In the United States Court of Federal Claims

NOTICE OF ADOPTION OF AMENDMENTS TO RULES

Following public notice of proposed amendments to its rules, opportunity for comment on the proposal, and consideration of comments received, the United States Court of Federal Claims hereby announces the adoption of amendments to its rules effective November 15, 2007. The amendments shall have such effect on pending proceedings as the court may order.

Except in two instances, the amendments that have been made reflect those that were proposed by the court via a Notice of Proposed Amendment to Rules issued on October 4, 2007. That notice has been posted on the court's website—http://www.uscfc.uscourts.gov—and will remain available on the website for a reasonable time.

Only one set of comments was received—from the Civil Division of the United States Department of Justice. In addressing these comments, we begin by noting that it is this court's policy to maintain procedural rules that adhere to the text of the Federal Rules of Civil Procedure. Thus, in general, the court will decline to implement comments on proposed rules that contemplate deviation from the federal rules unless such deviations are necessary to accommodate differences between this court's jurisdiction and the jurisdiction of the district courts. With this basic policy consideration in mind, the court identifies and addresses the submitted comments more specifically below.

(1) Rule 26(b)(2)(B): This rule addresses limitations on the scope of discovery of electronic information that is not reasonably accessible because of undue burden or cost. The rule recognizes, however, that even in instances where information retrieved would require the receiving party to incur undue burden or cost, upon a showing of good cause by the requesting party, the court may order discovery and "may specify conditions for the discovery." The comment requested that the language of the rule be amended to identify specifically the "conditions" to which the rule refers. The court considers the proposed amendment unnecessary. The court has ample authority under Rules 16 and 26 to control the incidents of discovery and to impose such conditions on discovery as justice may require.

(2) Rule 26(b)(5)(B): This rule concerns the inadvertent disclosure of information that is subject to a claim of privilege or of protection of trial preparation materials. The rule provides that a party asserting a claim of privilege or protection after production must give notice to the receiving party, and following the receipt of such notice, the receiving party, in turn, "must either promptly return, sequester, or destroy the specified information" or "promptly present the information to the court under seal for a determination of the claim." The comment requested that the word "promptly" be removed from the quoted text, or that the court provide guidance concerning the expected time-frame for asserting privilege and protection claims. The court does not consider the proposed amendment either necessary or desirable. For litigation to proceed in an orderly fashion, promptness in the assertion of a claim of privilege or of protection of trial preparation material, or in the assertion of a challenge to such claims, must be regarded as the expected performance standard. In cases

where special circumstances may have rendered such promptness of action impossible to achieve, counsel may look to the court in the exercise of its case management responsibilities to resolve any resulting difficulties.

(3) Rule 34(b): Rule 34(b) provides that a request for electronically stored information "may specify the form or forms in which electronically stored information is to be provided." The comment requested that the court clarify its approach to electronically stored information by specifically noting that although the requesting party may specify the form in which electronically stored information is to be produced, the providing party need not produce the electronically stored information in the form requested should the form be different from that in which the information was preserved, or should the cost of producing the information in the form requested be unreasonable, absent a cost-sharing agreement between the parties. Additionally, the comment requested that the rule be clarified to ensure that although information may be produced in the manner in which it was maintained, such production would not entitle the requestor access to the producer's actual hardware and/or software in which the information is stored. The court considers the proposed amendments unnecessary. Rule 34(b), on its face, recognizes that there may be objections to discovery and anticipates the court's resolution of any such objections.

(4) Rule 45(d)(1)(B): This rule provides that when a subpoena does not specify the form or forms for electronically stored information, the person responding to the subpoena must produce the information in a form or forms in which the person ordinarily maintains it or in a form or forms that are reasonably usable. The comment requested that the court change the language of the rule to relieve a person responding to a subpoena from having to produce electronically stored information in the form requested should that form be different from the form in which the information is preserved. The requested amendment is unnecessary. The person responding to a subpoena may obtain the protection afforded by any of the orders permitted under Rules 34(b) and 45(c).

(5) Rule 45(d)(1)(D): This rule provides that a party responding to a subpoena need not provide discovery of electronically stored information from sources that the party identifies as not reasonably accessible because of undue burden or cost. Upon a showing of good cause by the requesting party, however, the court may nevertheless order the discovery of such information and "specify conditions for the discovery." The concern the comment raised was that the production of electronically stored information by the government may involve files stored on outdated hardware for which no present access is reasonably available and, hence, the retrieval of such information could require the government to incur significant expense. In light of this possibility, the comment requested that the rule be amended to specifically identify that as a condition to the retrieval of such outdated information, the court impose the costs of retrieval on the requesting party. The requested modification is not necessary. As noted in the court's response to the comments on Rules 26(b)(2)(B) and 45(d)(1)(B), the court has ample authority to manage the incidents of discovery in the cases before it with due regard to what fairness and justice may require in a particular instance.

(6) Rule 45(d)(2)(B): This subdivision of Rule 45 concerns the inadvertent disclosure of information produced in response to a subpoena that is subject to a claim of privilege or of protection of trial preparation material. As in the case of the essentially parallel provision in Rule 26(b)(5)(B)

(discussed above), the rule requires the party receiving such notification either to "promptly return, sequester, or destroy the specified information" or "to promptly present the information to the court under seal for a determination of the claim." The comment requested that the word "promptly" be stricken from the rule or that the rule be amended to include a time-frame for the assertion of claims of privilege or protection. The court deems the proposed amendment neither necessary nor desirable. As noted above in response to the similar comments regarding Rule 26(b)(5)(B), promptness in the assertion of claims of privilege and of protection of trial preparation materials as well as promptness in the assertion of challenges to such claims is required for the expeditious resolution of litigation. In instances where special circumstances may have thwarted such timeliness of action, the parties should look to the court for the resolution of any resulting problems.

(7) Appendix C ("Procedure in Procurement Protest Cases"), Section II ("Requirements for Pre-Filing Notification"):

(a) Appendix C, paragraph 2, lists the names of the entities to whom plaintiff's counsel must provide 24-hour advance notice of the expected filing of a bid protest action. The comment recommended that the opening sentence in paragraph 2 be modified to add the words "to all of the following." Thus, the sentence, as amended, would conclude: "plaintiff's counsel must . . . provide at least 24-hour advance notice of filing a protest case to all of the following." The court considers the proposed additional language unnecessary since the existing text already makes clear that notice must be provided to all of the listed entities.

(b) Appendix C, paragraph 2 (third sentence), currently describes the purpose of the pre-filing notice as a notice designed to enable "the Department of Justice to assign an attorney to the case who can be prepared to address the relevant issues on a timely basis and to permit the court to ensure the availability of appropriate court resources." The proposed revision would substitute the word "will" in place of "can." The comment objected to this change in wording saying that the effect would be to require of government counsel a level of preparedness that cannot be achieved given the limited time available between counsel's receipt of the pre-filing notice and the court's subsequent engagement of the merits of the action in the initial hearing that typically occurs within 24 hours of the action's filing. Upon consideration of this comment, the court deems it advisable to modify the proposed language by substituting the words "who can address" in place of "who will be prepared to address." Thus, as changed, the third sentence of paragraph 2 will read: "The pre-filing notice is intended to permit the Department of Justice to assign an attorney to the case who can address relevant issues on a timely basis . . . ."

(c) Appendix C, paragraph 3, lists the information that must be included in the pre-filing notice. The comment requested that the list be expanded to include the name and telephone number of the agency attorneys with whom the protestor's counsel had been in contact concerning the subject matter of the protest. In support of this request, the comment explained that early identification of knowledgeable agency counsel would benefit government counsel (and the interests of the litigation in general) by providing access to a source of information that could more quickly explain the nature of the protest. The court

agrees with this comment and accordingly approves amendment of Appendix C, paragraph 3, to include the following language: "(c) the name and telephone number of the principal agency attorney, if known, who represented the agency in any prior protest of the same procurement."

The rules as amended by this notice are posted on the court's website under the "Rules" link.

s/Brian Bishop
Brian Bishop
Clerk of Court