

ARMED SERVICES BOARD OF CONTRACT APPEALS

Appeal of -- )  
)  
Public Warehousing Company, K.S.C. ) ASBCA No. 56116  
)  
Under Contract Nos. SPO300-03-D-3061 )  
SPM300-05-D-3119 )  
SPM300-05-D-3128 )

APPEARANCES FOR THE APPELLANT: Michael R. Charness, Esq.  
Jamie F. Tabb, Esq.  
Vinson & Elkins LLP  
Washington, DC

APPEARANCE FOR THE GOVERNMENT: Michael L. McGlinchey, Esq.  
Chief Trial Attorney  
Defense Supply Center (DLA)  
Philadelphia, PA

OPINION BY ADMINISTRATIVE JUDGE TING  
ON THE GOVERNMENT'S MOTION TO STAY

Public Warehousing Company, K.S.C (PWC) submitted a claim seeking an interpretation of certain provisions in three contracts affecting its right to retain early payment discounts it received from its suppliers. The contracting officer (CO) issued a decision setting out what she considered to be *bona fide* early payment discounts that could be retained by PWC under one of these contracts. She did not address the other two. PWC has appealed and initiated discovery. The government now moves to stay proceedings until 1 June 2008 to allow the Department of Justice to complete civil and criminal fraud investigations without interference by Board proceedings. PWC opposes the motion. We grant the motion.

FINDINGS OF FACT FOR PURPOSES OF THE MOTION

1. PWC is a logistics company organized under the laws of the State of Kuwait (compl., ¶ 1). The Defense Supply Center Philadelphia (DSCP) is a field activity of the Defense Logistics Agency (DLA). DSCP supplies and services United States military personnel by providing them with food, clothing, textiles, medicines, medical equipment, and general and industrial supplies (mot. at 2, ¶ 1).

2. On 30 May 2003, PWC and DSCP entered into Contract No. SPO300-03-D-3061 ("the PV1 contract"), a \$22 million prime vendor contract for

supplying food and other items to military customers in the Middle East. The PV1 contract incorporated by reference Solicitation No. SPO300-02-R-4003 (“the PV1 solicitation”). (R4, tab 10) On 17 February 2005, PWC and DSCP entered into Contract No. SPM300-05-D-3119 (“the PV Bridge contract”) (estimated dollar value exceeding \$1 billion). This was a follow-on contract to the PV1 contract. The PV Bridge contract incorporated by reference the terms and conditions of the PV1 contract. (R4, tab 15) On 7 July 2005, PWC and DSCP entered into Contract No. SPM300-05-D-3128 (“the PV2 contract”). The PV2 contract incorporated by reference Solicitation No. SPM300-04-R-0323 (“the PV2 solicitation”) (R4, tab 29). The PV2 contract has an estimated value of \$1.4 billion for the base period and \$933 million for the first option year (*id.* at 4 of 32).

3. All three contracts use the same pricing formula: Unit Price = Delivered Price + Fixed Distribution Price (or Fee). (R4, tab 10 at 3-4; tab 29 at 3; compl., ¶ 23) “Unit Price” is defined as “the total price (in U.S. currency) that is charged to DSCP per unit for a product delivered to the Government.” “Delivered Price” is defined as “the manufacturer/supplier’s actual invoice price (in U.S. currency) to deliver to the Prime Vendor’s . . . distribution point.” “Distribution Price” is defined as “a firm fixed price, offered as a dollar amount, which represents all elements of the unit price, other than the delivered price.” The “Distribution Price” typically consists of “the Prime Vendor’s projected general and administrative expenses, overhead, profit, packaging costs, transportation costs . . . to the final delivery point or any other projected expenses associated with the distribution function.” (R4, tab 10 at 3-4; tab 29 at 3)

4. The PV1 contract contained the following clause:

15. REBATES/DISCOUNTS

. . . .

B. Rebates and discounts are to be returned to DSCP when they are directly attributable to sales resulting from orders exclusively submitted by DSCP or its customers. Additionally, any rebates and discounts offered to any commercial customer or other Government organization shall be returned to DSCP or its customers in the form of an up-front price reduction (resulting in a lower delivered invoice price to the customer/reduced STORES price).

. . . .

(R4, tab 1 at 18 of 329)

5. The PV2 contract contained a shorter but similar clause:

24. REBATES/DISCOUNTS:

Rebates and discounts are to be returned to DSCP when they are directly attributable to sales resulting from orders exclusively submitted by DSCP or its customers. Additionally, any rebates and discounts offered to any commercial customer or other Government organization shall be given to DSCP or its customers in the form of an up-front price reduction. The discount/allowance shall be reflected via a reduced STORES price, resulting in a lower invoice price to the customer.

(R4, tab 16 at 27 of 356)

6. According to PWC, it typically negotiated prompt or early payment discounts when creating supply relationships with food manufacturers and distributors in connection with the PV contracts (compl., ¶ 30). PWC alleges that at no point did it understand that early payment discounts were among the types of discounts required to be passed on to DSCP by the terms of the PV contracts (compl., ¶ 31).

7. PWC's Business Proposal dated 14 August 2002 for the PV1 contract included the following provision: "Delivered Price is not reduced by cash discounts for prompt payment available to PWC or its supplier," and did not include prompt payment discounts among the rebates and allowances it would pass to DSCP ( R4, tab 37 at 12, 14-15). This Business Proposal, however, was not included in the list of documents incorporated by reference in the PVI contract (R4, tab 10 at 2).

8. PWC's Business Proposal dated 16 November 2004 for the PV2 contract included the same prompt payment provision as in the Business Proposal for the PV1 contract, and similarly did not include prompt payment discounts among the rebates and allowances it would pass to DSCP (R4, tab 22 at 6, 9-10). However, unlike the Business Proposal for the PV1 contract, the Business Proposal for the PV2 contract was included in the list of documents incorporated by reference in the contract for which it was submitted (R4, tab 29 at 2).

9. PWC alleges that in October 2006, its General Manager received an e-mail from the cognizant contracting officer Timothy Dlugokecki (CO Dlugokecki) inquiring how PWC and its subcontractors tracked early payment discounts received (compl., ¶ 43). According to PWC, CO Dlugokecki later withdrew his inquiry when he was informed that "[d]iscounts or rebates received by the prime vendor from its suppliers as a

result of a prompt or early payment made by the prime vendors to such suppliers are not required to be passed to DSCP or its customers” (compl., ¶ 44).

10. PWC points out that DSCP’s November 2006 solicitations for Prime Vendor Support contracts revised the earlier REBATES/DISCOUNTS clauses by adding Paragraph E:

E. *As described in this section, the terms “rebates” and “discounts” do not include any discounts or rebates received by the Prime Vendor due to early or prompt payments to suppliers. Discounts or rebates received by the prime vendor from its suppliers as a result of a prompt or early payment made by the prime vendors to such suppliers are not required to be passed to DSCP or its customers.*

(Compl., ¶ 47)

11. On 7 January 2007, PWC received a *subpoena duces tecum* from the Department of Defense Office of the Inspector General (compl., ¶ 56). According to PWC, based on the types of documents requested in the subpoena and based on conversations between PWC in-house counsel and the Assistant U.S. Attorney conducting the investigation, “[o]ne of the focuses of the Government’s investigation is the legality of PWC’s practice of retaining prompt payment discounts received from its suppliers” (compl., ¶ 57).

12. By letter dated 16 March 2007 to CO Dlugokecki and CO Linda L. Ford (CO Ford), PWC’s counsel contended that neither the definition of Delivered Price nor the REBATES/DISCOUNTS clause required PWC to pass on to DSCP prompt or early payment discounts. The letter explained that a prompt or early payment discount was a financial arrangement between PWC and a supplier, and did not change the supplier’s invoice price and thus had no relation to DSCP or its customers. Given what PWC perceived as the government’s inconsistent positions, the letter asked for the CO’s final decision interpreting the Delivered Price definition and the REBATES/DISCOUNTS clause in the PV contracts “to resolve a pending investigation being conducted by the government.” (R4, tab 33 at 4) PWC stated that its claim “involves no monetary dispute” (*id.*).

13. CO Ford issued her final decision on 18 July 2007. The decision states:

. . . Because your claim fails to identify any specific rebates or discounts you seek a decision on, this decision is prospective only. Given the pendency of the Department of

Justice's investigation concerning PWC's pricing practices, I am reluctant to address any prior PWC practices that could be the subject of the ongoing DOJ investigation [footnote omitted].

....

. . . I have determined for purposes of this claim response only that bona fide early payment/prompt payment discounts/rebates may be retained by PWC under contract SPM300-07-D-3128 only if these discounts satisfy all of the following conditions:

- the discount/rebate is based on the cost of money,
- the discount/rebate is consistent with commercial practice,
- the discount/rebate is routinely given by the suppliers to customers other than PWC at the same discount rate and under the same conditions as provided to PWC,
- the discount/rebate is not established, requested, or negotiated for the purpose of avoiding giving DSCP a lower cost or rebate or in exchange for a higher invoice price,
- the discount/rebate is no more than 2 percent and to obtain the discount/rebate, the early payment is required within 10 days, AND
- the discount/rebate was actually earned by PWC making the required payment within the time period required to receive the discount/rebate.

(R4, tab 34)

14. PWC timely filed a "Notice of Appeal and Complaint" on 23 July 2007. The Board docketed the appeal as ASBCA No. 56116 on 24 July 2007. DSCP filed its answer on 5 October 2007. In its complaint, PWC alleges that "[i]f the Contracting Officer's decision [as to what constitutes a *bona fide* early payment discount] is upheld, PWC would have to drastically alter its procurement and invoicing procedures to comply with the terms of the decision" (compl., ¶ 74). While contending "[t]his would represent a significant expense for the company," PWC gave no indication what the cost impact

would be in altering its procedure (*id.*). PWC's complaint also states that "[t]he Board's interpretation of the question is also needed because of the issue's importance to the Government's investigation . . . [which] could lead to proceedings in which large civil fines or criminal penalties may be sought by the Government (compl., ¶ 75).

15. PWC has initiated discovery in this appeal. On or about 24 October 2007, it forwarded to DSCP "Appellant's First Request for Production of Documents and First Set of Interrogatories" (mot., attach. C). Among other documents, DSCP was asked to:

8. Produce all documents relating to, or in which is discussed, PWC's intention and/or practice of retaining prompt or early payment discounts from its suppliers.

9. Produce all documents relating generally to, or in which is discussed, the issue of prompt or early payment discounts offered to prime contractors by subcontractors, and the retention of such discounts by prime contractors.

....

15. Produce all documents containing and/or referencing any communications between and among any DoD, DLA, DSCP *and other government employees* concerning appellant's retention of prompt or early payment discounts (emphasis added).

(*Id.* at 5-6)

16. PWC notified the Board on 14 November 2007 that it desired a hearing under the Board's Rules. The record shows that PWC's counsel had, since 24 October 2007, tried to coordinate with DSCP counsel to arrange for the depositions of CO Ford and CO Dlugokecki. Finally, DSCP counsel advised PWC on 15 November 2007 that:

We are not inclined to schedule depositions at this time. The agency has decided to request a stay in the ASBCA proceedings and plans to have a request filed in two to three weeks.

On the same day, PWC requested the Board to order the depositions of CO Ford and CO Dlugokecki. PWC stated that it wishes to question the basis of CO Ford's interpretation underlying her decision, and the basis of CO Dlugokecki's interpretation underlying his 26 October 2006 e-mail.

17. By letter dated 19 November 2007, PWC requested subpoenas be issued for the depositions of CO Ford and CO Dlugokecki. On the same day, DSCP advised the Board that the DOJ had asked the agency to request a stay of Board proceedings because of its ongoing fraud investigations “related to the rebates and discounts clause at issue in this appeal.” DSCP requested that we defer issuance of any subpoenas until we consider its motion to stay expected to be filed on or about 27 November 2007. The Board advised the parties by letter dated 20 November 2007 that it would decide the government’s motion to stay before issuing the requested subpoenas.

18. DSCP’s 30 November 2007 motion<sup>1</sup> seeks a stay of proceedings at the Board until 1 June 2008 (mot. at 1). In support of its motion, DSCP has provided the declarations of two DOJ attorneys: Art J. Coulter, Esq., of DOJ’s Civil Division, Commercial Litigation Branch, Fraud Section, and James J. Graham, Esq., of DOJ’s Fraud Section, Criminal Division (mot., attachs. F, G). In addition, DSCP has provided the declarations of CO Ford and CO Dlugokecki (*id.* at attachs. D, E).

19. According to the DOJ attorneys’ declarations, the on-going fraud investigations involve the three PV contracts which are the subject of the appeal before the Board (mot., attach. F, ¶ 3; attach. G, ¶ 3). The investigations began in 2005 and since then significant progress has been made. However, there are still critical leads that must be followed, witnesses to interview, and documents to obtain (mot., attach F, ¶ 6; attach. G, ¶ 5). DOJ anticipates that much of the investigative work will be substantially completed within the next six months (mot., attach. F, ¶ 6).

20. According to the DOJ declarations, in addition to numerous investigators from the Federal Bureau of Investigation (FBI), Defense Criminal Investigation Service (DCIS) and Army Criminal Investigation Division (CID), seven attorneys from the U.S. Attorney’s Office in the Northern District of Georgia and DOJ’s Criminal Division have been assigned to the case (mot., attach. F, ¶ 4; attach. G., ¶ 4).

21. PWC’s appeal challenged the CO’s determination of what constituted *bona fide* early payment discounts that could be retained by PWC. The DOJ has alleged that PWC has received kickbacks from its suppliers disguised as early payment discounts. This was supposedly done when PWC’s suppliers increased the prices they would have otherwise charged PWC to allow PWC to retain larger than normal early payment discounts. According to the DOJ attorneys’ declarations, evidence that has been

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<sup>1</sup> Along with its motion to stay, DSCP submitted to the Board certain documents for *in camera* review. The Board returned these documents to DSCP by letter dated 5 December 2007 with instructions. DSCP renewed its request to submit the documents for *in camera* review by letter dated 12 December 2007. PWC opposed the request by letter dated 19 December 2007. In view of our decision, the government’s request for *in camera* review is denied.

assembled to date shows that, using early payment discounts as a “cover” for kickbacks, PWC has fraudulently overcharged the government. (Mot., attach. F, ¶ 3; attach. G, ¶ 3)

22. Using WPC’s Document Request Nos. 8 and 15 as examples, the DOJ attorneys expressed the following concerns in their declarations:

. . . . Being able to review such documents would provide PWC with significant knowledge and insight into the fraud investigation that it could use to tailor its position, manufacture evidence, and create defenses which could impede determination of the facts of the case. Release of such confidential internal government documents before the conclusion of the investigation would also allow PWC officials to shape, spin, and alter their testimony in ways which would allow them to minimize liability or responsibility.

(Mot., attach. F, ¶ 5a; attach. G., ¶ 7a)

23. PWC has sought to depose CO Ford and CO Dlugokecki. According to the declarations of the DOJ attorneys, CO Ford and CO Dlugokecki have been briefed by the DOJ concerning the on-going civil and criminal investigations (mot., attach. F, ¶ 5b; attach. G, ¶ 7b). DOJ attorneys tell us that depositions are of particular concern because of their free-flowing nature and the limited grounds available for instructing a witness not to answer a question:

. . . . Allowing Ms. Ford and Mr. Dlugokecki to be deposed would risk release of confidential information concerning these on-going investigations that would . . . [allow] PWC officials to tailor and shape any future testimony or information they might provide in the fraud investigation, hindering the effectiveness of the on-going investigation and preventing the facts from being determined.

(*Id.*, attach. F, ¶ 5b; attach. G, ¶ 7b)

24. The DOJ attorneys point out other potential problems to the government’s continuing investigations were we to permit discovery to go forward at this juncture. The knowledge of government witnesses and the information in internal government documents are now being used by the government to formulate the government’s position on possible criminal or civil prosecution for fraud. Premature release of such information could close off investigative avenues that have yet to be explored. (Mot., attach., F, ¶ 5d;

attach. G, ¶ 7d) Furthermore, the DOJ attorneys are concerned that proceeding with discovery could provide PWC insight as to potential witnesses who have provided helpful information to the government (*id.*, attach. F, ¶ 5c; attach. G, ¶ 7c).

25. CO Dlugokecki's and CO Ford's declarations both state they are in good health, have no plans to retire, leave government or move in the next six months (mot. attachs. D, E). We find there is no pressing need to preserve their testimony by deposition.

## DECISION

We have inherent authority to stay proceedings. Exercise of such authority, however, “calls for the exercise of judgment, which must weigh competing interests and maintain an even balance.” *Landis v. North American Co.*, 299 U.S. 248, 254-55 (1936); *Afro-Lecon, Inc. v. United States*, 820 F.2d 1198 (Fed. Cir. 1987); *KiSKA Construction Corp.- USA and Kajima Engineering and Construction, Inc., A Joint Venture*, ASBCA Nos. 54613, 54614, 05-1 BCA ¶ 32,922 at 163,082. The parties are in general agreement with respect to the factors that are considered in determining whether civil – in this case Board – proceedings should be stayed based upon potential interference with criminal proceedings. These factors include: (1) whether the facts, issues, and witnesses in both proceedings are substantially similar; (2) whether the on-going investigations would be compromised in going forward with the case; (3) whether the proposed stay could harm the non-moving party; and (4) whether the duration of the requested stay is reasonable. *Landis*, 299 U.S. at 254-56; *Campbell v. Eastland*, 307 F.2d 478, 487 (5<sup>th</sup> Cir. 1962), *cert. denied*, 371 U.S. 955 (1963); *Container Systems Corporation*, ASBCA No. 40614 *et al.*, 93-2 BCA ¶ 25,798 at 128,382 (*citing C3, Inc. v. United States*, 5 Cl. Ct. 659 (1984)); *Ingalls Shipbuilding Division, Litton Systems, Inc.*, ASBCA No. 22645, 78-2 BCA ¶ 13,350.

### Factor 1: Similar or Related Issues

The government tells us “[t]he claim and appeal involve what ‘early payment’ discounts PWC can retain . . . and the investigation concerns the same facts” (mot. at 12). The government points out that “one of the issues in the fraud investigation is whether PWC was soliciting kickbacks and disguising these as ‘early payment discounts’ thereby overcharging the Government.” The government asserts that “[t]he extent to which the contracts would allow PWC to use ‘early payment discounts’ as a subterfuge for kickbacks and still retain the discount/kickback is the heart of the case.” (*id.* at 13)

PWS argues that in its appeal before the Board it is asking for our interpretation of “whether the PV contracts require Appellant [PWC] to pass on prompt payment discounts to the Government,” and the government, in contrast, has described the on-going investigations as concerning the issue of whether the early payment discounts

retained by PWC were *bona fide* early payment discounts or discounts and rebates attributable to sales that must be returned to the government. PWC argues that its requests for the Board’s interpretation is “not focused on any specific prompt payment discounts” whereas the on-going DOJ investigations deal with “specific negotiations and discounts agreed upon by Appellant with its suppliers.” (Opp’n at 8-9)

The determination of what constitutes a discount that is not “directly attributable to sales” for purposes of the PV1 and PV Bridge contracts and the determination of what constitutes “discounts for prompt payment” for purposes of the PV2 contract, present questions of mixed fact and law. The factual issues, such as the parties’ intent when entering into the contracts, established commercial practice, and any practical interpretations by the parties before the dispute arose, are sufficiently close to the facts that the DOJ is investigating as to warrant the requested stay.

As is obvious from the discovery it sought, PWC itself is not limiting this appeal to an interpretation of whether early or prompt payments in any amount are within the meaning of the discounts that must be passed on to the government. In its interrogatories, PWC sought the identity of all persons – government and non-government – who worked or contributed to the drafting of the PV1 and PV2 solicitations, and all persons who evaluated the proposals submitted by offerors in response to the PV1 and PV2 solicitations (mot., attach. C at 9-10, ¶¶ 3-7). PWC’s interrogatories also asked DSCP to list “all known examples of prompt or early payment discount terms that are ‘consistent with commercial practice’” (*id.*, ¶ 9) and to list “any experts expected to testify for DSCP at the hearing in this case” (*id.*, ¶ 11).

Moreover, PWC has requested the production of documents relating to CO Dlugokecki’s 24 and 26 October 2006 e-mails (mot., attach. C at 5, ¶¶ 5-7), the award of the PV1, PV Bridge, and PV2 contracts (*id.*, at 6, ¶ 13), the language appearing at part E of the new REBATES/DISCOUNTS clause (*id.*, ¶ 16), and the conditions that must be met for early payment discounts to be considered *bona fide* as set out in CO Ford’s 18 July 2007 decision (*id.*, at 7-8, ¶¶ 23-29). In addition, PWC has sought to depose CO Ford and CO Dlugokecki who were briefed by the DOJ concerning the on-going investigations. PWC has requested a hearing at which CO Ford and CO Dlugokecki will almost certainly be called as witnesses.

Despite its arguments to the contrary, PWC itself apparently believes that the facts, issues, and witnesses involved in the Board proceeding and the DOJ investigations are inter-related. In its 16 March 2007 claim, PWC said that it requested the CO decision “to resolve a pending investigation being conducted by the government” (R4, tab 33 at 4). In its complaint, PWC stated that “[t]he Board’s interpretation of the question is also needed because of the issue’s importance to the Government’s investigation. . . [which] could lead to proceedings in which large civil fines or criminal penalties may be sought by the Government” (compl., ¶ 75).

Resolution of the government’s request for a stay pending completion of the criminal investigation “requires no extensive comparative factual analysis . . . in order to conclude that the issues in the civil action are ‘related’ as well as ‘substantially similar’ to those in the criminal investigation.” *See* C3, 5 Cl. Ct. at 661 Moreover, the government may satisfy its burden to make a *prima facie* showing of the ultimate fact, circumstantially; defendant need not “contemplate an *in haec verba* iron-clad comparison of separate issues by *direct* proof.” *Id.*; *St. Paul Fire and Marine Ins. Co. v. United States*, 24 Cl. Ct. 513, 516 (1991).

Because we are persuaded that the facts and issues under investigation and those in the case before us are not only substantially similar but inextricably intertwined, we find the government has satisfied Factor 1.

Factor 2: Compromise of Ongoing Government Investigations

The Supreme Court has stated that the applicant for a stay “must make out a clear case of hardship or inequity in being required to go forward . . . .” *Landis*, 299 U.S. at 255. The reason for avoiding concurrent civil and criminal suits is to be sure that “the broader discovery permissible in civil proceedings is not unnecessarily used to compromise parallel criminal proceeding.” *Litton v. United States*, 215 Ct. Cl. 1056, 1057-1058 (1978). This compromise would occur particularly where the parallel criminal investigation may “churn over the same evidentiary material.” *Peden v. United States*, 512 F.2d 1099, 1103 (Ct. Cl. 1975) (where the facts of a civil proceeding are “inextricably intertwined” with the facts of pending criminal charges “it has long been the practice to freeze civil proceedings when a criminal prosecution involving the same facts is warming up or under way.”).

We understand from the declarations of the DOJ attorneys that significant progress has been made since investigations into the PV contracts began in 2005. We also understand there are still critical leads that must be followed, witnesses to interview and documents to obtain. DOJ attorney Art J. Coulter stated in his declaration: “I anticipate that much of this work will be completed within the next six months. A stay of six months should allow DOJ and the investigative agencies time to substantially complete the fraud investigation.” (Mot., attach. F at 3, ¶ 6) We accept Mr. Coulter’s representation and expect that all efforts will be made to bring the investigations to a conclusion by 1 June 2008.

Because we believe that the on-going DOJ investigations are coming to an end and because we believe that any proceedings at the Board within the next six months could compromise the investigations already conducted and yet to be completed, we are persuaded that the government will suffer hardship if it were required to go forward with this appeal now.

Factor 3: Harm to the Non-movant

The courts have held that a stay of the civil case requires not only a showing of need in terms of protecting the criminal litigation, but also a balanced finding that such need overrides the injury to the party being stayed. *Campbell*, 307 F.2d at 487. We have found that a contractor may be harmed by a stay where the government was withholding monies from the contractor. *Todd Shipyards Corp.*, ASBCA No. 31092, 88-1 BCA ¶ 20,509. We have found that the contractor may be harmed by a stay where the government's delay in paying an amount due and owing may preclude it from collecting interest. *Ingalls Shipbuilding*, 78-2 BCA at 65,261.

The government argues that no significant harm to PWC would result from a six-month stay. It points out that PWC has not asserted a money claim against the government; nor has the government asserted a money claim against PWC. The government has not retained any disputed early payment discounts. (Mot. at 18-19) PWC has not disputed these assertions. The government has also submitted declarations from CO Ford and CO Dlugokecki in which they state they are in good health, have no plans to leave the government or move in the next six months and thus will be available for depositions after 1 June 2008 (mot., attachs. D, E).

PWC's opposition states that the early payment discounts were negotiated with individual suppliers and their terms would be different. PWC says most of the discounts would not meet the "newly created conditions" CO Ford listed in her 18 July 2007 decision. PWC argues it is entitled to know where it stands on the question of early payment discounts and a stay of the appeal will subject it to ever-increasing amounts of potential liability. (Opp'n at 5) PWC tells us that "interpretation is needed immediately in order to ensure that the investigation does not continue based upon a false and inaccurate interpretation of PV contracts" and "[i]f the Board fails to issue its decision before the end of the investigation, potential settlement discussions with DOJ will be conducted without the benefit of an independent, authoritative interpretation of the contract, thus subjecting Appellant to potentially millions of dollars in additional liability." (Opp'n at 6)

We cannot say that PWC's argument for a prompt resolution of the parties' contractual dispute is without some merit. It is clear to us, however, that PWC's primary purpose in wishing to proceed with the appeal is to use the Board's decision to influence the direction of the on-going investigations, and to help its position in potential settlement discussions. In weighing the potential hardship that can result to the government in wrapping up its two-year investigation (factor 2) against the harm that may result to PWC (factor 3), we come down on the side of the government.

Factor 4: Duration of the Requested Stay

In its motion, DSCP asks for a stay of proceedings until 1 June 2008 “or until circumstances change which makes this motion moot, whichever occurs earlier” (mot. at 1). PWC contends that the proposed length of stay is unreasonable given that: (1) DSCP was aware of the on-going investigation when the appeal was filed in July 2007 and could have filed the motion five months ago;<sup>2</sup> and (2) DSCP has received multiple time extensions including more than four weeks for filing the Rule 4 file, nearly six weeks for filing its answer and additional weeks for placing the appeal on hold to draft the motion to stay. PWC points out that even if we deny the motion to stay, the motion itself would have delayed proceedings by two months. (Opp’n at 19)

According to the declarations of the DOJ attorneys, significant progress has been made since the investigations began in 2005. We are told (as of 30 November 2007) that the investigative work will be substantially completed within the next six months. We are mindful that a contractor has the right to a hearing and decision within a reasonable time. *Ingalls Shipbuilding*, 78-2 BCA ¶ 13,350; *KiSKA Construction*, 05-1 BCA at 163,082. To the extent the facts of the case warrant, a stay of civil proceedings may be granted so long as that discretion is not abused and the stay is “kept within the bounds of moderation.” *Landis*, 299 U.S. at 256-257.

Given the size of the contracts and the nature and scope of the investigations, however, we believe that DSCP’s request for a stay of proceedings until 1 June 2008 to wrap up the remaining investigations is reasonable. The length of the stay requested is consistent with other similar requests that have come before the Board. *See e.g., Aydin Corporation (West)*, ASBCA Nos. 43273 *et al.*, 94-1 BCA ¶ 26,588 (180-day stay granted pending completion of parallel criminal proceedings); *Container Systems*, 93-2 BCA ¶ 25,798 (six months limited stay until conclusion of criminal trial).

CONCLUSION

In weighing the arguments the parties advanced and applying the factors we have traditionally considered in cases involving an application to stay proceedings, we come down in favor of the government. Accordingly, in exercising our discretion, we grant the

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<sup>2</sup> We doubt filing a motion to stay in July 2007 would have accelerated the DOJ investigation.

government's motion and stay proceedings before the Board for a period expiring no later than 1 June 2008.

Dated: 31 January 2008

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PETER D. TING  
Administrative Judge  
Armed Services Board  
of Contract Appeals

I concur

I concur

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

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MONROE E. FREEMAN, JR.  
Administrative Judge  
Acting 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 No. 56116, Appeal of Public Warehousing Company, K.S.C., rendered in conformance with the Board's Charter.

Dated:

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CATHERINE A. STANTON  
Recorder, Armed Services  
Board of Contract Appeals