EPA-APPROVED REGULATIONS IN THE WEST VIRGINIA SIP—Continued

| State citation [Chapter 16–20 or 45 CSR] | Title/subject | State effective date | EPA Approval date | Additional explanation/ citation at 40 CFR 52.2565 |
|---|---|---|---|---|
| Section 45–13–12 | Permit Application Fees | 6/1/09 | 7–21–14 [Insert **Federal Register** citation]. | |
| Section 45–13–13 | Inconsistency Between Rules | 6/1/09 | 7–21–14 [Insert **Federal Register** citation]. | |
| Section 45–13–14 | Statutory Air Pollution | 6/1/09 | 7–21–14 [Insert **Federal Register** citation]. | |
| Section 45–13–15 | Hazardous Air Pollutants | 6/1/09 | 7–21–14 [Insert **Federal Register** citation]. | |
| Section 45–13–16 | Application for Permission to Commence Construction in Advance of Permit Issuance. | 6/1/09 | 7–21–14 [Insert **Federal Register** citation]. | New. |
| TABLE 45–13A | Potential Emission Rate | 6/1/09 | 7–21–14 [Insert **Federal Register** citation]. | |
| TABLE 45–13B | De Minimus Sources | 6/1/09 | 7–21–14 [Insert **Federal Register** citation]. | |

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[FR Doc. 2014–16409 Filed 7–18–14; 8:45 am]

**BILLING CODE 6560–50–P**

## DEPARTMENT OF DEFENSE

### Defense Acquisition Regulations System

**[Docket No. DARS–2014–0011]**

### 48 CFR Chapter 2, Appendix A

### Defense Federal Acquisition Regulation Supplement: Rules of the Armed Services Board of Contract Appeals (No DFARS Case)

**AGENCY:** Defense Acquisition Regulations System, Department of Defense (DoD).

**ACTION:** Final rule.

**SUMMARY:** DoD is issuing a final rule amending the Defense Federal Acquisition Regulation Supplement (DFARS) to update the Rules of the Armed Services Board of Contract Appeals (ASBCA). The final rule revises and reorders the Board's Rules for clarity and consistency and accounts for changes in technology, provides updated contact information, and adds two addendums.

**DATES:** Effective July 21, 2014.

**FOR FURTHER INFORMATION CONTACT:** Jeffrey Gardin, Deputy General Counsel, ASBCA, 703–681–8502, or Catherine Stanton, General Counsel, ASBCA, 703–681–8501.

**SUPPLEMENTARY INFORMATION:**

## I. Background

On February 28, 2014, DoD published a proposed rule in the **Federal Register** at 79 FR 11374 to revise the DFARS to update the Rules of the Armed Services Board of Contract Appeals at 48 CFR Chapter 2, Appendix A, Part 2. The rule proposed to revise and reorder the Board's Rules for clarity and consistency and account for changes in technology, remove contradictions, resolve ambiguities, provide updated contact information to allow for some electronic communication by litigants appearing before the Board, and added two addendums: *Equal Access to Justice Act Procedures* and *Alternative Methods of Dispute Resolution,* previously not formally contained in the Rules.

Two respondents submitted public comments in response to the proposed rule.

## II. Discussion and Analysis

DoD reviewed the public comments in the development of the final rule. A discussion of the comments is provided below. Minor changes were made to the final rule based on the comments.

### *A. Analysis of Public Comments*

*Comment 1:* One respondent recommended that the Board consider implementing an electronic filing standard equivalent to the systems utilized by the federal court system.

*Response:* The Board's proposed Rules provide for electronic filing, formalizing the guidance currently issued to the parties concerning electronic filings. The Board has not identified advantages sufficient to justify an electronic filing system similar to those in use in the federal courts. Moreover, the Board has *pro se* and foreign appellants that sometimes do not have the capability to send or receive documents electronically. The Board considers this proposed change unnecessary.

*Comment 2:* Rule 1(a). One respondent recommended allowing the copy of the notice of appeal that the appellant sends to the contracting officer be transmitted in accordance with the methods outlined in Rule 2(a) and that, if the electronic mail option is used, the appellant must use an address reasonably calculated to reach the contracting officer.

*Response:* The proposed Rules currently allow notices of appeal to be transmitted via the methods set out in Rule 2(a). The Board sees no reason to single out copies of notices of appeal sent to contracting officers for special treatment. The Board considers this proposed change unnecessary.

*Comment 3:* Rule 1(b). One respondent commented that Rule 1(b) should include a requirement that appeals having an amount in dispute over $100,000 shall contain the certification required by FAR 33.207(c). The respondent stated that this would ensure that the mandate at FAR 33.207(f) is met as it would correct any defective certification ''prior to the entry of . . . a decision by an agency BCA.''

*Response:* Notices of appeal are not required to be certified under the Contract Disputes Act or the Federal Acquisition Regulation. Claims are required to be certified by the Contract Disputes Act, not the Board's Rules. The Board considers this proposed change unnecessary.

*Comment 4:* Rule 1(c). One respondent recommended that the Board provide its notification of docketing electronically and that, therefore, the filed appeal would need to include a valid email address for both

the appellant and the contracting officer.

*Response:* There is no reason that notices of docketing should be sent electronically, and no requirement that any party have the capability to send or receive documents electronically. The Board considers this proposed change unnecessary.

*Comment 5:* Rule 2. One respondent recommended that section 2(a)(3) be changed to read as follows:

''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 must be, absent Board permission, in PDF format. Email attachments may not, absent Board permission, exceed 10 megabytes total . . .''

The respondent commented that the proposed change provides the Board the discretion to accept documents in other formats and larger sized attachments, if the Board desires, and as technology changes.

*Response:* The Board already possesses discretion to grant exceptions to administrative requirements of its Rules on a case-by-case basis. The Board considers this proposed change unnecessary.

*Comment 6:* Rule 2(a)(3). One respondent recommended allowing electronic filing for documents submitted pursuant to Rule 4 and hearing exhibits.

*Response:* The Board approves the filing of appeal files and exhibits on CDs on a case-by-case basis, upon the request of a party, reserving the right to require the filing of a paper copy. The Board has not permitted the filing of appeal files as attachments to emails but has discretion to allow it should the Board deem it advisable. The Board considers this proposed change unnecessary.

*Comment 7:* Rules 2(b) and 3. One respondent noted that documents may be served, and copies to opposing parties may be transmitted, in accordance with the methods outlined in Rule 2(a) and recommended that, if the electronic mail option is used, the appellant must use an address reasonably calculated to reach the opposing party.

*Response:* This comment addresses a perceived problem that the Board has not encountered. The Board considers this proposed change unnecessary.

*Comment 8:* Rule 4(a). One respondent recommended that section (a) be changed to read as follows:

''(a) Duties of the Government. Within 30 days from receipt of the complaint or with the submission of the answer, whichever comes later, the Government shall transmit to the Board and the appellant an appeal file consisting of the documents the Government considers relevant to the appeal, including . . .''

The respondent noted that, currently the Rule 4 file is due 30 days from notice that an appeal has been filed, which is before the complaint is due. Often times it is difficult to know based on the claim and the final decision alone, what documents are relevant to the appeal. The complaint often provides the information needed to help determine which documents are relevant. Additionally, it can also be a challenge getting the base to send the Government trial attorneys the documents needed in the Rule 4 file by the deadline. To avoid having to request extensions or later supplement the Rule 4 file, the Rule 4 file should, at the very earliest, be due 30 days from receipt of the complaint or with the submission of the answer, whichever is later.

*Response:* The requirement for the government to file the appeal file within 30 days from notice of filing of the appeal has been in place for many decades. The government, having reviewed or asserted the claim and issued a contracting officer's decision, should be familiar with the facts and circumstances it considers relevant to the dispute. Appeal files almost always need to be supplemented as discovery progresses and requests for extensions are dealt with routinely. The Board has no documents concerning the substance of the appeal that pre-date the contracting officer's decision until the appeal file is filed, and therefore the Board is unable to analyze any aspect of the appeal until the appeal file is received. The Board considers this proposed change unnecessary.

*Comment 9:* Rule 4(b). One respondent recommended that section (b) be changed to read as follows:

''(b) Duties of the Parties. Either party may supplement the Rule 4 file at any time during or after the close of discovery and a reasonable amount of time prior to a scheduled hearing.''

The respondent stated that, in practice, this recommended change is accomplished by the Board's scheduling order for submission of hearing exhibits. Also, there is no practical reason to require appellant to supplement within 30 days of the government's submission of the Rule 4 File. Appellants rarely follow this rule and the government rarely objects because final supplementation occurs after discovery.

*Response:* The Board perceives no reason to eliminate the current practice that requires appellants to timely file an appeal file.

*Comment 10:* Rule 4(c). One respondent commented that this Rule should clarify whether ''numbered sequentially'' applies to the individual documents in the appeal file, the page numbers within each document, or Bates numbers for the entire appeal file.

*Response:* The Rule will be modified to make it clear that ''numbered sequentially'' refers to the individually tabbed documents in the appeal file.

*Comment 11:* Rule 4(c). Two respondents recommended that this Rule be changed to allow documents to be submitted by email or on compact discs, digital versatile discs, or other electronic means.

*Response:* The Board approves the filing of appeal files and exhibits on CDs on a case-by-case basis, upon the request of a party, reserving the right to require the filing of a paper copy. The Board has not permitted the filing of appeal files as attachments to emails but has discretion to allow it should the Board deem it advisable. The Board considers this proposed change unnecessary.

*Comment 12:* Rule 5. One respondent recommended the Board incorporate its snow and other emergency day guidance in this Rule as it pertains to filing deadlines.

*Response:* Since the Board hears appeals nationally and internationally, we prefer to deal with emergency situations on a case-by-case basis so that rulings can be tailored to the relevant circumstances. The Board considers this proposed change unnecessary.

*Comment 13:* Rule 6. One respondent recommended that section (b) be changed to read as follows:

''(b) Government. Within 30 days from receipt of the complaint, or the aforesaid notice from the Board, the Government shall file with the Board 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 defenses to each claim asserted by the appellant, including any affirmative defenses. If the Board has deemed appellant's claim and notice of appeal to set forth its complaint, pursuant to Rule 6(a), the Government shall file an answer within 30 days of receiving the Board's determination, in which the Government will make a reasonable attempt to admit or deny the factual allegations in appellant's claim and notice of appeal and state the Government's defenses to each claim asserted by the appellant. Should the answer not be timely received, the Board may enter a general denial on behalf of the Government, and the parties will be notified.''

The respondent stated that this change addresses the issue of how the

Government should file its answer when the Appellant's notice of appeal and claim are deemed sufficient by the Board to serve as Appellant's complaint.

*Response:* Government pleadings in response to claims and/or notices of appeal that have been deemed to be appellants' complaint have not been a source of problems at the Board. The rules of pleading currently give government counsel sufficient flexibility to admit or deny on various bases the factual allegations in a deemed complaint. The Board considers this proposed change unnecessary.

*Comment 14:* Rule 9. One respondent recommended adding the following to the final sentence: ''In an effort to implement cost saving measures, whenever feasible to meet the intended goals of the conference, the Board will make use of telephonic and video conferences to the full extent possible.''

*Response:* The Board routinely allows party representatives and witnesses to appear by telephone or electronic means when appropriate. The Board considers this proposed change unnecessary.

*Comment 15:* Rule 12(d). One respondent recommended adding the following final sentence: ''To the extent necessary to make adequate presentation of their factual and legal positions, the parties are encouraged to engage in voluntary discovery procedures and cooperative meetings to reach mutual consent on the scope, method, time, and place for discovery, and provisions for governing the disclosure of information or documents.''

*Response:* Rule 12.2(a)(2),(b) and Rule 12.3(a),(b) address these matters. The Board considers this proposed change to Rule 12.1(d) to be unnecessary.

*Comment 16:* Rule 19. One respondent recommended that, as with the Expedited and Accelerated procedures under Rule 12, the Board should establish a maximum time in which decisions will be rendered under regular procedures.

*Response:* The Contract Disputes Act establishes time periods within which decisions should be rendered for expedited and accelerated appeals. No such time period is established for other appeals. The Board considers that other appeals vary so substantially in complexity and the need for extensive discovery and pre-trial motions, that any fixed time period would be arbitrary.

*Comment 17:* Rule 19(a). One respondent recommended adding language that would enable the Board to transmit its decisions electronically.

*Response:* The Board does transmit its decisions electronically when necessary. The Board considers this proposed change unnecessary.

*Comment 18:* Rule 22. One respondent recommended changing subsection (c)(l)(iii) to subsection (c)(2) since (iii) does not follow from (c)(l). In turn, this would necessitate changing (c)(2) to (c)(3). Also, respondent recommended deleting the word ''contumacy,'' since the concept is already captured with ''refusal to obey'' and the word does not appear to comply with the Government's requirement to use plain language.

*Response:* The subsection confusion the respondent references is a result of a formatting error in the editing process after submittal by the Board. The Rule has been edited and renumbered. The language the respondent proposes be deleted is from 41 U.S.C. 7105(f). The Board considers this proposed change to be unnecessary.

*B. Other Changes*

DoD has incorporated other non-substantive editorial changes in the final rule consisting of minor wording and paragraph numbering changes for clarity.

## III. Executive Orders 12866 and 13563

Executive Orders (E.O.s) 12866 and 13563 direct agencies to assess all costs and benefits of available regulatory alternatives and, if regulation is necessary, to select regulatory approaches that maximize net benefits (including potential economic, environmental, public health and safety effects, distributive impacts, and equity). E.O. 13563 emphasizes the importance of quantifying both costs and benefits, of reducing costs, of harmonizing rules, and of promoting flexibility. This is not a significant regulatory action and, therefore, was not subject to review under section 6(b) of E.O. 12866, Regulatory Planning and Review, dated September 30, 1993. This rule is not a major rule under 5 U.S.C. 804.

## IV. Regulatory Flexibility Act

DoD 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 revises and reorders the *Rules of the Armed Services Board of Contract Appeals* for clarity and consistency, removes contradictions, resolves ambiguities, accounts for changes in technology, provides updated contact information to allow for some electronic communication by parties appearing before the Board, and adds two addendums, previously not formally contained in the Rules, that reflect current practice before the Board.

## V. Paperwork Reduction Act

The rule does not contain any information collection requirements that require the approval of the Office of Management and Budget under the Paperwork Reduction Act (44 U.S.C. chapter 35).

## List of Subjects in 48 CFR Chapter 2, Appendix A

Government procurement.

**Amy G. Williams,**

*Deputy Director, Defense Acquisition Regulations System.*

Therefore, 48 CFR chapter 2 is amended as follows:

## CHAPTER 2—DEFENSE ACQUISITION REGULATIONS SYSTEM, DEPARTMENT OF DEFENSE

■ 1. The authority citation for Appendix A to Chapter 2 continues to read as follows:

**Authority:** 41 U.S.C. 1303 and 48 CFR chapter 1.

■ 2. Appendix A to Chapter 2 is amended by revising Part 2—Rules to read as follows:

## Appendix A to Chapter 2—Armed Services Board of Contract Appeals

**Armed Services Board of Contract Appeals**

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**Part 2—Rules**

Approved 15 July 1963
Revised 1 May 1969
Revised 1 September 1973
Revised 30 June 1980
Revised 11 May 2011
Revised 21 July 2014

**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 the Department of Defense, the Department of the Army, the Department of the Navy, the Department of the Air Force, the National Aeronautics and Space Administration or 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 (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.* 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 Board, established by the Chairman in such manner as to provide for the most effective and expeditious handling of appeals. The Chairman and a Vice Chairman act as members of each division. Hearings may be held by an 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, 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 that have occasioned serious dispute within the normal division decision process.

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

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**Rules**

**Rule 1. Appeals**

(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. 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 a decision within that period, 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 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 submitted a claim that involves no monetary amount, and the contracting officer, within 60 days of receipt of the 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, the contractor may file a notice of appeal as provided in paragraph (a) of this Rule, citing the failure of the contracting officer to issue a decision.

(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.

(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.

(5) In lieu of filing a notice of appeal under paragraph (a)(1) or (a)(2) of this Rule, the contractor may petition the Board to direct the contracting officer to issue a decision in a specified period of time as determined by the Board.

(b) *Contents of Notice of Appeal*—A notice of appeal 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 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 by the appellant or by the 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.

(c) *Docketing of Appeal*—When a notice of appeal has been received by the Board, it will be docketed. The Board will provide a written notice of docketing to the appellant and to the 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*.

(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) *Duties of the Government*—Within 30 days of notice that an appeal has been filed, the Government shall transmit to the Board and the appellant an appeal file consisting of the documents 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;

(3) All correspondence between the parties relevant to the appeal, including any claim in response to which the decision was issued.

The Government's appeal file may be supplemented at such times as are fair and reasonable and as ordered by the Board.

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

(c) *Organization of Appeal File*—Documents in the appeal file may be originals or legible copies, and shall be arranged in chronological order where practicable, tabbed with sequential numbers, and indexed to identify the contents of the file. Any document without internal page numbers shall have page numbers added. All documents must be in English or include an English translation. 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 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 the admissibility of a particular document 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 will constructively remove the document from the appeal file and permit the party offering the document to move its admission as evidence in accordance with Rules 10, 11, and 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. All requests for extensions of time should be in writing and indicate that the other party was contacted to seek its concurrence.

(b) In computing any period of time, the day of the event from which the designated period of time begins to run will not be included, but the last day of the 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 6. Pleadings**

(a) *Appellant*—Within 30 days after receipt of notice of docketing of the appeal, the appellant shall file with the Board a complaint setting forth simple, concise, and direct statements of each of its claims. The complaint shall also set forth the basis, with appropriate reference to contract provisions, of each claim and the dollar amount claimed, if any. This pleading shall fulfill the generally recognized requirements of a complaint, although no particular form is required. Should the complaint not be timely received, the 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.

(b) *Government*—Within 30 days from receipt of the complaint, or the aforesaid notice from the Board, the Government shall file with the Board 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 defenses to each claim asserted by the appellant, including any affirmative defenses. Should the answer not be timely received, the Board may enter a general denial on behalf of the Government, and the parties will be 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, or 13. The determination of foreign law shall be treated as a ruling on a question of law.

(d) *Further Pleadings*—The Board upon its own initiative or upon 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 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 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 non-moving 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

(3) 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 9. Pre-Hearing or Pre-Submission Conference**

The Board may, upon its own initiative, or upon the request of either party, arrange a conference or order the parties to appear before an Administrative Judge or examiner for a conference to 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.

(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.

(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.

(f) *Transcripts*—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. 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 in addition to the Rule 4 file if moved and accepted into evidence. Such submissions may be supplemented by briefs. The Board may designate, with 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.

(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 Procedures**

*12.1 Elections To Utilize Small Claims (Expedited) and 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) procedure requiring decision of the appeal, whenever possible, within 120 days after the Board receives written notice of the 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 procedure rather than the 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 procedure requiring decision of the appeal, whenever possible, within 180 days after the Board receives written notice of the appellant's election to utilize this procedure. The details of this procedure appear in section 12.3 of this Rule.

(c) The appellant's election of either the Small Claims (Expedited) procedure or the Accelerated procedure 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 Small Claims (Expedited) Procedure*

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

(1) Within 10 days from the Government's receipt of the appellant's notice of election of the Small Claims (Expedited) procedure, the Government shall send the Board a copy of the contract, the contracting officer's final decision, and the appellant's claim letter or letters, if any. 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 notice of election, the assigned Administrative Judge should take the following actions, if feasible, in a pre-hearing conference:

(i) Identify and simplify the issues;

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

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

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

(b) Pleadings, discovery, and other prehearing activity will be allowed only as consistent with the requirement to conduct a hearing, or if no hearing is elected, to close the record on a date that will allow the

timely issuance of the decision. The Board may shorten time periods prescribed or allowed under these Rules as necessary to enable the Board to decide the appeal within the 120-day period.

(c) Written decisions by the Board in appeals processed under the 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 at the conclusion of the hearing and after entertaining such oral argument as 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 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 20.

(d) A decision 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 Accelerated Procedure*

(a) In appeals proceeding under the 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 may shorten time periods prescribed or allowed under these Rules as necessary to enable the Board to decide the appeal within the 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.

(c) Written decisions by the Board in appeals processed under the 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.

*12.4 Motions for Reconsideration in Rule 12 Appeals*

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

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

(a) The record upon which the Board's decision will be rendered consists of the documents admitted under Rule 4, the documents 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 part of the record.

(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, no evidence will be received after completion of an oral hearing.

(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.

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

**Rule 14. Briefs**

(a) *Pre-Hearing Briefs*—The Board may require the parties to submit pre-hearing briefs. If the Board does not require pre-hearing briefs, either party 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.

(b) 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 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. 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, and

(2) To secure voluntary attendance of desired third-party witnesses and production of desired third-party books, records, documents, or tangible things whenever possible.

(b) *General*—Upon written request of either party, or on his or her own initiative, an Administrative Judge may issue a subpoena requiring:

(1) *Testimony at a deposition*—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 attendance of a witness for the purpose of taking testimony at a hearing; and

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

(c) *Request for Subpoena*—

(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.

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

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

(d) *Requests to Quash or 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 quash or modify the subpoena if it is unreasonable or oppressive or for other good cause shown, or 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) *Form of Subpoena*—

(1) Every subpoena shall state the name of the Board and the 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 records at a time and place therein specified. In issuing a subpoena to a requesting party, the Administrative Judge will sign the subpoena, 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) Where the witness is located in a foreign country, a letter rogatory may be issued and served under the circumstances and in the manner provided in 28 U.S.C. 1781.

(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 in any 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 attendance and the mileage provided by 28 U.S.C. 1821 or other applicable law. However, where the subpoena is issued on behalf of the Government, 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 such evidence as the Board deems appropriate.

(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 may 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 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 23. 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, ex parte, any evidence, explanation, analysis, or advice, whether written or oral, regarding any matter at issue in an appeal. This Rule does not apply to consultation among Board members or its staff or to ex parte communications concerning the Board's administrative functions or procedures.

**Rule 24. Effective Date**

These rules and addendums 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. They apply to all appeals filed on or after the date of final publication in the **Federal Register**, and to those appeals filed before that date, unless that application is inequitable or unfair.

**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.

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