of its claim, the liability of the agency, and the claimant's right to payment.

RULE 302 FILING CLAIMS

- (a) Form. A claim shall be in writing and must be signed by the claimant or by the claimant's attorney or authorized representative. No particular form is required. The request should describe the basis for the claim and state the amount sought. The request should also include—
- (1) The name, address, telephone number, and facsimile machine number, if available, of the claimant;
 - (2) The Government bill of lading or Government transportation request number;
 - (3) The claimant's bill number;
 - (4) The Government voucher number and date of payment;
 - (5) The Audit Division claim number;
 - (6) The agency for which the services were provided; and
 - (7) Any other identifying information.

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CBCA Rules of Procedure (cont'd):

(b) When and where claims are filed. A claim is filed when it is received by the Office of the Clerk of the Board during the Board's working hours. The Board's mailing address is: 1800 F Street, NW, Washington, DC 20405. The Board is located at: 1800 M Street, NW, 6th Floor, Washington, DC 20036. The Clerk's telephone number is: (202) 606-8800. The Clerk's facsimile machine number is (202) 606-0019. The Board's working hours are 8:00 a.m. to 4:30 p.m., Eastern Time, on each day other than a Saturday, Sunday, or federal holiday.

(c) Notice of docketing. A claim will be docketed by the Office of the Clerk of the Board, and a written notice of docketing will be sent promptly to the claimant, the Director of the Audit Division, and the agency for which the services were provided. The notice of docketing will identify the judge to whom the claim has been assigned.

(d) Service of copy. The claimant shall send to the Audit Division and the agency identified in paragraph (a)(6) of this section copies of all material provided to the Board. All submissions to the Board by a claimant shall indicate that a copy has been provided to the Audit Division and the agency.

RULE 303 RESPONSES TO CLAIM

(a) Content of responses. Within 30 calendar days after docketing by the Board (or within 60 calendar days after docketing if the agency office for which the services were provided is located outside the 50 states and the District of Columbia), the Audit Division and the agency for which the services were provided shall each submit to the Board:

- (1) A simple, concise, and direct statement of its response to the claim;
- (2) Citations to applicable statutes, regulations, and cases; and
- (3) Any additional information deemed necessary to the Board's review of the claim.

(b) Service of copy. All responses submitted to the Board shall indicate that a copy has been sent to the claimant and to the Audit Division or the agency, as appropriate. To expedite proceedings, if either the Audit Division or the agency will not file a response (e.g., it believes its reasons for denying the claim were sufficiently explained in the material filed by the claimant), it should notify the Board, the claimant, and the Audit Division or the agency, as appropriate, that it does not intend to file a response.

RULE 304 REPLY TO THE AUDIT DIVISION AND AGENCY RESPONSES

A claimant may file with the Board and serve on the Audit Division and the agency a reply to the Audit Division and agency responses within 30 calendar days after receiving the responses (or within 60 calendar days after receiving the responses, if the claimant is located outside the 50 states and the District of Columbia). To expedite proceedings, if the claimant does not wish to respond, the claimant should so notify the Board, the Audit Division, and the agency.

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CBCA Rules of Procedure (cont'd):**RULE 305
PROCEEDINGS**

(a) Requests for additional time. The claimant, the Audit Division, or the agency may request additional time to make any filing.

(b) Conferences. The judge will not engage in ex parte communications involving the underlying facts or merits of the claim. The judge may hold a conference with the claimant, the Audit Division, and the agency at any time, for any purpose. The judge may provide the participants a memorandum reflecting the results of a conference.

(c) Submissions. The judge may require the submission of additional information at any time. The claimant, the Audit Division, or the agency may request an opportunity to make additional submissions; however, no such submission may be made unless authorized by the judge.

**RULE 306
DECISIONS**

The judge will issue a written decision based upon the record, which includes submissions by the claimant, the Audit Division, and the agency, and information provided during conferences. The claimant, the Audit Division, and the agency will each be furnished a copy of the decision by the Office of the Clerk of the Board. In addition, all Board decisions are posted weekly on the Internet. The Board's Internet address is: www.cbca.gsa.gov.

**RULE 307
RECONSIDERATION OF BOARD DECISION**

A request for reconsideration may be made by the claimant, the Audit Division, or the agency. Such requests must be received by the Board within 30 calendar days after the date the decision was issued (or within 60 calendar days after the date the decision was issued, if the claimant or agency office making the request is located outside the 50 states and the District of Columbia). The request for reconsideration should state the reasons why the Board should consider the request. Mere disagreement with a decision or re-argument of points already made is not a sufficient ground for seeking reconsideration.

**RULE 308
PAYMENT OF SUCCESSFUL CLAIMS**

The agency for which the services were provided shall pay amounts the Board determines are due the claimant.

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CBCA Rules of Procedure (cont'd):

TRAVEL AND RELOCATION EXPENSES CASES

RULE 401

SCOPE

(a) Authority. These procedures govern the Board's resolution of claims by Federal civilian employees for certain travel or relocation expenses. 31 U.S.C. §3702 vests the authority to settle these claims in the Administrator of General Services, who has redelegated that function to the Civilian Board of Contract Appeals. The requirements contained in 31 U.S.C. §3702, including limitations on the time within which claims may be filed, apply to the Board's review of these claims.

(b) Types of claims. These procedures are applicable to the review of two types of claims made against the United States by federal civilian employees:

- (1) Claims for reimbursement of expenses incurred while on official temporary duty travel; and
- (2) Claims for reimbursement of expenses incurred in connection with relocation to a new duty station.

(c) Review of claims. Any claim for entitlement to travel or relocation expenses must first be filed with the claimant's own department or agency (the agency). The agency shall initially adjudicate the claim. A claimant disagreeing with the agency's determination may request review of the claim by the Board. The burden is on the claimant to establish the timeliness of the claim, the liability of the agency, and the claimant's right to payment. The Board will issue the final decision on a claim based on the information submitted by the claimant and the agency.

RULE 402

FILING CLAIMS

(a) Filing claims. A claim may be sent to the Board in either of the following ways:

- (1) Claim filed by claimant. A claim shall be in writing and must be signed by the claimant or by the claimant's attorney or authorized representative. No particular form is required. The request should describe the basis for the claim and state the amount sought. The request should also include—
 - (i) The name, address, telephone number, and facsimile machine number, if available, of the claimant;
 - (ii) The name, address, telephone number, and facsimile machine number, if available, of the agency employee who denied the claim
 - (iii) A copy of the denial of the claim; and
 - (iv) Any other information which the claimant believes the Board should consider.
- (2) Claim forwarded by agency on behalf of claimant. If an agency has denied a claim for travel or relocation expenses, it may, at the claimant's request,

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CBCA Rules of Procedure (cont'd):

forward the claim to the Board. The agency shall include the information required by paragraph (a)(1) of this section and by Rule 403.

(3) Where claims are filed. Claims should be filed with the Office of the Clerk of the Board. The Board's mailing address is: 1800 F Street, NW, Washington, DC 20405. The Board is located at: 1800 M Street, NW, 6th Floor, Washington, DC 20036. The Clerk's telephone number is: (202) 606-8800. The Clerk's facsimile machine number is: (202) 606-0019. The Board's working hours are 8:00 a.m. to 4:30 p.m., Eastern Time, on each day other than a Saturday, Sunday, or federal holiday.

(b) Notice of docketing. A request for review will be docketed by the Office of the Clerk of the Board. A written notice of docketing will be sent promptly to the claimant and the agency contact. The notice of docketing will identify the judge to whom the claim has been assigned.

(c) Service of copy. The claimant shall send to the agency employee identified in paragraph (a)(1)(ii) of this section, or the individual otherwise identified by the agency to handle the claim, copies of all material provided to the Board. If an agency forwards a claim to the Board, it shall, at the same time, send to the claimant a copy of all material sent to the Board. All submissions to the Board shall indicate that a copy has been provided to the claimant or the agency.

RULE 403 RESPONSE TO CLAIM

(a) Content of response. When a claim has been filed with the Board by a claimant, within 30 calendar days after docketing by the Board (or within 60 calendar days after docketing, if the agency office involved is located outside the 50 states and the District of Columbia), the agency shall submit to the Board:

- (1) A simple, concise, and direct statement of its response to the claim;
- (2) Citations to applicable statutes, regulations, and cases; and
- (3) Any additional information the agency considers necessary to the Board's review of the claim.

(b) Service of copy. A copy of these submissions shall also be sent to the claimant. To expedite proceedings, if the agency believes its reasons for denying the claim were sufficiently explained in the material filed by the claimant, it should notify the Board and the claimant that it does not intend to file a response.

RULE 404 REPLY TO AGENCY RESPONSE

A claimant may file a reply to the agency response within 30 calendar days after receiving the response (or within 60 calendar days after receiving the response, if the claimant is located outside the 50 states and the District of Columbia). If the claim has been forwarded by the agency, the claimant shall have 30 calendar days from the time the claim is docketed by the Board (or 60 calendar days after docketing, if the claimant is located outside the 50 states

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CBCA Rules of Procedure (cont'd):

and the District of Columbia) to reply. To expedite proceedings, if the claimant does not wish to reply, the claimant should so notify the Board and the agency.

**RULE 405
PROCEEDINGS**

- (a) Requests for additional time. The claimant or the agency may request additional time to make any filing.
- (b) Conferences. The judge will not engage in ex parte communications involving the underlying facts or merits of the claim. The judge may hold a conference with the claimant and the agency contact, at any time, for any purpose. The judge may provide the participants a memorandum reflecting the results of a conference.
- (c) Additional submissions. The judge may require the submission of additional information at any time.

**RULE 406
DECISIONS**

The judge will issue a written decision based upon the record, which includes submissions by the claimant and the agency, and information provided during conferences. The claimant and the agency will each be furnished a copy of the decision by the Office of the Clerk of the Board. In addition, all Board decisions are posted weekly on the Internet. The Board's Internet address is: www.cbca.gsa.gov.

**RULE 407
RECONSIDERATION OF BOARD DECISION**

A request for reconsideration may be made by the claimant or the agency. Such requests must be received by the Board within 30 calendar days after the date the decision was issued (or within 60 calendar days after the date the decision was issued, if the claimant or the agency office making the request is located outside the 50 states and the District of Columbia). The request for reconsideration should state the reasons why the Board should consider the request. Mere disagreement with a decision or re-argument of points already made is not a sufficient ground for seeking reconsideration.

**RULE 408
PAYMENT OF SUCCESSFUL CLAIMS**

The agency shall pay amounts the Board determines are due the claimant.

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CBCA Rules of Procedure (cont'd):

DECISIONS AUTHORIZED UNDER 31 U.S.C. 3529

RULE 501

SCOPE

These procedures govern the Board's issuance of decisions, upon the request of an agency disbursing or certifying official, or agency head, on questions involving payment of travel or relocation expenses that were formerly issued by the Comptroller General under 31 U.S.C. §3529. Section 204 of the General Accounting Office Act of 1996, Pub. L. 104-316, transfers the authority to issue these decisions to the Director of the Office of Management and Budget, and authorizes the Director to delegate the authority to perform that function to another agency or agencies. The Director has delegated the authority to issue these decisions to the Administrator of General Services, who has redelegated that function to the Civilian Board of Contract Appeals.

RULE 502

REQUEST FOR DECISION

(a) Request for decision. (1) A disbursing or certifying official of an agency, or the head of an agency, may request from the Board a decision (referred to as a "Section 3529 decision") on a question involving a payment the disbursing official or head of agency will make, or a voucher presented to a certifying official for certification, which concerns the following type of claim made against the United States by a federal civilian employee:

- (i) A claim for reimbursement of expenses incurred while on official temporary duty travel; and
- (ii) A claim for reimbursement of expenses incurred in connection with relocation to a new duty station.

(2) A request for a Section 3529 decision shall be in writing; no particular form is required. The request must refer to a specific payment or voucher; it may not seek general legal advice. The request should—

- (i) Explain why the official is seeking a Section 3529 decision, rather than taking action on his or her own regarding the matter;
- (ii) State the question presented and include citations to applicable statutes, regulations, and cases;
- (iii) Include—
 - (A) The name, address, telephone number, and facsimile machine number (if available) of the official making the request;
 - (B) The name, address, telephone number, and facsimile number (if available) of the employee affected by the specific payment or voucher; and
 - (C) Any other information which the official believes the Board should consider; and

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CBCA Rules of Procedure (cont'd):

(iv) Be delivered to the Office of the Clerk of the Board. The Board's mailing address is: 1800 F Street, NW, Washington, DC 20405. The Board is located at: 1800 M Street, NW, 6th Floor, Washington, DC 20036. The Clerk's telephone number is: (202) 606-8800. The Clerk's facsimile machine number is: (202) 606-0019. The Board's working hours are 8:00 a.m. to 4:30 p.m., Eastern Time, on each day other than a Saturday, Sunday, or federal holiday.

(b) Notice of docketing. A request for a Section 3529 decision will be docketed by the Office of the Clerk of the Board. A written notice of docketing will be sent promptly to the official and the affected employee. The notice of docketing will identify the judge to whom the request has been assigned.

(c) Service of copy. The official submitting a request for a Section 3529 decision shall send to the affected employee copies of all material provided to the Board. All submissions to the Board shall indicate that a copy has been provided to the affected employee.

RULE 503 ADDITIONAL SUBMISSIONS

If the affected employee wishes to submit any additional information to the Board, he or she must submit such information within 30 calendar days after receiving the copy of the request for decision and supporting material (or within 60 calendar days after receiving the copy, if the affected employee is located outside the 50 states and the District of Columbia). To expedite proceedings, if the employee does not wish to make an additional submission, the employee should so notify the Board and the agency.

RULE 504 PROCEEDINGS

(a) Requests for additional time. The agency or the affected employee may request additional time to make any filing.

(b) Conferences. The judge will not engage in ex parte communications involving the underlying facts or merits of the request. The judge may hold a conference with the agency and the affected employee, at any time, for any purpose. The judge may provide the participants a memorandum reflecting the results of a conference.

(c) Additional submissions. The judge may require the submission of additional information at any time.

RULE 505 DECISIONS

The judge will issue a written decision based upon the record, which includes submissions by the agency and the affected employee, and information provided during conferences. The agency and the affected employee will each be furnished a copy of the decision by the Office of the Clerk of the Board. In addition, all Board decisions are posted weekly on the Internet. The Board's Internet address is: www.cbca.gsa.gov.

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CBCA Rules of Procedure (cont'd):**RULE 506
RECONSIDERATION OF BOARD DECISION**

A request for reconsideration may be made by the agency or the affected employee. Such requests must be received by the Board within 30 calendar days after the date the decision was issued (or within 60 calendar days after the date the decision was issued, if the agency or the affected employee making the request is located outside the 50 states and the District of Columbia). The request for reconsideration should state the reasons why the Board should consider the request. Mere disagreement with a decision or re-argument of points already made is not a sufficient ground for seeking reconsideration.