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## DISCOVERY PROCESS IN BCA APPEALS

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*Department of Veterans Affairs Sanctioned for Withholding Documents*

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### INTRODUCTION

When an appeal from a Contracting Officer's final decision is filed with either the Armed Services Board of Contract Appeals (ASBCA) or the Civilian Board of Contract Appeals (CBCA), each Board's rules govern the **discovery** of the other party's information or documents, including **electronically stored information (ESI)**. These rules are designed to ensure a fair and efficient appeals process as the parties work toward resolution of any given claim.

In a recent ruling, the CBCA affirmed that when a Government agency **abuses these rules**, the Board may step in and impose limited sanctions, as discussed below.

### THE ASBCA AND CBCA DISCOVERY PROCESSES

When an appeal is filed with the ASBCA, the parties must conference to discuss discovery needs within 45 days after the pleadings have been filed. After this conference has taken place each party may serve a request for:

“the production, inspection, and copying of documents, electronic or otherwise...that may lead to the discovery of admissible evidence.”

See [ASBCA Rule 8\(c\)](#). This request for production is to be answered or objected to within 45 days after it is served (noting that the Board may allow a shorter or longer time). Therefore, the rule is designed to allow a party to receive discovery documents from the other party **within 90 days** after the pleadings are filed.

Similarly, the CBCA rules mandate that a written request for the production of documents, including electronically stored information, must be answered within 30 calendar days after the request has been served. See [CBCA Rule 14](#). The CBCA Rules **do not**, however, set a deadline for conducting a discovery conference.

### ABUSE OF DISCOVERY PROCESS

The CBCA recently ordered the Department of Veterans Affairs (VA) to allow an independent third-party access to its computer system to collect electronically stored information (ESI). In doing so, the Board blasted the VA for its “**egregious**” **abuse of the discovery process**, and **regretted that it did not have the authority** to impose monetary sanctions on the VA.

Brasfield & Gorrie LLC (B&G) was the Prime Contractor on the project that included major improvements to a VA medical center. B&G asserted claims of more than \$50 million under the contract, and filed discovery requests for emails and other ESI. See [\*Brasfield & Gorrie, LLC v. Department of Veterans Affairs\*](#), CBCA 3300 (Nov. 13, 2014).

The VA did not respond to B&G's discovery request for two months, and only agreed to a set protocol after 5 months. After the Board imposed deadlines for the VA to produce the requested ESI, the VA missed every deadline without even requesting an extension, and produced very limited information. After that, the VA came up with various excuses for why it could not produce the requested information.

After almost a year of "broken commitments" and no documents produced, B&G moved for sanctions against the VA for **abuse of the discovery process**. In doing so, B&G requested costs, legal fees, and more importantly, for access to the VA's computer system via an independent third-party.

As a result, the Board sanctioned the VA and allowed a third-party to access its computer system to discover any documents requested by B&G. However, the Board explained in some detail that, **unlike a federal court**, as an administrative Board, it did not have the authority to impose monetary sanctions.

## CONCLUSION

This Board decision highlights a common pain-point experienced by contractors who are pursuing a claim against the Government: the ability of a Government entity to **drag out the claims process**, causing a significant delay in the recovery of the contractor's costs. This can be especially painful for a small business that may not have the financial ability to endure a drawn-out appeals process.

As with any claim or appeal, it can be crucial in situations like these to consult with an expert who knows the process and can foresee possible delays or bumps in the road, and then take **preventative measures** to ensure the contractor recovers the amounts it is due in the shortest time possible.

**In the end, you will be glad you made the call; by the way, it's a FREE CALL.**

**EXCELL CONSULTING: "HERE TODAY FOR YOUR TOMORROW."**

*Author's note: The information contained in this article is for general informational purposes only. This information does not constitute legal advice, is not intended to constitute legal advice, nor should it be relied upon as legal advice for your specific factual pattern or situation. – Taylor Benson, Esq., Asst General Counsel*