

ARMED SERVICES BOARD OF CONTRACT APPEALS

Appeals of --)
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Government Business Services Group, LLC) ASBCA Nos. 54588, 54973
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Under Contract No. F49642-00-D-5003)

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APPEARANCES FOR THE GOVERNMENT: COL Anthony P. Dattilo, USAF
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ORDER STAYING PROCEEDINGS

These appeals involve a contract to perform security investigations. Government Business Services Group, LLC (appellant or GBSG) challenges the partial and deemed denials of its claims against the government. The United States Department of Justice (DOJ) has intervened in a *qui tam* action under the False Claims Act (FCA), 31 U.S.C. §§ 3729, *et. seq.*, against GBSG, *et. al.* That suit in the United States District Court Middle District of Florida Tampa Division also relates to the instant contract. The government moves to suspend these appeals or, alternatively, to dismiss them without prejudice pending the outcome of the FCA litigation. GBSG opposes the government's motion. Briefing by the parties was concluded on 8 August 2005. For the reasons set forth below, the motion is granted and proceedings in these appeals are suspended pending resolution of the FCA litigation.

“The Board has the inherent authority to manage its docket and to stay or suspend proceedings in appropriate circumstances.” *KiSKA Construction Corp.–USA and Kajima Engineering and Construction, Inc., A Joint Venture*, ASBCA No. 54613, 05-1 BCA ¶ 32,922 at 163,082. There is no general rule establishing definitive criteria for determining when the Board should stay its proceedings and defer to concurrent FCA litigation. Necessarily such determinations are made on a case-by-case basis. In deciding whether to issue a stay, the Board weighs and balances the competing interests of the parties and assesses any potential prejudice to those interests. *Afro-Lecon, Inc. v. United*

States, 820 F.2d 1198, 1202-04 (Fed. Cir. 1987); *E-Systems, Inc.*, ASBCA Nos. 32033 *et al.*, 88-2 BCA ¶ 20,752 at 104,868. The Board also considers whether a stay will promote judicial efficiency. *Hardrives, Inc.*, IBCA Nos. 2319 *et al.*, 91-2 BCA ¶ 23,769 at 119,065. In weighing the parties competing interests here, the commonality of issues in the parallel actions and judicial efficiency warrant suspending proceedings.

Commonality of Issues

There is a significant degree of commonality between the issues in these appeals and the FCA litigation. The same contract is involved in the concurrent proceedings. Although appellant contests the direct relevance of the FCA issues, there is sufficient potential overlap to adversely impact efficient discovery, development of the record and ultimately the accuracy, efficacy and finality of future fact findings and rulings by the Board.

GBSG argues that a discrete portion of its claims is not involved in the FCA litigation and can be decided by the Board. First, neither party disputes that to the extent local agency checks (LACs) were not performed (for which appellant billed the government and which the government has refused to pay), parallel factual questions are presented in both forums. Appellant argues that other claims do “not involve LACs in any respect” (app. resp. at 7). The differences, however, are not as clear and distinct as appellant implies. For example, GBSG asserts that the stop work order claim is unrelated to non-performance of the LACs. That assertion has been denied by the government. According to the government, its stop work order was based, at least in part, on perceived deficiencies with appellant’s LACs.

GBSG contends that the “additional investigative work” upon which the electronic personnel security questionnaire (EPSQ) claim is based did not “include LACs.” That contention is also problematic. The nature of all of the work required, including whether foundational LACs (or other record checks) were involved or should have been involved, is not established. It is conceivable that alleged failure to conduct LACs could be viewed as having tainted claims for “additional” EPSQ work. At this time we have insufficient facts needed to address these possible issues, but, in general, the scope of appellant’s duties and investigative responsibilities under the contract are disputed. Discovery relative to additional potential FCA claims is ongoing in the district court proceedings according to the government. Logical separation of issues before the district court and this forum are difficult at best at this juncture. *See, e.g., Sentry Insurance, a Mutual Company*, VABCA No. 2617, 88-1 BCA ¶ 20,318 at 102,725-26 (“While the facts may ultimately establish that segments of the work could have been separated from the fraud investigation, we can see a number of scenarios in which fraud could be involved in varying degrees with each aspect of work performed.”); *San-Val Engineering, Inc.*, GSBCA No. 10371, 92-1 BCA ¶ 24,558 at 122,538. The

interrelationship of the LAC issues with other issues is vague and ambiguous. More generally, the nature and impact of any misrepresentations in appellant's reimbursement claims is so uncertain that caution in proceeding on these appeals is warranted. The "taint" of misconduct, if any, on these appeals is unclear. We conclude that the potential impact of determinations and decisions in the FCA litigation is too substantial to warrant proceeding in these appeals.

Judicial Efficiency

GBSG emphasizes its right to expeditious resolution of its claims. Section 8(e) of the Contract Disputes Act (CDA), 41 U.S.C. § 607(e), requires the Board to provide "to the fullest extent practicable, informal, expeditious, and inexpensive resolution of disputes." This right has been considered and weighed in balancing the competing interests involved. It is our opinion the disadvantages of proceeding far outweigh the advantages.

In addition to the commonality of issues, the relative procedural stage of proceedings before the District Court and this Board are not sufficiently different to warrant proceeding to trial. Discovery in the FCA litigation is scheduled for completion in June 2006. The Board's current schedule requires completion of discovery in late October 2005. Given the delays attendant to the present motion, that schedule is highly improbable. An extension of the discovery cut-off date and continuation of the trial appear highly likely. Post-trial briefs/reply briefs in Board appeals of this size and complexity normally require several months. The Board's decision in the appeals would not be rendered until sometime thereafter. Consequently, the likelihood of any Board decision prior to the trial of the FCA matters is questionable. The duration of the requested stay in these circumstances is not unreasonable.

The DOJ has filed a "MEMORANDUM FOR STAY OF BOARD PROCEEDINGS" in support of the government's motion. The Memorandum alleges that the FCA litigation would be prejudiced and describes DOJ concerns should a stay of proceedings not be granted in these appeals. Both the DOJ and government maintain that common witnesses and documents are involved in both proceedings. We have reviewed the Memorandum and consider DOJ's concerns not unreasonable, in particular with respect to discovery issues. *See Hardrives, Inc., supra*, 91-2 BCA at 119,065. ("[C]onsiderations of comity and promotion of judicial efficiency" also favor a stay because the District Court and the Board "inevitably would be required to engage in duplicative procedures and evaluations, costly to all in time, money and use of resources.")

On balance, allowing the current appeals to proceed would result in an inefficient use of court, board and party resources. *See Aydin Corp. (West)*, ASBCA Nos. 43273

et al., 94-1 BCA ¶ 26,588 (stay granted where facts, issues and witnesses were substantially similar and no specific harm to contractor other than general delay shown); *San-Val Engineering, Inc.*, *supra*.

For the reasons set out above, the government's motion is granted. Further proceedings in these appeals, including discovery, are stayed pending resolution of the FCA litigation except as may be established in the future by a separate order.

Dated: 29 August 2005

ROBERT T. PEACOCK
Administrative Judge
Armed Services Board
of Contract Appeals

I concur

I concur

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

PAUL WILLIAMS
Administrative Judge
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. 54588, 54973, Appeals of Government Business Services Group, LLC, rendered in conformance with the Board's Charter.

Dated:

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

