

ARMED SERVICES BOARD OF CONTRACT APPEALS

Appeals of --)
)
R&R Group, Inc.) ASBCA Nos. 52328, 52711
)
Under Contract No. SPO300-97-D-2920)

APPEARANCE FOR THE APPELLANT: Francis Louis Zarrilli, Esq.
Broomall, PA

APPEARANCES FOR THE GOVERNMENT: Kathleen Hallam, Esq
Chief Trial Attorney
Maria Ventresca, Esq.
Trial Attorney
Defense Supply Center Philadelphia

OPINION BY ADMINISTRATIVE JUDGE REED
ON APPELLANT'S MOTION TO SUSPEND OR
TO DISMISS WITHOUT PREJUDICE UNDER BOARD RULE 30

R&R Group, Inc. (R&R or appellant) seeks a suspension of proceedings in the appeals, including a postponement of the hearing, for a minimum of six months. In the alternative, appellant requests that the appeals “be suspended without prejudice pursuant to Board Rule 30” (app. letter dated 18 December 2001 (app. mot. suppl.)). We construe the alternative motion as a motion to dismiss without prejudice under Board Rule 30. The Government objects to a suspension of the appeals, any delay in the hearing, and to dismissal without prejudice.

STATEMENT OF FACTS

1. On 27 December 1996, Contract No. SPO300-97-D-2920 (the contract) was awarded to appellant, a small disadvantaged business. The contract was for servicing naval vessels at Norfolk Naval Station, Virginia as a “Full Food Line Distributor.” (R4, tabs 2, 5-6)

2. In a letter dated 30 March 1999, R&R alleged additional costs of \$588,412.71, for “supplying military specific products rather than standard commercial products” and for “loading out a ship in California for transport to Japan on an emergency basis.” The contracting officer (CO) denied the requests in a letter dated 2 June 1999. The CO’s letter noted that the requests were not certified in accordance with the Contract Disputes Act of 1978, and FAR 52.233-1; however, the letter purported to be a CO final decision and included a recitation of appeal rights. On 21 July 1999, appellant’s President submitted a

written certification of “the claim dated March 29, 1999.” By letter dated 21 August 1999, an appeal from the CO’s letter dated 2 June 1999, was timely submitted by R&R and docketed by the Board as ASBCA No. 52328. On 18 April 2000, a “protective appeal” was docketed by the Board as ASBCA No. 52711, based on concerns related to the timing of appellant’s claim certification. (R4, tabs 29-32; Board letter dated 18 April 2000, Board Notice of Docketing (24 August 1999))

3. On or before 13 October 1999, agents of the Defense Criminal Investigative Service served a *subpoena duces tecum* on R&R “for copies of all business records related to the contract” (app. mot. suppl.).

4. On 31 July 2001, the Board scheduled, among other things, the exchange and submission to the Board of witness lists by 9 November 2001, and the hearing of the appeals during 15-18 January 2002. R&R’s five-person witness list dated 5 November 2001, included both appellant’s CEO and appellant’s President. According to the witness list, the testimony of R&R’s CEO and R&R’s President would address, among other things, preparation of the offer, including pre-award matters related to a “distribution fee” and a “quality assurance plan.” One other witness would testify concerning pre-award matters that differ from those about which the CEO and the President would testify. (Board Telephone Conference Memorandum and Order; appellant’s witness list dated 5 November 2001)

5. In separate letters from an Assistant United States Attorney dated 28 November 2001, R&R’s CEO and R&R’s President were notified that each was a target of an ongoing investigation into possible felony charges (mail fraud, wire fraud, false statements, conspiracy to defraud) and that each was likely to be recommended for indictment by a grand jury. In its motion (letter dated 12 December 2001), appellant represents that the “alleged wrongdoing [is] related to” the contract. Government counsel’s responses to the motion (letters dated 3 January 2002 and 14 December 2001) noted that the “issues in the criminal proceedings [concern] the source of certain information submitted by Appellant for evaluation prior to award” of the contract. (App. mot.; Gov’t mot. response; app. mot. suppl. exs. 1-2; Gov’t mot. response suppl.)

DECISION

In the motion, R&R requests that the Board postpone the hearing and all other proceedings in the appeals for a minimum period of six months. In the supplement to the motion, R&R alternatively requests dismissal without prejudice pursuant to Board Rule 30. According to R&R, the motion is “to protect the individuals involved to exposure of any information and/or data that may be elicited at the hearing that may be harmful to each of their interest in the matters of alleged wrongdoing” and “to protect the rights of R&R principals in the current criminal matter.”

We construe this to mean that appellant's CEO and appellant's President, as proposed witnesses for R&R, are concerned with possible self-incrimination and that they fear prejudice to their criminal defense from evidence that would be presented by appellant to support its claim(s) and by the Government's defense during the appeals hearing. We infer that the concerns of these two witnesses, the two most senior officers of a small corporation, will lead to the invocation of the right against self-incrimination. Our concern is not with the witnesses *per se*, but with appellant. However, the inability to present testimony from these witnesses would create a hardship for appellant in proving its case at the hearing. In effect, appellant would not have its "day in court."

The Government opposes the motion, as supplemented, for several reasons. First, the issues in the criminal investigation concern pre-award matters while the appeals relate to post-award performance issues. Second, R&R has not shown why testimony cannot be presented at the Board hearing and why appellant's principals need to be protected from testifying. Third, R&R's counsel knew of the investigation when the hearing was set. Fourth, postponement of the hearing will require additional preparation for the Government and may risk dulled memories of Government witnesses, thus interfering with the Government's defense of the appeals. Fifth, on balance, appellant has not shown a compelling need to protect the criminal litigation that overrides injury to the Government in not moving forward with the appeals hearing.

Board Rule 30 provides, in pertinent part:

In certain cases, appeals docketed before the Board are required to be placed in a suspense status and the Board is unable to proceed with disposition thereof for reasons not within the control of the Board. Where the suspension has continued, or may continue, for an inordinate length of time, the Board may, in its discretion, dismiss such appeals from its docket without prejudice to their restoration when the cause of suspension has been removed. Unless either party or the Board acts within three years to reinstate any appeal dismissed without prejudice, the dismissal shall be deemed with prejudice.

While a stay of civil and/or administrative proceedings is not constitutionally required pending the outcome of criminal proceedings, the interests of justice should be considered and the parties' interests balanced. If the threat of criminal prosecution is real and if the issues in the criminal matter may overlap with the same or similar issues in the appeals, thereby creating a likelihood that rights against self-incrimination could be undermined or a criminal defense prejudiced, such that appellant is hampered in presenting its case, then the Board will balance those considerations with possible injury to the Government of a delayed adjudication. Whether to stay the Board's proceedings is a matter

within the Board's discretion. *Afro-Lecon, Inc. v. United States*, 820 F.2d 1198, 1201-02, 1206 (Fed. Cir. 1987); *Laumann Mfg. Corp.*, ASBCA No. 50246, 01-1 BCA ¶ 31,414, *recon. granted*, 01-2 BCA ¶ 31,441 at 155,266-67.

The likelihood of criminal prosecution of two of R&R's witnesses in the Board proceedings has been shown by appellant (Statement of Facts 4-5).

In the complaint, ¶¶ 5-7, R&R refers to its "Technical Proposal," "Quality Plan," and "Business Plan," all allegedly required by the solicitation, as baselines in its offer against which certain of its performance expectations should be measured. Some of the claims under the appeals, as summarized in the request for equitable adjustment (Statement of Facts 2) and the complaint, ¶¶ 9-10 and 12-13, are said to be constructive changes consisting of extra tasks not required by the contract as envisioned by appellant and as reflected in its offer.

Government investigative activities concerning the contract have been broad. The focus of the criminal investigation is reported to be on "the source of certain information submitted by Appellant for evaluation prior to award." Receipt by R&R's witnesses of "target letters" after the hearing dates were set materially altered R&R's situation regarding prosecution of the Board appeals. (Statement of Facts 3-5)

Given the above, we are convinced that the threat of prosecution is real and that the issues are sufficiently similar in the criminal investigation and in the appeal proceedings to justify a balancing of the parties' interests. Against the likelihood of criminal prosecution of two of appellant's corporate officer witnesses and the likely adverse affect that could have on appellant's ability to prove its claim(s), the Government asserts that additional preparation time would be required for a later hearing, Government employee witnesses (the CO, the successor CO, a quality assurance specialist, and two inventory specialists) rearranged schedules to be available for the hearing, and memories may fade.

On balance, we conclude that R&R's interests outweigh those of the Government. Convening the hearing on 15 January 2002 is not warranted under the circumstances prevailing. The hearing is hereby canceled.

Whether to stay the appeals for a minimum of six months or to dismiss the appeals without prejudice remains to be determined. The requested minimum six-month enlargement of time is based on the educated guess of appellant's CEO's criminal defense attorney. However, the reasons for the suspension of the appeal proceedings are outside the Board's control and may extend for an inordinate time beyond six months. Therefore, we dismiss the appeals pursuant to Board Rule 30, without prejudice to reinstatement within three years from the date of this decision.

Dated: 4 January 2002

STEVEN L. REED
Administrative Judge
Armed Services Board
of Contract Appeals

I concur

I concur

PAUL WILLIAMS
Administrative Judge
Chairman
Armed Services Board
of Contract Appeals

EUNICE W. THOMAS
Administrative Judge
Vice Chairman
Armed Services Board
of Contract Appeals

I certify that the foregoing is a true copy of the Opinion and Decision of the Armed Services Board of Contract Appeals in ASBCA Nos. 52328 and 52711, Appeals of R&R Group, Inc., rendered in conformance with the Board's Charter.

Dated:

EDWARD S. ADAMKEWICZ
Recorder, Armed Services
Board of Contract Appeals