

DEMYSTIFYING APPEALS BEFORE THE BOARDS OF CONTRACT APPEALS

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This blog frequently discusses appeals before the Armed Services Board of Contract Appeals (“ASBCA”) and the Civilian Board of Contract Appeals (“CBCA”). Although appeals may appear to be complex, there is generally a regular order of procedure that is followed.

Typically, in a complete appeal to either board, there will be 12 different procedural steps. The following is an explanation of each of these procedural steps.

1. **Notice of Appeal.** Appellant files Notice of Appeal (sometimes this may include a complaint but that is not required).
2. **Docketing.** The Recorder assigns a docket number and notifies the parties in writing.
3. **Appeal File**, known as the “Rule 4” or R4” File. The Government assembles and transmits an appeal file to the Board and the appellant within 30 days of the date the government receives the docketing notice. This should contain all relevant documents, including the contract, the claim submitted to the Contracting Officer, the Contracting Officer’s final decision and other relevant documents.
4. **Complaint.** The appellant must file a complaint within 30 days of the date it receives the docketing notice. The complaint should set forth, in numbered paragraphs: (1) Simple, concise, and direct statements of the appellant’s claims; (2) The basis of each claim; and (3) The amount of each claim.
5. **Answer.** The government must answer the complaint within 30 days of the date it receives the complaint. The answer should set forth simple, concise, and direct statements of the government’s defenses to each of the numbered paragraphs in the appellant’s claims.
6. **Discovery.** The parties may begin discovery as soon as the appellant files the complaint. Discovery may include depositions taken under oath, interrogatories, requests for the production of documents, and requests for admission.
7. **Motions.** Parties must file jurisdictional motions promptly; however, the board may defer its ruling until the hearing. Parties may also file appropriate non-jurisdictional motions, such as requests to compel production of documents, etc.
8. **Record Submissions.** Either party may waive its right to a hearing and submit its case on the written record. The parties may supplement the record with affidavits, depositions, admissions, and stipulations when they choose to submit their case on the written record.

9. **Hearings.** Both parties may offer evidence in the form of testimony and exhibits at a hearing. Witnesses generally testify under oath and are subject to cross-examination. The board may subpoena witnesses and documents at a party's request, although enforcement must be done through the courts if the witness refuses to testify. A court reporter will prepare a verbatim transcript of the proceedings.
10. **Briefs.** The parties may file post-hearing briefs after they receive the transcript and/or the record is closed. These are often used instead of summation (closing arguments) by the attorneys at the hearing, but it may be requested in addition to closing arguments.
11. **Decisions.** The Boards issue written decisions.
12. **Appeals.** Either party may appeal to the Court of Appeals for the Federal Circuit within 120 days of the date it receives the board's decision.

A typical appeal may take between six and eighteen months or more. However, There are also two types of faster procedures:

- (1) **Small claims** (where the dispute is \$50,000 less--or \$150,000 or less or if a small business concern) where the Board is required to make a decision, wherever possible, within 120 days; and
- (2) **Accelerated Procedure** (where the amount in dispute is \$100,000 or less) where the Board is required to make a decision, wherever possible, within 180 days

In both types of the faster appeals, the Board's decision will be short and contain only summary findings of facts and conclusions. Small claims decisions have no value as precedent and may not be appealed.

Finally, both Boards offer a wide variety of Alternative Dispute Resolution ("ADR") including:

- (1) Facilitative mediation (a neutral aids the parties in settlement)
- (2) Evaluative mediation (facilitative mediation with the neutral informally assessing and advising on the strengths and weaknesses of each side's case)
- (3) Mini-trial (neutral hears evidence and then attempts mediation)
- (4) Non-binding advisory opinion (neutral renders a nonbinding opinion)
- (5) Summary binding decision (neutral renders brief written decision which is binding, precedential and non-appealable)
- (6) Other informal procedures structured and tailored to suit the requirements of the case (for example, the use of ADR neutrals outside the Board and techniques which do not require Board involvement)

All ADR is preceded by a written ADR agreement prior to its initiation.