

The Civilian Board of Contract Appeals Virtual Proceeding Protocol

Due to circumstances related to the COVID-19 pandemic, the Civilian Board of Contract Appeals (CBCA) is conducting most proceedings, including hearings, arbitrations, and mediations, virtually in order to resolve cases within a reasonable time period given the uncertainties regarding current and future social distancing constraints. A majority of these proceedings will be conducted using Zoomgov, the CBCA's preferred platform. By participating in these proceedings, the parties consent to resolution of the litigation through this process. All participants agree not to challenge the finality of any award, decision, or settlement on the basis that the proceeding was not held in person.

The parties must familiarize themselves and their witnesses with the technological platform that will be used to conduct the proceeding. All participants should be able to communicate clearly during the proceedings and the participants should readily be able to access and view any exhibits used in the proceeding.

At no point during witness testimony shall counsel, a representative, or the parties communicate with the testifying witness without the permission of the presiding judge. All witnesses and representatives (counsel or self-represented litigants) shall affirm that they will act in accordance with the panel's procedures. The witness affirmation shall include a statement that the witness is testifying under oath, based upon his or her own knowledge, and that the witness certifies that no one, other than authorized video conference participants, are present in the room. No one may seek to influence or guide the witness's testimony on the merits of the case during the testimony. However, if the witness experiences technical difficulty during his or her testimony, the proceeding will be stopped to allow counsel and the witness to resolve the issue.

1.0 Parties to the proceeding must prepare themselves and their witnesses for the technical challenges of a virtual proceeding.

In advance of the proceeding, parties and all testifying witnesses will need to participate in technical preparation sessions. The preparation sessions shall mirror the technical procedures that will be used in the pre-hearing conference as well as the actual hearing. Parties will practice presenting evidence and/or documents in these sessions.

- a) In the preparation session, counsel or the representative shall use all technical features that will be employed during the proceeding.
- b) This may include the testing of internal mechanisms counsel or the representative will use to communicate among themselves during the proceeding (e.g. an open conference line among counsel or representatives to

communicate during breaks, or the use of an additional device to communicate in writing during the proceeding).

- c) Counsel or the representative shall arrange for all relevant documents to be transmitted to the testifying witnesses in advance of the preparation sessions so that the witness may prepare to be examined with documents during the proceeding.
- d) Counsel or the party representative is responsible for ensuring that witnesses comply with the non-technical parameters listed in the “Attendance” section of the Protocol, such as how to use the camera most effectively, which is more fully discussed in the section on “Staging and Venue.”

1.1 In advance of the proceeding, the parties and the panel shall attend a pre-hearing conference.

- a) The presiding judge shall serve as the “host” or “co-host” of the proceeding.
- b) The host or co-host shall test the various technical features that the parties will employ, including the platform(s) to be used to view and mark exhibits, and to conduct break-out sessions.
- c) If parties intend to use transcription services or translation services, such service providers shall be present at the pre-hearing conference to ensure that they understand the Protocol and are able to connect virtually via the means agreed to by the parties.

2. The proceeding should be conducted according to the parameters set out below.

2.1 Calendaring

The presiding judge will coordinate with the parties to schedule the proceedings. To protect the security of the proceeding, electronic calendaring invites shall be limited to authorized attendees.

2.2 Time zones

The proceedings will be scheduled with every attempt to accommodate witnesses in different time zones.

2.3 Technical support

The parties should identify one person at each location with adequate technical knowledge to be present (virtually or otherwise) at the pre-hearing conference and available during the actual proceeding. This person shall be familiar with the technology, platforms, systems, and devices used at the venue they are supporting. To the extent more than one technical advisor participates in the proceedings, they shall

cooperate with each other, and report any issues promptly to the panel or presiding judge.

2.4 Platforms

- a) The presumptive platform for the proceedings shall be Zoomgov. In order to minimize disruption, a secondary platform shall be selected to be used if necessary. Details of this secondary platform shall be circulated in advance of the proceeding to ensure ease of access should a change become necessary. Additionally, the parties should select a separate means of internal communication via secure text message, video-conferencing platform, or telephonic dial-in. Virtual break out rooms are one such option available within many videoconferencing services. If the parties use virtual break out rooms, such features should be password-protected to prevent one party joining another's break out session.
- b) In the event that the presiding judge determines that Zoomgov is not the platform that will be used for the proceeding, the parties, with the consent of the presiding judge, shall agree to the platform(s) to be used. This platform must be secure and stable in order to protect the integrity of the proceedings. In selecting such platforms, parties should consider the level of encryption a platform offers, the types of security measures in place (e.g. whether the platform offers password protected meetings), and examine the potential cyber-risks presented by the platform. The chosen videoconferencing platform should be password-protected and all other security features of the platform should be utilized to ensure that the platform is secure.

2.5 Technology

Virtual communication platforms offer a variety of technologies for participation, including audio only and audio/video. It is the responsibility of the parties' representatives to familiarize themselves and their witnesses with the technology that will be used. The parties shall adhere, to the extent practicable, to the following recommendations:

2.5.1 Audio/Video

- a) A headset with an integrated microphone is preferred.
- b) If a speaker is used, it shall have sufficient volume to be audible for all participants.
- c) In order to minimize background noise, participants shall use a microphone or headset whenever possible and shall mute these devices when others are speaking.
- d) Mute all cell phones and disable other alert systems on personal laptops and devices.

2.5.2 Connection

- a) A wired network connection is preferred over wireless connections and the connection must be stable and reliable.
- b) Where a wired connection is unavailable, parties should not use public WiFi networks but should instead use a password-protected, secure wireless connection.

2.5.3 Troubleshooting

- a) In case one of the parties loses connectivity during the proceeding, it should be immediately reported to the rest of the attendees using a designated messaging system. This is especially relevant where there is only an audio connection.
- b) To the extent possible, an open chat window shall remain active during the proceedings. The chat window shall be used to allow all participants (including the court reporter) to raise non-time sensitive communications with all participants at the proceeding. There shall be no ex parte chat window communication with the panel. Similarly, there shall be no ex parte chat window communication between testifying witnesses and counsel or party representative offering their testimony. Each party should identify a member of their team to monitor the chat room and flag any relevant issues to their team.

2.6 Recording

- a) If the presiding judge determines that recording other than by a court reporter is appropriate, the presiding judge will inform the parties. Such a recording will not result in the creation of a certified record. If a recording is made, the participants will be notified by the presiding judge, host, or co-host that a recording is being made.
- b) With the exception of court reporters, the proceeding participants are not separately to record, tape, or otherwise capture the proceedings.

2.7 Court Reporters

If a court reporter is used in the proceedings, the reporter can either be physically co-located with the presiding judge or a panel member (but not a party) or the court reporter can attend the proceedings virtually. The host or co-host of the proceedings will control the court reporter's virtual access to the proceedings and the presiding judge will determine whether the court reporter attends the proceedings by connecting through audio only or audio and video. The court reporter's transcript will be the certified record of the proceedings. If the

proceedings are transcribed, there shall be a single court reporter for any given session of the proceedings.

2.8 Staging and venue

- a) The panel leaves to the parties' discretion the issue of whether they and/or their witnesses wish to appear together from a single venue. However, parties shall endeavor to have no more than two individuals in the camera frame at once.
- b) At all times the panel or presiding judge and at least any speaking participant(s) shall be visible.
- c) When presenting a witness, counsel or the party representative shall ensure that the camera captures the table in front of the witness and the top of the witness's head.

2.9 Additional practical considerations

Each party to the proceedings shall, on behalf of its team, including representatives, witnesses, and experts testifying on its behalf:

- a) shut down all background browsers and applications on the device used in aid of the proceeding;
- b) disable pop-up notifications on the device in use;
- c) ensure that their connection, devices, and technology are maintained on a secure network.

2.10 Attendance

- a) Participants to a proceeding shall be limited to those identified as attendees prior to the proceeding.
- b) If a party wishes to add an additional attendee not previously invited to a proceeding, the party shall alert the presiding judge prior to the start of the proceeding to request approval.
- c) Attendance will be taken of all participants for each day of the proceedings. Persons not previously identified will be removed from the proceedings.

3. Witness examination in the virtual proceeding shall be conducted to the extent possible in the manner prescribed below.

3.1 Appearance of the witnesses

- a) Witnesses need not be in attendance at the same venue as the parties. The venue shall be devoid of distractions and physical appearance shall be professional. Witnesses shall comport themselves as if they were in a physical courtroom.

- b) When providing witness testimony, representatives or counsel and the witness shall identify all individuals present in the room where the testifying witness is present, and shall confirm that the witness is not receiving communications of any sort during the testimony.
- c) The witness shall not use a “virtual background” without approval of the presiding judge.

3.2 Use of documents

- a) All exhibits and documents used in the course of a witness direct and/or cross-examination shall be made available to the witness.
- b) It may be necessary to designate a technology consultant to assist with the exhibits and to facilitate locating and presenting the documents to the witnesses during the witness testimony. All participants should be familiar with the functions of the document sharing platform prior to commencement of the proceedings.

3.3 Objections

- a) Parties and witnesses are to be mindful during examinations that the other party may object to questions.
- b) All parties and witnesses shall allow additional time for such objections to be made.
- c) Participants should make every effort not to speak at the same time. If any judges are speaking, participants should stop talking until the judge permits testimony to continue.
- d) A virtual breakout room will be designated for the purpose of conducting side-bar conversations, if necessary.

3.4 Interpreters

- a) In the event that interpretation services are needed for witness examinations, the representative shall arrange for any interpreters he or she needs in aid of his or her examinations.
- b) Opposing counsel or representative may retain his or her own separate interpreter to ensure the accuracy of the interpretation, but coordination will need to be made for the inclusion of such participants in the virtual proceeding.