

PART 6100 [RESERVED]

PART 6101—CONTRACT DISPUTE
CASES

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APPENDIX TO PART 6101—FORM NOS. 1-5

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SOURCE: 72 FR 36795, July 5, 2007, unless otherwise noted.

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

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

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

(2) *Application; applicant.* The term “application” means a submission to the Board of a request for award of fees and other expenses, under the Equal Access to Justice Act, 5 U.S.C. 504, pursuant to 6101.30 (Rule 30). The term “applicant” means a party filing an application.

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

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

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

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which it is associated was mailed on the date of the postmark.

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

(iii) Filings submitted by electronic mail (e-mail) are permitted, with the exception of appeal files submitted pursuant to 6101.4 (Rule 4), classified documents, and filings submitted *in camera* or under protective order pursuant to 6101.9(c) (Rule 9(c)). Filings by e-mail shall be submitted to: *cba.efile@cba.gov*. Filings must be in PDF format and may not exceed 18 megabytes (MB) total. Filings that are not in PDF format or over 18 MB will not be accepted. The filing of a document by e-mail occurs upon receipt by the Board on a working day, as defined in 6101.1(b)(9) (Rule 1(b)(9)). All e-mail filings received by 4:30 p.m., Eastern Time, on a working day will be considered to be filed on that day. E-mail filings received after that time will be considered to be filed on the next working day.

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

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

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

(9) *Working day*. The term "working day" means any day other than a Saturday, Sunday, federal holiday, day on which the Office of the Clerk is required to close earlier than 4:30 p.m., or day on which the Office of the Clerk

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does not open at all, as in the event of inclement weather.

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

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

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

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

(f) *Location and address*. The location of the Office of the Clerk of the Board

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is: 1800 M Street, NW, 6th Floor, Washington, DC 20036. The mailing address of the Office of the Clerk of the Board is: 1800 F Street, NW, Washington, DC 20405. The Clerk's telephone number is: (202) 606-8800. The Clerk's facsimile machine number is: (202) 606-0019. The Clerk's e-mail address for receipt of filings is: cbca.efile@cbca.gov.

[72 FR 36795, July 5, 2007, as amended at 73 FR 26950, May 12, 2008; 74 FR 66585, Dec. 16, 2009; 76 FR 50927, Aug. 17, 2011]

6101.2 Filing cases; time limits for filing; notice of docketing; consolidation [Rule 2].

(a) *Filing cases.* Filing of a case occurs as provided in 6101.1(b)(5) (Rule 1(b)(5)).

(1) *Notice of appeal.* (i) A notice of appeal shall be in writing and shall be signed by the appellant or by the appellant's attorney or authorized representative. If the appeal is from a contracting officer's decision, the notice of appeal should describe the decision in enough detail to enable the Board to differentiate that decision from any other; the appellant can satisfy this requirement by attaching to the notice of appeal a copy of the contracting officer's decision. If an appeal is taken from the failure of a contracting officer to issue a decision, the notice of appeal should describe in detail the claim that the contracting officer has failed to decide; the appellant can satisfy this requirement by attaching a copy of the written claim submission to the notice of appeal.

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

(A) The number and date of the contract;

(B) The name of the government agency and the component thereof against which the claim has been asserted;

(C) The name, address, telephone number, facsimile machine number, and e-mail address, if available, of the contracting officer whose decision is appealed and the date of the decision;

(D) If the appeal is from the failure of the contracting officer to decide a

claim, the name, address, telephone number, facsimile machine number, and e-mail address, if available, of the contracting officer who received the claim;

(E) A brief account of the circumstances giving rise to the appeal; and

(F) An estimate of the amount of money in controversy, if any and if known.

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

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

(ii) The petition should include the following information:

(A) The number and date of the contract;

(B) The name of the government agency and the component thereof against which the claim has been asserted; and

(C) The name, address, telephone number, facsimile machine number, and e-mail address, if available, of the contracting officer whose decision is sought.

(3) *Application.* An application for fees and other expenses shall meet all requirements specified in 6101.30 (Rule 30).

(b) *Time limits for filing—(1) Appeals.* (i) An appeal from a decision of a contracting officer shall be filed no later than 90 calendar days after the date the appellant receives that decision.

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

(2) *Applications.* An application for fees and other expenses shall be filed within 30 calendar days of a final disposition in the underlying appeal, as provided in 6101.30 (Rule 30).

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

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

- (1) Order the cases consolidated; or
- (2) Make such other orders concerning the proceedings as are needed to avoid unnecessary costs or delay.

[72 FR 36795, July 5, 2007., as amended at 76 FR 50927, Aug. 17, 2011]

6101.3 Time; enlargement; computation [Rule 3].

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

(b) *Enlarging time.* Upon request of a party for good cause shown, the Board may enlarge any time prescribed by the rules in this chapter or by an order or direction of the Board except the time limit for filing appeals (6101.2(b)(1) (Rule 2(b)(1))). A written request is required, but in exigent circumstances an oral request may be made and followed by a written request. An enlargement of time may be granted even though the request was filed after the time for taking the required action expired, but the party requesting the enlargement must show good cause for its inability to make the request before that time expired.

(c) *Computing time.* Except as otherwise required by law, in computing a period of time prescribed by the rules in this chapter or by order of the Board, the day from which the designated period of time begins to run shall not be counted, but the last day of the period shall be counted unless that day is a Saturday, a Sunday, or a federal holiday, or a day on which the Office of the Clerk of the Board is required to close earlier than 4:30 p.m., or does not open at all, as in the case of inclement weather, in which event the period shall include the next working day. Except as otherwise provided in this paragraph, when the period of time

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prescribed or allowed is less than 11 days, any intervening Saturday, Sunday, or federal holiday shall not be counted. When the period of time prescribed or allowed is 11 days or more, intervening Saturdays, Sundays, and federal holidays shall be counted. Time for filing any document or copy thereof with the Board expires when the Office of the Clerk of the Board closes on the last day on which such filing may be made.

6101.4 Appeal file [Rule 4].

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

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

(b) *Organization of the appeal file.* Appeal file exhibits may be originals or true, legible, and complete copies. They shall be arranged in chronological order, earliest documents first; bound in a loose-leaf binder on the left margin except where size or shape makes such binding impracticable;

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numbered; tabbed; and indexed. The loose-leaf binders cannot exceed four inches in depth. The numbering shall be consecutive, in whole Arabic numerals (no letters, decimals, or fractions), and continuous from one submission to the next, so that the complete file, after all submissions, will consist of one set of consecutively numbered exhibits. In addition, the pages within each exhibit containing more than three pages shall be numbered consecutively unless the exhibit already is paginated in a logical manner. Consecutive pagination of the entire file is not required. The index shall include the date and a brief description of each exhibit and shall identify which exhibits, if any, have been filed with the Board *in camera* or under protective order or otherwise have not been served on the other party.

(c) *Service.* The respondent shall serve a copy of the appeal file on the appellant at the same time that the respondent files it with the Board, except that the respondent need not serve on the appellant those documents furnished the Board *in camera* pursuant to 6101.9(c) (Rule 9(c)), and the respondent shall serve documents submitted under protective order only on those individuals who have been granted access to such documents by the Board. However, the respondent must serve on the appellant a list identifying the specific documents filed *in camera* or under protective order with the Board, giving sufficient details necessary for their recognition. This list must also be filed with the Board as an exhibit to the appeal file.

(d) *Submission to the Board by the appellant.* Within 30 calendar days after the respondent files its appeal file exhibits, or within such time as the Board may allow, the appellant shall file with the Board for inclusion in the appeal file documents or other tangible things relevant to the appeal that have not been submitted by the respondent. The appellant shall serve a copy of its additional exhibits upon the respondent at the same time as it files them with the Board, and shall organize the file as required by 6101.4(b) (Rule 4(b)).

(e) *Submissions on order of the Board.* The Board may, at any time during the pendency of the appeal, require any

party to file other documents and tangible things as additional exhibits. The Board may also require a party to file either copies of electronically stored information or printed versions of electronically stored information.

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

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

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

[72 FR 36795, July 5, 2007, as amended at 73 FR 26950, May 12, 2008]

6101.5 Appearances; notice of appearance [Rule 5].

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

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

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

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

(c) *Withdrawal of appearance.* Any person who has filed a notice of appearance and who wishes to withdraw from a case must file a motion which includes the name, address, telephone number, facsimile machine number, and e-mail address, if available, of the person who will assume responsibility for representation of the party in question. The motion shall state the grounds for withdrawal unless it is accompanied by a representation from the successor representative or existing co-counsel that the established case schedule will be met.

[72 FR 36795, July 5, 2007, as amended at 73 FR 26950, May 12, 2008; 76 FR 50928, Aug. 17, 2011]

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6101.6 Pleadings and amendment of pleadings [Rule 6].

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

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

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

(d) *Small claims and accelerated procedures.* When an appellant elects to use the small claims or accelerated procedures described in 6101.52 and 6101.53 (Rules 52 and 53), the Board may shorten the time for filing the complaint and the answer.

(e) *Amendment of pleadings.* Each party to an appeal may amend its

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

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

[72 FR 36795, July 5, 2007, as amended at 73 FR 26950, May 12, 2008]

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

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

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

(c) *Failure to make service.* If a document sent to the Board by a party does not show that a copy has been served on the other party, the Board may return the document to the party that submitted it with such directions as it considers appropriate, or the Board may inquire whether a party has re-

ceived a copy and note on the record the fact of inquiry and the response, and may also direct the party that submitted the document to serve a copy on the other party. In the absence of proof of service a document may be treated by the Board as not properly filed.

[72 FR 36795, July 5, 2007, as amended at 73 FR 26950, May 12, 2008]

6101.8 Motions [Rule 8].

(a) *How motions are made.* Motions may be oral or written. A written motion shall state the relief sought and, either in the text of the motion or in an accompanying legal memorandum, the grounds therefor. In addition, a motion for summary relief shall comply with the requirements of paragraph (g) of this section. Section 6101.23 (Rule 23) prescribes the form and content of legal memoranda. Oral motions shall be made on the record and in the presence of the other party. Except for joint motions by the parties, all motions must represent that the moving party has attempted to discuss the grounds for the motion with the non-moving party and tried to resolve the matter informally.

(b) *When motions may be made.* A motion filed in lieu of an answer pursuant to 6101.6(c) (Rule 6(c)) shall be filed no later than the date on which the answer is required to be filed or such later date as may be established by the Board. Any other dispositive motion shall be made as soon as practicable after the grounds therefor are known. Any other motion shall be made promptly or as required by the rules of this chapter.

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

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

(d) *Other motions.* Other motions may be made in good faith and in proper form. When filing a motion for an enlargement of time, the moving party shall state that it has contacted the

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opposing party about the request and shall inform the Board whether the opposing party consents to the request or will file an opposition.

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

(f) *Procedure.* Unless otherwise directed by the Board, a party may respond to a written motion other than a motion pursuant to 6101.26, 6101.27, 6101.28, or 6101.29 (Rules 26, 27, 28, or 29) at any time within 20 calendar days after the filing of the motion. Responses to motions pursuant to 6101.26, 6101.27, 6101.28, or 6101.29 (Rules 26, 27, 28, or 29) may be made only as permitted or directed by the Board. The Board may permit hearing or oral argument on written motions and may require additional submissions from any of the parties.

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

(2) With each motion for summary relief, there shall be served and filed a separate document titled Statement of Uncontested Facts, which shall contain in separately numbered paragraphs all of the material facts upon which the moving party bases its motion and as to which it contends there is no genuine issue. This statement shall include references to the supporting affidavits or declarations and documents, if any, and to the 6101.4 (Rule 4) appeal file exhibits relied upon to support such statement.

(3) An opposing party shall file with its opposition (or cross-motion) a separate document titled Statement of Genuine Issues. This document shall identify, by reference to specific paragraph numbers in the moving party's Statement of Uncontested Facts, those facts as to which the opposing party claims there is a genuine issue necessary to be litigated. An opposing party shall state the precise nature of its disagreement and give its version of the facts. This statement shall include

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references to the supporting affidavits or declarations and documents, if any, and to the 6101.4 (Rule 4) appeal file exhibits that demonstrate the existence of a genuine dispute. An opposing party may also file a Statement of Uncontested Facts as to any relevant matters not covered by the moving party's statement.

(4) When a motion for summary relief is made and supported as provided in 6101.8 (Rule 8), an opposing party may not rest upon the mere allegations or denials of its pleadings. The opposing party's response, by affidavits or as otherwise provided by 6101.8 (Rule 8), must set forth specific facts showing that there is a genuine issue of material fact. If the opposing party does not so respond, summary relief, if appropriate, shall be entered against that party. For good cause shown, if an opposing party cannot present facts essential to justify its opposition, the Board may defer ruling on the motion to permit affidavits to be obtained or depositions to be taken or other discovery to be conducted, or may make such other order as is just.

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

[72 FR 36795, July 5, 2007, as amended at 73 FR 26950, May 12, 2008]

6101.9 Record of Board proceedings; review and copying [Rule 9].

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

(1) The notice of appeal, petition, or application;

(2) Appeal file exhibits other than those as to which an objection has been sustained;

(3) Hearing exhibits other than those as to which an objection has been sustained;

(4) Pleadings;

(5) Motions and responses thereto;

(6) Memoranda, orders, rulings, and directions to the parties issued by the Board;

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(7) Documents and other tangible things admitted in evidence by the Board;

(8) Written transcripts or electronic recordings of proceedings;

(9) Stipulations and admissions by the parties;

(10) Depositions, or parts thereof, received in evidence;

(11) Written interrogatories and responses received in evidence;

(12) Briefs and memoranda of law; and

(13) Anything else that the Board may designate. All other papers and documents are part of the administrative record of the proceedings and are not included in the record upon which the Board's decision will be rendered.

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

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

(2) A party may also ask, or the Board may direct, that testimony be received under protective order or *in camera*. The procedures under paragraph (c)(1) of this section shall be fol-

lowed with respect to such request or direction.

(d) *Review and copying.* Except for any part thereof that is subject to a protective order or deemed an *in camera* submission, the record in a Board proceeding shall be made available for review at the Office of the Clerk of the Board during the Board's normal working hours, as soon as practicable given the demands on the Board of processing the subject case and other cases. If a request is made for copies of documents, and if making such copies involves more than minimal costs to the Board, reimbursement will be required. If a request is made for a copy of a transcript which was prepared pursuant to a contract with the Board, the fee charged by the Board for a copy of the transcript will be at the rate established by the contract. When required, the Office of the Clerk will certify copies of papers and documents as a true record of the Board. Except as provided in 6101.17 and 6101.32 (Rules 17 and 32), the Office of the Clerk will not release any part of the record in its possession to anyone.

6101.10 Admissibility of evidence [Rule 10].

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

[73 FR 26950, May 12, 2008]

6101.11 Conferences; conference memorandum [Rule 11].

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

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(1) Simplifying, clarifying, or severing the issues;

(2) Stipulations, admissions, agreements, and rulings to govern the admissibility of evidence, understandings on matters already of record, or other similar means of avoiding unnecessary proof;

(3) Plans, schedules, and rulings to facilitate discovery;

(4) Limiting the number of witnesses and other means of avoiding cumulative evidence;

(5) Stipulations or agreements disposing of matters in dispute; or

(6) Ways to expedite disposition of the case or to facilitate settlement of the dispute, including, if the parties and the Board agree, the use of alternative dispute resolution techniques, as provided in 6101.51 and 6101.54 (Rules 51 and 54).

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

6101.12 Suspensions and dismissals [Rule 12].

(a) *Suspension of proceedings to obtain contracting officer's decision.* The Board may in its discretion suspend proceedings to permit a contracting officer to issue a decision when an appeal has been taken from the contracting officer's alleged failure to render a timely decision.

(b) *Suspension for other cause.* The Board may suspend proceedings in a case for good cause, such as to permit the parties to finalize a settlement. The order suspending proceedings will prescribe the duration of the suspension or the conditions on which it will expire. The order may also prescribe actions to be taken by the parties during the period of suspension or following its expiration.

(c) *Dismissal, generally.* A case may be dismissed by the Board on motion of either party. A case may also be dismissed for reasons cited by the Board in a show cause order to which a re-

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sponse has been permitted. Every dismissal shall be with prejudice to reinstatement of the case except as specified in paragraph (d) of this section.

(d) *Dismissal without prejudice.* When circumstances beyond the control of the Board prevent the continuation of proceedings in a case, the Board may, in lieu of issuing an order suspending proceedings, dismiss the case without prejudice to reinstatement within 180 calendar days after the date of the dismissal. When a case has been dismissed without prejudice and neither party has timely requested that the case be reinstated, the case shall be deemed to be dismissed with prejudice on the last day such a request could have been made.

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

[72 FR 36795, July 5, 2007, as amended at 73 FR 26951, May 12, 2008]

6101.13 General provisions governing discovery [Rule 13].

(a) *Discovery methods.* The parties are encouraged to exchange documents and other information voluntarily. In addition, the parties may obtain discovery by one or more of the following methods:

(1) Depositions upon oral examination or written questions;

(2) Written interrogatories;

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

(4) Requests for admission.

(b) *Scope of discovery.* Except as otherwise limited by order of the Board, the parties may obtain discovery regarding any matter, not privileged, which is relevant to the subject matter involved in the pending case, whether it relates to the claim or defense of a party, including the existence, description, nature, custody, condition, and

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

(c) *Discovery limits.* The Board may limit the frequency or extent of use of the discovery methods set forth in 6101.13 (Rule 13) if it determines that:

(1) The discovery sought is unreasonably cumulative or duplicative, or is obtainable from some other source that is more convenient, less burdensome, or less expensive;

(2) The party seeking discovery has had ample opportunity by discovery in the case to obtain the information sought; or

(3) The discovery is unduly burdensome and expensive, taking into account the needs of the case, the amount in controversy, limitations on the parties' resources, and the importance of the issues at stake.

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

(e) *Discovery conference.* Upon request of a party or on its own initiative, the Board may at any time hold an informal meeting or telephone conference with the parties to identify the issues for discovery purposes; establish a plan and schedule for discovery; set limitations on discovery, if any; and determine such other matters as are necessary for the proper management of discovery. The Board may include in the conference such other matters as it deems appropriate in accordance with 6101.11 (Rule 11).

(f) *Discovery objections.* (1) In connection with any discovery procedure, the Board, on motion or on its own initiative, may make any order which justice requires to protect a party or person from annoyance, embarrassment, oppression, or undue burden or ex-

pense, including, but not limited to, one or more of the following:

(i) That the discovery not be had;

(ii) That the discovery be had only on specified terms and conditions, including a designation of the time and place, or that the scope of discovery be limited to certain matters;

(iii) That the discovery be conducted with no one present except persons designated by the Board; and

(iv) That confidential information not be disclosed or that it be disclosed only in a designated way.

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

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

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

(h) *Subpoenas.* A party may request the issuance of a subpoena in aid of discovery under the provisions of 6101.16 (Rule 16).

[72 FR 36795, July 5, 2007, as amended at 73 FR 26951, May 12, 2008]

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

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

(a) *Written interrogatories.* Written interrogatories shall be answered separately in writing, signed under oath or accompanied by a declaration under penalty of perjury, and answered within 30 calendar days after service. Objections shall be filed within the time limits set forth in 6101.13(f)(2) (Rule 13(f)(2)).

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

(c) *Written requests for admission.* A written request for the admission of the truth of any matter, within the proper scope of discovery, that relates to statements or opinions of fact or of the application of law to fact, including the genuineness of any documents or electronically stored information, is to be answered in writing and signed within 30 calendar days after service. Objections shall be filed within the time limits set forth in 6101.13(f)(2) [Rule 13(f)(2)]. Otherwise, the matter therein may be deemed to be admitted. Any matter admitted is conclusively established for the purpose of the pend-

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ing action, unless the Board on motion permits withdrawal or amendment of the admission. Any admission made by a party under this paragraph (c) is for the purpose of the pending action only and is not an admission for any other purpose, nor may it be used against the party in any other proceeding.

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

(e) *Change in time for response.* Upon request of a party, or on its own initiative, the Board may prescribe a period of time other than that specified in 6101.14 (Rule 14).

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

[72 FR 36795, July 5, 2007, as amended at 73 FR 26951, May 12, 2008]

6101.15 Depositions [Rule 15].

(a) *When depositions may be taken.* Upon request of a party, the Board may order the taking of testimony of any person by deposition upon oral examination or written questions before an officer authorized to administer oaths at the place of examination. Attendance of witnesses may be compelled by subpoena as provided in 6101.16 (Rule 16), and the Board may upon motion order that the testimony at a deposition be recorded by other than stenographic means, in which event the

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order may designate the manner of recording, preserving, and filing the deposition, and may include other provisions to ensure that the recorded testimony will be accurate and trustworthy. In addition, if the Board orders deposition testimony to be recorded by other than stenographic means, the Board will also determine who shall bear the burden of the cost of such recording, and shall permit the non-moving party to arrange to have a stenographic transcription made at its own expense.

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

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

(1) Any deposition may be used by a party for the purpose of contradicting or impeaching the testimony of the deponent as a witness.

(2) The deposition of a party or of anyone who at the time of taking the deposition was an officer, director, or managing agent, or a person designated to testify on behalf of a corporation, partnership, association, or government agency which is a party may be used by an adverse party for any purpose.

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

(i) The witness is dead;

(ii) The attendance of the witness at the place of hearing cannot be reasonably obtained, unless it appears that the absence of the witness was procured by the party offering the deposition;

(iii) The witness is unable to attend or testify because of illness, infirmity, age, or imprisonment;

(iv) The party offering the deposition has been unable to procure the attendance of the witness by subpoena; or

(v) Upon request and notice, exceptional circumstances exist which make it desirable in the interest of justice and with due regard to the importance of presenting the testimony of witnesses orally in open hearing, to allow the deposition to be used.

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

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

(1) The names and addresses of the persons to be examined and the substance of the testimony which the moving party expects to elicit from each; and

(2) The reasons for perpetuating the testimony of the persons named. If the Board finds that the perpetuation of testimony is proper to avoid a failure or a delay of justice, it may order the depositions to be taken and may make orders of the character provided for in 6101.13 (Rule 13) and in 6101.15 (Rule 15). Thereupon, the depositions may be taken and used as prescribed in the rules of this chapter for depositions taken in actions pending before the Board. Upon request and for good cause shown, a judge may issue or obtain a subpoena, in accordance with 6101.16 (Rule 16), for the purpose of perpetuating testimony by deposition during the pendency of an appeal from a Board decision.

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6101.16 Subpoenas [Rule 16].

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

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

(2) Secure the cooperation of third-party witnesses and production of evidence by third parties, when practicable, without issuance of a subpoena.

(b) *General.* Upon the written request of any party filed with the Office of the Clerk of the Board, or upon the initiative of a judge, a subpoena may be issued that commands the person to whom it is directed to:

(1) Attend and give testimony at a deposition in a city or county where that person resides or is employed or transacts business in person, or at another location convenient to that person that is specifically determined by the Board;

(2) Attend and give testimony at a hearing; and

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

(c) *Request for subpoena.* A request for a subpoena shall contain the name of the assigned judge, the name of the case, and the docket number of the case. It shall state the reasonable scope and general relevance to the case of the testimony and of any evidence sought. A request for a subpoena shall be filed at least 15 calendar days before the testimony of a witness or evidence is to be provided. The Board may, in its discretion, honor requests for subpoenas not made within this time limitation.

(d) *Form; issuance.* (1) Every subpoena shall be in the form specified in the appendix to the rules of this chapter and this form shall not be altered. Unless a party has the approval of a judge to submit a subpoena in blank (in whole or in part), a party shall submit to the judge a completed subpoena (save the "Return on Service" portion). In issuing a subpoena to a requesting party, the judge shall sign the subpoena. The party to whom the subpoena is issued shall complete the subpoena before service.

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

(e) *Service.* (1) The party requesting a subpoena shall arrange for service. Service shall be made as soon as practicable after the subpoena has been issued.

(2) A subpoena requiring the attendance of a witness at a deposition or hearing may be served at any place. A subpoena may be served by a United States marshal or deputy marshal, or by any other person who is not a party and not less than 18 years of age. Service of a subpoena upon a person named therein shall be made by personal delivery of a copy to that person and tender of the fees for one day's attendance and the mileage allowed by 28 U.S.C. 1821 or other applicable law; however, where the subpoena is issued on behalf of the Government, money payments need not be tendered in advance of attendance.

(f) *Proof of service.* The person serving the subpoena shall make proof of service thereof to the Board promptly and in any event before the date on which the person served must respond to the subpoena. Proof of service shall be made by completion and execution and submission to the Board of the "Return on Service" portion of a duplicate copy of the subpoena issued by a judge. If service is made by a person other than a United States marshal or his deputy, that person shall make an affidavit as proof by executing the "Return on Service" in the presence of a notary.

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

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

[72 FR 36795, July 5, 2007, as amended at 73 FR 26951, May 12, 2008]

6101.17 Exhibits [Rule 17].

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

(2) If a party elects to proceed on the record without a hearing pursuant to 6101.19 (Rule 19), documentary evidence submitted by that party will be numbered consecutively as appeal file exhibits.

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

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

exhibit or item from the record during the course of a proceeding.

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

[72 FR 36795, July 5, 2007, as amended at 73 FR 26951, May 12, 2008]

6101.18 Election of hearing or record submission [Rule 18].

Each party shall inform the Board, in writing, whether it elects a hearing or submission of its case on the record pursuant to 6101.19 (Rule 19). Such an election may be filed at any time unless a time for filing is prescribed by the Board. In most cases, the Board will require the parties to make an election soon after discovery closes. A party electing to submit its case on the record pursuant to 6101.19 (Rule 19) may also elect to appear at a hearing solely to cross-examine any witness presented by the opposing party, provided that the Board is informed of that party's intention within 10 working days of its receipt of notice of the election of hearing by the other party. If a hearing is elected, the election should state where and when the electing party desires the hearing to be held and should explain the reasons for its choices. A hearing will be held if either party elects one. If a party's decision whether to elect a hearing is dependent upon the intentions of the other party, it shall consult with the other party before filing its election. If there is to be a hearing, it will be held at a time and place prescribed by the Board after consultation with the party or parties electing the hearing. The record submissions from a party that has elected to submit its case on the record shall be due as provided in 6101.19 (Rule 19).

6101.19 Submission on the record without a hearing [Rule 19].

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

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(1) Any relevant documents or other tangible things it wishes the Board to admit into evidence;

(2) Affidavits, depositions, and other discovery materials that set forth relevant evidence; and

(3) A brief or memorandum of law. The Board may require the submission of additional evidence or briefs and may order oral argument in a case submitted on the record.

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

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

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

6101.20 Hearings: scheduling; notice; unexcused absences [Rule 20].

(a) *Scheduling of hearings.* Hearings will be held at the time and place ordered by the Board and will be scheduled at the discretion of the Board. In scheduling hearings, the Board will consider the requirements of the rules of this chapter, the need for orderly management of the Board's caseload, and the stated desires of the parties as expressed in their elections filed pursuant to 6101.18 (Rule 18) or otherwise. The time or place for hearing may be changed by the Board at any time.

(b) *Notice of hearing.* Notice of hearing will be by written order of the Board. Notice of changes in the hearing

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

(c) *Unexcused absence from hearing.* In the event of the unexcused absence of a party from a hearing, the hearing will proceed, and the absent party will be deemed to have elected to submit its case on the record pursuant to 6101.19 (Rule 19).

6101.21 Hearing procedures [Rule 21].

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

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

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

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

(5) Before the hearing begins, the Board may prescribe a time within which the presentation of evidence must be concluded, and may establish

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time limits on the direct and cross-examination of witnesses.

(6) Upon the request of either party or if the Board deems it advisable, the Board will order witnesses to be excluded from the hearing room so they cannot hear the testimony of other witnesses. The Board will not exclude a party who is an individual, the designated representative of a party which is an entity, a person whose presence is essential to the presentation of a party's case, or someone authorized by statute to be present.

(b) *Continuances; change of location.* Whenever practicable, a hearing will be conducted in one continuous session or a series of consecutive sessions at a single location. However, the Board may at any time continue the hearing to a future date and may arrange to conduct the hearing in more than one location. The Board may also continue a hearing to permit a party to conduct additional discovery on conditions established by the Board. In exercising its discretion to continue a hearing or to change its location, the Board will give due consideration to the same elements (set forth in 6101.20(a) (Rule 20(a))) that it considers in scheduling hearings.

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

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

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

(f) *Refusal to be sworn.* If a person called as a witness refuses to be sworn or to affirm before testifying, the Board may direct that witness to be sworn or to affirm and, in the event of continued refusal, the Board may permit the taking of testimony without oath or affirmation. If the Board permits a witness to testify without oath or affirmation, the Board will explain that statements made during the hearing are subject to provisions of federal law imposing penalties, including criminal penalties, for knowingly making false representations. Alternatively, the Board may refuse to permit the examination of that witness, in which event it may state for the record the inferences it draws from the witness's refusal to testify under oath or affirmation. Alternatively, the Board may issue a subpoena to compel that witness to testify under oath or affirmation and, in the event of the witness's continued refusal to be sworn or to affirm, may seek enforcement of that subpoena pursuant to 6101.16(h) (Rule 16(h)).

(g) *Refusal to answer.* If a witness refuses to answer a question put to him in the course of his testimony, the Board may direct that witness to answer and, in the event of continued refusal, the Board may state for the record the inferences it draws from the refusal to answer. Alternatively, the Board may issue a subpoena to compel that witness to testify and, in the event of the witness's continued refusal to testify, may seek enforcement of that subpoena pursuant to 6101.16(h) (Rule 16(h)).

(h) *Issues not raised by pleadings.* If evidence is objected to at a hearing on the ground that it is not within the issues raised by the pleadings, it may nevertheless be admitted by the Board if it is within the proper scope of the case. If such evidence is admitted, the Board may grant the objecting party a continuance to enable it to meet such evidence. If such evidence is admitted, the pleadings may be amended to conform to the evidence, as provided by 6101.6(f) (Rule 6(f)).

(i) *Delay by parties.* If the Board determines that the hearing is being unreasonably delayed by the failure of a party to produce evidence, or by the

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undue prolongation of the presentation of evidence, it may, during the hearing, prescribe a time or times within which the presentation of evidence must be concluded, establish time limits on the direct or cross-examination of witnesses, and enforce such order or ruling by appropriate sanctions.

6101.22 Transcripts of proceedings; corrections [Rule 22].

(a) *Transcripts.* Except as the Board may otherwise order, all hearings, other than those under the small claims procedure prescribed by 6101.52 (Rule 52), will be stenographically or electronically recorded and transcribed. Any other hearing or conference will be recorded or transcribed only by order of the Board. Each party is responsible for obtaining its own copy of the transcript if one is prepared.

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

6101.23 Briefs and memoranda of law [Rule 23].

(a) *Form and content of briefs and memoranda of law.* Briefs and memoranda of law shall be on standard size 8½ by 11-inch paper. They shall be double-spaced with text in the body and in the footnotes no smaller than 12 point. Otherwise, no particular form or organization is prescribed. The presiding judge may request prehearing and posthearing briefs and may also request, at any point in the proceedings, memoranda of law. Prehearing and posthearing briefs should, at a minimum, succinctly set forth:

(1) The facts of the case with citations to those places in the record where supporting evidence can be found; and

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(2) Argument with citations to supporting legal authorities.

(b) *Submission of posthearing briefs.* Except as the Board may otherwise order, posthearing briefs shall be filed 30 calendar days after the Board's receipt of the transcript; reply briefs, if filed, shall be filed 15 calendar days after the parties' receipt of the initial posthearing briefs. The Board will notify the parties of the date of its receipt of the transcript. In the event one party has elected a hearing and the other party has elected to submit its case on the record pursuant to 6101.19 (Rule 19), the filing of record submissions in the form of briefs shall be governed by 6101.23 (Rule 23).

[72 FR 36795, July 5, 2007, as amended at 73 FR 26951, May 12, 2008]

6101.24 Closing the record [Rule 24].

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

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

6101.25 Decisions; settlements [Rule 25].

(a) *Decisions.* (1) Except as provided in 6101.52 (Rule 52) (small claims procedure), decisions of the Board will be made in writing upon the record as prescribed in 6101.9 (Rule 9). The Board may also take notice of any fact or law of which a court could take judicial notice. Each of the parties will be furnished a copy of the decision certified by the Office of the Clerk of the Board, and the date of the receipt thereof by each party will be established in the record. In addition, all Board decisions are posted weekly on the Internet. The Board's Internet address is: <http://www.cbca.gov>.

(2) In its decision, the Board may reserve determination of the amount of recovery for other proceedings, regardless of whether there is evidence in the

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record concerning the amount of recovery, provided the Board notified the parties before the hearing began that its decision would not address the amount of any recovery. In any instance in which the Board has reserved its determination of the amount of recovery for other proceedings, as provided in 6101.21(a)(4) (Rule 21(a)(4)), its decision on the question of the right to recover shall be final so far as proceedings at the Board are concerned, subject to the provisions of 6101.26 through 6101.28 (Rules 26 through 28).

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

[72 FR 36795, July 5, 2007, as amended at 76 FR 50928, Aug. 17, 2011]

6101.26 Reconsideration; amendment of decisions; new hearings [Rule 26].

(a) *Grounds.* Reconsideration may be granted, a decision or order may be altered or amended, or a new hearing may be granted, for any of the reasons stated in 6101.27(a) (Rule 27(a)) and the reasons established by the rules of common law or equity applicable as between private parties in the courts of the United States. Reconsideration or a new hearing may be granted on all or any of the issues. Arguments already made and reinterpretations of old evidence are not sufficient grounds for granting reconsideration, for altering or amending a decision, or for granting a new hearing. Upon granting a motion for a new hearing, the Board will take additional testimony and, if a decision has been issued, either amend its findings of fact and conclusions or law or issue a new decision.

(b) *Procedure.* Any motion under 6101.26 (Rule 26) shall comply with the provisions of 6101.8 (Rule 8) and shall set forth:

(1) The reason or reasons why the Board should consider the motion; and

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

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

(d) *Effect of motion.* A motion pending under 6101.26 (Rule 26) does not affect the finality of a decision or suspend its operation.

6101.27 Relief from decision or order [Rule 27].

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

(1) Newly discovered evidence which could not have been earlier discovered, even through due diligence;

(2) Justifiable or excusable mistake, inadvertence, surprise, or neglect;

(3) Fraud, misrepresentation, or other misconduct of an adverse party;

(4) The decision has been satisfied, released, or discharged, or a prior decision upon which it is based has been reversed or otherwise vacated, and it is no longer equitable that the decision should have prospective application;

(5) The decision is void, whether for lack of jurisdiction or otherwise; or

(6) Any other ground justifying relief from the operation of the decision or order.

(b) *Procedure.* Any motion under 6101.27 (Rule 27) shall comply with the provisions of 6101.8 and 6101.26(b) (Rules

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8 and 26(b)), and will be considered and ruled upon by the Board as provided in 6101.26 (Rule 26).

(c) *Time for filing.* Any motion under 6101.27 (Rule 27) shall be filed as soon as practicable after the discovery of the reasons therefor, but in any event no later than 120 calendar days after the date of the moving party's receipt of the decision or order from which relief is sought. In considering the timeliness of a motion filed under 6101.27 (Rule 27), the Board may consider when the grounds therefor should reasonably have been known to the moving party.

(d) *Effect of motion.* A motion pending under 6101.27 (Rule 27) does not affect the finality of a decision or suspend its operation.

6101.28 Full Board consideration [Rule 28].

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

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

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

(b) *Initiation by Board.* A majority of the judges may initiate full Board consideration of a matter at any time while the case is before the Board, no later than the last date on which any party may file a motion for reconsideration or relief from decision or order,

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or if such a motion is filed by a party, within ten days after a panel has resolved it. The parties will be informed promptly, through an order, of the matter to be considered by the full Board. The concurring or dissenting view of any judge who wishes to express such a view may issue at the time of such order or at any time thereafter.

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

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

6101.29 Clerical mistakes; harmless error [Rule 29].

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

(b) *Harmless error.* No error in the admission or exclusion of evidence, and no error or defect in any ruling, order, or decision of the Board, and no other error in anything done or not done by the Board will be a ground for granting a new hearing or for vacating, reconsidering, modifying, or otherwise disturbing a decision or order of the Board unless refusal to act upon such error will prejudice a party or work a substantial injustice. At every stage of the proceedings the Board will disregard any error or defect that does not affect the substantial rights of the parties.

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

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

(b) *Time for filing.* A party seeking an award may submit an application no later than 30 calendar days after a final disposition in the underlying appeal. The Board's decision becomes final (for purposes of 6101.30 [Rule 30]) when it is not appealed to the United States Court of Appeals for the Federal Circuit within the time permitted for appeal or, if the decision is appealed, when the time for petitioning the Supreme Court for certiorari has expired. An application for fees or other expenses may not be filed before the Board's decision is final; a request for fees or other expenses made before the Board's decision is final does not constitute an application.

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

(1) Identify the applicant and the appeal for which fees and other expenses are sought, and the amount being sought;

(2) Establish that all applicable prerequisites for an award have been satisfied, including a succinct statement of why the applicant is eligible for an award of fees and other expenses;

(3) Be accompanied by an exhibit fully documenting any fees or expenses being sought, including the cost of any study, analysis, engineering report, test, project, or similar matter. The date and a description of all services rendered or costs incurred shall be submitted for each professional firm or individual whose services are covered by the application, showing the hours spent in connection with the proceeding by each individual, a description of the particular services performed by specific date, the rate at

which each fee has been computed, any expenses for which reimbursement is sought, and the total amount paid or payable by the applicant. Except in exceptional circumstances, all exhibits supporting applications for fees or expenses sought shall be publicly available. The Board may require the applicant to provide vouchers, receipts, or other substantiation for any fees and other expenses claimed and/or to submit to an audit by the Government of the claimed fees and other expenses;

(4) Be signed by the applicant or an authorized officer, employee, or attorney of the applicant;

(5) Contain or be accompanied by a written verification under oath or affirmation, or declaration under penalty of perjury, that the information provided in the application is true and correct;

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

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

(d) *Proceedings.* (1) Within 30 calendar days after receipt by the respondent of an application under 6101.30 (Rule 30), the respondent may file an answer. The answer shall explain in detail any objections to the award requested and set out the legal and factual bases supporting the respondent's position. If the respondent contends that any fees for consultants or expert witnesses for which reimbursement is sought in the application exceed the highest rate of compensation for expert witnesses paid by the agency, the respondent shall include in the answer evidence of such highest rate.

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

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6101.30 (Rule 30) shall describe the disputed issues and explain why additional proceedings are necessary to resolve those issues.

(e) *Decision.* Any award ordered by the Board shall be paid pursuant to 6101.31 (Rule 31).

[72 FR 36795, July 5, 2007, as amended at 73 FR 26952, May 12, 2008]

6101.31 Payment of Board awards [Rule 31].

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

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

(1) Both parties must, by execution of a Certificate of Finality, waive their rights to relief under 6101.26 and 6101.27 (Rules 26 and 27) and also their rights to appeal the decision of the Board; or

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

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

[72 FR 36795, July 5, 2007, as amended at 73 FR 26952, May 12, 2008]

48 CFR Ch. 61 (10-1-14 Edition)**6101.32 Appeal from a Board decision [Rule 32].**

(a) *Record on review.* When a party has appealed a Board decision to the United States Court of Appeals for the Federal Circuit, the record on review shall consist of the decision sought to be reviewed, the record before the Board as described in 6101.9(a)(1) through (a)(13) (Rule 9(a)(1) through (a)(13)), and such other material contained in the Board's file as may be required by the Court of Appeals.

(b) *Notice.* At the same time a party seeking review of a Board decision files a notice of appeal, that party shall provide a copy of the notice to the Board.

(c) *Filing of certified list of record materials.* Promptly after service upon the Board of a copy of the notice of appeal of a Board decision, the Office of the Clerk of the Board shall file with the Clerk of the United States Court of Appeals for the Federal Circuit a certified list of all documents, transcripts of testimony, exhibits, and other materials constituting the record, or a list of such parts thereof as the parties may designate, adequately describing each. The Board will retain the record and transmit any part thereof to the Court upon the Court's order during the pendency of the appeal.

(d) *Request by attorney of record to review record.* When a case is on appeal, an attorney of record may request permission from the Board to sign out for a reasonable period of time the record on appeal to review and to copy if the attorney is unable to gain access to the record from another source.

6101.33 Ex parte contact; sanctions and other proceedings [Rule 33].

(a) *Standards.* All parties and their representatives, attorneys, and any expert/consultant retained by them or their attorneys, must obey directions and orders prescribed by the Board and adhere to standards of conduct applicable to such parties and persons. As to an attorney, the standards include the rules of professional conduct and ethics of the jurisdictions in which that attorney is licensed to practice, to the extent that those rules are relevant to conduct affecting the integrity of the Board, its process, or its proceedings. The Board will also look to voluntary

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professional guidelines in evaluating an individual's conduct.

(b) *Ex parte communications.* No member of the Board or of the Board's staff shall entertain, nor shall any person directly or indirectly involved in an appeal submit to the Board or the Board's staff, off the record, any evidence, explanation, analysis, or advice, whether written or oral, without the knowledge and consent of the adverse party, regarding any matter at issue in that appeal. This provision does not apply to consultation among Board members or to ex parte communications concerning the Board's administrative functions or procedures.

(c) *Sanctions.* When a party or its representative or attorney or any expert/consultant fails to comply with any direction or order issued by the Board (including an order to provide or permit discovery), or engages in misconduct affecting the Board, its process, or its proceedings, the Board may make such orders as are just, including the imposition of appropriate sanctions. The sanctions may include:

(1) Taking the facts pertaining to the matter in dispute to be established for the purpose of the case in accordance with the contention of the party submitting the discovery request;

(2) Forbidding challenge of the accuracy of any evidence;

(3) Refusing to allow the disobedient party to support or oppose designated claims or defenses;

(4) Prohibiting the disobedient party from introducing in evidence designated documents or items of testimony;

(5) Striking pleadings or parts thereof, or staying further proceedings until the order is obeyed;

(6) Dismissing the case or any part thereof;

(7) Enforcing the protective order and disciplining individuals subject to such order for violation thereof, including disqualifying a party's representative, attorney, or expert/consultant from further participation in the case; or

(8) Imposing such other sanctions as the Board deems appropriate.

(d) *Denial of access to protected material for prior violations of protective orders.* The Board may in its discretion deny access to protected material to

any person found to have previously violated a protective order, regardless of who issued the order.

(e) *Disciplinary proceedings.* (1) In addition to the procedures in this section 6101.33 (Rule 33), the Board may discipline individual party representatives, attorneys, and experts/consultants for a violation of any Board order or direction or standard of conduct applicable to such individual where the violation seriously affects the integrity of the Board, its process, or its proceedings. Sanctions may be public or private, and may include admonishment, disqualification from a particular matter, referral to an appropriate licensing authority, or such other action as circumstances may warrant.

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

6101.34 Seal of the Board [Rule 34].

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

6101.35–6101.50 [Reserved]**6101.51 Variation from standard proceedings [Rule 51].**

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

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especially useful. The following are examples of these changes:

(a) Establishing an expedited schedule of proceedings, such as by limiting the times provided in 6101.1 through 6101.34 (Rules 1 through 34) for various filings, to facilitate a prompt resolution of the case;

(b) Developing a record and rendering a decision on the issue of entitlement prior to reviewing the issue of quantum in a party's claim;

(c) Developing a record and rendering a decision on any legal or factual issue in advance of others when that issue is deemed critical to resolving the case or effecting a settlement of any items in dispute; and

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

[72 FR 36795, July 5, 2007, as amended at 73 FR 26952, May 12, 2008]

6101.52 Small claims procedure [Rule 52].

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

(i) There is a monetary amount in dispute and that amount is \$50,000 or less, or

(ii)(A) There is a monetary amount in dispute and that amount is \$150,000 or less, and

(B) The appellant is a small business concern (as that term is defined in the Small Business Act and regulations promulgated under that Act).

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

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

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

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

[72 FR 36795, July 5, 2007, as amended at 73 FR 26952, May 12, 2008]

6101.53 Accelerated procedure [Rule 53].

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

(2) At the request of the respondent, or on its own initiative, the Board may determine whether the amount in dispute is greater than \$100,000, such that

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

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

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

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

[72 FR 36795, July 5, 2007, as amended at 73 FR 26952, May 12, 2008]

6101.54 Alternative dispute resolution [Rule 54].

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

(1) *Matters not on Board's Contract Disputes Act (CDA) docket.* Upon request, the Board will make an ADR Neutral available for an ADR proceeding, even if a contracting officer's decision has not been issued or is not contemplated. To initiate an ADR proceeding for all matters other than docketed CDA appeals, the parties shall jointly request ADR in writing and direct such a request to the Board

Chairman. For agencies whose issues in controversy do not fall within the Board's jurisdiction, the Board may provide ADR services on a reimbursable basis.

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

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

(2) *The ADR agreement.* Before an ADR proceeding can occur, the parties must execute a written ADR agreement. This agreement should set forth, among other things, the identity of the ADR Neutral to be used, the role and authority of the Neutral, the ADR techniques to be employed, the scope and extent of any discovery relating to ADR, the location and schedule for the ADR proceeding, and the extent to which dispute resolution communications in conjunction with the ADR proceeding are to be kept confidential (6101.54(b)(3) (Rule 54(b)(3))).

(3) *Confidentiality of ADR communications and materials.* Written material

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prepared specifically for use in an ADR proceeding, oral presentations made at an ADR proceeding, and all discussions in connection with such proceedings are considered “dispute resolution communications” as defined in 5 U.S.C. 571(5) and are subject to the confidentiality requirements of 5 U.S.C. 574. Unless otherwise specifically agreed by the parties, confidential dispute resolution communications shall be inadmissible as evidence in any pending or future Board proceeding involving the parties or the issue in controversy which is the subject of the ADR proceeding. However, evidence otherwise admissible before the Board is not rendered inadmissible because of its use in an ADR proceeding. The Board will not retain written materials used in an ADR proceeding after the proceeding is concluded or otherwise terminated. Parties may request a protective order in an ADR proceeding in the manner provided in 6101.9(c) (Rule 9(c)).

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

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

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

(3) *Mini-trial.* The parties make abbreviated presentations to an ADR Neutral who sits with the parties’ designated principal representatives as a mini-trial panel to hear and evaluate evidence relating to an issue in controversy. The ADR Neutral may thereafter meet with the principal representatives to attempt to mediate a settlement. The mini-trial process may also be a prelude to the Neutral’s provision of a non-binding advisory opinion (6101.54(c)(4) (Rule 54(c)(4))) or to the Neutral’s rendering of a binding decision (6101.54(c)(5) (Rule 54(c)(5))).

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

(5) *Summary binding decision.* This is a binding ADR procedure similar to binding arbitration under which, by prior agreement of the parties, the ADR Neutral renders a brief written decision which is binding, non-precedential, and non-appealable. As in a procedure under which the Neutral provides a non-binding advisory opinion, the manner in which information is presented for a summary binding decision may vary depending on the circumstances of the particular dispute and the wishes of the parties as set out in their ADR agreement.

(6) *Other procedures.* In addition to other ADR techniques, including modifications to those listed in paragraphs

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(c)(1) through (c)(5) of this section, the parties may use ADR neutrals outside the Board and techniques which do not require direct Board involvement.

(7) *Selective use of standard procedures.*
Parties considering ADR proceedings

are encouraged to adapt for their purposes any provisions in 6101.1 through 6101.34 (Rules 1 through 34) of the Board's rules which they believe will be useful.

APPENDIX TO PART 6101—FORM NOS. 1-5

FORM 1, GSA FORM 2465, NOTICE OF APPEAL.

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

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

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

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

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

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FORM 2, NOTICE OF APPEARANCE.

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Form 2



UNITED STATES
CIVILIAN BOARD OF CONTRACT APPEALS

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

NOTICE OF APPEARANCE

To: _____
 Board Judge
 Civilian Board of Contract Appeals

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

 (Name) (Date)

 (Title) (Phone)

 (Address) (Facsimile)

CERTIFICATE OF SERVICE

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

Signature

Note: This format shall be used only as a guide for individual preparation.
FORM 3, GSA FORM 9534, SUBPOENA.

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Civilian Board of Contract Appeals

SUBPOENA

OMB No. 3090-0221
Expires: 1/31/2007

Public reporting burden for this collection of information is estimated to average 10 minutes per response, including the time for reviewing instructions, searching existing data sources, gathering and maintaining the data needed, and completing and reviewing the collection of information. Send comments regarding this burden estimate or any other aspect of this collection of information, including suggestions for reducing this burden, to Civilian Board of Contract Appeals (G), GSA, Washington, DC 20405; and to the Office of Management and Budget, Paperwork Reduction Project (3090-0221), Washington, DC 20503.

Contract/Solicitation No. _____

CBCA _____

TO: _____

YOU ARE HEREBY COMMANDED to appear at _____
(Room Number) (Building)

(Street Number) (City) (State)

at _____ o'clock am/pm (circle one) on the _____ day of _____, _____
(Year)
to testify at a (deposition/hearing) in this case; and to bring with you* _____

and to stay there until given permission to leave. This subpoena is issued at the request of (circle one)
(Appellant/Petitioner/Applicant/Respondent).

Your appearance as ordered by this subpoena will entitle you to receive the fees and mileage provided by 28 U.S.C. § 1821 or other applicable law.

* Strike the words "and to bring with you" unless the subpoena is to require the production of documents or tangible things, in which case the documents and things should be designated in the blank space provided for that purpose. If testimony by an organization representative or designee is requested, describe with reasonable particularity the matters on which examination is requested.

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Upon written request to this Board by you or by a party to this case, which request should be made within 10 days after service but in any event no later than the time specified in the subpoena for attendance, the Board may (i) quash or modify the subpoena if it is unreasonable and oppressive or for other good cause shown, or (ii) require the party in whose behalf the subpoena was issued to advance the reasonable cost of producing subpoenaed books, papers, documents, or tangible things.

(Board Judge)

(Date)

(Representative for Appellant/Petitioner/Applicant)

(Representative for Respondent)

(Date Signed)

(Date Signed)

(Name of Firm)

(Agency)

(Street Address)

(Street Address)

(City, State, Zip Code)

(City, State, Zip Code)

(Telephone Number)

(Telephone Number)

RETURN ON SERVICE

Summoned the above named witness by delivering a copy to him/her (circle one) and tendering to him/her (circle one) the fees for one day's attendance and mileage allowed by law, on the _____ day of

_____, _____, at _____.

(Year)

(Address)

(Deliverer)

(Date Signed)

Subscribed and sworn to before me, a _____ this

_____ day of _____, _____.

(Year)

(Notary Public)

NOTE: Affidavit not required if service is made by U.S. Marshal or Deputy. Service may also be made by any other person who is not a party and is not less than 18 years of age. Service shall be made by personally delivering a copy to the person named and tendering the fees for one day's attendance and the mileage allowed by law; however, where the subpoena is issued on behalf of the Government, money payments need not be tendered in advance of attendance.

GSA 9534 (REV. 6/2007) BACK

FORM 4, GOVERNMENT CERTIFICATE OF FINALITY.

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Form 4



UNITED STATES
CIVILIAN BOARD OF CONTRACT APPEALS

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

GOVERNMENT CERTIFICATE OF FINALITY

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

_____ hereby certifies that:

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

Government Agency

_____ By _____
Date Signature and Title

Note: This format shall be used only as a guide for individual preparation.
FORM 5, APPELLANT/APPLICANT CERTIFICATE OF FINALITY.

