

DISTRICT OF COLUMBIA CONTRACT APPEALS BOARD

717 14TH STREET, N.W., SUITE 430

WASHINGTON, D.C. 20005

(202) 727-6597



February 22, 2010

Hon. Mary M. Cheh
Chair, Committee on Government Operations
and the Environment
1350 Pennsylvania Avenue, N.W., Suite 108
Washington, D.C. 20004

Dear Councilmember Cheh:

In preparation for the annual performance hearing for the Contract Appeals Board (CAB) scheduled for Monday, March 1, 2010, your office provided the Board a list of questions to be answered. Attached are the Board's responses (and attachments) to your questions.

If you have further questions or need supplementation of any of the responses and file attachments, please contact me at 202-727-3917 or by reply email.

Sincerely,

Jonathan D. Zischkau
Chief Administrative Judge

I. Agency Organization

- 1 Please provide a complete, up-to-date organizational chart for each division within the agency including, either attached or separately, an explanation of the roles and responsibilities for each division and subdivision.
 - Please include a list of the employees (name and title) for each subdivision and the number of vacant positions.
 - Please provide a narrative explanation of any organizational changes made during the previous year.

CAB Response:

Attached is the Board's current organizational chart. The Board has no divisions or subdivisions. The list of all employees within the Contract Appeals Board is provided in the attached file, *CAB Financial and Personnel Information for Responses to Council Questions.xls*, under the tab labeled *FY09-10 Schedule A*. There were no organizational changes in FY2009 and the only organizational change in FY2010 was that the Board hired a specialized government contracts attorney, Mr. William Selinger, as a temporary employee to fill temporarily the vacant third judge position. Mr. Selinger has been providing outstanding support to Chief Administrative Judge Zischkau and Administrative Judge Nash in conducting legal research and writing relating to cases pending before the Board. The mission and functions of the Board are stated below.

The District of Columbia Contract Appeals Board, created in 1953, was statutorily established under the Procurement Practices Act of 1985, D.C. Law 6-85. The Procurement Practices Act, the principal procurement statute for the District government, is codified at Division I (Government of District), Title 2 (Government Administration), Chapter 3 (Procurement), Unit A (Procurement Practices for the District Government) of the District of Columbia Code. Subchapter IX of Unit A deals specifically with the Contract Appeals Board, including its creation (§ 2-309.01), terms and qualifications of members (§ 2-309.02), jurisdiction (§ 2-309.03), contractor appeals to the Board (§ 2-309.04), judicial review of Board decisions (§ 2-309.05), oaths, discovery, and subpoena power (§ 2-309.06), standards of judicial review of Board decisions (§ 2-309.07), and protest procedures (§ 2-309.08). The Board's mission is to provide an impartial, expeditious, inexpensive, and knowledgeable forum for hearing and resolving contractual disputes and protests involving the District and its contracting communities. D.C. Code § 2-309.03 vests the Board with exclusive jurisdiction to decide: (1) protests of District contract solicitations, awards, and related procurement actions; (2) appeals by contractors of District government contracting officer final decisions; (3) claims by the District government against contractors; (4) appeals by contractors of suspensions and debarments; and (5) contractor appeals of interest payment claims under the Quick Payment Act.

As authorized by the Procurement Practices Act, the District government has issued procurement regulations which are published at Title 27 of the DCMR. Portions of the printed July 1988 compilation of Title 27 are now obsolete with amended chapters being published in scattered volumes of the District of Columbia Register. A nearly complete version of 27 DCMR can be found at the Office of the Secretary's website, <http://www.os.dc.gov/os/cwp/view,a,1207,q,640265.asp>, but note that amendments to various chapters have hyperlinks on the right side of this webpage.

The Board has published rules of practice and procedure which govern the adjudication of all cases before the Board. The Board's rules contain chapters on general procedures applicable to all cases (Chapter 1), procedures for appeals (Chapter 2), procedures for protests (Chapter 3), and procedures for electronic filing (Chapter 4). The rules are published in the District of Columbia Register and at the Board's website <http://cab.dc.gov/cab/cwp/view,a,3,q,594709,cabNav,%7C33324%7C.asp> and that of its electronic filing service provider.

II. Personnel

- 2 Please provide a complete, up-to-date position listing for your agency, which includes the following information:
 - Title of position
 - Name of employee or statement that the position is vacant, unfunded, or proposed.
 - Date employee began in position
 - Salary and fringe, including the specific grade, series, and step of position
 - Job status (continuing/term/temporary/contract)

Please list this information by program and activity

CAB Response:

This information is provided in the attached files, *CAB Financial and Personnel Information for Responses to Council Questions.xls*, under the tab labeled *FY09-10 Schedule A* and *CAB Organization Chart 02-22-2010.doc*. The Board has three funded Administrative Judge positions: Jonathan D. Zischkau is the Chief Administrative Judge, Administrative Judge Warren J. Nash is the vice chair, and the third Administrative Judge position had been vacant since Administrative Judge Matthew Watson retired in September 2005, but as explained above, the Board hired a specialized government contracts attorney, Mr. William Selinger, as a temporary employee to provide legal support to our judges.. The Board resolves cases through panel assignments, with each case being assigned a presiding judge, either Chief Judge Zischkau or Judge Nash. A minimum of two judges is required to meet the Board's quorum requirement as provided in D.C. Code § 2-309.02(b). With its two judges, the Board meets the quorum requirement.

Judge Nash has served on the Board for over six years. He has presided over or participated in the resolution of over 175 cases during his time of service as shown on a listing to be provided called *Judge Nash Contract Appeals Board Cases 2004-2010.doc*. His initial 4-year appointment expired on July 28, 2007, but he continues to serve pursuant to D.C. Code § 2-309.02(a)(1). Prior to being appointed to the Board, Judge Nash served for 20 years in the Office of the Attorney General (formerly Office of Corporation Counsel) and advised District contracting agencies concerning both government contract protest and performance disputes for more than 17 years, litigating over 100 cases before the Board. He was appointed to the Board on February 24, 2004. In 2006, he was elected to the Government Contracts and Litigation Section's Steering Committee of the D.C. Bar for a two year term and has served as its co-chair. Last year, he assisted in organizing and lectured at the very successful D.C. Bar Government Contracts and Litigation Section's Outreach Program which provided a two-day procurement law seminar aimed at District government contracting officials as well as the contracting community. While co-chair of the Section, he received the prestigious D.C. Bar award for the best D.C. Bar Section outreach program and best section award for 2008. In addition, Judge Nash is past president of the Board of Contract Appeals Judges Association, and has served as secretary and treasurer of the Association. He has participated as a panel member in D.C. Bar government contracts programs focusing on District procurement law and has been a reviewer and editor of the Government Contracts Chapter of the D.C. Practice Manual.

Chief Judge Zischkau has served on the Board for over sixteen years. He has presided over or participated in the resolution of well over 500 cases during his time of service as shown on a listing to be provided called *Judge Zischkau Contract Appeals Board Cases 1993-2010.doc*. His fourth 4-year term appointment expired on July 26, 2009, but he continues to serve pursuant to D.C. Code § 2-309.02(a)(1). He was first appointed to the Board on July 26, 1993. In 2004, he was elected to the Government Contracts and Litigation Section's Steering Committee of the D.C. Bar for a two year term and chaired the D.C. Bar Practice Manual committee and Nominations committee for the Section. Last year, he assisted in organizing and lectured at the very successful D.C. Bar Government Contracts and Litigation Section's Outreach Program which provided a two-day procurement law seminar aimed at District government contracting officials as well as the contracting community. Judge Zischkau has been a past member of the Board of Directors of the Board of Contract Appeals Judges Association. He has lectured frequently on government contracts law in general and on District procurement law in particular. He has participated as a lecturer in ABA, D.C. Bar, BCABA, and BCAJA government contracts programs and has been a reviewer and principal editor of the Government Contracts Chapter of the D.C. Practice Manual. Judge Zischkau served on the Council's Procurement Reform Task Force and was deeply involved in drafting major portions of what became the Procurement Reform Amendment Act of 1996. Prior to joining the Board in 1993, Judge Zischkau was a member of the government contracts practice group at Crowell & Moring, LLP, and before that, he clerked for Hon. Phillip B. Baldwin, Circuit Judge, United States Court of Appeals for the Federal Circuit.

- 3 Please provide the number of FY09 full-time equivalents (FTEs) for the agency, broken down by program and activity. Please also note the number of vacancies at the close of FY09, by program and activity, and current vacancy information.
 - For each vacant position, please note how long the position has been vacant and whether or not the position has since been filled.
 - How many vacancies within the agency were posted during FY09 and FY10, to date?

CAB Response:

This information is provided in the attached file, *CAB Financial and Personnel Information for Responses to Council Questions.xls*, under the tab labeled *FY09-10 Schedule A* and the tab labeled *FTEs*. The Board had a single vacant position in FY2009, namely the third administrative judge position which has been vacant since Administrative Judge Matthew S. Watson retired in September 2005. Despite the efforts of the Board in identifying four highly qualified and competent candidates who have applied for that position, the position has remained vacant. In the Board's view, it is in the best interest of the District and the public that the position only be filled with a highly qualified and competent candidate. In FY2010, the Board hired a specialized government contracts attorney, Mr. William Selinger, as a temporary employee to fill the vacant third judge position. Mr. Selinger has been providing outstanding support to Chief Administrative Judge Zischkau and Administrative Judge Nash in conducting legal research and writing relating to cases pending before the Board.

At the Board's recent BRT meeting with the Office of the City Administrator, the Board was advised that the Mayor is contemplating funding a total of five judge positions, that is, two more than are currently funded. The Board advised the City Administrator that the Board's caseload does not justify funding more than the three existing judge positions. Three judges, highly qualified in government contracts law, can clearly handle the caseload at the Board.

- 4 Please provide a narrative description of the personnel process within the agency. Specifically, please describe how the personnel activity within the agency works in coordination with the DC Department of Human Resources to ensure that human resource needs are met.

CAB Response:

The Board has two HR specialists who initiate personnel actions and conduct most personnel activities for the Board. Our dealings with DCHR show significant variation from very helpful support to poor support over the past several years. Because the Board's personnel authority is not clearly defined in the D.C. Code, in some instances DCHR representatives take the position that the Board has independent personnel authority while in other instances DCHR representatives seem to take the opposite

position. The Board formerly had the ability to perform HR processing on its own PARs without the intervention of DCHR. In the past year, apparently as part of changes implemented to PeopleSoft system wide, the Board has learned that for PARs involving compensation changes, its HR specialists can no longer perform the final HR processing step and must request a DCHR representative to perform that function. Although we have received notice of a new DCHR person "assigned" for handling Board PARs who seems very cooperative and supportive, we know from experience that turnover at DCHR is an issue, but more importantly, to protect the independence of the Board, the Board should not have to depend on personnel at DCHR to perform HR functions that the Board's own HR personnel previously had performed and should perform. To protect the independence of the Board, it is recommended that the Board's independent personnel authority be clarified by amending Section 301(13) of the District of Columbia Government Comprehensive Merit Personnel Act of 1978, effective March 3, 1979, D.C. Law 2-139 (D.C. Official Code § 1-603.01 (13)), to specifically list the Contract Appeals Board in the list of independent agencies with the other District agencies that perform quasi-judicial functions such as the Public Service Commission, the Public Employee Relations Board, and the Office of Employee Appeals.

- 5 Does the agency conduct annual performance evaluations of all its employees? Who conducts such evaluations? What steps are taken to ensure that all agency employees are meeting individual job requirements?

CAB Response:

The Board conducts annual performance evaluations of its employees. The General Counsel performs the evaluations of the Administrative Officer and the Staff Assistant and the Chief Administrative Judge reviews those evaluations. The Chief Administrative Judge prepares a performance evaluation of the Administrative Judges and the General Counsel. Beyond the formal performance evaluations, the Chief Administrative Judge provides informal feedback to Board employees on an as needed basis throughout the year. All Board employees continuously strive to study their work and identify better ways to do their work.

- 6 Please list all employees detailed to or from your agency, if any. Please provide the reason for the detail, the detailed employee's date of detail, and the detailed employee's projected date of return.

CAB Response:

No employees were detailed to or from the Board.

- 7 Please provide the Committee with:
 - A list of all employees who receive cellphones, personal digital assistants, or similar communications devices at agency expense

- A list of all vehicles owned, leased, or otherwise used by the agency and to whom the vehicle is assigned
- A list of employee bonuses granted in FY09 and FY10, to date, if any
- A list of travel expenses, arranged by employee
- A list of the total overtime and workman's compensation payments paid in FY09 and FY10, to date

CAB Response:

The Chief Administrative Judge, the Administrative Officer, and the Staff Assistant each have a PDA that provides both wireless data and voice capabilities under the District's standard AT&T plan, and the Board has one USB modem also under the District's standard AT&T plan capable of obtaining wireless internet access should the Board lose connectivity to the office's DCNET access to the DCWAN. The Board has no government vehicles (whether owned, leased or used). In FY2009, the Board granted a special service act award to our Staff Assistant, Mia House Thomas, in the amount of \$4,900 for her exceptional service to the Board handling the additional job functions during the period after the retirement of the Board's other clerk and during the training period of the new Administrative Officer. The only travel expenses incurred by the Board consist of metro fare card purchases for employees traveling by metro on Board business. The Board incurred no overtime or workman's compensation expenses in FY2009 and FY2010 to date.

III. Budget

- 8 Please provide a chart showing your agency's approved budget and actual spending, by program, for FY09 and FY10, to date. In addition, please describe any variance between fiscal year appropriations and actual expenditures for FY09 and FY10, to date.

CAB Response:

This information is provided in the attached file, *CAB Financial and Personnel Information for Responses to Council Questions.xls*, under the tab labeled *FY09-10 Program - CSG*.

- 9 Please list any reprogrammings, in or out, which occurred in FY09 or FY10, to date. For each reprogramming, please list the total amount of the reprogramming, the original purposes for which the funds were dedicated, and the reprogrammed use of funds.

CAB Response:

This information is provided in the attached file, *CAB Financial and Personnel Information for Responses to Council Questions.xls*, under the tab labeled *Reprogram*.

- 10 Please provide a complete accounting for all intra-District transfers received by or transferred from the agency during FY09 or FY10, to date.

CAB Response:

There were no intra-District transfers.

- 11 Please identify any special purpose revenue accounts maintained by, used by, or available for use by your agency during FY09 or FY10, to date. For each account, please list the following:
- The revenue source name and code
 - The source of funding
 - A description of the program that generates the funds.
 - The amount of funds generated by each source or program in FY09 and FY10, to date
 - Expenditures of funds, including the purpose of each expenditure, for FY09 and FY10, to date

CAB Response:

There were no special purpose revenue accounts.

- 12 Please provide a list of all projects for which your agency currently has capital funds available. Please include in this list a description of each project, the amount of capital funds available for each project, a status report on each project, and planned remaining spending on the project.

CAB Response:

There are no capital funds available to the Board.

- 13 Please provide a complete accounting of all federal stimulus funds received for FY09 and FY10, to date.

CAB Response:

There were none.

- 14 What steps have been taken during FY09 and FY10, to date, to reduce the following:
- Space utilization

- Communications costs
- Energy use

CAB Response:

The Board is actively involved with DRES in securing a new lease of approximately half the space the Board currently rents by locating with the Civilian Board of Contract Appeals and expects to reduce fixed cost rent by fifty percent as a result for FY2011. In its new space, the Board will be able to reduce the number of telephone lines it requires by about 50 percent. In its existing space, the main sources of power consumption at the Board's offices at 717 14th Street, N.W., Suite 430, are the HVAC units, the ceiling lights, and the IT equipment. The Board takes prudent steps to minimize its use of electricity by using HVAC units and lights only in the offices that are in use and turning off HVAC units (the building remotely provides power to these units only between the hours of 5 a.m. and 6:30 p.m. M-F) and lights at the end of the work day. The Board has replaced some higher wattage light fixtures with more modern lower wattage, higher lumen output fixtures. The Board's printers and copier have energy efficient standby modes. The Board does not have a separate line item cost for electricity as building utility costs are wrapped up into the overall rental cost managed by DRES on behalf of all the District agencies in the 717 14th Street building.

- 15 Please provide the agency's fixed costs budget and actual spent for FY08, FY09, and FY10, to date. Please include a narrative description of any substantial changes in these costs.

CAB Response:

This information is provided in the attached file, *CAB Financial and Personnel Information for Responses to Council Questions.xls*, under the tab labeled *Fixed Cost*.

- 16 Please identify all legislative requirements that the agency lacks sufficient resources to properly implement.

CAB Response:

The Board has sufficient resources in FY2010 to implement all legislative requirements.

IV. Agency Programs and Policies

- 17 Please describe any initiatives your agency implemented within FY09 or FY10, to date, to improve the internal operation of the agency or the interaction of the agency with outside parties. For each initiative please provide:
- A detailed description of the program

- The name of the employee who is responsible for the program
- The total number of FTE's assigned to the program
- The amount of funding budgeted to the program
- The results, or expected results

CAB Response:

The following were the program objectives and initiatives for FY2009:

OBJECTIVE 1: Promote confidence in the integrity of the procurement process through equitable, timely, efficient, and legally correct adjudication of disputes and protests.

INITIATIVE 1.1: Complete digital archiving and loading into a database of all cases filed since 2004 and permit web-based retrieval and full-text searching capability by parties with pending cases and the public. Digital archiving provides for better preservation and retrieval than paper records. Once digitized, the Board's case files can be imported into its document management system and database. The database is linked to the Board's public website which contains a series of searching options for users, such as searching documents by case number and full-text searching. This functionality is very useful for litigants who have cases pending before the Board and for the contracting community and the public who wish to find case-specific information or general information about contract administration, contract formation, and protest and dispute resolution. The Board expects to complete this initiative within its current contracting services budget for FY2009.

INITIATIVE 1.2: Improve the features for electronic filing and service of pleadings in Board cases. The Board will continue working with its electronic filing service provider to improve the features available to litigants, including securing and redacting protected information in filings, improve the procedures for initiating electronically new cases, and improve the user interface to reduce filing errors and to make the electronic filing process faster and more functional. The Board expects to perform this initiative without additional cost to the District government.

OBJECTIVE 2: Assist parties to resolve disputes through negotiation and settlement by initiating early case intervention, focusing attention on critical facts, resolving threshold legal issues, and conducting regular status conferences.

OBJECTIVE 3: Educate government and private contracting parties on procurement policies of fair, open, and broad-based competition, the legal requirements for conducting proper procurements, and resolving disputes through traditional and alternative dispute resolution methods.

The following are the program objectives and initiatives for FY2010:

OBJECTIVE 1: Promote confidence in the integrity of the procurement process through equitable, timely, efficient, and legally correct adjudication of disputes and protests.

INITIATIVE 1.1: Complete digital archiving and loading into a database of all cases filed since 2003 and permit web-based retrieval and full-text searching capability by parties with pending cases and the public. Digital archiving provides for better preservation and retrieval than paper records. Once digitized, the Board's case files can be imported into its document management system and database. The database is linked to the Board's public website which contains a series of searching options for users, such as searching documents by case number and full-text searching. This functionality is very useful for litigants who have cases pending before the Board and for the contracting community and the public who wish to find case-specific information or general information about contract administration, contract formation, and protest and dispute resolution. The Board completed archiving and loading into the database of all cases filed since 2004 during FY2009 and expects to complete cases filed since 2003 within its current contracting services budget for FY2010.

INITIATIVE 1.2: Improve the features for electronic filing and service of pleadings in Board cases. The Board will continue working with its electronic filing service provider to improve the features available to litigants, including securing and redacting protected information in filings, improving the procedures for initiating electronically new cases, and improving the user interface to reduce filing errors and to make the electronic filing process faster and more functional. The Board expects to perform this initiative without additional cost to the District government.

OBJECTIVE 2: Assist parties to resolve disputes through negotiation and settlement by initiating early case intervention, focusing attention on critical facts, resolving threshold legal issues, and conducting regular status conferences.

OBJECTIVE 3: Educate government and private contracting parties on procurement policies of fair, open, and broad-based competition, the legal requirements for conducting proper procurements, and resolving disputes through traditional and alternative dispute resolution methods.

The Chief Administrative Judge is responsible for the overall program objectives and initiatives. All Board personnel have been and continue to be involved in successfully achieving these program objectives and initiatives. The judges and the general counsel are primarily responsible for Objective 1 while the Board's administrative officer and the staff assistant are primarily involved with Initiative 1.1, including the electronic archival of pending and closed cases, and importing pleadings to the Board's database. The Chief Administrative Judge, Administrative Officer, and Staff Assistant are primarily responsible for Initiative 1.2. The Board judges and General Counsel are primarily responsible for Objectives 2 and 3. These objectives and initiatives

are achieved within the Board's budget primarily through the expenditure of labor hours. The expected results are set forth above in the objectives and initiatives narrative.

- 18 Please provide a list of all studies, research papers, and analyses ("studies") the agency prepared, or contracted for, during FY09 and FY10, to date. Please state the status and purpose of each study.

CAB Response:

The main work product of the Board is case management, assisting parties in developing a proper record, factual analysis, government contracts and litigation legal research, legal analysis, legal writing, conducting status conferences, prehearings, and hearings, assisting parties in reaching settlements where possible, and issuing interlocutory and final decisions on cases. Unpublished orders can be found at the Board's website and published decisions can be found at the Board's website, LexisNexis, Westlaw, and the District of Columbia Register.

- 19 If applicable, please explain the impact on your agency of any legislation passed at the federal level during FY09 or FY10, to date.

CAB Response: Not applicable.

- 20 Please list all regulations for which the agency is responsible for oversight or implementation. Please list by chapter and subject heading, including the date of the most recent revision.

CAB Response: The Board is responsible for implementing rules of practice and procedure under Subchapter IX of the PPA. The current version of the Board's rules, published at 49 D.C. Reg. 2078 (March 8, 2002), is found at the Board's website (<http://cab.dc.gov/cab/cwp/view,A,3,Q,600974.asp>) and at the legal databases of LexisNexis and West Group. The Board has jurisdiction to interpret and apply the Procurement Practices Act as well as regulations authorized by the PPA, Title 27 of the DCMR, to the cases before the Board.

- 21 Did the agency meet the objectives set forth in the performance plan for FY09? Please provide a narrative description of what actions the agency undertook to meet the key performance indicators or any reasons why such indicators were not met.

CAB Response: The Board met Objective 1 and Initiatives 1.1 and 1.2. The Board also met Objectives 2 and 3. The key performance indicators are discussed below under section VI, entitled "Measures."

- 22 Please list and describe any ongoing investigations, studies, audits, or reports on your agency or any employee of your agency, or any investigations, studies, audits, or reports

on your agency or any employee of your agency that were completed during FY09 or FY10, to date.

CAB Response: None.

- 23 Please identify all electronic databases maintained by your agency, including the following:
- A detailed description of the information tracked within each system
 - Identification of persons who have access to each system, and whether the public can be granted access to all or part of each system
 - The age of the system and any discussion of substantial upgrades that have been made or are planned to the system

CAB Response: The Board has an electronic database and document management system linked to the Board's public website called WorkSite Server, version 8.3. The database contains copies of the Board's pleadings loaded from pending appeals and protests as well as a number of closed appeals and protests. The database contains full text proximity searching capabilities and an electronic docket sheet feature, according to different search links which are found at the Board's <http://cab.dc.gov> website. This database can be accessed read-only by the public. The Board maintains and inputs information using a backend client application called FileSite which works with WorkSite Server. The WorkSite Server system was upgraded to version 8.3 during FY2009.

- 24 What has the agency done in the past year to make the activities of the agency more transparent to the public? In addition, please identify ways in which the activities of the agency and information retained by the agency could be made more transparent.

CAB Response: See responses to Questions 17-23 above.

- 25 Please identify any statutory or regulatory impediments to your agency's operations.

CAB Response: The needed clarification of the Board's independent personnel authority is discussed above in the response to Question 4.

- 26 Please identify all recommendations identified by the Office of the Inspector General or the D.C. Auditor during the previous 3 years. Please note what actions have been taken to address these recommendations.

CAB Response: Not applicable.

V. Contracting and Procurement

27 Please list each contract, procurement, lease, and grant (“contract”) awarded or entered into by your agency during FY09 and FY10, to date. For each contract, please provide the following information, where applicable:

- The name of the contracting party
- The nature of the contract, including the end product or service
- The dollar amount of the contract, including budgeted amount and actually spent
- The term of the contract, including any option years.
- Whether the contract was competitively bid or not
- The name of the agency’s contract monitor and the results of any monitoring activity
- Funding source

CAB Response:

During FY2009, the Board issued no major contracts but had two purchase orders, one with K-Street Group, to provide network and IT support services, monitored by Mia House-Thomas, Albert Wilcox, Richard Rothschild, and Jonathan Zischkau, and another with Theodore Tarone for electronic archival services, monitored by Mia House-Thomas, Albert Wilcox, Richard Rothschild, and Jonathan Zischkau. In FY2010, the Board has one purchase order with Harlan Friddle, to provide electronic archival services, monitored by Mia House-Thomas, Albert Wilcox, Richard Rothschild, and Jonathan Zischkau. These purchase orders were all funded from the Board’s 0040 CSG account.

28 Please provide a list of all MOUs currently in place and any MOUs planned for the coming year.

CAB Response: Not applicable.

29 Please describe the steps taken by the agency to provide oversight and management for contracts. Specifically, how does the agency ensure that its programmatic needs are being met? How does the agency ensure that contracting actions are standardized across various programs?

CAB Response: Oversight and management of the Board’s few purchase orders is shared by the complementary roles of Mia House-Thomas, Albert Wilcox, Richard Rothschild, and Jonathan Zischkau.

30 What is the process, including a timetable, for the procurement of goods and services? How many steps must the agency take in order to complete a procurement? What is the process for a sole-source procurement?

CAB Response: For the one or two purchase orders placed by the Board per year, the needs are identified in a timely manner and the purchase order is requisitioned by the Board and an OCP contracting officer issues the purchase order in a timely manner.

- 31 Please describe the methods used by your agency to monitor contract compliance. If your agency has a written policy on contract monitoring, please provide a copy of the policy.

CAB Response: See response to Question 27.

VI. Measures

- 32 Please provide the following statistics regarding matters brought before the Board in FY09 and FY10, to date:
- A breakdown of the number and types of cases that came before the Board
 - A breakdown of how these cases were resolved
 - A breakdown of how many cases were resolved early
 - The number of cases appealed and the results of those cases appealed
 - The number of cases settled through alternative dispute resolutions
 - The number of disputes involving contracts of more than \$100,000

CAB Response:

In FY 2009, contractors filed 40 protests with the Board (up from 24 filed in FY2008), and the Board resolved 37 protests (up from 18 in FY2008). During the first 5 months of FY2010, that is, since October 1, 2009, 14 new protests have been filed, and a total of 20 protests have been resolved (14 of which were protests filed during FY 2009). Our measure of performance for protest cases is whether the Board resolved at least 90 percent of the protest cases within 60 business days of filing. The 60-business day requirement is found in D.C. Code § 2-309.08(d) (2001). Consolidated protests are measured from the latest filing date and the Board considers timely decisions on protests that are issued reasonably promptly after the record is complete, e.g., where the parties require additional time to prepare the record, the contracting agency delays the closing of the record by reconsidering its actions, or the parties attempt to settle the protest. For FY2009, the performance result was 78.4 percent (29/37), and for FY 2010 (to date) the performance result is 85 percent (17/20).

In FY 2009, contractors filed 23 appeals (down from 30 appeals in FY 2008), and the Board resolved 21 appeals. Of the 21 appeals resolved, 8 cases involved claims exceeding \$100,000. Since October 1, 2009, 10 new appeals have been filed and 9 appeals have been resolved. The Board currently has 84 appeals pending. The performance measures relating to appeals is the percentage of appeals cases decided within 4 months of their being ready for decision. In FY2009, all 21 closed appeals were voluntary dismissals based on settlement. In FY2010 to date, 7 decisions were voluntary dismissals, and 2 decisions were published opinions, one of which was decided more than 4 months after the appeal was ready for decision but that came after a protracted period in which the parties were attempting to settle the case.

The proper forum for judicial review of a Board dispute decision is the D.C. Court of Appeals, while for protests, it is the D.C. Superior Court in the first instance. No party sought judicial review of any appeals decision in FY2009, and in FY2010 to date; one interlocutory order (D-1062 10/26/2009) has been appealed to the D.C. Court of Appeals but the Board is not aware of any action by the Court on that petition for judicial review. There was one "appeal" misfiled by a party in the D.C. Court of Appeals of a Board protest decision (P-0809 08/26/2009). During FY2009, one decision was issued by the D.C. Superior Court remanding to the Board for further proceedings a protest decided by the Board in FY2008 involving the validity of the provisional recertification of a bidder by the DSLBD. In FY2010, petitions for review have been filed in D.C. Superior Court regarding the Board's September 18, 2009 decision in the consolidated protests of CAB Nos. P-0817 and P-0818, and those petitions are currently pending before D.C. Superior Court.

33 For another year, the Board has been operating without a third judge. What impact has this had on Board operations?

CAB Response: The lack of a highly qualified third administrative judge means that the two current judges are unable to provide in some cases the optimal early case evaluations that might assist the parties in resolving their dispute at an earlier stage in the litigation. In some cases, the Board has been able to assist the parties in an early resolution but the Board could do so in more cases with a highly qualified third judge. The hiring of Mr. Selinger, the government contracts attorney, as a temporary employee, has enabled the Board judges to perform their adjudicatory roles more effectively by providing legal research and analysis along with the Board's General Counsel. The Board anticipates that this temporary solution will allow the Board to deliver timely decisions in all of its cases that become ready for decision. The appointment of an unqualified or less than highly qualified candidate to the third judge position would severely impede the performance of the Board by forcing the Board to end the temporary employment of Mr. Selinger which has brought significant performance gains to the Board and would significantly drain the valuable time of Judge Zischkau and Judge Nash in training an appointee who is not already highly qualified in the very specialized field of government procurement law. As the Committee understands and has proposed in its procurement reform legislation, a highly qualified government contracts practitioner should have well over 60 solid months (a minimum of 7,500 hours) of billable-type government contracts work, including procurement litigation. We ask the Committee to judge candidates by measuring a candidate's *demonstrated* government contracts experience with the experience of the four candidates identified by the Board who have submitted detailed qualification statements of their extensive government contracts practice. A judicial candidate should be *well known* and *recognized* by one's government contracts practitioner peers (DC Bar Government Contracts and Litigation Section, ABA Public Contract Law Section, and the Board of Contract Appeals Bar Association) as a highly qualified government contract attorney. Among other elements, the integrity and effectiveness of the District's procurement system depends on a Contract Appeals Board

composed only of highly respected and highly qualified government contracts professionals.

VII. Performance Plans

34 Did the agency meet the objectives set forth in the FY09 performance plan? Please provide a narrative description of what actions the agency undertook to meet the key performance indicators or any reasons why such indicators were not met.

CAB Response:

As described above in response to Question 32, the Board met all of its performance objectives and initiatives. With regard to the five key performance indicators, the Board has met or exceeded all targets except for the KPI of resolving 90 percent of its protests within 60 business days. Considering that the Board's protest filings increased by 166 percent during FY2009, the Board believes that it performed very well in resolving 78.4 percent of the protests in a timely manner, especially considering the complexity of a number of the protests. From the standpoint of the critical importance of the Board's adjudicatory function, the Board believes that the government contracts bar recognizes the Board as a very effective tribunal from the standpoint of the fairness, quality, and quantity of its adjudicatory work product in FY2009 and FY2010 to date.

In FY2009, the Board (1) resolved 100 percent of its appeals cases within 4 months of the cases being ready for decision; (2) achieved 100 percent of new cases using the electronic filing services; (3) had no decisions decided in the year that were reversed or remanded on appeal (one decision remanded from FY2008); and (4) achieved 95 percent of cases closed by the Board which were completely archived electronically and web accessible.

In October 2001, the Board became the first administrative tribunal in the District (and, in the nation, as far as we can tell) to have a fully operational and comprehensive electronic filing system for its entire docket.

The Board's website went live on August 15, 2006, with its integrated document management system. This functionality enables website users to display electronic docket sheets with hyperlinks to individual pleadings, as well as permitting users to conduct full-text searching of the Board's case database, such as published opinions, pending appeals and protests, closed appeals and protests, and the entire Board database. We are not aware of any other judicial or quasi-judicial tribunal that has this type of functionality available to public users.

- 35 *INITIATIVE 1.1 of CAB's FY10 performance plan describes a process to complete digital archiving and loading into a database of all cases filed since 2003. This task has been ongoing each year, with FY09's initiative relating to cases filed since 1999.*
- Please assign the agency a letter grade, from A to F, based on whether it accomplished this objective. Please justify this grade.
 - How much web traffic did the web-based retrieval system received in FY09 and FY10, to date?
 - Last year, the Board indicated that by the end of FY11, digital archiving would extend back to 1999. Has this been achieved?

CAB Response:

The Board should receive an "A" grade for its digital archiving and database loading efforts. As stated above, the Board with its own resources designed and implemented the archiving solution and integrated it with the Board's public website which enables public users to conduct proximity and full text searching queries on the entire Board database or user selected portions of the database. This achievement provides outstanding transparency of and accessibility to the Board's cases and work that is not matched by any other judicial or quasi-judicial tribunal in the nation as far as we are aware.

The Board's FY2009 performance plan set a target of extending the digital archiving and loading into the database of cases from 2004. The Board met this target.

The Board's FY2010 performance plan set a target of extending the digital archiving and loading into the database of cases from 2003. The Board will meet this target by the end of FY2010.

The Board originally set a target in approximately FY2006 of achieving by FY2009 the archiving and loading of cases since 1999. Due to the vast majority of this work being done in-house by the Board's staff with little funding available to contract archival support services, the Board revised its targets in FY2008 to realistic goals based on funding provided to the Board.

- 36 *INITIATIVE 1.2 of CAB's FY10 performance plan describes how the Board wants to improve features for electronic filings. After a party initiates a case, all future pleadings should be filed electronically. The electronic filing system retains all pleadings filed in each case and parties may download and print pleadings from the electronic filing website at any time.*
- Please assign the agency a letter grade, from A to F, based on whether it accomplished this objective. Please justify this grade.
 - What improvements have been made to the electronic filing system? How can it be made more functional?
 - Why is the FY09 plan identical to the FY10 plan?

CAB Response:

The Board should receive an “A” grade for its electronic filing system initiatives. As stated above, the Board judges spent considerable time researching electronic filing solutions and identified an electronic filing solution by CourtLink (later acquired by LexisNexis) which provides at no cost to the Board comprehensive electronic filing and service capabilities in every Board case. As stated earlier, in October 2001, the Board became the first administrative tribunal in the District (and, in the nation, as far as we can tell) to have a fully operational and comprehensive electronic filing system for its entire docket. Since 2001, there have been numerous enhancements to the electronic filing system, with recent enhancements including a redaction functionality and the ability of pro se parties to not only access the electronic filing system read-only but to also be able to file and serve using a pay as you go system rather than the traditional monthly firm billing system, which is a feature we are told that is unique to the Contract Appeals Board. The plan is identical in FY2009 and FY2010 because the Board will always consider each year new enhancements which will make the electronic filing system more effective.

37 *OBJECTIVE 1 of CABs’ FY10 performance plan is to continue to educate government and private contracting parties on procurement policies for fair, open, and broad-based competition, and the legal requirements for conducting proper procurements.*

- Please assign the agency a letter grade, from A to F, based on whether it accomplished this objective. Please justify this grade.
- Why were no initiatives listed under this objective?
- In what ways has the Board educated the public regarding procurement policies and practices?
- What percentages of matters are rejected by the Board due to those matters resting outside the Board’s jurisdiction?
- Has the Board noticed any increase in the awareness of the Board and its work by the public over FY09 and FY10, to date?
- What presentation or seminars has Board members attended during FY09 and FY10, to date?

CAB Response:

The Board should receive an “A” grade for Objective 3. Beyond the unique ability of the Board (among judicial tribunals) to make publicly available its electronic case docket and full text capable searching database of cases and pleadings for its pending and loaded closed cases, the Board judges have promoted the education of our contracting communities by organizing, with members of the DC Bar Government Contracts and Litigation Section Steering Committee, an annual procurement seminar directed to District government contracting personnel (counsel, contracting officers, contract specialists, contracting agency personnel) and contractor personnel. The Board judges have lectured frequently on topics of District procurement law, general government contracts law, Board practice and procedure, procurement litigation, and alternative

dispute resolution. The Board judges and general counsel continue to participate actively and/or carry out leadership roles in the principal government contract bar organizations, including the DC Bar Government Contracts and Litigation Section, the ABA Public Contract Law Section, the Board of Contract Appeals Bar Association, and the Board of Contract Appeals Judges Association.