

ARMED SERVICES BOARD OF CONTRACT APPEALS

Appeals of --)
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WEDJ/Three C's, Inc.) ASBCA Nos. 53747, 53756
)
Under Contract Nos. DAAB07-98-C-E502)
DAAB07-00-D-C015)

APPEARANCE FOR THE APPELLANT: Mr. Neil R. Tucker
President

APPEARANCES FOR THE GOVERNMENT: COL Samuel J. Rob, JA
Chief Trial Attorney
MAJ Robert B. Neill, JA
CPT Geraldine Chanel, JA
Trial Attorneys

OPINION BY ADMINISTRATIVE JUDGE HARTMAN
ON THE APPELLANT'S MOTION TO SUSPEND PROCEEDINGS AND
GOVERNMENT'S MOTION TO DISMISS PURSUANT TO RULES 30 OR 31

Appellant, WEDJ/Three C's, Inc., seeks a suspension of proceedings in the appeals, including postponement of a hearing, "pursuant to Rule 30" because testimony from three of its senior officials required for the presentation of its appeals may not be available due to their invocation of the right against self-incrimination guaranteed by the Fifth Amendment of the United States Constitution. The government objects to further suspension of the appeals and seeks re-establishment of discovery and hearing schedules. Alternatively, the government seeks dismissal of the appeals without prejudice pursuant to Rule 30 because any "suspension may continue for an inordinate period of time" or "with prejudice" pursuant to Rule 31 "for failure to prosecute."

BACKGROUND

On 7 January 2002, a contracting officer (CO) for the Department of the Army's Communications-Electronics Command (CECOM) at Fort Monmouth, New Jersey, issued a final decision terminating for default Contract No. DAAB07-98-C-E502 with appellant, WEDJ/Three C's, Inc. (WEDJ), for production of 24,000 BTU, "split-pack" air conditioners due to failure to: make progress; cure conditions endangering contract performance; provide adequate assurances of performance; and perform material contract provisions, "including failure to satisfy the requirements of ISO 9001," which governed

the quality assurance system required to be established by WEDJ. WEDJ filed an appeal of the CO's decision with this Board, which was docketed as ASBCA No. 53747. (Complaint (Compl.) at 1; Answer at 1; Notice of Appeal (NOA) exhibit (ex.) at 1; gov't br. at 1)

On 22 January 2002, another CO for CECOM issued a final decision terminating for default Contract No. DAAB07-00-D-C015 with WEDJ for the production of small air conditioning units also based upon failure to make progress, cure conditions endangering contract performance, provide adequate assurances of performance, and perform material contract provisions, "including failure to satisfy the requirements of ISO 9001." WEDJ again filed an appeal of the decision with this Board, which was docketed as ASBCA No. 53756. (Compl. at 1; Answer at 1; NOA ex. at 1; gov't br. at 1)

On 16 December 2002, in a case "under seal," a U.S. Magistrate for the Middle District of Pennsylvania issued a search warrant for the three buildings that comprise WEDJ's York, Pennsylvania facility. The warrant authorized the Defense Criminal Investigative Service to seize, among other things, all records pertaining to: more than 50 contracts between WEDJ and the government (including the two at issue here); company finances; quality assurance tests; First Article Testing; "calibration of applicable equipment involved in the Testing process;" and nonconforming material reports. (App. mot. at 2, ex. A; gov't br. at 2)

During late March and early April 2003, the U.S. Attorney for the Middle District of Pennsylvania notified the president, vice-president and an employee of WEDJ that they were "targets" of a Federal Grand Jury investigation being conducted regarding possible violations of the United States Code, including false claims, major fraud, and conspiracy to defraud the United States. The U.S. Attorney stated he was affording the individuals notified an "opportunity to request to testify and to bring to the attention of [h]is office any information . . . which may bear in any way on [their] innocence or non-involvement in the . . . investigation," but they should "be advised that any decision to testify and/or to recommend other evidence to be considered by the Grand Jury . . . could be used against [them] if any criminal charges should be returned against [them]." (App. mot. at 2, exs. B, C; gov't br. at 2)

During spring of 2003, the parties to these appeals were engaged in the conduct of discovery. WEDJ had responded to a request for discovery from the government and the government anticipated scheduling depositions of, among others, the three individuals notified by the U.S. Attorney they were "targets" of the Grand Jury investigation. (App. mot. at 3; gov't br. at 2; app. opp'n at 1-2)

In June of 2003, WEDJ filed a motion requesting we suspend its appeals for six months because there were "ongoing negotiations" which "may lead to a pre-indictment

resolution of the Grand Jury investigation.” The government “concurred” in WEDJ’s request that proceedings be suspended for six months and we granted the unopposed motion for a suspension of proceedings. (App. 2003 br. at 3; gov’t br. at 2-3; app. opp’n at 2)

During December 2003, WEDJ filed a motion seeking a further suspension of all proceedings in these appeals. WEDJ again stated that there were “ongoing negotiations” which “may lead to a pre-indictment resolution of the Grand Jury investigation.” WEDJ appended to its motion an affidavit from its president stating that WEDJ “will need to present the testimony of [its president] and other agents and employees of the company to support its claim, but such testimony may be unavailable as these witnesses . . . have a constitutional right against self-incrimination guaranteed to them by the Fifth Amendment.” (App. mot. at 5-6)

During February of 2004, counsel retained by WEDJ with respect to the criminal investigation met with representatives of the U.S. Attorney’s office to discuss, among other things, a possible resolution of the criminal investigation. The meeting did not, however, result in a pre-indictment resolution of the criminal investigation. (Gov’t br. at 3)

The government subsequently filed an opposition to WEDJ’s motion to extend the suspension of proceedings in these appeals, stating “it is unlikely that any pre-indictment negotiated resolution of the criminal investigation of the Appellant and its officers and employees will be concluded in the foreseeable future” (gov’t br. at 3-4). The government requested that we “reestablish discovery and hearing schedules in the appeals” or, in the alternative, dismiss “the appeals pursuant to Rule 30” because any “suspension may continue for an inordinate period of time” or “with prejudice for failure to prosecute pursuant to Rule 31.” (Gov’t br. at 1)

During July 2004, WEDJ filed a reply to the government’s opposition to its motion and an opposition to the government’s motions to dismiss. WEDJ stated, among other things, that Martin C. Carlson, First Assistant United States Attorney for the Middle District of Pennsylvania “indicated that he is willing to meet with [WEDJ’s attorney] and the Assistant United States Attorney assigned to” the matter “in an effort to achieve a global resolution of this matter.” (App. opp’n at 5)

During subsequent status conferences conducted by telephone, WEDJ continued to assert that we should not dismiss its appeals because it was seeking a “global resolution” of all legal issues which had arisen between it and the government. Neither WEDJ nor the government, however, could provide any specific indication when such a resolution might be reached, if ever.

DECISION

I. Motion to Suspend

There is no “*per se*” right to receipt of a suspension of proceedings when criminal proceedings have been or are being initiated by the government. *E.g.*, *Afro-Lecon, Inc. v. United States*, 820 F.2d 1198, 1206 (Fed. Cir. 1987). The Constitution does not require a stay of civil proceedings pending the outcome of criminal proceedings. *Id.* at 1202. A tribunal, however, has “discretion to stay civil proceedings” and “postpone civil discovery . . . ‘when the interests of justice seem[] to require such action.’” *Id.*, quoting *United States v. Kordel*, 397 U.S. 1, 12 n.27 (1970). While there is a policy interest in allowing both criminal and civil cases to go forward, one “may be required to submit to delay not immoderate in extent and not oppressive in its consequences if the public welfare or convenience will be promoted.” *Todd Shipyards Corp.*, ASBCA No. 31092, 88-1 BCA ¶ 20,509 at 103,682, quoting *Landis v. North American Co.*, 299 U.S. 248, 256 (1936); accord *Afro-Lecon, Inc. v. United States*, 820 F.2d at 1202, 1205.

To receive a stay, an applicant must make a showing of “hardship or inequity in being required to go forward.” *Todd Shipyards Corp.*, ASBCA No. 31092, 88-1 BCA at 103,682, quoting *Landis v. North American Co.*, 299 U.S. at 256. We must then weigh the competing interests and balance the parties’ interests in determining whether to grant the request for stay. *Landis*, 299 U.S. at 254-55 (decision to stay parallel proceedings calls for exercise of judgment, which must weigh competing interests and maintain an even balance); accord *Afro-Lecon, Inc. v. United States*, 820 F.2d at 1202, 1206; *R&R Group, Inc.*, ASBCA Nos. 52328, 52711, 02-1 BCA ¶ 31,728 at 156,754.

WEDJ has made a showing here that two of its senior officials and an employee who have been notified that they are targets of the Grand Jury investigation will likely invoke the Fifth Amendment and refuse to testify in these appeals. WEDJ asserts it “will need to present the testimony of [its president] and other agents . . . of the company to support its claim [here], but such testimony may be unavailable” to it due to parallel criminal proceedings.

The Fifth Amendment provides that “no person . . . shall be compelled in any criminal case to be a witness against himself.” U.S. CONST. amend. V. An individual need not be indicted to properly claim the Fifth Amendment privilege. *Afro-Lecon, Inc. v. United States*, 820 F.2d at 1207. The privilege can be asserted if the answers supplied would “‘furnish a link in the chain of evidence’ leading to” prosecution of the claimant for a federal crime. *Id.*, quoting *Hoffman v. United States*, 341 U.S. 479, 486 (1951).

“Other than where there is specific evidence of agency bad faith or malicious governmental tactics, the strongest case for deferring civil proceedings until after

completion of criminal proceedings is where a party . . . is required to defend a civil or administrative action involving the same matter” because “[t]he noncriminal proceeding, if not deferred, might undermine the party’s Fifth Amendment privilege against self-incrimination, expand rights of criminal discovery . . . , expose the basis of the defense to the prosecution in advance of criminal trial, or otherwise prejudice the case.” *SEC v. Dresser Industries, Inc.*, 628 F.2d 1368, 1375 (D.C. Cir.), *cert. denied*, 449 U.S. 993 (1980). As the Court of Appeals for the Federal Circuit explained in *Afro-Lecon, Inc. v. United States*, 820 F.2d at 1203, *citing Hickman v. Taylor*, 329 U.S. 495, 507 (1947), the Federal Rules of Civil Procedure broadly authorize discovery of any unprivileged matter which is relevant to the subject matter involved in the pending action and information sought in discovery need not be admissible at trial, but only reasonably calculated to lead to discovery of admissible evidence. Discovery pursuant to the Federal Rules of Criminal Procedure, however, is highly restricted. For example, under Rule 15, Federal Rules of Criminal Procedure, a defendant cannot be deposed without his consent and the conduct of depositions is permitted only pursuant to court order. Thus, a stay of the civil proceedings may be granted to avoid any improper interference with the criminal proceedings “if they churn over the same evidentiary material.” *Peden v. United States*, 512 F.2d 1099, 1103 (Ct. Cl. 1975); *accord Afro-Lecon, Inc. v. United States*, 820 F.2d at 1203-04.

The government asserts WEDJ has not shown the “issues in the criminal matter . . . may overlap with . . . similar issues in the[se] appeals” (gov’t br. at 4). The final decisions at issue here, however, concern “default terminations” for failure to make progress, cure conditions endangering contract performance, and perform material contract provisions, “including failure to satisfy the requirements of ISO 9001” with respect to the quality assurance system to be established by WEDJ. The contractual documents seized by the government pursuant to the search warrant include: quality assurance tests; First Article Testing; “calibration of applicable equipment involved in the Testing process;” and nonconforming material reports. Thus, issues in the criminal proceedings appear similar to issues in these appeals. Moreover, in its brief, the government expressly acknowledges that the “[i]ssues relevant to the instant appeals of which” the grand jury targets “have knowledge may also be related to the possible violations of federal law[,] including conspiracy to defraud the United States, false claims, and fraud . . . presently being investigated by federal authorities” (gov’t br. at 2). We conclude, therefore, that the issues in the criminal proceedings are sufficiently similar and may involve the same evidentiary material as these appeals. *See R&R Group, Inc.*, ASBCA Nos. 52328, 52711, 02-1 BCA ¶ 31,728; *Laumann Mfg. Corp.*, ASBCA No. 50246, 01-2 BCA ¶ 31,441.

The government also asserts that WEDJ has not shown here that the “threat of criminal prosecution” is real (gov’t br. at 4). WEDJ, however, has shown its records were seized by the government pursuant to a search warrant issued in a case under seal

and its senior officials notified that they are targets of a Grand Jury investigation. We conclude, accordingly, that there clearly is a threat of criminal prosecution. *See R&R Group, Inc.*, ASBCA Nos. 52328, 52711, 02-1 BCA ¶ 31,728; *Laumann Mfg. Corp.*, ASBCA No. 50246, 01-2 BCA ¶ 31,441; *compare Container Sys. Corp.*, ASBCA Nos. 40614, 43694, 93-2 BCA ¶ 25,798.

According to the affidavit of WEDJ's president, the absence of testimony from the individuals notified they are targets of the Grand Jury investigation will "substantially hamper [WEDJ's] ability to present [its] case[s] to the Board" and will "likely prove fatal to [its] Appeal[s]" (app. opp'n at 4). Balancing "the interest of [WEDJ] in postponement, which is strong, against the possible prejudice to [the government] by way of important evidence that will be lost over time," *Afro-Lecon, Inc. v. United States*, 820 F.2d at 1206; *Laumann Mfg. Corp.*, ASBCA No. 50246, 01-2 BCA ¶ 31,441 at 155,266-67, we conclude that grant of a stay of proceedings is warranted.¹

II. Motion to Dismiss for Failure to Prosecute

The government requests that we dismiss WEDJ's appeals for failure to prosecute. According to the government, WEDJ's representations that witnesses "will be unavailable to testify due to their constitutional right against self-incrimination is tantamount to an assertion of [WEDJ's] intention not to continue the prosecution of its appeals." (Gov't br. at 6)

Rule 31 provides:

Whenever a record discloses the failure of either party to file documents required by these rules, respond to notices or correspondence from the Board, comply with orders of the Board, or otherwise indicates an intention not to continue the prosecution or defense of an appeal, the Board may, in the case of a default by the appellant, issue an order to show cause why the appeal should not be dismissed or, in the case of a default by the government, issue an order to show cause why the Board should not act thereon pursuant to Rule 35. If good cause is not shown, the Board may take appropriate action.

¹ Both appeals before us involve terminations for default. We have held that terminations for default are government claims. *E.g., Independent Mfg. & Service Companies of America, Inc.*, ASBCA No. 47636, 94-3 BCA ¶ 27,223 at 135,678; *accord Malone v. United States*, 849 F.2d 1441, 1443 (Fed. Cir. 1988).

A “dismissal with prejudice for failure to prosecute is a harsh measure operating as an adjudication on the merits, and we employ it sparingly.” *See, e.g., Generator Technologies, Inc.*, ASBCA No. 53206, 03-1 BCA ¶ 32,058 at 158,461.

There has been no failure by WEDJ to file documents required by the rules, respond to Board notices or correspondence, or comply with Board orders in these appeals. Thus, there has been no “default” by WEDJ here. Neither our Rules nor the Federal Rules of Civil Procedure permit the resisting of discovery on account of a valid claim of privilege against self-incrimination to be the basis for punishment. Accordingly, we deny the government’s motion to dismiss for failure to prosecute.

III. Motion to Dismiss Pursuant to Rule 30

Alternatively, the government requests that we dismiss WEDJ’s appeals pursuant to Armed Services Board of Contract Appeals Rule 30.² According to the government, “it is unlikely that any pre-indictment negotiated resolution of the criminal investigation of [WEDJ] and its officers and employees will be concluded in the foreseeable future” (gov’t br. at 3-4).

Rule 30, in pertinent part, provides:

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

² While WEDJ has captioned its motion as one “pursuant to Rule 30” and states that its motion is “pursuant to Rule 30” (app. mot. at 1), its motion is mislabeled. WEDJ does not seek a dismissal of its appeal, but only a “suspension of proceedings.” As discussed below, our Rule 30 does not provide for a simple suspension of proceedings.

The intent of Rule 30 is to allow the Board to remove from its docket appeals that cannot proceed for an uncertain or inordinate amount of time for reasons beyond the control of the Board without prejudice to their restoration when the cause of suspension has been removed. *See General Dynamics Corp.*, ASBCA Nos. 39500, 40995, 00-1 BCA ¶ 30,719 at 151,724.

Based on the parties' representations and prior efforts at obtaining a negotiated resolution of the criminal matters, it does not appear that the criminal issues presented will be resolved by negotiated resolution any time soon and, in the event the issues are not resolved by negotiation, the parties may be awaiting the issuance of an indictment, conduct of trial, and possibly resolution of an appeal. The course of those events is not within the control of this Board and "may continue[] for an inordinate length of time." Accordingly, we conclude that dismissal without prejudice under Rule 30 is warranted.

CONCLUSION

The appeals are dismissed pursuant to Rule 30 without prejudice to reinstatement within three years from the date of this decision.

Dated: 13 September 2005

TERRENCE S. HARTMAN
Administrative Judge
Armed Services Board
of Contract Appeals

I concur

I concur

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

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

I certify that the foregoing is a true copy of the Opinion and Decision of the Armed Services Board of Contract Appeals in ASBCA Nos. 53747, 53756, Appeals of WEDJ/Three C's, Inc., rendered in conformance with the Board's Charter.

Dated:

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