

ARMED SERVICES BOARD OF CONTRACT APPEALS

Appeals of --)
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General Dynamics Ordnance and) ASBCA Nos. 56870, 56957
Tactical Systems, Inc.)
)
Under Contract No. W52P1J-05-G-0002)

ORDER ON APPELLANT'S MOTION FOR PROTECTIVE ORDER

In these appeals under the Contract Disputes Act (CDA), 41 U.S.C. §§ 601-613, General Dynamics Ordnance and Tactical Systems, Inc. (appellant) seeks \$18,193,894 to recover unanticipated costs based upon claimed inadequate government estimates of ammunition quantities under the subject contract. This contract was to serve as a “second source” to supply small caliber ammunition to the Army for a base year plus option years, in addition to the quantities furnished by the Army’s primary supplier, Alliant Techsystems, Inc. (ATK).

Appellant has sought the discovery of documents identified in the government’s Rule 4 file that the government has listed as “Reserved-Possible Trade Secrets.”¹ On 22 October 2009, appellant filed a motion for entry of a protective order, seeking a limited disclosure of these documents. On 14 December 2009, the government filed an opposition to appellant’s request for protective order, objecting to the release of these documents in any manner, contending: (1) that the requested material is irrelevant to these appeals or not reasonably calculated to lead to admissible evidence; and (2) the requested material constitutes “trade secrets” under the Trade Secrets Act (TSA), 18 U.S.C. § 1905, and the government’s disclosure of trade secrets under a protective order would violate the TSA.

On 30 December 2009, the Board issued an “Order on Briefing and *In Camera* Review,” directing the government to submit the disputed documents for Board review, *in camera*, and requesting a fuller briefing of the issues by the parties. The parties have complied with this Order.

¹ These documents are located in the Rule 4 file at tabs 1, 2, 3, 5, 6, 7, 8, 10, 12, 13, 14, 16, 17, 20, 22, 28, 35, 37, 40, 42-46, 56, 59, 62, 66, 67 and 82.

I. THE WITHHELD DOCUMENTS

The government has furnished the withheld documents to the Board, *in camera*, and has provided a declaration under penalty of perjury from Mr. Scott Aeilts, Director of Business Operations at ATK, dated 29 January 2010, whose corporate information is contained in these documents. In summary, Mr. Aeilts declared (1) that appellant and ATK are major competitors and competed for the subject contract (awarded to appellant in August 2005); (2) that ATK also had a contract at that time with the government to manufacture the same articles that were to be furnished by appellant under this contract; (3) that the government's files contain contract-related information from ATK related to the purchasing of these articles; (4) that this information includes ATK trade secrets or confidential financial data of a proprietary nature, including proprietary unit pricing, production quantity data and manufactured per assembly line data related to the subject ATK contract and other contracts; (5) that disclosing this information would cause significant and incalculable competitive harm to ATK; (6) that releasing the data would put ATK at a significant competitive disadvantage and provide ATK's competitors with useful information on which to base bids; (7) that ATK competitors could use this information to potentially calculate ATK's actual costs with a high degree of precision to allow them to undercut ATK in future bids; and (8) that ATK objects to the release of any of this information to appellant or any other party. (Gov't resp., attach. 1)

The undersigned has reviewed the withheld documents. For the most part, they constitute e-mails between government employees that refer to ATK unit prices and production capacity for specified rounds of ammunition at the government-owned, contractor-operated facility known as the "Lake City Army Ammunition Plant" LCAAP), or relate to information from which this type of data could be derived. For purposes of this Order, all such information shall be treated as trade secrets or confidential data as defined under the TSA (*see infra*).

These government e-mails reflect ATK data or ATK projected data that were current as of the dates of these e-mails. Sixteen of these e-mails were dated in 2004 (tabs 1, 2, 3, 5, 6, 7, 8, 10, 12, 13, 14, 16, 17, 20, 22, 28); thirteen e-mails were dated in 2005 (tabs 35, 37, 40, 42, 43, 44, 45, 46, 56, 59, 62, 66, 67) and one e-mail was dated in 2006 (tab 82). Mr. Aeilts' declaration does not address how the release of this dated information could presently cause ATK "significant and incalculable competitive harm" or enable competitors to "potentially calculate ATK's actual costs with a high degree of precision so as to allow them to undercut ATK in future bids."

II. THE WITHHELD DOCUMENTS ARE RELEVANT TO APPELLANT'S CLAIM.

FED. R. CIV. P. 26(b)(1), which the Board uses for guidance, provides in pertinent part that “[p]arties may obtain discovery regarding any nonprivileged matter that is relevant to *any party’s claim* or defense.... Relevant information need not be admissible at trial if the discovery appears reasonably calculated to lead to the discovery of admissible evidence....” (emphasis added).

Appellant’s certified claim, dated 13 February 2009, as amended, contends that the government’s estimate of cartridge mix in the solicitation was inadequate (R4, tab 187). Appellant’s complaint before the Board reiterates this claim (Bd. corr. file). The contracting officer has provided a declaration that the disputed documents contain information that the government reviewed to develop the estimates in the solicitation (gov’t opp’n, Slusser decl., attach. 2). Moreover, the government is hard-pressed to now argue lack of relevancy when it has identified these documents in its Rule 4 file submission to the Board, which file is required to contain “all documents pertinent to the appeal” as well as “any additional information considered relevant to the appeal,” Board Rule 4(a), (a)(5).

Based upon the documents of record, it is concluded that the subject documents are relevant to appellant’s claim or may lead to the discovery of admissible evidence in these appeals, and that appellant has a need for this information to assist in the preparation of its case.

III. THE TSA DOES NOT APPLY TO DISCLOSURES AUTHORIZED BY LAW

The TSA provides as follows:

Whoever, being an officer or employee of the United States or of any department or agency thereof, any person acting on behalf of the Federal Housing Finance Agency, or agent of the Department of Justice as defined in the Antitrust Civil Process Act (15 U.S.C. 1311-1314), or being an employee of a private sector organization who is or was assigned to an agency under chapter 37 of title 5, publishes, divulges, discloses, or makes known in any manner or to any extent *not authorized by law* any information coming to him in the course of his employment or official duties or by reason of any examination or investigation made by, or return, report or record made to or filed with, such department or agency or officer or employee thereof, which information concerns or

relates to the trade secrets, processes, operations, style of work, or apparatus, or to the identity, confidential statistical data, amount or source of any income, profits, losses, or expenditures of any person, firm, partnership, corporation, or association; or permits any income return or copy thereof or any book containing any abstract or particulars thereof to be seen or examined by any person except as provided by law shall be fined under this title, or imprisoned not more than one year, or both; and shall be removed from office or employment.

18 U.S.C. § 1905 (emphasis added). The TSA prohibits and provides criminal penalties for disclosures of confidential business information defined therein “not authorized by law.” It follows that the TSA does not apply to disclosures “authorized by law.”

IV. THE CONTRACT DISPUTES ACT (CDA), 41 U.S.C. § 610, PROVIDES STATUTORY AUTHORITY FOR BOARD MEMBERS TO AUTHORIZE DISCOVERY IN APPEAL PROCEEDINGS. ANY BOARD ORDER OF DISCLOSURE RELATED TO DISCOVERY IS “AUTHORIZED BY LAW” AND DOES NOT VIOLATE THE TSA.

Under 41 U.S.C. § 607(d), the ASBCA has jurisdiction to decide a contractor appeal from the decision of a contracting officer of the Department of the Army and other specified military agencies under a contract subject to the Act. In connection with this jurisdiction, Congress granted Board members the authority to “authorize depositions and discovery proceedings” in these appeals, 41 U.S.C. § 610. This statutory authority inherently includes the duty to preside over and issue orders on any and all discovery requests and disputes in these appeals, including those related to the disclosure or protection of trade secrets or similar confidential matter, and to exercise all power necessary and incident to the proper performance of this duty. *See* ASBCA Charter, 48 C.F.R. Chapter 2, Appx. A, Part 1, ¶ 5 (2009): “The Board shall have all powers necessary and incident to the proper performance of its duties.” Hence, any such Board ordered disclosure in connection with appeal proceedings constitutes a disclosure “authorized by law,” and does not violate the TSA.

The government argues that our CDA statutory authority is limited because the CDA does not expressly grant the boards the authority to order the release of trade secrets and confidential matter under the TSA. The government cites no authority for this proposition, and it is not persuasive. According to this reasoning, even federal courts established by the Congress would be unauthorized to issue protective orders for such confidential material held by the government without express language to this effect in their enabling statutes. However, even without such express statutory authority, federal

courts issue such orders as a matter of course.² *United States v. W. R. Grace*, 455 F. Supp. 2d 1140 (D. Mont. 2006); *Consolidated Box Co. v. United States*, 19 CCF ¶ 82,717, 1973 WL 157850 (1973). See also *Pleasant Hill Bank v. United States*, 58 F.R.D. 97, 100 (W.D. Mo. 1973) (trade secrets under 18 U.S.C. § 1905 exempt from disclosure under FOIA are unquestionably discoverable under FED. R. CIV. P. 26(c)(7)). As stated by the Supreme Court of the United States in *Federal Open Market Committee v. Merrill*, 443 U.S. 340, 61 L.Ed. 2d 587, 99 S.Ct. 2800 (1979) at L.Ed. 2d 604, n.24:

Actually, orders forbidding any disclosure of trade secrets or confidential commercial information are rare. More commonly, the trial court will enter a protective order restricting disclosure to counsel....

See also 8A Wright, Miller & Marcus, *Federal Practice and Procedure*, § 2043 (2010) at 252-54:

In most cases the key issue is not whether the information will be disclosed but under what conditions, as the Supreme Court has recognized. The need for the information is ordinarily held paramount but reasonable protective measures are supplied to minimize the effect on the party making the disclosure. On this point the trial court has a very wide discretion. As Justice Holmes said long ago:

It will be understood that if, in the opinion of the trial judge, it is or should become necessary to reveal the secrets to others, it will rest in the judge's discretion to determine whether, to whom, and under what precautions, the revelation should be made.

The lower courts have adhered to this view.

The most common kind of order allowing discovery on conditions is an order limiting the persons who are to have

² While FED. R. CIV. P. 26(c)(1)(G) specifically provides for orders of disclosure of a trade secret or other confidential information, Board Rule 14(a), duly published in the Code of Federal Regulations, similarly provides for orders of disclosure of confidential information, which includes the type of information involved here. (See Section V herein for further discussion).

access to the information disclosed and the use to which these persons may put the information. [Footnotes omitted]

The ASBCA has followed the federal courts in this regard. In *Ingalls Shipbuilding Division, Litton Systems, Inc. (Ingalls)*, ASBCA No. 17717, 73-2 BCA ¶ 10,205 at 48,103, the Board stated as follows:

[I]f a claim of business confidentiality is made, we will examine with particular care the relevance of the documents or information sought and if we are convinced by *in camera* inspection or otherwise that the material is relevant and entitled to be held confidential, *we will follow the lead of the courts and issue an appropriate protective order to minimize the possibility of future disclosure* (emphasis added).

The Board issued a protective order, limiting the disclosure of a general ledger.

While *Ingalls* was a pre-CDA case, there is nothing in the CDA to suggest that the Congress intended to weaken existing board authority in this respect. To the contrary, it is clear that the Congress intended to strengthen the agency boards' authority as quasi-judicial bodies to adjudicate appeals under the Act:

The agency boards of contract appeals as they exist today, and as they would be strengthened by this bill, function as quasi-judicial bodies. Their members serve as administrative judges in an adversary-type proceeding, make findings of fact, and interpret the law. Their decisions set the bulk of legal precedents in Government contract law, and often involve substantial sums of money. In performing this function they do not act as a representative of the agency, since the agency is contesting the contractor's entitlement to relief.

S. Rep. No. 95-1118 at 26, as reprinted in 1978 U.S.C.C.A.N. 5235, 5260. In exercising its CDA jurisdiction, the Board does not act as a member or representative of an agency, as the government suggests, but as an independent, quasi-judicial body with court-like powers and authority. *See, e.g.*, 41 U.S.C. § 607(d): "In exercising this jurisdiction, the agency board is authorized to grant any relief that would be available to a litigant asserting a contract claim in the U.S. Court of Federal Claims."

The government's reliance on *Chrysler Corp. v. Brown*, 441 U.S. 281 (1979), is misplaced. In *Chrysler* the Court held, in a disclosure dispute under FOIA, that the disclosure of claimed confidential information was not authorized by the statutes or

regulations relied upon by the disclosing agency, and as such, was not “authorized by law” for purposes of the TSA. *Chrysler* did not address the authority of federal courts or other duly authorized federal tribunals to issue protective orders for confidential information in connection with litigation authorized by statute, as is the case here.

The government’s reliance on *Canadian Commercial Corp. v. Department of Air Force* (“*CCC*”), 514 F.3d 37 (D.C. Cir. 2008), is also misplaced. In *CCC*, the Court affirmed a lower court ruling forbidding the Air Force from releasing line-item pricing in a government contract under FOIA. The Court held:

[I]t is the law of this circuit that line-item prices do come within [FOIA] exemption 4.... Constituent or line-item pricing information in a Government contract falls within Exemption 4 of the FOIA if its disclosure would “impair the government’s ability to obtain necessary information in the future” or “cause substantial harm to the competitive position of the person from whom the information was obtained.”
Nat’l Parks, 498 F.2d at 770.

514 F.3d at 40. According to the government’s reasoning, since the Air Force was precluded from disclosing line-item pricing information in *CCC* under FOIA, the Board is likewise precluded from ordering the Army to disclose the line-item pricing information here pursuant to a protective order in an appeal under the CDA.

The government’s reasoning is unpersuasive for a number of reasons. First, *CCC* is factually and legally distinguishable from this case. *CCC* involved a suit to enjoin agency disclosure of confidential information under FOIA. Here, the government objects to the Board’s issuance of a protective order in connection with a discovery-type dispute in an appeal under the CDA. *CCC* did not address or suggest that its holding would apply to a court or a similar federal tribunal to forbid the disclosure of such information through the issuance of a protective order in litigation. Indeed, such a reading would fly in the face of established precedent both in the courts and the boards.

We also note that the nature and the impact of the pricing information in *CCC* differ from that claimed here. In *CCC*, the court ruled that “*CCC* has shown that release of the pricing information here at issue would cause it substantial competitive harm with respect to the option years in its contract with the Air Force...” 514 F.3d at 43. However, the government has made no persuasive showing here of any substantial competitive harm. Indeed, much of the pricing information sought to be protected was prepared many years ago, *i.e.*, 2004, for a contract to be awarded in August 2005. Mr. Aielts’ declaration fails to address how such old data may cause substantial harm to ATK’s present competitive position. *See Boeing Co. v. Dept. of Air Force*,

616 F. Supp. 2d 40, 49 (D. DC 2009) (insufficient evidence to show how old data could be used to calculate future rates and cause substantial competitive harm); *Acumentics Research and Technology v. Dept. of Justice*, 843 F.2d 800, 808 n.8 (4th Cir. 1988) (“Even were a competitor able to derive Acumentics’ multiplier, we agree with DOJ’s opinion that competitive harm would be minimal because the information is stale.”) Any possible or conceivable competitive harm to ATK here will be mitigated through the issuance of a properly crafted protective order.

The case law is clear that agency disclosure obligations under FOIA and agency disclosure obligations in litigation are not the same. This issue was squarely addressed in *Consolidated Box Co., supra*, 1973 WL 157850. In *Consolidated Box*, a government motion seeking to withhold certain confidential business information from a litigant in discovery was denied. The government’s request to follow the agency’s disclosure practices under FOIA was rejected (at 4, 5):

Essentially the Government’s case seems to be that this court should in regulating discovery follow what now seems to be the practice of the Renegotiation Board, under the Freedom of Information Act, of disclosing the names of contractors whose profits are renegotiated, but withholding as confidential such details as nonrenegotiated sales and profits totals (footnote omitted). But even proven confidentiality under the Freedom of Information Act does not conclude a court in regulating discovery in a contested case, under either this court’s rule 71(f) 1(vii) or the identical Rule 26(c) of the Federal Rules of Civil Procedure.

The exemption of confidential papers from disclosure under the Freedom of Information Act is absolute (citations omitted). In court, in litigation, civil or criminal, the policy in favor of ascertainment of the facts relevant to the cause is paramount, and a merely confidential document is not immune from discovery or process for disclosure, in the interest of a decision on all relevant facts (citations omitted). The exemption for confidential information from discovery in litigation is therefore not absolute, but discretionary with the court, which under rule 71(f) and the identical Federal Rule 26(c) “may” order that confidential information not be disclosed or be disclosed only in a designated way.

....

Public availability of agency papers under the Freedom of Information Act and the discovery of relevant evidence in judicial proceedings are different systems. It is policy that administrative agencies disclose information in their files, with an absolute exemption for confidential business information in the interest of governmental gathering of information. In litigation, policy sets a different objective - discovery of all the facts needed to do justice - and in serving that policy a court is authorized to sacrifice the confidentiality of business information. When, therefore, a Government agency is in possession of evidence relevant to a cause in court, the agency becomes subject to the duty to make discovery, a duty different than it owes to a member of the public under the Freedom of Information Act (citation omitted).

This reasoning was also adopted in *ABA Electromechanical Systems, Inc.*, NASA BCA No. 181-13, 83-1 BCA ¶ 16440 (trade secrets enjoy no absolute privilege in discovery at the boards, nor is disclosure restricted by FOIA; motion for production denied for failure to show relevance).

Based upon the statutory authority granted by the CDA, its legislative history and the case law, there is no sound legal basis to distinguish between the adjudicatory functions of the federal courts and the boards of contract appeals insofar as the issuance of protective orders for the disclosure or protection of confidential information is concerned. As a court ordered disclosure of confidential information is a disclosure authorized by law, so is a board ordered disclosure of confidential information authorized by law. Such disclosures do not violate the TSA. *United States v. W.R. Grace*, 455 F. Supp. 2d at 1148; *Grumman Aerospace Corp. v. Titanium Metals Corp. of America*, 91 F.R.D. 84, 90 (E.D. N.Y. 1981). See *Ingalls, supra*. See also *Houck Limited v. Department of Veteran Affairs*, CBCA No. 1509, 09-1 BCA ¶ 34,113; *Computer Sciences Corp.*, ASBCA No. 27275, 84-3 BCA ¶ 17,671 at 88,138.

V. THE BOARD'S DULY PUBLISHED RULES HAVE THE FORCE AND EFFECT OF LAW. ANY BOARD ORDER OF DISCLOSURE ISSUED UNDER THE BOARD'S RULES IS AUTHORIZED BY LAW AND DOES NOT VIOLATE THE TSA.

It is well settled that agency rules and regulations that have been duly published have the force and effect of law. *Federal Crop Insurance Corporation v. Merrill*, 332 U.S. 380 (1947). The Rules of the Armed Services Board of Contract Appeals have been

duly published in the Code of Federal Regulations. See 48 C.F.R., Chapter 2, Appx. A, Part 2 (2009). The Board's rules have the force and effect of law.

Insofar as pertinent, Board Rule 14(a) states as follows:

In connection with any deposition or other discovery procedure, the Board may make any order required to protect a party or person from annoyance, embarrassment, or undue burden or expense. Those orders may include limitations on the scope, method, time and place for discovery, *and provisions for protecting the secrecy of confidential information or documents.*

(Emphasis added). Board Rule 14(a) gives the Board the authority to issue an order of limited disclosure that protects the secrecy of confidential matter. Appellant has requested such an order. It therefore follows that any such Board order is authorized by law and does not violate the TSA.

VI. WHETHER THE OPINION OF THE DEPARTMENT OF JUSTICE (DoJ) THAT A BOARD MAY NOT SUBPOENA DOCUMENTS FROM A THIRD-PARTY FEDERAL AGENCY UNDER THE CDA PRECLUDES THE BOARD FROM ISSUING A PROTECTIVE ORDER IN THIS APPEAL.

Citing *Mountain Valley Lumber, Inc. (MVL)*, AGBCA No. 2003-171-1, 06-2 BCA ¶ 33,339, in which the DoJ took the position that a board of contract appeals does not have the authority under the CDA to subpoena the documents of a third-party federal agency, the government asserts that this DoJ opinion precludes the Board from issuing a protective order to the Army in these appeals for the production of trade secrets or similar confidential information under the TSA.

The government's contention is not persuasive for a number of reasons. First, the Board has not issued any subpoena or order to a third party federal agency. Rather, appellant seeks an order directed to the Army, the contracting agency before the Board in these appeals. The Board is also not required to apply to the DoJ for the enforcement of such an order. Board Rule 35 authorizes sanctions for failure or refusal to obey an order issued by the Board.

Based upon the foregoing, the referenced DoJ opinion has no bearing on the Board's authority under the present circumstances.

VII. CONCLUSION

The undersigned has duly considered all the authorities and the arguments offered by the government. For reasons stated, it is concluded that the Board is authorized by the CDA and by its duly published Rules to issue protective orders in connection with the disclosure of trade secrets or related confidential business information in appeals before the Board. Any such disclosures are authorized by law and do not violate the TSA.

Having duly considered and weighed appellant's need for this information and its relevancy to its claim in these appeals, the government's burden of producing the information and any resulting harm to ATK in the disclosure of the information, it is concluded that a protective order, limiting the disclosure to certain persons and under limited circumstances, is a reasonable accommodation of these competing interests.

Appellant's motion for a protective order is GRANTED. The parties are ordered to confer and to agree to a protective order for the Board's signature no later than 30 days from receipt of this Order. If the parties are unable to agree upon the terms and conditions of a protective order by that time, they may file their own proposed terms and conditions for the Board's review and the Board shall issue the protective order.

Failure to comply with Board orders may result in the imposition of sanctions under Board Rule 35.

Dated: 1 June 2010

/s/ Jack Delman

JACK DELMAN

Administrative Judge

Armed Services Board
of Contract Appeals