



District of Columbia

REGISTER

HIGHLIGHTS

- D.C. Council schedules a public hearing on Bill 23-0637, Warehousing and Storage Eminent Domain Authority Act of 2020
- D.C. Council schedules a public hearing on Bill 23-641, Dynamic Performance Parking Zone Amendment Act of 2020
- Contract Appeals Board updates the Board's rules, practices and procedures
- Office of State Superintendent of Education imposes an 18-month suspension of educator preparation provider approvals and renewals pending the promulgation of new regulations
- Department of Energy and Environment announces funding for the Fiscal Year 2021 Clean Water Construction Treatment Works Projects
- Department of Energy and Environment establishes new requirements for underground storage tanks
- Department of Health updates procedures for maternal mortality reporting
- D.C. Water and Sewer Authority revises engineering review fees and charges

CONTRACT APPEALS BOARD**NOTICE OF FINAL RULEMAKING**

The District of Columbia Contract Appeals Board, pursuant to the Contract Appeals Board Rulemaking Amendment Act of 2017, effective December 13, 2017 (D.C. Law 22-0033; D.C. Official Code § 2-361.06(a)(3) (2019 Supp.)), hereby gives notice of the adoption of the following amendments to Chapters 1 (General Rules of the Contract Appeals Board), 2 (Appeal Procedures of the Contract Board), 3 (Protest Procedures of the Contract Appeals Board), and 4 (Electronic Filing) of Title 27 (Contracts and Procurement) of the District of Columbia Municipal Regulations (DCMR).

The purposes of this rulemaking include harmonizing the Board's rules with existing District of Columbia procurement statutes, including The Procurement Practices Reform Act of 2010, effective April 8, 2011 (D.C. Law 18-371; D.C. Official Code §§ 2-351.01 *et seq.* (2016 Repl.)), as amended, and The Procurement Integrity, Transparency, and Accountability Amendment Act of 2016, effective October 8, 2016 (D.C. Law 21-0158, D.C. Official Code §§ 2-221.01 *et seq.* (2016 Repl. & 2019 Supp.)), as well as clarifying the Board's existing practices and procedures.

The Notice of Proposed Rulemaking was published in the *D.C. Register* on November 22, 2019 at 66 DCR 15488. The District of Columbia Office of the Attorney General, Government Contracts Section, submitted comments on the proposed rulemaking. Responses to those comments have resulted in alterations to Subsections 100.3, 104.1(c), 107.7, 107.8, 109.1, 110.7, 202.2, 217.2(a), 305.4, 314.1, 403.1, and 409.1 of the proposed rules that include the addition or deletion of material that serves only to clarify the intent, meaning, or application of this Notice of Final Rulemaking in the *D.C. Register*.

These rules were adopted as final on January 30, 2020 and will be effective on April 6, 2020.

Title 27 DCMR, CONTRACTS AND PROCUREMENT, is amended as follows:

Chapter 1, GENERAL RULES OF THE CONTRACT APPEALS BOARD, is amended to read as follows:

100 GENERAL PROVISIONS

- 100.1 Scope. These rules, consisting of Chapters 1, 2, 3 and 4 of Title 27 DCMR, govern all proceedings in all cases filed with the District of Columbia Contract Appeals Board (Board).
- 100.2 Codification. These rules shall amend Chapters 1, 2, 3, and 4 of Title 27 of the District of Columbia Municipal Regulations (DCMR) and shall be cited with the appropriate reference to the publication of these rules in the *D.C. Register*, indicating the volume number, page number and the date of publication.

- 100.3 Application. These rules shall apply to all appeals and protests filed with the Board on or after April 6, 2020, and to all further proceedings in appeals and protests pending before the Board at that time.
- 100.4 Transition. If, however, the Board determines that the application of a rule in a particular case pending before the Board on the effective date of these rules would be impracticable or would work an injustice on a party, the Board may order that all or a portion of the former rules shall apply to further proceedings in the case.
- 100.5 Construction. These rules shall be construed to obtain the just, expeditious, and inexpensive resolution of every case. In addition to the Board's own precedent, the Board will be guided by (i) precedent of the District of Columbia courts in construing those Board rules that are analogous to the Rules of Civil Procedure of the DC Superior Court; and (ii) precedent of the United States Government Accountability Office in construing those Board rules that are analogous to protest rules of the Government Accountability Office.

101 BOARD

- 101.1 The name of the Board is the District of Columbia Contract Appeals Board.
- 101.2 The Board's membership shall consist of a Chief Administrative Judge (Chairperson) and other administrative judges, as provided by law.
- 101.3 Cases before the Board are assigned to panels consisting of three administrative judges as appropriate for final disposition or decision, except as determined by the Chief Administrative Judge in accordance with Subsection 215.5, or otherwise.
- 101.4 The presiding administrative judge designated to manage a particular case pursuant to Subsection 102.5 shall have the authority to administer oaths and affirmations, issue subpoenas, rule on all interlocutory matters and nondispositive motions, schedule and conduct proceedings and hearings, and take other action as necessary to prepare the case for final disposition or decision.
- 101.5 Except for appeals processed under the small claims (expedited) procedure, as prescribed in Section 215, the final disposition of a case shall be made by majority vote of the administrative judges assigned to the panel.
- 101.6 The Board's final decision in a case shall be in writing and based solely on the record, including such matters as the Board may expressly take notice of. A copy of the decision shall be dated and forwarded to the parties by first class mail or electronically. All decisions which constitute a final adjudication of a case, except decisions issued on cases under the optional small claims procedures of Section 215, shall be published in the *District of Columbia Register*.
- 101.7 The Board shall hear and decide de novo all cases under its jurisdiction.

101.8 If any contracting agency, which is exempt from coverage of the Procurement Practices Reform Act, wishes to have the Board hear and decide appeals and/or protests, the Board shall do so only in accordance with a written agreement with the agency. The cost of processing cases involving such an agency shall be on a reimbursable basis agreed to by the Board and the agency.

101.9 Proceedings before the Board shall be conducted at its offices, unless otherwise ordered by the Board.

102 CHIEF ADMINISTRATIVE JUDGE (CHAIRPERSON)

102.1 The chairperson of the Board shall serve as the Chief Administrative Judge of the Board.

102.2 In addition to participating in the hearing of cases, the Chief Administrative Judge shall oversee the administrative activities of the Board and shall provide, within approved budgetary ceilings, for the staffing of the Board with nonmember personnel. These persons shall be responsible to and shall function under the direction, supervision, and control of the Chief Administrative Judge.

102.3 In the case of a vacancy in the position of the Chief Administrative Judge, or his or her absence or disability, the administrative judge who has the senior length of service shall serve as the Acting Chief Administrative Judge and exercise all of the authority, duties, and responsibilities of the Chief Administrative Judge.

102.4 When by reason of a vacancy, disability, or absence, neither the Chief Administrative Judge nor the member who has the senior length of service is available to exercise the duties of the Chief Administrative Judge, the administrative judge next in length of service shall serve as the Acting Chief Administrative Judge. Should there not be an administrative judge with a senior length of service, the Chief Administrative Judge shall designate a Board member to serve as Acting Chief Administrative Judge.

102.5 The Chief Administrative Judge shall assign and, as necessary, reassign cases and administrative judges to panels and shall designate one of the panel members as the presiding judge having the lead responsibility for the management of a particular case.

102.6 The Chief Administrative Judge may authorize the performance by another administrative judge or Board employee of any function of the Chief Administrative Judge, except that, as provided by law, only administrative judges may hear and decide cases. The attendance of at least two members of the Board shall constitute a quorum.

103 BOARD OPERATIONS

103.1 The Board's office shall be open for the transaction of business from 9:00 a.m. until 5:00 p.m. daily, except Saturdays, Sundays, and legal holidays.

103.2

(a) Unless otherwise directed by an administrative judge, all paper pleadings, briefs, motions, and any other submissions to the Board shall be filed at the Board's office during business hours.

(b) Subject to Chapter 4, documents can be filed electronically at any time. As stated in Chapter 4, electronic filing is the electronic submission of documents to the Board via the Board's designated electronic file and serve system. Sending an email to the Board is not a proper method of electronic filing.

103.3 Upon the receipt of a paper appeal or a protest, the Board shall stamp the date of filing next to the title of the case. Upon receipt of an electronic filing, the Board's designated vendor shall issue a confirmation showing the authorized date and time of filing. If a person filing requests a Board certification, a copy of the submission provided by the person shall be marked to show the time and date of the filing and it shall be initialed by the Board.

103.4 The Board shall keep and maintain: all incoming pleadings, motions, and other communications to the Board, and all outgoing notices, correspondence, and Board actions; a monthly docket of current cases under the Board's jurisdiction; copies of decisions and final orders of the Board; and copies of the Board's rules.

103.5 Subject to the provisions of Section 104, the case docket, and copies of decisions, final orders, and rules shall be available for inspection by the public at the Boards' office. Copies of Board decisions and final orders shall be available to the public at a reasonable cost. Consistent with the requirements of the District of Columbia Freedom of Information Act, the Board shall provide access to electronic records not subject to a Protective Order under Section 104 during normal business hours.

103.6 The Board shall maintain records that contain the date of mailing, or delivery, of all papers that are served or delivered.

103.7 Cases before the Board shall be assigned consecutive numbers in the appropriate docket books in order of their filing, one sequence for appeals bearing the letter "D" as a prefix, and another sequence for protests bearing the letter "P" as a prefix.

- 103.8 Upon request, the Board shall furnish to the public the names of its members, and the identity of the Board members comprising the panel to which a particular case has been assigned.
- 103.9 The Board shall maintain a case docket, updated monthly, which provides the names of the appellant or protester, the name of the contracting agency, the case number, the date the case was filed with the Board, the name of the presiding judge, the date of any scheduled hearing on the merits of the case, and an identification of accelerated and small claims appeals.
- 103.10 Active case files containing all pleadings and other records of the case, except as provided by Section 104, shall be available for inspection by the public at the Board's office. However, the public may not remove any pleadings or other records from the case file nor remove the case file from the Board's office without the express written authorization of an administrative judge.

104 PROTECTIVE ORDERS; IN CAMERA REVIEW

104.1

- (a) At the request of a party to a protest or appeal or on its own initiative, the Board may issue a protective order controlling the treatment of protected information. Such information may include proprietary, confidential, or source-selection-sensitive material, as well as other information the release of which could result in a competitive advantage to one or more firms. The protective order shall establish procedures for application for access to protected information, identification and safeguarding of that information, and submission of redacted copies of documents omitting protected information. For informational purposes only, a sample protective order, as well as sample applications for access to materials under a protective order, are available on the Board's website: www.cab.dc.gov.
- (b) If a party to a protest or appeal seeks to have its initial filing in a case sealed, it must submit with the filing a motion for a protective order pursuant to this Rule, or submit an explicit request for a protective order in the filing, as well as a redacted copy of the filing that would be accessible to the public. If, a party seeks to have a subsequent filing or specified exhibits sealed, it must first file a motion for a protective order pursuant to this rule. Redacted copies of the exhibits need not be submitted, however. Only the specific document or exhibit that is to be filed under seal shall be designated as sealed. For any party that has not been allowed access under the protective order, the filing party shall serve notice of the filing and that the served party must request admission under the protective order to access the documents filed.

- (c) If no protective order has been issued, the agency may withhold from the parties those portions of a document submission which would ordinarily be subject to a protective order. The Board will review in camera all information not released to the parties.
- (d) After a protective order has been issued, counsel or consultants retained by counsel appearing on behalf of a party may apply for admission under the protective order by submitting an application to the Board, with copies furnished simultaneously to all parties. The application shall establish that the applicant is not involved in competitive decision making for any firm that could gain a competitive advantage from access to the protected information and that there will be no significant risk of inadvertent disclosure of protected information. Objections to an applicant's admission shall be raised within two (2) days after receipt of the application, although the Board may consider objections raised after that time.
- (e) Any violation of the terms of a protective order may result in the imposition of sanctions as the Board deems appropriate, including referral to appropriate bar associations or other disciplinary bodies and restricting the violator's practice before the Board.

104.2 At the request of a party or on its own initiative, the Board may order that specific documents or tangible articles be submitted for in camera review by the Board, and not be available for inspection, if they are asserted to contain privileged information. A party by motion may challenge another party's assertion of privilege.

104.3 Information subject to a protective order under this Rule may be used in any appellate matter filed with the Superior Court of the District of Columbia or the District of Columbia Court of Appeals (collectively, "Court"), without the Board's prior authorization, provided that the information is filed under seal with the Court, that the Court is informed by the Appellant(s) of the Board's protective order, and that the Appellant(s) request the Court to issue its own protective order to cover the protected material. Use of information protected under the Board's protective order in such appellate proceedings will be governed by the protective order issued by the Court.

105 EX PARTE COMMUNICATIONS

105.1 *Ex parte* communications, as defined in Subsection 199.1, shall be prohibited.

105.2 Excluded from *ex parte* communications are those that:

- (a) Are specifically authorized by law to be made on an *ex parte* basis; or
- (b) Relate to the Board's administrative functions or procedures; or

- (c) Are matters of public record; or
- (d) Are communications among Board members, and/or communications among Board members and staff.

105.3 An administrative judge or a staff member of the Board who receives an ex parte communication prohibited by this section, shall immediately report its receipt to the Chief Administrative Judge and prepare a memorandum describing in detail the substance of the communication. The memorandum shall be placed in the case file, along with the actual communication if it is in written form. The Board shall provide a copy of the memorandum to all parties.

106 APPEARANCE AND REPRESENTATION

106.1 In a proceeding before the Board, an individual, receiver, or trustee may appear in his or her behalf; a general partner of a partnership may represent the partnership; and an officer of a corporation may represent the corporation. The Office of the Attorney General for the District of Columbia shall represent the District. Independent agencies of the District of Columbia may be represented by agency counsel.

106.2 A party may be represented in a proceeding by an attorney at law admitted to practice before the District of Columbia Court of Appeals or before the highest court of the state where he or she resides or maintains an office. An attorney at law employed by the District of Columbia government may represent an agency in accordance with the requirements of Rule 49(c)(4) of the Rules of the District of Columbia Court of Appeals.

106.3 An individual appearing before or transacting business with the Board in a representative capacity pursuant to the provisions of Subsection 106.1 may be required to establish his or her authority to act in that capacity.

106.4 Notice of Appearance. Each person, including an Assistant Attorney General, representing a party in a case pending before the Board shall file with the Board a written notice of appearance containing the following:

- (a) The signature of the representative;
- (b) The typed or printed name of the representative;
- (c) The business address and telephone number of the representative; and
- (d) The name of the party for whom the appearance is made.

106.5 The notice of appearance shall become a part of the record.

106.6 Each person who has entered an appearance shall be deemed to continue as representative of the named party unless there is filed with the Board any of the following:

- (a) A notice of withdrawal of appearance signed by both the representative and the party; or
- (b) A notice signed by the party stating that the representation has been concluded, together with proof of service upon the representative; or
- (c) A notice of substitution of a representative that conforms to the requirements of Subsection 106.4.

106.7 If two or more persons have entered their appearance for a party, service on one representative shall be service on the party, unless one of the representatives has been designated for service.

107 FORM AND FILING OF PLEADINGS, MOTIONS, AND OTHER SUBMISSIONS

107.1 For documents, such as protests, agency reports, complaints, answers, motions, and responses thereto, filed on paper, an original and two (2) copies shall be filed with the Board. All paper filings shall contain proof of service, in accord with Section 109.

107.2 A filing may be made by mail, hand-delivery or electronically in accordance with Chapter 4, unless otherwise ordered by the Board. Irrespective of the method used for filing, a submission shall only be considered timely filed if it is actually received in the Board's office during business hours or received by the electronic filing vendor within the time established by law, regulation, or Board order.

107.3 Complaints, protests, and other pleadings shall, on the first page, contain a caption setting forth the name of the Board, title of the case, and contain a heading under the caption describing the nature of the pleading, motion, or matter being brought to the attention of the Board. The caption and heading shall be in the following format:

GOVERNMENT OF THE DISTRICT OF COLUMBIA
CONTRACT APPEALS BOARD [PROTEST] OR [APPEAL] OF: [NAME OF
PROTESTER or APPELLANT])
([ADDRESS OF PROTESTER or APPELLANT]) CAB No.
(Under [IFB or RFP] or [Contract] No.) [HEADING]

107.4 In addition to the requirements of Subsection 107.3, the initial filing by or on behalf of a party shall have in the caption the name and full business or residence

address of the party. If the party is appearing pro se (without an attorney), the caption shall also include the party's business or personal email address, and a contact telephone number. In the initial filing by a non-governmental corporate body party, the party shall file a corporate disclosure statement identifying all parent companies, subsidiaries (except wholly-owned subsidiaries), and affiliates that have issued shares to the public.

- 107.5 A submission signed by an attorney shall contain the name, office address, telephone number, and bar identification number of the attorney. Notice of a change in address or telephone number of the attorney, or a party not represented by an attorney, shall be filed within five (5) business days of the change.
- 107.6 Unless they are changed by a notice filed with the Board, the address and telephone number of a party or any attorney noted on the first filing shall be conclusively taken as the last known address and telephone number of the party or attorney.
- 107.7 The original of a paper submission that is filed with the Board shall be signed in ink by the party, its attorney, or its authorized representative.
- 107.8 All submissions filed shall be typed (double spaced), reproduced by any duplicating or copying process that produces a clear black image on white 8½ x 11 inch size paper, and, unless filed electronically, fastened at the top.
- 107.9 A submission shall not include documents that are not relevant to the case. Irrelevant documents may be rejected by the Board.
- 107.10 Submissions that do not conform to the requirements of this Rule may be rejected either before or after filing. If the submission is rejected after filing, the effect shall be the same as if it had not been filed.

108 SERVICE OF PLEADINGS, MOTIONS, AND OTHER SUBMISSIONS

- 108.1 Except as otherwise provided in the Board's rules or directed by an administrative judge, a pleading, motion, notice, appearance, or other submission filed with the Board subsequent to the filing of an appeal or a protest, shall be served by the filing party upon each party in the case.
- 108.2 Whenever, under this Rule or a Board order, service is required or permitted to be made upon a party who is represented by an attorney, the service shall be made upon the attorney.
- 108.3 Electronic service upon a party shall be as provided in Chapter 4. Non-electronic service upon a party, or an attorney representing a party, shall occur at the time of hand delivery; or, if by mail, to the address of record, by the postmark date plus three days as prescribed in Section 122.

108.4 The Board may waive the requirement of furnishing to other parties copies of bulky, lengthy, or out-of-size documents when the party, by written motion, has shown that service would impose an undue burden. The moving party shall notify the other parties that the documents are available for inspection at the office of the Board.

108.5 Notwithstanding the foregoing, any document may be served electronically pursuant to Chapter 4.

109 PROOF OF SERVICE

109.1 This section only applies to non-electronic filing. A party filing a document with the Board shall furnish written proof that a copy also has been sent to every other party.

109.2 The proof shall show the date and manner of service and may be written acknowledgment of service, affidavit of the person making service, certificate of an attorney of record, or by other proof satisfactory to the Board.

109.3 Proof of service shall not be required if the document has been served electronically pursuant to Chapter 4.

110 MOTIONS PRACTICE

110.1 Every application to the Board for an order or other relief shall be by motion. Before filing any motion, the moving party shall first ascertain whether other affected parties will consent to the relief sought. Only when the movant certifies in writing that despite diligent efforts consent could not be obtained, will the Board consider the motion as a contested matter. If the relief sought is consented to but requires Board approval, the moving party shall serve the other parties and file with the Board a motion which includes the word "Consent" in its title and states that all affected parties have consented to the relief sought.

110.2 With the exception of a motion made during a hearing or conference, all motions shall be in writing, unless otherwise directed by the Board. A motion shall be accompanied by a statement of its purpose, the grounds on which it is based, and the reasons for the order or relief sought.

110.3 A written motion shall include on separate page(s) following the signature page a proposed order for the Board's signature including, if paper filed, a list of all parties, and their current addresses.

110.4 A motion shall include within its body a statement setting forth specific points and authorities to support the motion, including a concise statement of facts

material to the issues raised in the motion. No separate memorandum of points and authorities shall be required.

- 110.5 A memorandum of opposing points and authorities may be filed with the Board and served on a party no later than ten (10) days after service of the motion, unless another Board rule prescribes a larger or shorter time. The Board may also grant or order a larger or shorter time for such filing. If a statement of opposing points and authorities is not filed within the prescribed time, the Board may treat the motion as conceded.
- 110.6 A reply memorandum may be filed with the Board and served on a party no later than seven (7) days after service of the opposition described in Subsection 110.5, or within a larger or shorter time as the Board may grant or order.
- 110.7 The Board may decide a motion without a hearing. The Board may also order a hearing on a motion upon the application of either party, or on the Board's initiative.
- 110.8 Despite the provisions of Subsection 110.5, for good cause shown, the Board may act upon a motion at any time without waiting for a response to the motion by the opposing party.
- 110.9 If a moving party fails to appear at a hearing on its motion, the Board may treat the motion as withdrawn and the motion may be refiled only with the permission of the Board. If the opposing party fails to appear at the hearing, the Board may treat the motion as conceded.
- 110.10 In addition to the statement of points and authorities required by Subsection 110.4 to be included within the body of the motion, a motion for summary judgment shall also include within the motion a separate statement of the material facts as to which the moving party contends there is no genuine issue.

111 STIPULATIONS

- 111.1 The parties may stipulate to facts, issues, admission of relevant documents, testimony, discovery procedures, and other matters which may aid in expediting the proceedings in a case, subject to acceptance by the Board. A stipulation, however, may not extend a time limit established by a rule or order of the Board without its approval.

112 DISCOVERY

- 112.1 The Board encourages all parties to engage in voluntary discovery. Discovery documents shall not be filed with the Board unless the Board, on its own initiative or by granting the motion of a party, orders that they be filed.

- 112.2 After an appeal has been docketed, a party may obtain discovery regarding a matter which is not privileged and is relevant to the case. It shall not be a ground for objection to a discovery request that the information will be inadmissible in the record of the case, if the information appears reasonably calculated to lead to the discovery of admissible evidence.
- 112.3 A party to a protest or a small claims (expedited) appeal may engage in discovery only to the extent it is acceptable to and ordered by the Board. The Board shall not permit discovery unless it is necessary to advance a fair and expeditious resolution.
- 112.4 A party may obtain discovery by one or more of the following methods:
- (a) Depositions upon oral examination or written questions, but said deposition testimony may only be used at the hearing of an appeal if the witness is unavailable, or to contradict or impeach the testimony of the deponent given at the hearing;
 - (b) Written interrogatories;
 - (c) Requests for production of documents or other tangible things; and
 - (d) Requests for admissions.
- 112.5 Written interrogatories and requests for admission shall be answered separately in writing, signed under oath by the person making the answers, within thirty (30) days after service. Requests for production of documents or other tangible things shall be answered within 30 days after service. Unless otherwise ordered by the Board, any objection to a discovery request must be filed within fifteen (15) days after service. A party shall fully respond to any discovery request to which it does not file a timely objection. The parties are required to make a good faith effort to resolve objections to discovery requests.
- 112.6 The use of the discovery methods set forth in Subsection 122.4 shall be limited by the Board if it determines that:
- (a) The discovery is unreasonably cumulative or duplicative or is obtainable from some other source that is more convenient, less burdensome, or less expensive; and
 - (b) The discovery is unduly burdensome and expensive, taking into account the needs of the case, amount involved in the controversy, limitations on the parties' resources, and importance of the issues at stake in the case.
- 112.7 The parties are encouraged to utilize electronic transmission to the maximum extent practicable. When discovery material is transmitted electronically, the

attorney or other person transmitting the material shall be deemed to have certified that the documents contained in the transmission are what they purport to be.

113 FAILURE TO MAKE OR COOPERATE IN DISCOVERY; SANCTIONS

113.1 Before any motion to compel discovery is filed, the affected parties or counsel must meet for a reasonable period of time in an effort to resolve the disputed matter. The movant shall accompany any motion to compel discovery with a certification that despite a good faith effort to secure it, the discovery material sought has not been provided. This certification shall set forth specific facts describing the good faith effort, including a statement of the date, time, and place of the meeting required by this rule.

113.2 If a party fails to obey an order to provide or permit discovery, the Board may make:

- (a) An order that certain facts shall be taken to be established in accordance with the claim of the moving party;
- (b) An order refusing to allow the disobedient party to support or oppose designated claims or defenses, or prohibiting that party from introducing designated matters in evidence;
- (c) An order striking pleadings, staying further proceedings until the order is obeyed, dismissing the case or proceeding or any part thereof, or rendering a judgment by default against the disobedient party; or
- (d) An order imposing such other sanctions as the Board deems appropriate.

113.3 When the Board believes that the circumstances warrant either dismissing the case or rendering a default judgment against the disobedient party as a discovery sanction, it will issue an order to show cause pursuant to Subsection 121.3.

114 SUBPOENAS

114.1 A party is expected to cooperate in good faith by making available witnesses and evidence under the party's control, when requested by another party, without issuance of a subpoena and by securing the voluntary attendance of third-party witnesses and the production of evidence by third parties.

114.2 The presiding judge may issue, on his or her initiative or upon written motion of a party, a subpoena that commands the person to whom it is directed to:

- (a) Attend and give testimony at a deposition;

- (b) Attend and give testimony at a hearing; and
 - (c) Produce the books, papers, documents, and other tangible things designated in the subpoena.
- 114.3 A request for subpoena shall be filed at least fifteen (15) calendar days before the testimony of a witness or evidence is to be provided, and shall state the relevancy, materiality, and scope of the testimony or documentary evidence sought, including, as to documentary evidence, the identification of all documents desired and the facts to be proved by them in sufficient detail to indicate materiality and relevancy. The Board may, in its discretion, honor requests for subpoenas not made within the time limit provided by this rule.
- 114.4 The party requesting a subpoena shall arrange for its service. The service shall be made as soon as practicable after the subpoena has been issued.
- 114.5 A subpoena requiring the attendance of a witness at a deposition or hearing may be served at any place consistent with the rules of the D.C. Superior Court. A subpoena may be served by registered or certified mail, by a United States Marshal or his or her deputy, or by any other person who is not a party and is not less than eighteen (18) years of age.
- 114.6 The service of a subpoena upon a person named in the subpoena shall be made by personally delivering a copy to that person and tendering the fees for one day's attendance and the mileage allowed by law. However, where the subpoena is issued on behalf of the District government, the fees and mileage allowance need not be tendered in advance of attendance.
- 114.7 The person serving the subpoena shall make proof of the service to the Board promptly, and, in any event, before the date on which the person served must respond to the subpoena. The proof of service shall be made by completing and executing the "Return on Service" portion of a duplicate copy of the subpoena issued by an administrative judge and returning it to the Board. If service is made by a person other than a United States Marshal or his or her deputy, that person shall make an affidavit as proof by executing the "Return on Service" in the presence of a notary.
- 114.8 Upon written motion by the person subpoenaed or by a party, made within ten (10) days after service, but in any event not later than the time specified in the subpoena for compliance, the Board may:
 - (a) Quash or modify the subpoena if it is unreasonable and oppressive or for other good cause shown; or
 - (b) Require the party in whose behalf the subpoena was issued to advance the reasonable cost of producing subpoenaed documentary evidence.

- 114.9 In a case of contumacy or refusal to obey a subpoena by a person who resides, is found, or transacts business within the jurisdiction of the D.C. Superior Court, the Board shall apply to the D.C. Superior Court for an order requiring the person to appear before the Board to give testimony, produce evidence, or both. If a person fails to obey the order, without adequate excuse, the Board may apply for an order that the person be held in contempt by the Court.

115 JURISDICTION

- 115.1 The Board at any time may consider the question of its jurisdiction to decide a case.

116 SUSPENSION OF RULES

- 116.1 In the interest of expediting a decision in a case or for other good cause shown, the Board may, except for the time requirements for filing a protest or an appeal, suspend or dispense with the filing requirements and procedural provisions of these rules on the motion of a party or on its own initiative and may order proceedings in accordance with its direction.

117 RECONSIDERATION

- 117.1 A party to an appeal or a protest may by motion request the Board to reconsider its decision or order for the reasons stated below:

- (a) To clarify the decision;
- (b) To present newly discovered evidence which by due diligence could not have been presented to the Board prior to the rendering of its decision;
- (c) If the decision contains typographical, numerical, technical or other clear errors that are evident on their face; or
- (d) If the decision contains errors of fact or law, except that parties shall not present arguments substantially identical to those already presented to the Board.

- 117.2 For appeals, a motion for reconsideration shall be filed within (30) thirty days after the Board's decision or order is transmitted to a party. For protests, a motion for reconsideration shall be filed within the time period set forth in Subsection 313.2.

- 117.3 A motion for reconsideration shall set forth the following:

- (a) The particular points of fact or law which the moving party believes the Board has overlooked or misapprehended;
- (b) Any argument the moving party wishes to make in support of the motion; and
- (c) The relief sought and the reasons for seeking the relief.

117.4 For appeals, a party may file an opposition to a motion for reconsideration no later than fifteen (15) days after the motion is served. For protests, a party may file an opposition no later than seven (7) days after the motion is served.

117.5 If a motion for reconsideration is granted, the Board may make a final disposition of the case without reargument, permit reargument, or issue an appropriate order regarding further proceedings.

117.6 A motion of reconsideration does not affect the finality of the Board's decision or suspend its operation except that the Board may stay its decision for good cause shown.

118 CONSOLIDATION OF CASES

118.1 When cases involving a common question of law or facts are pending before the Board, consolidation may be ordered by the Board on its own initiative, or on the motion of a party in order to avoid unnecessary costs or delay.

119 SEPARATE DETERMINATION OF LIABILITY

119.1 The Board may limit a hearing to those issues of law and fact relating to the right of a party to recover, reserving the determination of the amount of recovery, if any, for another proceeding.

120 BURDEN OF PROOF

120.1 Except as otherwise provided by law, the burden of persuasion by a party to establish a fact or facts in dispute shall be met by a preponderance of the evidence.

121 DISMISSAL OF CASES

121.1 A case may be dismissed by an appellant or protester as a matter of right by filing a notice of dismissal at any time prior to the service of an answer or motion on the appellant or protester, or by filing a stipulation signed by each party.

121.2 A dismissal initiated by an appellant or protester not covered by Subsection 121.1 shall be approved by the Board upon terms and conditions as it deems proper.

121.3 Whenever either party fails to file documents required by these rules, respond to notices or correspondence from the Board, comply with orders of the Board, or otherwise indicate an intention not to continue the prosecution or defense of a case, the Board may issue an order to show cause why the case should not be dismissed for failure to prosecute or defend.

121.4 The Board shall specify whether a dismissal is with or without prejudice.

122 COMPUTATION OF TIME

122.1 In computing any period of time prescribed or allowed by these rules, the day of the act, event, or default from which the designated period of time begins to run shall not be included.

122.2 The last day of each period computed pursuant to Subsection 122.1 shall be included unless it is a Saturday, Sunday, or legal holiday, or, when the act to be done is the filing of a paper with the Board, a day or any part of a day in which the Board's office is closed, in which event the period shall run until the end of the next day which is not one of the aforementioned days.

122.3 Whenever a party has the right or is required to do some act within a prescribed period after the service of a notice or other paper upon the party and the notice or paper is served upon the party by mail, three (3) days shall be added to the prescribed period.

122.4 Whenever a party has the right or is required to do some act within a prescribed period after the service of a notice or other document upon the party and the notice or document is served upon the party electronically in accordance with Chapter 4, the notice or document shall be considered as served when the transmission is completed ("authorized date and time"), provided, however, for the purpose of computing time for the served party to respond, any notice or document served on a day or at a time when the Board is not open for business shall be deemed to have been served on the day and at the time of the next opening of the Board for business.

123 ENLARGEMENT OF TIME

123.1 The Board, for good cause shown, may enlarge the time prescribed by the Board rules, or by its order, for doing any act, or may permit an act to be done after the expiration of the prescribed time. The Board, may not, however, enlarge the time for filing a protest or an appeal.

124 CONTINUANCES

124.1 Any party may move in writing to request a continuance of any scheduled hearing, or to extend the time to file a pleading, or for leave to amend a pleading if the motion is served on opposing parties and the Board at least five (5) business days before the hearing or the time limit.

124.2 Continuance shall be approved only for good cause shown.

124.3 Conflicting engagements of counsel, absence of counsel, or the employment of new counsel shall not be regarded as good cause for continuance unless set forth promptly.

125 UNEXCUSED ABSENCE OF A PARTY

125.1 The unexcused absence of a party at the time set for a motion or merits hearing will not be occasion for delay. In the event of such absence, the hearing will proceed and the motion or case will be regarded as submitted on the record by the absent party.

126 EVIDENCE

126.1 The Board shall follow the rules of evidence of the D.C. Superior Court. However, oral and documentary evidence not ordinarily admissible under those rules may be received in evidence at the discretion of the Board.

127 SANCTIONS

127.1 If a party or the party's representative fails or refuses to comply with a Board order or rule, or engages in unreasonable or vexatious conduct, the Board may, on its own initiative or on motion of a party, sanction the offending party or representative as it considers necessary to the just and expeditious conduct of the case.

127.2 The Board may deny any party's representative from appearing in a case currently before it if that individual is found by the Board, after hearing, either to be lacking in the requisite qualifications to represent others or to have engaged in unethical, improper or unprofessional conduct.

128 CONFLICT OF INTEREST

128.1 Board employees may not engage in outside employment, including the practice of law, that is incompatible with their duties and responsibilities on the Board or as District government employees, as provided in Title 6-B, Chapter 18, of the District of Columbia Municipal Regulations, as amended.

129 SEAL OF THE BOARD

- 129.1 The seal of the Board shall be a circular boss, the center portion of which shall depict the flag of the District of Columbia and flag of the United States. The outer margin of the seal shall bear the legend, "CONTRACT APPEALS BOARD, D.C."

199 DEFINITIONS

- 199.1 In addition to the terms defined in D.C. Official Code § 2-351.04, the following terms shall have the indicated definitions for purposes of Chapters 1, 2, 3, and 4 of these rules:

Aggrieved person means an actual or prospective bidder or offeror (i) whose direct economic interest would be affected by the award of a contract or by the failure to award a contract, or (ii) who is aggrieved in connection with the solicitation of a contract.

Appeal means a submission to the Board seeking administrative review of a claim by the District or a contractor arising under or related to a contract including those arising under the Public-Private Partnership Act of 2014, a claim for interest penalties pursuant to the District of Columbia Quick Payment Act, or a debarment or suspension action. Appellant means the party filing an appeal with the Board. For purposes of these rules, a "protest" is not an appeal.

Business day means any day other than a Saturday, Sunday, or legal holiday.

Case means an appeal, protest, debarment, or suspension.

Contracting agency means a department, agency, or instrumentality of the District government which employs the contracting officer who has the authority to enter into a contract which is the subject of the solicitation, contract, or agency action at issue before the Board.

Days refer to calendar days, unless otherwise provided. Subsections 122.1 - 122.4 govern computation of time.

Director means the Director of the Office of Contracting and Procurement who is the Chief Procurement Officer.

Dispositive motion means a motion which, if granted, would terminate part or all of a case on the merits or on procedural grounds.

An *ex parte* communication means any oral or written communication with the Board, which excludes one or more parties to the case, concerning the

merits of the case pending before the Board, made by any persons directly or indirectly involved in the outcome of the case.

In camera review refers to the private review of documents or exhibits by an administrative judge without the presence of parties or attorneys.

Interested party has the same meaning as aggrieved person.

Intervenor means an awardee if the contract has been awarded, or, if no award has been made, all bidders or offerors who appear to have a substantial prospect of receiving an award if the protest is denied.

Protected information means information subject to a protective order, such as proprietary, confidential, or source-selection-sensitive material, as well as other information the release of which could result in a competitive advantage to one or more firms.

Protest means a written objection by an aggrieved party to a solicitation for bids or proposals or a written objection to a proposed or actual contract award. Protester means an aggrieved party who files a protest with the Board.

Respondent means the contracting agency whose decision, action, or inaction is the subject of an appeal or protest.

Chapter 2, APPEAL PROCEDURES OF THE CONTRACT APPEALS BOARD, is amended to read as follows:

200 APPEALS BY CONTRACTORS

200.1 An appeal by a contractor of a final decision by the contracting officer relating to a contract dispute, a claim for interest penalties, or a decision of the Director relating to a debarment or suspension action, shall commence by the contractor filing a complaint with the Board.

200.2 The complaint shall be filed:

- (a) In a contract dispute, no later than ninety (90) days after the contractor received the decision of the contracting officer; or, where the time period for the contracting officer to issue a decision has expired, the contractor shall file a complaint within a reasonable time;
- (b) In a dispute concerning suspension or debarment, no later than sixty (60) days after the contractor receives the decision of the Director to suspend or debar.

- 200.3 The appellant shall serve a copy of the complaint on the agencies specified in Subsections 202.3(a) and (b), and shall furnish the Board with proof of service.

201 COMPLAINT

- 201.1 A complaint shall indicate that an appeal is being taken and shall identify the contract in dispute, or the suspension/debarment proceedings; the department or agency involved in the dispute; the decision from which the appeal is taken; the amount in dispute, if any; and shall state that the complaint is timely filed.
- 201.2 The complaint shall be signed by the contractor personally or by an authorized representative or attorney.
- 201.3 The complaint referred to herein does not require a particular form, but it shall fulfill the requirements of a complaint.
- 201.4 The appellant shall file a complaint setting forth simple, concise, and direct statements of each of its claims with the Board. If filed on paper, the appellant shall file an original and two (2) copies of the complaint with attachments.
- 201.5 The appellant shall set forth the basis, with appropriate reference to contract provisions and applicable law, of each claim to the extent known; the dollar amount claimed, to the extent known; and the relief sought from the Board.
- 201.6 If an appeal has been lawfully initiated by the filing of a complaint, the Board may thereafter order the District to file a complaint where an appellant has appealed an affirmative claim by the District asserted in a final decision by a contracting officer. In such cases, the Board may also order the appellant to file an answer as described in Section 205.

202 DOCKETING OF APPEALS

- 202.1 When a complaint has been received by the Board, it shall be docketed promptly.
- 202.2 The Board shall provide the appellant a written acknowledgment that the complaint has been docketed, the case docket number, and the citation of the publication containing the current rules of the Board. In addition, the Board shall advise the appellant of the identity of the persons furnished the acknowledgment as prescribed in Subsection 202.3.
- 202.3 The Board promptly shall send a copy of the acknowledgment to:
- (a) The Director in the case of an appeal of a debarment or suspension;
 - (b) The contracting officer in the case of any other appeal; and

- (c) The Office of the Attorney General or the counsel for the contracting agency.

202.4 The Board shall notify the contracting agency to file the appeal file as prescribed in Section 203.

203 THE APPEAL FILE

203.1 Within thirty (30) days after receipt of the acknowledgement that a complaint has been docketed, the contracting agency shall assemble and transmit to the Board an appeal file consisting of all documents pertinent to the appeal, including:

- (a) The decision from which the appeal is taken;
- (b) The contract, including specifications and pertinent amendments, plans, and drawings;
- (c) All correspondence between the parties relevant to the appeal, including the letter or letters of claim in response to which the decision was issued;
- (d) Transcripts of any testimony taken during the course of proceedings, and affidavits or statements of any witnesses on the matter in dispute made prior to the filing of the complaint with the Board; and
- (e) Any additional information considered relevant to the appeal.

203.2 Within the same thirty (30) day time period, the contracting agency shall furnish the appellant a copy of each document submitted to the Board, except those in Subsection 203.1 (b) above. As to the latter, a list furnished appellant indicating contractual documents submitted to the Board will suffice.

203.3 Within thirty (30) days after receipt of a copy of the appeal file assembled by the contracting agency, the appellant shall transmit to the Board any documents or other tangible things not contained therein which are considered relevant to the appeal, and shall furnish a copy of each document to the attorney representing the contracting agency.

203.4 The Board may, at any time during the pendency of the appeal, require either party to supplement the appeal file or record by filing other documents and tangible things.

203.5 All exhibits in the appeal file shall be considered, without further action by the parties, a part of the record upon which the Board will render its decision. However, a party may object, for reasons stated, to consideration of a particular document reasonably in advance of a hearing, or, if there is no hearing, of closing the record. If an objection is made, the Board shall remove the document from the

appeal file and permit the party offering the document to move its admission as evidence.

203.6 Documents in the appeal file may be originals or legible facsimiles or authenticated copies, and shall be arranged in chronological order where practicable, numbered sequentially, tabbed, and indexed to identify the contents of the file.

203.7 Original copies of documents may be withdrawn from the appeal file, with the Board's consent, if an acceptable copy is substituted.

204 JUDICIAL NOTICE

204.1 The record in each case may also include such matters as the Board may expressly take notice of.

205 ANSWER

205.1 Within thirty (30) days from receipt of the complaint, the contracting agency shall file an answer with the Board. If filed on paper, the contracting agency shall file an original and two (2) copies of the answer and attachments.

205.2 The contracting agency shall serve a copy of the answer on the appellant, or its attorney and, unless served electronically, provide proof of service to the Board.

205.3 The answer shall set forth simple, concise and direct statements of the contracting agency's defenses to each claim asserted by the appellant, and shall include any affirmative defenses or counterclaims available.

205.4 In lieu of answering, the contracting agency may file a dispositive motion. If the motion is filed and denied by the Board, in whole or in part, the answer shall be filed no later than thirty (30) days after the contracting agency receives the Board's ruling on the motion.

205.5 If no answer or motion is received from the contracting agency within thirty (30) days from receipt of the complaint, the Board may, in its discretion, enter a general denial to the appeal, and the appellant shall be so notified, or the Board may consider the failure to answer as an admission of the claims of the appellant.

206 SUPPLEMENTAL PLEADINGS

206.1 The Board, upon its own initiative, or upon application by a party, may order a party to make a more definite statement of the complaint or answer, or to reply to an answer.

207 AMENDMENT OF PLEADINGS

207.1 The Board may, in its discretion, and within the proper scope of the appeal, permit either party to amend its pleading upon conditions fair to both parties.

207.2 When issues within the proper scope of the appeal have not been raised by the pleadings but are tried by express or implied consent of the parties or by permission of the Board, they shall be treated in all respects as if they had been raised in the pleadings. In these instances, motions to amend the pleadings to conform to the proof may be made but are not required. If evidence is objected to at a hearing on the ground that it is not within the issues raised by the pleadings, it may be admitted within the proper scope of the appeal, provided, however, that the objecting party may be granted a continuance if necessary to enable it to meet the evidence.

208 ELECTION OF PROCEDURE

208.1 After the complaint, answer, appeal file and any supplemental pleadings have been filed, each party shall inform the Board whether it desires a hearing, as prescribed by Section 211, or whether it desires to submit its case on the record without a hearing, as prescribed by Section 209.

209 SUBMISSION ON THE RECORD

209.1 Both parties may elect to waive a fact-finding hearing and to submit the case on the record.

209.2 Submission of the case without a hearing shall not relieve the parties from providing the facts supporting their allegations and defenses.

209.3 Either party may apply to the Board to supplement the record by filing affidavits, depositions, admissions, answers to interrogatories, and stipulations.

209.4 The Board may permit the record to be supplemented by oral argument and briefs.

210 PREHEARING PROCEDURES

210.1 The Board may, upon its own initiative, or upon application of either party, arrange for a telephone conference or direct the parties to appear before the Board at a specified time and place, prior to or during the course of a hearing, to consider the following:

- (a) Settlement of part or all of the dispute;
- (b) The simplification of issues;

- (c) The necessity or desirability of amending the pleadings;
- (d) The possibility of obtaining admission of fact and stipulations concerning the use of documents to avoid unnecessary proof;
- (e) The limitation of the number of witnesses;
- (f) The possibility of prior mutual exchange of prepared testimony and exhibits between the parties;
- (g) A schedule for the completion of discovery, if discovery is deemed necessary, and has not been completed; and
- (h) Any other matters that may aid in shortening the hearing on the merits and in the disposition of the appeal.

210.2 The Board shall make an order or memorandum which shall recite the action taken at the conference. This order or memorandum, when filed, shall be a part of the record in the appeal and shall control the subsequent course of the appeal unless modified by the Board.

210.3 The Board may, on its initiative or upon application of either party, order the parties to file prehearing briefs explaining and analyzing the legal issues in any case.

210.4 Pleadings, discovery, and other prehearing activity shall be allowed only as consistent with the requirement to conduct the hearing on the date scheduled, or, if no hearing is scheduled, to close the record in a reasonable time. The Board, at its discretion, may impose shortened time periods for any actions prescribed or allowed under these rules.

211 HEARINGS

211.1 The Board shall provide the parties at least seven (7) business days' notice of the time and place of a hearing, but the notice may be waived by the parties.

211.2 All hearings on the merits shall be open to the public. The Board may limit access to testimony covered by a protective order entered in the case pursuant to Section 104.

211.3 Questions concerning the admissibility of evidence and other matters that may arise in the course of the hearing shall be ruled upon by the presiding administrative judge, or, if necessary, by a majority vote of the designated panel. A decision upon the merits, or a final disposition of any appeal or part thereof, shall be by majority vote of the designated panel, except as provided in Subsection 215.5.

- 211.4 Witnesses at hearings shall be examined orally under oath or affirmation, which shall be administered by the presiding administrative judge or any member of the assigned panel. Any member of the panel may question any witness at any time during or after examination or cross-examination by the parties.
- 211.5 An official reporter selected by the District shall make an official transcript of the proceedings at hearings on the merits. After the close of a hearing this transcript, together with any exhibits, briefs, or other documents filed in the proceeding, shall be filed with the Board and become a part of the record. No other recordings of the proceedings will be made.
- 211.6 The official reporter shall transmit copies of the transcript to the Board and the contracting agency. Copies of the official transcript shall be supplied to other parties by the official reporter at rates determined between the official reporter and the parties.
- 211.7 Motions to correct an official transcript shall be filed with the Board within fifteen (15) days after the receipt of the last portion of the transcript, and shall certify the date when the last portion of the transcript was received by the maker of the motion.
- 211.8 Witnesses are to be excluded from the hearing room so they cannot hear the testimony of other witnesses, except a party who is an individual, the designated representative of a party which is an entity, someone authorized by statute to be present, or a person whose presence is essential to the presentation of the party's case.

212 POST HEARING BRIEFS

- 212.1 Unless filed electronically in accordance with Chapter 4, an original and two (2) copies of post hearing briefs shall be submitted as directed by the Board at the conclusion of the hearing.
- 212.2 Briefs and any memoranda of law shall be filed electronically in accordance with Chapter 4, or be typewritten on white bond 8½ x 11 inch paper and shall be double spaced except for quotations.
- 212.3 Briefs shall contain, in the following order, a short procedural history of the case, a table of contents, a table of authorities cited, a concise summary of argument, proposed findings of fact with citations to those places in the record where supporting evidence can be found, proposed conclusions of law with citations to supporting legal authorities, and the relief desired by the party.

213 RECORD

- 213.1 The record of the appeal shall include the complaint, answer, appeal file, all motions and other submissions filed by the parties with the Board pursuant to these rules; all correspondence exchanged between the Board and the parties or their attorney; transcripts made of hearings before the Board; all exhibits and other evidence admitted to the record; all findings, decisions, opinions, and orders of the Board; and such other matters as the Board may expressly take notice of.

214 DECISIONS

- 214.1 All decisions shall be in writing and based solely on the record as prescribed in Subsection 213.1.

- 214.2 With each decision finally disposing of an appeal or any part thereof, the Board shall file separate findings of fact and conclusions of law unless the findings of fact and conclusions of law appear therein.

- 214.3 A copy of the decision shall be transmitted by the Board to each party or his or her attorney.

- 214.4 Judicial Review of Board Decisions on Appeals.

- (a) A contractor may appeal the Board decision to the District of Columbia Court of Appeals within one hundred twenty (120) days after the date of receipt of the Board's decision.
- (b) If the District determines that an appeal should be taken, the Director, with the prior approval of the Office of the Attorney General, may appeal the Board's decision to the District of Columbia Court of Appeals within one hundred twenty (120) days after the date of the receipt of the Board's decision.
- (c) When a Board decision is appealed, the appealing party must also provide a copy of the notice of appeal to the Board.

215 OPTIONAL SMALL CLAIMS (EXPEDITED) PROCEDURES

- 215.1 In an appeal where the amount in dispute is ten thousand dollars (\$10,000) or less, the appellant may elect to have the appeal adjudicated under the small claims procedure set forth in this rule, or the accelerated procedure in Section 216.

- 215.2 Whenever possible, decisions under the small claims procedure will be rendered within ninety (90) days from the date on which the contractor files an appeal. The election shall be stated in the complaint, except that the Board for good cause may permit the election to be made after the complaint is filed. Once the election is

made, it may not be withdrawn except with the permission of the Board for good cause shown.

215.3 The following time periods shall apply for cases proceeding as a small claims appeal unless otherwise ordered by the Board:

- (a) Within ten (10) business days of receipt of notice of the appellant's election, the respondent shall submit to the Board a copy of the contract, the contracting agency's final decision, and the appellant's claim letter or letters; other documents from the appeal file prescribed in Section 203 shall be submitted as the Board directs.
- (b) Within fifteen (15) days after the Board has received the appellant's election, the designated administrative judge shall take the following action in an informal meeting or a telephone conference with the parties:
 - (1) Formulate and simplify the issues;
 - (2) Establish a simplified procedure appropriate to the appeal;
 - (3) Determine whether either party wants a hearing, and, if so, fix a time and place;
 - (4) Require the respondent to furnish any additional documents relevant to the appeal; and
 - (5) Establish an expedited schedule for resolution of the appeal.

215.4 Pleadings, discovery, and other prehearing activity shall be allowed only as consistent with the requirement to conduct the hearing on the date scheduled, or, if no hearing is scheduled, to close the record on a date that will allow decisions within the ninety (90)-day limit. The Board, at its discretion, may impose shortened time periods for any actions prescribed or allowed under these rules as necessary to enable the Board to decide the appeal within the time limit.

215.5 Written decisions by the Board in cases adjudicated under the small claims (expedited) procedure shall be short and may contain abbreviated findings of fact and conclusions of law. The decisions may be rendered for the Board by a single administrative judge. A decision under the small claims procedure shall have no precedential value in future cases before the Board.

215.6 In a case where a small claims procedure has been elected and in which there has been a hearing, the administrative judge presiding at the hearing may, in the judge's discretion, at the conclusion of the hearing and after entertaining any oral arguments as deemed appropriate, render on the record oral findings of fact, conclusions of law, and a decision of the appeal.

- 215.7 Whenever an oral decision is rendered pursuant to Subsection 215.6, the Board shall subsequently furnish the parties with a written copy of the oral decision for record and payment purposes, and to establish the starting date for the period for filing a motion for reconsideration or a judicial appeal.

216 OPTIONAL ACCELERATED PROCEDURES

- 216.1 In appeals where the amount in dispute is fifty thousand dollars (\$50,000) or less, the appellant may elect to have the appeal adjudicated under the accelerated procedure set forth in this rule. The appellant's election must be made within thirty (30) days after the answer is filed.
- 216.2 Decisions under the accelerated procedure shall be rendered within one hundred and eighty (180) days from the date the Board receives notice that the appellant has elected to utilize the accelerated procedure.
- 216.3 The appellant's election herein, once exercised, may not be withdrawn, except with the permission of the Board for good cause shown.
- 216.4 In a case proceeding as an accelerated appeal, the Board shall encourage the parties to waive or limit pleadings, discovery, and briefs to the maximum possible extent consistent with the adequate presentation of their factual and legal positions.
- 216.5 Within thirty (30) days of receiving appellant's election of the accelerated procedure, the respondent shall file the appeal file as prescribed by Section 203.
- 216.6 Within forty-five (45) days of receiving appellant's election of the accelerated procedure, the Board shall convene an informal meeting, or a telephone conference, with the parties and shall proceed with the case.
- 216.7 The Board shall permit discovery by the parties consistent with its requirement to decide their case under the time limit imposed by Subsection 216.2.

217 ALTERNATIVE DISPUTE RESOLUTION

- 217.1 Availability of ADR procedures. The Board will make its services available for ADR proceedings in contract appeals and protest matters involving District agencies.
- (a) ADR subsequent to docketing of case at the Board. Parties are encouraged to consider the feasibility of using ADR as soon as their case is docketed. If, however, at any time during the course of a Board proceeding, the parties agree that their dispute may be resolved through the use of an ADR technique, the presiding judge may suspend proceedings for a reasonable

period of time while the parties and the Board attempt to resolve the dispute in this manner. The use of an ADR technique will not toll any relevant statutory time limit for deciding the case.

- (b) Other ADR. Upon request, the Board will make a Board Neutral available for an ADR proceeding involving a District agency in any contract, protest, or procurement matter at any stage of a procurement, even if no contracting officer decision has been issued or is contemplated. To initiate an ADR proceeding, the parties shall jointly request the ADR in writing and direct such request to the Chief Administrative Judge. The Board will provide ADR services on a reimbursable basis.

217.2 Conduct of ADR.

- (a) Selection of Board Neutral. If ADR is agreed to by the parties and the Board, the parties may request the appointment of one or more Board judges to act as a Board Neutral or Neutrals. The parties shall request that the Chief Administrative Judge appoint a particular judge or judges as the Board Neutral, or appoint any judge or judges as the Neutral. If, when ADR has been requested for a case that has already been docketed with the Board, as provided in Subsection 217.1(a), the parties may request that the presiding judge serve as the Board Neutral. In such situation, when the ADR is unsuccessful, (i) if the ADR has involved mediation, the presiding judge shall not retain the case, and (ii) if the ADR has not involved mediation, the presiding judge, after considering the parties' views, shall decide whether to retain the case.
- (b) Retention and confidentiality of materials. The Board will review materials submitted by a party for an ADR proceeding, but will not retain such materials after the proceeding is concluded or otherwise terminated. Material created by a party for the purpose of an ADR proceeding is to be used solely for that proceeding unless the parties agree otherwise. Parties may request a protective order in an ADR proceeding in the manner provided in Section 104.

217.3 Types of ADR. ADR is not defined by any single procedure or set of procedures. The Board will consider the use of any technique proposed by the parties which is deemed to be fair, reasonable, and in the best interest of the parties, the Board, and the resolution of disputes. The following are examples of available techniques:

- (a) Mediation. The Board Neutral, as mediator, aids the parties in settling their case. The mediator engages in ex parte discussions with the parties and facilitates the transmission of settlement offers. Although not authorized to render a decision in the dispute, the mediator may discuss with the parties, on a confidential basis, the strengths and weaknesses of

their positions. No judge who has participated in discussions about the mediation will participate in a Board decision of the case if the ADR is unsuccessful.

- (b) Neutral case evaluation. The parties agree to present to the Board Neutral information on which the Board Neutral bases a non-binding, oral, advisory opinion. The manner in which the information is presented will vary from case to case depending upon the agreement of the parties. Presentations generally fall between two extremes, ranging from an informal proffer of evidence together with limited argument from the parties to a more formal presentation of oral and documentary evidence and argument from counsel, such as through a mini-trial.
- (c) Binding decision. One or more Board judges render a decision which, by prior agreement of the parties, is to be binding and non-appealable. As in the non-binding evaluation of a case by a Board Neutral, the manner in which information is presented for a binding decision may vary depending on the circumstances of the particular case.
- (d) Other procedures. In addition to other ADR techniques, including modifications to those listed above, as agreed to by the Board and parties, the parties may use ADR techniques that do not require direct Board involvement.
- (e) Selective use of standard procedures. Parties considering the use of ADR are encouraged to adapt for their purposes any provisions in the Board's rules which they believe will be useful. This includes but is not limited to provisions concerning record submittal, prehearing discovery procedures, and hearings.

Chapter 3, PROTEST PROCESSES OF THE CONTRACT APPEALS BOARD, is amended to read as follows:

300 PARTIES ENTITLED TO PROTEST

- 300.1 An aggrieved person, as defined in Subsection 199.1, may protest to the Board a solicitation issued by or for a District contracting agency for the procurement of property or services, or a proposed award, or the award of such a contract.

301 FORM AND CONTENT OF PROTEST

- 301.1 All protests shall be in writing, addressed to the Board, and shall include the following:

- (a) The name, address, and telephone number of the protester;

- (b) The identity of the contracting agency, the number and date of the solicitation, and if a contract has been awarded, the number and date of the contract and to whom the contract was awarded, if known;
- (c) A clear and concise statement of the legal and factual grounds of the protest, including copies of relevant documents, and citations to statutes, regulations, or solicitation provisions claimed to be violated;
- (d) Information establishing the timeliness of the protest (see Section 302);
- (e) Information establishing that the protester is an aggrieved person for the purpose of filing the protest (see Subsection 199.1); and
- (f) The relief sought by the protester.

In addition, a protest may request a protective order, request specific documents relevant to the protest grounds, and request a hearing.

- 301.2 Protests shall be signed by the protester or by an authorized representative or attorney.
- 301.3 Protests are not required to be formal or technical but shall be logically arranged and legally sufficient.
- 301.4 A protest may be dismissed for failure to comply with any of the requirements of this Rule.

302 FILING THE PROTEST WITH THE BOARD; TIME LIMITATIONS

- 302.1 Unless filed electronically in accordance with Chapter 4, the protester shall file an original and two (2) paper copies of its protest, including all attachments, with the Board by hand delivery, mail, or commercial carrier within the time limitations established by law and set forth below in Subsection 302.2. The protester shall also serve a copy of the protest, including all attachments, on the contracting agency and shall furnish the Board with proof of service.
- 302.2 Time Limitations. Filing occurs when the protest is received on paper by the Board or electronically by the Board's designated electronic filing system in accordance with Chapter 4. The following paragraphs specify the time limitations associated with the filing of a protest.
 - (a) A protest based upon alleged improprieties in a solicitation which are apparent prior to bid opening or the time set for receipt of initial proposals shall be filed with the Board prior to bid opening or the time set for receipt of initial proposals. In procurements where proposals are requested, alleged improprieties which do not exist in the initial solicitation, but

which are subsequently incorporated into the solicitation, must be protested not later than the next closing time for receipt of proposals following the incorporation.

- (b) Protests other than those covered in paragraph (a) shall be filed with the Board not later than ten (10) business days after the basis of the protest is known or should have been known, whichever is earlier.

302.3 A protest concerning a procurement conducted by an agency exempt from the Procurement Practices Reform Act, which has entered into an agreement with the Board under Subsection 101.8 to resolve protests, shall be filed with the Board within the time prescribed by the agency's regulations. If the agency has no regulations placing limits on the time for filing protests, these rules shall govern.

303 BOARD DOCKETING OF PROTESTS

303.1 Docketing of Protests. When a protest has been accepted for filing by the Board, it shall be docketed immediately.

- (a) The Board shall prepare an acknowledgment that the protest has been docketed, indicating the name of the protester, the solicitation at issue, the Board's protest docket number, and the *District of Columbia Register* citation to the current rules of the Board. In addition, the Board shall advise the protester of the identity of the persons furnished with the acknowledgment.
- (b) Within one (1) business day of receipt of the protest filing, the Board shall send a copy of the acknowledgment to:
 - (1) The contracting officer;
 - (2) The Office of the Attorney General or the counsel for an independent agency; and
 - (3) The protester.
- (c) The parties will also be notified that the acknowledgment is available at the Board for pickup.

303.2 The acknowledgment shall notify the contracting officer to file the Agency Report as prescribed in Section 305.

303.3 The contracting agency shall immediately give notice of the protest to:

- (a) In the case of a protest alleging solicitation improprieties, prospective bidders or offerors who can reasonably be ascertained;

- (b) In protests other than those covered in paragraph (a), (i) if a contract has not been awarded, to all bidders or offerors who appear to have a reasonable prospect of receiving an award; (ii) if a contract has been awarded, to the contract awardee and all other bidders or offerors who appear to have a reasonable prospect of receiving an award if the protest is sustained.

The contracting agency shall furnish copies of the protest submissions to those parties, except where disclosure of the information is prohibited by law, with instructions to communicate further directly with the Board. All parties shall furnish copies of all protest communications to the contracting agency and to other participating parties.

- 303.4 All protest communications shall be sent by means reasonably calculated to effect timely delivery.

304 AUTOMATIC STAY; DIRECTOR DETERMINATION TO PROCEED

- 304.1 Automatic Stay Procedures. Except as provided by law, no contract may be awarded in any procurement after the contracting officer has received the notice of protest pursuant to Subsection 303.1 (b) and while the protest is pending.
- 304.2 If an award has already been made but the contracting officer receives the notice of protest within eleven (11) business days after the date of award, the contracting officer shall immediately direct the awardee to cease performance under the contract and to suspend any related activities that may result in additional obligations being incurred by the District under that contract. Except as provided by law, performance and related activities suspended pursuant to law may not be resumed while the protest is pending.
- 304.3 Director Determination to Proceed with Performance. Performance under a protested procurement may proceed, or award may be made, while a protest is pending only if the Director makes a written determination, supported by substantial evidence, that urgent and compelling circumstances that significantly affect interests of the District will not permit waiting for the decision of the Board concerning the protest. A copy of the determination shall be provided within one business day of issuance to both the Board and the protester.
- 304.4 Protester Challenge. If the protester wishes to challenge a determination made by the Director pursuant to Subsection 304.3, the protester may do so by filing a written motion with the Board (with same day service on the District) within five (5) business days of receipt of a copy of the Director's determination. The District shall file a written response with the Board (with same day service on the protester) within two (2) business days of receipt of the protester's motion. The

protester may file a reply within one (1) business day of receipt of the District's response.

304.5 Board Decision on Protester Challenge. The Board shall issue a decision on the protester's motion within ten (10) business days after the date the written motion is filed by the protester.

305 AGENCY REPORT

305.1 As expeditiously as possible but no later than twenty (20) days after receipt of the Board acknowledgment specified in Subsection 303.1 (a), the contracting agency shall file an Agency Report with the Board which shall include, where relevant:

- (a) The procurement solicitation;
- (b) The bid or proposal submitted by the protester;
- (c) The bid or proposal which is being considered for award, or which has resulted in an award, if any;
- (d) Bid tabulation sheets or proposal selection reports and evaluation reports, work papers, and scoring sheets;
- (e) The contracting agency position and defense for each ground of the protest, including the facts, legal principles, and precedents supporting its position; and
- (f) Any other documents and exhibits that are relevant to the protest.

305.2 The contracting agency shall simultaneously provide a copy of the Agency Report to the protester and all interested parties.

305.3 Copies of the Agency Report provided under Subsection 305.2 shall include all relevant documents including documents containing protected information. Copies of the Agency Report served on the protester or an intervenor shall be redacted to exclude protected information unless such parties have been admitted under a protective order.

305.4 The Board may require parties to supplement the Agency Report by filing other documents and tangible things. Any motion by a party to compel the District to supplement the Agency Report must be filed within five (5) days after receipt of the Agency Report.

305.5 All exhibits in the Agency Report shall be considered, without further action by the parties, a part of the record upon which the Board will render its decision. However, a party may object, for reasons stated, to consideration of a particular

document reasonably in advance of closing the record. If an objection is made, the Board shall remove the documents from the Agency Report and permit the party offering the document to move its admission as evidence.

305.6 Documents in the Agency Report may be originals or legible facsimiles or authenticated copies, and shall be arranged in chronological order where practicable, numbered sequentially, tabbed, and indexed to identify the contents of the file.

305.7 Original copies of documents may be withdrawn from the Agency Report, with the Board's consent, if an acceptable copy is substituted.

305.8 The contracting agency may request, by motion, an extension of the deadline for filing the Agency Report and shall explain why an extension is needed. Extensions are to be considered exceptional and will be granted only for good cause.

305.9 When a contracting agency fails to submit an Agency Report, the Board may treat the factual allegations contained in the protest as conceded. When a contracting agency fails to challenge or rebut a factual allegation in the protest, the Board may treat the factual allegation as conceded.

306 DISPOSITIVE MOTION IN LIEU OF REPORT

306.1 In lieu of filing the Agency Report, the contracting agency may file a dispositive motion with the Board and serve it on all parties. If the motion is filed and denied by the Board in whole or in part, the Agency Report shall be filed no later than ten (10) days after receipt of the Board's ruling or within a lesser period as the Board may order.

307 COMMENTS ON AGENCY REPORT OR MOTION

307.1 Within seven (7) business days after receipt of the Agency Report, or the dispositive motion prescribed in Subsection 306.1, the protester and interested parties may file a reply or response to either which shall state the party's factual and legal agreement or opposition to the Agency Report or motion.

307.2 All parties shall be served with a copy of the comments and proof of service provided to the Board.

307.3 Failure of the protester to file comments, or to file a statement requesting that the case be decided on the existing record, or to request an extension of time for filing, shall result in closing the record of the case and may result in dismissal of the protest.

- 307.4 When a protester fails to file comments on an Agency Report, factual allegations in the Agency Report's statement of facts not otherwise contradicted by the protest, or the documents in the record, may be treated by the Board as conceded.

308 SUMMARY DISPOSITION OF PROTESTS

- 308.1 When a protest is, on its face, invalid or untimely filed, or otherwise not for consideration, the Board shall summarily dismiss the protest without requiring submission of an Agency Report.
- 308.2 Frivolous Protests. The Board may dismiss, at any stage of the proceedings, any protest, or portion of a protest, it deems frivolous. In addition, the Board may require the protester to pay the agency attorney fees, at the rate of one hundred dollars (\$100) per hour, for time counsel spent representing the agency in defending the frivolous protest or its frivolous part. If the entire protest is dismissed on frivolous grounds, the Board may also assess the protester damages for each day the contract was suspended equal to the amount of liquidated damages specified in the contract for late completion of the contract. The Board shall not determine damages, if liquidated damages are not specified in the contract. In addition, counsel for the protester may be suspended or barred from practicing before the Board.
- 308.3 A motion for assessment of agency attorney fees and/or damages on account of defending against a frivolous protest shall be submitted by the contracting agency during protest proceedings or within twenty (20) days of receipt of a Board decision determining that a protest in whole or in part was frivolous.
- 308.4 The motion shall be accompanied by sufficient documentation supporting the requested costs and/or damages.
- 308.5 The protester may, within fifteen (15) days after its receipt of the contracting agency's motion, file a written response to the motion.

309 DISCOVERY

- 309.1 Discovery in protest cases shall be permitted only with approval by the Board and is available only to the protester, the contracting agency, and an intervenor.
- 309.2 The Board may permit a protester or intervenor to engage in discovery if no Agency Report is filed in order to provide a sufficient factual basis for the fair and just resolution of the protest.
- 309.3 The cost of discovery pursuant to Subsection 309.2 may be borne by the contracting agency as equitably determined by the Board.

310 CONFERENCE

- 310.1 A conference may be held at the discretion of the Board upon its own motion or upon the request of the protester, the contracting agency, or another proper party who filed comments on the Agency Report in accordance with Section 307.
- 310.2 A request for a conference shall be made promptly in order to receive favorable consideration.
- 310.3 The protester, all proper parties who filed comments, and the contracting agency may attend the conference and the Board may request the attendance of other persons as it deems appropriate.
- 310.4 The conference shall be an informal meeting between the Board and the parties to discuss matters relevant to the protest without strict regard to formal rules of evidence or procedure. These matters may include:
- (a) Simplifying or clarifying the issues including the elimination of frivolous allegations or defenses;
 - (b) Stipulations, admissions, or agreements which will avoid unnecessary proof;
 - (c) Clarification of matters already in the record; and
 - (d) Any other matter which might aid in a just and expeditious disposition of the protest.
- 310.5 No direct or cross-examination shall be permitted at the conference.
- 310.6 The conference may be electronically recorded by the Board at its discretion. If the preparation of a transcript is ordered by the Board, any party desiring a copy of the transcript shall be responsible for obtaining one at the party's expense.
- 310.7 The Board may require or permit the submission of briefs, legal memoranda, or proposed findings of fact and conclusions of law after the conference has been completed. A party failing to attend the conference shall not be permitted to file a post-conference submission.

311 EVIDENTIARY HEARINGS

- 311.1 If the Board determines that there is a genuine issue of material fact which cannot be resolved on the written record, the Board may order an evidentiary hearing. Ordinarily, hearings will be conducted at the Board, however, the Board may at its discretion order hearings by other electronic means, including by telephone.

- 311.2 At the hearing, the Board shall receive from the parties probative evidence or relevant testimony under oath or affirmation. Direct and cross-examination of witnesses shall be allowed at the hearing.
- 311.3 The hearing shall be stenographically transcribed or electronically recorded. Stenographic transcriptions shall be arranged in accordance with Subsection 211.5. Any party desiring a copy of the transcript shall be responsible for obtaining one at the party's expense.
- 311.4 At the conclusion of the hearing, the Board may order or permit the submission of proposed findings of fact and conclusions of law.

312 DECISION

- 312.1 All decisions shall be in writing, based solely on the record, issued sixty (60) business days from the protest filing date, and transmitted to each party who has participated in the protest before the Board.
- 312.2 Judicial Review of Board decisions on Protests.
- (a) A protester may seek judicial review of the Board's decision by filing a petition for review of agency action in the Superior Court of the District of Columbia.
- (b) If the District determines that it should seek judicial review, the Director, with the prior approval of the Office of the Attorney General, may seek judicial review of the Board's decision in the Superior Court of the District of Columbia.

[See *District of Columbia v. Group Ins. Admin.*, 633 A.2d 2, 14 (D.C. 1993); *Francis v. Recycling Solutions, Inc.*, 695 A.2d 63, 70 (D.C. 1997).]

313 RECONSIDERATION

- 313.1 The protester, the contracting agency, or an interested party who filed comments on the Agency Report may by motion request the Board to reconsider a decision.
- 313.2 Motions for reconsideration shall be conducted in accordance with Section 117 of these rules, except that the time periods contained in Subsection 117.2 and Subsection 117.4 shall be shortened to fifteen (15) days and seven (7) days respectively.

314 REMEDIES

- 314.1 If the Board determines, in sustaining a protest, that the solicitation, proposed award, or award does not comply with the applicable law, regulations, or terms

and conditions of the solicitation, the Board may order the contracting agency to do one or more of the following:

- (a) Terminate the contract for the convenience of the District government;
- (b) Refrain from exercising any options under the contract;
- (c) Recompete the contract;
- (d) Issue a new solicitation;
- (e) Award a contract consistent with the law and regulations; or
- (f) Take such other action, except enjoining a contract award, as the Board may direct.

If the Board determines that a contract is void pursuant to D.C. Official Code § 2-359.02, the Board shall direct that the contract be canceled consistent with the requirements of D.C. Official Code § 2-359.02(c).

314.2 In determining the appropriate remedy, the Board shall consider the circumstances surrounding the procurement, including, but not limited to, the following factors:

- (a) Best interest of the District government;
- (b) Seriousness of the procurement deficiency or violation;
- (c) Existence of prejudice to other bidders or offerors;
- (d) Maintaining the integrity of the procurement system; and
- (e) Good faith of District government officials and other parties.

314.3 In determining whether to terminate a contract, the Board shall consider the following additional factors:

- (a) Extent of contract performance;
- (b) Impact of termination on the contracting agency's activities and mission;
- (c) Costs to the government from termination; and
- (d) Urgent need for the procurement.

- 314.4 If the Board finds that the District government actions were arbitrary and capricious, the Board may, when requested, award the protester's reasonable bid or proposal preparation costs and costs of pursuing the protest, but not legal fees.
- 314.5 A motion for bid or proposal preparation costs and costs of pursuing the protest shall be submitted by the protester within twenty (20) days of receipt of the Board's decision.
- 314.6 The motion shall be accompanied by sufficient documentation supporting the requested costs and an appropriate proposed order for the Board.
- 314.7 The contracting agency may, within fifteen (15) days after its receipt of the protester's motion, file a written response to the motion.
- 314.8 At the request of the protester or the District government or on its own initiative, the Board may conduct a hearing on the motion before issuing a ruling.

Chapter 4, ELECTRONIC FILING, is amended to read as follows:

400 ELECTRONIC FILING OF PLEADINGS AND OTHER DOCUMENTS

- 400.1 All pleadings, motions, memoranda of law, orders, or other documents may be filed electronically through the Board's designated vendor, File & ServeXpress ("Vendor") which can be contacted online at: www.fileandservexpress.com. Documents may be filed as either E Documents or E Images as defined under this Rule. The Board may at its discretion designate alternative and/or additional electronic filing systems.

401 ASSIGNMENT BY THE VENDOR OF PERSONAL IDENTIFICATION NUMBERS

- 401.1 Upon receipt by the Vendor of a properly executed subscriber agreement at their website, the Vendor shall assign a confidential password to the attorney or other designated representative of a party before the Board which must be used to file, serve, receive, review, and retrieve electronically filed pleadings, orders, and other documents. An attorney or other authorized user shall be responsible for any use of his or her password.

402 MAINTENANCE OF ORIGINAL DOCUMENT

- 402.1 Unless otherwise ordered by the Board, an original of all documents filed electronically, including original signatures, shall be maintained by the party filing the document and shall be made available, upon reasonable notice, for inspection by other counsel or the Board. From time to time, it may be necessary to provide the Board with a hard copy of an electronically filed document.

403 TIME FOR FILING AND EFFECT OF USE OF E FILING

- 403.1 Any pleading filed electronically shall be considered as filed with the Board when the transmission is completed ("authorized date and time"). Any document filed electronically with the Board before midnight local time at the Board's offices is deemed filed with the Board on that date; however, for the purpose of computing time for any other party to respond, any document filed on a day or at a time when the Board is not open for business shall be deemed to have been filed on the day and at the time of the next opening of the Board for business. In the event of service via facsimile, the Vendor's system will record the date and time the fax transmission was completed as proof of service. The Vendor is hereby appointed the agent of the Board as to the electronic filing, receipt, service, and/or retrieval of any pleading or document maintained electronically. Upon filing and receipt of a document, the Vendor shall issue a confirmation that the document has been received. The confirmation shall serve as proof that the document has been filed. A filer will receive email notification of documents subsequently rejected by the Board, and may be required to refile the instruments to meet necessary filing requirements.

404 SYSTEM OR USER FILING ERRORS

- 404.1 If the electronic filing is not filed with the Board because of (1) an error in the transmission of the document to the Vendor which was unknown to the sending party, (2) a failure to process the electronic filing when received by the Vendor, or (3) other technical problems experienced by the filer, the Board may upon satisfactory proof enter an order permitting the document to be filed nunc pro tunc to the date it was first attempted to be sent electronically.

405 FORM OF DOCUMENTS ELECTRONICALLY FILED

- 405.1 Format of Electronically Filed Documents. All electronically filed pleadings shall, to the extent practicable, be formatted in accordance with the applicable rules governing formatting of paper pleadings, and in such other and further format as the Board may require from time to time.
- 405.2 Representations by Using a Typographical Signature. Every pleading, document, and instrument electronically filed shall be deemed to have been signed by the attorney or declarant and shall bear a facsimile or typographical signature of such person, along with the typed name, address, telephone number, and Bar number of a signing attorney. Typographical signatures shall be styled "/s/ name" and shall be treated as personal signatures for all purposes under these Rules.
- 405.3 Electronic Title of Pleadings and Other Documents. The electronic title of each electronically filed pleading or other document ("paper"), shall include:

Party or parties filing the paper;

Nature of the paper;
Party or parties against whom relief, if any, is sought; and
Nature of the relief sought (*e.g.*, “Appellant’s Motion to Compel Discovery and for Sanctions against Appellee”).

406 MULTIPLE CASE FILING

406.1 Where counsel is filing a pleading in consolidated cases, a single filing in the lead case is deemed to be filed in all cases consolidated with it.

407 ELECTRONIC SERVICE OF PLEADINGS AND OTHER DOCUMENTS

407.1 Electronic and Facsimile Service. All parties or their representatives may make service upon other parties electronically through the E File Service. Parties who subscribe to the E File Service consent to receive electronic service of documents via the E Filing Service. Parties, or their designated counsel, shall receive all documents E Filed and E Served upon them via access to the Vendor's system over the Internet or, if a party or party’s designee has not subscribed to the Services, via facsimile transmission. For the purposes of this Rule, service of documents via facsimile is hereby authorized in addition to those methods of service permitted in Subsection 108.3.

407.2 Effect of Electronic Service of Filings. The electronic service of a pleading or other document shall be considered as valid and effective service on all parties and shall have the same legal effect as an original paper document. Proof of service required by Section 109 shall not be necessary for electronically filed documents.

407.3 Service on Parties; Time to Respond or Act. E Service shall be deemed complete at the time a document has been received by the Vendor's system as reflected by the authorized date and time appearing on the confirmation provided, however, for the purpose of computing time for any other party to respond, any document filed on a day or at a time when the Board is not open for business shall be deemed to have been filed at the time of next opening of the Board for business. If electronic service on a party does not occur because of (1) inaccessibility to the Vendor's system; (2) an error in the Vendor’s transmission of notice to the party being served, (3) the Vendor’s failure to process the electronic filing for service, or (4) the party was erroneously excluded from the service list, the party to be served shall, absent extraordinary circumstances, be entitled to an order extending the date for any response or the period within which any right, duty or other act must be performed.

In the event of service via facsimile, the Vendor’s system will record the date and time the fax transmission was completed as proof of service.

408 ELECTRONIC FILING AND SERVICE OF ORDERS AND OTHER PAPERS

408.1 The Board may issue, file, and serve notices, orders, and other documents electronically, subject to the provisions of these Rules.

409 SEALED DOCUMENTS

409.1 A motion for protective order may be filed and served electronically. Redacted copies of documents filed under seal may be filed and served electronically.

499 DEFINITIONS

499.1 Definitions

E Filing. Electronic transmission of an original document (pleading) to the Board via the Vendor's system. An E File consists of a document, an image, or both.

E Service. Electronic transmission of an original document (pleading) to all other designated recipients via the Vendor's system. Upon the completion of any transmission to the Vendor's system, a certified receipt is issued to the sender acknowledging receipt by the Vendor system.

E Document. An electronic file of a word processing document that contains almost exclusively text.

E Image. An electronic file of a document that has been scanned or converted to a graphical or image format.