William & Mary Law Review

Volume 8 (1966-1967)
Issue 4

Article 3

June 1967

# Discovery Before the Contract Appeals

Gilbert A. Cuneo

Thomas H. Truitt

# DISCOVERY BEFORE THE CONTRACT APPEAL BOARDS

GILBERT A. CUNEO* AND THOMAS H. TRUITT**

## I

## INTRODUCTION

"Discovery" is that process by which a litigant obtains information and other materials relevant to a pending lawsuit.[1] Its purpose is admittedly to delimit the areas of controversy and to focus attention, in the controverted areas, on those matters which are likely to be dispositive of the case.[2]

It is the thesis of this article that the discovery procedures available both to appellant and to the Government under the rules of the various boards of contract appeals are inadequate to fulfill the clear mandate of the Supreme Court's decision in *United States v. Bianchi*.[3] The *Bianchi* decision requires, at a minimum, reappraisal of the entire disputes procedure and the role played by the various boards of contract appeals designated to hear disputes arising under a contract between the United States and the contractor. It focused attention upon the procedures of a particular board of contract appeals, with heightened emphasis upon the nature of the "board record," that is, the way in which it is compiled and the extent to which it varies from the record which can be made in a United States District Court or the Court of Claims. It is the belief of the authors that this decision, together with subsequent holdings in *United States v. Anthony Grace & Sons, Inc.*[4] and *United States v. Utah Construction and Mining Co.*[5] require, by implication, a serious reevaluation of the entire discovery procedures at the board level, and a careful reappraisal of the role played by the various boards of contract appeals designated to hear disputes arising under a contract between the United States and the contractors.

*A.B. 1934, St. Vincent College (Latrobe, Pennsylvania); LL.B. 1937, Harvard University. Member of the New York and District of Columbia Bars; Partner in the firm of Sellers, Conner & Cuneo. Author, Government Contracts Handbook (1962).

**A.B. 1960, George Washington University; LL.B. 1964, University of Virginia. Member of the Virginia and District of Columbia Bars; Associate in the firm of Sellers, Conner & Cuneo.

1. *See Developments in the Law–Discovery*, 74 Harv. L. Rev. 940, 942 (1961).
2. *Ibid.*
3. 373 U.S. 709 (1963).
4. 384 U.S. 424 (1966).
5. 384 U.S. 394 (1966).

The Court held in *Bianchi* that a contractor is entitled to only one hearing on the facts of his claim, and that the findings of the Board of Contract Appeals on factual issues are final and conclusive unless the reviewing court deems the decision fraudulent, arbitrary, capricious, grossly erroneous, or not supported by substantial evidence.[6] Two Justices dissented,[7] stating that the Board of Claims and Appeals of the Corps of Engineers had "sub-normal administrative procedures." [8]

Considerable furor followed the *Bianchi* decision. The legal journals offered lengthy comment[9] and Congressional legislation was introduced designed to overrule the decision.[10] Subsequent Court of Claims cases

6. United States v. Bianchi, 373 U.S. 709 (1963); *see* Wunderlich Act, 68 Stat. 81 (1954), 41 U.S.C. §§ 321-22 (1964); *see* Schultz, *infra*, note 9.

7. Mr. Justice Douglas, with whom Mr. Justice Stewart concurred, dissented.

8. 373 U.S. at 721.

9. The articles published on the Bianchi decision are too numerous to list. For an excellent article, *see* Schultz, *Wunderlich Revised: New Limitations on Judicial Review of Administrative Determination of Government Contract Disputes*, 29 LAW & CONTEMP. PROB. 115 (1964). Following the Bianchi decision, the Subcommittee on Government Procurement of the Senate Select Committee on Small Business conducted a detailed investigation into the "Operation and Effectiveness of Government Boards of Contract Appeals." Hearings were held and questionnaires were sent to Federal Agencies having boards, to lawyers and major Government contractors. The Subcommittee's Report affords an excellent study of what the litigant may encounter at the boards. SENATE SUBCOMM. ON GOV'T PROCUREMENT, METHODS OF RESOLVING CONTRACT CONTROVERSIES PERTAINING TO GOVERNMENT CONTRACTS AND SUBCONTRACTS; AN EMPIRICAL AND ANALYTICAL STUDY, S. Doc. No. 99, 89th Cong., 2d Sess. (1966) [hereinafter cited as 1966 *Hearings*].

10. H.R. 289, 89th Cong., 1st Sess. (1965): A Bill to Amend the Act of May 11, 1954 (ch. 199, sec. 1, 68 Stat. 81; 41 U.S.C. 321), to provide for full adjudication of rights of Government contractors in courts of law.

*Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled*, That the Act of May 11, 1954 (ch. 199, sec. 1, 68 Stat. 81; 41 U.S.C. 321), is amended to read as follows:

"No provision of any contract entered into by the United States or determination by a head of any department or agency or his duly authorized representative or board made pursuant to any such contract with respect to a dispute involving a question of fact arising under, or growing out of, the performance of such contract shall serve to limit in any manner any judicial proceeding in a court of competent jurisdiction relating to said dispute. Such court may decide the issues in a trial de novo and on the basis of such evidence as is admissible under the applicable rules of evidence: *Provided, however*, That a rebuttable presumption of correctness shall attach to any such administrative decision which presumption may be overcome by a preponderance of evidence received in court, the party challenging such decision having the burden of proof. Nothing herein contained shall be construed as relieving any party to the contract from the requirement of exhausting all of the administrative remedies provided for by the contract for the determination of disputes or as preventing a full administrative determination of all questions of fact but such determination shall not be final so

sought to avoid applying the *Bianchi* rule[11], and confusion developed[12] concerning the scope of judicial review—did it exist and if so, to what extent.

The Supreme Court recognized the existing confusion in the area of administrative adjudications of federal contract cases and sought to foreclose further speculation by its 1966 decisions in *Utah Construction Co.* and *Anthony Grace & Sons.* In those cases, the Court severely limited the scope of review available in the Court of Claims in considering matters arising under the "Disputes" clause.[13] Such a determination implicitly shifts the burden of affording the appellant and the government a full and complete hearing to the appropriate fact-finding tribunal,

---

as to preclude the de novo adjudication by a court of competent jurisdiction as hereinabove authorized."

11. Stein Bros. Mfg. Co. v. United States, 337 F.2d 861 (Ct. Cl. 1963), which held that the court could make findings and determination of facts as necessary to resolve an issue of law before it; WPC Enterprises Inc. v. United States, 323 F.2d 874 (Ct. Cl. 1963), which held that once an administrative decision is determined to be unsupported by substantial evidence, the Court of Claims could make its own findings from the whole record and from new evidence that had not been objected to by the Government; National Presto Indus., Inc. v. United States, 338 F.2d 99 (Ct. Cl. 1964); Utah Constr. and Mining Co. v. United States, 339 F.2d 606 (Ct. Cl. 1964), which held that where same facts involved a dispute and a breach, contractor entitled to trial de novo in breach case although same facts were determined in "dispute" before the Board; C. J. Langenfelder & Son, Inc. v. United States, 341 F.2d 600 (Ct. Cl. 1965); Anthony Grace & Sons, Inc. v. United States, 345 F.2d 808 (Ct. Cl. 1965).

12. The extent to which both bench and bar were unable to reconcile the Court of Claims cases on scope of review after *Bianchi* is noted in Crowell and Anthony, *Practical Problems Facing Contractors as a Result of Fragmentation of Remedies,* 18 AD. L. REV. 128 (1965). For cases after *Bianchi* which discuss the inadequacy of board proceedings, *see* Specialty Assembling & Packing Co. v. United States, No. 204-57, Ct. Cl., Jan. 21, 1966 (Slip Op. at 52-54); Roberts v. United States, 357 F.2d 938, 944 (Ct. Cl. 1966); Allen & Whalen of Virginia, Inc. v. United States, No. 165-63, Ct. Cl., July 16, 1965 (Slip Op. at 3-4); Johnson v. United States, No. 333-60, Ct. Cl., Nov. 12, 1965 (Slip Op. at 37-38).

13. In *Anthony Grace* the Court makes explicit what was implicit in the *Bianchi* decision by holding that since a court action with respect to a contract claim within the board's jurisdiction is appellate in nature, the court could not itself add evidence to an administrative record which was incomplete or defective. Rather the reviewing court should refer the case back to the board for perfection or in extreme cases, enter summary judgment. In *Utah Construction,* the Court held that where a claim concerning which a board of contract appeals can properly give some form of relief is first brought before the board as a dispute and then appealed to the Court of Claims on a breach of contract theory, the court is nonetheless bound by the administrative record made before the board. It is clear that *Utah Construction* is a strong reaffirmation of the *Bianchi* case and places even greater responsibility on the boards of contract appeals to develop a good administrative record.

the Board of Contract Appeals, and requires a change of procedure at the board level so that the proceedings will be in keeping with their "judicial" nature.

Justice Harlan made it amply clear in *Bianchi* that the various departments must "make adequate provisions for a record that could be subjected to judicial scrutiny," [14] since it was "clearly part of the legislative purpose to achieve uniformity." [15] Thus, the issue immediately shifts to an examination of the real practices of the contract appeals boards and the extent to which these practices provide a complete evidentiary hearing.

Judge Madden, speaking for the Court of Claims in *Volentine & Littleton v. United States*,[16] referred to the "administrative record" as follows:

> [T]he so-called "administrative record" is in many cases a mythical entity. There is no statutory provision for these administrative decisions or for any procedure in making them. The head of the department may make the decision on appeal personally or may entrust anyone else to make it for him. Whoever makes it has no power to put witnesses under oath or to compel the attendance of witnesses or the production of documents. There may or may not be a transcript of the oral testimony. The deciding officer may, and even in the departments maintaining the most formal procedures, does, search out and consult other documents which, it occurs to him, would be enlightening, and without regard to the presence or absence of the claimant.[17]

While these board procedures are not necessarily "subnormal" (though many subscribe to that view), they are often inadequate to provide for a complete evidentiary hearing. Nevertheless, a board record is not fairly categorized as a "mythical entity" for in many instances the discovery policy of a board is quite liberal, providing both the appellant and the Government a full and complete opportunity to present their

14. 373 U.S. at 718.

15. *Ibid.*

16. 145 F. Supp. 952 (Ct. Cl. 1956).

17. *Id.* at 954; In Johnson v. United States, *supra* note 12, at 3, the Court of Claims deplored the comment by the Chairman of the Board of Contract Appeals of the General Services Administration wherein he stated that the proceeding was "not a court proceeding [but] an informal round table discussion." And in Roberts v. United States, *supra* note 12, at 944, the Court of Claims commented that "The administrative proceeding leaves much to be desired."

respective positions. Where such a liberal policy exists, it should be made a part of the rules.

In the majority of cases, the "administrative record" is comprised of the testimony of the witnesses for each side in the dispute, the pleadings and orders, the documents constituting the appeal file, and such other documents as are proffered at the hearing and admitted into evidence by the board member hearing the appeal. To this extent, the administrative record which may ultimately be "subjected to judicial scrutiny" is a product of the rules of the contract appeals board. Each contract appeals board must have rules which provide the contractor and the Government with adequate tools for complete discovery. The Government and the contractor receive equal benefit from any procedure which insures a complete evidentiary hearing.

It is the purpose of this article to examine the discovery procedures available before the various boards of contract appeals, the efficacy of which determines whether the Court of Claims has an adequate record for review. Discovery will be treated as contemplated by the rules of the various contract appeals boards and as commented upon in their published decisions. The aim and scope of the discovery provisions of the Federal Rules of Civil Procedure will be broadly outlined as an available example. Practical problems encountered under present discovery procedures at the board level will be analyzed and recommendations for the future will be made.

The mandate in *Bianchi, Utah,* and *Grace* is abundantly clear: the board hearing is now the sole forum for presenting evidence in a Government contract dispute. Therefore, all evidence must be introduced and ruled upon by the board. The only limitation is the Wunderlich Act. It is within this framework that board discovery provisions will be examined.[18]

## II

## Discovery Available at the Board Level

### *The Armed Services Board of Contract Appeals*

The Armed Services Board of Contract Appeals (ASBCA) derives its authority from the charter promulgated by Department of Defense

18. This article does not cover an examination of the discovery provisions of any advisory board of contract appeals nor of the several *ad hoc* boards. The Board of Contract Appeals of the Deportment of Agriculture is *ad hoc.* 7 C.F.R. §§ 1.101-106 (1966). The Board of Review of the Department of Health, Education, and Welfare is advisory. 30 Fed. Reg. 1847 (1966).

Directive 5154-17, March 20, 1962. The rules of the Board are contained in Volume thirty-two of the Code of Federal Regulations.[19] Because the rules of the ASBCA are permissive, they provide neither the appellant nor the Government adequate means for the presentation of testimony. Rule 14 of the Board concerns depositions. Rule 15, which provides for interrogatories to parties, inspection of documents, and admission of facts, begins with "under appropriate circumstances, but not as a matter of course." The ASBCA does not have subpoena power.

The discovery rules of the ASBCA do not, however, reflect its present policy in ruling on discovery motions filed either by appellant or by the Government. Some board members have stated that they will follow the rules of the United States Court of Claims, while others have indicated a preference for the Federal Rules of Civil Procedure. Of the twenty-seven board members constituting the ASBCA, no consensus is available concerning discovery policy, and the extent to which discovery is available varies considerably from member to member.

*The Atomic Energy Commission Board of Contract Appeals*

The Atomic Energy Commission Board of Contract Appeals (AECBCA) was established by the Commission on September 11, 1964. The rules of the Board published in part three of Volume ten of the Code of Federal Regulations, became effective on November 10, 1964.[20] The AECBCA rules provide for depositions and written interrogatories (section 2.740), discovery and production of documents (section 2.741) and admissions (section 2.742). Rule 2.710 of the AECBCA provides for the issuance of subpoenas on the application of any party who needs the testimony of witnesses or the production of evidence.[21] The Board has stated, however, that it usually will not issue a subpoena to a party having a contractual relationship with the AEC.[22]

The AEC rules relating to pre-trial discovery are sophisticated and

19. 32 C.F.R. § 30.1. The discovery portion of the rules is set forth in Appendix A.

20. 10 C.F.R. § 2-740. The discovery portion of the rules is set forth in Appendix B.

21. The lack of subpoena power is an often noted defect in board procedure. 16 Stat. 412 (1871), 5 U.S.C. § 94 (1964), provides a burdensome statutory procedure whereby the head of a department in which a claim against the United States is pending may apply in a United States District Court for issuance of a subpoena for witnesses. The procedure does not cover subpoena for production of documents and is available for use by appellant at the Board Members' discretion and with the cooperation of the Department of Justice. The procedure is practically useless. *See* 14 Ops. Att'y Gen. 419 (1874).

22. Avien, Inc., AECBCA No. 14-65, 65-2 BCA para. 5282.

well drafted, even though they are phrased in the permissive language of "may." Thus, it does not appear that the AEC rules grant discovery as a matter of right. For depositions, written interrogatories, and the production of documents, the moving party must establish "good cause."

The original publication of the AEC rules set forth the following statement:

> The amendments are designed to expedite proceedings without sacrificing the fair and impartial consideration and adjudication of issues, and to embody the results of experience gained under the existing rules while incorporating useful provisions of the rules of practice [previous] or other regulatory agencies *and of the Federal Rules of Civil Procedure.*[23] [Emphasis added.]

The extent to which AEC hearing examiners apply the old rules to provide for adequate discovery is illustrated by *Beryllium Corp.*[24] There the Government's failure to produce required information resulted in a ruling that the Government could not submit supporting evidence concerning the matters covered by the undisclosed items.

*The Coast Guard Board of Contract Appeals*

The authority of the Coast Guard Board of Contract Appeals (CGBCA) was prescribed by the Secretary of the Treasury on December 24, 1964.[25] The regulations issued at that time established a permanent board with authority to determine and take final action on all contract disputes involving the Coast Guard. The CGBCA Rules provide at section 11-60.106(c) as follows:

> It is the purpose of the rules in this part to facilitate resolution of disputes arising out of Government contracts. It is impractical to articulate a rule to fit every possible circumstance which may be encountered. Therefore, the rules will be interpreted so as to secure just and inexpensive determination of appeals without unnecessary delay.[26]

The rules provide, upon application of a party or upon agreement by

23. 27 Fed. Reg. 377 (1962); 6 Gov't Cont., para. 405.

24. AECBCA No. 164; Gov't Cont., para. 209.

25. 29 Fed. Reg. 18368 (1964). The discovery portion of the rules is found in 41 C.F.R. § 11-60.342 and is set forth at Appendix C.

26. 29 Fed. Reg. 18369 (1964).

the parties, for the taking of testimony by deposition (upon oral examination or written interrogatories) for use as evidence in appeal proceedings. They also provide for interrogatories to parties, inspection of documents, and admission of facts. In each of these instances, however, the right to discovery is circumscribed by "under appropriate circumstances" and "not as a matter of course." The Board does not have subpoena power.

*The Department of Commerce Appeals Board*

The Department of Commerce Appeals Board was established at the direction of the Secretary of Commerce[27] within the Office of the Assistant Secretary for Administration. Its discovery rule, as of December 30, 1964, is broad and permissive, placing all discovery in the discretion of the board member. All discovery before this Board is keyed to the purpose of a "fair," "expeditious," and "inexpensive" determination of the appeal. This Board does not have subpoena power.

*The District of Columbia Contract Appeals Board*

The District of Columbia Contract Appeals Board was established by order of the Board of Commissioners in Reorganization No. 29 issued pursuant to Reorganization Plan No. 5 of 1952.[28] Its Rules of Practice and Procedure are superior to the rules of the other boards.

Rule 11.1 of the Board provides for the issuance of subpoenas and for the production of documentary evidence. Witnesses who neglect or refuse to obey the subpoenas are subject to process in the United States District Court for the District of Columbia.[29]

The rules provide for the taking of depositions and interrogatories. Rule 10.7, dealing with interrogatories to parties, specifically provides that interrogatories may be served "upon an adverse party in accordance with the first paragraph of Rule 33 of the Rules of Civil Procedure for the United States District Courts." Although no specific rule covers the production of documents, Rule 11.1 provides for the issuance of subpoenas "for the production of documentary evidence."

*The Corps of Engineers Board of Contract Appeals*

The Corps of Engineers Board of Contract Appeals has authority to

27. 15 C.F.R. §§ 3.1-16 (1966). The discovery portion of the rules is found in 15 C.F.R. § 3.10 and is set forth at Appendix D.

28. 66 Stat. 824 (1952). The discovery portion of the rules is set forth at Appendix E.

29. Title 4, D. C. Code Ann. tit. 4, § 603 (1961).

decide appeals by contractors from decisions of the contracting officer. The board's regulations, which are found in section 2104 of Volume thirty-three of the Code of Federal Regulations, have been in effect since October 1, 1959.[30]

Although the Board Rule 12 provides for the taking of depositions where a necessary witness cannot be expected to appear for oral examination, they do not provide for the production of documents, the admission of facts, or the issuance of subpoenas. One authority has determined that written interrogatories may be utilized before this Board provided that proper notice is given to the other party.[31]

*The Federal Aviation Agency Contract Appeals Panel*

The authority of the Federal Aviation Agency Contract Appeals Panel (FAACAP) is contained in section 102 of part 2-60 of Volume forty-one of the Code of Federal Regulations.[32] The rules provide for depositions but make no provision for the production of documents, the use of interrogatories, the admission of facts, or the issuance of subpoenas. Rule 2-60. 210-4 does provide, however, that the Panel "shall make orders that are appropriate . . . and upon conditions that will promote efficiency in disposing of the appeal."

The extent to which the FAACAP has exceeded its somewhat cursory rules is noted in *Arthur Venneri Co.*[33] In that case, appellant made requests for certain auditors' work papers, certain memoranda of the engineers, and certain progress schedules. The Board, overcoming the fact that its own rules did not make provision for the production of documents, adopted and applied the applicable sections of the Federal Rules of Civil Procedure:

> The detailed procedures for depositions and discovery contained in Part V, Rules 26 through 37, of the Federal Rules of Civil Procedure, and the cases construing those rules, provide the guidelines which this Panel will follow on applications for discovery. Rule 34, the relevant rule, requires that the moving party affirmatively demonstrate that there is "good cause" for the granting of the Motion. The con-

30. The discovery portion of the rules is found at 33 C.F.R. § 21.04 and is set forth in Appendix F.

31. 1966 *Hearings* 82.

32. 41 C.F.R. § 2-60 (1966). The discovery portion of the rules is set forth in Appendix G.

33. FAACAP No. 67-9, 66-2 BCA para. 5995.

> tracting officer opposes this Motion on the ground that the Appellant has not demonstrated good cause for the production of the documents sought. We shall consider each of the Appellant's requests separately.[34]

*The General Services Administration Board of Contract Appeals*

The General Services Administration Board of Contract Appeals (GSBCA) is the successor of the Board of Review, which was established in 1950 by the first Administrator of General Services.[35]

The rules provide that "upon agreement of the parties" the deposition of any person may be taken for use as evidence, and that the deponent may be examined on any relevant matter which is not privileged. Rule 7 C[36] provides that the appellant may move for the production or inspection of records within the custody of the General Services Administration provided that they are not privileged. The rules define privileged records as those which relate to internal management, those which are confidential by law, those which are security classified, and those which it would not be in the public interest to release. The GSA Board does not have subpoena power.

The GSBCA has decided a number of cases dealing directly with the question of discovery. In *Blount Brothers Corp.*[37] the Board set down the guidelines which the parties must follow in utilizing the discovery rules:

> To exercise the discovery rule properly and intelligently, guidelines are required. We find no precedents emanating from the administrative agencies. The Administrative Procedure Act contains no provision for pre-trial discovery in the administrative process. Neither the provisions of the Federal Rules of Civil Procedure for the United States District Courts nor the rules of the United States Court of Claims apply to administrative proceedings.
>
> Although the Board's rule for discovery is not as comprehensive as that of the Court of Claims or the United States District Courts, our course of action here seems to be dictated by the dictum in United States v. Morgan, 313 U.S. 409, 422; that the administrative proceeding "has a quality resembling that of judicial proceeding," and "although the administrative process has had a different development and pursues

34. *Id.* at 27,711.

35. The Board of Review was established pursuant to the Federal Property and Administrative Services Act of 1949, § 205(3), 63 Stat. 390 (1949). The discovery portion of the rules is found at 41 C.F.R. § 5-60.2 and is set forth in Appendix H.

36. 41 C.F.R. § 5-60.2 (1966).

37. GSBCA No. 1385, 65-2 BCA para. 4898.

> somewhat different ways from those of courts, they are to be deemed collaborative instrumentalities of justice . . ." Accordingly, we look to the courts for guidelines.
>
> The order requested by Appellant will not be issued inasmuch as we find Appellant's motion defective. The purpose of the discovery rule, as we understand its legal significance, is not to discover what exists, but to force the production of records that do exist. An order to produce should not be entered until the existence of the desired documents is established, whether a particular document exists, what its nature may be, and in whose custody it may lie, may be ascertained through deposition or by interrogatory. United States v. Becton Dickinson & Company, 30 F.R.D. 132 (1962). Moreover, it appears fundamental that designation of the documents to some degree is essential. How much specificity is necessary is subject to opposing views. But even designation by categories, a more liberal application of the Federal rule, must be defined with particularity. 4 Moore's Federal Practice, sec. 34.07, pp. 2442-2449. Further, the relevancy of the material to the subject matter of the dispute has not been established.[38]

In *Aberdeen Construction Co.*[39] the GSBCA held that a statement by Government counsel that the contracting officer is unable to locate particular documents will be accepted as correct by the Board. In addition, the Board denied Aberdeen's request for information concerning the number of contracts which were awarded in a particular procurement activity, the number of these contracts which were terminated, the number of contracts which were completed on schedule, and the number of contractors who were given notice that they were behind schedule. The Board determined that this information was not relevant.

In *Cerro Copper & Brass Co.*[40] the Board commented on the purpose of its rules as follows:

> Certainly the purpose of the Board's discovery rule[s] . . . point to the desirability of permitting access to unprivileged Government documents on a legitimate request from a litigant with the Government.[41]

Yet in reaching this decision, the GSBCA firmly supported a strict construction of Rule 7 C(3)[42] concerning "privileged" documents.

38. *Id.* at 23,188.
39. GSBCA No. 2165, 66-2 BCA para. 5943.
40. GSBCA No. 1964, 66-2 BCA para. 5935.
41. *Id.* at 27,502.
42. *Supra* note 36.

In its well-reasoned opinion in *Kahoe Supply Co., Inc.*[43] the GSBCA held that, where appellant so requests, the Government will be ordered to produce documents which should be in the appellant's possession. In the same opinion, however, the Board denied the appellant's request for information showing the arrival and departure times of the Government inspectors during the period of the contract on the ground that this information was privileged; that is, it was not of such a nature that it needed to be in appellant's possession.

*The Department of Interior Board of Contract Appeals*

The Interior Board of Contract Appeals (IBCA) has been given authority by the Secretary of the Interior to decide appeals from findings of fact or from decisions by contracting officers.[44] Although the rules of the IBCA contain no discovery provisions, it has been the custom of the Board to invoke the appropriate rule of the ASBCA where its own rules are silent. In *Vitro Corp. of America*,[45] for example, the IBCA referred to both the rules of the Court of Claims and the Federal Rules of Civil Procedure in discussing the matter of privilege. The IBCA lacks subpoena power.

*The Contract Appeals Board of the House Office Building Commission*

The House Office Building Commission's Board of Contract Appeals was established in 1963 by the Chairman of the Commission, the Honorable John W. McCormack. Although this Board has limited jurisdiction and may hear appeals only in connection with contracts for the Rayburn House Office Building Project, its rules on discovery are noteworthy.[46]

Rule 9 of the Board provides for depositions, while rule 10 covers discovery and production of documents. Rules 11 and 12 provide for interrogatories to parties, admission of facts, and genuineness of documents. The Board does not have subpoena power. Since its discovery provisions were fashioned after the Federal Rules of Civil Procedure, they are broader and clearer than the rules of many of the other contract appeals boards.[47]

43. GSBCA No. 1730, 66-2 BCA para. 5876.
44. Authority for the Rules is found in 72 Stat. 547 (1958), 5 U.S.C. § 22 (1964).
45. IBCA No. 376, 1964 BCA para. 4360.
46. The discovery portion of the rules is set forth in Appendix I.
47. Rules 9, 10, 11 and 12 are a combination of Fed. R. Civ. P. 26 and 34.

*The National Aeronautics and Space Administration Board of Contract Appeals*

The National Aeronautics and Space Administration Board of Contract Appeals (NASA BCA) was first established in 1959 pursuant to NASA Management Instruction 2-4-1. The Board is authorized to exercise the full authority of the Administrator in all cases in which, by the terms of the contract, the contractor may appeal the final decision and findings of fact of the contracting officer to the Administrator. The discovery portions of the NASA BCA rules permit discovery only through the taking of depositions.[48] The Board rules do not provide for interrogatories, production of documents, or admission of facts, and the Board does not have subpoena power.

*The Post Office Department Board of Contract Appeals*

The Post Office Department Board of Contract Appeals (POBCA) is authorized to exercise the authority of the Postmaster General in all matters in which, by terms of the contract, the contractor may appeal from findings of fact or a final decision of the contracting officer to the Postmaster General. The discovery provisions of the rules allow the taking of depositions only for use as evidence.[49] The rules are silent on the use of interrogatories and on motions to produce documents or to admit facts. The Board does not have subpoena power.

*The Department of State Contract Appeals Board*

The rules of the Department of State Contract Appeals Board do not provide for a discovery procedure; however, they do authorize the Board to request either party to furnish information which it deems necessary or desirable in connection with its consideration of the appeal.[50] The Board does not have subpoena power.

*The Veterans Administration Contract Appeals Board*

The Veterans Administration Contract Appeals Board (VACAB), which was established in 1960, has jurisdiction over all Veterans Administration contract disputes.

The VACAB rules provide for depositions, interrogatories to parties,

48. The discovery portion of the rules is set forth in Appendix J.
49. The discovery portion of the rules is set forth in Appendix K.
50. This rule is found in 41 C.F.R. § 6-60 and is set forth in Appendix L.

and production of documents.[51] The Board does not have subpoena power.

After covering the threshold question of relevancy, the Board's rules concerning production of documents list those documents deemed privileged. The definition of "privileged" is quite similar to that provided in Rule 7 C(3) of the GSA Rules.

*The Office of Economic Opportunity Contract Appeals Board*

This Board, created in May 1966, has jurisdiction over decisions of contracting officers filed under the "Disputes" clause of OEO contracts. Although the OEOBCA does not have a discovery provision as such, the rules provide that the Board may request of either party such information as is deemed necessary in connection with its resolution of the appeal.[52] The Board does not possess subpoena power.

## III

## The Purpose and Scope of Discovery

It is not the authors' intention to detail the discovery procedures available in a federal court, but rather to discuss in a general way the body of law that has developed under the Federal Rules of Civil Procedure with an emphasis on problems peculiar to discovery against the Government.

A principal aim of the Federal Rules of Civil Procedure is to afford every party to a civil action the opportunity, prior to trial, to discover all relevant information in the possession of any person, unless the information is privileged.[53] The tools for achieving this end are rules 26 to 37, which provide a number of procedural devices by which this information may be obtained. Civil trials are not supposed to be "carried on in the dark," [54] and the use of discovery rules is intended to "make a trial less a game of blind man's buff and more a fair contest with the basic issues and facts disclosed to the fullest practicable extent." [55]

In spite of the fact that the discovery provisions of the Federal Rules of Civil Procedure are applicable to all parties,[56] when the Government

51. The discovery portion of the rules is found in 38 C.F.R. § 1.770 and is set forth in Appendix M.

52. The discovery portion of the rules is set forth in Appendix N.

53. 2A Barron & Holtzoff, Federal Practice § 641 (Wright ed. 1961).

54. Hickman v. Taylor, 329 U.S. 495, 501 (1947).

55. United States v. Proctor & Gamble Co., 356 U.S. 677, 683 (1958).

56. United States v. General Motors Corp., 2 F.R.D. 528 (E.D. Ill. 1942).

is confronted with a discovery motion, it may, unlike the private litigant, make the initial claim that it need not submit to discovery at all.[57] Thus, although it is not consonant with the spirit of the rules to overemphasize technicalities,[58] it is advisable nonetheless to attend to certain procedural details in seeking discovery against the Government, since it is to be expected that the Government will frequently insist upon procedural correctness:

> The policy the Government follows in opposing discovery orders has been formally stated in a recent Justice Department Civil Division Directive, and we may expect that this will be the mode of resistance to discovery in the future. First of all, the Department resists discovery on the grounds that the subpoena constitutes "harassment and oppression," that the litigant has followed improper procedures, that he has not demonstrated adequate need for the information or, as I discussed above, that there are alternative means for obtaining the information. In short, the Department first raises every conceivable technical objection to discovery.[59]

The Government may, of course, interpose those objections to discovery which a private litigant similarly situated would interpose. A guiding principle, however, is that the discovery procedure available under the Federal Rules of Civil Procedure is flexible and should vary with the needs and equities of each case.[60]

The principles which have been judicially written into the rules include the following: (1) the matters sought to be discovered must be relevant to the subject matter of the action; (2) "good cause" must first be shown where discovery is sought under rules 34 and (as against a party) 45; (3) upon a showing of "good cause," a protective order preventing discovery may be obtained in accordance with rules 31(b) and (d); (4) privileged matter and the "work product" of an attorney are not discoverable.

Discovery under the Federal Rules of Civil Procedure and under the Rules of the United States Court of Claims is primarily limited to dis-

57. United States v. Proctor & Gamble Co., 356 U.S. at 680; 4 MOORE, FEDERAL PRACTICE 1581-84 (2d ed. 1963); 2A BARRON & HOLTZOFF, FEDERAL PRACTICE § 651.1 (Wright ed. 1961).

58. Hickman v. Taylor, 329 U.S. at 505-06.

59. Porter, *Release of Government Information in Private Litigation*, 2 THE FORUM 5, 10 (1963) [Journal of the District of Columbia Chapter of The Federal Bar Association].

60. *See, e.g.*, United States v. Kohler Co., 9 F.R.D. 289, 291 (E.D. Pa. 1949).

covery of that which is relevant and that which is unprivileged. The test for permitting discovery is not whether the information sought would be admissible at trial. Consequently, the standard of relevance when applied to discovery is broader than the standard of relevance when applied to the admissibility of evidence at trial.[61]

There is no need to elaborate upon these provisions here; rather, comment may be restricted to certain topics generally inapplicable in private litigation due to the size and complexity of the Government.

Ordinarily a party must designate with particularity the documents which he desires to discover. Yet how does a litigant particularize that which is out of sight as well as out of reach. Chief Justice Marshall's question in the *Aaron Burr* case answers itself: "Now, if a paper be in possession of the opposite party, what statement of its contents or applicability can be expected from the person who claims its production, he not precisely knowing its contents?" [62] It is clear that the test of particularity must necessarily be a relative one.[63]

Similarly, the defense that the information sought is not within the custody or control of the United States or the officer against whom the motion is directed can be unduly burdensome. At times, not even the highest Government officials know which of them technically has custody or control.[64] Although several courts have sustained opposition to discovery on the ground that the information was actually in the hands of another government official, such cases are inconsistent with the spirit of the rules and with the decisions regarding discovery from corporate officials.[65]

Rules 31, 34, and (as against a party) 45 require a showing of "good cause" for the respective motions made thereunder. The Supreme Court in *Hickman v. Taylor*[66] added what might be termed the "very good cause" standard for the production of "work product," and in *United States v. Reynolds*[67] the Court required that a showing of "necessity" be made for the production of Government information.

Courts frequently use the term "good cause" indiscriminately. In

61. Fed. R. Civ. P. 26(b); Ct. Cl. R. 30(g). For an excellent comment on the meaning of "relevant" as used in Fed. R. Civ. P. 26(b), *see* Kaiser-Frazer Corp. v. Otis & Co., 11 F.R.D. 50, 53 (S.D.N.Y. 1951).

62. United States v. Burr, 25 Fed. Cas. 187, 191 (C.C. Va. 1807).

63. Tiedman v. American Pigment Corp., 253 F.2d 803, 808 (4th Cir. 1958).

64. *E.g.*, 42 Ops. Att'y Gen. No. 18 (1964).

65. *Developments in the Law–Discovery*, 74 HARV. L. REV. 940, 1026-27 (1961).

66. 329 U.S. at 495.

67. 345 U.S. 1 (1953).

both *Hickman* and *Reynolds*, the Court intended (for public policy reasons) that an especially rigorous showing of necessity be required. It is difficult, however, to say what this means as applied to the facts of a particular case. There is still no settled understanding of what ordinary "good cause" means, much less "necessity" or "very good cause." [68] Although no standard has yet been developed, several recent cases contain a clearer statement of the factors to be considered.[69]

The Board rules discussed above make reference with varying degrees of specificity to the accepted principle that discovery should be allowed except where the documents or information sought are privileged. In some instances those things deemed to be privileged are listed in the rules. There is, however, no basis at common law for non-disclosure or privilege concerning information in the hands of administrative officials.[70]

Certain statutes make confidential those matters required by law to be reported or recorded, while other statutes flatly preclude disclosure of specified information in the custody of government officials.[71] Even where no statute confers secrecy upon the disclosure of information and where all of the procedural prerequisites have been complied with, the Government may nonetheless interpose a claim of privilege on the theory that the executive branch of Government is recognized as possessing the privilege of withholding documents the disclosure of which would be detrimental to the public interest.[72]

The courts generally refer to privileges as they are understood in the law of evidence.[73] Evidentiary privileges which the Government may claim in opposition to discovery may be grouped into the following general categories: Government counsel's work product, attorney-client privilege, interdepartmental communications privilege, and privilege for "housekeeping" regulations.

In the *Hickman* case, the Court recognized a qualified immunity limiting the extent to which a party could require disclosure of facts or trial tactics gathered in the preparation for litigation. The limitation is

68. Wright, Discovery, 35 F.R.D. 39, 83-84 (1964).

69. United States v. Gates, 35 F.R.D. 524 (D. Colo. 1964); Johnson v. Ford, 35 F.R.D. 347 (D. Colo. 1964); Crowe v. Chesapeake & O. Ry. Co., 29 F.R.D. 148, 150-51 (E.D. Mich. 1961).

70. Annot., 165 A.L.R. 1302, 1308 (1946).

71. *See House Comm. on Gov't Operations, Federal Statutes on the Availability of Information,* 86th Cong., 2d Sess. (1960) [hereinafter cited as 1960 *Hearings*].

72. *Cf.* United States v. Burr, *supra* note 62.

73. United States v. Reynolds, *supra* note 67, at 6; Kaiser Aluminum & Chem. Corp. v. United States, 157 F. Supp. 939 (Ct. Cl. 1958).

the "work product" of an attorney which is not subject to discovery unless there is a showing of necessity or "very good cause." [74] Government counsels have successfully resisted discovery of their "work product" even where appropriate necessity has been shown.[75] Although the United States Attorney is charged with defending suits against the Government, for administrative reasons his office does not normally investigate the claims, but rather proceeds on the basis of reports from investigators within a governmental subdivision. These reports are generally compiled, however, as a matter of administrative routine and not in anticipation of litigation.[76] The courts have refused to apply the "work product" label to such routine factual reports of claim agents and inspectors, civilian or government, which are made in the regular course of business or government operation.[77]

There is some indication that the attorney-client privilege[78] is available to protect communications between government administrative officials and government attorneys.[79] It is doubtful, however, that this privilege is required in order to promote free disclosure by government officials to the government attorneys. Furthermore, the government administrator usually has no choice as to who will conduct his office's litigation;[80] hence, the relationship between attorney and client is distinguishable from that encountered by a private party.

In a recent case wherein discovery of governmental memoranda was being resisted on the ground of privilege, Judge Mathes stated:

> Clearly there is no such privilege known to the law of evidence. The most then that can be said for the Government's position is that there is a general public policy against unnecessary disclosure of files of the executive branches of the Government. However, this policy may

74. 329 U.S. at 495. *See generally* 4 MOORE, FEDERAL PRACTICE 1315-1485 (2d ed. 1963); Taine, *Discovery of Trial Preparation in the Federal Courts*, 50 COLUM. L. REV. 1026 (1950); Tolman, *Discovery Under the Federal Rules: Production of Documents and the Work Product of the Lawyer*, 58 COLUM. L. REV. 498 (1958).

75. *E.g.*, United States v. Anderson, 34 F.R.D. 518, 521-22 (D. Colo. 1963).

76. Snyder v. United States, 20 F.R.D. 7, 8 (E.D.N.Y. 1956).

77. Burke v. United States, 32 F.R.D. 213 (E.D.N.Y. 1963); California v. United States, 27 F.R.D. 261 (N.D. Cal. 1961).

78. For discussion of the privilege and its history *see* Radiant Burners, Inc. v. American Gas Ass'n, 320 F.2d 314 (7th Cir. 1963); United States v. United Shoe Machinery Corp., 89 F. Supp. 357 (D. Mass. 1950); McCormack, Evidence § 92 (1954).

79. United States v. Anderson, 34 F.R.D. 518, 522-23 (D. Colo. 1963).

80. Note, *The Representation of the Government by the Department of Justice, in Schwartz and Jacoby*, GOVERNMENT LITIGATION, 18-20 (1963).

> readily be outweighed by the public interest in disclosure when such files contain documents of evidentiary value in a court of justice. See Reynolds v. United States, 3 Cir., 1951, 192 F.2d 987, 995, reversed on other grounds, 1953, 345 U.S. 1, 73 S.Ct. 528.[81]

This same policy was referred to by Mr. Justice Reed in *Kaiser Aluminum & Chemical Corp. v. United States*.[82] In the *Kaiser* case, however, the Court of Claims refused to order disclosure of an intra-office advisory memorandum because "the policy of open, frank discussion between subordinate and chief concerning administrative action" [83] outweighed the need for disclosure. The court noted that this is not "a privilege to protect the official but one to protect free discussion of prospective operations and policy." [84] Not privileged in any event are "the primary facts upon which conclusions are based." [85] And broad discovery has been allowed even where the memorandum is from a person playing a part in the operative events and is one having a direct bearing in the issues developed in the litigation.[86]

A claim of privilege may be founded upon a regulation promulgated by an agency or department head withdrawing from his subordinates all discretion to disclose official information. If such a regulation is passed pursuant to a secrecy statute, then, in accordance with the intent of Congress, non-disclosure is the rule.[87] Where, however, the regulation is derived from a generally phrased statute, or has no statutory basis at all, no privilege exists. Although these latter regulations have been said to confer a "privilege," it would appear to be more accurate to state that such regulations confer immunity from punitive judicial sanctions.[88]

Both statutes and judicial decisions have contributed to the trend away from government "housekeeping" regulations which would create the privilege of non-disclosure of information. The 1958 amendment to what was termed "The Federal Housekeeping Statute" [89] eliminated

81. United States v. Certain Parcels of Land, 15 F.R.D. 224, 230 (S.D. Calif. 1954).
82. 157 F. Supp. 939 (Ct. Cl. 1958).
83. *Id.* at 946.
84. *Id.* at 947.
85. *Ibid.*
86. See the excellent opinion in United States v. Procter & Gamble Co., 25 F.R.D. 485 (D.N.J. 1960).
87. *See* Note 71, *supra.*
88. United States ex. rel. Touhy v. Ragen, 340 U.S. 462 (1951); Boske v. Comingore, 177 U.S. 459 (1900).
89. 72 Stat. 547, 5 U.S.C. § 22 (1958).

a former haven for government officials by stating that the section did "not authorize withholding information from the public or limiting the availability of records to the public."

Minutes written contemporaneously with, or shortly after, a meeting and in the regular course of business are often recognized as being the most reliable evidence of what occurred. For this reason, such records are held admissible in evidence under the well-recognized exception to the hearsay rule.[90] The Federal Business Records Act[91] embodies just such a theory, that is, that records kept in the normal course of business are usually reliable evidence. This statute has been construed to make minutes of meetings of employee representative groups admissible in federal court despite the contention that they are merely inter-office communications.[92]

Federal courts have been reluctant to enter into areas where its orders cannot be enforced. In some instances discovery against the federal government presents such a problem.[93] Where the Government is a party, the courts employ various methods of enforcing discovery orders against it. For example, where the Government is the plaintiff, the action can be dismissed;[94] where the Government is the defendant, the introduction of government evidence on certain points can be prohibited.[95] In all cases, orders may be made with regard to the just disposition of the case in accordance with Rule 37(b)(2) of the Federal Rules of Civil Procedure. Where the Government is not a party and a subpoena has issued to the official having custody or control of the information required, the only available sanction is that of contempt of court under rule 45.

## IV

### Comments, Recommendations, and Conclusions

There will be some nostalgia that the once informal procedures before a board of contract appeals will have to be formalized. This will be

90. Joseph v. Krull Wholesale Drug Co., 147 F. Supp. 250 (E.D. Pa. 1956), aff'd. 245 F.2d 231 (3d Cir. 1957).

91. 28 U.S.C. § 1732 (1964). See also 1966 amendment to the Administrative Procedure Act, 80 Stat. 250, P.L. 89-487, 89th Cong. 2nd Sess.

92. NLRB v. Sharples Chemicals, 209 F.2d 645 (6th Cir. 1954).

93. On "Sanctions," generally, see Note 1, *supra* at 905-91 and, regarding sanctions against the Government *see id.* at 988-89; Wright, *supra* note 68, at 94-98.

94. Sperandeo v. Local Milk Drivers Union, 334 F.2d 381 (10th Cir. 1964); Mitchell v. Bass, 252 F.2d 513 (8th Cir. 1958).

95. Bank Line, Ltd. v. United States, 76 F. Supp. 801, 805 (S.D.N.Y. 1948).

greeted by critics who will contend that such formalization will increase the cost of presenting appeals and lengthen the time the contractor must wait for a decision. These conclusions can be fairly debated, but if proved true, they will be a small price for a due process hearing.

It is clear that the majority of the discovery rules of the boards of contract appeals are inadequate to meet the task of creating an administrative record which will comply with *Bianchi*, *Utah*, and *Grace*. A complete evidentiary hearing must include complete discovery. It is not enough that a particular board professes to follow a liberal discovery policy when its rules remain permissive and vague. The discovery procedures and the policies behind them should be clearly articulated in the rules.

Discovery before the boards does not exist as a matter of right. The extent to which a party may obtain discovery varies from board to board, and sometimes from board member to board member. In many instances the discovery provisions, where they exist at all, create an *ad hoc* privilege precluding the discovery of certain documents which would be available to the moving party in a federal court. Most of the boards of contract appeals, however, follow a liberal policy with regard to the admission of evidence. In keeping with this policy, it should certainly follow that each board should offer full discovery as well.

The principle of full discovery limited to relevant and unprivileged matters is generally misunderstood by the boards. Frequently, discovery is opposed or disallowed because the information sought might not be admissible at the hearing. Under the Federal Rules of Civil Procedure and the Rules of the United States Court of Claims, discovery is not limited to testimony which would be admissible at trial. Rather, the only limitation is that the testimony sought must appear to be "reasonably calculated to lead to the discovery of admissible evidence." [96]

Government counsel may now object to the appellant's discovery motion on the ground that the information sought will be available at the time of the hearing. The Supreme Court made it amply clear in the *Hickman* case[97] however, that discovery is designed to enable the parties to ascertain the facts before the trial, and it referred to this procedure as "one of the most significant innovations of the federal rules." [98] If the parties are not permitted to gather evidence in advance of the hear-

96. Fed. R. Civ. P. 26(b); Ct. Cl. R. 30(g).
97. 329 U.S. 495 (1946).
98. *Id.* at 500.

ing, "cases will not be proved or will be proved clumsily or wastefully." [99] Thus, discovery before the Boards must be a matter of right, and since the Boards are now courts of initial jurisdiction subject to review on the administrative record, discovery should be equated to the Federal Rules of Civil Procedure.

As noted, the purpose of discovery is to eliminate surprise and narrow the issues—to enable both parties to prepare their cases in advance of hearing with full knowledge of all relevant facts. The informal practice before the contract appeals boards is frequently defended on the ground that informality facilitates a just, inexpensive, and speedy resolution of contract disputes. In the area of discovery, however, these are the same factors which, according to the federal courts, are promoted by "allowing a wide scope to the legitimate use of interrogatories." [100]

Government counsel commonly resist discovery and often on untenable grounds. Recently an objection to appellant's discovery was filed on the ground that that which appellant sought to discover was related to those areas of the case upon which appellant had the burden of proof. This demonstrates a complete lack of understanding of the purpose of pre-trial discovery.

Closely related to the question of discovery is the method of its enforcement. As noted, the majority of the boards do not possess subpoena power. Certainly a litigant who is to be bound by the record made before the board should be entitled to the use of a subpoena and an examination of all documents which are relevant and unprivileged.

The most obvious problem in the creation of an administrative record before the board is the lack of adequate discovery provisions.[101] Profes-

99. Sinclair Ref. Co. v. Jenkins Petroleum Co., 289 U.S. 689 (1933).

100. Aktiebolaget Vargos v. United States, 8 F.R.D. 635, 636 (D.D.C. 1949).

101. *See* the comments of Professor Harold C. Petrowitz in 1966 *Hearings*, *supra* note 9, at 152:

Of perhaps even greater importance in the development of an adequate appeal record is good discovery procedure and this is where almost all board rules are deficient. It is absolutely essential that each party be able to get discovery of documents pertinent to the appeal unless privilege is claimed and justified. The existing discovery rules of most of the boards are not adequate because they give the board too much discretion in the granting of discovery. The only board having a satisfactory rule on discovery is the Appeals Board of the House Office Building Commission. Its rule was adopted in toto from the Federal Rules of Civil Procedure. Admittedly, this rule is liberal and may permit some "fishing expenditions," [sic] but it has achieved wide acceptance in administrative procedure and there is no good reason why it should not apply to boards of contract appeals. When it comes to alternatives in this area, it is better to have too much discovery rather than too little.

sor John William Whelan has taken a laudable first step by developing Proposed Uniform Rules of Procedure for Government Agency Boards of Contract Appeals.[102] The proposed rules have drawn heavily on the Federal Rules of Civil Procedure and include such refinements as costs, refusal to make discovery, protective orders, and sanctions. The proposed rules would provide to the litigating parties the tools for developing, prior to hearing, the pertinent facts, documents and admissions necessary to an orderly hearing of the appeal. Surely such proposed rules might extend the time for pre-trial procedure. The benefit, however, to the boards would be a shorter, more orderly and complete evidentiary hearing. The mandate of *Bianchi*, *Utah*, and *Grace* will be substantially complied with when comprehensive rules on discovery are adopted by the boards of contract appeals.

## APPENDIX A

### RULES OF THE ARMED SERVICES BOARD OF CONTRACT APPEALS

14. *Depositions*

(a) *When Depositions May be Taken*

After an appeal has been docketed the Board may, upon application of either party or upon agreement by the parties, permit the taking of the testimony of any person, by deposition upon oral examination or written interrogatories, for use as evidence in the appeal proceedings. Leave to take a deposition will not ordinarily be granted unless it appears that it is impracticable to present deponent's testimony at the hearing of the appeal, or unless a hearing has been waived and the case submitted pursuant to Rule 11.

(b) *Before Whom Taken*

Depositions to be offered in evidence before the Board may be taken before and authenticated by any person authorized by the laws of the United States, or by the laws of the place where the deposition is taken, to administer oaths.

102. The portions of the proposed rules relating to discovery are set forth in Appendix O. The PROPOSED UNIFORM RULES OF PROCEDURE FOR GOVERNMENT AGENCY BOARDS OF CONTRACT APPEALS were prepared under the direction of Professor John William Whelan as part of a Government Contracts Seminar, Graduate School of Law, Georgetown University Law Center, Washington, D. C. The rules were prepared under the Chairmanship of Joseph M. Zorc, Esq., of the District of Columbia Bar and appear in PUBLIC SERVICE PAPER No. 1, Federal Publications, Inc. (1967).

(c) *By Oral Examinations*

When either party desires to take the testimony of any person by deposition upon oral examination, the moving party shall give the opposite party at least 15 days written notice of the time and place where such deposition is proposed to be taken, the name, address, and title of the person before whom it is proposed to be taken, and the name and address of the witness. This notice is unnecessary in any case where the deposition has been scheduled by mutual agreement. If the party so served finds it impracticable to appear at the taking of the deposition, in person or by counsel, he shall promptly so notify the moving party who shall make available to him a copy of the evidence given at the deposition. Within 15 days after receipt of such copy, the party so served may serve cross-interrogatories upon the moving party, and proceedings shall be had thereon as provided in the next succeeding subparagraph (d) herein.

(d) *By Written Interrogatories*

When either party desires to take the testimony of any person by deposition upon written interrogatories, the moving party shall serve them upon the opposite party with a notice stating the name and address of the person who is to answer them and the name, address and title of the person before whom the deposition is to be taken. Within 15 days thereafter, the party so served may serve cross-interrogatories upon the moving party. A copy of the notice and copies of all interrogatories served shall be delivered by the moving party to the person before whom the deposition is to be taken, and the latter shall proceed promptly to take the testimony of the witness in response to the interrogatories.

(e) *Form and Return of Deposition*

Each deposition should show the docket number and the caption of the proceedings, the place and date of taking, the name of the witness, and the names of all persons present. The person taking the deposition shall certify thereon that the witness was duly sworn by him and that the deposition is a true record of the testimony given by the witness, and he shall enclose the original deposition and exhibits in a sealed pre-paid package and forward same to the Recorder, Armed Services Board of Contract Appeals.

(f) *Introduction In Evidence*

No testimony taken by deposition shall be considered as part of the evidence in the hearing of an appeal unless and until such testimony is offered and received in evidence at the hearing. It will not ordinarily be received in evidence if the deponent is present and can testify personally at the hearing. In such case it can, however, be utilized to contradict or impeach the testimony of deponent as a witness. If the opportunity to be heard has been waived and the case submitted pursuant to Rule 11, the deposition shall be deemed to be part of the record before the Board.

15. *Interrogatories to Parties; Inspection of Documents; Admission of Facts.* Under appropriate circumstances, but not as a matter of course, the Board will entertain applications for permission to serve written interrogatories upon the opposing party, applications for an order to produce and permit the inspection of designated documents, and applications for permission to serve upon the opposing party a request for the admission of specified facts. Such applications shall be reviewed and approved only to the extent and upon such terms as the Board in its discretion considers to be consistent with the objective of securing just and inexpensive determination of appeals without unnecessary delay, and essential to the proper pursuit of that objective in the particular case.

## APPENDIX B

### Rules of Procedure in Contract Appeals of the Atomic Energy Board of Contract Appeals

Depositions and Written Interrogatories; Discovery; Admission; Evidence

§ 2.740 *Depositions and Written Interrogatories.*

(a) On motion and for good cause shown, the Commission may order that the testimony of any party or other person be taken by deposition on oral examination or written interrogatories. The attendance of witnesses may be compelled by subpoena.

(b) The motion shall give reasonable notice of the proposed time and place of taking the deposition; the name and address of each person to be examined, if known, or, if the name is not known, a general description sufficient to identify him or the class or group to which he belongs; and the reasons why the deposition should be taken. If good cause is shown,

an order will be issued authorizing the deposition and imposing any proper limitations for the benefit of witnesses or parties. The order shall be served on all parties by the person proposing to take the deposition a reasonable time in advance of the time fixed for taking testimony.

(c) Within the United States, a deposition may be taken before any officer authorized to administer oaths by the laws of the United States or of the place where the examination is held. Outside of the United States, a deposition may be taken before a secretary of an embassy or legation, a consul general, vice consul or consular agent of the United States, or a person authorized to administer oaths designated by the Commission.

(d) Unless the order provides otherwise, the deponent may be examined regarding any matter, not privileged, which is relevant to the subject matter involved in the hearing. He shall be sworn or shall affirm before any questions are put to him. Examination and cross-examination shall proceed as at a hearing. Except as the parties otherwise agree, the deposition upon written interrogatories shall be taken with only parties and counsel, the deponent, the officer, and the reporter or stenographer present during the interrogation, and the officer shall certify to that fact. Each question propounded shall be recorded and the answer taken down in the words of the witness. Objections on questions of evidence shall be noted in short form without the arguments. The officer shall not decide on the competency, materially, or relevancy of evidence but shall record the evidence subject to objection. Objections to questions of evidence not made before the officer shall not be deemed waived unless the ground of the objection is one which might have been obviated or removed if presented at that time.

(e) When the testimony is fully transcribed, the deposition shall be submitted to the deponent for examination and signature unless he is ill or cannot be found or refuses to sign. The officer shall certify the deposition or, if the deposition is not signed by the deponent, shall certify the reasons for the failure to sign, and shall promptly forward the deposition by registered mail to the Commission.

(f) Where the deposition is to be taken on written interrogatories, the party proposing the deposition shall file a copy of the proposed interrogatories showing each interrogatory separately and consecutively numbered, the name and address of the person who is to answer them, and the name, description, title, and address of the officer before whom they are to be taken. Within seven (7) days after filing, any other party may serve cross-interrogatories. Objections to interrogatories or cross-interrogatories shall be made promptly and will be ruled upon by the presiding officer. Objections to form, unless made before the order for taking the deposition is issued, shall be deemed waived. The interrogatories, cross-interrogatories, and answers shall be recorded and signed, and the deposition certified, returned, and filed as in the case of a deposition on oral examination.

(g) A deposition will not become a part of the record in the hearing unless received in evidence. If only part of a deposition is offered in evidence by a party, any other party may introduce any other parts. A party shall not be deemed to make a person his own witness for any purpose by taking his deposition.

(h) A deponent whose deposition is taken and the officer taking a deposition shall be entitled to the same fees as are paid for like services in the district courts of the United States, to be paid by the party, at whose instance the deposition is taken.

(i) The witness may be accompanied, represented, and advised by legal counsel.

§ 2.741 *Discovery and Production of Documents and Things for Inspection, Copying, or Photographing.*

(a) *Order to produce.* On motion of any party showing good cause and on notice to all other parties, the Commission may:

(1) Order any party to produce and permit the inspection and copying or photographing, by and on behalf of the moving party, of any designated documents, papers, books, accounts, letters, photographs, objects or tangible things in his or its possession, custody, or control, which are not determined to be privileged, and which constitute or contain evidence (including the existence, description, nature, custody, condition and location of any books, documents, or other tangible things and the identity and location of persons having knowledge of relevant facts) regarding any matter that is relevant to the subject matter involved in the pending action, whether it relates to the claim or defense of the examining party or to the claim or defense of any party; or

(2) Order any party to permit entry upon designated land or other property in his or its possession or control for the purpose of inspecting, measuring, surveying, or photographing the property or any designated object or operation which is relevant within subparagraph (1) of this paragraph.

(b) *Relation to admissible evidence.* It is not ground for objection to the motion that the evidence will be inadmissible if the evidence sought appears reasonably calculated to lead to the discovery of admissible evidence.

(c) *Scope of order.* The order shall specify the time, place, and manner of making the inspection and taking the copies and photographing, and may prescribe such terms and conditions as are just. The Commission may make an order that the inspection, copying, measuring, surveying, or photographing shall be limited to certain matters or that secret processes, developments, or research need not be disclosed and any other order which justice requires to protect the party from annoyance, embarrassment, or oppression.

§ 2.742 *Admissions.*

(a) At any time after his answer has been filed, a party may file a written request for the admission of the genuineness and authenticity of any relevant document described in or attached to the request, or for the admission of the truth of any specified relevant matter of fact. A copy of the document shall be delivered with the request unless a copy has already been furnished.

(b) Each requested admission shall be deemed made unless, within a time designated by the presiding officer or the Commission, and not less than ten (10) days after service of the request or such further time as may be allowed on motion, the party to whom the request is directed serves on the requesting party either (1) a sworn statement denying specifically the relevant matters of which an admission is requested or setting forth in detail the reasons why he can neither truthfully admit nor deny them, or (2) written objections on the ground that some or all of the matters involved are privileged or irrelevant or that the request is otherwise improper in whole or in part. Answers on matters to which such objections are made may be deferred until the objections are determined. If written objections are made to only a part of a request, the remainder of the request shall be answered within the time designated.

(c) Admissions obtained pursuant to the procedure in this section may be used in evidence to the same extent and subject to the same objections as other admissions.

## APPENDIX C

### Rules of the Coast Guard Board of Contract Appeals

§ 11-60.342 Depositions.

(a) *When depositions may be taken.* After an appeal has been docketed the Board may, upon application of either party or upon agreement by the parties, permit the taking of the testimony of any person, by deposition upon oral examination or written interrogatories, for use as evidence in the appeal proceedings. Leave to take a deposition will ordinarily be granted when it appears that it is impracticable to present deponent's testimony at the hearing of the appeal, or when a hearing has been waived and the case submitted pursuant to § 11-60.336.

(b) *Before whom taken.* Depositions to be offered in evidence before the Board may be taken before and authenticated by any person authorized by the laws of the United States, or by the laws of the place where the deposition is taken, to administer oaths, or by a Coast Guard officer under authority in Article 10-1-9 of U.S. Coast Guard Regulations promulgated pursuant to section 636 of title 14 U.S. Code, 63 Stat. 545, and Article 136, Uniform Code of Military Justice, 10 U.S.C. 936, 70A Stat. 77.

(c) *By oral examinations.* When either party desires to take the testimony of any person by deposition upon oral examination, the moving party shall give the other party at least 15 days written notice of the time and place where such deposition is proposed to be taken, the name, address, and title of the person before whom it is proposed to be taken, and the name and address of the witness. This notice is unnecessary in any case where the deposition has been scheduled by mutual agreement. If the party so served finds it impracticable to appear at the taking of the deposition, in person or by counsel, he shall promptly so notify the moving party who shall make available to him a copy of the evidence given at the deposition. Within 15 days after receipt of such copy, the proceedings shall be had thereon as provided in paragraph (d) of this section.

(d) *By written interrogatories.* When either party desires to take the testimony of any person by deposition upon written interrogatories, the moving party shall serve them upon the other party with a notice stating the name and address of the person who is to answer them and the name, address and title of the person before whom the deposition is to be taken. Within 15 days thereafter, the party so served may serve cross-interrogatories upon the moving party. A copy of the notice and copies of all interrogatories served shall be delivered by the moving party to the person before whom the deposition is to be taken, and the latter shall proceed promptly to take the testimony of the witness in response to the interrogatories.

(e) *Form and return of deposition.* Each deposition should show the docket number and the caption of the proceedings, the place and date of taking, the name of the witness, and the names of all persons present. The person taking the deposition shall certify thereon that the witness was duly sworn by him and that the deposition is a true record of the testimony given by the witness, and he shall enclose the original deposition and exhibits in a sealed package which he shall promptly forward at the expense of the moving party, to the Recorder, Coast Guard Board of Contract Appeals, Coast Guard Headquarters, Washington, D. C., 20226.

(f) *Introduction in evidence.* No testimony taken by deposition shall be considered as part of the evidence in the hearing of an appeal unless and until such testimony is offered and received in evidence at the hearing. It will not ordinarily be received in evidence if the deponent is present and can testify personally at the hearing. In such case, it can, however, be utilized to contradict or impeach the testimony of deponent as a witness. If the opportunity to be heard has been waived and the case submitted pursuant to § 11-60.336, the deposition shall be deemed to be part of the record before the Board.

§ 11-60.345 INTERROGATORIES TO PARTIES: INSPECTION OF DOCUMENTS; ADMISSION OF FACTS.

(a) Under appropriate circumstances, but not as a matter of course, the Board will entertain applications for permission to serve written interrogatories upon the opposing party, applications for an order to produce and permit the inspection of designated documents, and applications for permission to serve upon the opposing party a request for the admission of specified facts. Such applications shall be reviewed and approved only to the extent and upon such terms as the Board in its discretion considers to be consistent with the objective of securing just and inexpensive determination of appeals without unnecessary delay, and essential to the proper pursuit of the objective in the particular case.

## APPENDIX D

RULES OF PROCEDURES OF THE DEPARTMENT OF COMMERCE APPEALS BOARD

§ 3.10 DEPOSITIONS, INTERROGATORIES, PRODUCTION OF DOCUMENTS.

The Appeals Board may consider requests for permission to take the testimony of any person by deposition, to serve written interrogatories upon the opposing party, and to produce and permit the inspection of designated documents. Such requests shall be approved only to the extent and upon such conditions as the Board in its discretion considers to be consistent with the objective of securing a fair, expeditious and inexpensive determination of the dispute on appeal.

## APPENDIX E

RULES OF PROCEDURE OF THE DISTRICT OF COLUMBIA CONTRACTS APPEALS BOARD

DEPOSITIONS AND INTERROGATORIES

RULE 10.1. *When Permissible.* After an appeal has been docketed by the Board either party may take the testimony of any person, including a party, by deposition upon oral examination or written interrogatories for use as evidence at the hearing of the appeal. The attendance of witnesses may be compelled by the use of subpoenas as provided in Part 11. All expenses in connection with the taking of a deposition shall be paid by the party taking such deposition, except that any other party shall be entitled to a copy of the deposition only upon payment of reasonable charges therefor.

RULE 10.2. *Use of Deposition.* At any hearing or in any proceeding before the Board, any part or all of a deposition, so far as admissible under

the rules of evidence, may be used against any party who was present or represented at the taking of the deposition or who had due notice thereof, in accordance with any one of the following provisions:

(1) Any deposition may be used by any party for the purpose of contradicting or impeaching the testimony of deponent as a witness.

(2) The deposition of a party or of any one who at the time of taking the deposition was an officer, director, or managing agent of a public or private corporation, partnership, or association which is a party may be used by an adverse party for any purpose.

(3) The deposition of a witness, whether or not a party, may be used by any party for any purpose if the Board finds: (a), that the witness is dead; or (b), that the witness is at a greater distance than 100 miles from the District of Columbia, unless it appears that the absence of the witness was procured by the party offering the deposition; or (c), that the witness is unable to attend or testify because of age, sickness, infirmity, or imprisonment; or (d), that the party offering the deposition has been unable to procure the attendance of the witness by subpoena; or (e), upon application and notice, that such exceptional circumstances exist as to make it desirable, in the interest of justice and with due regard to the importance of presenting the testimony of witnesses orally in open hearing, to allow the deposition to be used.

(4) If only part of a deposition is offered in evidence by a party, an adverse party or the Board may require him to introduce all of it which is relevant to the part introduced, and any party may introduce any other parts.

RULE 10.3. *Objections to Admissibility.* Objection may be made at the hearing to receiving in evidence any deposition or part thereof for any reason which would require the exclusion of the evidence if the witness were then present and testifying.

RULE 10.4. *Persons Before Whom Taken.* Within the United States or within a territory or insular possession subject to the dominion of the United States, depositions shall be taken before an officer authorized to administer oaths by the laws of the United States or of the place where the examination is held; elsewhere the deposition may be taken before an officer or person agreed upon by the parties or designated by the Board.

RULE 10.5. *Depositions Upon Oral Examination.* (a) *Notice of Oral Examination.* A party desiring to take the deposition of any person upon oral examination shall give at least 15 days notice in writing to every other party to the appeal. The notice shall state the time and place for taking the deposition and the name and address of each person to be examined, if known, and, if the name is not known, a general description sufficient to identify him or the particular class or group to which he belongs. A copy of the notice shall be filed with the Board.

(b) *Record of Examination.* The officer before whom the deposition is to be taken shall put the witness on oath and shall personally, or by some one acting under his direction and in his presence, record the testimony of the witness. The testimony should be taken stenographically and transcribed unless the parties agree otherwise. All objections made at the time of examination to the qualification of the officer taking the deposition, or to the manner of taking it, or to the evidence presented, or to the conduct of any party, and any other objection to the proceedings, should be noted by the officer upon the deposition. Evidence objected to shall be taken subject to the objections. In lieu of participating in the oral examination parties served with notice of taking a deposition may transmit written interrogatories to the officer, who shall propound them to the witness and record the answers verbatim.

(c) *Submission to Witness.* When the testimony is fully transcribed the deposition shall be submitted to the witness for examination and shall be read to or by him, unless such examination and reading are waived by the witness and by the parties. Any change in form or substance which the witness desires to make shall be entered upon the deposition by the officer with a statement of the reasons given by the witness for making them. The deposition shall then be signed by the witness, unless the parties by stipulation waive the signing or the witness is ill or cannot be found or refuses to sign. If the deposition is not signed by the witness, the officer shall sign it and state on the record the fact of the waiver or of the illness or absence of the witness or the fact of the refusal to sign together with the reason, if any, given therefor; and the deposition may then be used as fully as though signed, unless on a motion to suppress the Board holds that the reasons given for the refusal to sign require rejection of the deposition in whole or in part.

(d) *Form, and Certification and Filing by Officer.* Each deposition shall have a caption as in Rule 3.1, and shall show the date and place of taking, the name of the witness, and the names of all persons present. The officer shall certify on the deposition that the witness was duly sworn by him and that the deposition is a true record of the testimony given by the witness, and shall enclose the original deposition and exhibits, if any, in a sealed package and shall promptly file the same with the Board or send it by registered or certified mail, postage prepaid, to the Board for filing.

RULE 10.6. *Depositions Upon Written Interrogatories.* (a) *Serving Interrogatories, Notice.* A party desiring to take the deposition of any person upon written interrogatories shall serve them upon every other party with a notice stating the name and address of the person who is to answer them and the name or descriptive title and address of the officer before whom the deposition is to be taken, and shall file a copy of such notice with the

Board. Within 15 days thereafter a party so served may serve cross interrogatories upon the party proposing to take the deposition. Within 10 days thereafter the latter may serve redirect interrogatories upon the party who has served cross interrogatories. Within 5 days after being served with redirect interrogatories, a party may serve recross interrogatories upon the party proposing to take the deposition.

(b) *Officer to Take Responses and Prepare Record.* A copy of the notice and copies of all interrogatories served shall be delivered by the party taking the deposition to the officer designated in the notice, who shall proceed promptly in the manner provided by Rule 10.5.(b), (c) and (d), to take the testimony of the witness in response to the interrogatories and to prepare, certify, and file or mail the deposition, attaching thereto a copy of the notice and the interrogatories received by him.

RULE 10.7. *Interrogatories to Parties.* A party may serve written interrogatories upon an adverse party in accordance with the first paragraph of Rule 33 of the Rules of Civil Procedure for the United States District Courts, as amended August 1, 1961; but the word "court" in said Rule 33 shall mean "Board". Answers to interrogatories may be used to the same extent as provided in Rule 10.2. hereof for the use of the deposition of a party.

## APPENDIX F

### Rules of Procedure of the Corps of Engineers Board of Contract Appeals

RULE 12. DEPOSITIONS, PROCEDURE FOR TAKING.

(a) *Reason for taking.* A deposition may be taken and read, whenever in the discretion of the presiding member it appears that a necessary witness cannot be reasonably expected to be present for oral examination.

(b) *Form and return of deposition to Board.* Each deposition should show the docket number and the caption of the proceeding, the place and date of taking, the name of the witness and the party by whom called. The person recording the deposition shall certify thereon that it is a true record of the testimony given by the witness and shall inclose the original deposition and exhibits, in a sealed packet, with postage or other transportation prepaid and forward the same to the Corps of Engineers Board of Contract Appeals.

(c) *Notice to take.* When either party desires to take a deposition, unless the parties shall stipulate as to the time when and place where the deposition is to be taken and the name and address of the witness, such party should give to the opposite party at least 15 days' notice of the time when and the place where such deposition will be taken as well as the

name of the witness. Depositions may be taken upon oral or written interrogatories. Copies of the written interrogatories should accompany the notice to take depositions. If the opposite party desires to submit cross-interrogatories, the cross-interrogatories should be served upon the party giving the notice within 10 days from the receipt of the notice to take the deposition.

## APPENDIX G

### Rules of the Federal Aviation Agency Contract Appeals Panel

§ 2-60.210-4 Motions.

Motions by the appellant or by the contracting officer are made by filing two copies of a notice thereof, together with any supporting papers, with the Panel, and furnishing one copy to the other party. The Panel shall consider any timely motion for extension of time to file; to cure defaults; to require that a petition, answer, or reply be made more definite and certain; to dismiss for lack of jurisdiction, to dismiss or grant summary relief because the petition, answer or reply does not raise a justiciable issue; to require a prehearing conference to reopen a hearing; *to take depositions;* to dismiss for failure to prosecute; or to reconsider a decision. In addition, the Panel may make its own motions, by furnishing a notice thereof to the parties. A party who receives a notice of motion has 20 days after the date he receives the notice to reply and file any answering material, unless a longer time is allowed by the Panel. Motions to reconsider a decision must be made within 30 days after the date of receipt of the decision, unless for good cause shown, the Panel permits a longer period of time. On all motions the Panel shall make orders that are appropriate and are just to the parties, and upon conditions that will promote efficiency in disposing of the appeal. The Panel may, in its discretion, permit oral hearing or argument and the presentation of briefs. [Emphasis added.]

## APPENDIX H

### Rules of the General Services Administration Board of Contract Appeals

7. A. *Representation.*

An appellant may appear before the Board in person, or may be represented by counsel or by any other duly authorized representative.

B. *Depositions.*

(1) Upon agreement of the parties, the testimony of any person may be taken by deposition for use as evidence in the appeal proceedings. The

deponent may be examined on any matter, not privileged, which is relevant to the subject of the appeal. Testimony taken by deposition shall not be considered as evidence in the appeal until such testimony is offered and received in evidence at the oral hearing. If oral hearing has been waived and the appeal is submitted on the record pursuant to the Board's rules, the deposition shall be considered in evidence before the Board, unless any objection made thereto shall have been sustained. Objection may be made at the oral hearing or on submission on the record to receiving in evidence any deposition, or any part thereof on the ground that it does not qualify for admission or upon any other ground which would require the exclusion of the evidence if the witness were orally testifying before the Board. Opportunity for rebuttal of relevant evidence contained in a deposition which is received in evidence shall be accorded the adverse party.

(2) Depositions shall be taken before any person authorized to administer oaths by the laws of the United States or of the state where the examination is held. Each deposition shall show the Board's docket number and style of the proceeding, the place and date of taking, the name of the deponent and the names of all persons present. The person taking the deposition shall certify thereon that the witness was duly sworn by him and that the deposition is a true record of the testimony given by the witness.

(3) Depositions may be taken upon oral examinations or upon written interrogatories.

C. *Discovery*.

(1) Upon written motion filed with the Board, appellant may move for access to official records in the custody of the General Services Administration for the inspection or production of records, not privileged, which constitute or contain evidence regarding any matter which is relevant to the subject matter involved in the appeal.

(2) The motion shall identify with reasonable particularity the document desired and in what respect it is relevant to the issues of the case in terms of discovery. No record furnished in response to a motion shall become evidence until offered and received in evidence. Motions for an order of discovery shall be filed with the Board prior to oral hearing.

(3) Privileged records are those (a) relating solely to internal management, (b) confidential by law, (c) security classified, and (d) whose release is otherwise not in the public interest.

(4) Records, as used herein, include, but are not limited to, documents, papers, books, and letters.

## APPENDIX I

### RULES OF THE CONTRACT APPEALS BOARD OF THE HOUSE OFFICE BUILDING COMMISSION

### RULE 9

### DEPOSITIONS

a. *When depositions may be taken.*—After an appeal has been docketed by the Board either party may take the testimony of any person by deposition upon oral examination or written interrogatories for use as evidence in the appeal proceedings.

b. *Before whom taken.*—Depositions to be offered in evidence before the Board may be taken before and authenticated by any person authorized by the laws of the United States, or by the laws of the place where the deposition is taken, to administer oaths.

c. *Written interrogatories.*—(1) A party desiring to take the deposition of any person upon written interrogatories shall serve them upon the opposite party with a notice stating the name and address of the person who is to answer them and the name or descriptive title and address of the person before whom the deposition is to be taken. Within 15 days thereafter the party so served may serve cross-interrogatories upon the party proposing to take the deposition.

(2) A copy of the notice and copies of all interrogatories and cross-interrogatories served shall be delivered by the party taking the deposition to the person designated in the notice who should proceed promptly to take the testimony of the witness in respose to the interrogatories and cross-interrogatories.

d. *Oral interrogatories.*—When either party desires to take the testimony of any person by deposition upon oral examination, unless the parties stipulate as to the time and place the deposition is to be taken and the name of the person before whom it is to be taken and the name and address of the witness, such party shall give the opposite party at least 15 days written notice of the time and place such deposition will be taken and the name, address and official title of the person before whom it is proposed to take the deposition, and the name and address of the witness. If the party so served finds it impracticable to appear at the taking of the deposition, in person or by counsel, he shall promptly so notify the moving party who shall make available to him a copy of the evidence given at the deposition. Within 15 days after receipt of such copy, the party so served may serve cross-interrogatories upon the moving party.

e. *Objections.*—When notice of intention to take testimony by deposition upon written or oral interrogatories, or cross-interrogatories, is served, the

party on whom such notice is served may within 10 days after such service notify the Board in writing of objections and the nature thereof. The Board will thereupon set a time for hearing to determine the extent to which the interrogatories will be permitted.

f. *Form and return of deposition.*—Each deposition shall show the caption of the proceedings, the place and date of taking, the name of the witness, and the names of all persons present. The person taking the deposition shall certify on the deposition that the witness was duly sworn by him and that the deposition is a true record of the testimony given by the witness, and shall enclose the original deposition and exhibits in a sealed packet with postage and other transportation prepaid and forward safe to the Board. If a party upon whom notice to take a deposition has been served gives notice prior to the taking of such deposition that he will not be able to be present at the time and place set therefor, the person taking the deposition shall furnish a certified copy thereof to such party within 15 days of the date of taking.

g. *Introduction in evidence.*—No testimony taken by deposition shall be considered as part of the evidence in the hearing of an appeal unless and until such testimony is offered and received in evidence at the hearing. It will not ordinarily be received in evidence if the deponent is present and can testify personally at the hearing. In such case it can, however, be utilized to contradict or impeach the testimony of deponent as a witness. If the opportunity to be heard has been waived and the case submitted pursuant to Rule 16, the deposition shall be deemed to be part of the record before the Board.

## RULE 10

### DISCOVERY AND PRODUCTION OF DOCUMENTS AND THINGS FOR INSPECTION, COPYING, OR PHOTOGRAPHING

a. *Order to produce.*—Upon motion of any party showing good cause therefor and upon notice to all other parties, the Board may (1) order any party to produce and permit the inspection and copying or photographing, by or on behalf of the moving party, of any designated documents, papers, books, accounts, letters, photographs, objects or tangible things, not privileged, which are in his or its possession, custody, or control and which constitute or contain evidence (including the existence, description, nature, custody, condition and location of any books, documents, or other tangible things and the identity and location of persons having knowledge of relevant facts) regarding any matter that is relevant to the subject matter involved in the pending action, whether it relates to the claim or defense of the examining party or to the claim or defense of any other party; or (2) order any party to permit entry upon designated land or other property in his or

its possession or control for the purpose of inspecting, measuring, surveying, or photographing the property or any designated object or operation thereon which is relevant as described in (1) above.

b. *Relation to admissible evidence.*—It is not ground for objection to the motion that the evidence will be inadmissible at the hearing if the evidence sought appears reasonably calculated to lead to the discovery of admissible evidence.

c. *Scope of order.*—The order shall specify the time, place, and manner of making the inspection and taking the copies and photographs and may prescribe such terms and conditions as are just. The Board may make an order that the inspection, copying, measuring, surveying, or photographing shall be limited to certain matters, or that secret processes, developments, or research need not be disclosed; or the Board may make any other order which justice requires to protect the party from annoyance, embarrassment, or oppression.

## Rule 11

### Interrogatories to Parties

After an appeal has been filed with the Board, a party may serve on the adverse party written interrogatories to be answered by the party served or, if the party served is a public or private corporation or a partnership or association, by any officer or agent who shall furnish such information as is available to the party. The interrogatories shall be answered separately and fully in writing under oath. The answers shall be signed by the person making them, and the party upon whom the interrogatories have been served shall serve a copy of the answers on the party submitting the interrogatories within 15 days after the service of the interrogatories, unless the Board in its discretion allows, or the parties stipulate to, a longer period of time. Within 10 days after service of interrogatories the party served, if he objects thereto, may notify the Board in writing of the objections and the nature thereof. The Board will thereupon set a time for hearing to determine the extent to which the interrogatories will be permitted.

Interrogatories may relate to any matters which can be inquired into under Rule 9 (Depositions), and the answers may be used to the same extent as provided for the use of the deposition of a party. The number of interrogatories or of sets of interrogatories to be served shall not be limited except as the Board may require to protect a party from annoyance, expense, embarassment, or oppression.

## Rule 12

### Admission of Facts and of Genuineness of Documents

After an appeal has been filed with the Board, a party may serve upon

any other party a written request for the admission by the latter of the genuineness of any relevant documents described in and exhibited with the request or of the truth of any relevant matters of fact set forth in the request. Each of the matters for which an admission is requested shall be deemed admitted unless, within a period designated in the request, not less than 10 days after service thereof, the party to whom the request is directed serves upon the party requesting the admission either—

(1) a sworn statement denying specifically the matters of which an admission is requested or setting forth in detail the reasons why he cannot truthfully admit or deny those matters or

(2) written objections on the ground that some or all of the requested admissions are privileged or irrelevant or that the request is otherwise improper in whole or in part, together with a notice of hearing the objections at the earliest practicable time.

If written objections to a part of the request are made, the remainder of the request shall be answered within the period designated in the request. A denial shall fairly meet the substance of the requested admission, and when good faith requires that a party deny only a part or a qualification of a matter of which an admission is requested, he shall specify so much of it as is true and deny only the remainder.

## APPENDIX J

### CONTRACT APPEAL PROCEDURE OF THE NATIONAL AERONAUTICS AND SPACE ADMINISTRATION BOARD OF CONTRACT APPEALS

§ 18-54.113 DEPOSITIONS.

(a) Depositions shall be limited to those situations where there is reason to believe that the witness will not be available for the hearing, and shall be permitted in evidence only when in fact the witness is not present at the hearing. Subject to the foregoing limitation, depositions upon oral examination or written interrogatories may be taken by either party and used as evidence at the hearing when relevant and material to the case.

(b) Depositions to be offered in evidence before the Board may be taken before and authenticated by any person authorized by the laws of the United States, or by the laws of the place where the deposition is taken, to administer oaths.

(c) The taking of a deposition shall be preceded by giving the opposite party at least 15-day notice in writing of the time and place where such deposition will be taken. The notice shall state the name and address of the witness, and the name, official title, and address of the person before whom

the deposition is to be taken; and shall indicate whether the deposition will be taken on oral examination or written interrogatories. The parties may stipulate in writing the requirements of the notice, in which case no notice is required. If the deposition is to be taken on written interrogatories, two copies thereof should accompany the notice or stipulation.

(d) Within 10 days after receipt of the interrogatories, the opposing party may serve cross-interrogatories to be propounded to the witness by forwarding them to the officer designated to take the deposition and simultaneously forwarding a copy to the other party.

(e) Each deposition shall show the docket number and caption of the proceedings, the place and date of taking, the name of the witness, and the names of all persons present. The person taking the deposition shall certify on the deposition that the witness was duly sworn by him and that the deposition is a true record of the testimony given by the witness, and shall enclose the original deposition and exhibits in a sealed packet with postage and other transportation prepaid and forward same to the Board.

## APPENDIX K

### Rules of Practice of the Post Office Department Board of Contract Appeals

§ 201.113 *Depositions.*

(a) *Depositions as evidence.* Depositions upon oral examination or upon written interrogatories may be taken by either party and used as evidence at the hearing when relevant and material to the case.

(b) *Persons authorized to take.* Depositions may be taken before any person authorized by the laws of the United States or by the laws of the place where they are taken to administer oaths.

(c) *Procedure for taking.* Either party may take a deposition of a witness by giving the opposite party at least 15 days' notice in writing of the time and place where such deposition will be taken. The notice shall contain: The name, address and official title of the officer before whom it is proposed to take the deposition; the name of the witness and the address; whether the deposition will be taken on oral examination or written interrogatories. The parties may stipulate in writing the requirements of the notice in which case the notice can be dispensed with. If the deposition is to be taken on written interrogatories, two copies thereof should accompany the notice or stipulation. The opposing party may serve cross interrogatories to be propounded to the witness within 10 days after receipt of the interrogatories, by forwarding them to the officer designated to take the deposition and simultaneously forwarding a copy to his opponent.

(d) *Procedure for offering in evidence.* A deposition taken under the

provisions of this rule may be offered in whole or in part by either party. Depositions will not be considered as evidence until they have been offered and received as such. All objections made at the time of the taking of the deposition will be passed on at the hearing by the Board which may exclude any part determined to be irrelevant, immaterial or otherwise not admissible as evidence in the proceedings.

## APPENDIX L

### RULES OF THE DEPARTMENT OF STATE CONTRACT APPEALS BOARD

§ 6-60.309 SUBMISSION OF INFORMATION AT BOARD'S REQUEST.

The Board may at any stage of an appeal proceeding, request either party to furnish any information the Board deems necessary or desirable in connection with its consideration of the appeal. Submission thereof shall be made within a time limit to be specified by the Board. Failure of the contractor to comply may result in dismissal of the appeal.

## APPENDIX M

### RULES OF THE VETERANS ADMINISTRATION CONTRACT APPEALS BOARD

(q) *Rule 17; depositions.* (1) Depositions upon oral examination or upon written interrogatories may be taken by either party and offered as evidence.

(2) Depositions may be taken before any person authorized to administer oaths by laws of the United States or by the laws of the place where they are taken.

(3) Either party may take a deposition by giving 15 days' notice in writing to the opposing party of the time and place where such deposition will be taken. By agreement, depositions may be taken without regard to the notice requirement. The notice shall contain: The name, address and official title of the person before whom the deposition is to be taken; the name and address of the witness; and whether the deposition will be taken on oral examination or on written interrogatories. If the deposition is to be taken on written interrogatories, two copies thereof should accompany the notice. The opposing party may within 15 days after receipt of the interrogatories serve cross-interrogatories to be propounded to the witness by forwarding them to the person designated to take the deposition and simultaneously forwarding a copy to the opposing party.

(4) Each deposition should show the docket number and the caption of the proceeding, the place and date of taking, the name of the witness and the party by whom called. The person recording the deposition shall certify thereon that it is a true and complete record of the testimony given by the witness.

(5) A deposition taken under the provisions of this rule may be offered in evidence in whole or in part by either party. Depositions will not be considered as evidence until they have been offered and received as such. All objections will be passed upon by the Board. Evidence not ordinarily admissible under rules of evidence may be received in the discretion of the Board as provided in praragraph (y) (4) (ii) of this section (Rule 25).

(r) *Rule 18; interrogatories to the parties.* Under appropriate circumstances, but not as a matter of course the Board will entertain applications for permission to serve stated written interrogatories upon the opposing party.

(s) *Rule 19; production of documents.* (1) The Board in its discretion may on application order the production of designated documents in the custody of either party, not privileged, which constitute or contain evidence regarding any matter which is relevant to the subject matter involved in the appeal, for inspection and copying.

(2) Documents in the custody of the Veterans Administration regarded as privileged include those:

(i) Relating solely to internal management;
(ii) Confidential by law;
(iii) Security classified; and
(iv) Whose release is otherwise not in the public interest.

## APPENDIX N

### Rules of the Office of Economic Opportunity Contract Appeals Board

§ 22-60.212 Submission of Additional Information at Board's Request.

The Board may request either party at any stage of an appeal proceeding to furnish any information which the Board deems necessary or desirable in connection with its consideration of the appeal. Submission thereof shall be made within a reasonable time limit to be specified by the Board.

## APPENDIX O

### Ppoposed Uniform Rules of Procedure for Government Agency Boards of Contract Appeals

Rule 15. Discovery

(a) *Depositions*

(1) *When Depositions May Be Taken.* After an appeal has been filed with the Board either party, upon notice, may take the testimony of any

person by deposition upon oral examination or written interrogatories for the purpose of discovery or for use as evidence or for both purposes.
[Reference: Fed. R. Civ. P. 26(a); HOBCCAB R. 9(a).]

(2) *Scope For Examination.* The deponent may be examined regarding any matter, not privileged, which is relevant and provided only that the testimony sought appears reasonably calculated to lead to the discovery of admissible evidence.
[Reference: Fed. R. Civ. P. 26(b).]

(3) *Before Whom Taken.* Depositions shall be taken before an officer authorized to administer oaths at the place of examination.
[Reference: Fed. R. Civ. P. 28.]

(4) *Notice.* Except as otherwise agreed to by the parties, the party taking the deposition shall give the opposing party at least fifteen (15) days' written notice of the time and place where the deposition is proposed to be taken, the name, address and title of the person before whom it is proposed to be taken, and the name and address of the witness, if known, and if the name is not known, a general description sufficient to identify him for the particular class or group to which he belongs.
[Reference: Fed. R. Civ. P. 30(a).]

(5) *Deposition Upon Written Interrogatories.* If the deposition is to be upon written interrogatories, the notice shall be accompanied by a copy of the interrogatories, and within ten (10) days after receipt of the notice, the opposing party may serve cross-interrogatories to be propounded to the witness by forwarding them to the person designated to take the deposition and simultaneously forwarding a copy to the other party.
[Reference: Fed. R. Civ. P. 31(a).]

(6) *Form And Return Of Deposition.* Each deposition should show the docket number and the caption of the proceedings, the place and date of taking, the name of the witness, and the names of all persons present. The person taking the deposition shall certify thereon that the witness was duly sworn by him and that the deposition is a true record of the testimony given by the witness, and he shall enclose the original deposition and exhibits in a sealed pre-paid package and forward same to the Board.
[Reference: Fed. R. Civ. P. 30(f).]

(7) *Use Of Deposition.* No testimony taken by deposition shall be considered as part of the evidence in the hearing of an appeal unless such testimony is offered and received in evidence at the hearing. Depositions may be used for any purpose, except that depositions will not ordinarily be received in evidence in lieu of testimony if the deponent is present

and can testify personally at the hearing, or if the party seeking its admission failed to make reasonable efforts to secure the presence of the deponent at the hearing. If the appeal is to be submitted without a hearing, all depositions shall be deemed to be part of the record before the Board, except that either party may move to strike all or any portion thereof.
[Reference: Fed. R. Civ. P. 26(d).]

(8) *Expenses.* All expenses in connection therewith shall be paid by the party taking the deposition, except that the other party shall be entitled to copies of the deposition only upon payment of reasonable charges therefor.
[Reference: New.]

(b) *Interrogatories To Parties.* After an appeal has been filed with the Board, a party may serve on the other party written interrogatories to be answered separately in writing, signed under oath and returned within 15 days. Upon timely objection by the party the Board will determine the extent to which the interrogatories will be permitted. The scope and use of interrogatories will be controlled by Rule 15(a)(2) and (7).
[Reference: Fed. R. Civ. P. 33; HOBCCAB R. 11.]

(c) *Discovery And Production of Documents And Things For Inspection, Copying, Or Photographing.* Upon motion of any party showing good cause therefor, and upon notice, the Board may order the other party to produce and permit the inspection and copying or photographing of any designated documents or objects, not privileged, which are reasonably calculated to lead to the discovery of admissible evidence. If the parties cannot themselves agree thereon, the Board shall specify just terms and conditions of making the inspection and taking the copies and photographs.
[Reference: Fed. R. Civ. P. 34; HOBCCAB R. 10.]

(d) *Admission Of Facts And Of Genuineness Of Documents.* A party may make a written request for the admission by the other party of the genuineness of documents or of the truth of facts. Each of the matters for which an admission is requested shall be deemed admitted unless specifically denied or objected to within ten (10) days after receipt of the request.
[Reference: Fed. R. Civ. P. 36; HOBCCAB R. 12.]

(e) *Orders For The Protection Of Parties And Deponents.* After discovery proceedings have been initiated pursuant to this Rule, upon motion seasonably made by a party or by the person to be examined and upon notice and for good cause shown, the Board may make any order which justice requires to protect the party or witness.
[Reference: Fed. R. Civ. P. 30(b).]

(f) *Refusal To Make Discovery.* The Board, on its own motion or upon

the motion of a party, may enter such orders as are just under the circumstances to ensure compliance with this rule.

[Reference: Fed. R. Civ. P. 37.]

*Comment*

1. Court decisions interpreting the Wunderlich Act have placed upon the Boards the responsibility for developing as complete an administrative record as possible for judicial review. Rule 15, modeled substantially after the Federal Rules of Civil Procedure, provides for broad discovery procedures consistent with this responsibility and compatible with the existing administrative procedures and powers of the Boards. The extent to which the scope of discovery is expanded from existing board levels reflects the due process protection to which the parties will be entitled as the Boards are made the sole fact-finding bodies.

2. The sanction provided under paragraph (f) is considered sufficient in light of the cooperative attitude that normally prevails between the litigants and the Boards' willingness and ability to exercise all their powers of persuasion to obtain the attendance of witnesses. Further, unless all the Boards obtain the subpoena power with its concomitant contempt sanctions, there would seem to be no basis for enlarging the powers of the Boards to enforce discovery. This Rule contemplates sanctions comparable to those set forth in Federal Rule 37(b)(2)(i), (ii), (iii), 37(c) and 37(d).