



ARMED SERVICES BOARD OF CONTRACT APPEALS  
SKYLINE 6, ROOM 703  
5109 LEESBURG PIKE  
FALLS CHURCH, VA 22041-3208

**RULES**  
*of the*  
**ARMED SERVICES BOARD**  
**OF CONTRACT APPEALS**

21 July 2014 ~~May 2011~~

THESE RULES ARE APPLICABLE TO  
APPEALS PROCESSED UNDER THE  
CONTRACT DISPUTES ACT (CDA),  
41 U.S.C. §§ 7101-7109,  
AND OTHER APPEALS TO THE EXTENT  
CONSISTENT WITH LAW.

# **RULES OF THE ARMED SERVICES BOARD OF CONTRACT APPEALS**

## **PREFACE**

### **I. Jurisdiction for Considering Appeals**

The Armed Services Board of Contract Appeals (referred to herein as the Board) has jurisdiction to decide any appeal from a final decision of a contracting officer, pursuant to the Contract Disputes Act, 41 U.S.C. §§ 7101-7109, or its Charter, 48 CFR Chap. 2, App. A, Pt. 1, relative to a contract made by ~~(i)~~ the Department of Defense, the Department of the Army, the Department of the Navy, and the Department of the Air Force or the National Aeronautics and Space Administration or ~~(ii)~~ any other department or agency, as permitted by law.

### **II. Location and Organization of the Board**

(a) The Board's address is Skyline Six, Room 703, 5109 Leesburg Pike, Falls Church, VA 22041-3208; telephone 703-681-8500 (~~receptionist~~general); 703-681-8502 (Recorder). The Board's facsimile number is 703-681-8535. The Board's Recorder's email address is [asbca.recorder@mail.mil](mailto:asbca.recorder@mail.mil). The Board's Web site address is <http://www.asbca.mil>.

(b) The Board consists of a Chairman, two or more Vice Chairmen, and other Members, all of whom are attorneys at law duly licensed by a State, commonwealth, territory, or the District of Columbia. Board Members are designated Administrative Judges.

~~(c)~~—There are a number of divisions of the ~~Armed Services Board of Contract Appeals~~, established by the Chairman of the Board in such manner as to provide for the most effective and expeditious handling of appeals. The Chairman and a Vice Chairman ~~of the Board~~ act as members of each division. ~~Appeals are assigned to the divisions for decision without regard to the military department or other procuring agency which entered into the contract involved.~~ Hearings may be held by an ~~designated member~~ (Administrative Judge), or by a duly authorized examiner. Except for appeals processed under the expedited or accelerated procedure (see Rules 12.2(c) and 12.3(c)), the decision of a majority of a division constitutes the decision of the Board, unless the Chairman refers the appeal to the Board's Senior Deciding Group (consisting of the Chairman, Vice Chairmen, ~~and~~ all division heads, and the Judge who drafted the decision), in which event a decision of a majority of that group constitutes the decision of the Board. Appeals referred to the Senior Deciding Group are those of unusual difficulty or significant precedential importance, or ~~which that~~ have

occasioned serious dispute within the normal division decision process. ~~For decisions of appeals processed under the expedited or accelerated procedure, see Rules 12.2(e) and 12.3 (b):~~

(d) The Board will to the fullest extent practicable provide informal, expeditious, and inexpensive resolution of disputes.

**Formatted:** Space Before: 15 pt, Line spacing: Exactly 14.9 pt, Font Alignment: Baseline, Tab stops: 0.35", Left + 0.6", Left

**TABLE OF CONTENTS**

**RULES OF THE  
ARMED SERVICES BOARD OF CONTRACT APPEALS**

		Page
<b>PRELIMINARY PROCEDURES</b>		
Rule 1	Appeals, <del>How Taken</del>	1
Rule 2	<del>Notice of Appeal, Contents of</del> <u>Filing Documents</u>	1
Rule 3	<del>Docketing of Appeals</del> <u>Service Upon Other Parties</u>	2
Rule 4	Preparation, Content, Organization, Forwarding, and Status of Appeal File	2
Rule 5	<del>Motions</del> <u>Time, Computation and Extensions</u>	3
Rule 6	Pleadings	3
Rule 7	<del>Motions</del> <u>Amendments of Pleadings or Record</u>	4
Rule 8	<del>Hearing Election</del> <u>Discovery</u>	4
Rule 9	<del>Prehearing or Presubmission Conference</del> <u>Prehearing Briefs</u>	
Rule 10	<del>Prehearing or Presubmission Conference</del> <u>Hearings</u>	
Rule 11	Submission Without a Hearing	6
Rule 12	Optional Small Claims (Expedited) and Accelerated Procedures	6
Rule 13	Settling the Record <u>in Appeals with a Hearing</u>	8
Rule 14	<del>Discovery—Depositions</del> <u>Briefs</u>	9

Rule 15 ~~Interrogatories to Parties, Admission of Facts, and  
Production and Inspection of Documents~~ Representation 10

Formatted: Indent: Left: 0.1", Space Before: 1.2 pt, Tab stops: 1.05", Left + Not at 6.4"

Rule 16 ~~Sanctions~~ Service of Papers Other than Subpoenas 10

### HEARINGS

Rule 17 ~~Dismissal or Default for Failure to Prosecute or Defend~~ Where and When Held 10

Formatted: Font: Not Bold

Rule 18 ~~Suspensions; Dismissal Without Prejudice~~ Notice of Hearings 10

Rule 19 ~~Decisions~~ Unexcused Absence of a Party 11

Rule 20 ~~Motion for Reconsideration~~ Hearings: Nature, Examination of Witnesses 11

Rule 21 ~~Subpoenas~~ Remand from Court 11

Rule 22 ~~Subpoenas~~ Copies of Papers 13

Rule 23 ~~Ex parte Communications~~ Post Hearing Briefs 13

Formatted: French (Belgium)

Formatted: French (Belgium)

Rule 24 ~~Effective Date~~ Transcript of Proceedings 14

Rule 25 ~~Withdrawal of Exhibits~~ 14

### REPRESENTATION

Rule 26 ~~The Appellant~~ 14

Rule 27 ~~The Government~~ 14

### DECISIONS

Rule 28 ~~Decisions~~ 15

### MOTION FOR RECONSIDERATION

Rule 29 ~~Motion for Reconsideration~~ 15

SUSPENSIONS, DISMISSALS, DEFAULTS, REMANDS

Rule 30	<del>Suspensions; Dismissal Without Prejudice</del>	15
Rule 31	<del>Dismissal or Default for Failure to Prosecute or Defend</del>	16
Rule 32	<del>Remand from Court</del>	16

TIME, COMPUTATION AND EXTENSIONS

Rule 33	<del>Time, Computation and Extensions</del>	16
---------	---	----

Formatted: English (U.S.)

EX PARTE COMMUNICATIONS

Rule 34	<del>Ex parte Communications</del>	17
---------	------------------------------------	----

SANCTIONS

Rule 35	<del>Sanctions</del>	17
---------	----------------------	----

EFFECTIVE DATE AND APPLICABILITY

Rule 36	<del>Effective Date</del>	17
---------	---------------------------	----

APPENDIX — STANDARDIZED PLEADING FORMAT	18
---	----

ADDENDUM I — Equal Access to Justice Act Procedures

ADDENDUM II — Alternative Methods of Dispute Resolution

## RULES

### **Rule 11. Appeals, How Taken** **Notice**

(a) Taking an Appeal—For appeals subject to the Contract Disputes Act, notice of an appeal shall be in writing and mailed or otherwise furnished to the Board within 90 days from the date of receipt of a contracting officer's decision. ~~A copy thereof shall be furnished to the contracting officer from whose decision the appeal is taken.~~ officer's decision. The appellant (contractor) should also furnish a copy of the notice of appeal to the contracting officer. For appeals not subject to the Contract Disputes Act, the contractor should refer to the Disputes clause in its contract for the time period in which it must file a notice of appeal.

(1) Where the contractor has submitted a claim of \$100,000 or less to the contracting officer and has requested a written decision within 60 days from receipt of the request, and the contracting officer has not provided ~~one a decision~~ within ~~the that~~ period ~~required, or where such a contractor request has not been made and the contracting officer has not issued a decision within a reasonable time,~~ the contractor may file a notice of appeal as provided in ~~subparagraph~~ paragraph (a) of this Rule, citing the failure of the contracting officer to issue a decision.

(2) Where the contractor has submitted a properly certified claim over \$100,000 to the contracting officer or has ~~requested~~ submitted a ~~decision by the contracting officer which presently claim that~~ involves no monetary amount ~~pursuant to, and the contracting officer, within 60 days of receipt of the Disputes clause claim, fails to issue a decision or fails to provide the contractor with a reasonable date by which a decision will be issued,~~ and the contracting officer has failed to issue a decision within a reasonable time, ~~taking into account such factors as the size and complexity of the claim,~~ the contractor may file a notice of appeal as provided in ~~subparagraph~~ paragraph (a) of this Rule, citing the failure of the contracting officer to issue a decision.

~~Upon docketing of appeals filed pursuant to (b) or (c)~~

(3) A reasonable time shall be determined by taking into account such factors as the size and complexity of the claim and the adequacy of the information provided by the contractor to support the claim.

~~(3)~~(4) Where an appeal is before the Board pursuant to paragraph (a)(1) or (a)(2) of this Rule, the Board may, at its option, stay further proceedings pending issuance of a final decision by the contracting officer within such period of time as is determined by the Board.

~~(4)~~(5) In lieu of filing a notice of appeal under (b) paragraph (a)(1) or (c) (a)(2) of this Rule, the contractor may request petition the Board to direct the contracting officer to issue a decision in a specified period of time; as determined by the Board, ~~in the event of undue delay on the part of the contracting officer.~~

### Contents of Rule 2. Notice of Appeal, Contents of

(b) —A notice of appeal ~~should~~ shall indicate that an appeal is being taken and should

identify the contract (by number), the department and/or agency involved in the dispute, the decision from which the appeal is taken, and the amount in dispute, if ~~known any~~. A copy of the contracting officer's final decision, if any, should be attached to the notice of appeal. The notice of appeal should be signed ~~personally~~ by the appellant (~~the contractor taking the appeal~~), or by the ~~appellant's~~ appellant's duly authorized representative or attorney. The complaint referred to in Rule 6 may be filed with the notice of appeal, or the appellant may designate the notice of appeal as a complaint, if it otherwise fulfills the requirements of a complaint.

### ~~Rule 3. Docketing of Appeals~~

(c) Appeal—When a notice of appeal ~~in any form~~ has been received by the Board, it ~~shall~~ will be docketed ~~promptly~~. Notice in writing shall be given. The Board will provide a written notice of docketing to the appellant with a copy of these Rules, and to the contracting officer Government.

### Rule 2. Filing Documents

(a) Documents may be filed with the Board by the following methods:

(1) Governmental Postal Service—Documents may be filed via a governmental postal service. Filing occurs when the document, properly addressed and with sufficient postage, is transferred into the custody of the postal service. Contact the Recorder before submitting classified documents.

(2) Courier—Documents may be filed via courier. Filing occurs when the document is delivered to the Board. Contact the Recorder before submitting classified documents.

(3) Electronic Mail—Documents, except appeal files submitted pursuant to Rule 4, hearing exhibits, classified documents, and documents submitted in camera or under a protective order, may be filed via electronic mail (email). Email attachments should be in PDF format and the attachments may not exceed 10 megabytes total. The transmittal email should include the ASBCA docket number(s), if applicable, and the name of the appellant in the "Subject:" line. Filing occurs upon receipt by the Board's email server. When a document is successfully filed via email, the document should not also be submitted by any other means, unless so directed by the Board. Submit emails to: [asbca.recorder@mail.mil](mailto:asbca.recorder@mail.mil).

(4) Facsimile Transmission—Documents, except appeal files submitted pursuant to Rule 4, hearing exhibits, classified documents, and documents submitted in camera or under a protective order, may be filed via facsimile (fax) machine. Due to equipment constraints, transmissions over 10 pages should not be made absent Board permission. Filing occurs upon receipt by the Board. When a document is successfully filed via fax, the document should not also be submitted by any other means, unless so directed by the Board.

(b) Copies to Opposing Party—The party filing any document with the Board will send a copy to the opposing party unless the Board directs otherwise, noting on the document filed with the Board that a copy has been so furnished.

### Rule 3. Service Upon Other Parties

Documents may be served personally or by mail, addressed to the party upon whom service is to be made, unless the parties have agreed to an alternate means of service. Subpoenas shall be served as provided in Rule 22.

#### **Rule 4. Preparation, Content, Organization, Forwarding, and Status of Appeal File**

(a) ~~(a) Duties of Contracting Officer~~the Government—Within 30 days of ~~receipt of an appeal, or~~ notice that an appeal has been filed, the ~~contracting officer~~Government shall ~~assemble and~~ transmit to the Board ~~and the appellant~~ an appeal file consisting of ~~all the~~ documents ~~pertinent~~the Government considers relevant to the appeal, including:

- (1) The decision from which the appeal is taken;
- (2) The contract, including pertinent specifications, amendments, plans, and drawings;

All correspondence between the parties relevant to the appeal, including ~~the letter or letters of~~any claim in response to which the decision was issued, ~~The Government's appeal file may be supplemented at such times as are fair~~

(3) ~~Transcripts of any testimony taken during the course of proceedings, and affidavits or statements of any witnesses on the matter in dispute made prior to the filing of the notice of appeal with the Board;~~reasonable and as ordered by the Board.

~~(1) Any additional information considered relevant to the appeal.~~

~~Within the same time specified in paragraph (a) of this Rule, the contracting officer shall furnish the appellant a copy of each document the contracting officer transmits to the Board, except those in subparagraph (a)(2) of this Rule. As to the latter, a list furnished the appellant indicating specific contractual documents transmitted will suffice.~~

(b) ~~(b) Duties of the Appellant~~—Within 30 days after receipt of a copy of the Government's appeal file ~~assembled by the contracting officer~~, the appellant shall transmit to the Board ~~and the Government~~ any documents not contained therein ~~which that~~ the appellant considers relevant to the appeal, ~~and furnish two copies of such documents to the Government trial attorney. Appellant's appeal file may be supplemented at such times as are fair and reasonable and as ordered by the Board.~~

~~(e) Organization of Appeal File~~—Documents in the appeal file may be originals or legible ~~facsimiles or authenticated~~ copies, and shall be arranged in chronological order where practicable, ~~numbered sequentially,~~ tabbed with sequential numbers, and indexed to identify the contents of the file.

(c) ~~Lengthy~~ Any document without internal page numbers shall have page numbers added. All documents must be in English or include an English translation. Documents—~~Upon~~ request by either party, the Board may waive the requirement to furnish to the other party copies of bulky, lengthy, or out of size documents shall be submitted in 3-ring binders, with spines not wider than 3 inches wide, with labels identifying the name of the appeal, ASBCA number and tab numbers contained in each volume, on the front and spine of each volume. Each volume shall contain an index of the documents contained in the appeal file when inclusion would be burdensome. At the time a party files with the Board a document for which such a waiver has been granted, the party shall notify the other party that the document or a copy is available for inspection at the offices of the Board or of the filing party ~~entire~~ Rule 4 submission.

(d) *Status of Documents in Appeal File*—Documents contained in the appeal file are considered, without further action by the parties, as part of the record upon which the Board will render its decision. However, a party may object, for reasons stated, to ~~consideration~~ the admissibility of a particular document ~~or documents~~ reasonably in advance of hearing or, if there is no hearing, of settling the record, ~~or in any case as ordered by the Board~~. If such objection is made, the Board ~~shall~~ will constructively remove the document ~~or documents~~ from the appeal file and permit the party offering the document to move its admission as evidence in accordance with Rules ~~13~~ 10, 11, and ~~20~~ 13.

#### Rule 5. Time, Computation, and Extensions

(a) ~~Where practicable, actions should be taken in less time than the time allowed. Where appropriate and justified, however, extensions of time will be granted. Notwithstanding~~ All requests for extensions of time should be in writing and indicate that the other party was contacted to seek its concurrence.

~~(a)(b)~~ In computing any period of time foregoing, the filing day of the Rule 4(a) and (b) documents may be dispensed with by event from which the Board either upon request of designated period of time begins to run will not be included, but the appellant in its notice of appeal or thereafter upon stipulation last day of the parties period will be included unless it is a Saturday, Sunday, or a Federal holiday, in which event the period will run to the next business day.

#### Rule 5. Motions

(a) Any motion addressed to the jurisdiction of the Board shall be promptly filed. Hearing on the motion shall be afforded on application of either party. However, the Board may defer its decision on the motion pending hearing on both the merits and the motion. The Board shall have the right at any time and on its own initiative to raise the issue of its jurisdiction to proceed with a particular appeal, and shall do so by an appropriate order, affording the parties an opportunity to be heard thereon. ~~The Board may entertain and rule upon other appropriate motions.~~

#### **Rule 6. Pleadings**

(a) ~~(a)~~ *Appellant*—Within 30 days after receipt of notice of docketing of the appeal, the appellant shall file with the Board ~~an original and two copies of~~ a complaint setting forth simple, concise, and direct statements of each of its claims. The ~~appellant~~ complaint shall also set forth the basis, with appropriate reference to contract provisions, of each claim and the dollar amount claimed, ~~to the extent known if any~~. This pleading shall fulfill the generally recognized requirements of a complaint, although no particular form is required. ~~Upon receipt of the complaint, the Board shall serve a copy of it upon the Government unless a copy has been provided directly by the appellant.~~ Should the complaint not be timely received ~~within 30 days~~, the ~~appellant's~~ appellant's claim and notice of appeal may, ~~be deemed to set forth its complaint if~~, in the opinion of the Board, the issues before the Board are sufficiently defined, and the parties will be notified, ~~are sufficiently defined, be deemed to set forth its complaint and the Government shall be so notified.~~

(b) *Government*—Within 30 days from receipt of the complaint, or the aforesaid notice from the Board, the Government shall ~~prepare and~~ file with the Board an ~~original and two copies of an~~ answer thereto. The answer shall admit or deny the allegations of the complaint and shall set forth simple, concise, and direct statements of the ~~Government's~~ Government's defenses to each claim asserted by the appellant, including any affirmative defenses ~~available~~. ~~Upon receipt of the answer, the Board shall serve a copy upon the appellant.~~ Should the answer not be timely received ~~within 30 days~~, the Board may, ~~in its discretion~~, enter a general denial on behalf of the Government, and the ~~appellant shall~~ parties will be ~~so~~ notified.

(c) *Foreign Law*—A party who intends to raise an issue concerning the law of a foreign country shall give notice in its pleadings or other reasonable written notice. The Board, in determining foreign law, may consider any relevant material or source, including testimony, whether or not submitted by a party or admissible under Rules 10, 11, 13, or 2013. The determination of foreign law shall be treated as a ruling on a question of law.

#### Further ~~Rule 7. Amendments of Pleadings or Record~~

(d) ~~—~~ The Board upon its own initiative or upon ~~application by a party~~ motion may order a party to make a more definite statement of the complaint or answer, or to reply to an answer. The Board may, ~~in its discretion, and within the proper scope of the appeal~~, permit either party to amend its pleading upon conditions fair to both parties. When issues within the proper scope of the appeal, but not raised by the pleadings, are tried by express or implied consent of the parties, or by permission of the Board, they shall be treated in all respects as if they had been raised therein. In such instances, motions to amend the pleadings to conform to the proof may be entered, but are not required. If evidence is objected to at a hearing on the ground that it is not within the issues raised by the pleadings, it may be admitted within the proper scope of the appeal, provided however, that the objecting party may be granted ~~a continuance, if necessary, to enable it an opportunity~~ to meet such evidence.

#### Rule 7. Motions

(a) *Motions Generally*—The Board may entertain and rule upon motions and may defer ruling as appropriate. The Board will rule on motions so as to secure, to the fullest extent practicable, the informal, expeditious, and inexpensive resolution of appeals. All motions should be filed as separate documents with an appropriate heading describing the motion. Oral argument on motions is subject to the discretion of the Board.

(b) *Jurisdictional Motions*—Any motion addressed to the jurisdiction of the Board should be promptly filed. An evidentiary hearing to address disputed jurisdictional facts will be afforded on application of either party or by order of the Board. The Board may defer its decision on the motion pending hearing on the merits. The Board may at any time and on its own initiative raise the issue of its jurisdiction, and shall do so by an appropriate order, affording the parties an opportunity to be heard thereon.

(c) *Summary Judgment Motions*—

(1) To facilitate disposition of such a motion, the parties should adhere to the following procedures. Where the parties agree that disposition by summary judgment or partial summary judgment is appropriate, they may file a stipulation of all material facts necessary for the Board to rule on the motion. Otherwise, the moving party should file with its motion a “Statement of Undisputed Material Facts,” setting forth the claimed undisputed material facts in separate, numbered paragraphs. The nonmoving party should file a “Statement of Genuine Issues of Material Fact,” responding to each numbered paragraph proposed, demonstrating, where appropriate, the existence of material facts in dispute and if appropriate propose additional facts. The moving party and the non-moving party should submit a memorandum of law supporting or opposing summary judgment.

(2) In deciding motions for summary judgment, the Board looks to Rule 56 of the Federal Rules of Civil Procedure for guidance. The parties should explicitly state and support by specific evidence all facts and legal arguments necessary to sustain a party’s position. Each party should cite to the record and attach any additional evidence upon which it relies (e.g., affidavits, declarations, excerpts from depositions, answers to interrogatories, admissions). The Board may accept a fact properly proposed and supported by one party as undisputed, unless the opposing party properly responds and establishes that it is in dispute.

(d) *Response to Motions*—A non-moving party has 30 days from receipt of a motion to file its response, unless a different period is ordered by the Board. A moving party has 30 days from receipt of a non-moving party’s response to file a reply, unless a different period is ordered by the Board.

## **Rule 8. Discovery**

(a) *General Policy and Protective Orders*—The parties are encouraged to engage in voluntary discovery procedures. Within 45 days after the pleadings have been filed, the parties must confer concerning each party’s discovery needs, including the scheduling of discovery and the production of electronically stored information. Absent stipulation or a Board order, no discovery may be served prior to this conference. Any motion pertaining to a discovery dispute

shall include a statement that the movant has in good faith attempted to resolve the discovery dispute without involvement of the Board. In connection with any discovery procedure, the Board may issue orders to protect a party or person from annoyance, embarrassment, or undue burden or expense. Those orders may include limitations on the scope, method, time, and place for discovery, and provisions for governing the disclosure of information or documents. Any discovery under this Rule shall be subject to the provisions of Rule 16 with respect to sanctions.

(b) *Depositions—When Permitted*—Subject to paragraph (a) of this Rule, a party may take, or the Board may upon motion order the taking of, testimony of any person by deposition upon oral examination or written interrogatories before any officer authorized to administer oaths at the place of examination, for use as evidence or for purpose of discovery. The Board expects the parties to make persons under their control available for deposition. The motion for an order shall specify whether the purpose of the deposition is discovery or for use as evidence.

(1) *Depositions—Orders*—The time, place, and manner of taking depositions shall be as mutually agreed by the parties, or failing such agreement, governed by order of the Board.

(2) *Depositions—Use as Evidence*—No testimony taken by deposition shall be considered as part of the evidence in the hearing of an appeal until such testimony is offered and received in evidence at such hearing. It will not ordinarily be received in evidence if the deponent can testify at the hearing. The deposition may be used to contradict or impeach the testimony of the deponent given at a hearing. In cases submitted on the record, the Board may receive depositions to supplement the record.

(3) *Depositions—Expenses*—Each party shall bear its own expenses associated with the taking of any deposition, absent an agreement by the parties or a Board order to the contrary.

(4) *Depositions—Subpoenas*—Where appropriate, a party may request the issuance of a subpoena under the provisions of Rule 22.

(c) *Interrogatories, Requests for Admissions, Requests for Production*—Subject to paragraph (a) of this Rule, a party may serve, or the Board may upon motion order:

(1) *Written interrogatories to be answered separately in writing, signed under oath and answered or objected to within 45 days after service;*

(2) *A request for the admission of specified facts and/or of the authenticity of any documents, to be answered or objected to within 45 days after service, the factual statements and/or the authenticity of the documents to be deemed admitted upon failure of a party to respond to the request; and*

~~(a)~~(d) *A request for the production, inspection, and copying of any documents, electronic or otherwise, or objects, not privileged, which reasonably may lead to the discovery of*

admissible evidence, to be answered or objected to within 45 days after service. The Board may allow a shorter or longer time.

**Rule 8- Rule 9. Pre-Hearing- Election**

~~After filing of the Government's answer or notice from the Board that it has entered a general denial on behalf of the Government, each party shall advise whether it desires a hearing as prescribed in Rules 17 through 25, or whether it elects to submit its case on the record without a hearing, as prescribed in Rule 11.~~

**Pre-Submission Rule 9. Prehearing Briefs**

~~Based on an examination of the pleadings, and its determination of whether the arguments and authorities addressed to the issues are adequately set forth therein, the Board may, in its discretion, require the parties to submit prehearing briefs in any case in which a hearing has been elected pursuant to Rule 8. If the Board does not require prehearing briefs, either party may, in its discretion and upon appropriate and sufficient notice to the other party, furnish a prehearing brief to the Board. In any case where a prehearing brief is submitted, it shall be furnished so as to be received by the Board at least 15 days prior to the date set for hearing, and a copy shall simultaneously be furnished to the other party as previously arranged.~~

**Rule 10. Prehearing or Presubmission Conference**

~~(a) Whether the case is to be submitted pursuant to Rule 11, or heard pursuant to Rules 17 through 25, the~~

~~The Board may, upon its own initiative, or upon the application request of either party, arrange a telephone conference or call upon order the parties to appear before an Administrative Judge or examiner of the Board for a conference to consider; address any issue related to the prosecution of the appeal.~~

**Rule 10. Hearings**

~~(a) Where and When Held—Hearings will be held at such times and places determined by the Board to best serve the interests of the parties and the Board.~~

~~(b) Unexcused Absence—The unexcused absence of a party at the time and place set for hearing will not be occasion for delay. In the event of such absence, the hearing will proceed and the evidentiary record will consist solely of the evidence of record at the conclusion of the hearing, except as ordered otherwise by the Board.~~

~~(a)(c) Nature of Hearings—Hearings shall be as informal as may be reasonable and appropriate under the circumstances. The parties may offer such evidence as they deem appropriate and as would be admissible under the Federal Rules of Evidence or in the sound discretion of the presiding Administrative Judge or examiner. The Federal Rules of Evidence are not binding on the Board but may guide the Board's rulings. The parties may stipulate the testimony that would be given by a witness if the witness were present. The Board may require evidence in addition to that offered by the parties.~~

Formatted: Indent: Left: 0"

(d) Examination of Witnesses—Witnesses will be examined orally under oath or affirmation, unless the presiding Administrative Judge or examiner shall otherwise order. If the testimony of a witness is not given under oath or affirmation, the Board may advise the witness that his or her testimony may be subject to any provision of law imposing penalties for knowingly making false representations in connection with claims.

(e) Interpreters—In appropriate cases, the Board may order that an interpreter be used. An interpreter must be qualified and must be placed under oath or affirmation to give a complete and true translation.

~~(1) Transcripts Simplification, clarification, or severing of the issues;~~

~~(2) The possibility of obtaining stipulations, admissions, agreements, and rulings on admissibility of documents, understandings on matters already of record, or similar agreements that will avoid unnecessary proof;~~

~~(3) Agreements and rulings to facilitate discovery;~~

~~(4) Limitation of the number of expert witnesses, or avoidance of similar cumulative evidence;~~

~~(5) The possibility of agreement disposing of any or all of the issues in dispute; and~~

~~(6) Such other matters as may aid in the disposition of the appeal.~~

~~(b) The Administrative Judge or examiner of the Board shall make such rulings and orders as may be appropriate to aid in the disposition of the appeal. The results of pre-trial conferences, including any rulings and orders, shall be reduced to writing by the Administrative Judge or examiner and this writing shall thereafter constitute a part of the record.~~

(f) —Testimony and argument at hearings will be reported verbatim, unless the Board otherwise orders. The Board will contract for a reporter. No other recordings of the proceedings will be made.

#### **Rule 11. Submission Without a Hearing**

(a) 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 hearing does not relieve the parties from the necessity of proving the facts supporting their allegations or defenses. Affidavits, declarations, depositions, admissions, answers to interrogatories, and stipulations may be employed to supplement other documentary in addition to the Rule 4 file if moved and accepted into evidence in the Board record. The Board may permit such. Such submissions to may be supplemented by oral argument (transcribed if requested), and by briefs arranged in accordance. The

Board may designate, with ~~Rule 23~~ notice to the parties, any document to be made part of the record.

(b) As appropriate, the Board may also rely on pleadings, prehearing conference memoranda, orders, briefs, stipulations and other documents contained in the Board's file.

(c) Except as the Board may otherwise order, no evidence will be received after notification by the Board that the record is closed.

(d) The weight to be given to any evidence will rest within the discretion of the Board. The Board may require either party, with appropriate notice to the other party, to submit additional evidence on any matter relevant to the appeal.

~~(b)~~(e) The record will at all reasonable times be available for inspection by the parties at the offices of the Board.

**Rule 12. Optional ~~SMALL CLAIMS (EXPEDITED)~~ and ~~ACCELERATED~~ Small Claims (Expedited) and Accelerated Procedures**

~~(These procedures are available solely at the election of the appellant.)~~

*12.1 Elections ~~to~~ Utilize ~~SMALL CLAIMS (EXPEDITED)~~ Small Claims (Expedited) and ~~ACCELERATED~~ Accelerated Procedures*

(a) In appeals where the amount in dispute is \$50,000 or less, or in the case of a small business concern (as defined in the Small Business Act and regulations under that Act), \$150,000 or less, the appellant may elect to have the appeal processed under a ~~SMALL CLAIMS (EXPEDITED)~~ Small Claims (Expedited) procedure requiring decision of the appeal, whenever possible, within 120 days after the Board receives written notice of the ~~appellant's~~ appellant's election to utilize this procedure. The details of this procedure appear in section 12.2 of this Rule. An appellant may elect the ~~ACCELERATED~~ Accelerated procedure rather than the ~~SMALL CLAIMS (EXPEDITED)~~ Small Claims (Expedited) procedure for any appeal where the amount in dispute is \$50,000 or less.

(b) In appeals where the amount in dispute is \$100,000 or less, the appellant may elect to have the appeal processed under an ~~ACCELERATED~~ Accelerated procedure requiring decision of the appeal, whenever possible, within 180 days after the Board receives written notice of the ~~appellant's~~ appellant's election to utilize this procedure. The details of this procedure appear in section 12.3 of this Rule.

(c) The ~~appellant's~~ appellant's election of either the ~~SMALL CLAIMS (EXPEDITED)~~ Small Claims (Expedited) procedure or the ~~ACCELERATED~~ Accelerated procedure ~~may~~ shall be made by written notice within 60 days after receipt of notice of docketing, unless such period is extended by the Board for good cause. The election, once made, may not be ~~changed or~~ withdrawn except with permission of the Board and for good cause.

(d) The 45-day conference required by Rule 8(a) does not apply to Rule 12 appeals.

12.2 ~~The SMALL CLAIMS (EXPEDITED)~~ Small Claims (Expedited) Procedure

(a) ~~(a)~~ In appeals proceeding under the ~~SMALL CLAIMS (EXPEDITED)~~ Small Claims (Expedited) procedure, the following time periods shall apply:

~~(1)~~ Within 10 days from the ~~Government's first~~ Government's receipt ~~from either of the appellant or the Board of a copy of the appellant's~~ appellant's notice of election of the ~~SMALL CLAIMS~~

(1) ~~(EXPEDITED)~~ Small Claims (Expedited) procedure, the Government shall send the Board a copy of the contract, the contracting ~~officer's~~ officer's final decision, and the ~~appellant's~~ appellant's claim letter or letters, if any; ~~remaining. Any other~~ documents required under Rule 4 shall be submitted in accordance with times specified in that Rule unless the Board otherwise directs.

~~(2)~~ Within 15 days after the Board has acknowledged receipt of the ~~appellant's~~ appellant's notice of election, the assigned Administrative Judge ~~shall~~ should take the following actions, if feasible, in ~~an informal meeting or a telephone~~ a pre-hearing conference ~~with both parties: (i) identify;~~

~~(i)~~ Identify and simplify the issues; ~~(ii) establish~~

~~(ii)~~ Establish a simplified procedure, including discovery, appropriate to the particular appeal involved; ~~(iii) determine~~

~~(iii)~~ Determine whether either party ~~wants~~ selects a hearing, and if so, fix a time and place therefor; ~~(iv) require the Government to furnish all the additional documents relevant to the appeal; and (v) establish and~~

~~(iv)~~ Establish an expedited schedule for the timely resolution of the appeal.

(b) ~~(b)~~ Pleadings, discovery, and other prehearing activity will be allowed only as consistent with the requirement to conduct ~~the~~ hearing on the date scheduled, or if no hearing is ~~scheduled~~ elected, to close the record on a date that will allow ~~decisions within the 120-day limit~~ timely issuance of the decision. The Board, ~~in its discretion,~~ may ~~impose shortened~~ shorten time periods ~~for any actions~~ prescribed or allowed under these Rules; as necessary; to enable the Board to decide the appeal within the 120-day limit, allowing whatever time, up to 30 days, that the Board considers necessary for the preparation of the decision after closing the record and the filing of briefs, if any, period.

~~(c)~~ Written ~~decision~~ decisions by the Board in appeals processed under the ~~SMALL CLAIMS~~

(c) ~~(EXPEDITED)~~ Small Claims (Expedited) procedure will be short and will contain only summary findings of fact and conclusions. Decisions will be rendered for the Board

by a single Administrative Judge. If there has been a hearing, the Administrative Judge presiding at the hearing may, ~~in the judge's discretion,~~ at the conclusion of the hearing and after entertaining such oral ~~arguments~~argument as ~~are~~ deemed appropriate, render on the record oral summary findings of fact, conclusions, and a decision of the appeal. Whenever such an oral decision is rendered, the Board will subsequently furnish the parties ~~a typed~~an authenticated copy of such oral decision for record and payment purposes and to establish the starting date for the period for filing a motion for reconsideration under Rule ~~2920~~.

(d) ~~(d)~~ A decision ~~against the Government or the appellant under Rule 12.2~~ shall have no value as precedent, and in the absence of fraud, shall be final and conclusive and may not be appealed or set aside.

### 12.3 ~~The ACCELERATED~~Accelerated Procedure

(a) In appeals proceeding under the ~~ACCELERATED~~Accelerated procedure, the parties are encouraged, to the extent possible consistent with adequate presentation of their factual and legal positions, to waive pleadings, discovery, and briefs. The Board, ~~in its discretion,~~ may shorten time periods prescribed or allowed ~~elsewhere in~~under these Rules, ~~including Rule 4,~~ as necessary, to enable the Board to decide the appeal within ~~180 days after the Board has received the appellant's notice of election of the ACCELERATED procedure, and may reserve 30 days for preparation of the decision~~180-day period.

(b) Within 30 days after the Board has acknowledged receipt of the appellant's notice of election, the assigned Administrative Judge should take the following actions, if feasible, in a pre-hearing conference:

(1) Identify and simplify the issues;

(2) Establish a simplified procedure, including discovery, appropriate to the particular appeal involved;

(3) Determine whether either party elects a hearing, and if so, fix a time and place therefor; and

(4) Establish an accelerated schedule for the timely resolution of the appeal.

~~(b)~~(c) Written ~~decision~~decisions by the Board in appeals processed under the ~~ACCELERATED~~Accelerated procedure will normally be short and contain only summary findings of fact and conclusions. Decisions will be rendered for the Board by a single Administrative Judge with the concurrence of a Vice Chairman, or by a majority among these two and the Chairman in case of disagreement. ~~Alternatively, in an appeal where the amount in dispute is \$50,000 or less as to which the ACCELERATED procedure has been elected and in which there has been a hearing, the single Administrative Judge presiding at the hearing may, with the concurrence of both parties, at the conclusion of the hearing and after entertaining such oral arguments as are deemed appropriate, render on the record oral summary findings of fact, conclusions, and a decision of the appeal. Whenever such an oral decision is rendered, the Board will~~

~~subsequently furnish the parties a typed copy of such oral decision for record and payment purposes, and to establish the starting date for the period for filing a motion for reconsideration under Rule 29.~~

#### 12.4 Motions for Reconsideration in Rule 12 Appeals

Motions for reconsideration of appeals decided under either the ~~SMALL CLAIMS (EXPEDITED)~~ Small Claims (Expedited) procedure or the ~~ACCELERATED~~ Accelerated procedure need not be decided within the original 120-day or 180-day limit, but all such motions ~~shall~~ will be processed and decided ~~rapidly~~ promptly so as to ~~fulfill~~ be consistent with the intent of this Rule.

#### **Rule 13. Settling the Record in Appeals With a Hearing**

(a) ~~(a)~~ The record upon which the ~~Board's~~ Board's decision will be rendered consists of the documents ~~furnished under Rules 4 and 12, to the extent admitted in evidence, and the following items, if any: pleadings, prehearing conference memoranda or orders, prehearing briefs, depositions or interrogatories received in evidence, admissions, stipulations, transcripts of conferences and hearings, hearing exhibits, post-hearing briefs, and under Rule 4, the documents which the Board has specifically designated~~ admitted into evidence as hearing exhibits, together with the hearing transcript. The Board may designate with notice to the parties, any document to be made a part of the record. The record will, at all reasonable times, be available for inspection by the parties at the office of the Board.

~~(b)~~ As appropriate, the Board may also rely on pleadings, pre-hearing conference memoranda, orders, briefs, stipulations, and other documents contained in the Board's file.

~~(c)~~ Except as the Board may otherwise order in its discretion, no ~~proof shall~~ evidence will be received ~~in evidence~~ after completion of an oral hearing ~~or, in cases submitted on the record, after notification by the Board that the case is ready for decision.~~

~~(d)~~ The weight to be ~~attached~~ given to any evidence ~~of record~~ will rest within the ~~sound~~ discretion of the Board. The Board may ~~in any case~~ require either party, with appropriate notice to the other party, to submit additional evidence on any matter relevant to the appeal.

~~(e)~~ The record will at all reasonable times be available for inspection by the parties at the offices of the Board.

#### **Rule 14. ~~Discovery~~ Depositions**

~~General Policy and Protective Orders—The parties are encouraged to engage in voluntary discovery procedures. In connection with any deposition or other discovery procedure, the~~ Briefs

~~(a) Pre-Hearing Briefs—The Board may make any order required to protect a party or person from annoyance, embarrassment, or undue burden or expense. Those orders may include~~

~~limitations on the scope, method, time, and place for discovery, and provisions for protecting the secrecy of confidential information or documents.~~

~~(b) *When Depositions Permitted* \_\_\_\_\_ After an appeal has been docketed and complaint filed, require the parties may mutually agree to, or to submit pre-hearing briefs. If the Board may, upon application of does not require prehearing briefs, either party, order the taking of testimony of any person by deposition upon oral examination or written interrogatories before any officer authorized to administer oaths at the place of examination, for use as evidence or for purpose of discovery. The application for order shall specify whether the purpose of the deposition is discovery or for use as evidence.~~

~~(a) *Orders on Depositions*—The time, place, and manner of taking depositions shall be as mutually agreed by the parties, or failing such agreement, governed by order of may, upon appropriate and sufficient notice to the other party, furnish a pre-hearing brief to the Board.~~

~~(b) *Post-Hearing Briefs*—Post-hearing briefs may be submitted upon such terms as may be directed by the presiding Administrative Judge or examiner at the conclusion of the hearing.~~

#### **Rule 15. Representation**

~~(a) An individual appellant may represent his or her interests before the Board; a corporation may be represented by one of its officers; and a partnership or joint venture by one of its members; or any of these by an attorney at law duly licensed in any state, commonwealth, territory, the District of Columbia, or in a foreign country. Anyone representing an appellant shall file a written notice of appearance with the Board.~~

~~(b) The Government shall be represented by counsel. Counsel for the Government shall file a written notice of appearance with the Board.~~

#### **Rule 16. Sanctions**

~~If any party fails to obey an order issued by the Board, the Board may impose such sanctions as it considers necessary to the just and expeditious conduct of the appeal.~~

#### **Rule 17. Dismissal or Default for Failure to Prosecute or Defend**

~~Whenever the record discloses the failure of either party to file documents required by these Rules, respond to notices or correspondence from the Board, comply with orders of the Board, or otherwise indicates an intention not to continue the prosecution or defense of an appeal, the Board may, in the case of a default by the appellant, issue an order to show cause why the appeal should not be dismissed with prejudice for failure to prosecute. In the case of a default by the Government, the Board may issue an order to show cause why the Board should not act thereon pursuant to Rule 16. If good cause is not shown, the Board may take appropriate action.~~

### Rule 18. Suspensions; Dismissal Without Prejudice

(a) The Board may suspend the proceedings by agreement of the parties for settlement discussions, or for good cause shown.

~~(e) In certain cases, appeals docketed before the Board are required to be placed in a suspense status and the Board is unable to proceed with disposition thereof for reasons not within the control of the Board. Use as Evidence—No testimony taken by depositions shall be considered as part of the evidence in the hearing of an appeal until such testimony is offered and received in evidence at such hearing. It will not ordinarily be received in evidence if the deponent is present and can testify at the hearing. In such instances, however, the deposition may be used to contradict or impeach the testimony of the deponent given at the hearing. In cases submitted on the record, the Board may, in its discretion, receive depositions to supplement the record.~~

~~(d) Expenses—Each party shall bear its own expenses associated with the taking of any deposition.~~

(b) ~~Subpoenas~~ Where the suspension has continued, or may continue, for an inordinate length of time, the Board may dismiss such appeals from its docket for a period of time without prejudice to their restoration. Unless either party or the Board moves to reinstate the appeal within the time period set forth in the dismissal order, or if no time period is set forth, within one year from the date of the dismissal order, the dismissal shall be deemed to be with prejudice.

### Rule 19. Decisions

(a) Decisions of the Board will be made in writing and authenticated copies of the decision will be sent simultaneously to both parties. All orders and decisions, except those as may be required by law to be held confidential, will be available to the public. Decisions of the Board will be made solely upon the record.

(b) Any monetary award shall be promptly paid.

(c) In awards that may be paid from the Judgment Fund, 31 U.S.C. 1304, the Recorder will forward the required forms to each party with the decision. If the parties do not contemplate an appeal or motion for reconsideration, they will execute the forms indicating that no judicial review will be sought. The Government agency will forward the required forms with a copy of the decision to the Department of the Treasury for certification of payment.

(d) When the parties settle an appeal in favor of the appellant, they may file with the Board a stipulation setting forth the amount of the settlement due to the appellant. By joint motion, the parties may request that the Board issue a decision in the nature of a consent judgment, awarding the stipulated amount to the appellant. These decisions will be processed in accordance with paragraph (c) of this Rule.

(e) After a decision has become final the Board may, upon request of a party and after notice to the other party, grant the withdrawal of original exhibits, or any part thereof. The Board may require the substitution of true copies of exhibits or any part thereof as a condition of granting permission for such withdrawal.

#### **Rule 20. Motion for Reconsideration**

A motion for reconsideration may be filed by either party. It shall set forth specifically the grounds relied upon to grant the motion. The motion must be filed within 30 days from the date of the receipt of a copy of the decision of the Board by the party filing the motion. An opposing party must file any cross-motion for reconsideration within 30 days from its receipt of the motion for reconsideration. Extensions in the period to file a motion will not be granted. Extensions to file a memorandum in support of a timely filed motion may be granted.

#### **Rule 21. Remand from Court**

Whenever any Court remands an appeal to the Board for further proceedings, each of the parties shall, within 30 days of receipt of such remand, submit a report to the Board recommending procedures to be followed so as to comply with the Court's remand. The Board will consider the reports and enter an order governing the remanded appeal.

**Rule 22.** ~~Where appropriate, a party may request the~~Subpoenas

(a) Voluntary Cooperation—Each party is expected:

(1) To cooperate and make available witnesses and evidence under its control as requested by the other party without issuance of a subpoena under the provisions of Rule 21., and

#### **Rule 15. Interrogatories to Parties, Admission**

To secure voluntary attendance of ~~Facts,~~desired third-party witnesses and

##### **Production and Inspection**production of **Documents**

~~After an appeal has been docketed and complaint filed with the Board, a party may serve on the other desired third-party: (a) Written interrogatories to be answered separately in writing, signed under oath and answered or objected to within 45 days after service; (b) a request for the admission of specified facts and/or of the authenticity of any books, records, documents, to be answered or objected to within 45 days after service; the factual statements and/or the authenticity of the documents to be deemed admitted upon failure of a party to respond to the request; and (c) a request for the production, inspection, and copying of any documents or objects not privileged, which reasonably may lead to the discovery of admissible evidence, to be answered or objected to within 45 days after service. The Board may allow a shorter or longer time. Any discovery engaged in under this Rule shall be subject to the provisions of Rule 14(a) with respect to general policy and protective orders, and of Rule 35 with respect to sanctions.~~

**~~Rule 16. Service of Papers Other Than Subpoenas~~**

~~Papers shall be served personally or by mail, addressed to the party upon whom service is to be made. Copies of complaints, answers, and briefs shall be filed directly with the Board. The party filing any other paper with the Board shall send a copy thereof to the opposing party, noting on the paper filed with the Board that a copy has been so furnished. Subpoenas shall be served as provided in Rule 21.~~

**~~Rule 17. Where and When Held~~**

~~Hearings will be held at such places determined by the Board to best serve the interests of the parties and the Board. Hearings will be scheduled at the discretion of the Board with due consideration to the regular order of appeals, Rule 12 requirements, and other pertinent factors. On request or motion by either party and for good cause, the Board may, in its discretion, adjust the date of a hearing.~~

**~~Rule 18. Notice of Hearings~~**

~~The parties shall be given at least 15 days notice of the time and place set for hearings. In scheduling hearings, the Board will consider the desires of the parties and the requirement for just and inexpensive determination of appeals without unnecessary delay. Notices of hearings shall be promptly acknowledged by the parties.~~

**~~Rule 19. Unexcused Absence of a Party~~**

~~The unexcused absence of a party at the time and place set for hearing will not be occasion for delay. In the event of such absence, the hearing will proceed and the case will be regarded as submitted by the absent party as provided in Rule 11.~~

**~~Rule 20. Hearings: Nature, Examination of Witnesses~~**

~~(b)(g) *Nature of Hearings*—Hearings shall be as informal as may be reasonable and appropriate under the circumstances. The appellant and the Government may offer such evidence as they deem appropriate and as would be admissible under the Federal Rules of Evidence or in the sound discretion of the presiding Administrative Judge or examiner. Stipulations of fact agreed upon by the parties may be regarded and used as evidence at the hearing. The parties may stipulate the testimony that would be given by a witness if the witness were present. The Board may require evidence in addition to that offered by the parties.~~

~~(2) *Examination of Witnesses*—Witnesses before the Board will be examined orally under oath or affirmation, unless the presiding Administrative Judge or examiner shall otherwise order. If the testimony of a witness is not given under oath, the Board may advise the witness that his or her statements may be subject to the provisions of Title 18, United States Code, sections 287 and 1001, and any other provision of law imposing penalties for knowingly making false representations in connection with claims against the United States or in any matter within the jurisdiction of any department or agency thereof or tangible things whenever possible.~~

**Rule 21. Subpoenas**

(b) ~~(a)~~ *General*—Upon written request of either party ~~filed with the Recorder~~, or on his or her own initiative, ~~the~~an Administrative Judge ~~to whom an appeal is assigned or who is otherwise designated by the Chairman~~ may issue a subpoena requiring:

(1) *Testimony at a deposition*—~~the~~The deposing of a witness in the city or county where the witness resides or is employed or transacts business in person, or at another location convenient for the witness that is specifically determined by the Board;

(2) *Testimony at a hearing*—~~the~~The attendance of a witness for the purpose of taking testimony at a hearing; and

(3) ~~(3)~~ *Production of books and papers*—~~in addition to (1) or (2), the records~~—The production by the witness at the deposition or hearing of books and ~~papers~~records (including electronically stored information and other tangible things) designated in the subpoena.

~~(b) Voluntary Cooperation~~ — ~~Each party is expected (i) to cooperate and make available witnesses and evidence under its control as requested by the other party, without issuance of a subpoena, and (ii) to secure voluntary attendance of desired third party witnesses and production of desired third party books, papers, documents, or tangible things whenever possible.~~

~~(c) Requests~~

(c) Request for Subpoena—

(1) ~~(1)~~ A request for subpoena shall normally be filed at least:

(i) 15 days before a scheduled deposition where the attendance of a witness at a deposition is sought; or

(ii) 30 days before a scheduled hearing where the attendance of a witness at a hearing is sought.

~~In its discretion, the~~

(2) The Board may honor requestsa request for subpoenasubpoena not made within ~~these~~the time limitations set forth in paragraph (c)(1) of this Rule.

(3) ~~(2)~~ A request for a subpoena shall state the reasonable scope and general relevance to the case of the testimony and of any books and ~~papers sought~~records sought. The Board may require resubmission of a request that does not provide this information.

(d) ~~(d) Requests to Quash or Modify~~—Modify—Upon written request by the person subpoenaed or by a party, made within 10 days after service but in any event not later than the time specified in the subpoena for compliance, the Board may ~~(i)~~ quash or modify the subpoena if it is unreasonable ~~and~~or oppressive or for other good cause shown, or ~~(ii)~~ require the person in whose behalf the subpoena was issued to advance the reasonable cost of producing subpoenaed

books and papers. Where circumstances require, the Board may act upon such a request at any time after a copy of the request has been served upon the opposing party.

(e) ~~(e) Form: Issuance of Subpoena~~—

(1) ~~(1)~~ Every subpoena shall state the name of the Board and the ~~title~~ caption of the appeal, and shall command each person to whom it is directed to attend and give testimony, and if appropriate, to produce specified books and ~~papers~~ records at a time and place therein specified. In issuing a subpoena to a requesting party, the Administrative Judge ~~shall~~ will sign the subpoena ~~and may, in his or her discretion,~~ enter the name of the witness and may otherwise leave it blank. The party to whom the subpoena is issued shall complete the subpoena before service.

(2) ~~(2)~~ Where the witness is located in a foreign country, a letter rogatory ~~or subpoena~~ may be issued and served under the circumstances and in the manner provided in 28 U.S.C. 1781 ~~-1784~~.

(f) ~~(f) Service~~—

(1) The party requesting issuance of a subpoena shall arrange for service.

(2) A subpoena requiring the attendance of a witness at a deposition or hearing may be served ~~at~~ in any ~~place~~ state, commonwealth, territory, or the District of Columbia. 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 personally delivering a copy to that person and tendering the fees for one ~~day's~~ day's attendance and the mileage provided by 28 U.S.C. 1821 or other applicable law; ~~however, However,~~ where the subpoena is issued on behalf of the Government, ~~money payments~~ payment need not be tendered in advance of attendance.

(3) The party at whose instance a subpoena is issued shall be responsible for the payment of fees and mileage of the witness and of the officer who serves the subpoena. The failure to make payment of such charges on demand may be deemed by the Board as a sufficient ground for striking ~~the testimony of the witness and the books or papers the witness has produced~~ such evidence as the Board deems appropriate.

(g) ~~(g) Contumacy or Refusal to Obey a Subpoena~~—In 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 ~~will~~ may apply to the Court through the Attorney General of the United States for an order requiring the person to appear before the Board ~~or a member thereof~~ to give testimony or produce evidence or both. Any failure of any such person to obey the order of the Court may be punished by the Court as a contempt thereof.

**Rule 22. Copies of Papers**

~~When books, records, papers, or documents have been received in evidence, a true copy thereof or of such part thereof as may be material or relevant may be substituted therefor, during the hearing or at the conclusion thereof.~~

**Rule 23. ~~Post-Hearing Briefs~~**

~~Post-hearing briefs may be submitted upon such terms as may be directed by the presiding Administrative Judge or examiner at the conclusion of the hearing.~~

**Rule 24. ~~Transcript of Proceedings~~**

~~Testimony and argument at hearings shall be reported verbatim, unless the Board otherwise orders. Waiver of transcript may be especially suitable for hearings under Rule 12.2. Transcripts of the proceedings shall be supplied to the parties at such rates as may be established by contract between the Board and the reporter, provided that ordinary copy of transcript shall be supplied to the appellant at an amount no greater than the cost of duplication.~~

**Rule 25. ~~Withdrawal of Exhibits~~**

~~After a decision has become final the Board may, upon request and after notice to the other party, in its discretion permit the withdrawal of original exhibits, or any part thereof, by the party entitled thereto. The substitution of true copies of exhibits or any part thereof may be required by the Board in its discretion as a condition of granting permission for such withdrawal.~~

**Rule 26. ~~The Appellant~~**

~~An individual appellant may appear before the Board in person; a corporation by one of its officers; and a partnership or joint venture by one of its members; or any of these by an attorney at law duly licensed in any State, commonwealth, territory, the District of Columbia, or in a foreign country. An attorney representing an appellant shall file a written notice of appearance with the Board.~~

**Rule 27. ~~The Government~~**

~~Government counsel may, in accordance with their authority, represent the interest of the Government before the Board. They shall file notices of appearance with the Board, and notice thereof will be given the appellant or the appellant's attorney in the form specified by the Board from time to time.~~

**Rule 28. ~~Decisions~~**

~~Decisions of the Board will be made in writing and authenticated copies of the decision will be forwarded simultaneously to both parties. The Rules of the Board and all final orders and decisions~~

(except those required for good cause to be held confidential and not cited as precedents) shall be open for public inspection at the offices of the Board. Decisions of the Board will be made solely upon the record, as described in Rule 13.

~~(a) Any monetary award to a contractor by the Board shall be promptly paid in accordance with the procedures provided by 31 U.S.C. 1304, as amended. To assure prompt payment the Recorder will forward the required forms to each party with the decision. If the parties do not contemplate an appeal or motion for reconsideration, they will execute the waiver forms which so state. The Government agency will forward the waiver and other forms with a copy of the decision to the Department of the Treasury for certification of payment.~~

**~~Rule 29. Motion for Reconsideration~~**

~~A motion for reconsideration may be filed by either party. It shall set forth specifically the grounds relied upon to sustain the motion. The motion shall be filed within 30 days from the date of the receipt of a copy of the decision of the Board by the party filing the motion.~~

**~~Rule 30. Suspensions; Dismissal Without Prejudice~~**

~~The Board may suspend the proceedings by agreement of counsel for settlement discussions, or for good cause shown. In certain cases, appeals docketed before the Board are required to be placed in a suspense status and the Board is unable to proceed with disposition thereof for reasons not within the control of the Board. Where the suspension has continued, or may continue, for an inordinate length of time, the Board may, in its discretion, dismiss such appeals from its docket without prejudice to their restoration when the cause of suspension has been removed. Unless either party or the Board acts within three years to reinstate any appeal dismissed without prejudice, the dismissal shall be deemed to be with prejudice.~~

**~~Rule 31. Dismissal or Default for Failure to Prosecute or Defend~~**

~~Whenever a record discloses the failure of either party to file documents required by these Rules, respond to notices or correspondence from the Board, comply with orders of the Board, or otherwise indicates an intention not to continue the prosecution or defense of an appeal, the Board may, in the case of a default by the appellant, issue an order to show cause why the appeal should not be dismissed or, in the case of a default by the Government, issue an order to show cause why the Board should not act thereon pursuant to Rule 35. If good cause is not shown, the Board may take appropriate action.~~

**~~Rule 32. Remand from Court~~**

~~Whenever any court remands a case to the Board for further proceedings, each of the parties shall, within 20 days of such remand, submit a report to the Board recommending procedures to be followed so as to comply with the court's order. The Board shall consider the reports and enter special orders governing the handling of the remanded case. To the extent the court's directive and time limitations permit, such orders shall conform to these Rules.~~

**~~Rule 33. Time, Computation, and Extensions~~**

~~Where possible, procedural actions should be taken in less time than the maximum time allowed. Where appropriate and justified, however, extensions of time will be granted. All requests for extensions of time shall be in writing.~~

~~(a) In computing any period of time, the day of the event from which the designated period of time begins to run shall not be included, but the last day of the period shall be included unless it is a Saturday, Sunday, or a Federal legal public holiday, in which event the period shall run to the end of the next business day.~~

#### **Rule 34. Ex Parte Communications**

No member of the Board or of the ~~Board's~~Board's staff shall entertain, nor shall any person directly or indirectly involved in an appeal, submit to the Board or the ~~Board's~~Board's staff, ~~off the record~~ex parte, any evidence, explanation, analysis, or advice, whether written or oral, regarding any matter at issue in an appeal. This ~~provision~~Rule does not apply to consultation among Board members or ~~its staff or~~ to ex parte communications concerning the ~~Board's~~Board's administrative functions or procedures.

#### **Rule 24. Effective Date**~~35. Sanctions~~

~~If any party fails or refuses~~

~~These rules and addendums are applicable to obey an order issued by appeals processed under the Board, the Board may then make such order as it considers necessary Contract Disputes Act (CDA), 41 U.S.C. 7101-7109, and other appeals to the just and expeditious conduct of the appeal.~~

#### **Rule 36. extent consistent**

~~with law. They~~Effective

~~Date~~ These Rules shall

apply

~~(a) Mandatorily, to all appeals relating to contracts entered into~~filed on or after ~~1 March 1979~~the date of final publication in the Federal Register, and

~~At the contractor's election, to those appeals relating to earlier contracts, with respect to claims pending~~filed before the contracting officer on ~~1 March 1979 or initiated thereafter~~that date, unless that application is inequitable or unfair.

**APPENDIX - STANDARDIZED PLEADING FORMAT**

AUTHOR'S NAME & ORGANIZATION  
ADDRESS  
(AREA CODE) PHONE NUMBER

[day] [month] [year]

Recorder  
Armed Services Board of Contract Appeals  
Skyline Six, Room 703  
5109 Leesburg Pike  
Falls Church, Virginia 22041-3208

Re: ASBCA No. [  
Appeal of [Appellant's  
Name] Under Contract No. [

TITLE OF PLEADING

[TEXT OF PLEADING]

/s/

Author's Name  
Title

CC: W/ENCL  
TO: opposing  
party address

*Your adoption of the above standard format will assist the Board in its efforts to deal efficiently with incoming correspondence and pleadings.*

*Particular attention should be directed towards..*

- 1. the caption, which includes (a) the ASBCA number, (b) the appellant's name, (c) the contract number, and (d) a descriptive title of the filing (e.g., complaint);*
- 2. furnishing copies of correspondence to the opposing party and indicating compliance with this requirement ("cc: w/encl," will generally suffice); and*
- 3. providing the author's phone number on all correspondence to assist in clarifying potential confusion and complying with Board Rule 26 concerning representation of appellant.*

*The Board appreciates your cooperation.*

## ADDENDUM I

### EQUAL ACCESS TO JUSTICE ACT PROCEDURES

(a) Definitions— For the purpose of these procedures:

(1) “Equal Access to Justice Act,” or “EAJA,” means 5 U.S.C. 504, as amended;

(2) “Board” means the Armed Services Board of Contract Appeals; and

(3) “Contract Disputes Act” means the Contract Disputes Act, 41 U.S.C. 7101–7109 (CDA).

(b) Scope of procedures—These procedures are intended to assist the parties in the processing of EAJA applications for award of fees and other expenses incurred in connection with appeals pursuant to the CDA.

(c) Eligibility of applicants—

(1) To be eligible for an EAJA award, an applicant must be a party appellant that has prevailed in a CDA appeal before the Board and must be one of the following:

(i) An individual with a net worth which did not exceed \$2,000,000 at the time the appeal was filed; or

(ii) Any owner of an unincorporated business, or any partnership, corporation, association, unit of local Government, or organization, the net worth of which does not exceed \$7,000,000 and which does not have more than 500 employees; except:

(A) Certain charitable organizations or cooperative associations; and

(B) For the purposes of 5 U.S.C. 504(a)(4), a small entity as defined in 5 U.S.C. 601, need not comply with any net worth requirement (see 5 U.S.C. 504(b)(1)(B)).

(2) For the purpose of eligibility, the net worth and number of employees of an applicant shall be determined as of the date the underlying CDA appeal was filed with the Board.

(d) Standards of awards—A prevailing eligible applicant shall receive an award of fees and expenses incurred in connection with a CDA appeal, unless the position of the Government over which the applicant prevailed was substantially justified, or if special circumstances make the award unjust.

(e) Allowable fees and other expenses—

(1) Fees and other expenses must be reasonable. Awards will be based upon the prevailing market rates, subject to paragraph (e)(2) of this section, for the kind and quality of services furnished by attorneys, agents, and expert witnesses.

(2) No award for the fee of an attorney or agent may exceed \$125 per hour. No expert witness shall be compensated at a rate in excess of the highest rate of compensation for expert witnesses paid by the agency involved.

(3) The reasonable cost of any study, analysis, engineering report, test, or project, prepared on behalf of a party may be awarded, to the extent that the study or other matter was necessary in connection with the appeal and the charge for the service does not exceed the prevailing rate for similar services.

(f) Time for filing of applications—An application may be filed after an appellant has prevailed in the CDA appeal within 30 days after the Board's disposition of the appeal has become final.

(g) Application contents—

(1) An EAJA application shall comply with each of the following:

(i) Show that the applicant is a prevailing party;

(ii) Show that the applicant is eligible to receive an award;

(iii) Allege that the position of the government was not substantially justified; and

(iv) Show the amount of fees and other expenses sought, including an itemized statement thereof.

(2) An original and one copy of the application and exhibits should be filed with the Board. The applicant will forward one copy to the Government.

(3) When a compliant application has been timely filed, the Board, in order to obtain more detailed information, may require supplementation of the application.

(h) Net worth exhibit—Each applicant for which a determination of net worth is required under the EAJA should provide with its application a detailed net worth exhibit showing the net worth of the applicant when the CDA appeal was filed. The exhibit may be in any form convenient to the applicant that provides full disclosure of assets, liabilities, and net worth.

(i) Fees and other expenses exhibit—The application should be accompanied by a detailed fees and other expenses exhibit fully documenting the fees and other expenses, including

the cost of any study, analysis, engineering report, test, or project, for which an award is sought. The date and a description of all services rendered or costs incurred should be indicated. A separate itemized statement should be submitted for each professional firm or individual whose services are covered by the application showing the hours spent in connection with the CDA appeal 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, the total amount claimed, and the total amount paid or payable by the applicant or by any other person or entity for the services provided. The Board may require the applicant to provide vouchers, receipts, or other substantiation for any expenses sought.

(j) Answer to application—

(1) Within 30 days after receipt by the Government of an application, the Government may file an answer. Unless the Government requests an extension of time for filing or files a statement of intent to negotiate under paragraph (2) below, failure to file an answer within the 30-day period may be treated by the Board at its discretion as a general denial to the application on behalf of the Government.

(2) If the Government and the applicant believe that the matters raised in the application can be resolved by mutual agreement, they may jointly file a statement of intent to negotiate a settlement. Filing of this statement will extend the time for filing an answer for an additional 30 days. Further extensions may be requested by the parties.

(3) The answer will explain in detail any objections to the award requested and identify the facts relied upon in support of the Government's position.

(4) An original and one copy of the answer should be filed with the Board. The Government will forward one copy to the applicant.

(k) Reply—Within 15 days after receipt of an answer, the applicant may file a reply. An original and one copy of the reply will be filed with the Board. The applicant will forward one copy to the Government.

(l) Award proceedings—

(1) The Board may enter an order prescribing the procedure to be followed or take such other action as may be deemed appropriate under the EAJA. Further proceedings will be held only when necessary for full and fair resolution of the issues arising from the application.

(2) A request that the Board order further proceedings under this paragraph will describe the disputed issues, explain why the additional proceedings are deemed necessary to resolve the issues and specifically identify any information sought and its relationship to the disputed issues.

(m) Evidence—

(1) Decisions on the merits—When a CDA appeal is decided on the merits, other than by a consent judgment, the record relating to whether the Government’s position under the EAJA was substantially justified will be limited to the record in the CDA appeal. Evidence relevant to other issues in the award proceeding may be submitted.

(2) Other dispositions—When a CDA appeal is settled, or decided by a consent judgment, either party in proceedings under the EAJA may, for good cause shown, supplement the record established in the CDA appeal with affidavits and other supporting evidence relating to whether the position of the agency was substantially justified or other issues in the award proceeding.

(n) Decision—Decisions under the EAJA will be rendered by the Administrative Judge or a majority of the judges who would have participated in a motion for reconsideration of the underlying CDA appeal. The decision of the Board will include written findings and conclusions and the basis therefor. The Board’s decision on an application for fees and other expenses under the EAJA will be the final administrative decision regarding the EAJA application.

(o) Motions for reconsideration—Either party may file a motion for reconsideration. Motions for reconsideration must be filed within 30 days of receipt of the Board’s EAJA decision. Extensions in the period to file a motion will not be granted. Extensions to file a memorandum in support of a timely filed motion may be granted.

(p) Payment of Awards—The Board’s EAJA awards will be paid directly by the contracting agency over which the applicant prevailed in the underlying CDA appeal.

## **ADDENDUM II**

### **Alternative Methods of Dispute Resolution**

1. The Contract Disputes Act (CDA), 41 U.S.C. 7105(g)(1), states that boards of contract appeals “shall . . . to the fullest extent practicable provide informal, expeditious, and inexpensive resolution of disputes.” Resolution of a dispute at the earliest stage feasible, by the fastest and least expensive method possible, benefits both parties. To that end, the parties are encouraged to consider Alternative Dispute Resolution (ADR) procedures for pre-claim and pre-final decision matters, as well as appeals pending before the Board. The Board may also conduct ADRs for any Federal agency. However, if the matter is not pending before the Board under its CDA jurisdiction, any settlement may not be paid out of the Judgment Fund.

2. The ADR methods described in this Addendum are intended to suggest techniques that have worked in the past. Any appropriate method that brings the parties together in settlement, or partial settlement, of their disputes is a good method. The ADR methods listed are not intended to preclude the parties’ use of other ADR techniques that do not require the Board’s participation, such as settlement negotiations, fact-finding conferences or procedures, mediation, or minitrials not involving use of the Board’s personnel. Any method, or combination

of methods, including one that will result in a binding decision, may be selected by the parties without regard to the dollar amount in dispute.

3. The parties must jointly request ADR procedures at the Board. The request must be approved by the Board. The Board may also schedule a conference to explore the desirability and selection of an ADR method and related procedures. If an ADR involving the Board's participation is requested and approved by the Board, a Neutral will be appointed. If an Administrative Judge has already been assigned to an appeal, the same judge will normally be assigned to be the Neutral in an ADR. If an Administrative Judge has not yet been assigned to the appeal, or if the subject of the ADR is a matter pending before the contracting officer prior to any appeal, the Board will appoint an Administrative Judge to be the Neutral. In such instances, as well as situations in which the parties prefer that an assigned Administrative Judge not be appointed to serve as the Neutral, the parties may submit a list of at least three preferred Administrative Judges and the Board will endeavor to accommodate their preferences.

4. To facilitate full, frank and open discussion and presentations, any Neutral who has participated in a non-binding ADR procedure that has failed to resolve the underlying dispute will be recused from further participation in the matter unless the parties expressly agree otherwise in writing and the Board concurs. Further, the recused Neutral will not discuss the merits of the dispute or substantive matters involved in the ADR proceedings with other Board personnel.

5. 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 between the parties and the Neutral are confidential and, unless otherwise specifically agreed by the parties, inadmissible as evidence in any pending or future Board proceeding involving the parties or matter in dispute. However, evidence otherwise admissible before the Board is not rendered inadmissible because of its use in the ADR proceeding.

6. The ADR method and the procedures and requirements implementing the ADR method will be prescribed by the written agreement of the parties and approved by the Board. ADR methods can be used successfully at any stage of the litigation.

7. The following are examples of ADR methods commonly used at the Board:

a. *Nonbinding*—Mediations: A Neutral is an Administrative Judge who will not normally hear or have any formal or informal decision-making authority in the matter and who is appointed for the purpose of facilitating settlement. In many circumstances, settlement can be fostered by a frank, in-depth discussion of the strengths and weaknesses of each party's position with the Neutral. The agenda for meetings with the Neutral will be flexible to accommodate the requirements of the case. To further the settlement effort, the Neutral may meet with the parties either jointly or individually. A Neutral's recommendations are not binding on the parties. When this method is selected, the ADR agreement must contain a provision in which the parties and counsel agree not to subpoena the Neutral in any legal action or administrative proceeding of any kind to produce any notes or documents related to the ADR

proceeding or to testify concerning any such notes or documents or concerning his/her thoughts or impressions.

b. *Binding—Summary Proceeding With Binding Decision:* A summary proceeding with binding decision is a procedure whereby the resolution of the appeal is expedited and the parties try their appeal informally before an Administrative Judge. A binding ‘bench’ decision may be issued upon conclusion of the proceeding, or a binding summary written decision will be issued by the judge no later than ten days following the later of conclusion of the proceeding or receipt of a transcript. The parties must agree in the ADR agreement that all decisions, rulings, and orders by the Board under this method shall be final, conclusive, not appealable, and may not be set aside, except for fraud. All such decisions, rulings, and orders will have no precedential value. Pre-hearing, hearing, and post-hearing procedures and rules applicable to appeals generally will be modified or eliminated to expedite resolution of the appeal.

c. *Other Agreed Methods*—The parties and the Board may agree upon other informal methods, binding or nonbinding that are structured and tailored to suit the requirements of the individual case.

8. The above-listed ADR procedures are intended to shorten and simplify the Board’s more formalized procedures. Generally, if the parties resolve their dispute by agreement, they benefit in terms of cost and time savings and maintenance or restoration of amicable relations. The Board will not view the parties’ participation in ADR proceedings as a sign of weakness. Any method adopted for dispute resolution depends upon both parties having a firm, good faith commitment to resolve their differences. Absent such intention, the best structured dispute resolution procedure is unlikely to be successful.