SUMMARY OF THE COMMENTS

The enclosed comments are directed to the District of Columbia Contract Appeals Board ("Board") and provide recommendations on changes to be made to the draft rules for this forum.

It is our belief that the District of Columbia Government operates programs to assist disadvantaged businesses in obtaining contracts to perform work for the District of Columbia. Accordingly, in the event these businesses file claims regarding District of Columbia procurement matters, it is likely that they will represent themselves. Thus, it is our belief that the Board, the forum that will adjudicate claims made by these businesses, should have rules that are simple, clear, and concise. Our comments provide suggestions to further this end.

COMMENTS ON BEHALF OF THE GOVERNMENT CONTRACTS AND LITIGATION SECTION OF THE DISTRICT OF COLUMBIA BAR[1/]

In general, we believe that the proposed rules of the District of Columbia Contract Appeals Board ("Board") are cogent and well articulated. However, in a number of instances, various provisions of the rules should be simplified to better suit the essential functions to be accomplished by the Board.

Looking at the draft rules as a whole, the Government Contracts and Litigation Section of the District of Columbia Bar offers the general comment that the draft rules are too formalistic and court-like in form and content for a contract appeals board. It appears that the Federal Rules of Civil Procedure were used as a general format. This is not to say that due process procedures are undesirable, unnecessary or that rules are not needed for the orderly processing of cases. However, as an administrative body, the Board should neither act like a court nor follow all of the detailed procedures which the courts invoke to control and manage their dockets. In this regard, one essential fact should be kept in mind. Unlike the courts, contract appeals boards historically have permitted contractors to

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1/ The views expressed herein represent only those of Division 10: Government Contracts and Litigation Section of the District of Columbia Bar and not those of the District of Columbia Bar or of its Board of Governors.

appear on a pro se basis and have not insisted that all appearing parties be represented by counsel. See CAB Rule 106.1.

The District of Columbia has an active disadvantaged business contracting program which mandates that a sizable portion of District of Columbia Government procurements go to disadvantaged businesses, mostly of the small business variety. This mandate virtually assures that a large proportion of the contract disputes that will be coming before the Board will be those in which the contractor only has a minimal ability to sustain the costs of retaining counsel for the prosecution of claims against the District of Columbia. While it is well and good to have rules governing the processing of large claims where the contractor is well represented by experienced and knowledgeable counsel, the Board's procedural rules also must be simple and clear enough for a small businessman to be able to present his claim on a pro se basis directly to the Board without counsel. Thus, the rules on the whole should be of a character suitable for use by ordinary businessmen, corporate officials, and the like. Accordingly, we submit the following general comments upon particular rules:

CLERK

Rule 103.3. This rule grants the Clerk far too much power and imparts a degree of formality in what is filed before the Board far in excess of what is really needed. For example, most contract appeals boards in the Federal Government will waive the filing of a formal complaint if the contractor's claim or appeal

sufficiently defines the issues. See Rule 6, Final Uniform Rules of Procedure, issued by Office of Federal Procurement Policy, Office of Management and Budget. ("OFPP"). In fact, the Board's own proposed rules contain an ambiguity in that they leave open the question as to whether a contractor may be able to file a notice of appeal rather than a full blown complaint. Compare Draft Board Rule 103.3 with 122.1.

FORM AND FILING OF PLEADINGS, MOTIONS, AND OTHER PAPERS

Rule 107.3. This rule requires that contractors submit their claims on forms provided by the Board. We fail to see why there is a need to require that all appeals or protests should be filed on such forms. We believe that this requirement will over-judicialize Board proceedings and jeopardize the chances of disadvantaged businesses successfully filing a timely claim at the Board.

Rule 107.8. This rule, requiring the Board to reject "substantially non-conforming" pleadings as if they had never been filed, is too rigid and implies an unnecessary degree of formality in the handling of Board cases. Acceptance of late filings and the grant of time extensions for good cause shown has been the practice of some contract appeals boards.

SERVICE AND PROOF OF SERVICE
OF PLEADINGS, MOTIONS, AND OTHER PAPERS

Rule 108 and 109. The proposed rules on the service of pleadings and proof of service are far too court-like and much too

cumbersome for an administrative body. They will be far beyond the understanding of a pro se contractor and will be a constant source of controversy. In our view there is little need for more than a simply stated requirement that every paper filed with the Board shall show that a copy of same was mailed or otherwise furnished to the opposing party and the date served.

MOTIONS PRACTICE

Rule 110.1. This rule requires that parties file motions for every application to the Board for an order or relief. This rule makes Board practice much too court-like. There is no reason why time extensions, scheduling problems, the resolution of discovery disputes, hearing dates and the like cannot be handled by letter (with copies sent to the other party). Formal motions and the motion practice that goes with it should be held to a minimum and in fact ought to be discouraged. At present, the Board's Draft Rules 110.1 and 110.11 invite motions and motion practice. This invitation will not be lost upon certain counsel who will exploit it to its fullest.

DISCOVERY

Rule 112. The Board's discovery rules are commendable, especially those which limit the use or abuse of discovery.

SUSPENSION OF RULES

Rule 116. This rule provides for the suspension of the rules for good cause. It is to be commended. However, it is suggested that the word "motion" be changed to "request."

RECONSIDERATION

Rule 118. This rule permits a party to file a motion for reconsideration of the Board's decision or order within ten days of the Board's issuance of the decision on order. This rule is in conflict with Draft Rule 211.4. Rule 211.4 provides that a party has twenty days from date of issuance to appeal a decision or order of the Board. These rules need to be reconciled.

APPEAL PROCEDURES

Rule 200. The draft rules are ambiguous on this point. Rule 122.1 refers to a notice of appeal, but this section of the draft rules does not refer to such notices at all. Presumably, there is a reason why the proposed procedures dealing with contract appeals do away with the filing of a notice of appeal as the initiating event for an appeal and instead require that an appeal be initiated through the filing of a complaint. We believe that these rules lean too much in the direction of over-judicialization. This formality tends to discourage the pro se representation of contractors on contract claims and it makes Board procedures too much like those of the courts. Other boards

of contract appeals typically require the contractor to file a notice of appeal within ninety days of the issuance of the final contracting officer's decision and a formal complaint within thirty days after the filing of the notice of appeal. See e.g., ASBCA Rule Rule 6. We think that the Board should be consistent with other boards of contract appeals in this regard and provide for the filing of a notice of appeal within 90 days after the final decision of the Director of Administrative Services.

Rule 200.3. We would like to know why all of the listed elements are necessary for a proper complaint. What happens if the complaint does not contain all of the elements? Is it defective? We would propose alternative language that provides that "the complaint should contain. . . ."

Rule 200.6. This rule is the logical outcome of putting too many requirements in Rule 200.3 and it becomes a case in point that the draft rules are far too detailed. Note: the Federal Rules of Civil Procedure, which govern the entire gamut of Federal civil litigation only require that a complaint set forth a short, plain statement of the claim, etc. FRCP 8(a). We do not believe that an administrative body should demand more, especially when the case comes to the Board after the contractor has previously submitted his claim to the Contracting Officer, the Contracting Officer has rendered a written decision on it, and it has been through a review by the Director of Administrative Services.

ANSWER

Rule 202.3. See the comment on Rule 110.1.

SUBMISSION OF APPEAL FILE

Rule 205.1. Subparagraph (f) should be changed to read, "Any additional material which is relevant to the appeal."

PROTEST PROCEDURES

The draft rules closely track the essential provisions of the Procurement Practices Act with respect to bid protest procedures. We invite the Board's attention to the fact that nothing in the Act gives the Board the power to issue an order staying or delaying the award or performance of the contract pending the Board's decision on a bid protest. And nothing in the Act prohibits the Board from so ordering in appropriate cases. The Act merely directs the Board to adopt those rules appropriate to the exercise of its authority with respect to bid protests. D.C. Code § 1-1189.8(f).

It has long been an acknowledged fact that the relief granted in selected bid protest cases has been rendered nugatory or ineffective where contract performance has progressed to the point where it is either imprudent or impractical to order the cancellation of a contract and award to the party who should have received the contract in the first place. We believe that the

power to order the delay of a contract award or performance is a necessary part of the function of deciding bid protests. Otherwise the relief granting power proposed will become illusory.

Accordingly, we recommend that the Board consider the promulgation of a rule concerning the exercise of such stay authority in cases where the Board deems it prudent or necessary to do so.

CONCLUSION

As members of the Government Contracts and Litigation Section of the District of Columbia Bar, we represent clients from both the Government and the private sector before the boards of contract appeals. We urge the Board to consider our comments in preparing the Board's final version of these rules. We would be happy to meet with you to discuss our comments and to work on solutions thereto.

Susan Warshaw Ebner, Chairman
Gregory A. Smith, Vice Chairman
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