

ARMED SERVICES BOARD OF CONTRACT APPEALS

Appeal of --)
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Suh'dutsing Technologies, LLC) ASBCA No. 58760
)
Under Contract No. HC1028-10-D-2003)

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OPINION BY ADMINISTRATIVE JUDGE O'SULLIVAN
ON RESPONDENT'S MOTION TO DISMISS WITHOUT PREJUDICE OR
STAY PROCEEDINGS

Respondent has filed a motion to dismiss without prejudice or to stay proceedings in this appeal. Respondent requests that the Board either dismiss the appeal without prejudice pursuant to Board Rule 18, or in the alternative stay the appeal for at least six months pending the outcome of a Department of Justice investigation into whether false representations of intent to comply with the FAR limitation on subcontracting were made in connection with the award of the section 8(a) set-aside contract involved in the appeal. Appellant opposes the motion. For the reasons stated below, we deny the motion.

STATEMENT OF FACTS FOR PURPOSES OF THE MOTION

Contract No. HC1028-10-D-2003 was awarded to Suh'dutsing Technologies, LLC (Suh'dutsing), on 26 March 2010 (R4, tab 1). Suh'dutsing is owned by the Cedar Band of the Paiute Tribe and participates as a small disadvantaged business in the Small Business Administration's (SBA's) 8(a) program (app. supp. R4, tab 24 at 1). The claims at issue in this appeal are those of Suh'dutsing's subcontractor, ESCgov,

Inc. (ESCgov), and ESCgov's subcontractor, SMS Data Products Group, Inc. (SMS) (app. supp. R4, tab A).

DISA awarded the contract for implementation and sustainment services in furtherance of its requirement to upgrade DISA Computing Services from its existing IBM Tivoli Enterprise Console solution to IBM's published upgrade path, which included IBM Netcool software (R4, tab 1 at 13). DISA actively worked with IBM to identify an Alaskan native or tribal 8(a) firm to act as prime contractor so that the award would not have to be competed, and Suh'dutsing was identified to DISA by IBM (app. stmt. of add'l facts ¶ 3).¹

As originally envisioned by DISA in a November 2009 solicitation, the contract would have had a one-year base period (implementation phase) with four one-year options for sustainment services (app. supp. R4, tab B1 at 1-4). DISA made it clear in this 2009 solicitation that it expected the implementation phase to include both the acquisition and the installation of the IBM Netcool software (*id.* at 37-39). The parties ultimately negotiated a three-year base period with two option years (app. supp. R4, tabs B17, B18, B24 at 2; compl. ¶ 26).

On 27 June 2011, DISA notified Suh'dutsing that it elected not to proceed with the sustainment phase of the contract (R4, tab 4). Subsequently, Suh'dutsing sponsored a claim on behalf of its subcontractor ESCgov to recover \$4,254,430.61 in costs occasioned by DISA's alleged constructive termination for convenience of the contract (including upfront IBM software costs that were to have been recovered over the negotiated three-year base period of the contract) and DISA's alleged constructive changes to the contract causing both ESCgov and its subcontractor, SMS, to incur additional labor costs. This certified claim was submitted to the contracting officer on 21 December 2012. (App. supp. R4, tabs A, B, C) On 28 June 2013, appellant filed an appeal to this Board from the contracting officer's deemed denial of its claim (R4, tab 39) which we docketed as ASBCA No. 58760.

Following the Board's denial on 28 April 2014 of the government's motion to dismiss the appeal for lack of jurisdiction (14-1 BCA ¶ 35,596), the parties engaged in written discovery and the government sought and received leave, twice, to amend its answer to add additional affirmative defenses. Of note, the most recent amendment,

¹ Previously in this appeal, respondent filed a motion for summary judgment accompanied by a memorandum of law, a statement of undisputed material facts, and supporting exhibits. In response, appellant filed its opposition and its statement of genuine issues of material fact, which included its statement of additional facts, and supporting exhibits. On 8 May 2015 respondent filed its reply to appellant's opposition, along with a reply to appellant's statement of genuine issues of fact, and supporting exhibits.

for which the Board granted leave on 23 March 2015, adds the affirmative defense that appellant misrepresented its intent to abide by the requirement that it perform at least 50 percent of the cost of labor incurred to perform the contract with its own personnel, that the contract would not have been awarded but for the alleged misrepresentation, and that therefore the contract is void *ab initio*. (Second amended answer, affirm. def. ¶ 22) On 12 March 2015 the government filed its motion for summary judgment, based in part on the same affirmative defense. Appellant filed its opposition to the motion for summary judgment on 13 April 2015, arguing in part that had the government not terminated the contract before the base period had run, Suh'dutsing would have been able to satisfy the 50 percent requirement.

On 15 April 2015, the government filed the motion that is the subject of this decision. Appended to the motion was a letter from the office of the United States Attorney for the Southern District of Illinois, dated 14 April 2015, stating that the office is conducting an investigation under the False Claims Act, 31 U.S.C. §§ 3729-3733, regarding "allegations that false claims were submitted or caused to be submitted by Suh'dutsing Technologies, LLC to the United States through false representations that it would perform at least 50% of the contract cost for personnel." Also attached to the government's motion was a Civil Investigative Demand (CID) served on the appellant on 30 March 2015 by the Department of Justice (DOJ). The CID requests production of all documents produced by appellant in discovery in this appeal, and any other written communications regarding the work to be performed by appellant, ESCgov, or SMS under the contract at issue in this appeal.

In order to allow time for the Board to issue a decision on the government's motion, the Board stayed the taking of depositions in this appeal until 22 June 2015, and rescheduled the hearing to commence 10 August 2015.

DECISION

The Board has inherent authority to stay its proceedings. In exercising this authority in connection with parallel proceedings, we "weigh competing interests and maintain an even balance." *Palm Springs General Trading and Contracting Establishment*, ASBCA No. 56290 *et al.*, 10-1 BCA ¶ 34,406 at 169,867 (citing *Public Warehousing Company, K.S.C.*, ASBCA No. 56116, 08-1 BCA ¶ 33,787 at 167,226 and *Landis v. North American Company*, 299 U.S. 248, 254-55 (1936)). In exercising our discretion, we recognize that, under the Contract Disputes Act, 41 U.S.C. §§ 7101-7109, "a contractor is entitled to have a properly asserted appeal litigated before, and decided by, the Board." *Kellogg Brown & Root Services, Inc.*, ASBCA Nos. 56358, 57151, 11-1 BCA ¶ 34,614 at 170,603 (citing *TRW, Inc.*, ASBCA Nos. 51172, 51530, 99-2 BCA ¶ 30,407 at 150,332).

The factors normally considered by the Board in determining whether to stay proceedings in these circumstances include: (1) whether the facts, issues, and witnesses in both proceedings are substantially similar; (2) whether the ongoing investigation or litigation would be compromised by going forward with the case before us; (3) the extent to which the proposed stay would harm the nonmoving party; and (4) whether the duration of the requested stay is reasonable. *Public Warehousing Company*, 08-1 BCA ¶ 33,787 at 167,227-29; *Kellogg Brown & Root Services*, 11-1 BCA ¶ 34,614 at 170,603-05. We also consider whether the government has demonstrated a “clear case of hardship or inequity in being required to go forward,” *TRW*, 99-2 BCA ¶ 30,407 at 150,332, and whether considerations of judicial efficiency counsel in favor of granting a stay. *Kaman Precision Products, Inc. formerly dba Kaman Dayron, Inc.*, ASBCA No. 56305 *et al.*, 10-2 BCA ¶ 34,499 at 170,153.

Similarity

The government contends that the investigation undertaken by DOJ “involves the same parties, Contract, witnesses, documents, and issues as in the appeal,” and is concerned that if the appeal is not stayed pending the DOJ investigation, “Appellant will get free discovery in the False Claims Act litigation [sic]² by deposing Government witnesses in the appeal” (gov’t mot. at 2-3). Appellant responds that the only issue that appears to be the subject of the DOJ investigation is exactly defined by the respondent’s recently asserted affirmative defense (i.e., whether Suh’dutsing intended to incur 50 percent or more of the labor cost of performing the contract), and that the remaining issues in this appeal concern many other facts, documents, and witnesses that do not overlap with the DOJ investigation (app. opp’n at 1-2).

This appeal involves the sponsored claims of appellant’s subcontractors for unrecovered costs occasioned by DISA’s decision not to proceed with the sustainment phase of the contract, which appellant argues is a constructive termination for convenience of a contract that was supposed to run for at least three years, as well as unreimbursed expenses and increased costs resulting from alleged constructive changes to the contract by the government. The government decided not to proceed with the contract in June of 2011, and the companies involved in this appeal have been pursuing a resolution of their contract claims for nearly four years now. The investigation, which appears to be of recent origin, does not overlap any issues in this appeal except for the one issue introduced by the government’s most recently asserted affirmative defense, which is only one of many affirmative defenses asserted by respondent (24 in all).

² The government’s references to “litigation” appear mistaken, since at present there is only an investigation.

We conclude respondent has not satisfied this factor.

Judicial Efficiency

Respondent argues that proceeding with the appeal would be an inefficient use of judicial resources since, if the contract is voided on the basis that it was obtained through fraudulent misrepresentations, appellant cannot recover because there will be no contract (gov't mot. at 3). Respondent also argues that even if appellant prevails in this appeal, the contracting officer cannot pay any amount on the claim "as long as the False Claims Act litigation [sic] is pending" (*id.*).

The Board has in numerous instances decided whether a contract was awarded in reliance on misrepresentations of fact, or due to illegal or fraudulent activity established by conviction or un rebutted evidence. If so, the contract is rendered void *ab initio* and the Board will deny recovery. *Atlas International Trading Corporation*, ASBCA No. 59091, 15-1 BCA ¶ 35,830 at 175,198; *Vertex Construction & Engineering*, ASBCA No. 58988, 14-1 BCA ¶ 35,804 at 175,110; *Servicios y Obras Isetan S.L.*, ASBCA No. 57584, 13 BCA ¶ 35,279 at 173,162-63; *C&D Construction, Inc.*, ASBCA No. 38661, 90-3 BCA ¶ 23,256 at 116,683-84; *National Roofing and Painting Corp.*, ASBCA Nos. 36551, 37714, 90-2 BCA ¶ 22,936 at 115,133-34.

In this case, judicial efficiency counsels that the Board should decide whether respondent has established its affirmative defense, because respondent's ability to do so depends on the resolution of contract interpretation issues that are within the Board's subject matter expertise. Indeed, the essence of respondent's argument is that Suh'dutsing did not, and knew it would not, perform 50 percent of the cost of personnel on the contract during the implementation phase (first year of the contract), which the respondent refers to as "the Contract." (Resp. memo. of law in support of mot. for summ. judgment at 11-12) Thus, the government's affirmative defense depends in great part on the Board agreeing with the government that its contractual commitment was met, and "the Contract" was concluded, at the end of the implementation phase. Appellant, however, bases its claims for recovery on its position that the parties specifically negotiated a three-year base contract so that the upfront cost of the IBM software could be recovered over a greater period of time, thus reducing total cost to the government. Appellant's position is that the government committed to a three-year contract and was well aware that subcontractor involvement would be greater in the first year (implementation phase) due to the requirement that the work be done by personnel with expertise in the IBM Netcool software. Once the project moved into the two-year sustainment phase, appellant states it would have been

able to perform more of the contract with its own personnel and thus achieve overall compliance with the 50 percent rule.³

On balance, while we note the government's points, (1) the great disparity between the stage this appeal has reached and that of the DOJ investigation, which is apparently of recent origin, and (2) the relevance of contract interpretation issues to the ultimate success or failure of the government's fraud allegations, cause us to conclude that judicial efficiency is best served by proceeding with this appeal.

Whether the Ongoing Investigation Would Be Compromised

The government states that, because of the asserted commonality of witnesses, documents, and issues, "there is significant risk that the development of the record and ultimately the accuracy, efficacy, and finality of future fact findings and rulings by the Board will impact the False Claims Act litigation [sic]" (gov't mot. at 2). The government is also concerned that if the appeal is not stayed pending the DOJ investigation, "Appellant will get free discovery in the False Claims Act litigation [sic] by deposing Government witnesses in the appeal" (*id.* at 3).

As noted previously, there is no False Claims Act litigation, only an investigation. This appeal was docketed on 5 July 2013, and the contractor has been seeking a resolution of its contractual claims from the government for nearly four years. In addition, we agree with appellant that the overlap between the civil investigation and this appeal is relatively circumscribed and limited to whether appellant misrepresented its intent to incur 50 percent of the cost of labor to perform the contract, whereas numerous other contractual issues are presented for resolution in this appeal.

Significantly, this appeal presents issues of contract interpretation that are foundational to the government's affirmative defense and should be decided first, lest the cart go before the horse. In that respect, this case is similar to *TRW*, where we found the underlying issues regarding the correctness of TRW's accounting for indirect costs to be within our statutory mandate to determine. *TRW*, 99-2 BCA ¶ 30,407 at 150,332. We said that if TRW's treatment of costs was found to be incorrect, the district court had jurisdiction to decide whether TRW's actions were fraudulent. *Id.*

³ There are additional matters on which the parties disagree that may affect the outcome on this issue, including interpretation of the applicable SBA regulations and which version of those regulations applies to the appellant's contract performance.

Appellant argues that the government has failed to articulate any harm to the investigation from proceeding with the appeal, other than appellant's getting "free discovery." Appellant notes that there has been no explanation of how deposing government witnesses in this appeal would be detrimental to DOJ's investigation. We agree. If there were a concurrent criminal proceeding, there could be a legitimate concern that depositions in this proceeding might be used to circumvent the more restrictive rules governing discovery in criminal proceedings. *See, e.g., Public Warehousing Company K.S.C.*, ASBCA No. 58078, 14-1 BCA ¶ 35,574 at 174,340. That is not a concern here, however.

We also understand the government to suggest that there could be a danger of inconsistent rulings, but we do not see this as a current issue, given the absence of an active False Claims Act case involving overlapping issues being litigated concurrently in a federal district court. If a forum other than this Board subsequently has litigation before it related to the issues in this appeal, it will determine to what extent collateral estoppel will apply.

In summary, we conclude that respondent has failed to "demonstrate a clear case of hardship or inequity in being required to go forward." *TRW*, 99-2 BCA ¶ 30,407 at 150,332.

Harm to the Nonmoving Party

Appellant is a small disadvantaged tribal business. The claims in this appeal are for a significant sum of money, over \$4.25 million dollars. Appellant argues against dismissal or stay on the ground that Suh'dutsing and its subcontractors, both small businesses, have already spent a great deal of time and money in defending against the government's motion to dismiss for lack of jurisdiction and substantially completing discovery. If the appeal is dismissed or subjected to a lengthy stay, appellant asserts, not only will it further delay resolution on the merits, but there will likely be duplication of effort and cost involved in re-starting the appeal, and the availability of evidence or witnesses may become an issue. The government, on the other hand, asserts that no harm will accrue from "general delay" since interest on the claim will continue to accrue.

We are not convinced that eventual recovery of CDA interest will prevent harm to the appellant and its subcontractors. In addition, a hiatus of any length risks the loss of witnesses and evidence. No representation has been made by the government that the investigation will be concluded within a time certain. If this Board dismisses the appeal without prejudice or stays it for a period of time pending completion of the DOJ investigation, which is in a very early stage, there is no telling how much longer appellant and its subcontractors may be forced to wait for their claim to be adjudicated.

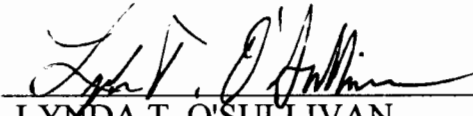
Reasonableness of the Duration of the Stay

Respondent requests that the appeal be dismissed without prejudice until conclusion of the DOJ investigation and any resulting litigation. “[A] stay of indefinite duration in the absence of a pressing need [is an abuse of discretion].” *Landis*, 299 U.S. at 255. In the context of the likely harm to appellant and the other factors discussed above, we find the requested duration to be unreasonable.

CONCLUSION

The respondent’s motion to dismiss without prejudice or to stay is denied.

Dated: 18 June 2015



LYNDA T. O'SULLIVAN
Administrative Judge
Armed Services Board
of Contract Appeals

I concur



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

I concur



RICHARD SHACKLEFORD
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 No. 58760, Appeal of Suh'dutsing Technologies, LLC, rendered in conformance with the Board's Charter.

Dated:

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