

## PART 6100 [RESERVED]

### PART 6101—RULES OF PROCEDURE OF THE CIVILIAN BOARD OF CONTRACT APPEALS

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#### 6101.1 General information; definitions [Rule 1].

(a) *Scope*. The rules of this chapter govern cases filed with the Board on or after September 17, 2018, and all further proceedings in cases then pending, unless the Board decides that using the rules in this part in a case pending on their effective date would be inequitable or infeasible. The Board may alter these procedures on its own initiative or on request of a party to promote the just, informal, expeditious, and inexpensive resolution of a case.

##### (b) *Definitions*.

*Appeal; appellant*. “Appeal” means a contract dispute filed with the Board under the Contract Disputes Act (CDA), 41 U.S.C. 7101–7109, or under a disputes clause in a non-CDA contract that allows for Board review. An “appellant” is the contractor filing an appeal.

*Appeal file*. “Appeal file” means the submissions to the Board under Rule 4 (48 CFR 6101.4).

*Application; applicant*. “Application” means a submission to the Board under Rule 30 (48 CFR 6101.30) of a request for an award of fees and other expenses under the Equal Access to Justice Act (EAJA), 5 U.S.C. 504, or another provision authorizing such an award. An “applicant” is a party filing an application.

*Attorney*. “Attorney” means a person licensed to practice law in a State, commonwealth, or territory of the United States or in the District of Columbia.

*Board judge; judge*. “Board judge” or “judge” means a member of the Board.

*Business days and hours*. The Board’s business days are days other than Saturdays, Sundays, Federal holidays, days on which the Board is required to close before 4:30 p.m., or days on which the Board does not open for any reason, such as inclement weather. The Board’s business hours are 8 a.m. to 4:30 p.m. Eastern Time.

*Case*. “Case” means an appeal, petition, or application.

*Clerk of the Board*. The “Clerk” of the Board receives filings, docket cases,

and prepares official correspondence for the Board.

*Efile; efilings.* The Clerk accepts electronic filings (“efilings”), meaning documents submitted through the Board’s email system (“efiled”). Parties may efile documents by sending an email (usually with attachments) to [cbca.efile@cbca.gov](mailto:cbca.efile@cbca.gov), except for documents that are classified or submitted *in camera* or under protective order (Rule 9). Efilings occur upon receipt by the Board’s email server, except that attachments must be in .pdf format and 18 megabytes (MB) or smaller or they will be rejected.

*Electronically stored information.* “Electronically stored information” means information created, manipulated, communicated, stored, and best used in digital form with computer hardware and software.

*Equal Access to Justice Act (EAJA),* 5 U.S.C. 504. This statute governs applications for awards of fees and other expenses in certain cases.

*Facsimile (fax) transmissions.* The Board sends and accepts facsimile transmissions. A document is filed by fax at the time the Board receives all of it. The Board does not automatically extend filing deadlines if its fax machine is busy or otherwise unavailable.

*Filing.* A notice of appeal or application is filed upon the earlier of its receipt by the Clerk or, if mailed through the United States Postal Service (USPS), the date it is mailed to the Board. A USPS postmark is prima facie evidence of a mailing date. Any other document is filed upon receipt by the Clerk.

*Party.* “Party” means an appellant, applicant, petitioner, or respondent.

*Petition; petitioner.* “Petition” means a request that the Board direct a contracting officer to issue a written decision on a claim. A “petitioner” is a party submitting a petition.

*Receipt.* The Board deems a party’s “receipt” of a document to occur upon the earlier of the emailing of the document to the party’s email address of record (without notice of delivery failure) or the party’s possession of a document sent by other means.

*Respondent.* A “respondent” is the government agency whose decision, ac-

tion, or inaction is the subject of an appeal, petition, or application.

(c) *Construction.* The Board construes this part to promote the just, informal, expeditious, and inexpensive resolution of every case. The Board may apply principles of the Federal Rules of Civil Procedure (28 U.S.C. App.) to resolve issues not covered by this part.

(d) *Panels.* The Board assigns each case to a panel of three judges, one of whom presides. The presiding judge sets the case schedule, oversees discovery, and conducts conferences, hearings, and other proceedings. The presiding judge may without participation by other panel members decide any appeal under the small claims procedure of Rule 52, any nondispositive motion, or any petition, and may dismiss a case as permitted by Rule 12(c) (48 CFR 6101.12(c)). The Board decides all other matters by majority vote of a panel unless the full Board decides a matter under Rule 28 (48 CFR 6101.28). Only panel and full Board decisions are precedential.

(e) *Location and addresses.* The Board’s physical and mailing address is 1800 M Street NW, 6th Floor, Washington, DC 20036. The mailing address is 1800 F Street NW, Washington, DC 20405. The Clerk’s telephone number is (202) 606–8800. The Clerk’s fax number is (202) 606–0019. The Clerk’s email address for efilings is [cbca.efile@cbca.gov](mailto:cbca.efile@cbca.gov). The Board’s website is <http://www.cbca.gov>.

(f) *Clerk’s office hours.* The Clerk’s office is open to the public and for physical deliveries during business hours (Rule 1(b) (48 CFR 6101.1(b))). Efilings received after midnight are considered filed the next business day. The Clerk’s office is closed when the Board’s physical address is closed for any reason, including any closure of the Federal Government in the Washington, DC, metropolitan area.

[83 FR 41010, Aug. 17, 2018, as amended at 85 FR 5335, Jan. 30, 2020]

## **6101.2 Filing appeals, petitions, and applications; consolidation [Rule 2].**

(a) *Filing an appeal.* A notice of appeal shall be in writing; signed by the appellant, the appellant’s attorney, or an authorized representative (see Rule 5 (48 CFR 6101.5)); and filed with the Board, with a copy to the contracting

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officer who received or issued the claim, or the successor contracting officer. A notice of appeal should include:

(1) The name, telephone number, and mailing and email addresses of the appellant and/or its attorney or authorized representative;

(2) The contract number;

(3) The name of the contracting officer who received or issued the claim, with that person's telephone number, mailing address, and email address;

(4) A copy of the claim with any certification; and

(5) A copy of the contracting officer's decision on the claim or a statement that the appeal is from a failure to issue a decision ("a deemed denial").

(b) *Filing a petition.* A petition shall be in writing; signed by the petitioner, the petitioner's attorney, or an authorized representative (see Rule 5 (48 CFR 6101.5)); and filed with the Board, with a copy to the contracting officer who received the claim, or the successor contracting officer. A petition shall ask the Board to order the contracting officer to issue a decision and should include:

(1) The name, telephone number, and mailing and email addresses of the petitioner and/or its attorney or authorized representative;

(2) The contract number;

(3) The name of the contracting officer who received the claim, with that person's telephone number, mailing address, and email address; and

(4) A copy of the claim with any certification.

(c) *Filing an EAJA application.* See Rule 30 (48 CFR 6101.30).

(d) *Time limits.* (1) Under the CDA, a notice of appeal must be filed within 90 calendar days after the date of receipt of a contracting officer's decision on a claim.

(2) Alternatively, under the CDA, a contractor may appeal when a contracting officer has not issued a decision on a claim within the time allowed by the CDA or the time set by a tribunal acting on a petition.

(3) Under the CDA, a petition may be filed in the period between—

(i) Receipt of notice from a contracting officer, within 60 days after the submission of a claim, that the contracting officer intends to issue a

decision on the claim more than 60 days after its submission, and

(ii) The due date stated by the contracting officer.

(4) Under EAJA, an application must be filed within 30 days after the date that the decision in the underlying appeal becomes no longer subject to appeal.

(e) *Notice of docketing.* Upon receipt of a notice of appeal, a petition, or an application, the Clerk issues a written notice of docketing to all parties.

(f) *Consolidation.* The Board may consolidate cases wholly or in part if they involve common questions of law or fact.

### 6101.3 Computing and extending time [Rule 3].

(a) *Computing time.* Consistent with Rule 6 of the Federal Rules of Civil Procedure: In computing any time period, omit the day of the event from which the period begins to run. Omit nonbusiness days only if the period is less than 11 days; otherwise include them. A period ends on a business day. If a computed period would otherwise end on a nonbusiness day, it ends on the next business day.

(b) *Extensions.* Parties should act sooner than required whenever practicable. However, the Board extends time when appropriate. A motion for an extension shall be in writing and shall state the other party's position on the motion or describe the movant's effort to learn the other party's position. The Board cannot extend statutory deadlines.

### 6101.4 Appeal file [Rule 4].

(a) *Filing.* Within 30 days after receiving the Board's docketing notice, the respondent shall file and serve all documents relevant to the appeal, including:

(1) The contracting officer's decision on the claim;

(2) The contract, including all pertinent specifications, amendments, plans, drawings, and incorporated proposals or parts thereof;

(3) All correspondence between the parties relevant to the appeal;

(4) The claim with any certification;

(5) Relevant affidavits, witness statements, or transcripts of testimony taken before the appeal;

(6) All documents relied on by the contracting officer to decide the claim; and

(7) Relevant internal memoranda, reports, and notes.

(b) *Organization of electronic appeal file.* (1) Unless otherwise ordered, parties shall file the appeal file and supplements thereto in an electronic storage medium (*e.g.*, hard disk or solid state drive, compact disc (CD), or digital versatile disc (DVD)), labeled with the docket number, case name, and range of exhibit numbers.

(2) A party may efile an appeal file or a supplement thereto by permission of the Board.

(3) Appeal file exhibits shall be in .pdf format or will be rejected. The appeal file index and each exhibit shall be separate documents, without embedded documents.

(4) Appeal file exhibits shall be complete, legible, arranged in chronological order, numbered, and indexed. Parties shall avoid filing duplicative exhibits and shall number exhibits continuously and consecutively from one filing to the next, so that a complete appeal file consists of one set of consecutively numbered exhibits.

(5) Parties shall number the pages of each exhibit consecutively, unless an exhibit is already paginated in another logical manner.

(6) The appeal file index shall describe each exhibit by date and content.

(7) Parties may file documents *in camera* only by permission of the Board.

(c) *Organization of paper appeal file.*

(1) Appeal files and supplements thereto may be filed on paper only by permission of the Board.

(2) Appeal file exhibits shall be complete, legible, arranged in chronological order, tabbed, and indexed. Parties shall avoid filing duplicative exhibits and shall number exhibits continuously and consecutively from one filing to the next, so a complete appeal file consists of one set of consecutively tabbed exhibits.

(3) Parties shall number the pages of each paper exhibit consecutively, un-

less an exhibit is already paginated in another logical manner.

(4) Parties shall file exhibits in 3-ring binders with spines no wider than 3 inches, labeled on the cover and spine with the name of the appeal, CBCA number, and tab numbers in each binder. Include in each binder the index of the entire filing.

(5) The appeal file index shall describe each exhibit by date and content.

(6) Parties shall separately file and index documents submitted *in camera* or under a protective order. However, documents may be submitted *in camera* only by permission of the Board.

(d) *Supplements.* Within 30 days after the respondent files the appeal file, the appellant may file non-duplicative documents relevant to the claim, organized as instructed in Rule 4(b) or (c) (paragraph (b) or (c) of this section), starting with the next available exhibit number.

(e) *Classified or protected material.* Neither classified nor protected material may be efiled.

(f) *Submission by order.* The Board may order a party to supplement the appeal file, including by filing an exhibit in another format.

(g) *Status of exhibits.* The Board considers appeal file exhibits part of the record for decision under Rule 9(a) unless a party objects to an exhibit within the time set by the Board and the Board sustains the objection.

(h) *Other procedures.* The Board may postpone or waive the filing of an appeal file.

#### **6101.5 Appearing; notice of appearance [Rule 5].**

(a) *Appearing before the Board—*(1) *Appellant; petitioner; applicant.* An appellant, petitioner, or applicant may appear before the Board through an attorney. An individual appellant, petitioner, or applicant may appear for himself or herself. A corporation, trust, or association may appear by one of its officers. A limited liability corporation, partnership, or joint venture may appear by one of its members. Each individual appearing on behalf of an appellant, petitioner, or applicant must have legal authority to appear.

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(2) *Respondent*. A respondent may appear before the Board through an attorney or, if allowed by the agency, by the contracting officer or the contracting officer's authorized representative.

(3) *Others*. The Board may permit a special or limited appearance of or for a nonparty, such as an *amicus curiae*.

(b) *Notice of appearance*. The Board deems the person who signed a notice of appeal, petition, or application to have appeared for the appellant, petitioner, or applicant. The Board deems the head of the respondent's litigation office to have appeared for the respondent unless otherwise notified. Other participating attorneys shall file notices of appearance including all of the information required by the sample notice of appearance posted on the Board's website. Attorneys representing parties before the Board shall list their bar numbers or other identifying data for each State bar to which they are admitted.

(c) *Withdrawal of appearance*. Anyone who has filed a notice of appearance and wishes to withdraw from a case must file a motion identifying by name, telephone number, mailing address, and email address the person who will assume responsibility for representing the party in question. The motion must state grounds for withdrawal, unless the motion represents that the party in question will meet the existing case schedule.

### 6101.6 Pleadings; amending pleadings [Rule 6].

(a) *Complaint*. Within 30 days after receiving the notice of docketing, the appellant shall file a complaint stating in simple, concise, and direct terms the factual basis for each claim and the amount in controversy. Alternatively, the appellant or the Board may designate as a complaint the notice of appeal, a claim submission, or any other document containing the information required in a complaint. The Board may in its discretion order a respondent asserting a claim to file a complaint.

(b) *Answer*. Within 30 days after receiving the complaint or a designation of a complaint, the respondent (or the appellant, if so ordered) shall file an

answer stating in simple, concise, and direct terms its responses to the allegations of the complaint and any affirmative defenses it chooses to assert.

(c) *Amendments*. A party may amend a pleading once, before a responsive pleading is filed, with permission of the other party. Amending a pleading restarts the time to respond, if any. The Board may allow a party to amend a pleading in other circumstances.

(d) *Motion in lieu of answer*. The Board may allow a party to file a dispositive motion or to move for a more definite statement in lieu of filing an answer.

### 6101.7 Service of documents [Rule 7].

A party filing any document not submitted *in camera* (see Rule 9(c)(2) (48 CFR 6101.9(c)(2))) shall send a copy to the other party by a method at least as fast as the filing method. The filing party shall indicate the method and address of service, otherwise the Board may consider a document not served and not properly filed.

### 6101.8 Motions [Rule 8].

(a) *Generally*. A party may make a motion for a Board action orally on the record in the presence of the other party or in a written filing. A written motion shall be a document titled as a motion and shall state the relief sought and the legal basis (see Rule 23(b) (48 CFR 6101.23(b))). Except for joint or dispositive motions, all motions shall represent that the movant tried to resolve the motion with the other party before filing. The Board may hold oral argument on a motion.

(b) *Jurisdictional motions*. A party challenging the Board's jurisdiction should file such a motion promptly.

(c) *Procedural motions*. A party may move for an extension of time (Rule 3(b) (48 CFR 6101.3(b))). The Board may in its discretion consider motions on other procedural matters. A procedural motion shall state the other party's position on the motion or describe the movant's effort to learn the other party's position.

(d) *Discovery motions*. See Rule 13(e) (48 CFR 6101.13(e)).

(e) *Motions to dismiss for failure to state a claim*. A party may move to dismiss all or part of a claim for failure to

state grounds on which the Board could grant relief. In deciding such motions, the Board looks to Rule 12(b)(6) of the Federal Rules of Civil Procedure for guidance.

(f) *Summary judgment motions.* A party may move for summary judgment on all or part of a claim or defense if the party believes in good faith it is entitled to judgment as a matter of law based on undisputed material facts. In deciding motions for summary judgment, the Board looks to Rule 56 of the Federal Rules of Civil Procedure for guidance.

(1) *Statement of undisputed material facts.* The movant shall file with its summary judgment motion a separate document titled, “Statement of Undisputed Material Facts.” This document shall set forth facts supporting the motion in separate, numbered paragraphs, citing appeal file exhibits, admissions in pleadings, and/or evidence filed with the motion.

(2) *Statement of genuine issues.* The opposing party shall file with its opposition a separate document titled, “Statement of Genuine Issues.” This document shall respond to specific paragraphs of the movant’s Statement of Undisputed Material Facts by identifying material facts in genuine dispute, citing appeal file exhibits, admissions in pleadings, and/or evidence filed with the opposition.

(g) *Briefing.* A party may file a brief in opposition to a motion under Rule 26, Rule 27, Rule 28, or Rule 29 (48 CFR 6101.26, 6101.27, 6101.28, or 6101.29) only by permission of the Board. Unless otherwise ordered, a brief in opposition to any other nonprocedural motion is due 30 days after receipt of the motion, and a movant’s reply brief is due 15 days after receipt of an opposition brief. A nonmovant may file a surreply only by permission of the Board. Unless otherwise ordered, a brief in opposition to a procedural motion is due 5 days after receipt of the motion, and there shall be no reply.

(h) *Effect of pending motion.* Unless otherwise stated in this part, the filing of a motion does not affect a party’s obligations under the Board’s rules or orders.

#### **6101.9 Record; content and access[Rule 9].**

(a) *Record for decision.* The record on which the Board will decide a case includes the following:

(1) *Evidence.* Evidence in a case includes:

(i) Rule 4 (48 CFR 6101.4) appeal file exhibits other than those to which an objection is sustained;

(ii) Other documents or parts thereof admitted as evidence;

(iii) Tangible things admitted as evidence;

(iv) Transcripts or recordings of testimony before the Board; and

(v) Factual stipulations and factual admissions.

(2) *Other material.* The Board may also rely on to decide a case:

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

(ii) The complaint, answer, and amendments thereto;

(iii) Motions and briefs on motions;

(iv) Other briefs;

(v) Demonstrative hearing exhibits; and

(vi) Anything else the Board may expressly admit or take notice of.

(b) *Other contents of case file.* The Board’s administrative record may be broader than the record for decision. Material in the Board’s case file that is not listed in Rule 9(a) (48 CFR 6101.9(a)) is part of the administrative record but is not part of the record for decision.

(c) *Enlarging or reopening the record.* The Board may enlarge or reopen the record for decision on terms fair to the parties.

(d) *Protected and in camera submissions.* The Board may limit access to specified material in a record for decision.

(1) *Protective orders.* The Board may limit access to specified material in a record for decision if the Board finds good cause to treat the material as privileged, confidential, or otherwise sensitive.

(2) *In camera submissions.* The Board may allow a party to submit a document solely for the Board’s review *in camera* if:

(i) The party submits the document to explain a discovery dispute;

(ii) The Board denies a motion for protective order, and the movant asks

that the record include a document that the party would have used in the case with a protective order, for possible later review of the Board's denial; or

(iii) Good cause exists to find that *in camera* review may limit or prevent needless harm to a party, witness, or other person.

(3) *Status in record.* A document submitted and accepted under a protective order or *in camera* is part of the record for decision. If the Board's decision is judicially reviewed, the Board will endeavor to preserve the protected or *in camera* nature of the document to the extent consistent with judicial review.

(e) *Review and copying.* The Clerk makes records for decision, except evidence submitted under a protective order or *in camera*, available for review on reasonable notice during business hours, and provides copies of such available documents for a reasonable fee. The Clerk will not relinquish possession of material in the Board's files.

#### **6101.10 Admissibility of evidence [Rule 10].**

The Board may in its discretion receive any evidence to which no party objects. In ruling on evidentiary objections, the Board is guided but not bound by the Federal Rules of Evidence, except that the Board generally admits hearsay unless the Board finds it unreliable.

#### **6101.11 Conferences [Rule 11].**

The Board may order a conference of the parties for any purpose. Conferences are usually telephonic and are rarely recorded or transcribed. No one may record a conference by any means without Board approval. If the Board issues a memorandum or order memorializing a conference, a party has 5 days from receipt of the memorandum or order to object in writing to the memorialization.

#### **6101.12 Stays and dismissals [Rule 12].**

(a) *Stays.* The Board may stay a case for a specific duration, or until a specific event, for good cause.

(b) *Dismissals*—(1) *Generally.* The Board may dismiss a case or part of a case either on motion of a party or after permitting a response to an order

to show cause. Dismissal is with prejudice unless a Board order or other applicable law provides otherwise.

(2) *Voluntary dismissal.* Subject to Rule 12(b)(3) (paragraph (b)(3) of this section), the Board will dismiss all or part of a case on the terms requested if the appellant, petitioner, or applicant moves for dismissal with prejudice or moves jointly with the respondent for dismissal with or without prejudice.

(3) *For lack of jurisdiction.* If the Board finds that it lacks jurisdiction to decide all or part of a case, the Board will dismiss the case or the part of the case, regardless of the parties' positions on jurisdiction or dismissal.

(4) *For failure to prosecute.* The Board may dismiss all or part of a case for failure to prosecute.

(c) *Dismissal orders and decisions.* The presiding judge acting alone may stay a case or grant voluntary dismissal with or without prejudice. A panel or the full Board may dismiss a case on other grounds.

(d) *Admonition.* Dismissal of a party's case without prejudice does not necessarily mean that the party may later refile the case at the Board or in another forum under the jurisdictional and procedural laws applicable to the case.

#### **6101.13 Discovery generally [Rule 13].**

(a) *Methods.* Parties may obtain discovery by depositions, interrogatories, requests for production, and requests for admission.

(b) *Scope.* Unless otherwise ordered, the scope of discovery is the same as under Rule 26(b)(1) of the Federal Rules of Civil Procedure.

(c) *Limits.* The Board may limit the frequency or extent of discovery for a reason stated in Rule 26(b)(2) of the Federal Rules of Civil Procedure.

(d) *Timing.* The Board encourages parties to agree on a discovery plan that the Board may adopt in a scheduling order. The Board may modify an agreed discovery plan.

(e) *Disputes*—(1) *Objections.* A party objecting to a written discovery request must make the objection in writing no later than the date that its response to the discovery request is due.

(2) *Duty to cooperate.* Parties shall try in good faith to resolve objections to

discovery requests without involving the Board. The Board may impose an appropriate sanction under Rule 35 (48 CFR 6101.35) on a party that does not meet its discovery obligations.

(3) *Motions to compel.* A party may move to compel a response or a supplemental response to a discovery request. The movant shall attach to its motion a copy of each discovery request and response at issue, and shall represent in the motion that the movant complied with Rule 13(e)(2) (paragraph (e)(2) of this section).

(f) *Subpoenas.* A party may request a subpoena under Rule 16 (48 CFR 6101.16).

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

(a) *Generally.* Interrogatories, requests for production, requests for admission, and responses thereto shall be in writing and served on the other party.

(b) *Interrogatories.* Interrogatories shall be answered or objected to separately in writing, under signed oath, within 30 days of service. A party may answer an interrogatory by specifying records from which the answer may be derived or ascertained when that response would be allowed under Rule 33(d) of the Federal Rules of Civil Procedure.

(c) *Requests for production.* Responses and objections to requests for production, inspection, and/or copying of documents, electronically stored information, or tangible things are due within 30 days of service of the requests and shall state when and how the responding party will make responsive material available.

(d) *Requests for admission—(1) Content.* A party may serve requests for admission that would be proper under Rule 36(a)(1) of the Federal Rules of Civil Procedure.

(2) *Responses and failure to respond.* Responses and objections shall comply with Rule 36(a)(4) and (5) of the Federal Rules of Civil Procedure. If the served party does not respond within 30 days of service of a request, the Board may on motion deem a matter admitted and conclusively established solely for the pending case.

(3) *Relief from admission.* The Board may allow a party to withdraw or amend an admission for good cause.

(e) *Altering time to respond.* The parties may agree to alter deadlines to respond to discovery requests. The Board may alter the deadlines to meet the needs of a case.

(f) *Supplementing and correcting responses.* A party must supplement or correct a response to a discovery request if and when this action would be required by Rule 26(e)(1) of the Federal Rules of Civil Procedure.

**6101.15 Depositions [Rule 15].**

(a) *Generally.* Unless otherwise ordered, parties may take depositions after service of the answer. If the parties agree in writing on the deponent, time, place, recording method, and maximum duration of a deposition, no formal deposition notice is needed. The Board may order a deposition on motion under Rule 8 (48 CFR 6101.8) or by subpoena under Rule 16 (48 CFR 6101.16).

(b) *Use.* Parties may use deposition testimony in a case to the extent that would be permitted by Rule 32(a) of the Federal Rules of Civil Procedure.

(c) *To perpetuate testimony.* If the Board has decided a case, and either the time to appeal has not expired or an appeal has been taken, the Board may for good cause grant leave to take a deposition as if the case were still before the Board in order to preserve testimony for possible further proceedings before the Board.

**6101.16 Subpoenas [Rule 16].**

(a) *Expectation of cooperation in lieu of subpoena.* Subpoenas should rarely be necessary, as the Board expects parties to respond cooperatively to discovery requests and to try in good faith to secure the cooperation of third parties who have or may have evidence responsive to discovery requests.

(b) *Generally.* The Board may issue a subpoena for a purpose for which a United States district court may issue a subpoena under Rule 45(a)(1) of the Federal Rules of Civil Procedure. Parties and the Board shall take all reasonable steps to avoid imposing undue burden on a person subject to a subpoena.



(c) *How requested; form.* A party may ask the Board to issue a subpoena by motion under Rule 8 (48 CFR 6101.8), substantially before the proposed compliance date. The movant shall attach to its motion a completed subpoena form for signing by a Board judge, and shall explain in the motion why the proposed subpoena scope is reasonable and how the evidence sought is relevant to the case.

(d) *Production cost.* The Board's policy is to require a requesting party to advance a subpoenaed person the reasonable cost of producing subpoenaed material.

(e) *Service.* The requesting party shall serve a subpoena and provide proof of service as would be required by Rule 45(b) of the Federal Rules of Civil Procedure.

(f) *Motion to quash or modify.* On or before the date specified for compliance, a subpoenaed person may file a motion to quash or modify the subpoena for a reason stated in Rule 45(d)(3) of the Federal Rules of Civil Procedure. The Board may rule on the motion any time after the party that served the subpoena receives the motion.

(g) *Enforcement.* As necessary, the Board may ask the Attorney General of the United States to petition a United States district court to enforce a Board subpoena.

(h) *Letter rogatory in lieu of subpoena.* If a person to be subpoenaed resides in a foreign country, the Board may facilitate the issuance of a letter rogatory to the person by the United States Department of State under 28 U.S.C. 1781–1784.

#### **6101.17 Exhibits [Rule 17].**

(a) *Marking exhibits.* Unless otherwise ordered, parties shall, to the fullest extent practicable, submit exhibits for inclusion in the appeal file before a hearing starts under Rule 20 (48 CFR 6101.20) or before the first brief is filed when a case is submitted on the written record under Rule 19 (48 CFR 6101.19). Parties shall mark any exhibits offered in evidence thereafter as sequential additions to the appeal file. Such exhibits shall become part of the appeal file if admitted as evidence.

(b) *Copies.* The Board expects all document exhibits to be true, complete, and legible copies rather than originals. The Board may order a party to substitute a better copy or to make an original document available for inspection.

(c) *Withdrawal.* The Board may allow a party to withdraw an exhibit from the appeal file and the record for decision on terms fair to the other party.

(d) *Disposition.* Unless the Board advises the parties of another deadline, the Board may discard physical (non-electronic) exhibits in its possession 90 days after the time to appeal the Board's decision in the case expires.

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

(a) *Generally.* The Board will hold a hearing in a case if the Board must find facts and either party elects a hearing. A party may elect to submit its case for decision on the written record under Rule 19 (48 CFR 6101.19). The presiding judge will set the deadline for an election under this rule.

(b) *Hybrid election.* A party may elect to submit its case on the written record under Rule 19 (48 CFR 6101.19) and also elect to appear at a hearing, solely to cross-examine the other party's witnesses and to object to evidence offered at the hearing.

#### **6101.19 Record submission without a hearing [Rule 19].**

(a) *Generally.* If a party elects to submit its case on the record without a hearing, the Board will set a schedule for the parties to complete the evidentiary record and file briefs.

(b) *Evidence and objections.* When a party elects submission on the record without a hearing, that party may submit material for inclusion in the record no later than the date the party files its initial brief. Unless otherwise ordered, the other party may object to the admission of such material as evidence within 5 days after receiving the submission. If one party elects a hearing and the other party elects record submission (or makes a hybrid election under Rule 18(b) (48 CFR 6101.18(b)), the evidentiary record shall close at the end of the hearing. The Board may rule

on objections either before or in its decision.

(c) *Briefs and argument.* The Board may receive briefs and/or oral argument on a record submission. If one party elects a hearing and the other party elects record submission, the first brief of the party submitting its case on the record shall be due no later than the start of the hearing.

#### **6101.20 Scheduling hearings [Rule 20].**

(a) *Generally.* The Board will set the time, place, duration, and subject matter of a hearing in a written order after consulting with the parties.

(b) *Subject matter.* The Board may schedule for hearing all or some of the claims or issues in a case, or all or some of the claims, issues, or questions of fact or law common to more than one case.

(c) *Unexcused absence.* If a party fails without good excuse to appear at a hearing of which it received notice under this rule, the Board will deem that party to have elected to submit its case on the record under Rule 19.

#### **6101.21 Hearing procedures [Rule 21].**

(a) *Generally.* The Board generally holds hearings in public hearing rooms. Except as necessary under a protective order or *in camera* procedures, hearings are open to the public. The Board entrusts the conduct of hearings to the discretion of the presiding judge.

(b) *Witnesses, evidence, other exhibits.* A party that intends to offer testimony, other evidence, or other material for the record at a hearing shall arrange for the witness, evidence, or other material to be present in the hearing room. The Board may in its discretion allow testimony by telephone or video.

(c) *Exclusion of witnesses.* The Board may exclude witnesses from a hearing, other than one designated representative for each party or a person authorized by statute to be present, so that witnesses are not influenced by the testimony of other witnesses.

(d) *Sworn testimony.* Hearing witnesses shall testify under oath or affirmation. If a person called as a witness refuses to so swear or affirm, the Board may receive the person's testimony under penalty of making a materially

false statement in a Federal proceeding under 18 U.S.C. 1001. Alternatively, the Board may disallow the testimony and may draw inferences from the person's refusal to swear or affirm.

#### **6101.22 Transcripts [Rule 22].**

The Board arranges transcription of hearings, other than hearings under the small claims procedure of Rule 52 (48 CFR 6101.52). The Board may, but generally does not, arrange transcription of conferences or other proceedings. No one may record or transcribe a Board proceeding without the Board's permission. The Board may order or acknowledge corrections to an official transcript. Each party is responsible for obtaining its own copy of a transcript.

#### **6101.23 Briefs [Rule 23].**

(a) *Generally.* The Board may order or invite briefs on any issue in a case at any time. Briefs shall be formatted for 8.5 by 11-inch paper, double spaced, with body and footnote text no smaller than 13 point.

(b) *Prehearing, post-hearing, and other briefs.* Prehearing and post-hearing briefs, briefs filed under Rule 19, and briefs on non-procedural motions shall cite record evidence for factual statements and legal authority for legal arguments.

#### **6101.24 Closing the record [Rule 24].**

(a) *Closing the evidentiary record.* Unless otherwise ordered, the evidence as defined in Rule 9(a)(1) (48 CFR 6101.9(a)(1)) is closed at the end of a hearing under Rule 20 or at the start of merits briefing when a case is submitted on the record under Rule 19 (48 CFR 6101.19).

(b) *Closing the record for decision.* Unless otherwise ordered, the record for decision as defined in Rule 9(a) (48 CFR 6101.9(a)) is closed when the Board receives the final scheduled brief on the matters to be decided.

#### **6101.25 Decisions and settlements [Rule 25].**

(a) *Decisions.* The Board issues decisions in writing, except as allowed by Rule 52 (48 CFR 6101.52). The Board will send a copy of a decision to each party, requesting confirmation of receipt (see

Rule 1 (48 CFR 6101.1)), and will post the decision on its website. If a decision reserves any part of a case for later proceedings, it is conclusive as to the matters it resolves, except as provided in Rules 26 and 28 (48 CFR 6101.26 and 6101.28).

(b) *Settlements.* Parties may settle a case by stipulating to an award. The Board may issue a decision making the stipulated award if:

(1) The Board is satisfied that it has jurisdiction; and

(2) The stipulation states that no party will seek reconsideration of, seek relief from, or appeal the Board's decision.

#### **6101.26 Reconsideration [Rule 26].**

(a) *Grounds.* The Board may on motion reconsider a decision or order for a reason recognized in Rule 59 of the Federal Rules of Civil Procedure. Arguments and evidence previously presented are not grounds for reconsideration.

(b) *Time limit for motion.* A party may move for reconsideration of a decision or order on an appeal or petition within 30 days after that party receives the decision or order. A party may move for reconsideration of a decision or order on an application within 7 days after receiving the decision or order. The Board does not extend these time limits.

(c) *Effect of motion.* A pending reconsideration motion does not affect any obligation to comply with a decision or order.

#### **6101.27 Relief from decision or order [Rule 27].**

(a) *Grounds.* The Board may grant relief, for a reason recognized in Rule 60 of the Federal Rules of Civil Procedure, from a decision or order that, alone or in conjunction with prior decisions or orders, resolves all of an appeal, petition, or application.

(b) *Time limit for motion.* A party may move for relief under this rule within 120 days after that party receives the decision or order at issue.

(c) *Effect of motion.* A pending motion for relief under this rule does not affect any obligation to comply with a decision or order.

#### **6101.28 Full Board consideration [Rule 28].**

(a) *By motion.* The full Board may consider a decision or order when necessary to maintain uniformity of Board decisions or if the matter is exceptionally important. Motions for full Board consideration are disfavored and are decided by a majority of the Board. A party may move for full Board consideration within 10 days after that party receives the decision or order at issue. An order granting full Board consideration will include concurring or dissenting opinions, if any.

(b) *By Board initiative.* A majority of the Board may initiate full Board consideration of any matter in a case, up to 10 days after a judge or panel issues a decision or order on that matter. The full Board will inform the parties by order of the matter or matters to be considered. The order will include concurring or dissenting opinions, if any.

(c) *Full Board decision.* The full Board decides matters by majority vote. A full Board decision will include concurring or dissenting opinions, if any.

(d) *Effect of motion.* A pending motion for full Board consideration does not affect any obligation to comply with a decision or order.

#### **6101.29 Clerical mistakes; harmless error [Rule 29].**

(a) *Clerical mistakes.* The Board may correct clerical mistakes while a case is pending, or within 60 days thereafter if a decision has not been appealed. If a Board decision is appealed, the Board may correct clerical mistakes only by leave of the appellate Court.

(b) *Harmless error.* The Board disregards errors that do not affect a substantive right of a party. No error in a ruling, order, or decision of the Board will be grounds for a new hearing or for vacating, reconsidering, modifying, or otherwise disturbing a decision or order unless refusing to correct the error will prejudice a party or work a substantial injustice.

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

(a) *Application for fees and other expenses.* A party in an appeal may apply for an award of fees and other expenses as permitted under EAJA or any other

### 6101.31

provision that may entitle the party to such an award.

(b) *Time for filing.* A party may file an application for fees and other expenses only after the time to seek appellate review of a Board decision has expired. A party may file an application within 30 calendar days after that date.

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

(1) Specify the applicant, appeal, and amount sought;

(2) Explain why the applicant is legally eligible for an award;

(3) Provide a schedule of fees and expenses with supporting documentation;

(4) Be signed by the applicant or a person appearing for the applicant, with a declaration under penalty of perjury that the information in the application is correct;

(5) Provide evidence of the applicant's small business status or net worth; and

(6) Justify any request for attorney fees exceeding the statutory rate.

(d) *Proceedings.* (1) Within 30 days after receiving an application, the respondent may file an answer with any objections to the award requested, supported by facts and legal analysis.

(2) The Board may order further proceedings if necessary for a full and fair resolution of issues arising from an application.

(e) *Decision.* The Board will issue a written decision on an application.

### 6101.31 Payment of award [Rule 31].

When permitted by law, Board awards under contracts may be paid from the permanent indefinite judgment fund under 31 U.S.C. 1304 and 31 CFR part 256. An EAJA award is paid from funds of the respondent.

### 6101.32 Appeal from Board decision [Rule 32].

(a) *Notice.* A party filing a notice of appeal with the United States Court of Appeals for the Federal Circuit (or with a district court in an admiralty case) shall provide a copy of the notice to the Board.

(b) *Record on review.* The record on appellate review is the record for decision under Rule 9(a) (48 CFR 6101.9(a))

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and any other material in a case file that the appellate Court may require.

(c) *Certified list.* The Clerk will provide the clerk of the appellate Court a certified list as required by the Court's rules.

(d) *Inspection or copying of record.* The Clerk will make a record on appeal available for inspection and copying in accordance with the rules of the appellate Court.

### 6101.33 Remand from appellate Court [Rule 33].

If a Court remands a case to the Board for further proceedings, each party shall, within 30 days of receipt of the appellate mandate, recommend procedures to comply with the remand order. The Board will then issue an order on further proceedings.

### 6101.34 Ex parte communications [Rule 34].

No member of the Board or of the Board's staff will communicate with a party about any material issue in a case outside of the presence of the other party, and no one shall attempt such communications on behalf of a party. This rule does not bar such communications about the Board's administrative functions or procedures.

### 6101.35 Standards of conduct; sanctions [Rule 35].

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

(b) *Sanctions.* If a party or its representative, attorney, expert, or consultant fails to comply with any direction or order of the Board (including an order to provide or permit discovery) or engages in misconduct affecting the Board, its process, or its proceedings, the Board may make such orders as are

just, including the imposition of appropriate sanctions. Sanctions may include, but are not limited to:

(1) Taking the facts pertaining to the matter in dispute to be established for the purpose of the case in accordance with the contention of the party who is not at fault;

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

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

(4) Prohibiting the party from introducing into evidence designated claims or defenses;

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

(6) Dismissing the case or any part thereof;

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

(8) Drawing evidentiary inferences adverse to the party; or

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

(c) *Denial of access to protected material.* The Board may in its discretion deny access to protected material to any person found to have previously violated a protective order, regardless of who issued the order.

(d) *Disciplinary proceedings*—(1) *Sanctions.* The Board may discipline individual party representatives, attorneys, experts, or consultants for violating any Board order, direction, or standard of conduct if the violation seriously affects the integrity of the Board, its process, or its proceedings. Sanctions may be public or private, and may include admonishment, reprimand, disqualification from a particular matter, referral to an appropriate licensing authority, or other action that circumstances may warrant.

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

#### **6101.36 Board seal [Rule 36].**

The seal of the Board is a circular logo with "Civilian Board of Contract Appeals" on the outer margin. The seal is a means of authenticating records, notices, orders, dismissals, opinions, subpoenas, and certificates issued by the Board.

#### **6101.37–6101.50 [Reserved]**

#### **6101.51 Alternative procedures [Rule 51].**

An appellant in an eligible case may elect the small claims procedure under Rule 52 (48 CFR 6101.52) or the accelerated procedure under Rule 53 (48 CFR 6101.53). Parties may jointly elect alternative dispute resolution under Rule 54 (48 CFR 6101.54).

#### **6101.52 Small claims procedure [Rule 52].**

(a) *Election.* The small claims procedure is available solely at an appellant's election and is limited to appeals in which there is a monetary amount in dispute and the requirements for expedited disposition set forth in the Contract Disputes Act, 41 U.S.C. 7106(b), are met. An appellant may elect the small claims procedure up to 30 days after receiving the respondent's answer.

(b) *Procedure.* The respondent may object to an election, on the grounds that Rule 52(a) (paragraph (a) of this section) is not satisfied, within 10 days after receiving the election. If the small claims procedure is used, the Board will set a schedule for timely resolution of the appeal. The schedule may restrict or eliminate pleadings, discovery, and other prehearing activities.

(c) *Decision.* The presiding judge may issue a decision in summary form. A decision is final and conclusive, shall not be set aside except for fraud, and is not precedential. If possible, the Board will resolve the appeal within 120 days after the appellant elects the small claims procedure. The Board may extend the appeal schedule if an appellant does not adhere to the established schedule.

**6101.53 Accelerated procedure [Rule 53].**

(a) *Election.* The accelerated procedure is available solely at an appellant's election and is limited to appeals in which there is a monetary amount in dispute and the requirements for accelerated disposition set forth in the Contract Disputes Act, 41 U.S.C. 7106(a), are met. The appellant may elect the accelerated procedure up to 30 days after receiving the respondent's answer.

(b) *Procedure.* The respondent may object to an election, on the grounds that Rule 53(a) (paragraph (a) of this section) is not satisfied, within 10 days after receiving the election. If the accelerated procedure is used, the Board will set a schedule for timely resolution of the appeal. The schedule may restrict or eliminate pleadings, discovery, and other prehearing activities.

(c) *Decision.* The presiding judge may issue a decision with the concurrence of at least one panel member. If the presiding judge and a panel member disagree, the panel will decide the appeal. If possible, the Board will resolve the appeal within 180 days after the appellant elects the accelerated procedure. The Board may extend the appeal schedule if an appellant does not adhere to the established schedule.

**6101.54 Alternative dispute resolution [Rule 54].**

(a) *Availability.* The CDA requires boards of contract appeals to provide to the fullest extent practicable 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. The Board provides alternative dispute resolution (ADR) services for pre-claim and pre-final decision matters, as well as appeals pending before the Board. The Board may also conduct ADR proceedings for any Federal agency. The use of ADR proceedings does not toll any statutory time limits.

(b) *Procedures for requesting ADR.* Parties may jointly ask the Board Chair to appoint a judge as an ADR Neutral. The parties may request a particular judge or judges, to include the presiding judge. To facilitate full, frank,

and open participation, a Neutral will not discuss the substance of the case or the parties' conduct in ADR with other Board personnel, and a Neutral who participates in a nonbinding ADR procedure that does not resolve the dispute is recused from further participation in the matter unless the parties agree otherwise in writing and the Board concurs.

(c) *Confidentiality.* Written material prepared for use in ADR, oral presentations made in ADR, and all discussions between the parties and the Neutral are confidential, subject to 5 U.S.C. 574, and, unless otherwise specifically agreed by the parties, inadmissible as evidence in any Board proceeding, although evidence otherwise admissible before the Board is not rendered inadmissible merely because of its use in ADR.

(d) *ADR agreement.* Parties shall agree in writing to an ADR method and the procedures and requirements for implementing it. The ADR agreement shall provide that the parties and counsel will not subpoena the Neutral in any legal action or administrative proceeding of any kind to provide documents or testimony relating to the ADR.

(e) *Types of ADR.* Parties and the Board may agree on any type of binding or nonbinding ADR suited to a dispute.

**PART 6102—CROP INSURANCE CASES**

Sec.

6102.201 Scope of rules [Rule 201].

6102.202 Rules for crop insurance cases [Rule 202].

AUTHORITY: 7 U.S.C. 1501 *et seq.*; 41 U.S.C. 438(c)(2).

SOURCE: 83 FR 41010, 41017, Aug. 17, 2018, unless otherwise noted.

**6102.201 Scope of rules [Rule 201].**

These procedures govern the Board's resolution of disputes between insurance companies and the Department of Agriculture's Risk Management Agency (RMA) involving actions of the Federal Crop Insurance Corporation (FCIC). Prior to the creation of this Board, the Department of Agriculture Board of Contract Appeals resolved