

ARMED SERVICES BOARD OF CONTRACT APPEALS

Appeals of --)
)
Unconventional Concepts, Inc.) ASBCA Nos. 56065, 56066, 56202
) 56217, 56260
Under Contract Nos. DAAD16-03-C-0049)
and W911QY-05-C-0082)

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APPEARANCES FOR THE GOVERNMENT: COL Anthony M. Helm, JA
Chief Trial Attorney
CPT Marlin D. Paschal, JA
Trial Attorney

OPINION BY ADMINISTRATIVE JUDGE JAMES
ON RESPONDENT'S MOTION TO STAY

Appellant Unconventional Concepts, Inc. (UCI) seeks payment of monthly invoices totaling \$933,845.15 for services allegedly performed during April through July 2006. ASBCA Nos. 56065 and 56202 arise under Contract No. DAAD16-03-C-0049 (contract 49), and ASBCA Nos. 56066, 56217 and 56260 arise under Contract No. W911QY-05-C-0082 (contract 82). The appeals under each contract are consolidated.

On 3 June 2008 respondent moved to stay Board proceedings on the appeals for up to six months because of an ongoing criminal investigation. Respondent submitted, *inter alia*, a letter from Tamera L. Fine, Assistant United States Attorney (AUSA), District of Maryland, Northern Division, and a declaration from contracting officer (CO) Darlene L. Rideout. Appellant opposed the motion on 23 June 2008, submitting an affidavit and other exhibits in support of its opposition.

Respondent responded on 26 June 2008, submitting “law enforcement sensitive documents for *in camera* review **only**” (emphasis in original). Respondent stated in its cover letter, a copy of which was provided to appellant’s attorney, that the government “has alleged that Appellant conspired with various government technical and project

personnel to create and approve fraudulent contract documents in order to get contract funds released to Appellant absent actual contract performance.” Respondent also disputed UCI’s evidence of financial hardship if a stay were granted. On 21 July 2008 appellant responded, alleging that respondent’s submissions regarding its motion were untimely, urging the Board to disregard respondent’s *in camera* documents and reiterating that respondent’s motion, as submitted, did not support the stay for which it prayed. The Board has considered the parties’ contentions and has decided to grant respondent’s request for review of the *in camera* documents. The statements below, however, are based exclusively on the public record in the appeals.

STATEMENT OF FACTS (SOF)

Contracts 49 and 82

1. On 23 April 2003 the U.S. Army Natick Contracting Division awarded contract 49 to UCI for a \$100,000 fixed price for technical and engineering support for the National Protection Center and the Defense Advanced Research Projects Agency (DARPA) (ASBCA Nos. 56065, 56202 (hereinafter 56065), R4, tab 1 at 1-2). As amended 11 times, contract 49’s options were exercised, its price was increased to \$3,848,750 and its performance period was extended to 31 July 2006 (56065, R4, tabs 4-9, 11-12, 14-15, 17).

2. The invoices in dispute under contract 49 relate to Contract Line Item 0008 (CLIN 8). Modification No. P00006 effective 25 March 2005 added this CLIN in the amount of \$3,000,000. It called for “Assessment of Opportunities for Transition and Applications of Technologies for the DARPA Defense Sciences” over a seven-month period in accordance with UCI’s proposal. That proposal identified Mr. Michael J. Hopmeier, UCI’s president, as the principal investigator. CO Rideout subsequently extended the period of performance through 31 July 2006. (56065, R4, tabs 9, 14)

3. On 2 August 2005, the Natick Contracting Division awarded contract 82 to UCI in the amount of \$5,760,950 for technical and program management support for the Natick Soldier Center, including inter-agency liaison tasks for DoD, NASA and Army activities from 1 August 2005 to 31 July 2006. The contract’s key personnel list identified Mr. Hopmeier as the principal investigator. (ASBCA Nos. 56066, 56217, 56260 (hereinafter 56066), R4, tab 1 at 1, 11, 15, 21)

4. The invoices in dispute under contract 82 relate to tasks 1 and 2. Task 1 called for assistance to the Deputy Assistant to the Secretary of Defense for Chemical and Biological Defense Programs and task 2 called for assistance to NASA. (56066, R4, tab 1 at 11)

The Criminal Investigation

5. On 15 July 2005, Mr. Brian E. Martin, Contracting and Grants Officer at the U.S. Army Medical Research Acquisition Activity, notified Mr. Hopmeier by e-mail that an audit for the years ending 1999, 2000, and 2001 had indicated that UCI was in possession of excess funds in the amount of \$334,263 on cooperative agreement DAMD17-97-2-7020. Mr. Martin requested that UCI return funds in the amount of \$509,167 (principal plus interest) within 30 days. The e-mail showed a copy to a Mr. Richard Drill, later identified as a Special Agent (SA) assigned to the U.S. Army Criminal Investigation Command, Major Procurement Fraud Unit. (App. opp'n, exs. I, J). This e-mail is the first reference in the record to a special agent of the U.S. Army Criminal Investigation Command, sometimes referred to as CID.

6. In May 2006 U. S. government agents searched and seized records from UCI's offices in Florida and Virginia (ASBCA No. 56202, compl. & answer, ¶ 77).

7. SA Drill's 15 May 2006 e-mail to CO Martin and UCI's attorney Robert Korroch stated that "UCI has been formally identified as the target of a federal criminal investigation which includes issues related to the DAMD17-97-2-7020 Cooperative Agreement" (app. opp'n, ex. K).

8. On 28 June 2006 CO Rideout e-mailed the individual who was the technical point of contact at NASA on contract 82, task 2, that she had "been informed that the US Army CID and NASA-OIG are investigating UCI concerning this contract and this research effort" (56066, R4, tab 19 at 1).

9. According to a redacted CID Agents Investigative Report, ROI No. 0009-2006-CID182-50807, dated 28 July 2006:

The Boston Fraud Resident Agency...and the Maryland Fraud Resident Agency...are investigating allegations of False Statements, False Claims, Conspiracy to Commit Fraud, Wire Fraud, and Larceny committed by [UCI], by it's [sic] employees and both former and current federal employees.... A search of two UCI corporate locations was conducted in May 2006, and numerous documents were seized. Additionally, numerous government employees have been interviewed during the course of the investigation including the contract officers and personnel administering UCI contracts and cooperative agreements.

(Gov't mot., ex. 5)

The Disputed Invoices, Claims and CO's Final Decisions

10. UCI submitted the following invoices under contract 49 for work allegedly performed on CLIN 8 (56065, R4, tabs 16, 20-22):

<u>Invoice No.</u>	<u>Date</u>	<u>Performed</u>	<u>Amount</u>
DARPA0406	05/26/2006	Apr. 2006	\$174,069.93
DARPA0506	01/29/2007	May 2006	\$174,069.98
DARPA0606	01/29/2007	June 2006	\$174,069.98
DARPA0706	01/29/2007	July 2006	<u>\$174,069.99</u>
			\$696,279.88

11. UCI submitted the following invoices under contract 82 for work allegedly performed on tasks 1 (WOSD) and 2 (NASA) (56066, R4, tabs 14-17, 25-27, 39):

<u>Invoice No.</u>	<u>Date</u>	<u>Performed</u>	<u>Amount</u>
WOSD0406	05/24/2006	Apr. 2006	\$24,353.71
NASA0406	05/24/2006	Apr. 2006	\$48,412.30
WOSD0506	07/03/2006	May 2006	\$23,352.67
WOSD0606	07/03/2006	June 2006	\$23,352.67
NASA0506	01/29/2007	May 2006	\$44,469.12
NASA0606	01/29/2007	June 2006	\$45,803.01
NASA0707	01/29/2007	July 2006	\$44,469.12
WOSD0706	07/17/2007	July 2006	<u>\$23,352.67</u>
			\$237,565.27

12. CO Rideout rejected all 12 of these invoices because of the ongoing fraud investigation (56065, R4, tabs 25-26, 28, 18; 56066, R4, tabs 20-23, 30-32, 44).

13. On 3 January, 9 July and 31 August 2007 UCI resubmitted the rejected invoices under contracts 49 and 82 as certified claims, alleging that the invoiced work had been performed (56065, R4, tabs 19, 30; 56066, R4, tabs 24, 38, 40). On 23 March, 6 and 28 September and 28 November 2007, CO Rideout issued five final decisions generally denying UCI's claims and stating that UCI may have billed for work not performed and her rejection of UCI's invoices was based on the fraud investigation that was being conducted under these contracts. In the case of the invoices for April 2006 through June 2006 relating to contract 82, task 1, CO Rideout stated that, upon further review, she would process the invoices for payment if the individual who was the

technical point of contact signed off on them. It appears this did not happen. (56065, R4, tabs 27, 32, 56066, R4, tabs 36, 42, 46).

Proceedings at the Board

14. UCI timely appealed the CO final decisions to the ASBCA. UCI's invoices under the two contracts correlate to the following appeals:

<u>Contract 49</u>	<u>Invoice(s)</u>
ASBCA 56065	DARPA0406
ASBCA 56202	DARPA0506, -0606, -0706

<u>Contract 82</u>	
ASBCA 56066	NASA0406, WOSD0406, -0506, -0606
ASBCA 56217	NASA0506, -0606, -0706
ASBCA 56260	WOSD0706

15. Respondent's 17 September 2007 answers to UCI's complaints in ASBCA Nos. 56065 and 56066 stated: "The Government avers that the basis of this appeal is tainted by significant evidence of fraud, which might compromise the Board's ability to adjudicate this matter," pleaded the "Affirmative Defense – Fraud," on "the basis [that] this entire appeal is tainted by significant evidence of fraud" and asserted the following:

CONCLUSION

Between 1999 and 2006, UCI has received approximately \$42 million in federal funding through at least five separate Cooperative Agreements, and three contracts administered by various federal entities, to include the subject contract. Since at least May of 2006, UCI has been under active investigation by several federal law enforcement agencies. These investigations have netted significant evidence that shows that Appellant has been actively defrauding the Government throughout the performance period of the subject contract. The Army is collecting the evidence of fraud from the Department of Justice and will introduce it into evidence in this appeal.

16. UCI's 4 January 2008 discovery requests in ASBCA Nos. 56065 and 56202, Interrogatory No. 5, requested respondent to:

State the basis for your allegation that “significant evidence of fraud” taints UCI’s appeals, ASBCA Nos. 56065 and 56202, and explain how that evidence “might compromise the Board’s ability to adjudicate” the appeals.... Describe the time, place and means by which the fraud was committed as well as the identity of the person who perpetrated the fraud and what he obtained thereby.

(Gov’t mot., ex. 1a at 7). On 7 March 2008, appellant served an identical interrogatory in ASBCA Nos. 56066, 56217 and 56260 (*id.*, ex. 1b at 7).

17. On 4 March 2008, appellant moved to compel answers to its 4 January 2008 interrogatories and for “a more definite statement of [respondent’s] answer with definite and particular facts supporting its allegation of fraud” (app. mot. to compel at 1).

18. Respondent’s 28 March 2008 response to UCI’s foregoing motion stated:

The Government has reviewed your motion to compel.... [D]ue to the nature of the ongoing criminal investigation, many details cannot be disclosed. Be advised, however, that the Government’s allegation concern [sic] Mr. Hopmeier, and the Government’s belief that he billed the Government for work he failed to perform. All invoices were rejected on those grounds.

(Gov’t opp’n to mot. to compel, ex. 1) Respondent also provided a memorandum dated 28 March 2008 from SA Peter J. Seguin. SA Seguin states that he and SA McCarron have reviewed appellant’s discovery requests. He continues that:

Upon our review, it was determined that the questions presented directly involve an active fraud investigation involving the Appellant, which is being conducted under...ROI 0009-2006-CID182-50807, that has been referred to the Department of Justice for prosecution. Likewise, documents requested which are responsive to the Appellant’s request are directly related to the investigation, and it has been determined that the answering of these questions and/or the production of these documents would impede the investigation and prematurely provide protected information to the Appellant and expose the investigation to greatly increased risk of witness tampering, destruction of evidence, and other interference.

(*Id.*, ex. 2)

19. On 10 April 2008, the Board denied appellant's motion to compel.

20. At the end of April 2008, in response to appellant's request, respondent offered to make CO Rideout available for a deposition on 28 or 29 May 2008. The Department of Justice learned of this deposition on 28 April 2008. On 5 May 2008, the government informed appellant that all discovery would be suspended until the Board ruled on a forthcoming motion for a stay. (Gov't mot. to stay at 11)

21. On 3 June 2008, respondent moved to stay the appeals for six months or until circumstances changed to make the motion moot, which ever occurs earlier, "to allow the Department of Justice and other law enforcement agencies to investigate allegations that the Appellant has engaged in criminal conduct under the contracts involved in the current appeal" (cover letter).

22. AUSA Fine's 20 May 2008 letter to the Board states:

I understand that the [ASBCA] is currently hearing appeals concerning two contracts [49 and 82] awarded to [UCI]. I recently learned that depositions are scheduled in these appeals.

These two contracts have been referred to the United States Department of Justice for investigation of possible criminal conduct, and that investigation is ongoing and has consumed substantial government resources. The proceeding before the ASBCA involves issues directly related to the criminal investigation and may interfere with and impede the criminal investigation.

In federal District Court, parallel civil cases are routinely stayed to allow the criminal investigation to be brought to a conclusion. We ask that the Board take a similar position and stay these proceedings for a period of six months.

(Gov't mot., ex. 4)

23. CO Rideout's 15 May 2008 declaration states that she has no intention of leaving Natick Contracting Division in the next six months, and has every reason to

believe that she will be available for a deposition six months in the future if the government's request for a six-month stay is granted (gov't mot. ex. 6).

24. Appellant's opposition to the motion includes the 23 June 2008 affidavit of Mr. K. D. "Ken" Bricker, a CPA retained by UCI. The affidavit states that since 2006, UCI has reduced its work force from nine to three full-time equivalents, its monthly payroll has declined from \$117,911 to \$11,248, it has closed its Virginia office and reduced its Florida office space by 50%, its revenues dropped from \$10 million in 2005 to a projected \$800,000 in 2008 and Mr. Hopmeier has received no salary payment from UCI since November 2007 (app. opp'n, ex. L).

DECISION

When the government moves to stay or to suspend civil proceedings based on alleged interference with criminal proceedings, case precedents establish that the civil tribunal must consider, weigh and balance several factors, including: (1) whether 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.

Considering these various factors, we believe the government has made a sufficient showing for a stay of up to six months with respect to these appeals. First, the criminal investigation and the appeals both concern the issue of the extent to which UCI performed the services for which it seeks to be paid under contracts 49 and 82. The witnesses who are knowledgeable about that issue and the facts relating to it presumably will be the same in the civil and prospective criminal proceedings. Second, respondent persuasively argues that continuing with the appeals, and particularly discovery against the government, "is akin to giving Appellant a roadmap of the Government's investigation" (gov't mot. at 16). We recognize that so far as the record reveals "[t]he rules of criminal discovery...are not yet applicable." *Todd Shipyards Corp.*, ASBCA No. 31092, 88-1 BCA ¶ 20,509 at 103,684. We do not think that is decisive. Rather, one must look at the circumstances. In *Todd* it was undisputed that the government had already "had access to literally every non-privileged document in appellant's possession pertaining to its workers' compensation program for the past 32 years." Here, although the government seized appellant's records in May 2006, the investigation allegedly extends beyond appellant to its employees and various government technical and project personnel who were part of a conspiracy (SOF ¶ 9; gov't cover ltr. dtd. 26 June 2008). Under those circumstances, the government would suffer hardship if it were required to respond to civil discovery relating to the performance of services under contracts 49 and 82 before it completed its investigation. Third, the proposed stay may cause appellant

harm if it ultimately results that appellant's invoices were valid (SOF ¶¶ 10-12). Fourth, we consider that six-months is a reasonable period. We expect, as in *Public Warehousing Co., supra*, that this time period should be sufficient for the investigation to be completed as intimated in the last paragraph of AUSA Fine's letter.

For the foregoing reasons, we grant respondent's motion to stay proceedings in the five captioned ASBCA appeals for a period of six months from 3 June 2008 through 2 December 2008 unless there is a prior change in circumstances mootng the motion.

Dated: 7 August 2008

DAVID W. JAMES, JR.
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. 56065, 56066, 56202, 56217, and 56260, Appeals of Unconventional Concepts, Inc., rendered in conformance with the Board's Charter.

Dated:

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