

ARMED SERVICES BOARD OF CONTRACT APPEALS

Appeals of --)
)
Palm Springs General Trading and)
Contracting Establishment) ASBCA Nos. 56290, 56291
)
Under Contract No. W90F6P-05-A-0001)

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OPINION BY ADMINISTRATIVE JUDGE TING
ON THE GOVERNMENT’S MOTION TO STAY

Palm Springs General Trading and Contracting Establishment (Palm Springs) entered into a Joint Venture Agreement with Green Valley Company (Green Valley) to provide goods and perform certain services, including black and gray water removal and dumpster services at Camp Arifjan in Kuwait under a Blanket Purchase Agreement (BPA). In late 2005 and early 2006, the government uncovered a scheme to inflate the amount of black and gray water removed from Camp Arifjan. As a consequence, Green Valley was debarred but Palm Springs was not because the debarring official was persuaded that Palm Springs was unaware of the deception and acted responsibly after the scheme was uncovered. Two Army officers who were involved in the award and administration of the BPA subsequently pled guilty to bribery and conspiracy charges though not with respect to the BPA involved in these two appeals.

In the meantime, the government refused to pay the invoices Palm Springs submitted for the black and gray water removed and for the dumpster services provided resulting in two appeals filed before the Board: ASBCA No. 56290 (black and gray water removal) and ASBCA No. 56291 (dumpster services). In July 2008, after discovery in both appeals was underway, the government filed “GOVERNMENT’S MOTION TO STAY” (gov’t mot.) seeking to stay Board proceedings until “six months after the date of the Board’s decision” (*id.* at 28). Palm Springs submitted a “RESPONSE IN OPPOSITION TO MOTION TO STAY” (app. opp’n), and thereafter, the government submitted a response (gov’t resp.).

For reasons set forth below, we deny the government's motion to stay. In reaching this decision, we relied on certain fact findings contained in the parties' submissions which are outside the Rule 4 file, such as the Army Suspension and Debarment Official's 18 May 2007 DECISION MEMORANDUM (app. opp'n, ex. B) and various Department of Justice (DOJ) court filings and a DOJ news release (gov't mot., tabs 3, 4; R4, tab 34). These submissions are essential for purposes of reaching our decision on the government's motion though they are extraneous to the contract documents in the Rule 4 file.

STATEMENT OF FACTS FOR PURPOSES OF THE MOTION

1. Green Valley is a Kuwaiti company engaged in providing transportation services, water supply, construction equipment and materials, portable cabins and toilets, consumer goods and other services to the United States government installations in Kuwait and Iraq (app. opp'n, ex. B at 1).

2. Palm Springs is a Kuwaiti limited liability company engaged in wholesale food and water supply (bottled water and water treatment facility operations) and based in Kuwait City, Kuwait (app. opp'n, ex. B at 1).

3. On 18 October 2004, the U.S. Army Contracting Command SWA-Kuwait issued BPA No. W90F6P-05-A-0001 (BPA 0001) to Green Valley to provide tents, latrines, bulk water, generators and light sets, to remove black and gray water, and to provide and service dumpsters at Camp Arifjan, Kuwait. MAJ John J. Cockerham, Jr., (MAJ Cockerham) was the contracting officer (CO). (R4, tab 1) According to the government, MAJ Cockerham was deployed to Kuwait on several occasions between November 2000 and late December 2005. While he was deployed to Camp Arifjan, he oversaw the administration of numerous BPAs including the establishment of BPA 0001 with Green Valley and later with Green Valley's joint venture partner Palm Springs. (Gov't resp., 17 July 2008 debarment memo. at 11, ¶ 4.b) MAJ James Momon, Jr., (MAJ Momon) was a CO assigned to Camp Arifjan from 21 September 2005 until 10 August 2006 and was assigned similar duties as MAJ Cockerham (*id.* at 4).

4. BPAs are governed by FAR 13.303 (48 C.F.R pt. 13). A BPA is "a simplified method of filling anticipated repetitive needs for supplies or services by establishing 'charge accounts' with qualified sources of supply." FAR 13.303-1. The government through various COs, including MAJ Cockerham, issued "calls" under BPA 0001 (R4, tabs 2, 3, 5, 6, 8, 9, 10).

5. In order to perform under the contract, Green Valley entered into a Joint Venture Agreement with Palm Springs (R4, tab 33, subtab 16 at 1A). According to Palm

Springs, under the Joint Venture Agreement, “Palm Springs was to supply the dumpsters and service thereto, the tents and lighting equipment, and Green Valley was to supply the tanker trucks with drivers for the removal of the black and gray water.” Additionally, Palm Springs was to supply administrative and management services. (App. opp’n at 1-2) Appellant’s counsel represents that “Green Valley Co. is a totally separate entity from Palm Springs” (app. opp’n at 1 n.1). Paragraph 3.3 of the Joint Venture Agreement provides that “[e]ach party is an independent entity and has their own status with respect to their business” (R4, tab 33, subtab 16 at 1A).

6. As a result of the Green Valley – Palm Springs joint venture, the CO modified BPA 0001 a number of times. On 29 December 2004, the CO issued Modification No. P00001 to add Palm Springs for payment purposes “inasmuch as Palm Springs and Green Valley had agreed that Palm Springs would administer the payment” (R4, tab 4; opp’n at 2). On 20 December 2005, the CO issued Modification No. P00002 to extend the BPA from 18 October 2006 to 18 October 2007, and to change the name and address of the joint venture to Palm Springs at a different address (R4, tab 8; app. opp’n at 2).

7. As explained by the government, black and gray water removal was accomplished by using a black and gray water truck. In Zone IV of Camp Arifjan, such a truck would collect black and gray water from latrines, dining facilities, laundry facilities and other locations until its tank was full. The driver would then report to a “Tech Monitor” at the Zone IV Command Cell. The “Tech Monitor” would check the water gage at the back of the truck to determine how much black and gray water was actually in the tank. Once this was recorded in the driver’s log book and the Tech Monitor signs off on the amount, the truck is driven to a dumpsite where it is emptied. Once a driver’s log book has a full page, a copy of it is made and stored in the Zone IV billeting office. At the end of the month, the Contracting Officer Representative (COR) receives an invoice with copies of all logs from the contractor. These logs are compared with the ones kept in the billeting office. If they match, the COR issues a DD Form 250 certifying the amounts of black and gray water removed during the past month for payment. (App. opp’n, ex. B at 2 of 9)

8. In November 2005, the BPA was expanded to cover other areas of Camp Arifjan serviced by another contractor. This resulted in higher payment than in past months. When this additional service was terminated in December 2005, however, the black and gray water claimed for December 2005 was still significantly higher than in November 2005 despite a decrease in the sources of black and gray water services. No significant change in the number of personnel assigned to Camp Arifjan in December 2005 would account for this change. In addition, the amount of black and gray water removed during the night was extremely high despite the fact that water usage would be expected to be lower at night. (App. opp’n, ex. B at 2 of 9)

9. In early December 2005, black and gray water trucks would arrive at the Command Cell every 45 to 50 minutes. Later that month, trucks were showing up for certification every 20 to 30 minutes. (App. opp'n, ex. B at 2 of 9)

10. The above irregularities caused the COR, CPT Craig C. Morgan (CPT Morgan) to assign soldiers to follow the trucks to see if they were indeed collecting and dumping black and gray water. In January 2006, drivers were observed not to load and unload black and gray water before returning to the Command Cell for inspection by Tech Monitors. Trucks were observed parked with no collection or dumping activity between inspections. At other times, drivers were seen giving the appearance of attaching and detaching hoses without actually pumping or discharging black and gray water. (App. opp'n, ex. B at 3 of 9)

11. Following the discovery of these irregularities, CPT Morgan contacted Palm Springs to correct the ongoing practices. Palm Springs agreed to reduce its December 2005 invoice. Subsequent to this meeting, trucks showed up for inspection every 35 to 45 minutes for about a week before showing up every 20 minutes or so again. (App. opp'n, ex. B at 3 of 9)

12. In late January 2006, military personnel again followed Green Valley trucks and observed drivers failing to load and unload black and gray water before returning to the Command Cell for inspection. Drivers were also observed switching trucks to disguise the amount of black and gray water removed from Zone IV. (App. opp'n, ex. B at 3 of 9)

13. In May 2006, the Army Criminal Investigation Command (CID) requested the Defense Contract Audit Agency (DCAA) to analyze Green Valley/Palm Springs' invoices of black and gray water collected between December 2005 and May 2006. Based on its estimate of an average of 22 gallons per person per day output of black and gray water, DCAA estimated that Green Valley/Palm Springs could have overcharged the government by \$978,183. (App. opp'n, ex. B at 4 of 9)

14. Due to concerns raised by the COR regarding the unusually large amount of black and gray water removed in December 2005, Palm Springs adjusted its invoice submitted to the government for that month. The new invoice used the government's estimate of black and gray water removed. No payments have been made for invoices submitted in 2006. (App. opp'n, ex. B at 4 of 9 ; R4, tab 33, subtab 16)

15. By letter dated 1 December 2006, the Army Suspension and Debarment Official proposed to debar Green Valley from further contracting with any executive branch of the government. Green Valley was told that the proposed debarment was based upon "accusations that Green Valley Company, in collusion with Palm Springs General

Trading and Contracting Establishment engaged in a scheme to submit false claims for payment for the removal of black and gray water from Camp Arifjan between on or about 1 December 2005 and on or about 29 February 2006.” Green Valley was given the opportunity to present information and argument in opposition to the proposed debarment. (R4, tab 33, subtab 13) Palm Springs was also proposed for debarment by a similar letter dated 1 December 2006 (*id.*).

16. Green Valley did not oppose the proposed debarment (app. opp’n, ex. B at 6 of 9).

17. Palm Springs submitted, through its counsel, a detailed opposition to the proposed debarment by letter dated 5 February 2007. The opposition pointed out that under the joint venture, Green Valley was responsible for supplying the trucks and the drivers and Palm Springs had no control over the actions of the drivers. The letter said that Palm Springs was completely unaware of the deception in which Green Valley and its truck drivers were involved, and when it learned of the deception, it took immediate steps to stop the deception, and when it did not work, it terminated its joint venture with Green Valley. The letter also explained the way the joint venture operated was that Green Valley would submit to Palm Springs reports of the amounts of black and gray water removed so that Palm Springs could prepare the monthly invoices and collect payment for the services, and that upon receipt of the payment from the Army, Palm Springs would then pay Green Valley for its services as agreed, and Green Valley would in turn pay its drivers. The letter said that Palm Springs had no opportunity to discover any deception was being committed in reporting the actual amount of the black and gray water that was removed by Green Valley drivers. (R4, tab 33, subtab 16 at 6, 7 of 19) Palm Springs terminated its joint venture with Green Valley on 28 February 2006. Thereafter, Palm Springs became the prime contractor on BPA 0001 and continued removing black and gray water from Camp Arifjan until expiration of the BPA. Palm Springs hired a subcontractor – Abdul Hammed Salem & Sons Comm. Co. W.L.L. – to perform the work relating to the removal of black and gray water. (Gov’t resp., 17 July 2008 debarment memo. at 7, ¶ k.3; ASBCA No. 56290, compl. ¶ 5)

18. Palm Springs’ opposition also points out that in addition to black and gray water removal service, it also supplied and serviced 263 dumpsters located throughout Camp Arifjan from October 2004 to January 2007, and had never received allegations of wrongdoing in connection with the performance of that service. Palm Springs submitted evidence that it had received a nearly perfect score (a rating of 9 out of 10) in its Past Performance Survey, and that its superintendent and associates had been recognized by CSA, Ltd. (the main sustainment contractor for the U.S. Army in Kuwait) as professionals deserving high ratings in a demanding environment. (R4, tab 33, subtab 16 at 15-16 of 19)

19. As reflected in his 18 May 2007 DECISION MEMORANDUM, the Army Suspension and Debarment Official debarred Green Valley until 1 December 2009 (app. opp'n. ex. B at 8-9 of 9). A contrary decision was reached with respect to Palm Springs:

e. In light of Palm Springs' action and the available facts, Green Valley's wrongdoing should not be imputed to Palm Springs, in accordance with FAR 9.406-5(c). Palm Springs acted in a responsible manner through its warnings to Green Valley, correction of the December 2005 invoice and termination of its Joint Venture Agreement for the implementation of the black and gray water removal contract. Palm Springs, therefore, should not be debarred at this time.

The DECISION MEMORANDUM concluded that "Palm Springs' proposed debarment shall be rescinded and the company may continue to do business with the Government." (*Id.*)

20. On 22 August 2007, a Grand Jury in San Antonio, Texas, returned a six-count indictment against John Cockerham, Jr., the CO for Contract 0001, his wife (Melissa Cockerham) and his sister (Carolyn Blake) (R4, tab 34). The indictment states that Cockerham was deployed to Camp Arifjan, Kuwait, and served as a CO from 30 June 2004 through late December 2005, and that he was responsible for soliciting and reviewing bids and for awarding contracts, including BPAs to provide goods and services in support of Army operations in the Middle East (*id.* at 1-2, ¶ 1). The indictment charged that in return for cash bribe payments totaling approximately \$9.6 million to Cockerham, his wife, and his sister, Co-conspirator One (a personal friend of Cockerham) at various times would award DoD contracts, including bottled water BPAs, and issue calls on and modifications to various BPAs to Co-conspirators A, B, and C, and that the principal of Co-conspirator Contractor B used multiple companies when seeking contracts from DoD (*id.* at 2-4, ¶¶ 2-16).

21. The indictment listed five specific BPAs Cockerham was charged to have awarded, and as to which he had issued modifications or calls for the purpose of furthering the conspiracy. All of the BPAs were for bottled water. The specific bottled water BPAs cited in MAJ Cockerham's indictment are: DABM06-03-A-0045, W912D1-05-A-0058, W912D1-05-A-0071, W912D1-05-A-0074, and W912D1-05-A-0084. BPA 0001 for removal of black and gray water and for providing and servicing dumpsters at Camp Arifjan was not implicated. The indictment specifically identified Co-conspirators A, B or C as being involved in each transaction. (R4, tab 34 at 5-7, ¶¶ 18-25, 33-38)

22. By letter dated 27 August 2007, counsel submitted, on behalf of Palm Springs, a certified claim for "the removal of black and gray water at the US Army Camp Arifjan

in Kuwait between January 1, 2006 and September 30, 2006.” The claim was in the amount of \$2,516,105.53. The specific nature of the claim was described as follows:

The service for which payment is claimed herein was actually rendered by Palm Springs as described in each invoice, and the amounts of black and gray water therein stated were actually removed from Camp Arifjan on those dates. Palm Springs has submitted the attached invoices for the removal of black and gray water at Camp Arifjan...for payment by the US Government but the same remain outstanding including the invoices corresponding to the services rendered in February and March 2006 which have already been accepted by the U.S. Contract [sic] Officer Representative, Capt. Craig C. Morgan and for which the attached DD Form 250 were issued (see *Attachment No. 10 and 11*).

(Gov’t mot., tab 1) Despite numerous requests, the CO (LTC EN Nicholas J. Vozzo) failed to issue a decision on the claim. Palm Springs appealed to the Board pursuant to 41 U.S.C. § 605(c)(5) by notice dated 11 January 2008. The Board docketed the appeal as ASBCA No. 56290 on 14 January 2008.

23. By letter dated 27 August 2007, counsel submitted, on behalf of Palm Springs, a certified claim for “the dumpster services rendered under the contract...at the US Army Camp Arifjan in Kuwait between October 1, 2006 and January 22, 2007.” The claim was in the amount of \$746,516.34. The specific nature of the claim is stated as follows:

The service for which payment is claimed herein was actually rendered by Palm Springs as described in each invoice and the amounts of dumpsters therein indicated were actually serviced at Camp Arifjan on those dates. The service was terminated on January 22, 2007 and on February 13, 2007 Palm Springs submitted its invoices to Maj. Marcellus Newson...for payment by the Department of the Army (*Attachment No. 5*). However, to this date the invoices remain outstanding and are now more than 4 months over due.

(Gov’t mot., tab 2) Despite numerous requests, the CO failed to issue a decision on the claim. Palm Springs appealed to the Board pursuant to 41 U.S.C. § 605(c)(5) by notice dated 11 January 2008. The Board docketed the appeal as ASBCA No. 56291 on 14 January 2008.

24. In ASBCA No. 56290, Palm Springs' complaint, filed on 13 February 2008, alleges that "the invoices for the removal of black and gray water at Camp Arifjan between January 1, 2006 and September 30, 2006 are overdue," and despite numerous demands, the government has not paid (compl. ¶ 13). The complaint alleges that the government now owes Palm Springs \$2,516,105.53 plus interest and attorney fees (compl. ¶ 20). The government's answer, filed on 16 April 2008, admits that it has not paid the invoices submitted between 1 January and 30 September 2006. Citing the debarment decision, the government avers that the invoices for January and February 2006 are "based on fraudulent activities." The government avers that based on DCAA's review and analysis, the government was overcharged "between \$978,183 and \$1,367,891." (Answer ¶ 13) The government summarized its position in the "CONCLUSION" paragraphs of its answer as follows:

The BPA awarded to Green Valley, Palm Springs's joint venture partner, has a dark history involving fraudulent activities. First, the BPA awarded to Green Valley was executed by Major Cockerham, an unscrupulous contracting officer indicted for bribery, conspiracy and money laundering. Second, Green Valley is currently debarred for engaging in fraudulent activities while performing the BPA.

Palm Springs is well aware that the Army debarred Green Valley for inflating the amount of black and gray water it removed from Camp Arifjan. Palm Springs also knows that Green Valley's fraudulent activities occurred from 1 December 2005 to 29 February 2006. Despite Palms Springs' knowledge of these uncontroverted facts, Palm Springs is requesting payment from the Government for services provided in January 2006 and February 2006.

DCAA's analysis of the invoices submitted by Palm Springs, the truck log sheets with the amount of black and gray water collected, and the population of Camp Arifjan from December 2005 to May 2006 revealed that Palm Springs overbilled the Government in the amount of \$1,367,891. Because of the fraudulent activities surrounding the BPA coupled with the dispute as to the actual amount of black and gray water actually removed from Camp Arifjan, the Government could not render payment on any of the invoices.

(Answer at 21)

25. In ASBCA No. 56291, Palm Springs' complaint, filed on 13 February 2008, alleges that it provided monthly dumpster service to the government at Camp Arifjan between 1 October 2006 and 22 January 2007 (compl. ¶ 12) when the government terminated the service by ordering Palm Springs to remove the dumpsters from Camp Arifjan (compl. ¶ 10). Palm Springs alleges that "the invoices for the dumpster services rendered at Camp Arifjan between October 1, 2006 and January 22, 2007 are in dispute" because the government has not paid them after numerous discussions (compl. ¶ 11), and Palm Springs now seeks \$746,516.34 plus interest and attorney fees (compl. ¶ 17). The government's answer avers that "[t]he four invoices submitted by Palm Springs indicated that dumpster services were provided beyond the performance period prescribed by the Master BPA and the call numbers," and Palm Springs is therefore "not entitled to payment for services it provided beyond the performance period stated in the BPA and the call numbers" (answer at 15). The government also avers that even assuming that Green Valley/Palm Springs was directed to provide the dumping services beyond the period of performance of the BPA and call numbers, the BPA is tainted by MAJ Cockerham "who awarded the BPA to Green Valley and administered the BPA...and it has not yet been determined whether the dumpster service under the BPA is involved in Major Cockerham's criminal activities" (answer at 15).

26. The Rule 4 files for both appeals were received on 16 April 2008. On 21 May 2008, Palm Springs notified the Board of its desire to have a hearing on each appeal.

27. By letter dated 19 March 2008, Palm Springs counsel notified the government's trial attorney that she wished to depose (1) CPT Craig Morgan; (2) MAJ Marcellus Newson, (3) Raymond Strother, and (4) MAJ Momon (gov't mot., tab 5). On 19 May 2008, Palm Springs counsel served on the government trial attorney its (1) first set of interrogatories, (2) first set of requests for production of documents, and (3) first set of requests for admission (*id.*, tabs 7, 8, 9) pertaining to ASBCA No. 56290 (black and gray water case). On 30 May 2008, Palm Springs counsel served on the government's trial attorney a similar set of discovery requests pertaining to ASBCA No. 56291 (the dumpster case) (*id.*, tabs 10, 11, 12). On 20 June 2008, Palm Springs counsel sent the government's trial attorney a notice of deposition of Jeffrey Szafarski for 24 July 2008 (*id.*, tab 6).

28. On 7 July 2008 the government filed "GOVERNMENT'S MOTION TO STAY" proceedings in both appeals. The cover letter to the motion stated that a stay of proceedings for six months was needed "to allow the Department of Justice and the Army Criminal Investigation Command to investigate allegations that Appellant has engaged in criminal conduct under the contract involved in the current appeals." The motion asks the Board to grant "a stay of six months after the date of the Board's decision" (gov't

mot. at 28). The motion included a letter dated 20 June 2008 addressed to the Board from a DOJ trial attorney, Mark W. Pletcher (Pletcher). This letter states:

Dear Members of the Board,

I understand the Armed Services Board of Contract Appeals is currently hearing appeals concerning contract W90FP6-05-A-0001, awarded to the joint venture of Green Valley Company and Palm Springs General Trad& [sic] Cont. Est. I recently learned the first set of discovery requests have [sic] been submitted and additional depositions have been requested.

The contract has been referred to the United States Department of Justice for investigation of possible criminal conduct. This investigation is ongoing and has consumed substantial government resources. The proceeding before the ASBCA involves issues related to the open criminal investigation and may directly interfere with or impede the criminal investigation.

In Federal District Court, parallel civil cases are routinely stayed to allow the criminal investigation to be concluded. We ask the Board to stay the proceedings for a period of six months.

(Gov't mot., tab 13) Palm Springs counsel was given 30 days to oppose the stay.

29. In the meantime, Palm Springs counsel's 7 July 2008 status report to the Board advised that, in connection with ASBCA No. 56290, she had already deposed CPT Craig Morgan (COR in the management of Palm Springs' services) and Raymond Strother, a CO, and the deposition of Jeffrey Szafarski would take place on 24 July 2008. The status report identified three more government representatives for deposition: MAJ James Momon, Jr., Stephen Schenke, and Marc I. Sherman (DCAA Supervisory Auditor). In connection with ASBCA No. 56291, a similar status report advised that Palm Springs counsel had already deposed MAJ Marcellus Newson, CPT Lance Hannan, and Raymond Strother, all of whom were COs at Camp Arifjan. The status report identified three more government representatives for deposition: CPT Nathan Cooper, Mrs. Briggs, and CPT Suzanne Burkholder. We understand that Szafarski's deposition was taken, as scheduled, on 24 July 2008 under a stipulation that if government counsel considered any questions as intruding upon any criminal investigation, the answer to such

questions would be deferred until the Board ruled on the motion to stay. As it turned out, no objections were raised by government counsel. (App. opp'n at 12-13)

30. On 24 June 2008, DOJ issued a press release. It states that John Cockerham pled guilty to one count of bribery, one count of conspiracy to commit bribery and one count of money laundering. Cockerham's wife pled guilty to one count of money laundering. The press release states that "each face up to 20 years in prison and a fine of \$500,000 for the money laundering count," and that Cockerham and his wife "are cooperating with this investigation," and the trial of Cockerham's sister, Blake is scheduled to begin on 27 October 2008. It also states that "[t]he government continues to investigate others in the conspiracy." (Gov't mot., tab 4)

31. As a CO, MAJ Momon worked on contracts and numerous BPAs to purchase bottled water and waste water removal service for Camp Arifjan and other United States military bases in Kuwait. On 12 June 2008, MAJ Momon entered into a Plea Agreement with DOJ in which he agreed to plead guilty to a three-count information charging him with one count of conspiracy (18 U.S.C. § 371) and two counts of bribery (18 U.S.C. § 201). (Gov't mot., tab 3 at 1, ¶¶ 2-4, ¶ 7(b)) According to the Plea Agreement, during the relevant period, Co-conspirator Contractors One, Three, Four, and Five each held BPAs for the supply of bottled water, and Co-conspirator Contractor Two held a BPA for, among other things, the removal of waste water from Camp Arifjan and other United States military bases in Kuwait (*id.* at 4, ¶ 7(c)).¹ The Plea Agreement also states that during the relevant period, MAJ Momon accepted approximately \$1.6 million in return for being influenced in the performance of official duties (*id.* at 4-5, ¶¶ 7(d)-(g)).

32. The government's 7 July 2008 motion to stay both ASBCA Nos. 56290 and 56291 is also supported by the declaration of Kyle S. Sbarbaro (Sbarbaro) (*id.* tab 14). Sbarbaro is a Special Agent of the Kuwait Task Force, Major Procurement Fraud Unit, CID. His declaration states that he is currently "investigating criminal allegations relating to the contract referenced [W90F6P-05-A-0001], and after reviewing Palm Springs' discovery requests he believes "[a]nswering Palm Springs' discovery requests and continuing depositions in this case would impede the investigation and prematurely release protected information." Sbarbaro also stated that he expects that the investigation will conclude "within six months and a stay in the ASBCA appeals will allow the investigation to continue without any interference." (Gov't mot., tab 14, ¶¶ 1, 4, 5)

¹ The related criminal Information identifies the waste water BPA as BPA W912D1-05-A-0063 (gov't resp., 17 July 2008 debarment memo., ex. 7, ¶ 24).

CONTENTIONS OF THE PARTIES

In moving to stay proceedings before the Board, the government asserts that “[t]here can be little dispute that the fraud investigation and the instant ASBCA appeals involve substantially the same issues, facts and witnesses” (gov’t mot. at 19). With respect to the similarity of issues, the government relies on the 20 June 2008 DOJ letter and the declaration of CID Special Agent (SA) Sbarbaro (*id.*). The government also relies on the fact that MAJ Cockerham and MAJ Momon, “the contracting officers involved with either awarding or administering the Contract, pled guilty to bribery, conspiracy or conspiracy to commit bribery while deployed to Kuwait” (*id.*). In asserting the witnesses and documents are essentially the same, the government tells us that Palm Springs counsel has requested to depose MAJ Momon who was “involved with administering the BPA,” and to depose former DCAA auditor Szafarski who was involved in analyzing the invoices submitted by Palm Springs for black and gray water removal from December 2005 to May 2006 (*id.* at 20). The government’s motion cites to several discovery requests as examples that proceeding with the appeals would prejudice or compromise the fraud investigation (*id.* at 21-23). In asserting that Palm Springs would not be harmed by a six-month stay, the government says that Palm Springs has provided no evidence that withholding payment on invoices has created hardship to the company and argues that any harm would be “attenuated by the fact that CDA interest would continue to run throughout the stay period,” and that the possibility that witnesses or evidence could be lost is “minimal” (*id.* at 26). The government also tells us that numerous Board decisions in the past have found a six-month stay reasonable.

With respect to the similarity of issues, Palm Springs’ opposition points out that the only information DOJ and SA Sbarbaro provided is that BPA 0001 has been referred to the DOJ for investigation and no details have been provided as to the nature of the investigation. The opposition points out that there is nothing in the record or in the statements offered by Messrs. Pletcher and Sbarbaro that indicates whether the DOJ investigation pertains to Palm Springs or to Green Valley, or “what activity of Palm Springs in particular is the subject of the investigation” (app. opp’n at 9). The opposition brings to our attention that the government motion does not state “that the service for which we [Palm Springs] are seeking compensation – the supply and service of dumpsters and the removal of black and gray water at Camp Arifjan, or the invoices we seek payment of – is the subject of the investigation by the DOJ.” The opposition reminds us that the government’s initial allegation with respect to the issue of black and gray water in connection with the proposed debarment was resolved in its favor by the Army Suspension and Debarment Official. Palms Springs argues that just because BPA 0001 has been referred to the DOJ for unspecified reasons does not support a conclusion that the investigation necessarily pertains to the manner in which Palms Springs performed BPA 0001 or to the issue of whether Palms Springs is entitled to payment for services performed under the contract. (App. opp’n at 8-10) Palm Springs’ opposition

also points out that neither MAJ Cockerham's guilty plea nor MAJ Momon's Plea Agreement identified BPA 0001 at issue in ASBCA Nos. 56290 and 56291, and the fact the two COs peripherally involved in the contract turned out to be corrupt "does not negate the fact that Palm Springs rendered a service to the U.S. Government for which the Government is required to pay, an issue that is before this Board" (app. opp'n at 10).

With respect to depositions, Palm Springs' opposition tells us that the depositions of the COR CPT Morgan and DCAA auditor Szafarski have already been taken. The opposition tells us that MAJ Momon's deposition is requested like "every other Contracting Officer who was involved with the service during the period for which the payment remains outstanding," and his deposition is requested "to ratify what Capt. Morgan has already said" with respect to per person per day output of waste water. (App. opp'n at 11, 12) With respect to the depositions of CPT Nathan Cooper, Mrs. Briggs, and CPT Suzanne Burkholder in connection with ASBCA No. 56291, the opposition says that none have been mentioned in connection with the alleged fraud case (*id.* at 11 n.15). With respect to the discovery requests the government listed as problematic, the opposition has withdrawn Interrogatory No. 5 (ASBCA No. 56290) acknowledging that a broad interpretation "may include other issues...that the DOJ is considering in its investigation of the Contract subject of these appeals" (*id.* at 16). With respect to the rest of the discovery requests, Palm Springs says that it simply wants to know why the government continues to withhold payment for services rendered (*id.* at 17).

With respect to the extent of the harm to Palm Springs resulting from a stay, Palm Springs tells us that it has been deprived of \$2,516,105.53 (for the black and gray water removal service) and \$746,516.34 (for the dumpster service) for a total of \$3,262,621.87 that it had rightfully earned, that it had to cease operations due to a lack of cash flow, and that it had paid its subcontractor to continue black and gray water removal service after it dissolved its joint venture with Green Valley and it has "sustained a loss and continues to do so every day that the Government withholds payment." (App. opp'n at 21, 22) With respect to witnesses, the opposition says that unless it pressures for depositions, the government has no incentive to locate some of the key witnesses whose whereabouts the government has so far refused to reveal (app. opp'n at 24).

On 19 September 2008, the Board received the government's response to Palm Springs' opposition. In response to the contention that the government's motion lacked specific information, the government answered "[t]he whole point and purpose" of its motion is to allow DOJ and CID to conduct the criminal investigation "without disclosing information." The government argues that based on the DOJ letter and the declaration of CID SA Sbarbaro, alone "[t]here is no doubt that Appellant and the Contract are the subjects of the criminal investigation." (Gov't resp. at 1) The government's response also advised that, on 23 July 2008, Palms Springs was again proposed for debarment.

The government's response included a 17 July 2008 memorandum for the Army Suspension and Debarment Official. The memorandum was accompanied by 60 exhibits but the government provided only those exhibits that are relevant to the proposed debarment of Palm Springs. The Army's 17 July 2008 memorandum in support of the proposed debarment shows that Palm Springs was one of the 23 firms and individuals proposed for debarment. As reflected in the memorandum, Palm Springs is proposed for debarment because it and Jireh Ventures USA are affiliates of Jireh Springs General Trading and Contracting Establishment (Jireh Springs). The memorandum states that based on available information, Palm Springs, Jireh Springs and Jireh Ventures USA, all are "controlled by or can be controlled by Mona Al Dahma, a.k.a 'Muna A. Al Dahma,' 'Mona A. Al Dhama' and 'Mona A. Al Dahmah.'" (Gov't resp., 17 July 2008 debarment memo. at 13) As far as we can determine, Jireh Springs was among several other firms and individuals that made payments to MAJ Cockerham, Ms. Cockerham and Ms. Blake (*id.* at 3). There is nothing in the proposed debarment memorandum that indicates that the debarment of Palm Springs is proposed due to its performance of black and gray water and dumpster services performed at Camp Arifjan which are the subject of ASBCA Nos. 56290 and 56291. We have received no indication that a decision has been rendered by the Army Suspension and Debarment Official.

DECISION

After the Board docketed the appeals here involved in January 2008 and discovery by Palm Springs was well underway, the government moved to stay proceedings in July 2008. Palm Springs opposed the motion.

When considering whether civil proceedings should be stayed pending the outcome of criminal proceedings, the Federal Circuit has adopted a "flexible approach" requiring a case-by-case determination and balancing the parties' interests. *Afro-Lecon, Inc. v. United States*, 820 F.2d 1198, 1202 (Fed. Cir. 1987), *citing SEC v. Dresser Industries, Inc.*, 628 F.2d 1368, 1375 (D.C. Cir. 1980), *cert. denied*, 449 U.S. 993 (1980); *Attorney General of the United States v. Irish People, Inc.*, 684 F.2d 928, 953 (D.C. Cir. 1982) (noting that "balancing of the parties' interests is required...efforts at accommodation of both sides must be made"), *cert denied*, 459 U.S. 1172 (1983).

When the government moves to stay Board proceedings based on alleged interference with criminal proceedings, we have considered, weighed and balanced several factors, including: (1) whether the facts, issues, and witnesses in the Board 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. *Unconventional Concepts, Inc.*, ASBCA No. 56065 *et al.*,

08-2 BCA ¶ 33,934 at 167,930; *Public Warehousing Co., K.S.C.*, ASBCA No. 56116, 08-1 BCA ¶ 33,787 at 167,225.

1. Similarity of Facts, Issues and Witnesses

As disclosed by Palm Springs' claims and complaints, the issue in ASBCA No. 56290 relates to unpaid invoices for January through September 2006 for the removal of black and gray water at Camp Arifjan. The issue in ASBCA No. 56291 relates to unpaid invoices for dumpster services Palm Springs provided to the government at Camp Arifjan between 1 October 2006 and 22 January 2007.

The government, as the moving party, is required to show that there are "substantially similar" issues, facts and witnesses in both the Board and criminal proceedings. *E-Systems, Inc.*, ASBCA No. 32033 *et al.*, 88-2 BCA ¶ 20,753 at 104,868. In moving to stay proceedings before the Board, the government relies principally on the fact that MAJ Cockerham, the CO who awarded and administered BPA 0001 pled guilty to bribery, conspiracy to commit bribery and money laundering while deployed to Kuwait, and the fact that another CO, MAJ Momon, who was involved with administering the BPA also pled guilty to bribery and conspiracy while deployed to Kuwait (gov't mot. at 1).

As reflected in the DOJ press release, MAJ Cockerham pled guilty to one count of bribery, one count of conspiracy to commit bribery and one count of money laundering. The indictment against MAJ Cockerham shows that he was charged in connection with five specific BPAs for bottled water. BPA 0001 for removing black and gray water and for dumpster service at Camp Arifjan was not implicated.

As reflected in his Plea Agreement, during the time (21 September 2005 until 10 August 2006) when he was a CO at Camp Arifjan (gov't mot., ex. 3, ¶ 7), MAJ Momon made numerous calls on BPAs for goods and services (*id.* ¶ 7(b)) in return for money and other things from unnamed Co-conspirator Contractors. There is nothing in the record to indicate that MAJ Momon received bribes in connection with the award or administration of BPA 0001.

Thus, the government has failed to show any connection between MAJ Cockerham's and MAJ Momon's guilty pleas and any calls or administration of BPA 0001 at issue in the appeals before us. The fact that MAJ Cockerham and MAJ Momon pled guilty to other crimes does not, in and of itself, mean that performance under BPA 0001 by Palm Springs was also corrupt.

Moreover, although Green Valley, Palm Springs' joint venture partner, was implicated in a scheme to inflate the amount of black and gray water removed from

Camp Arifjan, Palm Springs was apparently able to convince the Army Suspension and Debarment Official that it was a separate entity from Green Valley and that it was unaware of Green Valley's deception. In his 18 May 2007 decision, the Army Suspension and Debarment Official found Palm Springs acted in a "responsible manner" when Green Valley's wrongdoings were discovered and should not be debarred. Although Palm Springs was again proposed for debarment due to its alleged affiliation with another firm which allegedly made payments to MAJ Cockerham, we have no indication that the Army Suspension and Debarment Official has, or is taking steps to, reverse his May 2007 decision. In addition, Palm Springs has represented, and the government has not disputed, that there has never been any allegations of wrongdoing in connection with Palm Springs' performance of dumpster services which is involved in ASBCA No. 56291.

The government also relies on the 20 June 2008 DOJ letter and the declaration of CID SA Sbarbaro in support of its motion to stay. The DOJ letter only tells us that the BPA, identified as W90FP6-05-A-0001, "has been referred" to the DOJ for "investigation," and proceeding before the Board "may directly interfere with or impede the criminal investigation." This statement and the papers the government submitted along with its motion are insufficient for us to make an informed assessment that the facts, issue and witnesses in ASBCA Nos. 56290 and 56291 and the ongoing criminal investigation are substantially similar so as to warrant a stay of proceedings. *E-Systems*, 88-2 BCA ¶ 20,753 at 104,871 ("The Government's mere statements that the related criminal investigation will be prejudiced is insufficient without a clear showing why.")

We conclude that the government has failed to show that there are substantial similarity of facts, issues, and witnesses between the ongoing criminal investigation and the appeals before us.

2. *Compromising Ongoing Investigations*

When the government filed its motion to stay on 7 July 2008, Palm Springs' counsel had already taken the deposition of the COR and one of the COs in connection with ASBCA No. 56290. Four other individuals, including MAJ Momon and DCAA auditor Szafarski remained. Of the remaining individuals for deposition, MAJ Momon had already pled guilty and pledged to cooperate with DOJ. In connection with ASBCA No. 56291, Palm Springs counsel had already taken the deposition of three of the COs involved in that case, and the deposition of three other individuals remained. Except for SA Sbarbaro's general statement in his declaration, we have been given nothing to enable us to make an assessment that the deposition of the remaining individuals may affect the criminal investigation in the context of similar facts and issues.

We have reviewed Palm Springs' discovery requests (interrogatories, requests for production of documents and requests for admission) in both appeals (gov't mot., tabs 7-12). While some of the requests (*e.g.*, ASBCA No. 56290, Interrogatory No. 5 (*id.* tab 7 at 5); ASBCA No. 56291, Interrogatory No. 31 (*id.* tab 10 at 12-13)) when broadly interpreted, can be read to intrude into the ongoing investigation, given the lack of any meaningful demonstration that there is some connection between the investigation and the facts and issues presented in the appeals, we are not persuaded that answering the bulk of the discovery requests would compromise the government's ongoing investigation (factor 2).

We note that despite the fact that the government filed its motion to stay on 7 July 2008, the parties proceeded with the deposition of one witness (Szafarski) on 24 July 2008 under their stipulation that questions intruding upon any criminal investigation would be deferred. We note also that Palm Springs' counsel has withdrawn Interrogatory No. 5 acknowledging that a broad interpretation of that interrogatory could intrude into DOJ's investigation of BPA 0001. In light of counsels' demonstrated ability to cooperate to stay clear of the ongoing criminal investigation, we believe going forward, the same kind of stipulation can be employed to complete discovery and to bring ASBCA Nos. 56290 and 56291 to hearing. *E-Systems*, 88-2 BCA ¶ 20,753 (government motion for stay denied, hearing cancelled to allow government to complete deposition and contractor to take depositions to preserve witness testimony); *CFS-Related Securities Fraud Litigation*, 256 F. Supp. 2d 1227, 1236 (N.D. Okla. 2003) ("A general stay is just one of several procedures available. Other options may be utilized in lieu of imposing a stay. These alternate tools include the imposition of protective orders, sealed interrogatories, a stay for a finite period of time, or a stay limited to a specific matter.")

3. Harm to the Non-Moving Party

With respect to whether the requested stay could harm Palm Springs, its counsel tells us that Palm Springs had paid its subcontractors, that it has not received payment of \$3.2 million for services rendered, and that it has ceased operations due to lack of cash flow. Weighing this against the government's lack of satisfactory explanation for its refusal to pay, we come down in favor of Palm Springs on factor 3.

4. Reasonableness of the Duration of the Requested Stay

Since the government has failed to support its request for a stay of proceedings as explained above, we need not consider whether the duration of the stay it requested – "six months after the date of the Board's decision" – is reasonable.

CONCLUSION

Because the government has failed to persuade us on the factors we generally considered in determining whether to grant a stay of Board proceedings when a parallel criminal investigation is ongoing, we deny the motion to stay in both appeals. The parties are to proceed to complete discovery, and to bring any disagreement relating to the proper scope of inquiry to the Board for resolution.

Dated: 30 October 2008

PETER D. TING
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. 56290, 56291, Appeals of Palm Springs General Trading and Contracting Establishment, rendered in conformance with the Board's Charter.

Dated:

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

