

In the United States Court of Federal Claims

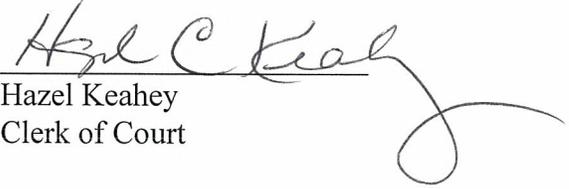
NOTICE OF PROPOSED AMENDMENTS TO RULES

Pursuant to 28 U.S.C. §§ 2071(b) and 2503(b), the United States Court of Federal Claims hereby provides notice that it proposes to amend its rules and invites public comment on the proposed amendments. The proposed amendments affect (i) RCFC 5.5, 9, 26, 41, 52.1, and 58.1; (ii) Appendix E (electronic case filing procedure); and (iii) Form 8 (standard protective order in procurement protest cases). All proposed changes are shown by strikethrough and highlighting.

Comments must be received by May 25, 2012, and must be addressed to:

Hazel Keahey
Clerk of Court
United States Court of Federal Claims
717 Madison Place, NW
Washington, DC 20005

Absent further notice, these amendments will take effect July 2, 2012.


Hazel Keahey
Clerk of Court

Issued: April 10, 2012

Proposed Amendment to Rule 5.5

Rule 5.5. Format of Filings and Required Information

* * * * *

(d) Number of Copies.

(1) *Complaint.*

(A) *Paper Form.* Plaintiff must file an original and 2 copies of the complaint, attaching a completed cover sheet to the original (shown in Form 2 of the Appendix of Forms).

(B) *Electronic Copy.* If the complaint exceeds 20 pages and plaintiff is not appearing *pro se* pursuant to RCFC 83.1, plaintiff must also file one copy of the complaint in electronic form using a disc in CD-ROM format.

(2) *Subsequent Filings.* Except in an electronic case under Appendix E ~~or in an appeal under RCFC 58.1~~, a party must file an original and 2 copies of any filing.

* * * * *

(As revised and reissued May 1, 2002; as amended July 1, 2004; as renumbered Nov. 15, 2007; as amended Nov. 3, 2008, July 15, 2011, _____.)

Rules Committee Notes

* * * * *

2012 Amendment

RCFC 5.5(d)(2) has been amended to eliminate the requirement that parties file paper copies of notices of appeal in electronic cases.

Proposed Amendment to RCFC 9

Rule 9. Pleading Special Matters

* * * * *

(p) Prior Litigation. In pleading a claim that has been previously presented to another court, whether in whole or in part or directly or indirectly, a party must include a statement identifying the effect, if any, of the prior litigation on this court's subject matter jurisdiction.

* * * * *

(As revised and reissued May 1, 2002; as amended Nov. 3, 2008, _____.)

Rules Committee Notes

* * * * *

2012 Amendment

RCFC 9(p) has been added to require a claimant to address the effect, if any, that a pending prior suit brought in another court may have on this court's jurisdiction in light of 28 U.S.C. § 1500. *See United States v. Tohono O'Odham Nation*, ___ U.S. ___, 131 S. Ct. 1723 (2011).

Proposed Amendment to Rule 26

Rule 26. Duty to Disclose; General Provisions Governing Discovery

(a) Required Disclosures.

* * * * *

(2) *Disclosure of Expert Testimony.*

* * * * *

(D) *Time to Disclose Expert Testimony.*

A party must make these disclosures at the times and in the sequence that the court orders. Absent a stipulation or a court order (see Appendix A ¶¶ 5 and 8), the disclosures must be made:

(i) at least 90 days before the date set for trial or for the case to be ready for trial at least 70 days before the scheduled close of discovery;

or

(ii) if the evidence is intended solely to contradict or rebut evidence on the same subject matter identified by another party under RCFC 26(a)(2)(B) or (C), within 30 days after the other party's disclosure.

* * * * *

(As revised and reissued May 1, 2002; as amended Nov. 15, 2007, Nov. 3, 2008, July 15, 2011, _____.)

Rules Committee Notes

* * * * *

2012 Amendment

RCFC 26(a)(2)(D) has been amended to conform to its FRCP counterpart. In particular, the time within which a party must disclose expert testimony has been tied to the date of trial rather than to the scheduled close of discovery.

Proposed Amendment to Rule 41

Rule 41. Dismissal of Actions

(a) Voluntary Dismissal.

(1) *By the Plaintiff.*

(A) *Without a Court Order.* Subject to RCFC 23(e) and 23.1(c) and any applicable federal statute, the plaintiff may dismiss an action without a court order by filing:

- (i) a notice of dismissal before the opposing party serves either an answer, or a motion for summary judgment, or a motion for judgment on the administrative record; or
- (ii) a stipulation of dismissal signed by all parties who have appeared.

* * * * *

(As revised and reissued May 1, 2002; as amended Nov. 3, 2008, _____.)

Rules Committee Notes

* * * * *

2012 Amendment

RCFC 41(a)(1)(A)(i) has been amended to clarify that the filing of a motion for judgment on the administrative record by the opposing party is an event that thereafter precludes a plaintiff from dismissing an action without a court order.

Proposed Amendment to Rule 52.1

Rule 52.1. Administrative Record

- (a) **In General.** When proceedings before an agency are relevant to a decision in a case, the administrative record of those proceedings must be certified by the agency and filed with the court.
- (b) **Time for Filing.** The court may establish a time for filing the administrative record by order.
- (c) **Motions for Judgment on the Administrative Record.**
- (1) **Initial Motion.** Absent an order by the court establishing a different procedure, a party may move for partial or other judgment on the administrative record and must include in its motion or supporting memorandum a statement of facts that draws upon and cites to the portions of the administrative record that bear on the issues presented to the court.
- (2) **Response.** A party opposing a motion based on the administrative record must include in any response a counter-statement of facts that similarly draws upon and cites to the administrative record.
- (3) **Effect of a Motion.** A motion under this rule for judgment on the administrative record relating to all claims in an action obviates the requirement for the filing of an answer under RCFC 12(a)(1).

nonetheless be filed if the motion does not pertain to all claims.

(Added June 20, 2006; as amended Nov. 3, 2008,
_____.)

Rules Committee Notes

* * * * *

2012 Amendment

RCFC 52.1(c) has been amended to clarify that the filing of a motion for judgment on the administrative record relating to all claims in an action obviates the requirement for the filing of an answer to the complaint. An answer must

Proposed Amendment to RCFC 58.1

Rule 58.1. Notice of Appeal

To appeal a decision of this court, a party must:

- (a) except in an electronic case under Appendix E, file an original and two ~~no fewer than four~~ copies of the notice of appeal with the clerk within the time and in the manner prescribed for appeals in Rule 3 of the Federal Rules of Appellate Procedure; and
- (b) pay the fee prescribed in 28 U.S.C. §§ 1913 and 1917 ~~in accordance with RCFC 77.1(c)~~.

(As revised and reissued May 1, 2002; as amended Nov. 3, 2008, _____.)

Rules Committee Notes

* * * * *

2012 Amendment

RCFC 58.1(a) has been amended to eliminate the requirement that parties file paper copies of notices of appeal in electronic cases.

In addition, RCFC 58.1(b) has been corrected to reflect that the fee for an appeal is prescribed by 28 U.S.C. §§ 1913 and 1917.

Proposed Amendment to Appendix E, ¶ 25

APPENDIX E ELECTRONIC CASE FILING PROCEDURE

* * * * *

VII. COURT ORDERS, JUDGMENTS, AND APPEALS

* * * * *

25. Notice of Appeal. A notice of appeal to the United States Court of Appeals for the Federal Circuit must be **filed** ~~accomplished~~ in the traditional manner in accordance with the court's rules **or may be filed electronically in an ECF case** ~~rather than electronically.~~

* * * * *

Rules Committee Notes

* * * * *

2012 Amendment

Paragraph 25 has been amended to eliminate the requirement that parties file paper copies of notices of appeal in electronic cases.

Proposed Amendments to Form 8, §§ 12 and 20

**FORM 8
PROTECTIVE ORDER IN PROCUREMENT PROTEST CASES**

United States Court of Federal Claims

_____)	
)	
)	
Plaintiff,)	No. _____
)	
v.)	Judge _____
)	
THE UNITED STATES,)	
)	
Defendant.)	

PROTECTIVE ORDER

The court finds that certain information likely to be disclosed orally or in writing during the course of this litigation may be competition-sensitive or otherwise protectable and that entry of a Protective Order is necessary to safeguard the confidentiality of that information. Accordingly, the parties shall comply with the terms and conditions of this Protective Order.

I.

1. Protected Information Defined. “Protected information” as used in this order means information that must be protected to safeguard the competitive process, including source selection information, proprietary information, and confidential information contained in:
 - (a) any document (e.g., a pleading, motion, brief, notice, or discovery request or response) produced, filed, or served by a party to this litigation; or
 - (b) any deposition, sealed testimony or argument, declaration, or affidavit taken or provided during this litigation.

2. Restrictions on the Use of Protected Information. Protected information may be used solely for the purposes of this litigation and may not be given, shown, made available, discussed, or otherwise conveyed in any form except as provided herein.

II.

3. Individuals Permitted Access to Protected Information. Except as provided in paragraphs 7 and 8 below, the only individuals who may be given access to protected information are counsel for a party and independent consultants and experts assisting such counsel in connection with this litigation.
4. Applying for Access to Protected Information. An individual seeking access to protected information pursuant to Appendix C, Section VI of this court's rules must read this Protective Order; must complete the appropriate application form (Form 9—"Application for Access to Information Under Protective Order by Outside or Inside Counsel," or Form 10—"Application for Access to Information Under Protective Order by Expert Consultant or Witness"); and must file the executed application with the court.
5. Objecting to an Application for Admission. Any objection to an application for access must be filed with the court within two (2) business days of the objecting party's receipt of the application.
6. Receiving Access to Protected Information. If no objections have been filed by the close of the second business day after the other parties have received the application, the applicant will be granted access to protected information without further action by the court. If any party files an objection to an application, access will only be granted by court order.
7. Access to Protected Information by Court, Department of Justice, and Agency Personnel. Personnel of the court, the procuring agency, and the Department of Justice are automatically subject to the terms of this Protective Order and are entitled to access to protected information without further action.
8. Access to Protected Information by Support Personnel. Paralegal, clerical, and administrative support personnel assisting any counsel who has been admitted under this Protective Order may be given access to protected information by such counsel if those personnel have first been informed by counsel of the obligations imposed by this Protective Order.

III.

9. Identifying Protected Information. Protected information may be provided only to the court and to individuals admitted under this Protective Order and must be identified as follows:
 - (a) if provided in electronic form, the subject line of the electronic transmission shall read **"CONTAINS PROTECTED INFORMATION"**; or
 - (b) if provided in paper form, the document must be sealed in a parcel containing the legend **"PROTECTED INFORMATION ENCLOSED"** conspicuously marked on the outside.The first page of each document containing protected information, including courtesy copies for use by the judge, must contain a banner stating **"Protected Information to Be Disclosed Only in Accordance With the U.S. Court of Federal Claims Protective Order"** and the portions of any document containing protected information must be clearly identified.
10. Filing Protected Information. Pursuant to this order, a document containing protected information may be filed electronically under the court's electronic case filing system using the appropriate activity listed in the **"SEALED"** documents menu. If filed in paper form, a document containing protected

information must be sealed in the manner prescribed in paragraph 9(b) and must include as an attachment to the front of the parcel a copy of the certificate of service identifying the document being filed.

11. Protecting Documents Not Previously Sealed. If a party determines that a previously produced or filed document contains protected information, the party may give notice in writing to the court and the other parties that the document is to be treated as protected, and thereafter the designated document must be treated in accordance with this Protective Order.

IV.

12. Redacting Protected Documents For the Public Record.

- (a) Initial Redactions. After filing a document containing protected information in accordance with paragraph 10, or after later sealing a document pursuant to paragraph 11, a party must promptly serve on the other parties a proposed redacted version marked “**Proposed Redacted Version**” in the upper right-hand corner of the first page with the claimed protected information deleted.
- (b) Additional Redactions. If a party seeks to include additional redactions, it must advise the filing party of its proposed redactions within two (2) business days after receipt of the proposed redacted version, **or such other time as agreed upon by the parties.** The filing party must then provide the other parties with a second redacted version of the document clearly marked “**Agreed-Upon Redacted Version**” in the upper right-hand corner of the page with the additional information deleted.
- (c) Final Version. At the expiration of the **two-day** period noted in (b) above, or after an agreement between the parties has been reached regarding additional redactions, the filing party must file with the court the final redacted version of the document clearly marked “**Redacted Version**” in the upper right-hand corner of the first page. This document will be available to the public.
- (d) Objecting to Redactions. Any party at any time may object to another party’s designation of certain information as protected. If the parties are unable to reach an agreement regarding redactions, the objecting party may submit the matter to the court for resolution. Until the court resolves the matter, the disputed information must be treated as protected.

V.

13. Copying Protected Information. No party, other than the United States, may for its own use make more than three (3) copies of a protected document received from another party, except with the consent of all other parties. A party may make additional copies of such documents, however, for filing with the court, service on the parties, or use in discovery and may also incorporate limited amounts of protected information into its own documents or pleadings. All copies of such documents must be clearly labeled in the manner required by paragraph 9.
14. Waiving Protection of Information. A party may at any time waive the protection of this order with respect to any information it has designated as protected by advising the court and the other parties in writing and identifying with specificity the information to which this Protective Order will no longer

apply.

15. Safeguarding Protected Information. Any individual admitted under this Protective Order must take all necessary precautions to prevent disclosure of protected information, including but not limited to physically securing, safeguarding, and restricting access to the protected information.
16. Breach of the Protective Order. If a party discovers any breach of any provision of this Protective Order, the party must promptly report the breach to the other parties and immediately take appropriate action to cure the violation and retrieve any protected information that may have been disclosed to individuals not admitted under this Protective Order. The parties must reasonably cooperate in determining the reasons for any such breach.
17. Seeking Relief From the Protective Order. Nothing contained in this order shall preclude a party from seeking relief from this Protective Order through the filing of an appropriate motion with the court setting forth the basis for the relief sought.

VI.

18. Maintaining Filed Documents Under Seal. The court will maintain properly marked protected documents under seal throughout this litigation.
19. Retaining Protected Information After the Termination of Litigation. Upon conclusion of this action (including any appeals and remands), the original version of the administrative record and any other materials that have been filed with the court under seal will be retained by the court pursuant to RCFC 77.3(c). Copies of such materials may be returned by the court to the filing parties for disposition in accordance with paragraph 20 of this Protective Order.
20. Disposing of Protected Information. Within thirty (30) days after the conclusion of this action (including any appeals and remands), each party must destroy all protected information **received pursuant to this litigation** and certify in writing to each other party that such destruction has occurred or must return the protected information to the parties from which the information was received. Each party may retain one copy of such documents provided those documents are properly marked and secured.

IT IS SO ORDERED.

Judge