

ARMED SERVICES BOARD OF CONTRACT APPEALS

Appeal of --)
)
Laguna Construction Company, Inc.) ASBCA No. 58292
)
Under Contract No. FA8903-04-D-8690)

APPEARANCE FOR THE APPELLANT: Carolyn Callaway, Esq.
Carolyn Callaway, P.C.
Albuquerque, NM

APPEARANCES FOR THE GOVERNMENT: Alan R. Caramella, Esq.
Air Force Chief Trial Attorney
Skye Mathieson, Esq.
Trial Attorney

OPINION BY ADMINISTRATIVE JUDGE DELMAN ON GOVERNMENT'S
MOTION TO STAY PROCEEDINGS

The Department of the Air Force (government) has moved to stay proceedings in this appeal pending conclusion of criminal proceedings against three principal officers of Laguna Construction Company, Inc. (appellant or Laguna) and four subcontractor principals indicted for fraud under this contract. Appellant opposes any stay. We have jurisdiction under the Contract Disputes Act (CDA), 41 U.S.C. §§ 7101-7109.

STATEMENT OF FACTS FOR PURPOSES OF THE MOTION

1. On 21 November 2003, the government awarded to appellant Contract No. FA8903-04-D-8690, an Indefinite Delivery/Indefinite Quantity (IDIQ) contract for Worldwide Environmental Remediation and Construction (WERC) services, which were to be ordered by the government through the issuance of task orders (compl. ¶¶ 3-5).
2. On 25 June 2004, the government awarded to Laguna a cost-plus-fixed-fee task order (TO) 0006 under this contract for field construction work for An Numaniyah Military Training Base (Phase II) and An Numaniyah Bridge in Iraq (compl. ¶¶ 6-7).
3. Effective 6 December 2004, Laguna awarded a subcontract to the Yacoub & Ramzi Snobar Company (Snobar) under TO 0006 for electrical related work (gov't mot., ex. 2). The award amount was \$1,860,000.00 (*id.* at 2). Over the next six months, to 12 June 2005, Laguna issued change orders to Snobar that more than doubled Snobar's subcontract price to \$4,315,175.00 (gov't mot., ex. 3, next to last page).

4. From 25 June 2004 to 15 December 2006, Laguna performed work on TO 0006 and submitted vouchers for payment (compl. ¶ 14; R4, tab 12). The government paid Laguna's first 24 vouchers in the amount of \$41,186,902 (compl. ¶ 15). According to the government these were provisional payments, and appellant's submitted costs were subject to audit (answer ¶ 15).

5. Voucher No. 25 was dated 29 June 2006. It sought payment of \$457,717, of which \$379,839 was subcontractor cost. The subcontractor was not identified on the voucher. (R4, tab 20) Voucher No. 26 was dated 9 August 2006, and sought payment in the amount of \$45,450, of which \$17,138 was subcontractor cost. The subcontractors under this voucher were identified as Kellogg Brown & Root Services, Inc. and Brad Christiansen (R4, tab 21 at 1, 2, 4). Voucher No. 27 was dated 13 October 2006 and sought payment in the amount of \$717,450. Appellant listed subcontractor cost as \$793,959 and listed a credit for "SUPPLIES & SERVICES" in the amount of \$193,715. (R4, tab 23 at 1, 2) The subcontractor was not identified on the voucher. Voucher No. 28 was dated 21 November 2006, and sought payment of \$51,276 and did not include any subcontractor cost (R4, tab 24 at 1, 2). Voucher No. 29 was dated 15 December 2006 and sought payment of \$54,441, of which \$13,810 was subcontractor cost. The subcontractor was not identified on the voucher. (R4, tab 25 at 1, 2)

6. The government did not pay Voucher Nos. 25 through 29.

7. In February 2008, the FBI and the Defense Criminal Investigative Service launched an investigation into Laguna and its employees related to reports that Laguna's upper management was involved in a subcontract bid-rigging scheme on work performed on Iraq contracts, including allegations that kickbacks from subcontractors were received in exchange for awarding contracts to those subcontractors (gov't mot., ex. 10 at 3, ¶ 6).

8. On 29 December 2008, Laguna submitted a certified claim to the contracting officer (CO) in the amount of \$1,326,334, plus interest, for the payment of Voucher Nos. 25-29 (compl. ¶ 27).

9. On 12 May 2009, the CO informed Laguna that he was postponing the final decision due to the ongoing fraud investigation under the contract (gov't mot., ex. 9).

10. On 28 February 2012, a federal grand jury indicted three principal officers of Laguna and four principal officers of Laguna's subcontractors in the U.S. District Court for New Mexico. The indictment listed 91 counts of fraud and unlawful conduct. The grand jury indicted Laguna's president, its vice president and chief operating officer, and its contract compliance manager. It also indicted the principals of four of Laguna's subcontractors under this contract: Snobar, Tigris River Company (Tigris), Mercury Development Company and The New Millennium Company. Generally, the indictment charged a scheme of kickbacks, wire fraud and money laundering in a subcontract

bid-rigging scheme designed to inflate invoices and to defraud the government under this and other contracts. Specifically, the indictment included charges of a scheme, between on or about January 2004 through on or about February 18, 2009 “to unlawfully over-bill the United States by submitting materially false and fraudulent reimbursement vouchers to [the government]...thereby causing overpayment to the subcontractors in order to generate excess funds for the subcontractors to allow defendants...to offer and to pay kickbacks for the award of Iraqi reconstruction subcontracts to defendants....” (Gov’t mot., ex. 1 at 1, 3, 11-12)

11. Snobar and Tigris were subcontractors on TO 0006.

12. On 20 August 2012, Laguna appealed the deemed denial of its certified claim to this Board, seeking \$1,326,334.00 for unpaid Voucher Nos. 25 to 29, plus interest. The appeal was docketed as ASBCA No. 58292.

13. The government filed the subject motion to stay Board proceedings on or about 1 November 2012. Shortly thereafter, it filed a letter from the Office of the U.S. Attorney, District of New Mexico, dated 13 November 2012. The letter referenced the subject indictment and those indicted and stated as follows:

It is the United States’ understanding that the same contract (FA8903-04-D-8690) is also at issue in the ASBCA dispute and that the civil dispute involves the same relevant time period at issue in the criminal proceedings. Moreover, it is the United States’ understanding that several of these subcontractors indicted in the criminal proceedings were involved in Task Order 0006, which is at issue in the ASBCA dispute.

Because of the overlap in both subject matter and defendants with the pending civil dispute before the ASBCA, the ASBCA matter has the potential to interfere with our ongoing criminal proceedings. The United States therefore respectfully requests a stay of ASBCA No. 58292 for one year or until conclusion of the criminal trial, currently set for October 7, 2013.

According to the Assistant U.S. Attorney for the District of New Mexico, the trial is expected to last six to eight weeks (gov’t mot. at 10, ¶ 33).

DECISION

The review of a motion for a stay calls for the exercise of discretion and judgment in weighing and balancing the competing interests of the parties. *See 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). Our case law requires the consideration of the following factors when a stay of an appeal is based upon parallel criminal proceedings:

- (1) [W]hether the facts, issues and witnesses in both the civil and criminal proceedings are substantially similar,
- (2) whether the government's on-going investigation would be compromised by going forward with the civil case, (3)
- whether the proposed stay could harm the non-moving party,
- and (4) whether the duration of the requested stay is reasonable. *Public Warehousing Co.*, ASBCA No. 56116, 08-1 BCA ¶ 33,787 at 167,225.

Unconventional Concepts, Inc., ASBCA No. 56065 *et al.*, 08-2 BCA ¶ 33,934 at 167,930. We address these factors below.

Substantial Similarity of Facts, Issues and Witnesses

The subject indictment charges a criminal scheme of subcontract bid-rigging, kickbacks, fraud and inflated contract costs perpetrated by appellant's indicted principals and the indicted subcontractor principals under this and other contracts between January 2004 and February 2009. As far as this appeal is concerned, TO 0006 was awarded in June 2004, the Snobar subcontract was awarded effective 6 December 2004, the subject vouchers were submitted in 2006, Voucher Nos. 25, 27 and 29 contain significant subcontractor cost and the government also asserts the affirmative defense of fraud.¹ We

¹ We note that by separate motion appellant has moved to strike all five of the government's affirmative defenses of fraud. Affirmative Defense No. 3 avers fraudulent activity as a breach of contract that calls into question the recoverability of costs claimed. This is generally a valid defense. *See Environmental Safety Consultants, Inc.*, ASBCA No. 53485, 02-2 BCA ¶ 31,904 at 157,613. Appellant contends that this defense is invalid because the allowability and reasonableness of appellant's claimed voucher costs are not properly before the Board (app. reply at 21). We do not agree. Appellant has claimed the costs under the CDA and has appealed on account of the failure of the CO to issue a decision. Appellant's cost claim is properly before us, including the related issues of its recoverability. That the government has at least one valid affirmative defense of fraud is sufficient for purposes of this motion. Given our disposition herein we defer consideration of the motion to strike on the government's other affirmative defenses.

believe there is a substantial similarity of facts and issues between the two proceedings. We also believe that the two proceedings will share common witnesses. A number of those indicted will have personal knowledge of TO 0006 and its award and performance, and will be potential witnesses in this appeal. The U.S. Attorney's letter also represents that the two proceedings share common subject matter and witnesses.

We believe there is a substantial similarity of facts, issues and witnesses in these parallel proceedings for purposes of this motion.

Risk of Compromising the Criminal Case

Appellant's broad discovery rights at our Board would include the right to explore the nature of the government's affirmative defense of fraud, which would risk the disclosure, and the compromise of the government's criminal case of fraud against those indicted. Moreover the government's broad discovery rights at our Board would include the right to depose those persons with personal knowledge of TO 0006, including those indicted. However, this discovery may be frustrated if the Fifth Amendment privilege against self-incrimination is invoked. Given these circumstances, we believe the government has shown a clear case of hardship or inequity in being required to move forward concurrently in these civil and criminal proceedings.

Harm to the Nonmovant

According to the government, the criminal trial is set for 7 October 2013. However a discovery and trial schedule has yet to be set for this appeal. Clearly, the criminal matter will be resolved prior to any decision of the Board on appellant's monetary claim. If the indicted contractor and subcontractor personnel are found guilty of criminal fraud or other unlawful conduct under this contract, such a determination may affect appellant's right to recover its claimed costs under the disputed vouchers in this appeal based upon the contractor's breach of contract, as asserted in Affirmative Defense No. 3. *Environmental Safety Consultants*, 02-2 BCA ¶ 31,904 at 157,613. On the other hand, if no criminality is proven and appellant's monetary claim is otherwise meritorious, any delay in adjudicating the claim at the Board will be compensated through payment of interest on the claim under the CDA.

We are mindful that under the CDA an agency board is enjoined to provide expeditious resolution of disputes "to the fullest extent practicable." 41 U.S.C. § 7105(g)(1). However, given the pending criminal indictment, the subject motion and the competing interests presented we must assess what is most practicable here. Under the circumstances presented, we believe that any potential harm to appellant of a moderate delay (see below), is outweighed by the public's interest in resolving the criminal matter without board interference.

The Duration of the Stay

According to the government, the criminal trial is set for 7 October 2013 and should last six to eight weeks, or to roughly 6 December 2013. The Board is persuaded that a stay of roughly six to seven months from the date of this opinion is a moderate and reasonable stay under the circumstances, and is consistent with other stays we have granted pending criminal proceedings. *E.g.*, *Unconventional Concepts*, 08-2 BCA ¶ 33,934 at 167,931 (six-month stay reasonable); *Aydin Corporation (West)*, ASBCA No. 43273 *et al.*, 94-1 BCA ¶ 26,588 (six-month stay granted).

CONCLUSION

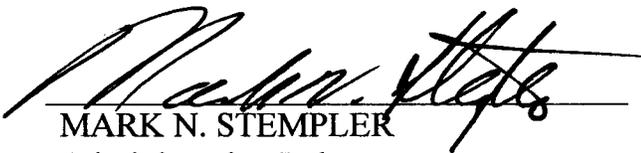
We have considered appellant’s arguments but are not persuaded by them. Having duly weighed the appropriate factors, we conclude that the government has met its burden to support a reasonable stay of this appeal. ASBCA No. 58292 is hereby stayed through 6 December 2013 or until such date as the criminal matter is resolved, whichever is earlier. The government’s motion is granted consistent with this opinion.

Dated: 13 May 2013



JACK DELMAN
Administrative Judge
Armed Services Board
of Contract Appeals

I concur



MARK N. STEMPLER
Administrative Judge
Acting Chairman
Armed Services Board
of Contract Appeals

I concur



PETER D. TING
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. 58292, Appeal of Laguna Construction Company, Inc., rendered in conformance with the Board's Charter.

Dated:

JEFFREY D. GARDIN
Recorder, Armed Services
Board of Contract Appeals