

THE NATIONAL LAW REVIEW

CBCA Rules Overhaul Finalized: Effective September 17, 2018

Thursday, August 23, 2018

On August 17, 2018, the Civilian Board of Contract Appeals (“Board” or “CBCA”) published in the [Federal Register](#) its amended Rules of Procedure governing appeals under the Contract Disputes Act (“CDA”). These amended rules: simplify and modernize access to the Board, clarify obligations under certain prior rules, and increase conformity between its rules and the Federal Rules of Civil Procedure (“Federal Rules”). Furthermore, as reflected in the [proposed changes issued in the Federal Register in March 2018](#), the amended rules are intended to “allow the Board to adopt and apply case law applying the relevant Federal Rules, as well as any future amendments to those Federal Rules, without revising the Board’s rules again.”

Our key takeaways are provided below, and a comparison of the Board’s prior and current rules can be found [here](#).

Effective Date

The amended rules will govern appeals 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 amended rules in a case then pending would be inequitable or infeasible.

Summary of Key Changes

Discovery

- The CBCA’s amended rules leave no doubt as to the significance of the Federal Rules as they directly incorporate certain aspects of the Federal Rules regarding the scope of discovery, submitting and responding to requests for admissions, responding to interrogatories, the use of deposition testimony, and supplementing discovery responses. For example, Rule 13(b) now expressly aligns the scope of permissible discovery with that permitted under Federal Rule 26(b)(1). Following amendments to Federal Rule 26(b)(1) in 2015, the scope of permissible discovery now requires the parties to account for the proportional needs of the case instead of only whether discovery sought is relevant. In another example, the amended rules require that objections be made by the date the response to a discovery request is due instead of within 15 days after receiving the discovery request.
- Nonetheless, although the amended rules borrow many concepts from the Federal Rules for discovery purposes, they do not borrow everything. For example, Federal Rule 34(b)(2)(B) requires that objections “state with specificity the grounds for objecting to the request, including the reasons,” and Federal Rule 34(b)(2)(C) requires that an objection “state whether any responsive materials are being withheld on the basis of that objection.” Board Rule 13(e)(1), however, simply provides the above-noted timeline for when objections must be made, without requiring particular content for an objection. Thus, the amended rules appear to strike a balance that should allow the Board (and litigants) to maintain the efficiencies often associated with Board practice.

Evidentiary Record

- Rule 4 now requires the parties to submit the appeal file in electronic format (rather than hardcopy) unless



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classified or protected materials are involved.

- Rule 9 clarifies that the evidentiary record consists of “evidence” (e.g., exhibits and testimony transcripts) and “other materials” (e.g., pleadings, motions, and demonstrative hearing exhibits), and that the Board “may also rely” on the latter category “to decide a case.”

Pleadings

- Rule 6 formally recognizes that the “Board may in its discretion order a respondent [i.e., the Government] asserting a claim to file a complaint.” This is consistent with past Board decisions, and should allow for more efficient proceedings.

Admissibility of Evidence

- Although it is unclear why the Board’s admissibility rule was substantially re-written, Rule 10 still maintains that the Board will use the Federal Rules of Evidence as a guidepost, and that the Board generally will admit hearsay evidence unless deemed unreliable.

Motions Practice

- For substantive motions (e.g., a motion to dismiss or a motion for summary judgment), Rule 8 extends the deadline to file an opposition brief from 20 days to 30 days, and the movant’s reply is due 15 days thereafter.

Voluntary Dismissals

- Under the prior rules, the Board could, in lieu of issuing an order suspending proceedings, dismiss the case without prejudice and reinstate the case within 180 days. However, when a case had been dismissed without prejudice and neither party timely requested that the case be reinstated, the Board deemed the case dismissed with prejudice.
- Rule 12 eliminates this provision based on limits to the Board’s jurisdiction under the CDA.

Will the Amended Rules Find the Right Balance?

As we discussed in an article, one of the significant recent trends at the Board has been its increase in publishing discovery-related decisions. We suggested that the increase in published discovery decisions has the potential to enable parties to better assess the bounds of permissible discovery, thereby allowing the parties to spend less time sidelined by discovery issues and more time focused on the underlying merits of appeals.

Explicitly aligning the Board’s discovery rules with the Federal Rules should provide even more predictability in discovery and better establish expectations. However, one challenge the Board may face in implementing the amended rules is striking the balance between following the often formalistic Federal Rules and maintaining the efficiencies and informalities that generally are hallmarks of Board practice.

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