



CONSOLIDATION OF THE CIVILIAN BOARDS OF CONTRACT APPEALS

Section 847 of the FY 2006 Defense Authorization Act (Pub. L. No. 109-63) consolidated the eight existing boards of contract appeals for the civilian agencies. The legislation consolidated the General Services Administration Board of Contract Appeals (“GSBCA”), the Department of Transportation Board of Contract Appeals (“DOT BCA”), the Department of Agriculture Board of Contract Appeals (“AGBCA”), the Department of Veterans Affairs Board of Contract Appeals (“VABCA”), the Department of Energy Board of Contract Appeals (“EBCA”), the Department of Interior Board of Contract Appeals (“IBCA”), the Department of Housing and Urban Development Board of Contract Appeals (“HUD BCA”), and the Department of Labor Board of Contract Appeals (“LBCA”) into a single new Civilian Board of Contract Appeals. The legislation had no impact on the Armed Services Board of Contract Appeals (“ASBCA”), the Postal Services Board of Contract Appeals (“PSBCA”), and the Tennessee Valley Authority Board of Contract Appeals.

On April 21, 2006, the George Washington University Law School Government Procurement Law Program, the BCA Bar Association, and the Federal Bar Association sponsored a colloquium on the consolidation of the civilian boards of contract appeals. The purpose of the colloquium was to discuss the impact of the consolidation on the current practice before the boards. Below is a summary of the highlights of the colloquium:

1. Organization and Location of the New Civilian Board of Contract Appeals
 - ♦ The new Civilian Board of Contract Appeals will take effect on January 7, 2007. The new Civilian Board of Contract Appeals will be part of GSA. GSA intends to lease office space located at 1800 M Street, N.W., Washington, D.C. (three blocks from the DC office) to house the new board.
 - ♦ Judge Stephen Daniels (currently the Chairman of the GSBCA) has been designated the Chairman of the new Civilian Board of Contract Appeals.
 - ♦ Currently, there are twenty-three judges on the eight boards. Twenty of the judges will be transferred over to the new Civilian Board of Contract Appeals. The remaining three judges have indicated that they will retire prior to January 7, 2007. Judge Daniels stated that he believes that the number of judges will continue to shrink due to attrition.
 - ♦ New appeals will be assigned to three judge panels. The judges will be assigned on a random basis.
2. Impact on Appeals Pending on January 7, 2007
 - ♦ Appeals pending in the eight existing civilian boards will be transferred to the new Civilian Board of Contract Appeals and will be assigned a new docket number.
 - ♦ The judges originally assigned to the appeal will be retained.
 - ♦ If the appeal currently is assigned to a panel of only two judges, the new board will randomly assign another judge to the panel.

If you have any questions, please contact Michael Branca or Lori Lange at 202.293.8815.



- ◆ It is unclear what precedential effect the decisions of the existing civilian boards will have on the new board, but Judge Daniels indicated that the decisions are likely to have precedential effect and conflicts between the board decisions will be resolved as they arise.
3. Civilian Board of Contract Appeals Rules of Procedure
- ◆ Interim Final Rules of Procedure will be published in the Federal Register on or about January 8, 2007.
 - ◆ Currently, draft Rules of Procedure are being circulated for review by the procurement industry.
 - ◆ In drafting the Rules of Procedure, the intent was not to make any significant changes, but rather to take the perceived best features of each of the boards' rules and incorporate them.
 - ◆ Some of the key rules being proposed are:
 - The draft Rules of Procedure contain a provision for full board reconsideration when necessary to secure or maintain uniformity of board decisions or when the matter to be referred is one of exceptional importance. (Draft Rule 28)
 - The draft Rules of Procedure provide for the issuance of sanctions when a party or its attorney or expert fails to comply with any direction or order issued by the board or otherwise engages in misconduct. (Draft Rule 33(c))
 - The draft Rules of Procedure prohibit ex parte communication. (Draft Rule 33(b))In lieu of suspending proceedings when circumstances beyond the control of the board prevent the continuation of proceedings, the draft Rules of Procedure provide for dismissal without prejudice within reinstatement within 180 calendar days. (Draft Rule 12(d))
 - ◆ In addition, the new Civilian Board of Contract Appeals may move to electronic filing.
4. Non-CDA Functions
- ◆ One of the concerns raised about consolidating the civilian boards was that the new Civilian Board of Contract Appeals would not be able to carry out many of the non-Contract Disputes Act ("CDA") functions that are currently being performed by the respective boards.
 - ◆ Various boards assume jurisdiction over non-CDA cases including Indian Self Determination disputes, Crop Insurance Corporation disputes, UNICOR contract disputes, financial assistance grants, Department of Energy laboratory subcontract ADR, debt collection disputes, travel and relocation expenses disputes, HUD guarantee loan defaults and offsets, and debarment/suspensions.
 - ◆ The legislation provides that the new Civilian Board of Contract Appeals may, with the concurrence of the federal agency affected, assume any functions performed by a board established pursuant to the CDA.
 - ◆ There is some indication that the new Civilian Board of Contract Appeals will (with the request of the affected federal agency) continue to assume jurisdiction over non-CDA cases as long as the board's decision is not subject to internal agency appeal. The new Civilian Board of Contract Appeals is unlikely to continue assuming jurisdiction over debarment/suspension cases as those board decisions are not binding on the agency.
 - ◆ The new Civilian Board of Contract Appeals intends to continue performing ADR.

