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PRACTICING BEFORE THE FEDERAL BOARDS OF CONTRACT APPEALS

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This project was initially undertaken in 2002 by the Pro Bono Committee of the Section of Public Contract Law of the American Bar Association, under the excellent supervision of the late Judge Eileen P. Fennessy. The purpose of the 2002 edition of the manual was to aid contractors in pursuing claims without benefit of counsel (pursuing the appeal as a *pro se* litigant). To that end, clerks and judges of the various boards of contract appeals (BCAs) made the manual available, free of cost, to *pro se* litigants. The manual has also been used by many in the government contracts legal community as a primer for lawyers new to the Contract Disputes Act process, as well as a refresher for more experienced public contract law litigators. Most BCAs connected to United States civilian agencies were consolidated in January 2007 into a single Civilian Board of Contract Appeals (CBCA). 41 U.S.C. § 7105(b)(1). Thus, the Section of Public Contract Law has determined that it is time to issue a revised edition of the manual. With many thanks to the authors and editors listed on the title page for their enthusiastic and thoughtful attention to their task, the Section provides this revision.

As was true with the first edition, as a public service, the BCAs are encouraged to make this manual available to litigants without charge. This manual may be updated from time to time if changes are made in BCA procedures. The latest version is available for downloading on the resource page of the ABA Section of Public Contract Law website, at:

http://www.americanbar.org/groups/public_contract_law/resources.html

The fact that a BCA makes the manual available does not imply any authorship, official endorsement, or responsibility for any errors contained herein, on the part of the BCA. This manual does not substitute in any way for a BCA's own rules. The rules for the CBCA may be found at 48 C.F.R. [Code of Federal Regulations] parts 6101 through 6105, or on its webpage at www.cbca.gov. The rules governing procedure at the Armed Services Board of Contract Appeals (ASBCA) are located at Appendix A to Chapter 2 of 48 C.F.R., or on its webpage at www.asbca.mil. The rules for the Postal Service Board of Contract Appeals (PSBCA) can be found at http://about.usps.com/who-we-are/judicial/board-contract-appeals-decisions/welcome.htm.

The authors and editors listed on the title page deserve primary credit for this revision. We wish to give special thanks to Oliya S. Zamaray, Esq. of Holland & Knight LLP, who coordinated the many drafts leading to this final product. The Section also wishes to thank the Chairman of the Armed Services Board of Contract Appeals, Paul Williams, and the Chairman of the Civilian Board of Contract Appeals, Stephen M. Daniels, for their encouragement and advice in the course of this revision, as well as the recorders and clerks of the ASBCA and CBCA who help disseminate this information. Finally, we wish to thank the following individuals for their varied assistance: Judge Richard C. Walters; David S. Black, Esq.; Daniel P. Graham, Esq.; Rachel A. Alexander, Esq.; and Barron A. Avery, Esq. We hope that the BCA system, the parties, their counsel, and the BCA judges who hear these cases, will benefit directly from the wisdom imparted in these pages.

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PRACTICING BEFORE THE FEDERAL BOARDS OF CONTRACT APPEALS

I. INTRODUCTION

The purpose of this manual is to provide simple, straightforward guidance for contractors who bring appeals to federal boards of contract appeals (BCAs) without representation by an attorney (*pro se* litigants), and for attorneys who may not be familiar with BCA practice. It may also help contractors decide whether to hire an attorney to present the appeal.[1]

The BCAs are tribunals established by Congress in the Contract Disputes Act (CDA) to resolve disputed claims arising under or relating to a federal government contract. 41 U.S.C. §§ 7101-7109. The BCAs are charged with providing informal, inexpensive, and prompt resolution of government contract disputes. In addition to providing a forum for a full hearing, the BCAs also make a variety of alternative dispute resolution procedures available; these procedures can be used either for matters that are already docketed at a BCA, or for issues still being disputed with a contracting officer that may later result in an appeal to a BCA.

Since January 2007, two main BCAs have been tasked with hearing appeals from contracting officers' final decisions. The ASBCA is generally responsible for deciding appeals from decisions of contracting officers in the Department of Defense, the Department of the Army, the Department of the Navy, NASA, and when specified, the CIA. The CBCA hears disputes from all other executive agencies except the United States Postal Service (USPS), the Postal Rate Commission, and the Tennessee Valley Authority. 41 U.S.C. §§ 7101-7109. The USPS is served by the PSBCA. In addition, the Government Accountability Office Contract Appeals Board (GAOCAB) handles contract disputes arising in the legislative branch, and the Office of Dispute Resolution for Acquisition (ODRA) handles contract disputes and bid protests arising out of Federal Aviation Administration procurements. This manual may be helpful to litigants before those BCAs as well. Some of the BCAs exercise jurisdiction in other types of disputes, not arising under the CDA. While this manual principally focuses on CDA cases, it should be a useful tool in other types of cases before a BCA.

For administrative purposes, the BCAs are housed within federal agencies. However, Congress has made the BCAs functionally independent. Decisions of the BCAs may not be reviewed or changed by any agency official. Board decisions issued under the CDA are final unless one of the parties appeals to the United States Court of Appeals for the Federal Circuit (Federal Circuit), or, in the case of maritime appeals, the appropriate Federal District Court.

Appendix B to this manual contains sample forms of pleadings, discovery requests, letters, mediation agreements, and other documents often used in BCA proceedings. These are typical documents which might be used by either side. Parties may, but are not required to, use these samples for preparing their own documents. Please remember that these forms will need to be tailored to each individual appeal. Finally, the ASBCA and CBCA allow pleadings, briefs, and certain other documents to be filed electronically as PDF attachments to e-mails. Please refer to the BCAs' websites, www.asbca.mil and www.cbca.gov, for instructions on e-filing. The

[1] Small businesses may be eligible for payment of attorneys' fees under the Equal Access to Justice Act. *See* Section XIV.

PSBCA and GAOCAB will allow pleadings and documents to be filed as attachments to e-mails upon request.

Each BCA publishes its own rules, which may be found at the webpage for that board as well as in the appropriate C.F.R. section (*i.e.*, 48 C.F.R. part 6101 for the CBCA, and Appendix A to Chapter 2 of 48 C.F.R. for the ASBCA). When questions arise, a party should always check the rules of the BCA in which it is appearing. Generally, when a contracting officer's decision is appealed to a board, the clerk of that BCA will send a copy of its rules to the contractor with the notice of docketing, or notify the contractor how those rules can be obtained.

This manual is not a substitute for the rules of the BCAs, and the published rules will govern if there is any discrepancy between this manual and the rules. Parties must be sure to read, and comply with, the rules and orders of the BCA to which the dispute has been appealed. For questions about a particular rule, the clerk of the BCA or the judge's legal assistant may be able to help you.

II. PREREQUISITES OF AN APPEAL

A. The Claim and Certification

Claims often arise during the course contract performance; a party might seek relief by requesting contract interpretation, money, and/or an extension of time. A claim generally consists of two parts: (1) the "entitlement" portion, which typically includes a detailed description of the actions or inactions of the party from whom relief is sought, entitling the claimant to compensation; and (2) the damages or "quantum" portion, which sets forth the calculations and support for the compensation claimed. The two parts are equally important because without entitlement, damages cannot be recovered, and without proof of damages, establishing entitlement is of little value.

Deciding to formally file and pursue a claim has significant implications. Among other things, relationships become more adversarial as parties protect their own positions in anticipation of litigation. If a party decides to file a claim and pursue an appeal, it should be sure that the claim is carefully calculated and supported.

Contracting officers are subject to scrutiny and oversight, both inside and outside of their own organizations. They will not typically pay a claim without sufficient back-up, even if it is just for "nuisance value," a practice which might make business sense. Some claims remain unresolved, and litigation prolonged, due to inadequate supporting proof of costs. In some instances, an inflated claim may cause the government to dispute any entitlement at all; indeed, if the contractor's claim is unsupportable due to misrepresentation or fraud, the contractor can be liable to the government for at least the unsupported amount of its claim, and perhaps more. So, although the parties have a legal right to assert and pursue legitimate claims, the implications, both as to process and as to proof, merit serious consideration.

The party that is asserting a claim has the responsibility to bring forward sufficient evidence to support its claim. Stated another way, the party seeking to recover usually has the "burden of proof." If the government is asserting a claim, *e.g.*, claiming it is entitled to liquidated damages, it has the burden of proving it is entitled to recovery. Likewise, if a contractor is making a claim, *e.g.*, it has been required to do work not required by the contract, then the contractor must prove entitlement to compensation for that work.

A BCA must have jurisdiction – the right to consider and decide a contract dispute. For a BCA to have jurisdiction over a contract dispute brought by a contractor, the CDA requires that the contractor must first submit a written claim to the contracting officer for his or her final decision denying or granting all or part of the claim. For a BCA to have jurisdiction over a government claim, the contracting officer must first have asserted the government's claim via a final decision.

For BCAs to exercise jurisdiction under the CDA, several prerequisites must be met. If these requirements are not met, a board will not have the authority to decide the dispute. First, a claim brought to a board must be in writing and seek, as a matter of right, the payment of money in a sum certain, the adjustment or interpretation of contract terms, or other relief arising under or relating to the contract. The claim must be a clear and definite statement that gives the

contracting officer notice of the basis and amount of the claim. Routine requests for payment such as invoices that are not in dispute at the time they are submitted are not claims. *See* Federal Acquisition Regulation (FAR) 52.233-l(c) (52 C.F.R. 52.233-1(c)).

If a contractor's claim is for more than $100,000, the claim must be certified in accordance with the CDA. The certification language required by the Disputes clause in the contract is shown at FAR 52.233-1(d) and currently reads:

> I certify that the claim is made in good faith; that the supporting data are accurate and complete to the best of my knowledge and belief; that the amount requested accurately reflects the contract adjustment for which the Contractor believes the Government is liable and that I am duly authorized to certify the claim on behalf of the Contractor.
>
> Signed by: _____
> [name, company, position]

The person who signs the certification must be authorized by the contractor to bind the contractor with respect to the claim.

A Sample Request for a Contracting Officer's Final Decision is shown at Appendix B-2. However, parties potentially facing a lengthy appeal process may wish to carefully consider when best to submit a CDA claim. Once a claim meeting CDA requirements is submitted to the contracting officer a final decision is required. The issuance of the final decision triggers the deadline for filing an appeal. As an alternative to a CDA claim, a contactor might request that the contracting officer issue an equitable adjustment (referred to as a request for equitable adjustment (REA)). Until the contractor's document requests a contracting officer's final decision (and, if over $100,000, is certified), the contracting officer should not issue a final decision triggering the appeal deadline.

B. The Contracting Officer's Final Decision

If a contractor's claim is for $100,000 or less, the contractor may ask for a final decision within 60 days, in which case, the contracting officer is obliged to comply. For certified claims for more than $100,000, the contracting officer has 60 days either to decide the claim or to notify the contractor when a final decision will be issued.

The contracting officer's decision must be in writing and must be mailed or otherwise furnished to the contractor. The contracting officer must state the reasons for the decision and notify the contractor of its rights, including the right to appeal the decision to a particular BCA within 90 days or to the United States Court of Federal Claims within twelve months of the final decision.

PRACTICE TIPS

- A BCA cannot consider a dispute until a claim has first been submitted to the contracting officer responsible for administering the contract and a final decision has been requested.

- A BCA cannot consider a government claim until the contracting officer has first asserted the claim by issuing a final decision and the final decision has been appealed.

- A claim must be in writing and seek the payment of money in a sum certain, the adjustment or interpretation of contract terms, or other relief arising under or relating to the contract.

- A claim for more than $100,000 must be certified in accordance with FAR 52.233-1.

III. BEGINNING AN APPEAL

A. Appeal from a Contracting Officer's Decision

An appeal to a BCA is relatively easy and inexpensive. A contractor must file an appeal with the appropriate board within 90 days after receiving the contracting officer's final decision. An appeal from a final decision issued by a USPS contracting officer may be also sent directly to the contracting officer.

An appeal may be filed via USPS mail or any other document delivery service. It may also be hand-delivered. An appeal sent by the USPS is timely if it transferred to the custody of the USPS or *postmarked* within that 90-day period. For delivery other than USPS mail, the appeal is timely only if the BCA *receives* it within 90 days after the contractor received the contracting officer's final decision. If an appeal is delivered by means other than USPS mail, a receipt should be obtained indicating the date and time of delivery.

There is no fee to take an appeal to a BCA. All that is required is a written notice of appeal.[2] The notice of appeal should:

a) be in writing and state that an appeal is being taken from a contracting officer's final decision;

b) describe the contracting officer's decision from which the appeal is intended in enough detail so the BCA can distinguish it from any other contracting officer's final decision; and

c) be submitted by the appellant, the appellant's authorized representative, or by the appellant's attorney.

To ensure that the above criteria are met, the notice of appeal should:

a) identify the contract, by number, and the department and/or agency or bureau involved in the dispute;

b) identify the amount of money in dispute or other relief sought; and

c) include a copy of the contracting officer's decision from which the appeal is taken.

Once an appeal has been filed with a BCA, the contractor is referred to as the appellant; the government agency is typically referred to as the respondent or the government. The appellant should also provide a copy of the notice of appeal to the contracting officer. In addition to alerting the contracting officer that an appeal has been filed, provision of the copy also serves as additional evidence of the date the appeal was filed.

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[2] A sample Notice of Appeal appears in the Appendix at B-3.

In instances where there is a question about whether the appellant has met the 90-day deadline, proof of timely delivery may be required by the BCA. If a contractor does not meet the 90-day deadline for filing an appeal, the board will dismiss the appeal for lack of jurisdiction. Even if a BCA does not have jurisdiction to consider an appeal because it was filed beyond the 90-day deadline, a contractor has the right to file an action in the Court of Federal Claims within twelve months after receiving the contracting officer's final decision.

B. Appeal from a Contracting Officer's Failure to Issue a Decision

A failure to issue a timely final decision is treated as a "deemed denial" of the claim, from which a contractor may appeal. For a claim of $100,000 or less, if the contracting officer does not issue a decision within 60 days of receipt of a request that a final decision be issued, the contractor may appeal that failure to render a decision. If, on a claim over $100,000, the contracting officer does not issue a decision within a reasonable time (which is at least 60 days or by another precise date that the contracting officer has told the contractor s/he will issue the final decision), the contractor may appeal from that failure.

A notice of appeal from a deemed denial should contain essentially the same information as set forth above, and should state that the appeal is taken from the failure of the contracting officer to render a decision within a reasonable time. An appeal from a deemed denial places the matter before the BCA. Upon receipt of such an appeal, the board may temporarily stop the proceedings and direct the contracting officer to either issue a decision or explain why a decision cannot be issued. The BCA may take this action so that it and the contractor will have an understanding of the government's position. To avoid potential problems and delays in an appeal from a "deemed denial," make sure that the contracting officer is late in issuing the final decision before filing the appeal.

PRACTICE TIPS

- An appeal *must* be filed with the appropriate board within 90 days after receiving the contracting officer's final decision.
- If a contracting officer does not issue a final decision within the required time frame, a contractor may appeal that failure as a "deemed denial" of the claim.
- If an appeal is delivered by means other than USPS mail, a receipt should be obtained indicating the date and time of delivery.
- Once an appeal has been filed with a BCA, the contractor is referred to as the appellant; the government agency is typically referred to as the respondent or the government. An appellant who represents himself or herself is sometimes called a *pro se* appellant. An attorney will always represent the government.

IV. THE PRELIMINARY PHASE

A. The Notice of Docketing

After receipt of a notice of appeal, the BCA sends a notice of docketing to the appellant and to the chief trial attorney of the agency that issued the final decision. The notice of docketing identifies the docket number that the BCA has assigned to the appeal. This docket number should be used in all future communications with the BCA as it is the principal way the BCAs track cases. The BCA will also either provide a copy of the board's rules or information on where the rules can be found electronically. The notice includes instructions concerning what the parties will be required to file in the near future, and when. These filings may include a complaint and answer, the government's appeal file, and the appellant's supplement to the appeal file. The notice of docketing letter will also describe the procedures available for resolving the appeal and options for possible settlement. These matters will be discussed in greater detail in the sections that follow.

The parties *must* comply with the time periods and dates set by the BCA's rules and by the board. If it turns out that a due date cannot be met and an extension is needed, the extension request should be made well before the filing is due. If a party misses a due date and fails to request an extension, depending on the circumstances, the board may or may not allow a late filing.

B. Representation before a BCA and the Notice of Appearance

At the outset of the appeal, the parties need to notify the board and each other who will be representing each of them before the board. An individual or an attorney cannot represent a party unless he or she has noted his or her appearance with the board. An appellant can do this by stating in its notice of appeal who will be its representative. Either party can submit a separate document called a notice of appearance.[3] The notice of appearance is a simple document. It must state the party's name, the designated representative's name, his or her relationship to the party, address, telephone number, and email address. The appellant should send a copy of the notice to the government's attorney, if known, or to the contracting officer who issued the final decision, who should forward the notice to the government attorney assigned to the case.

Although the BCAs do not require that the contractor's representative be an attorney, there are some limitations upon who may represent an appellant. An appellant who is an individual may represent him or herself before a BCA; a corporation may be represented by one of its officers; and a joint venture by one of its members.

Shortly after the appeal has been filed, the government's attorney will also file a notice of appearance. Additional notices of appearance must be filed by the government and the appellant each time a change in representation occurs.

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[3] A sample Notice of Appearance appears in the Appendix at B-4.

C. Service of Documents

Unless otherwise directed by the board a party must provide a copy of all correspondence and documents sent to the board to the opposing party's representative so that everyone knows what is happening in the appeal. The party should use the same delivery method to the opposing party as is used with the board, so if something was sent by telefax (facsimile) to a board, it should also be telefaxed to the opposing party on the same day. Each submission to the BCA should reflect that a copy of the submission was sent to the opposing party. For submissions to the BCA, such as the complaint or a brief, the parties should attach a certificate of service[4] to show that a copy was sent to the other side (unless the submission is sent with a cover letter that shows a copy was sent to the opposing party). A typical certificate of service states:

> CERTIFICATE OF SERVICE
>
> I hereby certify that I served, or caused to be served, a true and correct copy of the foregoing document by [state: hand-delivery, mail, e-mail or telefax] to the following attorney of record this [date] day of [month], [year]: [provide: name, title, address].
>
> Signed by: [signature]
> [name of person making the certification and title]

Sample letters and forms for submissions are included in Appendix B.

D. Private or *Ex Parte* Communications

Neither party is allowed to discuss the merits (that is, the applicable facts and law) of an appeal with the judge outside the presence of the opposing party. Therefore, if one or both sides want to discuss the merits of the appeal with the judge, either or both parties must request a telephone conference with the judge. The judge's office will typically set up a conference call with both parties participating. A request for a conference call may be submitted in writing to the BCA, by e-mail, or orally by telephoning the recorder (or, in the case of the CBCA, the judge's legal staff assistant). Private, or *ex parte*, discussions with the judge about purely procedural matters may be permitted.

E. Board Orders and Extensions of Time

The board or judge will set forth the schedule for various submissions and make other demands by issuing an "order." An order should be treated as a command from the judge to do what is set forth in the order by the date(s) specified in the order. If a party anticipates it will not be able to file (submit) a response to an order by the date(s) set forth in the order, it must ask the judge, in advance, for an extension of time.[5] The request should briefly set forth the reason(s) for the extension and notify the judge when the required pleading or information is requested to be filed. Additionally, before asking a judge for an extension, a party should contact the opposing party to

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[4] A sample Certificate of Service appears in the Appendix at B-5.

[5] A sample Request for an Extension of Time appears in the Appendix at B-6.

check whether that party is willing to agree to the extension. Be sure to let the judge know, in the extension request, whether the request is opposed or not, so the judge can be fully informed. Unopposed extension requests are typically granted, provided there is a legitimate basis for the request and the parties do not constantly ask for them. Extensions that are opposed may require more consideration by the judge. In any case, before granting an extension, the opposing party will need to be consulted.

If a party cannot meet a date set by the board's rules or by a judge, it *must* request an extension of time in advance from the board. Failure to meet deadlines may lead the board to impose sanctions. Repeated failures to meet deadlines can result in the dismissal of the appeal for failure to prosecute it.

F. The Appeal File

The appeal file is often referred to as the "Rule 4 file" because BCAs address the content and submission of the appeal file in Rule 4 of their rules of procedure. The government is required to submit the appeal file to the BCA and to the appellant within 30 days of receiving the notice of docketing. The appeal file should contain all the documents that the government considers pertinent to the dispute. Each document in the appeal file should be arranged in chronological order, if practical, and must be sequentially numbered, tabbed, and indexed.

For a number of reasons, appeal files are sometimes not complete when first submitted. For example, the government may not have considered certain documents to be relevant. Typically, the appellant will be ordered to submit a supplemental appeal file within 30 days after it received the government's appeal file.[6] This is the appellant's chance to submit relevant documents that the government failed to include in its appeal file. Documents that the government has already submitted should not be duplicated in the appellant's submission.

Documents submitted to the BCA in the government's appeal file and the appellant's supplement are considered evidence; they are made part of the record upon which the BCA will make a decision, unless the other party objects and the BCA grants the objection. The documents in the appeal file and the appellant's supplement which are included in the record will not have to be made exhibits during the hearing, which saves time and effort.

Usually, the BCAs will allow the parties to further supplement the appeal file after discovery has been completed and/or prior to the hearing. As a general rule, the earlier a document is submitted for the appeal file or appeal file supplement, the less likely it is to be opposed.

[6] A sample Supplement to the Appeal File appears in the Appendix at B-9.

PRACTICE TIPS

- The parties *must* comply with the time periods and dates set by the BCA's rules and by the judge. If it turns out that a due date cannot be met and an extension is needed, the extension request should be made well before the filing is due. If a party misses a due date and fails to request an extension, depending on the circumstances, the judge may or may not allow a late filing.

- Documents submitted to the BCA in the appeal file and any appeal file supplements are accepted by the board as evidence and are made a part of the record upon which the BCA will make a decision, unless the other party objects and the BCA sustains the objection. Once this occurs, there is no future need to submit these documents as exhibits.

- Once a document is included in the appeal file as an exhibit, do not resubmit the document as an exhibit in the appeal file supplement. Resubmission will cause confusion as to what document number should be referenced in future filings.

V. ELECTION OF PROCEDURES

The BCAs call their trials "hearings," but they follow traditional litigation and trial processes, including placing witnesses under oath, allowing direct and cross-examination, and ruling on evidentiary objections. In addition to traditional litigation processes, the BCAs offer small claims processes as well as alternative dispute resolution (ADR) procedures designed to help quickly and informally resolve appeals. ADR (which, in federal contract practice is sometimes generally referred to as mediation) is an alternative to having a hearing or submitting a case for a decision on the basis of the written record. It uses procedures that vary depending on the nature of the case. After a notice of appeal is received, a BCA will typically send a notice summarizing available ADR procedures or where on the web information about ADR may be found. The parties may elect to use an ADR procedure at any time.

The BCA's rules and/or the notice of docketing will state the times within which choices about litigation procedures must be made. The procedures discussed below are set forth in the rules of each BCA.

A. The Traditional Litigation Procedure – A hearing

The traditional litigation procedure is available for all types of cases, regardless of the dollar amount of the claim. Both parties file pleadings, with the appellant typically filing the first pleading, called a complaint. On occasion, however, the judge may order the government to file the complaint if the underlying dispute in the appeal arises from a government claim against the contractor. The content of the complaint is discussed in Section VII.A and a sample complaint can be found at Appendix B-7. After receiving the complaint, the government must then file an answer (unless the government filed the complaint, in which case the appellant will file the answer). The parties then typically conduct discovery, as discussed in Section VIII, to find out more about the case.

With the traditional procedure, the BCAs typically hold a hearing unless the parties submit the case for a decision on the written record. The hearing is conducted like a non-jury trial in the federal courts and usually involves the parties filing pre-hearing or post-hearing briefs, or both.

Although the BCAs are located in the Washington, D.C. area, the judge will usually hold a hearing at any location which best serves the interest of justice, so the judge will typically seek the suggestions of the parties on where to hold the hearing.

In the traditional procedure, one judge will preside at the hearing and prepare the initial draft of the decision. The decision will set forth, in detail, the factual and legal bases for the decision. Two other judges will consider the record and review the initial draft decision. At least two of the three judges must agree on the final version of the decision for it to be issued. At the ASBCA, if there is a dissent (one of the panel judges disagrees with the decision), the case will be decided by a five-judge panel. A decision issued pursuant to the traditional procedure is considered binding precedent for the BCA issuing the decision and is final unless either party files a timely appeal of the decision. Binding precedent means that the issuing BCA is obligated to follow the law established by that case in future cases that have comparable facts.

B. The Small Claims Expedited Procedure – A decision within 120 days

The BCAs have special procedures for small dollar value cases. For claims of $50,000 or less ($150,000 for small businesses), the appellant may elect the small claims procedure. The objective of this expedited procedure is to resolve the dispute within 120 days after the BCA receives the request for this process.

After the appellant asks for the expedited procedure, the judge assigned to the case will hold a conference call with the parties to discuss how the appeal will be processed, consistent with the objective of resolving it within 120 days.

The expedited procedure provides for simplified rules of procedure. The judge will streamline proceedings and may eliminate discovery, motions, and certain pre-hearing procedures. The judge may also shorten the time frames for completing such actions. The judge will hold a hearing unless the parties elect to proceed on the written record without a hearing.

The election of the expedited procedure puts the case on a fast track. The parties must be able to devote the time necessary to resolve the appeal quickly and must be willing to cooperate with each other for the expedited procedure to work successfully.

Only one judge will issue a decision in an expedited appeal. If a hearing was conducted, the judge, in his or her discretion, may ask the parties to give closing arguments and has the option of issuing an oral decision at the close of the hearing.

The decision is typically short, with summary findings of fact and a brief statement of the legal bases for the decision. A decision issued in an expedited appeal has no precedential value, meaning that it is not cited for guidance in deciding other cases. Although motions for reconsideration are permitted, appeals to the Federal Circuit are not allowed, except in cases of fraud.

C. The Small Claims Accelerated Procedure – A decision within 180 days

If the amount in dispute is less than $100,000, an appellant may ask to have the dispute resolved within 180 days under the accelerated procedure. The accelerated procedure is similar to the small claims procedure but involves the following major distinguishing features:

1) the appeal is to be resolved, if practicable, within 180 days after the BCA's receipt of the election;

2) the presiding judge issues the decision with the concurrence of one other judge; and

3) the decision may be cited as precedent in later cases and may be appealed to the Federal Circuit.

D. Submission on the Record

Regardless of which of these three procedures is used, a party may ask that the case be decided on the basis of the written record, without a hearing. If one party elects to have a hearing, a hearing will be held. The party who requested a decision on the written record can attend and participate at the hearing or may submit its case on the record and elect to appear at a hearing solely to cross-examine any witness presented by the opposing party.

If a party chooses to submit the case on the record, it must satisfy the same burden of proof or defense as would be required if a hearing were conducted. To help explain the documents in the record, the appeal file may be supplemented with affidavits (statements of fact sworn to and signed before a notary public), declarations (like affidavits but must contain a statement that "the facts are true and correct under penalty of perjury" instead of being signed before a notary public), depositions, admissions, answers to interrogatories, and/or stipulations of fact agreed to by the parties.

While supplementation of the record as described above is not required, these additional submissions may help the judge to better understand the parties' respective positions. If there are facts in dispute, it is important to supplement the record with affidavits or declarations given under penalty of perjury by a person with direct knowledge of the facts. Affidavits and declarations should also reference relevant documents in the appeal file or appellant's supplement.

The BCAs will usually require the record to be supplemented with legal briefs and/or oral argument. Although *pro se* appellants probably have not been trained to write legal briefs, it is wise to provide the presiding judge with a brief containing a concise statement of the important facts that includes citations to the evidence that support a claim or defeat a government claim. An appellant should also explain the reasons it believes that the government's position is incorrect based on the evidence in the record.

The submission of an appeal for a decision on the record does not eliminate the need to prepare pleadings or conduct discovery. A decision in an appeal submitted on the record without a hearing is final, subject only to an appeal by either party. *See* Section XIII.

E. Separate Decisions on Entitlement and Quantum

A claim generally consists of two parts: (1) the "entitlement" portion, which typically includes a detailed description of the actions or inactions of the party from whom relief is sought, entitling the claimant to compensation; and (2) the damages or "quantum" portion, which sets forth the calculations and support for the damages claimed. In some cases, to shorten the time needed to process an appeal and save resources, the parties may ask the judge to decide the appeal in two parts: entitlement and quantum. Sometimes the judge will raise this issue. When separate decisions are issued on entitlement and quantum, the appeal is said to be "bifurcated."

To decide whether an appeal should be bifurcated, the judge will consider the benefits of splitting the litigation into two parts. In the entitlement phase of an appeal, the merits of a case are addressed, *i.e.*, whether the party is entitled to any relief. The quantum phase determines the

amount of money that an entitled party should recover, *i.e.*, what costs the party has proved. If the judge determines in the entitlement phase of an appeal that the claim should be denied (for instance, the government did not change the contract as contended by the appellant), there is no need to move to the quantum phase. If the quantum portion of the claim is particularly complicated and will take a long time to explain and decide, it might be best to have a hearing and obtain a decision on entitlement first, leaving the issue of quantum (what/how much entitlement) to a later date. Sometimes, the parties may be able to agree to the amount of the equitable adjustment, but need the judge to decide whether the party is entitled to an equitable adjustment under the terms of the contract. Other times, both parties may agree that the contractor is entitled to an equitable adjustment but the amount of the entitlement is in dispute. Deciding whether to bifurcate a case is ultimately a decision left to the judge.

PRACTICE TIPS

- A hearing will be held if either party elects one.
- Electing the small claims or accelerated procedure puts the case on a fast track, but the parties must be willing to cooperate with each other and devote the time necessary to process the appeal with shorter than usual time frames.
- When a party decides it does not need a hearing to prove its case, it can ask the judge to make a decision on the written record. A party that chooses to submit the case on the record must satisfy the same burden of proof on the claim or defense as would be required if a full hearing were conducted.
- A party electing to submit its case on the record may also elect to appear at a hearing solely to cross-examine any witness presented by the opposing party.

VI. ALTERNATIVE DISPUTE RESOLUTION (ADR) AND SETTLEMENT NEGOTIATIONS

A. ADR Procedures

Because litigation is time-consuming and expensive, many agencies and contractors want a different approach – one that still involves a third party neutral but which is faster, more flexible, informal, and comprehensive. These kinds of alternative procedures are called alternative dispute resolution or ADR, and there are many different types, all of which can be tailored by the parties and the neutral. Statutes, regulations, and BCA procedures provide for and encourage ADR, and the success rates are high. Parties should seriously consider this option as they work to resolve their disputes.

ADR is voluntary; neither side is required to choose it. For an ADR proceeding to be conducted, both parties must agree to use ADR. However, most ADR processes still allow the parties to proceed later with litigation if the ADR is unsuccessful, so many parties consider ADR a no-risk proposition; they will either reach a resolution they can live with, or they can walk away and continue with traditional litigation. The parties may ask the board for ADR assistance anytime there is an issue in dispute, from pre-claim, through the early appeal process, to post-hearing. It is important to note that the later that ADR is requested, the more costs are incurred and the more entrenched the parties' positions become. ADR procedures can also be used for the entire dispute or just parts of it, as the parties agree.

There are two basic kinds of ADR – binding and non-binding – although there are many variations of both. Mediation, which is non-binding, is the most popular form of ADR used at the BCAs. When using mediation, the parties will typically exchange position papers addressing the facts and disputed issues, as well as their positions. They then meet with the judge in a joint session and make informal presentations to each other and the judge. Each party must be represented by someone with authority to settle the dispute. The judge, acting as a third-party neutral, meets both together and separately with the parties to assess the strengths and weaknesses of each side and help identify settlement options. If the parties reach an agreement, they sign a settlement agreement and then jointly move to dismiss the case. If they do not settle, the judge that served as the neutral withdraws and removes or "recuses" himself or herself from any further activity with the case. The case goes back into the litigation process before the presiding judge, or another judge is assigned to preside if the presiding judge conducted the ADR. This way, any concessions made for settlement purposes during the ADR remain private from the judge deciding the case. However, the parties may request that a presiding judge who conducts an ADR procedure remain as the presiding judge. This type of arrangement is allowed provided the parties and judge agree. The documents at Appendix C-7 through C-12 contain sample agreements for non-binding ADR. Reading those sample agreements can provide a better understanding of what to expect during an ADR procedure.

Binding ADR at the BCAs is typically accomplished through a procedure called summary trial with binding decision. This procedure is similar to binding arbitration and has been used to resolve many claims. The parties will normally be expected to prepare short pre-hearing statements identifying the disputed facts and applicable law. A summary trial, at which witnesses testify, is held. A board judge then issues a very brief written decision, which is

binding, non-precedential, and non-appealable. Cases that have single or well-defined issues, such as clear-cut factual issues, discrete cost issues, or matters of contract interpretation, may be good candidates for this procedure. This option should also be considered for cases in which the contractor could elect to proceed under the boards' small claims or accelerated procedures. Appendices C-15 through C-17 contain sample ADR agreements for binding ADR.

Sometimes the parties decide that using a combination of ADR processes will work the best for them. For instance, in the process called mediation/arbitration (or med/arb), the judge will start out as a mediator and work with the parties to resolve the dispute. If the parties reach an impasse and are unable to resolve the dispute between themselves through mediation, the judge is then tasked with becoming an arbitrator and making a decision. The decision can be binding or non-binding. *See* Appendix C-12 for a sample med/arb agreement.

If the parties decide they want to use ADR, a request should be sent to the board's chair, who will assign the matter to a board judge for action. The CBCA's chair will consider a joint request that a particular judge be assigned as the neutral, provided that judge has time in his or her schedule. Parties who have had particular success settling past cases using ADR sometimes request a particular judge by name. The ASBCA prefers that the parties provide a short list of preferred judges from which to make a selection.

The parties, sometimes with input from the judge, will prepare a written ADR agreement setting the schedule and defining the procedures for resolving the dispute. Sample ADR agreements for various binding and non-binding ADR processes can be found at Appendix C. These agreements should be tailored to the needs of the parties. Note that agreements can be crafted to allow for multiple techniques, so that if one ADR method fails to result in a settlement, a second method may be tried. For example, the parties might agree to non-binding mediation, and if that proves unsuccessful, proceed to a summary trial with binding decision. More information about ADR is available at the BCAs' websites.

Using a BCA judge for ADR has several benefits. Through ADR, the parties can get an early idea about the strengths and weaknesses of their cases, they can get a faster decision, the process is less formal than a hearing and easily done without an attorney, and relationships can be preserved and/or repaired. Any time the parties believe that getting the individuals important to the dispute together, with a board neutral helping them to discuss the dispute and to work through their differences, ADR should be seriously considered. The main restraint to using ADR to help resolve a contract dispute is that both parties must agree that using ADR might be beneficial.

B. Settlement Procedures

The government's policy is to try to resolve all disputes by mutual agreement at the contracting officer's level. Contracting officers are generally authorized, within any specific limitations of their warrants, to decide or resolve all claims arising under or relating to a contract subject to the CDA. However, the authority to decide or resolve claims does not include settlement, compromise, payment, or adjustment of any claim involving fraud.

Board judges encourage settlement of disputes. If the parties are engaged in serious and meaningful settlement discussions, the judge may be willing to postpone ("stay" or "suspend") proceedings for a reasonable period so the parties can focus on their settlement efforts without the distraction and expense of litigating the appeal at the same time. Sometimes the judge's involvement in issue identification during prehearing conference has prompted the parties to reassess their positions and agree to settlement.

The parties may consider settlement at any point during litigation or ADR. Settlement should always be considered after the appeal file has been submitted since both parties and their attorneys are now more actively involved and new faces can give a fresh perspective to the dispute. Settlement should also be considered after discovery is complete. Documents produced or testimony taken during discovery may provide additional information about the merits of the dispute, defenses to the claim, or whether the amount claimed can be justified.

Settlement can also occur at the hearing and sometimes occurs at the end of the hearing, or shortly thereafter, when the parties have had a chance to think about the evidence produced at the hearing. Depending on the circumstances, the presiding judge may be willing to help the parties with their assessment of the case.

PRACTICE TIPS

- ADR is voluntary, and neither side is required to choose ADR; for an ADR proceeding to be conducted, both parties must agree to use ADR.
- The important thing to remember about ADR is that the parties and the judge all work together to fashion an ADR proceeding that will meet the parties' needs.
- In most forms of ADR, the neutral judge does not act as a judge. Instead, the judge acts as an informal advisor helping each party consider and weigh the strengths and weaknesses of its case.
- ADR can be requested and used, and an appeal may be settled at any time before the judge issues a decision on the merits of the claim.

VII. PLEADINGS

A. The Complaint

The first pleading normally filed after the notice of appeal is called the complaint, which the appellant generally files with the board within 30 days after receiving the notice of docketing. Alternatively, the appellant can file the complaint along with the notice of appeal. The complaint tells the board about the dispute. It should contain a short, clear statement of the principal facts concerning the dispute, each set out in a separate numbered paragraph, followed by a concise statement of the relief requested. It is not necessary to address each detail of the dispute in the complaint. Appendix B-7 contains a sample complaint. When the claim at issue is a government claim, the board may ask the government to file the complaint.

If the claim is simple and the claim or appeal letter adequately explains the bases of the claim, upon request by an appellant, a board may be willing to designate the claim or appeal letter as the complaint. BCA judges typically construe a *pro se* party's pleadings liberally, holding it to less stringent standards than formal pleadings prepared by an attorney. However, this more lenient standard for interpreting pleadings does not change a *pro se* party's burden of proof or the judge's weighing of the factual record.

B. The Answer

The government is generally required to file a pleading called an "answer" within 30 days after receiving the appellant's complaint. Usually the government will simply admit or deny each of the allegations set forth in the complaint and assert any available affirmative defenses. Sometimes the government will add a section stating its perspective of the case. If the board has asked the government to file the complaint it will require the appellant to file the answer.

Where an appellant has elected the small claims expedited or accelerated procedure, the board may opt to not require a complaint and an answer if the claim and the contracting officer's final decision adequately frame the matters in dispute.

PRACTICE TIPS

- The complaint, which is typically to be submitted by the appellant, should contain a short, clear statement of the principal facts concerning the dispute, each set out in a separate numbered paragraph, followed by a concise statement of the relief requested.

- BCA judges typically construe a *pro se* party's pleadings liberally, holding it to less stringent standards than formal pleadings prepared by an attorney. However, this more lenient standard for interpreting pleadings does not change a *pro se* party's burden of proof or the judge's weighing of the factual record.

- If a party cannot meet a filing date set by the board's rules or by a judge, it should request a time extension before the filing is due. Repeated failures to meet deadlines can result in a judge issuing sanctions against the delinquent party.

VIII. DISCOVERY

A. Description, Purpose, and Scope

The term "discovery" relates to a number of ways each party can learn about the other side's case, by asking for information or documents, or getting the testimony of specific people. Discovery helps define or narrow issues for trial and allows the parties to go to trial with the best available proof of their case. Discovery can also help settlement, as each party better understands the facts of the dispute and the other party's case. However, despite its benefits, discovery can be very time-consuming and expensive. A party should tailor the type and extent of the discovery it conducts, particularly when the potential recovery in the case may not justify a substantial investment in pre-hearing discovery.

The BCAs encourage the parties to engage in discovery voluntarily and to cooperate with each other when asking for or responding to discovery. Either party may initiate discovery at any time after an appeal is docketed and the complaint has been filed with the board. The types of discovery, as discussed more fully below, are: (i) interrogatories, (ii) requests for production of documents, (iii) requests for admission, and (iv) depositions. The boards also encourage informal discovery. If a party just needs to learn more about the facts of the case, rather than make a formal request, it can ask the opposing party to participate in a meeting or conference call with the witness and the opposing attorney present, but with the matter not being recorded. Opposing attorneys will sometimes allow this informal procedure because it can save time and aggravation for everyone.

The board judges are not typically involved in the discovery process, so parties are not required to provide a copy of the discovery request or response to the judge.

B. Discovery Obligations

Whether issuing or responding to discovery requests, both parties have certain discovery obligations. Failure to understand and comply with discovery rules can result in sanctions or other negative consequences.

1. Board Rules Governing Discovery

A party is expected to know the discovery rules of the board before which its case is being heard. Each board has its own discovery rules, which are generally available on the board's website. Rules 13 through 16 of the CBCA rules of procedure pertain to discovery before the CBCA. Rules 14 and 15 of the ASBCA rules concern discovery before the ASBCA. Although not bound by the Federal Rules of Civil Procedure (FRCP), which govern discovery in federal courts, most BCAs find the federal rules instructive in managing discovery. FRCP Rules 26 through 37 concern discovery.

2. Preservation

Both parties have a legal obligation to preserve all documents and information relevant to a possible claim or defense in the pending case. The duty to preserve information usually arises even before an appeal is filed with the board. Certainly, upon filing or receipt of a claim, the

parties must retain all documents, data, and evidence that may be relevant to a possible claim or defense in the matter before the board.

3. Discovery Conferences

As a general matter, the BCAs expect that parties will cooperate to complete discovery and make a good faith attempt to resolve any disagreements relating to discovery before asking for board intervention. An early discovery conference between the parties is helpful to discuss the nature and basis of the claim and defenses, the possibilities for settlement, and development of a proposed discovery schedule and plans that can be submitted to the board for adoption. A discovery plan typically addresses an agreed-upon discovery schedule and the number of depositions, interrogatories, or requests for admission each party is allowed. The parties should also consider the potential witnesses and documents (electronic or otherwise) that are relevant to the dispute.

At the discovery conference, the parties should pay particular attention to whether the burden and expense of preserving, collecting, and reviewing large quantities of documents and electronically stored information outweighs the likelihood that the discovery will actually lead to useful information to help prove a case. The parties should balance the burden and expense of discovery against the amount in dispute, the parties' resources, and the importance of the issues at stake. A sample letter for forwarding discovery requests can be found at Appendix B-10.

C. Types of Discovery

1. Interrogatories

Interrogatories are written questions asked by one party and served on the opposing party. They are generally used to determine what factual issues are present in a case and help the parties to develop other discovery requests. Written answers or objections, if any, are required within the time specified by the rules of each board or as specified by the judge to whom the case is assigned, usually 30 or 45 days after the party receives the interrogatories.[7] Board rules require the answering party to certify or verify its interrogatory responses under oath. The responding party must sign the responses and certify, declare, or verify that the information provided is true and correct. "I, (name), (give name of company and position) hereby certify (declare or verify) under penalty of perjury that the facts contained in the within and foregoing [responses to respondent's interrogatories] are true and correct to the best of my information, knowledge and belief. Signed: (give signature)."

The responding party has a duty to provide written answers to all interrogatories that are not objectionable. Answers to interrogatories must be responsive, complete, and not evasive. Interrogatories are most useful for discovering the people who have the best knowledge about particular issues, identifying the most relevant documents, and learning the basis for assertions in the other party's pleadings. Appendix B-11 includes a sample set of appellant's interrogatories.

[7] The CBCA requires that objections to interrogatories must be provided within 15 calendar days after receipt. *See* CBCA Rules 13(f)(2), 14(a).

The party answering the interrogatories must provide all responsive information that is within its control, including information that could be obtained by questioning its agents or employees. Where the answer to an interrogatory may be derived from a party's business records, the responding party should specify the records from which the answer may be derived and give the asking party a chance to copy or inspect those records.

After submitting its initial response to an interrogatory, the responding party has an ongoing duty to supplement its responses with any subsequent information necessary to give a complete and accurate response to the original question. If an interrogatory is not answered, or the answer is evasive or incomplete, the party who asked the questions should discuss the issue with the opposing party's representative prior to contacting the board or submitting a motion to compel more complete answers. *See* Section IX.

2. Requests for Production of Documents

Requests for production of documents are written requests from one party to the other for specific documents or categories of documents. They are often served along with interrogatories. Requests for production generally include paper documents as well as any electronically stored information that is responsive and in the possession, custody, or control of the responding party.

The request for production should contain instructions regarding the documents sought and the form of production. Requests for production should be tailored to the key documents a party needs: if overbroad, they will likely trigger a discovery dispute. An example of a request for production of documents is included in Appendix B-16. The producing party generally should ensure that all documents or images it provides, whether electronic or paper, contain unique identifying numbers to help identify the documents later in depositions or in proceedings before the board.

Responses to requests for production, or any objections to document requests, must be made within the time specified by the rules of each board, which may span 15 to 45 days depending upon the board. If the parties cannot agree on the scope of the production, the requesting party may move for an order compelling production of the documents and/or the receiving party may move for a protective order. *See* Section IX.

The responding party is required to provide any information that is responsive to the request, unless the information is legally privileged or otherwise objectionable. Section IX provides further discussion of objections to written discovery and privilege issues. Generally, the responding party may satisfy the request for production by producing copies of the requested information or making the information available to the requesting party for inspection and copying.

As with interrogatories, after submitting its initial response to a request for production, a party has an ongoing duty to supplement its production with any subsequently available information necessary to give a complete and accurate response to the document request.

Failure to produce documents responsive to a production request may result in the judge issuing an order to produce them. Repeated refusal and failure to produce properly requested documents can lead to sanctions, such as the judge denying the part of the appeal to which the documents apply on the assumption that they contain evidence favoring the other side.

3. Requests for Admission

Requests for admission are a set of statements sent from one party to the opposing party, asking the opposing party to admit or deny each specific statement. This helps narrow the issues by showing what really is in dispute. Additionally, admitted facts do not have to be proven at trial, making the dispute process simpler and more efficient. Requests for admission may ask a party to admit or deny the authenticity of a document or the truth of factual allegations. A sample of a request for admissions is included at Appendix B-20.

The responding party can either admit, deny, or state in detail why it can neither admit nor deny the truthfulness of the statement (*e.g.*, for lack of knowledge). Requests for admission can be denied or admitted in full or in part. If a party makes the requested admission, it cannot argue later against the statement in which it admitted certain facts.

Responses to requests for admission are required within the time specified by the rules of the board to which you have appealed, which may be 15 to 45 days depending upon the board. **Failure to respond to a request for admission within the time stated in the board's rules can result in the statements contained in the request being deemed by the board to be admitted.**

4. Depositions

A deposition is the taking and recording of the testimony of a witness before a hearing. The individual being questioned is called the deponent. Deposition testimony is generally taken under oath, recorded, and transcribed into a written document by a court reporter. Depositions usually take place after responses have been made to interrogatories and requests for production because they build on information obtained in the earlier requests. Unlike written discovery, depositions allow a party to talk with witnesses and learn more about what happened, even if it is not documented. Depositions also give a party the chance to lock in the testimony of the other side's witnesses to use in dispositive motions or at the hearing. Sometimes, where a witness testifying at a hearing tries to change what he or she testified during the deposition, the opposing party might try to use the deposition to impeach the witness. To do this the party attacks the credibility of the witness using the deposition to show inconsistent testimony or evidence of lying.

The parties should work together to find mutually agreeable dates, times, and places for depositions. A party should not unilaterally set a date, time, and place for a deposition.

If one party believes the other party is being unreasonable in its deposition requests, it can ask the judge for a protective order limiting the scope, length, and number of depositions. Subsection D.3 of this section reviews protective orders in more detail. Similarly, if a party refuses to make a witness reasonably available, the board can issue a subpoena requiring the deposition. Once the individuals, locations, dates, and times are determined, the party requesting

the deposition should send a formal notice of deposition to the person to be questioned (deposed). A sample notice of deposition is at Appendix B-18. The requesting party is also responsible for obtaining a court reporter to record and transcribe the deposition.

At a deposition, the individual being deposed may be asked a wide variety of questions; questions are appropriate if they might reasonably lead to admissible statements or evidence. The deponent or his or her counsel may object for the record, but the deponent should then answer the question. A deponent who refuses to answer a reasonable question can be subject to sanctions.

After the requesting party has finished asking questions, the opposing party and any representative the deponent has with him or her can ask follow-up questions to clarify or emphasize the deponent's testimony. Any documents used to question the deponent are marked as exhibits and copies are attached to the deposition transcript. If a party plans to rely on these documents, it should make sure to supplement the appeal file with them because, as mentioned below, deposition transcripts (and the documents included with them) are not typically made part of the record.

Sometimes a party may wish to depose an individual as speaking for an entity (*e.g.,* corporation, governmental agency). If so, the requesting party sends a notice of deposition to the entity describing the matters it wishes to discuss in the deposition. The organization must then name someone to testify on its behalf about information known or reasonably available to the organization.

Deponents may also have to attend and testify at the hearing. Statements made in a deposition generally do not become part of the hearing record except where a witness' hearing testimony is inconsistent with his or her deposition testimony or where the witness is unexpectedly unable to testify at the hearing. If a party has concerns about whether a witness will be available to testify at the hearing (*e.g.*, due to serious illness), it can ask the board for permission to take an evidentiary deposition to preserve the testimony of the witness. The opposing party must be given notice of that so it can be prepared to cross-examine the witness.

D. Managing Discovery

Successful discovery helps a party to better understand the facts and merits of the whole case; unsuccessful discovery can overshadow the entire dispute. The parties, and the BCAs, have tools to help achieve a reasonable balance of disclosure of information.

1. Privilege

"Privilege" is the term used to describe the protection the law gives certain documents, information, and communications. With some limited exceptions, parties do not have to respond to discovery where the information being sought is protected by privilege. There are two main legal doctrines that protect communications or documents from disclosure during discovery. The first doctrine is attorney-client privilege, which protects certain communications between a client and his or her attorney and keeps those communications confidential. The second is the work-

product doctrine, which prevents disclosure to adversaries of materials developed in preparation for litigation. The contours of these two doctrines are further described in board case law.

2. Objections to Written Discovery

A party can object to a written discovery request that it believes is inappropriate. Objections to written discovery must be filed within the time frames specified by the board, and if a party does not raise an objection, it may be waiving the chance to raise that objection later. Objections to written discovery typically consist of both general and specific objections. General objections set forth any general objections to the written discovery requests or challenge definitions or instructions of the asking party. A party should also raise any specific objection it may have to a particular interrogatory, document request, or request for admission. If a party believes it should not have to answer a particular question, it must state a valid reason for not answering.

Objections may be made as to the form of the questions asked or to the information the questions seek. Form objections include, for example, objections that questions are vague, duplicative, overly broad, and/or lack detail. The responding party may also object to the substance of the questions. This may include objections that the information sought is not relevant; unduly burdensome; privileged, proprietary or confidential in nature; not within the possession of the party; and/or outside of the scope of the responding party's knowledge.

3. Protective Orders

Protective orders help to protect information exchanged during discovery or to prevent undue discovery burdens. Protective orders can be negotiated between the parties and proposed to the judge to protect trade secrets, confidential information, proprietary information, or other sensitive information. Such orders will provide that the specified documents (or parts of documents) that either party designates as covered by the protective order are to be held in confidence, used only to prepare for the hearing, and disclosed only to specified persons. A party may challenge a request that a document (or part of a document) be designated protected information by arguing the material is not in fact confidential or otherwise sensitive.

If a party believes that discovery requests it has received are unduly burdensome, it can ask the board to issue a protective order relieving it from having to respond. It is up to the board to decide whether or not to grant the request. However, the BCAs are often reluctant to grant protective orders unless a party can show a clearly defined serious injury if it is required to respond.

4. Motions to Compel

If a party does not respond to a discovery request or responds evasively or incompletely, the other party can ask the board to order a response or more complete answers. This request is called a motion to compel. Because the BCAs encourage voluntary discovery, parties should rarely have to resort to a motion to compel.

Whenever there is a dispute concerning the completeness of responses to discovery, the parties should first try to resolve the dispute before filing a motion to compel with the board. A motion

to compel should include a representation that the moving party has tried in good faith, before filing the motion, to resolve the matter informally with the other side. The motion should also include a copy of each discovery request at issue and the response, if any. Details on how to present a motion and tips for written advocacy appear at Section IX.C.

If the board has issued an order compelling responses to a discovery request and the non-complying party still refuses to respond or the response remains incomplete, the board has a number of options. The board may find facts relating to the incomplete or missing information in favor of the other party. In addition, the board may deny the non-complying party the right to present certain claims or defenses or exclude certain matters from evidence during the hearing. These options are called sanctions and may also be applied to any party for failure to comply with board orders.

5. Sanctions

Occasionally, after attempting to resolve discovery disputes with the opposing party, a party still refuses to comply with the discovery request. If after attempting to work with the opposing party a response is not forthcoming, the requesting party may ask the board to sanction the offending party. A party should not approach the board requesting sanctions without first attempting to work out the discovery dispute with the other party. After it has attempted that, the requesting party must then follow the procedures set forth below to obtain a board order. It is only after the board has become involved in the discovery by issuing an order that the requesting party should file a motion for sanctions.

The BCAs have considerable discretion in determining whether a sanction is appropriate, and if so, what particular sanctions should be used to address the specific circumstances of the case. Most board sanctions are issued because a party has failed to take action to develop its case (failure to prosecute) or has not been timely in responding to a discovery request.

A board's power to impose sanctions is broad. In egregious situations, for instance, where a party has willfully and repeatedly failed to respond to an order, appeals have been completely or partially dismissed. This sanction has been described as harsh and severe, so it is employed sparingly by boards. BCAs can issue sanctions prohibiting the introduction of evidence; taking the facts of the non-offending party as true; forbidding challenge of the accuracy of evidence; prohibiting the calling of witnesses; drawing adverse inferences; and disqualifying a party's representative, attorney, or consultant/expert from further participation in the case. Through sanction authority, boards have the flexibility to balance any injustice that may have occurred as the result of an offending party's behavior with appropriate penalties. Thus, BCA judges have available, and have used, a variety of sanctions designed to fit the situation and enforce compliance with its rules and orders.

Judges do not issue sanctions lightly. Parties are urged to work out problems before approaching the board for a sanction. Typically, a sanction will not be issued unless a board order has been violated, and, then, only after significant consideration by the judge. So, if a party is having difficulty getting a timely response to some discovery, it should first discuss the issue with the opposing party and agree to a specific date for production. If that does not work, next request a telephone conference with the judge. In that telephone conference, ask the judge to issue an

order establishing a specific date for production. Once the order has been issued, if the opposing party still does not comply, submit a motion for sanctions to the judge. It is only after a judge's order (or specific written direction) is not obeyed that a sanction will be issued.

The BCAs do not have the authority to sanction a party or an individual by holding it "in contempt," by issuing a monetary fine, or by forcing a party to perform a contract in a particular way (specific performance).

PRACTICE TIPS

- Tailor discovery to balance the need for information with the burden and expense of discovery. Consider the amount in dispute, resources, and the importance of the issues. Informal discovery is always an option, as is ADR.

- Remember that each party has an on-going duty to supplement responses to discovery if additional responsive information later becomes available.

- Try to work out all discovery disputes with the opposing party. Although recourse to the board is an option, judges generally dislike being dragged into discovery disputes and expect the parties to try to resolve the issues themselves.

- Where a party has repeatedly failed to respond to a discovery request and the board has issued an order setting a date for a response that the offending party has failed to meet, the party seeking the discovery may ask the judge to sanction the offending party. However, a sanction will not be issued against the offending party until after the judge has issued an order requiring the offending party to provide the discovery by a certain date and the party fails to meet that date.

IX. MOTIONS AND BRIEFS

Motions and briefs are written legal documents advocating a party's position and asking the board to rule in its favor on the points raised. They are filed at different times depending on the stage of the proceeding and what specifically a party is asking the BCA to rule on. Motions and briefs have many traits in common, including a statement of the facts, explanation of applicable legal authority, and analysis of why the party should win based on how the established law applies to the facts in the case. Distinctions and details are set forth below.

A. Dispositive Motions

Although motions can be filed on a wide variety of topics (including many procedural issues), motions that will resolve all or part of a case are particularly important. These are known as "dispositive motions" because they ask the board to resolve (dispose of) the appeal early, before a hearing or before the BCA's decision on the record. The two most common types of dispositive motions are the motion to dismiss and the motion for summary judgment.[8]

1. Motion to Dismiss

A motion to dismiss can be filed by either or both parties and may be based on a variety of theories. A motion to dismiss for lack of jurisdiction argues that the board does not have jurisdiction under the CDA to resolve the disputed issue(s). In a related vein, a motion can assert that the appellant has not stated a claim for which the BCA can grant relief. Procedural motions, such as a motion to dismiss for failure to prosecute the appeal, can also sometimes be dispositive. If a party files a dispositive motion, the BCA will give the opposing party a chance to respond to that motion. If the BCA raises the issue itself, as is sometimes the case with jurisdictional issues, both parties will be asked to file briefs addressing the judge's concern.

2. Motion for Summary Judgment

In a motion for summary judgment, the moving party asks the judge to enter a decision in its favor on the merits of the case (or on certain specific issues, in which case, it is called a motion for partial summary judgment). The grant of such a motion decides, and ends, the appeal (or the identified issues) at the BCA. Guidance on motions for summary judgment may be also found in Rule 56 of the Federal Rules of Civil Procedure (FRCP).

To win a motion for summary judgment, the party making the motion must show that: (1) there are no genuine issues of material fact in dispute, and (2) the law supports the position of the party making the motion. This means that the important facts on which the outcome of the case depends are not genuinely disputed, and even if all inferences from those facts are resolved in favor of the party *not* making the motion, the law (prior decisions, statutes, regulations, and/or contract terms) requires the conclusion that the moving party wins. To do this, the moving party must provide a statement of undisputed material facts at the start of the motion, clearly listing the material facts of the case. The statement of undisputed material facts is similar to the proposed findings of fact, discussed in Section IX below, but it lists undisputed facts, rather than disputed

[8] The CBCA refers to a motion for summary judgment as a motion for summary relief.

facts, about which the judge may make specific findings if the case proceeds. Without proposed undisputed material facts in a party's motion, the motion will likely be denied because the judge cannot determine that there is no genuine dispute of material fact.

If one party files a motion for summary judgment, the BCA will give the opposing party a chance to respond. That party may either cross-move for summary judgment, if it agrees there are no facts in dispute (but believes the law supports its position rather than the other side's), or simply oppose the motion if there are disputed facts. If the non-moving party disputes the facts asserted by the moving party, it must say so in its opposition to the statement of undisputed material facts by submitting a statement of genuine issues, clearly identifying which facts it agrees are undisputed and which it contests; it may also add any other facts that were omitted but essential to resolving the motion. The evidence can consist of documents in the appeal file, sworn affidavits, declarations, or other available evidence that contradicts the other side's version of the facts. Unsupported statements or conclusions in a party's brief are generally not considered evidence. Failure to adequately respond to the motion for summary judgment could result in a party losing its case.

B. Briefs

A brief is a legal document written by a party to persuade the judge to rule in that party's favor, typically filed before or after a hearing, or in connection with a submission on the record.

1. Pre-Hearing Briefs

The judge may require the parties to submit pre-hearing briefs to better inform the judge, before the hearing starts, about what facts will be presented (and disputed) and how they fit with the legal theories advanced by the party. If the judge asks for pre-hearing briefs, the judge will usually specify what the briefs should address and when they will be due. Typically, the brief will contain a statement of the facts and issues in dispute and a concise discussion of the applicable law. It should serve as a road map for the judge to understand the facts of the case, especially those that are not in the written record and will be addressed by witnesses. It should explain, from the party's standpoint, why the facts and appropriate law entitle the party to win.

2. Post-Hearing Briefs

At the end of the hearing, the judge will usually set up a schedule for submitting post-hearing briefs. Post-hearing briefs are similar to pre-hearing briefs except that they are typically more comprehensive and are based on the testimony actually presented at the hearing (rather than what the parties anticipated the hearing would show). They should put all the pieces (factual and legal) together and take the judge through each step to the logical conclusion in favor of the party writing the brief. All statements of fact must reference documents in the record and must cite to the hearing transcript (volume and page) whenever they refer to testimony given during the hearing. The judge may also allow for filing of reply briefs, where each side can counter the facts or legal positions taken by the opponent in its brief. The judge may require both parties to submit their initial post-hearing briefs at the same time (simultaneous briefing), or the judge may require sequential briefs where the party with the burden of proof submits its brief first, followed by the response by the opposing party, and then a last reply brief from the party with the burden

of proof. If one of the parties believes a particular order of submission is best for its case, suggest it in a pre-hearing conference or at the end of the hearing when the judge addresses briefs.

C. Writing Motions and Briefs

Although the BCAs do not require a particular format for motions and briefs, the guidelines below are standard, and using this format will help the BCA understand a party's position. Generally, briefs should be typed and double-spaced, using traditional upper and lower case lettering and traditional margin settings. Some judges set a page limit on briefs. If the judge's page limit is unclear (for example, if it does not address attachments or type-size), a party may receive clarification from the judge. If the judge does not set a page limit, write only as much as needed to present the case; then stop. Unnecessarily long, repetitious, or rambling briefs may weaken a presentation. It is important to pay attention to page limits set by the judge.

1. Introduction

The introduction provides an overview of what the case is about, summarizing clearly and succinctly the factual and legal issues. At this stage, simply summarize your position, without describing all the details. Any statement made in the introduction should be later supported in the proposed findings of fact section of the brief. The introduction should avoid inflammatory and derogatory language.

2. Questions Presented

State the questions (issues) before the BCA for decision. It is important to frame issues accurately. Inaccurate statements may lead the judge down the wrong path and potentially delay the case.

3. Proposed Findings of Fact

These are the facts that a party believes are true and wants the BCA to find are true also. The proposed findings of fact are very important to the brief because the judge applies the law to the facts of the case in making his or her decision. Each proposed finding of fact should be numbered and limited to either just one fact or just a very few closely related facts. Each fact should be supported by something in the record – the appeal file, the supplemental appeal file, any exhibits that were admitted into evidence at the hearing, and/or the transcript of the testimony presented during the hearing. The party must cite to the appropriate document for each proposed finding of fact, including the exact page where the support for the fact appears. Arrange the proposed findings of facts logically (typically chronologically), with headings if needed for clarity, *e.g.*, Contract Formation PFFs [proposed findings of fact] 1-8, Appellant's Progress [PFFs 9-25], Cure Notice [PFFs 26-29], Appellant's Response to Cure Notice [PFFs 30-42], Contract Termination [PFFs 42-50].

4. Argument

In the argument, the party explains the relevant law and applies the law to the facts, explaining why the case law, statutes, regulations, contract provisions, and other authorities, when applied

to the case, lead to a result in the party's favor. When a party cites cases to support its legal argument, be sure those cases stand for the proposition the party claims it stands for. If there is no case directly applicable, explain why the reasoning of a similar case should apply by analogy. A party should also address the arguments advanced by the opposing party in its brief and explain why those positions are not correct. If a party has weaknesses in its case, it should address them in the brief. Weaknesses won't go away, and opposing counsel will usually see them and point them out to the judge in a much more damaging way. Further, weaknesses in a case usually will be obvious to the judge even if the opposing party does not point them out. Therefore, a party should acknowledge its weaknesses and explain why those weaknesses do not prevent the judge from ruling in its favor. Despite the fact that this part of a typical brief is called "argument," avoid inflammatory and derogatory words, which really say nothing and can actually hurt a party's position. The judge will make his or her own conclusions about a party's behavior. Persuasion is best accomplished by strong facts and sound legal analysis, not by emotional pleas.

5. Conclusion

Finally, the party should provide a summary stating it believes it should win based on the facts and applicable law. Be clear and concise, and leave the judge with a final impression of the persuasiveness of your position.

PRACTICE TIPS

- When writing a motion for summary judgment, include a separate section setting forth the material facts.
- When responding to and defending against a motion for summary judgment, address the facts that the moving party says are not in dispute by either admitting those facts are not in dispute or stating they are in dispute (give reasons they are in dispute with citation to the record). Also, include material questions of fact that make summary judgment inappropriate.
- Try to keep written products concise and nonrepetitive.
- If a party's representative is not familiar with writing legal documents consider allowing someone who is not overly familiar with the dispute proof-read the document. If that individual is able to understand the facts and arguments the document is ready to be submitted to the board.

X. PRE-HEARING MATTERS

A. Pre-Hearing Orders

Typically, the presiding judge will issue a pre-hearing order which addresses various matters that need to be resolved before the hearing. Issues that may be addressed in a pre-hearing order may include cut-off dates for discovery and the submission of appeal file documents, and exhibits, and submission of a list of witnesses being called, including experts and consultants. The judge may require information concerning expert testimony, including a report or narrative of the actual testimony to be given by the expert. Sometimes a judge will order one or both of the parties to develop a joint stipulation of facts or a schedule of costs. At this stage in the proceedings, it is even more important that the parties make sure the due dates in the judge's orders are met. Items not provided by the due dates will often be excluded when a party attempts to introduce them later; witnesses not listed will typically not be allowed to testify at the hearing.

Parties should be aware that as the time grows closer to the hearing, many judges become more reluctant to grant time extensions, especially if they impact other due dates before the hearing. Judges want a full record to review prior to the hearing and do not respond well to surprise evidence attempted to be introduced for the first time during a hearing. The pre-hearing order is meant to eliminate any surprises.

Once a judge has stated that the established schedule is "firm," extensions or changes to that schedule will usually be made "only upon good cause," *e.g.*, when a good reason is given for the schedule change. While earlier in the proceedings, judges are usually fairly generous with extensions, later in the proceedings, after a pre-hearing order is issued, a party stating it simply "did not get it done" is not typically a good enough reason to grant an extension. If a judge decides that an extension is not merited and the party is unable to get the evidence timely submitted, that evidence may be excluded from consideration in the case.

Of course, a request for a time extension should be made before the item is due in case the extension is denied. Also, a party wishing to change the schedule or otherwise amend a pre-hearing order late in the proceedings should first consult with the opposing party before submitting a written request to the judge. Any such request must include the reasons for the request and state whether the opposing party concurs with or objects to the request. A copy of the written request must also be provided to the opposing party. After a pre-hearing order has been issued or late in the period immediately preceding a hearing, depending on the facts given for the request and its timing, a judge may or may not grant a request for an extension.

B. Pre-Hearing Conference

Pre-hearing conferences are held for the judge to determine if there are any irregularities or problems that might impede a smooth hearing and to resolve those issues off the record before the start of the hearing. Pre-hearing conferences are sometimes held face-to-face with the judge and other times via a telephone conference. Parties are encouraged to raise any questions that they have, as this may be the last conference scheduled by the judge prior to the hearing. Face-to-face prehearing conferences are usually held immediately before the start of the hearing. In

that type of conference, the judge will typically review the documents that comprise the appeal file and the appeal file supplement, exhibits, and who will be testifying at the hearing.

C. Exhibits

As discussed earlier, the purpose of the appeal file and any supplements is to eliminate the need for introduction of evidence at the hearing. If a document is submitted as part of the appeal file or supplements, and is not timely objected to by the opposing party, that document automatically becomes part of the record on which the case will be decided. There may be occasions, however, where a party may wish to include a document that was not part of the contract, such as a report prepared by a consultant after the contract work was finished. Similarly, to ensure the qualifications of each witness is fully understood, some judges request that the parties submit a resume, curriculum vitae, or biography for each witness. Each judge has his or her own preferences as to how to deal with evidentiary issues. The best time to deal with a potential problem is to raise it with the judge in a telephone conference prior to the hearing. A party should not wait until the hearing to find out about whether a particular piece of evidence will be admitted into the record because the party may be unpleasantly surprised at hearing when the judge decides to exclude it and the party is not prepared to work around the excluded evidence.

Parties should never surprise the judge or the opposition with new exhibits at the hearing. The party will probably be violating the judge's pre-hearing orders regarding exchange of exhibits by a certain date, and it risks not getting its evidence admitted if it has not given appropriate notice of the exhibit prior to the hearing. This particularly applies to an expert or consultant report or testimony that has not been previously disclosed. Judges typically will not allow what they consider to be litigation "by ambush."

D. Stipulations

Stipulations are agreements between the parties regarding the facts or legal principles that apply to the case. Some judges require that the parties develop a joint statement of stipulated facts to narrow the matters that will have to be decided at the hearing. An example of a stipulation is: "The contract was awarded on [date]. Appeal File, Exhibit 3." To arrive at stipulations the parties will need to exchange proposed stipulations and determine which ones are agreeable to both parties. Once there is agreement, the stipulation may be signed by both parties and presented to the judge for adoption as part of the record of the case.

E. Motions to Exclude Evidence

A motion to exclude evidence, sometimes raised *in limine* (preliminarily to a hearing), is a request for the judge to rule on whether to admit a particular piece of evidence into the record. For example, a party receives an updated, significantly more elaborate, report from the opposing party's expert consultant three days before the start of the hearing. Noting that all consultant reports were due a month earlier, the party requests through a motion to exclude evidence that the judge not allow the expert consultant's revised report into the record. A judge may exclude evidence if he or she believes that a party may be harmed by the late introduction of certain evidence.

F. Pre-Hearing Briefs or Position Papers

A judge may order the parties to submit pre-hearing briefs or position papers, or sometimes one party will request permission to submit a pre-hearing brief or position paper. Perhaps, as in some expedited proceedings, there will be insufficient time for filing briefs post-hearing, and the judge decides that a summary of the facts and law pertinent to the dispute will be helpful. Sometimes a judge may have questions about particular set of facts or law that he or she would like to have addressed prior to the hearing. If so, the judge will usually raise the need for pre-hearing briefs or position papers and set a date for submissions. These pre-hearing submissions can help the judge become familiar with a party's position on difficult technical and legal issues before the hearing. For more discussion on the structure and content of pre-hearing briefs or position papers, refer to Section IX.

PRACTICE TIPS

- Request time extensions as early as possible. As the time for the hearing grows closer, many judges become more reluctant to grant time extensions, especially if the extension will impact other items due before the hearing. If a solid reason for an extension is not given, be prepared for the request to be denied.

- Most judges will not allow one party to "ambush" another party during the hearing. This usually means the party cannot introduce things it has not previously disclosed, such as new evidence, reports, documents, witnesses, or theories of recovery. In a case that is developed correctly, each party has the opportunity to understand the other party's facts and theories of recovery fully before the hearing starts and is not "surprised" by any evidence that is attempted to be introduced for the first time at the hearing.

- Representatives should anticipate potential evidentiary problems and check to determine a particular judge's preference during a telephone conference, so they can prepare properly for the hearing.

XI. THE HEARING

A. Date and Length of the Hearing

If the parties elect to have a hearing, the judge will typically ask them to jointly propose a hearing date(s), to estimate the expected length of the hearing, and to propose a hearing location. If the parties cannot agree on the various items relating to a hearing, they should notify the judge of their disagreement and the reasons for it. All of the boards, which are located in the metropolitan Washington, D.C. area, have courtrooms. Judges decide the location for a hearing considering a variety of factors which may include the desires of the parties, the locations of witnesses, the location of the contract, and other pertinent factors raised by the parties. Judges will travel throughout the world to hold hearings at the location that best serves the needs of the parties and the judge. The parties should work together to find a mutually agreeable place for the hearing, so that when the judge asks they are ready to tell the judge their preferences. A typical hearing may start around 9 a.m. and continue until 5 p.m. Plan for at least one break in the morning and one in the afternoon, as well as a lunch break.

Parties should build into their estimates some extra time because, depending on the judge, they may be held to their estimates during the hearing. Allow time not only for questioning your own witnesses during direct and redirect examination, but also allow time for the opposing party to conduct cross-examination of those witnesses. As a rule of thumb, allow the same amount of time for cross-examination as for direct examination. Even experienced attorneys have underestimated the amount of time necessary to present their witnesses and run into problems with time limits at a hearing.

The judge will send an order to the parties setting the date, location, and starting time for the first day of the hearing. Make sure that witnesses and all the necessary documents, such as copies of the appeal file and any appeal file supplements, are at the hearing location early, allowing for some time to get organized and to be ready to start at the designated time.

B. Immediately Before the Start of the Hearing

The judge will typically go over several "housekeeping" matters immediately prior to the start of the hearing. The judge may raise the question of whether the parties wish to have the witnesses allowed in the hearing room throughout the hearing. A witness may be influenced by hearing the testimony of other witnesses. To avoid this, the parties or the judge may decide to have witnesses "sequestered" (excluded from the courtroom) before they testify. In that case, the judge will issue an order excluding the witnesses and prohibiting witnesses and party representatives from telling other witnesses about testimony in the hearing. Violations of a sequestration order may result in the judge excluding the testimony of a witness. However, a sequestration order ordinarily does not prohibit a party's representative from discussing the case with witnesses in preparation for their testimony as long as the testimony of other witnesses is not revealed. If there is any question as to the scope of the sequestration order, it is best to ask the judge to explain it on the record. Naturally, the judge will not exclude a party's representative who is also a witness, or someone essential to the presentation of the party's case.

The judge may ask who will be representing each party at the hearing, *i.e.*, who will be in charge of the presentation of the case. Do not arrive at the hearing with someone not authorized by the rules of the particular board to represent the party, such as a claims consultant or an unlicensed attorney, because the judge will not allow an unauthorized representative to speak at the hearing on an appellant's behalf or to question witnesses.

C. Failure to Appear at the Hearing

Once an agreed-upon hearing date has been set, a judge will not usually change the date unless the parties jointly request a change and/or the party requesting the change has a "good cause" for requesting a change (*e.g.*, death or a serious illness of a family member). The fact that a party or its representative may not be ready for the hearing or has gotten unexpected work is not good cause. However, if something serious happens that makes a party's representative or important witness unable to attend the hearing, the judge and other party's representative should be notified immediately. Postponement of the hearing should be requested with reasons given, and the parties should make sure the judge has granted the request and the hearing has been postponed, before the representatives and witnesses decide on their own not to appear for the hearing. The closer the hearing, the more reluctant the judge will be to postpone the hearing. If a postponement is not granted and the party does not appear for the hearing, the party will face an unexcused absence. The judge will likely proceed with the hearing and consider the party to have made its case on the record, *i.e.*, based solely on the documents that are already in evidence, such as documents in the appeal file and any supplements. Similar warnings apply to witnesses who become unavailable or do not show up for the hearing.

D. The Hearing Record

At the hearing, the proceedings are recorded by a court reporter who then types up a transcript, which is a precise written record of what was said, word by word, by every individual testifying at the hearing. The board hires the court reporter and, depending on the rules of the particular board, a transcript of the hearing may be purchased by, or is free to, each party. Usually, the judge will discuss what arrangements need to be made to obtain a transcript at the end of a hearing, when the judge is also discussing a briefing schedule. Each party will want a copy of the transcript because a judge expects that, for each statement in the brief the party claims supports its case, the party will also provide a citation by page number to the testimony or document where the judge can find proof of such support.

While only one judge presides over the hearing, two other judges will also review the written record of the hearing and participate in deciding the case, except in cases following the small claims or accelerated procedure. It is important when an individual is speaking at the hearing not to use ambiguous terms to describe documents, for example, "that piece of paper." Instead, the individual should refer to documents by identifying the volume and exhibit number, and waiting until the judge and opposing party finds the document. For example, instead of saying "I'm handing you a document to read," say, "I'm handing you volume [number] of the appeal file and I would like you to turn to exhibit [number], page [number]." Likewise if a document has more than one page, it is helpful to specify the page or paragraph number of the document to be addressed by the witness.

E. Orderly Conduct of the Hearing

A chief responsibility of the judge is to make sure that the hearing is conducted in an orderly fashion and that a proper record of the documents and testimony is made. A hearing is similar to a non-jury trial in a state or federal court, except that the rules of evidence are generally more relaxed at a hearing. This usually plays out to give the judge the choice to receive documents or testimony as evidence that might not be admitted as evidence by a federal court or in more formal trial proceedings. For instance, a witness' testimony may contain hearsay, *i.e.*, testimony by a witness relating a statement made by another individual who is not present to testify. Of course, it is always best to have the individual who actually said or saw something important speak about it during the hearing. However, sometimes that is not possible or practical and a compromise must occur. The judge has the freedom and responsibility to decide whether or not to accept the testimony and how much weight or value the evidence should be given. Typically, hearsay testimony will not be given as much weight as testimony from someone who was actually present.

If the parties have a disagreement at the hearing, both parties should not speak at the same time. It is difficult for the court reporter to make an accurate record if two people are talking at the same time; a judge cannot listen to both parties at the same time. Also, if both parties are talking at the same time, neither party is listening to what the other party is saying. If there is an issue on which both parties want to comment, the judge normally will ask one side to address the issue first. Then, when the first party is finished speaking or, when the judge thinks that he or she has heard enough, the judge will ask the other party to speak. Usually the judge will give the first party to have spoken an opportunity to reply to the other party's comments.

Board judges have many years of contract disputes experience and are often willing to help the parties focus on what the judge considers the key issues in a case. For example, some judges will question a witness during direct or cross-examination; this usually occurs if a judge does not fully understand some testimony or line of questioning or wants to get more quickly to the issues that he or she believes are important to the case. Some judges prefer to wait until after the witness has been cross-examined to ask questions that they believe might help them decide the case. Occasionally, a judge may ask a party or a witness to address a particular subject, or tell a party that he or she has heard enough testimony on a particular topic and ask the party to move on to another issue or topic.

F. Opening Statements and Order of Proceedings

Opening statements provide each party an opportunity to give the judge an overview of what is to come during the hearing. While an opening statement is common in a jury trial, it is not always necessary in BCA hearings. The judge conducting the hearing may not want to hear opening statements from the parties, particularly if the judge is familiar with the parties' positions from pre-hearing briefs or a detailed complaint and answer. However, if the judge requests opening statements, the parties should be prepared to give an overview of how the witnesses and exhibits relate to the dispute. An opening statement should consist of a summary of the dispute and how the party plans to prove its case, including a short statement of what key witnesses are expected to say when testifying. For example, one might say:

> This is a case about whether there was an ambiguity in the contract and whether appellant's interpretation was reasonable. First, appellant will call Mr. Smith as a witness. He will testify that he prepared appellant's bid and that he read the specifications as requiring . . . . Next, appellant will call Mr. Jones who will testify that . . . .

After opening statements, the party that has the burden of proof typically will present its case first. In most cases, the appellant has the burden of proof because it is the appellant who is asserting the claim. However, sometimes the government has the burden of proof, for instance when it must justify a termination for default. If in doubt about which party has the burden of proof or who will present its case first, consult with the judge before the hearing.

When it is time for a party to present a witness, its representative should state the witness' name and ask the witness to sit in the witness chair. Witness testimony is taken under oath and false statements made at the hearing may subject a witness to criminal prosecution. Either the judge or court reporter will administer the oath. When direct examination is completed, the opposing party has the opportunity to cross-examine the witness. The judge, in his or her discretion, may allow re-direct and re-cross-examination of the witness, or may ask questions.

After the first party has called all its witnesses and their testimony is finished, that party rests, telling the judge it is done with its presentation of witnesses. Then the opposing party has a chance to call its witnesses and present its case.

The judge may allow limited rebuttal testimony from the parties after each party has had a chance to present its case. Rebuttal testimony is testimony given to cast doubt on the evidence presented by the other party's witnesses. Witnesses will not be allowed to testify about new things that were not raised and discussed during the other party's presentation. Rebuttal witnesses can only be used to contradict the other party's witnesses.

G. Testimony

Witnesses are used to tell the story of what happened to cause the dispute. They can be used to tell the facts and to explain things that a layperson may have difficulty understanding. It is best to approach the judge as a lay person who is unfamiliar with the technical area of the dispute. It is up to the parties to recreate the facts of their particular issue so the judge can fully understand the dispute and the facts leading up to it. While judges have practiced federal contract law for many years, they need the particular facts associated with the dispute clearly presented to them in a way they can understand. Once a judge fully understands what the facts of a case are, he or she will be able to apply the correct law to the case and reach a decision.

A witness should not be used merely to repeat what is in a document that is already in evidence. If a document is in the appeal file or a supplement and has not been objected to by the opposing party, the document is already part of the evidence. The judge will have read the document to prepare for the hearing. However, if there is something particularly important in a document that a party wishes to inquire about, it is appropriate to go to that document and have the witness read the important part out loud and then answer questions about it.

If the party is represented by a non-lawyer representative, and that representative is personally aware of certain factual information, that individual has personal knowledge of what happened. If the representative has personal knowledge of certain facts he or she may wish to become a witness, be placed under oath, and testify about what he or she knows. A party's representative should do this only if he or she was personally present while the events he or she describes were happening and actually observed what he or she is testifying about. Second-hand information is not typically as reliable or convincing as first-hand information. A representative who was back in the office and heard about important events only after they had taken place, is not necessarily going to be the best witness to describe what happened. It is better to use the individual who was present at the scene as the witness to describe what happened. The representative should not give hearsay testimony, or talk about something that he or she does not know about from personal experience. Hearsay is testimony of a witness as to statements made by another individual who is not present in the courtroom to testify. If a party has a choice of several witnesses ready to testify about the same issue or event, they should use witness who can testify from personal knowledge, because that individual will be more convincing than an individual who was not directly involved and can only testify about what others told him or her.

If a party's representative plans to testify at the hearing, the judge may allow that individual to state the relevant facts as a story rather than by providing answers to questions.

H. Subpoenas

Normally, a party has no problem producing witnesses under its control, such as its employees. Parties are expected to cooperate with each other and make witnesses under their control available when requested to do so by the other party. Parties should work together to make sure all the witnesses who need to get to a hearing get there.

One option a party has for making sure a witness who is not under its control gets to a hearing is to ask the judge to issue a subpoena. Subpoenas should not be needed on a regular basis, but sometimes, witnesses need a subpoena to secure an excused absence from an employer. Other times, witnesses may not wish to cooperate with the party needing them, and a subpoena will order them to attend the hearing or face penalties as the judge sees fit. The rules of the various boards set forth the method for obtaining a subpoena.

I. Direct Examination of Witnesses

A judge wants to hear testimony in a witness' own words using the witness' own memory. Any witness called by a party should provide testimony that advances that party's position.

Avoid asking questions that can be answered with a simple yes or no because questions like that provide the testimony of the individual asking the questions – not the answer of the witness. Leading questions are not permitted on direct examination. A leading question is a question posed to a witness that is phrased so as to suggest or elicit a particular answer desired by the individual asking the questions.

J. Cross-Examination of Witnesses

After direct examination of a witness is completed, the judge will ask the other party if it has any questions or "cross-examination" for the witness. A party has a choice about whether to cross-examine. Where the other party's witness offers testimony damaging to your case, think carefully about the best way to handle the damaging testimony. For example, instead of cross-examining a witness who has provided testimony against your case, you may instead want to call your own witness, and/or rely upon documents, to lessen the weight given to the damaging testimony. It is unwise to give a witness an opportunity to repeat the testimony given on direct examination, as it just reinforces what he or she already said.

If a party decides to cross-examine the opposing party's witnesses, leading questions are appropriate. Leading questions may allow a party to control the testimony of a witness by limiting the witness to a series of "yes" or "no" or "I don't know" answers.

K. Conclusion of the Hearing

Normally, there are no closing arguments at a hearing; arguments are typically saved for the parties' briefs. Some judges close the record at the conclusion of the hearing, while other keep it open for the submission of post-hearing briefs. Once the record is closed, a judge will not take any more documents or testimony before issuing the decision. Accordingly, at the end of the hearing, before the record is closed, a party's representative should take the opportunity to review his or her notes and make sure that there is no other evidence that it wishes the judge to consider. Just as in a wedding ceremony, this is the time to "speak now or forever hold your peace." A judge will typically ask the parties if there is anything else they want to add before closing the record. Do not expect to get any documents or testimony considered by a judge after the hearing is concluded unless the judge has specifically agreed, before the end of the hearing, to consider that particular document or testimony.

L. Post-Hearing Briefs

At the conclusion of the hearing, the judge will usually set a schedule for submitting post-hearing briefs. Post-hearing briefs are similar to pre-hearing briefs except that they are based on the testimony as actually presented at the hearing rather than what the parties anticipated the hearing would show. A brief is a written document used to submit to the judge the party's final arguments and tie those arguments to the facts that support them. Briefs are used to reconcile different viewpoints and persuade the judge to rule in a party's favor. For more discussion on the structure and content of pre-hearing briefs or position papers, see Section IX.

PRACTICE TIPS

- A judge wants to hear testimony in a witness' own words using the witness' own memory; on direct examination, avoid asking questions that can be answered with a simple yes or no because questions like that provide the testimony of the individual asking the questions as opposed to the testimony of the witness.

- It is always best to use a witness who was there, personally observed what occurred, and has actual knowledge of what happened, as opposed to someone who heard about what happened later from someone who saw it.

- Do not expect to get any documents or testimony considered by a judge after the hearing is concluded unless the judge has specifically agreed, before the end of the hearing, to consider that particular document or testimony.

XII. PROOF OF DAMAGES – QUANTUM

A. Introduction

As discussed in Section II, a claim generally consists of two major parts: (1) the "entitlement" portion, which typically includes a detailed description of the actions or inactions of the party from whom relief is sought, entitling the claimant to compensation; and (2) the damages or "quantum" portion, which sets forth the calculations and support for the damages claimed. The two parts are equally important because without entitlement, damages cannot be recovered, and without adequate proof of damages, establishing entitlement is of no value.

When a claim is considered by a BCA judge, and for that matter by a contracting officer, it is usually first addressed in terms of entitlement. It may be that the contract was changed, a differing site condition was discovered, a latent ambiguity arose, or a delay occurred that caused the contractor to do extra work and incur extra costs it did not anticipate in the contract. However, only after it is determined that something occurred entitling a contractor to an equitable adjustment does the government start to consider quantum, *i.e.*, "how much" the contractor is entitled to recover. In analyzing a claim, and ultimately, in structuring and conducting a hearing, usually a BCA judge will first address entitlement, and only move to address quantum if he or she finds entitlement. If a party fails to establish why it is entitled to an equitable adjustment, there is no need to address "how much" the party should receive in terms of dollars and cents. This section addresses what types of damages may be recoverable, how damage claims should be presented, methodologies for calculating damages, and what records are required to support a claim.

As discussed in earlier sections, except where the government affirmatively asserts a claim a final decision, the BCAs deal with contractor claims that have been denied, in whole or in part, by a contracting officer. When a contractor submits a claim seeking additional monetary compensation, it should always submit proof of the damages it claims it incurred. Inflating damages is not usually a good idea. Where certification of a claim is required, inflating damages may have serious consequences beyond the case before the board. In some instances, a contracting officer may be motivated to deny all entitlement for a claim, simply because the damages sought "seem high" or because the contractor has failed to properly quantify its damages it seeks. Such occurrences can lead a contracting officer to doubt the validity of a claim from the outset, undervalue a claim, or make him or her unwilling to negotiate.

A party should not simply show up with a box full of receipts and expect the contracting officer or judge to review the records in order to substantiate or determine the correct amount of damages. Quantum calculations should be well-organized, easily understandable, and logically presented. This is true at both the claim stage and the appeal and hearing stages. BCA judges may be skeptical of claims when there is a lack of supporting documentation for the dollar amounts. Also, they will reject a claim where a contractor fails to show how the damages are causally connected to the changed events or condition that is the subject of the claim.

As soon as a party realizes that a potential change needing an equitable adjustment is occurring, it should immediately start to track and segregate the costs associated with the potential equitable adjustment. While estimates are frequently used, a contractor's actual costs incurred to perform

the changed work will be far more persuasive. Since most claims are litigated after the changed work has been completed, a contractor should have tracked and know the actual costs it incurred for the changed work. Similarly, if the government is asserting a claim against a contractor, the government has the burden (responsibility) of proving its costs. For example, where the government seeks excess reprocurement costs arising out of a contractor default, the government must prove the amount of increased costs it incurred in obtaining the goods or services under the replacement contract.

B. Types of Damages – Direct and Indirect

The BCAs deal primarily with cost-based claims. Cost-based claims usually arise when a contractor incurs increased out-of-pocket expenses during the performance of the contract. Contractor cost increases can arise for a variety of reasons, many of which are unrelated to any action, or inaction, of the government. In certain circumstances, the government may be entitled to recover cost increases.

In a claim, a contractor may seek direct costs and, if appropriate, indirect costs. Direct costs include: labor costs (including labor burden), material costs, equipment and small tools costs, and bond costs. Indirect costs may include home office overhead, jobsite overhead (if the contractor accounting system treats these costs as indirect costs and they have not been claimed as direct costs), general and administrative expenses, and ownership/operating costs. Recovery of indirect costs such as overhead and general and administrative costs is usually accomplished by the application of the contractor's normal indirect rates. The rates used may have been agreed to in the contract or, depending on the circumstances, it may be acceptable to use the actual rates that the contractor incurred during the change.

As with all claim items, the party seeking the damages must have actually incurred increased costs. For instance, the fact that a delay occurred and materials costs generally escalated is not proof. The appellant must demonstrate that it actually paid higher prices.

C. Necessary Records

A party will not be able to recover damages without proof of those damages. Proof usually consists of books, records, and documents that show how the claimed costs were derived. Records should be organized to include computations and summaries of costs for each claim element.

Supporting documentation for each cost component claimed may include: (a) copies of a contractor's accounting records, such as ledger sections, job cost reports; (b) job records reflecting labor hours expended (*e.g.*, daily logs, time cards) and material costs incurred (*e.g.*, material delivery receipts and vendor invoices); (c) documents establishing proof of payment, such as canceled checks, bank statements, remittance reports for electronic transfers; (d) documents that may bear on proof of government design related delay, such as large numbers of requests for information (RFIs), records showing days taken by the government to respond to RFIs and change orders arising from the RFIs; and (e) other documents essential to proving project delay and disruption, such as performance schedules and productivity reports, as well as

proving project cost overruns, including original contract cost estimates used for bidding, budgeting, and cost control.

D. Presenting the Claim

It is important to present the claim in an organized and easy to follow manner. Reference and provide support for each cost item to help validate the claimed costs. This will help all parties involved to trace the costs throughout the claim. A claim narrative specifically addressing why each element of the claimed costs is directly traceable to the issues in dispute can be very convincing. Explain why each of the cost items was incurred and the rationale for linking the costs to actions or inactions of the government.

One effective way to prepare a compelling claim is to provide a summary schedule that identifies each category of cost attributable to each claimable item included in the claim. The following chart is an example of a summary schedule.

Schedule A

Case Name
Case Number
Claim Summary Schedule

Description	Amount	Reference
Total Direct Labor	$ 44,000.00	Schedule B
Overhead (30%)	$ 13,200.00	Schedule C
Burdened Direct Labor	$ 57,200.00	
Total Materials	$ 13,500.00	Schedule D
Total ODCs	$ 8,650.00	Schedule E
Subtotal	$ 79,350.00	
G&A (5%)	$ 3,967.50	Schedule F
Subtotal	$ 83,317.50	
Profit (10%)	$ 8,331.75	Schedule G

Behind each claim cost summary detailed schedules should be included to support each cost element. These should include all important information relative to that cost element, such as dates, descriptions, quantities, rates, etc. For each detailed schedule, provide additional support for that cost, when applicable. For example, when claiming additional direct labor costs, detail those costs in a separate schedule; append documents such as: (1) the job cost report for the project showing the direct labor costs; (2) daily logs; and (3) copies of canceled employee

payroll checks or receipts for electronic payroll transfers. The claim narrative should specifically address why each element of the claimed labor cost is directly traceable to the issues in dispute, *e.g.*, explain the duration of claimed hours and rationale for attributing the extra labor hours actions or inactions of the government. Schedule B below provides an example of a detailed schedule showing appropriate labor information.

Schedule B

Case Name
Case Number
Direct Labor Summary
Job Cost Report

Position	Description	Project	Time Period	Hours	Rate	Amount	Reference
Project Manager	Employee A	Claim Project	Date Range	180	75.00	$ 13,500.00	Invoice B-1, Check B-1.a
Project Manager	Employee B	Claim Project	Date Range	120	75.00	9,000.00	Invoice B-2, Check B-2.a
Analyst	Employee C	Claim Project	Date Range	160	50.00	8,000.00	Invoice B-3, Check B-3.a
Analyst	Employee D	Claim Project	Date Range	150	50.00	7,500.00	Invoice B-4, Check B-4.a
Administrative Support	Employee E	Claim Project	Date Range	140	25.00	3,500.00	Invoice B-5, Check B-5.a
Administrative Support	Employee F	Claim Project	Date Range	100	25.00	2,500.00	Invoice B-6, Check B-6.a
Total Direct Labor						**$ 44,000.00**	

When addressing direct material costs, provide copies of invoices from the vendors that include a description of the material being purchased and copies of canceled checks showing payment for those materials. The claim narrative should specifically address why each element of the claimed damages is directly traceable to the issues or project in dispute. When the materials being claimed are of the same types as required to perform the base work, be prepared to explain when and why these purchases were made to justify their inclusion as an increased cost caused by actions of the government. Schedule D below provides an example of a schedule showing appropriate materials information.

Schedule D

Case Name
Case Number
Direct Materials Summary

Vendor	Description	Quantity	Per Unit	Amount	Reference
Acme, Inc.	Hardware	100	10.00	$ 1,000.00	Invoice D-1, Check D-1.a
Vandalay Industries	Computers	25	400.00	10,000.00	Invoice D-2, Check D-2.a
Amazon.com	Software	25	100.00	2,500.00	Invoice D-3, Check D-3.a
Total Direct Material				**$ 13,500.00**	

Make sure that your schedules are easy to follow and include all of the relevant information necessary to provide back-up. The more detail provided, the better the chance it will be well received. Take the time to prepare the schedules carefully and completely.

E. Claim Pricing Methodologies

There are three basic techniques that are generally used for pricing contract claims for increased costs: total cost, modified total cost, and specific identification/detailed cost buildup.

A total cost claim is calculated as total incurred cost minus the contract price. While the total cost method is the simplest and fastest method to calculate damages, it is also the method that is least favored by BCAs and courts. That is because it seeks recovery for a contractor's project cost overrun without attempting to segregate out any portion of the overrun that is attributable to factors unrelated to government action or inaction. Essentially, the total cost method fails to account for any portion of the cost overrun that was caused by the contractor. In order for the total cost method to be used, four specific criteria must be met:

1) total cost can only be used when absolutely no alternative method of calculating damages exists. In other words, it will be up to the appellant to convince the judge that, because of factors such as lack of records or that the project was subject to changes, delays, and/or disruptions from the very beginning, this method is the only reasonable one to use;

2) the original bid was reasonable and reflects the costs the appellant would have incurred had there been no changes, delays, and/or disruptions. The reasonableness of the bid can be shown by comparison to other bids the government received, comparison to government estimates, or comparison to other independent estimates;

3) the actual costs incurred to perform the work were reasonable and allowable. This means that the appellant needs to show that it performed the work in the most efficient and economical way possible, given the specific circumstances of the project; and

4) the contractor must demonstrate that it was not responsible for *any of* the extra costs incurred. This requires the contractor to closely analyze the costs incurred to ensure that none of the increased costs were due to a contractor problem. Failure to identify contractor caused cost increases can lead to denial of the appellant's claim.

The modified total cost methodology, as its name suggests, is the total cost method with adjustments to account for costs that are identified as having *not* been caused by the government. The claimed costs must be adjusted for contractor-responsible items such as: (1) bid errors; (2) contractor inefficiencies; (3) cost increases not due to government action or inaction; (4) other problems for which the contractor is responsible; and (5) factors beyond government or contractor control for which only an uncompensated time extension is allowed, *e.g.*, weather, acts of God, concurrent delay, etc.

Once these costs have been identified and removed from the claim amount, the presumption is that the remaining cost overruns are attributable to the government. It is the appellant's burden to prove that all non-government-caused costs have been removed from the claim amount. This will require the contractor to have thoroughly analyzed the records to convince the board that all such costs have been accounted for.

The specific identification method of claim pricing is likely to be the most successful methodology not only at the BCAs, but also in negotiations with the government. It identifies and links the increased cost of specific activities to the alleged changes made and actions or inactions of the government. This allows the BCA to adequately compensate the appellant for those increased costs which the board has determined were caused by the government.

The specific identification method involves the determination of the cost of each change. It is best, when possible, to have the actual costs segregated in the contractor's books and records. Because claims are usually submitted well after the changed or extra work has been performed, the board looks to the contractor to keep track of the costs associated with the change as the work is being performed. It is always more convincing to have contemporaneous cost records rather than to present reconstructed costs.

F. Estimates

While contemporaneously tracked actual costs are always more convincing evidence, it is not always practical to have records kept at this level of detail, and estimates may need to be used.

If the quantum includes an estimate as a portion of the damage calculation, that portion should be dealt with separately and clearly identified as an estimate. A detailed explanation of the estimate's calculation should be provided, as should an explanation of why an estimate is being utilized instead of the actual costs.

Even when actual costs are known, estimates may help to properly allocate the actual costs to each claim item. This can be the case when, for some reason, the contractor did not segregate costs between original and changed work. Perform reconciliations of actual costs to estimates to ensure the reasonableness of the estimate.

Documentation supporting the use of an estimate may also be useful where the estimate might not be easily understood by the judge, *e.g.*, if using RS Means as a cost estimating tool provide information on the particular data used and how the estimate was calculated. Understandably, an appellant's case is not enhanced if it claims more for a specific item of work than is actually recorded in the books and records.

Claimed costs are evaluated in accordance with the cost principles contained in FAR [Federal Acquisition Regulation] Part 31, 48 C.F.R. Part 31. Costs identified by the FAR as "unallowable" should not be included in a claim.

G. Government Audits

An appellant should be prepared for an auditor to question certain costs as being unallowable or unsupported. While an auditor's questioning of a cost indicates a potential problem with the questioned cost, the final determination of whether the cost is allowable, allocable, and reasonable rests with the judge.

An audit may be ordered by the government prior to the contracting officer's final decision or at any time before a hearing. Appellants should anticipate that the government will order an audit of a claim, particularly if it involves a large dollar amount or includes a significant amount of

indirect costs. The Defense Contract Audit Agency (DCAA) performs some federal government audits, and it often takes at least six months to complete one. Some agencies have audits performed by an internal Inspector General (IG) office. In other instances, the requesting agency may order an audit through a private consultant.

H. Stipulating to Damages

In many cases, the judge will encourage the parties to meet prior to trial to determine if they can agree on which, if any, damage amounts, are actually in dispute. The parties may be able to stipulate to some of the damage amounts so that no further presentation of evidence, or only a limited presentation, is required at hearing.

Agreeing to stipulate to damages often requires the parties to break the total claimed damages into discrete dollar amounts for each of the items at issue. For example, both parties may agree that the appellant's costs have increased as a result of schedule delays causing the contractor to incur increased costs for time-related expenses. If the parties can agree on the daily cost of those time-related expenses, those daily rates can easily be calculated once the judge determines government liability for delay and the number of days of delay. Stipulations, especially damages stipulations, are very useful in negotiating settlements and speeding up resolution of a dispute.

I. Schedule of Costs

After an appeal has been filed and before the hearing, some judges require the parties to submit a schedule of costs, particularly in the absence of an agreement stipulating to damages. A schedule of costs can also be particularly useful where the claimed damages are complex and not well defined by the claim that was submitted to the contracting officer.

A schedule of costs sets forth, in an easily understandable format, such as a spreadsheet, the damages portion of a claim and support for each cost damage asserted. Required information usually includes:

1) a reference to the claim (name/number);

2) a separate listing of each cost item with each individual component of each cost item separately listed;

3) a computation showing how each cost item and cost component was derived;

4) if the cost item is an actual cost, the identification of the specific books, records, accounting data, time sheets or cards, invoices, canceled checks or other documents supporting the cost, together with appended copies of any such documents (or relevant excerpts of books and records) for each cost item or component and/or citations to page numbers within the appeal file and appeal file supplement, as appropriate; and

5) if the cost item is based on an estimate, a detailed explanation of how the estimate was prepared, including the identification of any cost estimating guide used (with the page(s) upon which the party relies), and the identity of each witness who will be called to testify with respect to each and every claimed item of cost.

After the party seeking damages submits its schedule of costs, the judge may require the party that denies the costs to submit a detailed response to the schedule of costs claimed. If a particular cost item cannot be confirmed, the responder must specify the item to which it takes exception, together with a complete explanation of the reason for such exception. In the case where alternate amounts are proposed by the responder, an alternate schedule of costs for such items is required, and it should provide the same information required by the original schedule of costs.

After the schedule of costs and response are filed, it should be clear to the judge precisely where the parties are in dispute in terms of cost components being claimed and the extent to which evidence proving damages may exist. Some board judges have ruled that a party is deemed to have waived costs that are not included, or insufficiently detailed, in a schedule of costs. Likewise, where the government has failed to expressly challenge the accuracy of particular items listed in the schedule of costs in a timely fashion, some judges have concluded that the government has waived any future right to raise a challenge.

PRACTICE TIPS

- While it is only necessary to prove damages with reasonable certainty, where an appellant seeks damages, it is the appellant's burden to prove that the damages it claims are properly supported.
- The more detail and specific identification of the increased costs caused by the opposing party, the greater possibility of recovering damages, if entitlement is found.
- It is always more convincing to base damages on actual costs as opposed to estimated costs.
- Organize accounting and cost records in a clear and concise manner; do not expect a judge to dig through source documents to track damages.
- Explain how the damages were calculated, identifying methodologies, assumptions, and estimating techniques.

XIII. THE BOARD'S DECISION AND APPEALING TO THE COURT OF APPEALS FOR THE FEDERAL CIRCUIT

A. The Board's Decision

Following the presentation of evidence, a hearing, and/or briefs, the BCA will issue a written decision setting forth its findings of fact and legal conclusions. Except for certain motions and in the case of small claims procedures, a panel of three judges will decide the case. In most instances, the "presiding judge" will have put the primary work into the case and written a draft decision. Then, the two "panel judges" review the draft decision, make comments, and concur (agree) on a final decision. There is no time limit within which a decision must be issued.

B. Relief Granted

BCAs can grant two types of relief under the CDA: monetary and non-monetary.

In the case of monetary relief, a BCA awards the prevailing party a specific dollar amount and, in typical cases, interest on the award. Interest is calculated beginning on the date the contracting officer received a proper claim and ending on the date of payment. The rate of interest is set by the Department of Treasury and is adjusted every six months. Interest is generally not recoverable on relief awarded in non-CDA cases. Under the Equal Access to Justice Act, attorneys' fees may be awarded in limited situations, but not until after a decision is issued. *See* Section XIV.

In the case of non-monetary relief, a BCA declares the parties' rights and obligations in the dispute. Depending on the facts of the case, the board may even order reformation of the contract. In very unusual circumstances, the board may declare the contract void or invalid. The BCAs do not have jurisdiction to order specific performance by directing a party to perform in a precise way, nor can the BCAs issue an order prohibiting an act by issuing an injunction. Furthermore, a board may not direct that a contract be reinstated, that a contract or task order be awarded, or that an option be exercised.

C. Motion for Reconsideration

If a party is unsuccessful on one or more issues, it may ask the board to reconsider its decision. Motions for reconsideration must be filed within 30 days from the date the party received the board's decision; the board will usually give the opposing party a chance to respond to the motion.

BCAs generally grant motions for reconsideration in two circumstances: (1) to allow a party to present significant, newly discovered evidence; or (2) to address the board's own mistake of fact or law. Do not re-argue positions already presented to and rejected by the board, and do not present arguments that could have been made earlier. When presenting significant, newly-discovered evidence in a motion for reconsideration, attach the newly-discovered evidence to the motion, explain where it came from, why it was not available earlier, and why it is relevant and should alter the board's decision. If the motion is based on a mistake of fact or law by the board,

the party must explain the mistake and why the decision would be different if the mistake was corrected.

D. Appeal to the Court of Appeals for the Federal Circuit

Board decisions issued under the CDA are final unless one of the parties appeals to the United States Court of Appeals for the Federal Circuit (Federal Circuit), or, in the case of maritime appeals, the appropriate Federal District Court. Because the Supreme Court rarely considers decisions regarding government contract disputes, the Federal Circuit typically provides the last opportunity for review of a BCA decision.

Board CDA decisions are final unless appealed to the Federal Circuit within 120 days of receiving the board's decision. This is a strict deadline.

Corporations and associations must be represented by counsel when appearing before the Federal Circuit. An individual may bring his or her case *pro se* before the Federal Circuit as long as he or she was one of the litigants before the board. Alternatively, the individual may be represented by a lawyer admitted to practice before the Federal Circuit. The government will be represented by the Department of Justice, even if agency counsel appeared before the board.

The Federal Circuit follows two basic rules when reviewing a BCA decision. First, the Federal Circuit will review any legal issues or conclusions anew, without being bound by the board's determination. Second, the Federal Circuit will follow board findings of fact unless they are fraudulent, arbitrary, capricious, or so grossly erroneous as to imply bad faith, or not supported by substantial evidence. If the board's decision on a question of fact is supported by substantial evidence, the Federal Circuit is "bound" by it. Appellants must show that the error (of fact or law) actually affected the outcome of its case. Minor procedural errors rarely affect the outcome of a case.

If the appellant is successful before the Federal Circuit, the court may issue a decision in its favor or it may send the case back (remand) for further proceedings before the BCA.

The Federal Circuit's "Guide for *Pro Se* Petitioners and Appellants" provides an overview of the appeal process, along with useful practice pointers. The guide can be found at http://www.cafc.uscourts.gov/images/stories/rules-of-practice/pro%20se.pdf. The complete rules governing an appeal to the Federal Circuit are found in the "Rules of Practice before the United States Court of Appeals for the Federal Circuit," available at: http://www.cafc.uscourts.gov/images/stories/rules-of-practice/rules.pdf. The Rules of Practice include: the Federal Rules of Appellate Procedure (as amended for appeals to the Federal Circuit); the Federal Circuit Rules; the Federal Circuit Practice Notes; and Sample Forms (available at: http://www.cafc.uscourts.gov/rules-of-practice/forms.html). As these rules are amended with some regularity, it is imperative that a party obtains the current version of the rules and complies with the rules presently in effect.

E. Representation by Counsel

There are advantages to being represented by counsel in an appeal before the Federal Circuit. The Federal Circuit's rules have timeliness and other procedural requirements that can adversely affect an appeal if they are missed. Further, the government will be represented by an attorney from the Department of Justice and will have additional help from agency counsel. Contractors may want to seriously consider finding an attorney experienced in government contract law and knowledgeable in practice before the Federal Circuit.

Competent legal counsel may be found through a variety of sources. Review existing professional relationships and ask for a personal referral. If a personal network does not yield satisfactory results, bar associations may be able to provide a useful referral. The following government contracts bar associations are a good starting point in this search:

- the Federal Circuit Bar Association (www.fedcirbar.org); or
- the Court of Federal Claims Bar Association (www.cfcbar.org); or
- the Boards of Contract Appeals Bar Association (www.bcaba.org).

Online references, including the following, may also be a source of information about government contract lawyers.

- Chambers and Partners (http://www.chambersandpartners.com/uk/Editorial/37059);
- FindLaw (http://lawyers.findlaw.com/lawyer/practice/Government-Contracts); and
- Martindale Hubbell (www.martindale.com).

Once potential candidates are identified, but before making a final decision, consider speaking or meeting with candidates to learn more about their qualifications, practice, and personal style, as well as fee arrangements.

PRACTICE TIPS

- There is no time limit for BCAs to issue a decision; remember this when considering litigation strategies and ADR.
- Board CDA decisions are final unless appealed to the Federal Circuit within 120 days.
- The Federal Circuit typically provides the last opportunity for a review of a government contracts dispute.

XIV. ATTORNEYS' FEES AND EXPENSES IN BOARD LITIGATION

A. The Equal Access to Justice Act (EAJA)

Generally, under United States law, each party in litigation must pay its own attorneys' fees. In 1980, Congress enacted the Equal Access to Justice Act (EAJA), which allows certain individuals and small businesses to recover at least part of their attorneys' fees and expenses incurred in contract appeals litigation before a BCA. The portion of EAJA that applies to board practice is found at title 5, section 504 of the United States Code. It provides that small businesses and individuals whose net worth and size do not exceed the limits in the law may recover attorneys' fees and other legal expenses from the government if they prevail in an appeal brought against the United States, unless the position of the government was substantially justified or special circumstances make an award unjust. The party that submits an application for an EAJA award is referred to as the "applicant." The government cannot recover attorneys' fees from the appellant.

B. Timeliness of EAJA Applications

The application for an EAJA award must be submitted to the agency or the board within 30 days of the final disposition of the appeal. A disposition by decision is final when the period for appealing the decision has expired. Failure to file an EAJA application within the 30 day period is fatal to the applicant's claim for attorneys' fees and expenses.

C. Contents of Application for Award

The application must show that the party is eligible to receive an award under the EAJA's net worth and size limits and that the party is a "prevailing party." The application must also specify the amount of fees and expenses sought and include an itemized statement from any attorney, agent, or expert witness representing or appearing on behalf of the party stating the actual time expended and the rate at which fees and other expenses were computed. In addition, the party must allege in the application that the position of the government was not substantially justified.

D. Net Worth and Size Limits

The eligibility of a prevailing party depends on the party's net worth and size at the time the appeal is filed with the BCA. For individuals, recovery is limited to those whose net worth does not exceed $2 million. For other entities (such as partnerships and corporations) recovery is limited to those with a net worth of no more than $7 million and with no more than 500 employees. The burden is on the applicant to demonstrate that it meets the EAJA's net worth and size eligibility criteria. Financial statements, or other evidence showing that the applicant meets the net worth and size limits must accompany the EAJA application.

E. Establishing Prevailing Party Status

In addition to demonstrating that it meets the net worth and size limits, the applicant has the burden of proving in its EAJA application that it is a prevailing party. An applicant is considered a prevailing party if it succeeds on any significant issue in the litigation that achieves some of the

benefit sought in bringing the litigation. The applicant does not have to prevail on every issue in the litigation against the government to recover.

F. Government's Position Not Substantially Justified

An eligible prevailing party applicant may have its application for an EAJA award denied if the judge finds that the position of the government was substantially justified. The government has the burden of proving that its position was substantially justified. To meet this burden, the government is not required to prove that its position was correct. The government's position may be substantially justified if a reasonable person could think it was correct.

G. Applicant's Burden of Proof

An applicant seeking an award of fees and expenses under the EAJA has the burden of proving that the fees and/or expenses it seeks were incurred while litigating the appeal.

H. Recoverable Fees and Expenses

Attorney fees shall not be awarded in excess of $125 per hour unless the agency determines by regulation that an increase in the cost of living or a special factor such as the limited availability of qualified attorneys or agents for the proceedings involved justifies a higher fee. 5 U.S.C. § 504(b)(1)(A)(ii).

In addition to reasonable attorney fees, the EAJA permits a board to award an eligible prevailing party other expenses, including the reasonable expenses of expert witnesses, the reasonable cost of any study, analysis, engineering report, paralegal fees, duplication and postal fees, and any other fees which are found by the board to be necessary for the preparation of the party's case.

I. Proper Documentation

In order to recover fees and expenses, the applicant must submit proper documentation. This can include: (1) dates and time segments of work performed; (2) the name of each individual performing the work with a brief statement of the work; and (3) other pertinent details. If a dispute arises about the payment of attorneys' fees or expenses, the board will examine the fees and expenses claimed by an applicant and, in its discretion, determine a reasonable award.

J. *Pro Se* Litigants

Attorneys' fees are not available for *pro se* litigants under EAJA, even if the party's representative is an attorney. It is the intent of the EAJA to encourage litigants to obtain legal counsel; the boards have limited the recovery of attorney fees to fees paid to licensed attorneys acting in the capacity of an attorney, as opposed to an officer of a company. Similarly, an attorney acting *pro se* is not entitled to recover attorney fees. While a *pro se* litigant may recover other reasonable litigation expenses, this recovery does not include the salaries and wages of its own employees.

K. Fees Incurred before a Contracting Officer's Final Decision

Attorneys' fees and expenses incurred before receipt of the contracting officer's final decision are not reimbursable under the EAJA.

L. Effect of a Government Settlement Offer

The rejection of a government settlement offer may lead to a reduced recovery under the EAJA. Any reduction in recovery will depend on the amount of the judgment compared to the settlement offer and the reasonableness of the applicant's attorney fees and expenses incurred after the settlement offer. In order to be considered for reduction in EAJA fees, a settlement offer must be made a part of the administrative record.

PRACTICE TIPS

- In order to be considered eligible for an EAJA award, the appellant must be a prevailing party in litigation with the government; however, the appellant does not have to prevail on every issue.

- An EAJA application must be submitted within 30 days of the BCA's decision becoming final. This generally means 30 days after the time for filing an appeal has expired, but every appellant should review the board's rules carefully to be sure the EAJA application is timely. If an appellant fails to file its EAJA application within 30 days of final disposition, it cannot recover attorneys' fees and expenses under EAJA.

- Make sure that the EAJA application: (a) identifies the business and the appeal for which an award is sought; (b) shows that the applicant prevailed; (c) asserts that the position of the Government was not substantially justified; (d) states that the applicant's net worth does not exceed $2 million if it is an individual or, if the applicant is a business entity, states that its net worth does exceed $7 million and that its number of employees does not exceed 500; (e) specifies the amount of fees and other expenses sought; and (f) is signed by an authorized representative of the applicant. In addition, attach a net worth exhibit and fee and other expenses exhibit.

- Insist that attorneys, consultants, and experts keep detailed and itemized statements specifying the hours and the work performed so that adequate documentation can be provided to support the EAJA application.

- Keep in mind that under EAJA an applicant can only recover legal fees and litigation expenses incurred after a contracting officer has issued a final decision.

APPENDIX A

ADDRESSES OF THE BOARDS OF CONTRACT APPEALS

ARMED SERVICES BOARD OF CONTRACT APPEALS

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1800 F Street, NW
Washington, DC 20405

Office Address:
6th Floor
1800 M Street, NW
Washington, DC 20036

Tel: (202) 606-8800
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GOVERNMENT ACCOUNTABILITY OFFICE CONTRACT APPEALS BOARD

Government Accountability Office
Attn.: General Counsel, Contract Appeals Board
441 G Street, NW
Washington, DC 20548

Tel: (202) 512-3342
Fax: (202) 512-9749
Web: http://www.gao.gov/legal/contract/appeals.html

POSTAL SERVICE BOARD OF CONTRACT APPEALS

2101 Wilson Blvd. #600
Arlington, VA 22201-3078

Tel: (703) 812-1900
Fax: (703) 812-1901
Web: http://about.usps.com/who-we-are/judicial/welcome.htm

APPENDIX B

USE OF SAMPLE FORMS IN BCA SUBMISSIONS

As stated in the introduction to this manual, the following forms and letters are typical of what an attorney might use before a BCA. They have been provided as guidance only. Parties are not required to use them. However, if a party decides to use one or more of the sample forms as a guide for preparing its own documents for the appeal, it should be careful to tailor each form it uses to fit the particular circumstances of the appeal.

For ease of reference, the authors have designated ABC Company as the appellant on most of the forms and XYZ as the government agency. The terms government, respondent, and agency are used interchangeably in the forms.

[ABC Company's Letterhead]

[Date]

FIRST CLASS AND CERTIFIED MAIL,
RETURN RECEIPT REQUESTED

Contracting Officer
[Address]

RE: Contract No.: [ ]
Project Name: [ ]

Request for Contracting Officer's Final Decision

Dear [Contracting Officer]:

In accordance with the disputes provision of the contract and the Contract Disputes Act, [ABC Company] hereby requests a contracting officer's final decision on the parties' dispute as follows:

[*See* Section II.A]

Sincerely,

[Signature]
[James Smith, President]
[ABC Company]

[NOTE: Pursuant to the CDA, 5 U.S.C. § 7103(c), a contractor is required to include a specific certification for claims over $100,000. If this certification is not included, the submission does not meet the CDA definition of a claim and the contracting officer will not issue a final decision. A BCA cannot decide a claim over $100,000 that lacks certification, and will dismiss the appeal for lack of jurisdiction. *See* Section II.A for the certification.]

[ABC Company's Letterhead]

[Date]

Recorder/Clerk
[ ] Board of Contract Appeals
[Address]

RE: Contract No.: [ ]
Project Name: [ ]

NOTICE OF APPEAL

Dear Sir or Madam:

ABC Company hereby appeals the decision of the contracting officer dated [ ] (attached) denying its claim for [*e.g.*, equitable adjustment, remission of liquidated damages, breach of contract] under the referenced contract with the Department of [ ]. The amount in dispute is $[ ].

Sincerely,

[Signature]
[James Smith, President]
[ABC Company]

cc: Contracting Officer

Attachment: Contracting Officer's Final Decision

[ABC Company's Letterhead]

[Date]

Recorder/Clerk
[ ] Board of Contract Appeals
[Address]

[ ]BCA No. [ ]
Appeal of [ABC Company]
Contract No. [ ]

NOTICE OF APPEARANCE

Dear Sir or Madam:

Please enter my name as the representative of the [ABC Company] in this appeal. Mail should be directed to the undersigned at [address]. The undersigned may be reached by telephone at [telephone number] or by [email address].

Very truly yours,

[Signature]
[Sara Smith, Vice-President]
[ABC Company]
[Address]
[Telephone Number]

cc: Contracting Officer or Government Counsel (if known)

[CERTIFICATE OF SERVICE]

[NOTE: A certificate of service should be attached to the end of *each filing*, certifying that the party making the filing has sent a copy of the document to the opposing party or lawyer.]

CERTIFICATE OF SERVICE

I hereby certify that the foregoing was sent, by (describe the same means by which the request was transmitted to the board), this [ ] day of [ ], 20[ ], to:

[Government's Counsel]
[Address]

By: [Signature]
[Typed name]
[Position]

BEFORE THE [ ]
BOARD OF CONTRACT APPEALS

Appeal of [ ]	*	
	*	
	*	[ ]BCA No. [ ]
	*	

REQUEST FOR AN EXTENSION OF TIME

In accordance with [Rule 3 of the Civilian Board of Contract Appeals or Rule 33 of the Armed Services Board of Contract Appeals], respondent requests an extension of time until [date] in which to file [state what is due and the date of the order which set the date].

Respondent has contacted the opposing party regarding this request and the opposing party [has no objection to, does not oppose, consents to, opposes] the request.

[If the opposing party objects to the request, or the requestor believes the request will not be viewed by the judge favorably, give good reasons why the request should be granted.]

Dated: [ ]

Respectfully submitted,

[Signature]
[Typed name]
[Counsel for Respondent]

[CERTIFICATE OF SERVICE]

BEFORE THE [ ] BOARD OF

CONTRACT APPEALS

Appeal of [ABC Company] *
*
* [ ]BCA No. [ ]
*

COMPLAINT

[ABC Company] (appellant), for its complaint against the United States of America acting through the Department of [ ], alleges upon information and belief as follows:

1. [ ] is a [ ] corporation, with its principal place of business at [ ]. At all times relevant hereto, appellant was engaged in the business of [ ] and is properly licensed to transact business in the State of [ ].

2. The United States of America in this matter is acting through the Department of [ ], [address], (the government or respondent).

3. Jurisdiction is vested in the [ ] Board of Contract Appeals over this appeal of the contracting officer's denial [or deemed denial] of appellant's claim in accordance with the Contract Disputes Act of 1978, 41 U.S.C. §§ 7101-7109.

4. Appellant was awarded contract [No.] on [ ] in the amount of [dollars] ($[ ]) for [the manufacture and delivery of; or janitorial/security/computer maintenance/etc. services; or research and development work in [ ]; or construction of [ ]].

5. The contract incorporates by reference certain FAR clauses for [fixed price/cost reimbursement] [supply/services/R&D/construction/ADP] contracts as specifically stated in the contract.

6. Of significance to this appeal, the contract also provides as follows [page xx, paragraph yy]:

7. A dispute between the parties arose regarding [ ].

8. Appellant maintained [ ], because [ ].

9. Respondent maintained [ ], because it alleged [ ].

10. On [date], appellant submitted a certified claim and request for a contracting officer's final decision in the amount of $ [ ].

11. By final decision dated [ ], the contracting officer denied appellant's claim.

12. Appellant timely appealed the contracting officer's final decision.

Wherefore, appellant requests that its appeal be sustained in the amount of $ [ ] with interest from [date of claim].

Dated: [ ]

Respectfully submitted,

[Signature]
[Typed name]
[Title, ABC Company
or Counsel for Appellant]

[CERTIFICATE OF SERVICE]

[ABC Company's Letterhead]

[Date]

Recorder/Clerk
[ ] Board of Contract Appeals
[Address]

RE: [ ]BCA No. [ ]
Appeal of [ABC Company]
Contract No. [ ]

Dear Sir or Madam:

In accordance with Rule 4, appellant hereby submits appellant's supplement to the appeal file which includes copies of documents relevant to this appeal, but not included in the respondent's appeal file. Appellant reserves the right to introduce additional documents at the hearing in this matter.

Respectfully submitted

[Signature]_____
[Typed name]
[Title, ABC Company
or Counsel for Appellant]

cc w/enc: [Opposing counsel]

[CERTIFICATE OF SERVICE]

[ABC Company's Letterhead]

[Date]

[Government Counsel]

[Address]

Re: [ ]BCA No. [ ]
Appeal of [ ]
Contract No. [ ]

Dear [ ]:

Enclosed are the interrogatories, requests for production of documents, and requests for admission in the above-captioned appeal.

As you know, the [ ] Board of Contract Appeals encourages the parties to handle discovery on a voluntary basis. In order that discovery not be unduly delayed, it is requested that you notify me within 15 days if you have any objections to these interrogatories or requests.

If you have any further questions, please notify me at [ ].

Sincerely,

[Signature]
[Typed name]
[Title, ABC Company
or Counsel for Appellant]

Enc. [no cc to BCA]

BEFORE THE [ ]
BOARD OF CONTRACT APPEALS

Appeal of [ ] *
*
* [ ]BCA No. [ ]
*

APPELLANT'S FIRST SET OF INTERROGATORIES

In accordance with Rule [ ] of the [ ] Board of Contract Appeals, [ ] (appellant) hereby files this First Set of Interrogatories and requests that the respondent answer fully under oath the following interrogatories according to the instructions and definitions which follow, within thirty (30) days of receipt.

GENERAL INSTRUCTIONS

Your answers to these interrogatories shall be set forth separately and fully in writing under oath or shall state fully the grounds for refusal to answer any interrogatory.

In each of your answers to these interrogatories, you are requested to provide not only such information as is in your possession, but also such information available to you directly or through agents, representatives, or attorneys. In the event that you are able to provide only part of the information called for by any particular interrogatory, please provide all the information you are able and state the reason for your inability to provide the remainder.

If you object to or otherwise decline to answer any portion of an interrogatory, please provide all the information called for by that portion of the interrogatory to which you do not object or to which you do not decline to answer. If you object to an interrogatory on the ground that it is too broad (*i.e.*, that it calls for both information which is relevant to the subject matter of the action and information which is not), please provide such information as is concededly relevant. For those portions of any interrogatory to which you object, claim privilege not to answer, or otherwise decline to answer, state the reason for each objection or declination and the legal and factual basis for any such claim. If you perceive any ambiguities in a question, instruction, or definition, set forth the matter deemed ambiguous and the construction used in answering.

These interrogatories are continuing in nature. If you receive or become aware of information in addition to, or in any way inconsistent with, your initial responses to these interrogatories at any time before trial, you are required to supplement your answers promptly.

If you elect to specify and produce business records of yours in answer to any interrogatory, your specification shall be in sufficient detail to enable the interrogating party to locate and identify the records from which the answer may be ascertained.

DEFINITIONS

For the purposes of these interrogatories, and your responses thereto, the following definitions shall apply:

1. "You" or "your" shall include the party to whom these interrogatories are propounded, its predecessors, all of that party's agents, and, unless privileged, counsel for that party.

2. "Person" shall mean any individual, partnership, firm, corporation, association, joint venture, business organization, entity, or any employee or agent thereof.

3. "Documents" or "written communications" shall mean all graphic or computerized matter of whatever nature or description, including handwriting, typewriting, printing, photographing, photostatting, electronic mail, computerized data processing and every other means of recording upon any tangible thing, including without limitation all electronic sound recordings or transcripts thereof from whatever sources, and in any form, including without limitation, books, diaries, letters, notes, memoranda, reports, minutes of meetings, notes and memoranda of telephone conversations, position papers, stored computer data and printouts thereof, and papers of any nature, including drafts and proposed drafts of each. It shall also mean copies of documents by whatever means made, except for exact duplicates which do not differ from the original or from any other copy by way of color, interlineation, markings, notations or otherwise.

4. "Communication" shall mean any exchange of words, ideas, messages or information, whether by speech, signal, or writing, and includes both telephonic and in-person conversations.

5. To "identify a document" shall mean to state with respect thereto:

   a. The name of the person who prepared it;

   b. The name of each person to whom it was addressed or distributed;

   c. The name of the person who signed it or over whose name it was issued;

   d. Its date, or if it bears no date, the date it was prepared;

   e. The nature and substance of the document with sufficient particularity to enable it to be readily identified;

   f. Its present location and the name, address, and title of the person having possession custody or control of the document at present time;

g. Whether it has already been made available for inspection and copying; and

h. Whether the document will be made available for inspection and copying. If the document is to be made available, then attach a copy to your response.

6. To "identify a person" shall mean to state with respect thereto:

a. His or her name;

b. His or her business address and resident address at the time referred to in an Interrogatory, and at the present time; and

c. His or her title and occupation with each employer and date when each such employment began and ceased.

7. To "identify an oral statement or communication" shall mean to state with respect thereto:

a. Whether such oral statement or communication was made by telephone, face-to-face, or otherwise, and to identify the individuals who made the oral statement or communication, and to state the date the oral statement or communication was made, and to state the location of the participants at the time that they made the oral statement or communication;

b. The identity of each person who was present when such oral statement or communication was made, but who did not make any of the oral statements or communications;

c. In verbatim what each person said or, if not known verbatim, please so indicate and state the substance thereof to the best of your recollection; and

d. The identity of each document which identifies, reports, comments upon or relates in any way to such oral statement or communication.

8. "State the factual basis for" shall mean to state all facts and contentions which support the particular allegation(s) or contention(s) referred to; to identify all individuals who have knowledge of the facts underlying the particular allegation(s) or contention(s) referred to and state the substance of the knowledge of each individual identified; and to identify all documents and oral statements or communications which relate in any way to the particular allegation(s) or contention(s), whether or not such

documents or oral statements or communications tend to support such allegation(s) or contention(s).

9. "Appellant" shall mean [ABC Company], its predecessors and successors in interest, all former and present subsidiaries, divisions, parent corporations or other related corporate entities, its principals, employees, agents, assigns, or any other related person or entity acting in its direction.

10. "Government" or "respondent" shall mean the United States of America acting through the [agency], its present and former employees, agents, assigns, or any other related person or entity acting in its direction.

11. "Contract" shall mean the general contract, contract no. [ ], including the performance work statement, the technical exhibits, the general and special conditions, and any subsequent modifications and/or change orders thereto.

INTERROGATORIES

INTERROGATORY NO. 1: Identify all persons currently or formerly employed by you having personal knowledge of the matters and facts relevant to this case and the allegations contained in the contracting officer's final decision, appellant's complaint, and/or respondent's answer, and for each such person describe in detail their knowledge of the facts asserted therein.

INTERROGATORY NO. 2: Identify each and every person responsible for [ ]. For each person identified, describe in detail his or her responsibility and involvement with [ ].

INTERROGATORY NO. 3: Identify all expert witnesses with whom you have consulted regarding this matter. For every expert witness you intend to have testify at the trial, attach to your answers to these interrogatories copies of the following: the witness' resume and/or listing of the expert's qualifications, including a list of all publications authored by the witness within the preceding ten (10) years; the compensation to be paid for the expert's study and testimony; a listing of any other cases in which the witness has testified as an expert at trial or by deposition within the preceding four (4) years; any written report(s) provided to you, or a statement of the substance of the facts and opinions to which the expert is expected to testify, including a summary of the grounds for each opinion, and all data and other information considered by the witness in forming the opinions.

INTERROGATORY NO. 4: Identify each and every person responsible for preparing the Rule 4 file submitted in this appeal and identify each and every source of documents reviewed to prepare the Rule 4 file.

INTERROGATORY NO. 5: Identify each and every document reviewed by the respondent in the preparation of the contracting officer's final decision. State the purpose for which the respondent relied on each such document and state the factual basis for the reliance described.

INTERROGATORY NO.6: Identify each and every document reviewed by the respondent in the [ ]. State the purpose for which the respondent relied on each such document and state the factual basis for the reliance described.

INTERROGATORY NO. 7: Identify all reports, studies, analyses, justifications or any other documents prepared by the respondent in connection with the decision to [state pertinent decisions].

INTERROGATORY NO. 8: You state in respondent's answer that [ ]. State the factual basis for this statement and identify all documents that you rely on in support of this statement.

INTERROGATORY NO. 9: In respondent's answer, you deny the allegations contained in paragraph [ ] of appellant's complaint. State the factual basis for your denial and identify all documents that you rely on in support of this denial.

INTERROGATORY NO. 10: If you have received requests for admissions, for each request for admission to which you respond with other than an unqualified admission, explain why you responded with something other than an unqualified admission, state the factual basis for your answer, and identify and make available for inspection any relevant documents relating to your denial or qualification.

Respectfully submitted,

[Signature]_____
[Typed name]
[Title, ABC Company
or Counsel for Appellant]

[CERTIFICATE OF SERVICE]

[no copy to BCA]

BEFORE THE [ ] BOARD OF
CONTRACT APPEALS

Appeal of [ABC Company]	*	
	*	
	*	[ ]BCA No. [ ]
	*	

APPELLANT'S FIRST
REQUEST FOR PRODUCTION OF DOCUMENTS

In accordance with rule [ ] of the [ ] Board of Contract Appeals, [ABC Company] (appellant) hereby files this first request for production of documents and requests that the respondent produce, within thirty (30) days of the date of service of this request, all documents within its possession, custody, or control identified below. The documents should be made available for inspection and copying at appellant's offices located at [address], or at such other location as counsel for the parties may agree.

[NOTE: Here, the party would list any documents that it believes might be in the agency's possession that would assist it in litigating the appeal. Listed below are examples of documents a party might need in an appropriate case, but not all of these documents may be relevant to a particular appeal. So-called "boxcar" discovery, in which a party asks for every document that may be in any way relevant to the particular contract at issue, is rarely an effective tool. Instead, tailored requests for the basic documents necessary to gain an understanding of the case and to present a party's position to the board are generally the best way to narrow the issues, advance the interests of both parties and move the case more rapidly toward resolution.]

REQUEST NO. 1: All documents which refer or relate to the facts alleged in our complaint, and/or the respondent's answer.

REQUEST NO. 2: All documents consulted, relied on, referred to or used by the respondent in answering our First Set of Interrogatories [if any were propounded].

REQUEST NO. 3: Any and all documents identified in the answer to our First Set of Interrogatories [if any were propounded].

REQUEST NO. 4: All internal memoranda, notes, e-mails, documents and/or written communications regarding [ ].

REQUEST NO. 5: All documents and/or written communications by and between the respondent, appellant and/or any other party regarding [ ].

REQUEST NO. 6: All documents reviewed and/or relied upon by the respondent in preparing the contracting officer's final decision.

REQUEST NO. 7: All documents reviewed and/or relied upon by the respondent in making its decision that [ ].

REQUEST NO. 8: All project schedules, milestone schedules, schedule updates, schedule analyses, or any other analyses prepared by or for the respondent regarding the contract.

Respectfully submitted,

By: [Signature]
[Typed name]
[Title, ABC Company
or Counsel for Appellant]

[CERTIFICATE OF SERVICE]

[no copy to BCA]

[ABC Company's Letterhead]

[Date]

Government Counsel
[Address]

[ ]BCA No. [ ]
Appeal of [ ]
Contract No.[ ]

DEPOSITION OF [ ]

Thank you for your assistance in scheduling the depositions of the witnesses I have requested. Regarding those depositions, I will assume that the following ground rules apply to these and future depositions in this case:

a. Depositions will be conducted as discovery depositions, not evidentiary depositions;

b. Depositions will be conducted where the witness is located unless counsel mutually agree;

c. A verbatim transcript will be made of each deposition;

d. Each deponent will review, correct, and sign under oath before a notary public the verbatim transcript of his or her deposition;

e. Corrections to the deposition will be made by the deponent on errata sheets, not on the original transcript;

f. The qualifications of the court reporter will not be disputed;

g. Deposition transcripts will not be filed with the board.

h. Exhibits shown at a deposition that are not part of the Rule 4 file will be entered into the record of the deposition, and

i. Rulings on objections to questions propounded, except those concerning form or privilege, will be reserved until the time of hearing.

I will start on [ ] at [ ], and expect to finish with all witnesses by [ ]. If you object to any of these elementary ground rules or wish to discuss other arrangements concerning the depositions, please contact me immediately. I can be reached at [ ].

Sincerely,

[Signature]
[Typed name]
[Title, ABC Company
or Counsel for Appellant]

[no copy to BCA]

BEFORE THE [ ] BOARD OF
CONTRACT APPEALS

Appeal of [ABC Company] *
*
* [ ]BCA No. [ ]

APPELLANT'S FIRST
REQUEST FOR ADMISSION

In accordance with the rules of the [ ] Board of Contract Appeals, Rule [ ], [ABC Company] (appellant) hereby files this First Request for Admission.

DEFINITIONS

Appellant incorporates by reference all definitions set out in appellant's First Set of Interrogatories to respondent United States of America as if set forth in full herein.

INSTRUCTIONS

1. Failure to admit or deny the following Request for Admission in writing and under oath, within thirty (30) days, will result in it being deemed admitted.

2. You are required to admit as much of a request that is true and to qualify or deny only the remainder.

3. You are required to make reasonable inquiry before giving lack of information of knowledge as a basis for denial.

REQUESTS FOR ADMISSION

1. Admit that the contracting officer issued the notice to proceed on [ ].

2. Admit that on [date], the contracting officer received notification of a changed condition [describe].

3. Etc.

Respectfully submitted,
[Signature]
[Typed name]
[Title, ABC Company
or Counsel for Appellant]

[CERTIFICATE OF SERVICE]

[no copy to BCA]

BEFORE THE [ ] BOARD OF
CONTRACT APPEALS

Appeal of [ABC Company]	*	
	*	
	*	[ ]BCA No. [ ]
	*	

MOTION TO [STATE TYPE]

Pursuant to Board Rule [ ], the appellant moves to [describe motion]. In support of this motion, appellant states as follows:

1. [ ].

2. [ ].

3. *Etc*.

WHEREFORE, appellant respectfully moves that [ ].

Dated: [ ]

Respectfully submitted,
[Signature]
[Typed name]
[Title, ABC Company
or Counsel for Appellant]

[CERTIFICATE OF SERVICE]

BEFORE THE [ ]
BOARD OF CONTRACT APPEALS

Appeal of [ABC Company]	*	
	*	[ ]BCA No. [ ]
	*	

DECLARATION [AFFIDAVIT] OF [NAME OF DECLARANT OR AFFIANT]

I, [NAME OF DECLARANT or AFFIANT], hereby depose and state as follows:

1. I am over the age of 18 and am otherwise competent to make this Declaration [Affidavit].

2. I am [position at company,] responsible for [describe responsibilities]. I have personal knowledge of the facts set forth below and to make this affidavit.

3. [recitation of facts in short understandable groupings]

4. [continuation of recitation of facts]

5. . . . .

I hereby [certify/declare] under penalty of perjury that the foregoing is true and correct to the best of my knowledge.

Executed on: [date]

[Signature of Declarant or Affiant]

[Typed name]

Note: When making an affidavit, the document should be signed before a notary public and contain the following block executed by the notary:

State of
City/County of
The foregoing instrument was subscribed and sworn before me this
___ day of ___, 20 _____ by:

_____
(name of affiant)

_____
Notary Public
Notary registration number: _____
My commission expires: _____

[ABC Company's Letterhead]

[Date]

Recorder/Clerk
[ ] Board of Contract Appeals
[Address]

[ ]BCA No. [ ]
Appeal of [ ]
Contract No.[ ]

Dear Sir or Madam:

In accordance with Board Rule [ ], appellant notifies the Board that it [requests a hearing on the above appeal as prescribed in Rule [ ] or elects to submit its case on the record without a hearing, as prescribed in Rule [ ]].

Sincerely,
[Signature]
[Typed name]
[Title, ABC Company
or Counsel for Appellant]

cc: Opposing counsel

[ABC Company's Letterhead]
[Date]

Recorder/Clerk
[ ] Board of Contract Appeals
[Address]

Re: [ ]BCA No. [ ]
Appeal of [ ]
Contract No. [ ]

Dear Sir or Madam:

Concerning the hearing for the above-styled appeal, the following information is furnished:

a. Appellant expects the hearing to last [ ] days;

b. The exclusion of witnesses under FRE 615 [is] [is not] requested;

c. Appellant intends to offer additional exhibits at the hearing, but only to rebut, if necessary, evidence provided by opposing counsel;

d. Appellant anticipates that it will call the persons listed below as witnesses to testify as indicated. In the event that additional witnesses will be called, the Board and opposing counsel will so be notified:

[John Doe, contract specialist: Will testify about the meetings he attended, the discussions he had (etc.)]

[Jane Smith, engineer: Will testify about the technical aspects of the specification, her inspection of (etc.)]

e. Appellant reserves the right to call any witness identified by the respondent and any other unnamed witnesses to rebut testimony that may be given by witnesses called by the respondent.

Sincerely,
By: [Signature]
[Typed name]
[Title, ABC Company
or Counsel for Appellant]

cc: Opposing counsel

[Letterhead]

[Date]

Recorder/Clerk
[ ] Board of Contract Appeals
[Address]

Re: [ ]BCA No. [ ]
Appeal of [ ]
Contract No. [ ]

Dear Sir or Madam:

Enclosed is [appellant's complaint/motion/brief/reply brief] or [respondent's answer/motion/ brief/reply brief] in the above styled appeal.

Sincerely,

[Signature]
[Typed name]
[Title, ABC Company
or Counsel for Appellant]

cc w/encl.: Opposing counsel

ARMED SERVICES BOARD OF CONTRACT APPEALS

Revised 23 February 2011

NOTICE REGARDING ALTERNATIVE METHODS OF DISPUTE RESOLUTION

The Contract Disputes Act, 41 U.S.C. § 7105, states that boards of contract appeals "shall . . . to the fullest extent practicable provide informal, expeditious, and inexpensive resolution of disputes[.]" Resolution of a dispute at the earliest stage feasible, by the fastest and least expensive method possible, benefits both parties. To that end, the Board suggests that the parties consider Alternative Dispute Resolution (ADR) procedures.

The ADR methods described in this Notice are intended to suggest techniques which have worked in the past. Any method which brings the parties together in settlement, or partial settlement, of their disputes is a good method. The ADR methods listed are not intended to preclude the parties' use of other ADR techniques which do not require the Board's participation, such as settlement negotiations, fact finding conferences or procedures, mediation, or mini-trials not involving use of the Board's personnel. The ADR methods described below are designed to supplement existing "extrajudicial" settlement techniques, not to replace them. Any method, or combination of methods, including one which will result in a binding decision, may be selected by the parties without regard to the dollar amount in dispute.

Requests to the Board to utilize ADR procedures must be made jointly by the parties. If an ADR method involving the Board's participation is requested by the parties, the presiding administrative judge or member of the Board's legal staff will forward the request to the Board's Chairman for consideration. Unilateral requests or motions seeking ADR will not be considered. The presiding administrative judge or member of the Board's legal staff may also schedule a conference to explore the desirability and selection of an ADR method. If a non-binding ADR method involving the Board's participation is requested and approved by the Chairman, a settlement judge or other neutral advisor will be appointed. Usually the person appointed will be an administrative judge or hearing examiner employed by the Board.

If a non-binding ADR method fails to resolve the dispute, the appeal will be restored to the active docket for processing under the Board's Rules. To facilitate full, frank and open discussion and presentations, any settlement judge or neutral advisor who has participated in a non-binding ADR procedure which has failed to resolve the underlying dispute will ordinarily not participate in the restored appeal. Further, the judge or advisor will not discuss the merits of the appeal or substantive matters involved in the ADR proceedings with other Board personnel. Unless the parties explicitly request to the contrary, and such request is approved by the Chairman, the assigned ADR settlement judge or neutral advisor will be recused from consideration of the restored appeal.

Written material prepared specifically for use in an ADR proceeding, oral presentations made at an ADR proceeding, and all discussions in connection with such proceedings between representatives of the parties and a settlement judge or a neutral advisor are confidential and, unless otherwise specifically agreed by the parties, inadmissible as evidence in any pending or

future Board proceeding involving the parties or matter in dispute. However, evidence otherwise admissible before the Board is not rendered inadmissible because of its use in an ADR proceeding.

Guidelines, procedures, and requirements implementing the ADR method selected will be prescribed by agreement of the parties and the settlement judge or neutral advisor. ADR methods can be used successfully at any stage of the litigation. Adoption of an ADR method as early in the appeal process as feasible will eliminate substantial cost and delay. Generally, ADR proceedings will be concluded within 120 days following approval of their use by the Chairman.

The following ADR methods are consensual and voluntary. Both parties and the Board must agree to use of any of these methods.

1. Settlement Judge: A settlement judge is an administrative judge or hearing examiner who will not hear or have any formal or informal decision-making authority in the appeal and who is appointed for the purpose of facilitating settlement. In many circumstances, settlement can be fostered by a frank, in-depth discussion of the strengths and weaknesses of each party's position with the settlement judge. The agenda for meetings with the settlement judge will be flexible to accommodate the requirements of the individual appeal. To further the settlement effort, the settlement judge may meet with the parties either jointly or individually. A settlement judge's recommendations are not binding on the parties.

2. Mini-trial: The mini-trial is a highly flexible, expedited, but structured, procedure where each party presents an abbreviated version of its position to principals of the parties who have full contractual authority to conclude a settlement and to a Board-appointed neutral advisor. The parties determine the form of presentation without regard to customary judicial proceedings and rules of evidence. Principals and the neutral advisor participate during the presentation of evidence in accordance with their advance agreement on procedure. Upon conclusion of these presentations, settlement negotiations are conducted. The neutral advisor may assist the parties in negotiating a settlement. The procedures for each mini-trial will be designed to meet the needs of the individual appeal. The neutral advisor's recommendations are not binding.

3. Summary Trial with Binding Decision: A summary trial with binding decision is a procedure whereby the scheduling of the appeal is expedited and the parties try their appeal informally before an administrative judge or panel of judges. A summary "bench" decision generally will be issued upon conclusion of the trial or a summary written decision will be issued no later than ten days following the later of conclusion of the trial or receipt of a trial transcript. The parties must agree that all decisions, rulings, and orders by the Board under this method shall be final, conclusive, not appealable, and may not be set aside, except for fraud. All such decisions, rulings, and orders will have no precedential value. The

length of trial and the extent to which scheduling of the appeal is expedited will be tailored to the needs of each particular appeal. Pretrial, trial, and post-trial procedures and rules applicable to appeals generally will be modified or eliminated to expedite resolution of the appeal.

4. Other Agreed Methods: The parties and the Board may agree upon other informal methods which are structured and tailored to suit the requirements of the individual appeal.

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

CBCA RULE 54

ALTERNATIVE DISPUTE RESOLUTION

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

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

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

(b) Conduct of ADR.

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

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

(3) Confidentiality of ADR communications and materials. Written material prepared specifically for use in an ADR proceeding, oral presentations made at an ADR

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

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

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

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

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

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

presentation, with oral testimony, exchange of documentary evidence, and argument from counsel.

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

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

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

SAMPLE MEDIATION AGREEMENT I

The purpose of Alternative Dispute Resolution (ADR) in this matter is to resolve the issues in dispute between the Department of XYZ (XYZ, agency or respondent), and ABC Company (ABC or appellant) (collectively, the parties) in [case name and number] by facilitating negotiations and helping the parties evaluate the relative strengths and weaknesses of their respective positions concerning the merits of this case.

[ ], Judge, [ ] Board of Contract Appeals, the third-party mediator, whose signature appears below, and who has been selected jointly by the parties together with their counsel, agrees to act as a neutral in this matter in accord with the terms of this agreement.

The mediator will facilitate negotiations by clarifying interests, providing neutral feedback on the strengths and weaknesses of each side's positions, identifying areas of agreement and helping generate options that lead to a settlement that is satisfactory to all parties.

The mediator will not have authority to resolve this action and will not act as an advocate or attorney for any party.

The entire ADR procedure will be confidential. Documents prepared for any phase of the ADR procedure, any statements made by any person during the ADR meetings or sessions, and any communications between counsel relating in any way to the ADR or settlement will be inadmissible for any purpose and shall not be used or referred to in any subsequent litigation if a settlement is not achieved. However, evidence otherwise admissible or discoverable shall not be rendered inadmissible or undiscoverable because of its use in the ADR.

The parties and counsel agree not to subpoena the mediator or any documents prepared by or for submission to the mediator. In no event will the mediator voluntarily testify on behalf of any party or third-person or submit any type of report in connection with this ADR process.

During the course of the process, the parties, counsel, and mediator will not discuss any matter relating to the ADR with the press or any third party except by express written permission of the other party and the mediator.

Documents (and information contained therein) submitted to the mediator shall be deemed subject to release to or discussion with the non-disclosing party, unless the disclosing party designates in writing, by an appropriate legend or otherwise, that the document or information therein should be treated as confidential and not disclosed to the other party. Any information that is conveyed orally shall likewise be deemed subject to release to the non-disclosing party unless the disclosing party requests confidential treatment for such information, which request may be made orally.

Documents or information designated as privileged under the attorney/client or attorney/work product doctrines that are disclosed to the mediator shall be kept confidential by the mediator unless the disclosing party otherwise agrees. Disclosure of such documents or information to the mediator shall not be deemed by the parties to be a waiver of any privilege.

The mediator will review any written information submitted by the parties and counsel and may request position papers from each side outlining the legal and factual issues in the dispute as well as the range of settlement options. It is recognized that a party's settlement position(s) may not be fully developed until participation in the mediation. Both parties commit to develop good faith settlement options so that the mediation will be effective.

The mediator will conduct a face-to-face session with all counsel and parties present. In the initial meeting, at what is called the "joint session," each side will be invited to present a summary of its view of the case and respond to the questions from the mediator and the other party.

After the joint session, the mediator may hold a series of private sessions with each party separately to assist each party in identifying the relative strengths and weaknesses of its positions concerning the substantive merits of the case and in trying to find a mutually-acceptable solution.

This ADR procedure shall begin on [date] and is expected to be completed by [date].

The entire ADR procedure will be non-binding, unless and until the parties agree in writing upon a binding settlement. No party or counsel shall be bound by anything said or done during the ADR process unless a written settlement is reached and executed by all necessary parties and counsel. If a settlement is reached, the agreement shall be reduced to writing and, when signed and approved by the appropriate authorities for all parties and counsel, shall be binding upon all parties and counsel to the agreement.

This ADR agreement will become final once all the parties, their counsel and the mediator have signed it. This agreement may be signed in counterparts. By signature below, the parties acknowledge that they have read, understand and agree to this ADR agreement.

[Signed and dated by individuals with authority to bind the parties. To help protect confidentiality, a judge may require all individuals attending the ADR proceeding to sign the agreement. While it is not necessary for a judge to sign the agreement, some judges do; others do not. The agreement should be provided to the judge before the start of the ADR proceeding.]

SAMPLE MEDIATION AGREEMENT II

This Alternative Dispute Resolution (ADR) agreement is between the [agency name] and [appellant name]. [Agency name] and [appellant name] support ADR because it provides the parties with a voluntary, non-binding means of attempting to resolve disputes without the necessity of a lengthy and costly proceeding before the Board, and without prejudicing such proceeding. Therefore, the [agency name] and [appellant name] have agreed to submit [describe issue in controversy] to an ADR procedure.

TERMS OF THE ADR AGREEMENT

1. [Agency name] and [appellant name] will voluntarily engage in a non-binding ADR procedure.

2. The purpose of the ADR procedure will be to assist the parties in the resolution of the dispute, which would otherwise likely be resolved through the traditional litigation process. It is agreed that each party will have the opportunity to present its position in the ADR proceedings and the responsibility to negotiate in good faith.

3. Each party will have present a representative who has authority to settle the dispute. Each party will be responsible for its own costs. The neutral advisor will not charge either party for time or travel expenses.

Neutral Advisor

4. The parties agree that Judge [ ] of the [ ] Board of Contract Appeals will serve as the neutral advisor to the parties.

5. The neutral advisor will treat the subject matter of this ADR proceeding as confidential and refrain from disclosing any of the information exchanged to third parties. The neutral advisor will not appear as a witness, consultant, or expert for either party in this or any other dispute between the parties arising out of performance of the contract.

ADR Procedure

6. For purposes of establishing a framework for the ADR procedure, the parties agree as follows regarding certain rules set forth below.

7. The neutral advisor shall preside over the ADR proceeding. The neutral advisor will take an active role throughout the ADR proceedings to promote a fair settlement.

8. There shall be no ex parte communication with the neutral advisor regarding these claims, except as may be initiated by the neutral advisor or requested by either party during the ADR.

9. [Describe what the parties agree will be submitted in terms of documents prior to the ADR and when the submissions will be made.]

Mediation Session

10. While the ADR proceeding itself is not binding, and therefore the neutral advisor does not have the authority to impose a settlement on the parties, the neutral advisor will actively attempt during the course of the ADR proceeding to assist the parties in an effort to reach a satisfactory resolution of their claims and disputes. During the ADR proceeding, the neutral advisor is authorized to conduct both joint and separate, *ex parte* meetings and caucuses with the parties, to make oral recommendations and suggestions for settlement, and to comment on possible strengths and weaknesses of the parties' positions or case. The neutral advisor may be present during negotiations between the parties.

11. The ADR session is to be held on [date] at [address] and shall commence at [time], and continue until [date]. [appellant's name] will make its presentation first and then [agency name] will respond with its position. Clarifying questions will be allowed by the parties and the neutral during presentations, provided they are not disruptive to the presentation. The parties will be allowed to caucus in separate break-out rooms as necessary. The neutral advisor will be allowed to visit each party and discuss the relevant issues. The parties and the neutral advisor will then meet jointly in the ADR room to discuss entitlement. This process will continue until the parties determine whether the issues can be resolved.

12. The presentations to the neutral advisor will be informal. The rules of evidence will not apply, and presenters may provide statements in the narrative.

13. Neither party may cross-examine witnesses although either party may informally ask clarifying questions. The neutral advisor may question participants.

14. The presentation for each party can be structured as desired.

15. The issues to be presented involve entitlement and quantum.

16. If a full settlement of this matter is not reached during the ADR proceeding, then the parties shall define what remains in dispute and proceed with a hearing or a hearing on the record at a later date.

17. All ADR proceedings are private. The neutral advisor, the parties and their witnesses, authorized representatives, and counsel shall be permitted to attend the ADR session. Other persons shall attend only with the permission of both parties.

18. No transcript or recording shall be made of any portion of the proceedings. All aspects of the ADR procedures including, without limitation, any statements, or oral presentations made between or among the parties and/or neutral advisor at the ADR proceedings, are inadmissible as evidence, whether or not for purposes of impeachment, in any pending or future court or Board action which directly or indirectly involves the parties and this matter

in dispute. However, if settlement is reached as a result of the ADR procedure, any and all information prepared for, and presented at the proceedings may be used to justify and document the subsequent settlement. Furthermore, evidence that is otherwise admissible or discoverable shall not be rendered inadmissible or non-discoverable as a result of its use at the ADR hearing.

19. Each party has the right to terminate this agreement at any time for any reason whatsoever.

20. The individuals attending and participating in the ADR are: [list names, and titles/position]

21. The individuals authorized to enter into a settlement at the ADR are: [list names, and titles/position]

[Signed and dated by individuals with authority to bind the parties. To help protect confidentiality, a judge may require all individuals attending the ADR proceeding to sign the agreement. It is not necessary for the judge to sign the agreement. The agreement should be provided to the judge before the start of the ADR proceeding.]

SAMPLE MEDIATION/ARBITRATION (MED/ARB) AGREEMENT

This Alternative Dispute Resolution (ADR) agreement is between ABC Company (ABC) and the Department of XYZ (XYZ) regarding the appeal docketed by the [ ] Board of Contract Appeals ([ ]BCA) as [ ]BCA [state number]. XYZ and ABC support ADR because it provides a means to resolve disputes without the necessity of a lengthy and costly proceeding before the Board. Therefore, the XYZ and ABC have agreed to submit [ ]BCA [state number] to an ADR proceeding.

TERMS OF THE AGREEMENT

1. For purposes of establishing a framework for the ADR proceeding, the parties agree to the representations, rules and procedures as set forth in this agreement.

2. XYZ and ABC voluntarily agree to engage in this ADR proceeding, and have indicated a willingness to engage in this ADR proceeding to resolve their differences.

3. Position papers for the ADR proceeding will be due to the Judge by no later than [date].

4. The ADR proceeding will be held on [dates], and begin at 9:00 a.m., local time in [location]. The ADR proceeding is anticipated to take one day but, may continue over a second day if necessary. The location and arrangements for the ADR proceeding will be provided by XYZ counsel.

5. The parties agree that Judge [name] will serve as the neutral for the ADR proceeding, and that the [ ]BCA will not charge either party for time or travel expenses.

6. Judge [name] shall preside over the ADR proceeding. He/she will take an active role throughout the ADR proceedings to promote a fair settlement. There shall be no ex parte communication with the Judge regarding this claim, except as may be initiated by the Judge or requested by either party during the ADR proceeding.

7. The ADR proceeding will begin with Judge [name] using facilitative and evaluative mediation procedures to assist the parties in finding a mutually agreeable resolution to dispute in CBCA [state number]. In the event the parties reach impasse and are unable to resolve this appeal using facilitative and evaluative mediation, the parties agree that a summary binding decision as described in CBCA Rule 54(c)(5) shall be issued by Judge [name].

8. A representative who has authority to settle the dispute for each party will attend.

9. Once the ADR proceeding has begun, a party may modify the procedures agreed upon in this agreement only by consent of the other party and the Judge.

10. During the ADR proceeding the Judge will assist the parties in an effort to reach a mutually agreeable resolution of the dispute. The Judge is authorized to conduct both joint and

separate *ex parte* meetings and caucuses with the parties, to make oral recommendations and suggestions for settlement and to comment on possible strengths and weaknesses of the parties' positions or case. The Judge may be present during negotiations between the parties.

11. During the ADR proceeding, the Judge will begin by using facilitative and then evaluative mediation techniques to assist the parties in reaching a mutually agreed upon solution. The parties request that, in the event the parties reach impasse and are unable to resolve this appeal using facilitative and evaluative mediation, a summary binding decision be issued by Judge [name]. Said decision shall be issued in writing promptly following the proceeding.

12. ABC will start the ADR proceeding by making its presentation and then XYZ will respond with its position. The presentation for each party can be structured as desired. The presentations to the Judge will be informal. The issues to be presented involve entitlement and quantum.

13. The rules of evidence will not apply, and presenters may provide statements in the narrative. Neither party may cross-examine witnesses although either party may informally ask clarifying questions. The Judge may question participants. Clarifying questions will be allowed during presentations, provided they are not disruptive to the presentation. The parties will be allowed to caucus in separate break out rooms as necessary. The Judge will be allowed to visit each party and discuss the relevant issues. The parties and the Judge will then meet jointly to further discuss the issues.

14. The facilitative and evaluative mediation process will continue until the dispute is resolved mutually by the parties or the Judge when the parties agree that an impasse has been reached and that the parties are unlikely to be able to reach a mutually satisfactory resolution of the dispute.

15. Once the parties reach impasse and are unable to resolve this appeal, Judge [name], in the interest of finality and cost containment, shall issue a summary binding decision pursuant to CBCA Rule 54(c)(5) in writing promptly after the conclusion of the mediation.

16. The summary binding decision will be brief, will contain no findings of fact or conclusions of law. It will be binding upon all parties, final, conclusive, not subject to reconsideration or appeal, and may not be set aside, except for fraud. The decision shall have no precedential value. Each party expressly waives:

    a. Any rights to file post-procedure briefs;

    b. Any rights to appeal or to obtain judicial review;

    c. Any right to have its case decided by a panel of Administrative Judges; and

    d. Any other rights inconsistent with the foregoing procedures.

17. These proceedings are private. Only the Judge, the parties and their witnesses, authorized representatives, and counsel shall be permitted to attend the ADR proceedings. Other persons may attend only with the permission of both parties.

18. No transcript or recording shall be made of any portion of the proceedings. All aspects of the ADR proceedings including, without limitation, any statements, or oral presentations made between or among the parties and/or Judge at the ADR proceedings are inadmissible as evidence, whether or not for purposes of impeachment, in any pending or future court or Board action which directly or indirectly involves the parties and this matter in dispute. However, if settlement is reached as a result of the evaluative and facilitative proceedings, any and all information prepared for, and presented at the proceedings may be used to justify and document the subsequent settlement. Furthermore, evidence that is otherwise admissible or discoverable shall not be rendered inadmissible or non-discoverable as a result of its use at the ADR hearing. The decision rendered by the Judge in this matter will be publicly posted.

19. The Judge will treat the subject matter of this ADR proceeding as confidential, and refrain from disclosing any of the information exchanged to third parties.

20. The individuals attending and participating in the ADR are: [list names, and titles/position]

21. The individuals authorized to enter into a settlement at the ADR are:[list names, and titles/position]

[Signed and dated by individuals with authority to bind the parties. To protect confidentiality, the judge may require all individuals attending the ADR proceeding to sign the agreement. It is not necessary for the judge to sign the agreement. The agreement should be provided to the judge before the start of the ADR proceeding.]

SAMPLE SETTLEMENT JUDGE AGREEMENT [UNDER ASBCA NOTICE REGARDING ALTERNATIVE DISPUTE RESOLUTION or CBCA RULE 54]

THIS AGREEMENT is entered into by and between [appellant] (appellant) and the Department of [ ] (respondent).

WHEREAS, appellant filed with the [ ] Board of Contract Appeals ([ ]BCA) an appeal under contract No. [ ] which was docketed as [ ]BCA [number]; and

WHEREAS, [ ]BCA involves claims by [appellant/respondent] for the amount of $ [ ]; and

WHEREAS, the parties wish to resolve the appeal by alternative dispute resolution (ADR), specifically with the assistance of a Settlement Judge, under the Contract Disputes Act; and

WHEREAS, the [ ]BCA is authorized to resolve disputes by ADR and the Contract Disputes Act; and

NOW THEREFORE, the parties mutually agree as follows:

1. Schedule. The ADR proceeding on the appeal is scheduled for [ ] days, namely: [dates and times], at [location].

2. Settlement Judge. The Judge's role will be to facilitate the parties' settlement efforts. The Judge may meet with the parties either jointly or individually and to the extent necessary to foster a negotiated settlement of the dispute. The Judge's recommendations are not binding on the parties. [Note: The Settlement Judge will normally not participate further in the appeal if the parties' efforts are unsuccessful, unless the parties seek the continued involvement of the Judge.]

3. Record. [The parties should agree on what documents will be included in the record for consideration by the Settlement Judge in assessing the merits of the parties' positions.]

4. Transcript. A transcript of the proceedings will not be prepared.

5. Agenda. The presentations of the parties will be informal and the rules of evidence are waived. The Settlement Judge may, nonetheless, guide the presentation of evidence. [The parties should spell out how they wish to make their informal presentations and agree on time to be allotted to various phases of the process. It is often helpful for each party to submit a brief position paper (5-10 pages) sufficiently in advance of the proceeding for the Judge to consider in connection with the record agreed to by the parties.]

6. Participants. Each party will include among its representatives a principal with authority to settle the appeal. The individuals who will be participating in the ADR proceeding include: [list of participants, including title/position].

7. Use of statements and documents. The admissibility of statements made or documents used in connection with the ADR proceeding will be governed by Federal Rule of Evidence 408.

8. Fees and expenses. Each party will bear its own fees and expenses, including but not limited to attorney and agent fees and compensation for witnesses, incurred incidental to the ADR proceeding.

9. Good faith. All participants in the ADR proceeding agree to act in good faith in all aspects of the proceeding with the view of resolving the dispute.

10. Other agreements regarding the settlement judge. Like judges, arbitrators, and mediators, the Settlement Judge shall have the same common law immunity from suit for damages or equitable relief and from compulsory process to testify or produce evidence based on or concerning any action, statement, or communication in or concerning the ADR proceeding. The parties understand that there is no attorney-client relationship between the Settlement Judge and any party to their Agreement, and each party acknowledges that it will seek and rely on legal advice solely from its own counsel and not from the Settlement Judge. The parties agree on behalf of themselves and their counsel, that they will not call or subpoena the Settlement Judge in any legal action or administrative proceeding of any kind to produce any notes or documents related to the ADR proceeding or to testify concerning any such notes or documents or his or her thoughts or impressions.

[Signed and dated by individuals with authority to bind the parties. The agreement should be provided to the judge before the start of the ADR proceeding.]

SAMPLE AGREEMENT TO USE A SUMMARY TRIAL WITH BINDING DECISION [UNDER ASBCA NOTICE REGARDING ALTERNATIVE DISPUTE RESOLUTION or CBCA RULE 54]

THIS AGREEMENT is entered into by and between [appellant] (appellant) and the Department of [ ] (respondent).

WHEREAS, appellant filed with the [ ] Board of Contract Appeals ([ ]BCA) an appeal under contract No. [ ] which was docketed as [ ]BCA [number]; and

WHEREAS, [ ]BCA involves claims by [appellant/respondent] for the amount of $ [ ]; and

WHEREAS, the parties wish to resolve the appeal by alternative dispute resolution (ADR), specifically with the assistance of a Settlement Judge, under the Contract Disputes Act; and

WHEREAS, the [ ]BCA is authorized to resolve disputes by ADR and the Contract Disputes Act; and

NOW THEREFORE, the parties mutually agree as follows:

1. Motion practice in this appeal is waived.

2. Discovery will be concluded by [date].

3. The documentary record will be limited to those documents which have been submitted, identified and indexed pursuant to Rule 4 or as exhibits by no later than [date].

   [NOTE: The parties may agree to have the appeal decided on the documentary record in accordance with Board rules. If so, such procedure may be provided in additional paragraphs and should include the concepts below modified as necessary. If the parties seek an oral hearing on the appeal, the following ADR paragraphs should be considered.]

4. Each party's hearing presentation will be limited to [ ] hours [day[s]], including time for examination of witnesses, presentation of rebuttal evidence and oral argument, if any.

5. The appeal shall be tried informally, and the rules of evidence are waived. The parties agree, nonetheless, that the presiding judge shall retain discretion to limit evidence where necessary for the reasonable conduct of the hearing.

6. Witnesses shall be examined orally [under oath or affirmation]. A party shall be allowed to cross-examine the adverse party's witnesses.

7. Pre- and post-hearing briefs are waived. [A very brief (3-5 page) prehearing submission is often useful to the presiding Judge.]

8. A transcript of the proceedings [will be prepared/is waived].

9. Each party will bear its own fees and expenses, including but not limited to attorney and agent fees and compensation for witnesses, incurred incidental to the ADR proceeding.

10. The hearing on this appeal is scheduled for [ ] days, to begin on [ ].

[Signed and dated by individuals authorized to bind the parties. The agreement should be provided to the judge before the start of the ADR proceeding.]

ADR WEBSITES

Additional information on ADR can be found at the following websites:

- The ASBCA's "Notice Regarding Alternative Methods of Dispute Resolution" can be found at http://www.asbca.mil/index.html.

- The CBCA Rules and Rule 54 Alternative Dispute Resolution can be found at www.cbca.gsa.gov.