

ARMED SERVICES BOARD OF CONTRACT APPEALS

Appeal of -- )  
 )  
The Public Warehousing Company ) ASBCA No. 56022  
 )  
Under Contract No. SPO300-03-D-3061 )

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OPINION BY ADMINISTRATIVE JUDGE TING  
ON (1) APPELLANT'S MOTION TO COMPEL DEPOSITIONS AND (2) THE  
GOVERNMENT'S MOTION TO DISMISS WITH PREJUDICE, TO STAY  
DEPOSITIONS PENDING A COURT RULING, AND TO PLACE CERTAIN  
LIMITATIONS ON DEPOSITIONS IF ALLOWED TO PROCEED

After discovering that counsel representing The Public Warehousing Company (PWC) were live-streaming the contracting officer's (CO) deposition, Defense Logistics Agency (DLA) counsel confronted PWC counsel who refused to identify to whom the deposition was being streamed. Suspecting the deposition was being streamed to PWC's defense counsel in PWC's criminal and civil fraud cases pending before the U.S. District Court for the Northern District of Georgia, Atlanta Division, DLA counsel reported the incident to the Assistant United States Attorneys (AUSA) prosecuting the criminal and civil fraud cases. The AUSA filed a motion in the District Court, seeking to enjoin PWC from using civil discovery at the Board to gather evidence for the criminal case, to suppress any evidence so derived, and for an evidentiary hearing to determine what occurred at the deposition.

Pending a ruling from the District Court, DLA refused to proceed with the completion of the CO's deposition, and with the depositions of three other witnesses.

This led PWC counsel to move to compel the depositions. DLA responded by filing a motion to dismiss the appeal for abuse of the discovery process or in the alternative to stay the depositions until the District Court rules, and to place certain limitations on further depositions if we deny the motion to dismiss or to stay further depositions.<sup>1</sup>

#### STATEMENT OF FACTS (SOF) FOR PURPOSES OF THE MOTIONS

1. PWC, now known as Agility, is a public company organized under the laws of Kuwait. Defense Supply Center Philadelphia (DSCP), now known as DLA Troop Support, is a sub-agency of DLA, an agency within the Department of Defense. DLA Troop Support supports U.S. military personnel by providing them with food, clothing, textiles, medicines, medical equipment, and general industrial supplies. *PWC* 5<sup>2</sup> at 171,219, finding 1.

2. In 2003, DSCP awarded PWC a “Prime Vendor” contract (Contract No. SPO300-03-D-3061) (PV1 contract) for delivery of subsistence items—food, beverages and related items—to U.S. and allied forces in Kuwait and Qatar. Bilateral Modification No. 00001 (MOD 1) to the PV1 contract added the “Iraq Deployment Zone” (IZ) to the contract requiring PWC to make deliveries to customers in active combat zones. Under the contract, PWC was reimbursed for the cost of food it purchased for the military plus a distribution price (including profit). *PWC* 5 at 171,219-20, findings 2-4.

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<sup>1</sup> For ease of reference, the motion papers filed by the parties will be referred to as indicated in the parenthesis: (1) Appellant’s Motion to Compel Depositions (Mot. 1); (2) Government’s Combined Motion to Dismiss and in the Alternative Motion to Stay Depositions, and Response to PWC’s Motion to Compel Depositions (Mot. 2); (3) Appellant’s Response in Opposition to Government’s Combined Motion to Dismiss and in the Alternative Motion to Stay Depositions (Mot. 3); and (4) Government’s Reply to PWC’s Opposition to DLA’s Combined Motion to Dismiss and in the Alternative Motion to Stay Depositions, and Response to PWC’s Motion to Compel Depositions (Mot. 4).

<sup>2</sup> The Board has issued five decisions relating to the Prime Vendor or PV contracts. Where appropriate, we use our fact findings in those decisions for the motions here: (1) *Public Warehousing Co., K.S.C.*, ASBCA No. 56116, 08-1 BCA ¶ 33,787 (*PWC* 1); (2) *Public Warehousing Co., K.S.C.*, ASBCA No. 56116, 09-1 BCA ¶ 34,038; (3) *Public Warehousing Co., K.S.C.*, ASBCA No. 56116, 09-2 BCA ¶ 34,264; (4) *Public Warehousing Co., K.S.C.*, ASBCA No. 56888, 09-2 BCA ¶ 34,265, and (5) *The Public Warehousing Co.*, ASBCA No. 56022, 11-2 BCA ¶ 34,788 (*PWC* 5). Other pending cases before the Board include *Public Warehousing Company, K.S.C.*, ASBCA No. 57510 and *Public Warehousing Company, K.S.C.*, ASBCA No. 58078.

3. In 2005, DSCP awarded PWC a follow-on contract (Contract No. SPM300-05-D-3119) without full-and-open competition known as the "PV Bridge contract." In July 2005, DSCP awarded PWC Contract No. SPM300-05-D-3128 known as "the PV2 contract." *PWC 1* at 167,223, finding 2.

4. In September 2004, the parties entered into bilateral Modification No. P00027 (MOD 27). This modification established 29 days as the "maximum number of allowable trip days" for "all PWC trucks that depart from Kuwait to Iraq on or after September 16, 2004" and provided that the "additional days beyond the established minimum' fees are only applicable if the delay is customer caused; i.e., Hub, DFAC or MKT not having the capability to off load and return the truck."<sup>3</sup> *PWC 5* at 171,221, finding 9.

5. In December 2006, PWC submitted a certified REA/claim to the CO, Linda Ford (CO Ford), seeking payment of \$12,490,060.00 for costs said to have been incurred by PWC due to the government's use of PWC trucks past the 29-day maximum. *PWC 5* at 171,225, finding 32. PWC alleged that the trucks failed to return from Iraq within 29 days because of: (1) lack of convoy escorts; (2) road closures; (3) lack of storage; (4) vehicles being used for missions by the military; (5) vehicles being used by other contractors; and (6) PWC assets being used for recovery or other delivery missions. *PWC 5* at 171,225, finding 35. CO Ford's 9 April 2007 decision denied the claim on the bases that the government would not pay transportation fees beyond the 29-day maximum established by MOD 27, and PWC had not shown that the distribution fees already paid were unfair, unreasonable, or inequitable. *PWC 5* at 171,226, finding 37. PWC appealed the decision. The appeal was docketed as ASBCA No. 56022 on 1 June 2007. *PWC 5* at 171,226, finding 38.

6. On 9 November 2009, PWC was indicted in the U.S. District Court for the Northern District of Georgia (No. 1:09-CR-0490-TWT-AJB). The six-count indictment charged PWC with conspiracy to defraud the United States, conspiracy to commit major fraud, major fraud, wire fraud and abetting wire fraud. (See ASBCA No. 58078 (58078), gov't mot. at 6 and tab 1) A civil False Claims Act case was also filed against PWC in the same Court. The U.S. government intervened in the False Claims Act case and filed its own complaint in January 2011 (No. 1:05-CV-2968-GET). (*Id.*, tab 2) Both cases allege PWC committed fraud under the PV1, PV Bridge and PV2 contracts. Both the criminal and civil fraud cases against PWC are pending. Even though all three PV contracts are implicated, the criminal and civil fraud cases do not deal with the subject matter involved in the MOD 27 claim before the Board. (*Id.*, tabs 1, 2)

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<sup>3</sup> "DFAC" means "dining facility," and "MKT" means "Mobile Kitchen Trailer."  
*PWC 5* at 171,231 n.4.

7. In mid-January 2010, after the government decided to withdraw from Alternative Dispute Resolution (ADR) before another judge which had consumed the better part of 2009, the parties decided to resume litigation at the Board. In October 2010, the government moved to dismiss PWC's appeal, and in the alternative, for summary judgment. In response, PWC moved to amend its complaint, which the government opposed. *PWC 5* at 171,226-27, findings 39-45. The parties subsequently agreed that the government's summary judgment motion might be deferred. The Board's 22 June 2011 decision denied the government's motion to dismiss on jurisdictional grounds and granted PWC's motion to amend its complaint. *PWC 5* at 171,230.

8. At a pre-hearing conference held on 15 July 2011, the government was directed to file its answer to PWC's First Amended Complaint. The parties were directed, among other things, to confer and develop a discovery schedule leading to a hearing in 2012. (Bd. corr. file, ltr. dtd. 18 July 2011) The government filed its answer on 6 September 2011.

9. On 21 February 2012, PWC, as defendant in the criminal case, filed a Motion to Dismiss the Indictment Based on Prosecutorial Misconduct and Request for an Evidentiary Hearing. PWC alleged in its motion that the Department of Justice (DOJ) attorneys and government agents involved in investigating the case (1) "improperly pressured DSCP's lead contracting officer to change her positive evaluation of PWC"; (2) "instructed DSCP not to perform contractually mandated performance assessment reports and evaluations"; (3) "interfered with the routine administration of the PV Contracts"; (4) "obstructed PWC's legitimate attempts to obtain a judicial interpretation of the PV Contracts through the statutorily-defined administrative process"; (5) "interfered with defense counsel's access to critical witnesses"; and (6) "tried to coerce and intimidate a witness into revising testimony that was exculpatory to PWC." (58078, gov't mot., tab 11 at 2-3)

*Events Leading to the Parties' Motions in this Case*

10. By email to PWC counsel on 10 February 2012, DLA's lead counsel confirmed CO Ford's deposition in ASBCA No. 56022 for 27 and 28 March 2012. The email mentioned that his co-counsel had reserved a hearing room for the deposition at DLA Troop Support offices in Philadelphia, Pennsylvania. (Mot. 2, tab 4) PWC counsel's 14 February 2012 reply stated "We are in the process of making arrangements for a location in Philadelphia—we prefer that the deposition take place outside of DLA—and will also arrange for the videographer and court reporter" (*id.*).

11. In his 14 March 2012 email to PWC counsel, DLA lead counsel sought the following assurance discussed previously: "the deposition will be limited to matters concerning ASBCA 56022 (the Mod 27 claim) and you will not question Ms. Ford concerning matters involved in the criminal and civil fraud cases pending in Atlanta,

including matters related to rebates and discounts, the Sultan Center, in-land port, or PV2 contract award.” The email asked PWC counsel to “Please confirm your agreement.” (Mot. 2, tab 1, ex. A at 13) PWC counsel’s email reply on the same day asked DLA counsel to confirm moving the deposition to 28 and 29 March 2012. It went on to say that “We have reserved a conference room at the offices of Blank Rome” at One Logan Square, 130 North 18<sup>th</sup> Street, Philadelphia, PA, and “We do not intend to inquire about the issues you have identified below.” (*Id.* at 12)

12. CO Ford’s video deposition began at 9:30 a.m. on 28 March 2012. PWC was represented by two of the three counsel of record before the Board and its Vice President and General Counsel; DLA was represented by four counsel of record before the Board. At the start of the deposition, the videographer asked all counsel to identify themselves and all counsel present did so. According to DLA, “PWC did not disclose that other counsel were in fact receiving the transcript by live feed and participating in the deposition via remote electronic means.” (Mot. 2 at 4)

13. That afternoon, a number of events caused DLA counsel to suspect that CO Ford’s deposition was being live-streamed. According to DLA’s motion, it appeared to DLA counsel that one PWC counsel and PWC’s General Counsel “were receiving questions via electronic means and passing them to” PWC’s lead counsel who was asking Ms. Ford questions. (Mot. 2 at 4 n.2) While the videographer acknowledged that the deposition was being live-streamed, he was not helpful in disclosing to where it was being streamed. Concerned that the deposition was being streamed to defense counsel in the criminal case pending before the District Court, DLA counsel pressed PWC counsel to disclose where the deposition was being streamed. PWC counsel took the position that the information sought was irrelevant, and he was, in any case, not obligated to disclose the information. (Mot. 2 at 4-5)

14. At about 4 p.m., 28 March 2012, the Administrative Judge at the Board received a call from the parties seeking a ruling on whether live-streaming of Ms. Ford’s video deposition should be allowed to continue. After hearing arguments from both sides, the Judge ruled that he would permit live-streaming to continue only if PWC disclosed to whom the deposition was being sent. At this point, PWC counsel said “We will cut it off then.”

15. On 29 March 2012, the next day, the deposition continued. The Judge then received a second call from the parties. This time, DLA counsel objected to videotaping CO Ford’s deposition over concerns that CO Ford felt intimidated and that the videotaped deposition might be improperly used. The Judge ruled that he would permit videotaping upon the condition that the deposition could only be used for purposes of ASBCA No. 56022.

16. During CO Ford's deposition, DLA counsel objected to a number of questions and directed the deponent not to answer. At a teleconference on 5 April 2012, the Judge instructed PWC to submit the specific questions in writing for a ruling. PWC submitted the questions and arguments by letter dated 30 April 2012.

17. Following CO Ford's deposition, DLA counsel reported the live-streaming incident to the U.S. Attorney's Office in Atlanta. In a letter dated 31 May 2012 to Skadden, Arps, Slate, Meagher & Flom LLP (Skadden), PWC's defense counsel in the District Court cases, the AUSA, referring to passages from the Ford deposition, expressed alarm that PWC "may have intentionally" violated its agreement not to question CO Ford concerning matters involved in the criminal and civil fraud cases pending in the Atlanta District Court (mot. 2, tab 1, ex. C at 50-53). The letter also expressed concerns that PWC counsel in the Board case had been "surreptitiously 'streaming' the deposition to other unidentified individuals at an undisclosed location or locations, without consent of all the parties," potentially violating the Pennsylvania Wiretapping and Electronic Surveillance Control Act, 18 Pa.C.S. § 5701, *et seq.*, and implicating the Model Rules of Professional Conduct (*id.* at 51). The letter asked PWC defense counsel to provide information that PWC's counsel at the Board refused to provide during the Ford deposition—whether the deposition was streamed to PWC's counsel in the criminal case, and whether PWC's criminal attorneys were sending questions to PWC counsel at the deposition to ask CO Ford. The letter emphasized that while troubled by what may have occurred, the U.S. Attorney's Office wished to "avoid drawing any conclusions until we have all the facts." (*Id.* at 53)

18. Skadden's 6 June 2012 response dismissed the AUSA's inquiry as a "contrived... 'concern'" relating to "a deposition that took place more than two months ago in another proceeding in which the [DOJ] is not even a party" (mot. 2, tab 1, ex. D at 55).

19. After receiving DLA's response to the questions PWC submitted, the Board issued its ruling on 7 June 2012 through Discovery Order (DO) No. 1. Of the 11 deposition questions presented, the Board overruled DLA's objections as to 4 questions and sustained its objections as to 7. The rulings were based on the Board's understanding of the issues in ASBCA No. 56022 and the ongoing proceedings in the District Court. As to the objections which were sustained, DO No. 1 explained: "Given the criminal and civil fraud cases pending before the District Court in Atlanta, and given the prosecutorial misconduct case before that Court, any inquiry which encroaches or appear to encroach on the issues raised in those cases, are unnecessary and counterproductive for purposes of proceeding with ASBCA No. 56022." (Bd. corr. file, DO No. 1 of 7 June 2012 at 4, ¶ 4)

20. On 13 June 2012, PWC counsel emailed DLA counsel to check on the availability of CO Ford to finish her deposition as well as the deposition of three other

Troop Support witnesses (Mot. 1, ex. B). DLA counsel's 15 June 2012 reply said that he was checking the witnesses' availability (*id.*, ex. C).

21. On 20 June 2012, the AUSA filed in the District Court the United States' Motion for an Order Enjoining Defendant The Public Warehousing Company from Using Civil Discovery to Gather Evidence for this Criminal Case and Suppressing Any Evidence Derived Therefrom, and Request for an Evidentiary Hearing. This motion was filed under Criminal Indictment No. 1:09-CR-0490-AJB-TWT. (Mot. 2, tab 1)

22. The motion told the Court up front that ASBCA No. 56022 is "unrelated to the issues in the criminal or civil fraud cases pending before this Court" (mot. 2, tab 1 at 1-2). The motion told the Court that despite the agreement between the parties in that unrelated administrative appeal—ASBCA No. 56022—the transcript of CO Ford's deposition in that case was "replete with efforts by PWC to explore matters related only to the criminal and/or civil cases before this Court" (*id.* at 2-3). The motion told the Court that PWC's counsel at the ASBCA "had apparently been surreptitiously 'streaming' the deposition to other unidentified individuals at an undisclosed location or locations without consent of all the parties" (*id.* at 3-4). According to the motion, when DLA counsel discovered that the deposition was being streamed, he asked PWC counsel several times "to identify to whom and where the deposition was being streamed" (*id.* at 4), and PWC counsel refused to do so. The motion said PWC counsel did not deny that the deposition was being streamed to PWC's counsel in the criminal case, or deny that PWC counsel in the criminal case was sending questions to ask CO Ford. The motion told the Court that the government's good faith attempt to clarify what had happened was rebuffed, and asked the Court to "issue an Order enjoining PWC from using the civil discovery process as a means to obtain evidence for this criminal case and suppressing any evidence PWC may have obtained by engaging in such conduct" (*id.* at 8). The motion also asked for an "evidentiary hearing in order to assist the Court and the Government to develop the relevant facts and determine exactly what transpired during the Ford deposition and whether any further sanction by the Court is necessary" (*id.* at 8-9).

23. Skadden's 5 July 2012 response argued that DLA "neither requested nor obtained from the ASBCA a protective order limiting the use or distribution of Ms. Ford's deposition transcript in any way" (mot. 2, tab 1 at 10). It argued "If the Government wanted further relief, it should have sought it before the ASBCA," and "[i]t is inappropriate for the Government to now burden this Court with making a determination with respect to discovery in another case over which it has no jurisdiction" (*id.* at 15).

24. Skadden's response included a declaration from PWC's lead counsel in ASBCA No. 56022 (mot. 2, tab 2 at 113). In his declaration, he explained that he and his colleagues had been working closely with Skadden, PWC's lead counsel in the criminal

action and civil *qui tam* action (*United States of America ex rel. Kamal Mustafa Al-Sultan v. The Public Warehousing Company – K.S.C. d/b/a PWC Logistics, et al.*, Case No. 1:05-cv-02968-GET (N.D. Ga. Nov. 18, 2005)) pending before the District Court. He stated that “[a]s co-counsel for PWC, V&E and Skadden have been collaborating closely on all litigation related to PWC’s PV Contracts, including the ASBCA trucking fees appeal, the civil *qui tam* action, and the criminal case before this Court.” (*Id.* at 118, ¶ 12) He stated that “[a]s part of this collaboration, I asked the court reporter to live stream the transcript of Ms. Ford’s deposition to attorneys from Skadden” (*id.* at 118, ¶ 13). He further stated that he “did not instruct the court reporter to conceal the live streaming of Ms. Ford’s deposition transcript or otherwise keep it secret” (*id.* at 119, ¶ 15). According to his declaration, “Although live streaming of the video was ordered, it did not function on the day of the deposition, so only the transcript was live streamed” (*id.* at 118, ¶ 13). He explained that in modern commercial litigation, “the use of live streaming has become commonplace so that multiple attorneys may monitor a deposition without the need to be present” (*id.* at 119, ¶ 14).

25. After the DOJ filed its motion in Court, DLA apparently changed its mind on making witnesses available for further depositions. In response to PWC counsel’s email of 2 July 2012, DLA counsel’s 10 July 2012 email advised that DOJ had moved for an order in the District Court “to prevent PWC from using civil discovery to obtain information for use in the criminal case,” and PWC’s defense counsel had filed a response on 5 July 2012 admitting “it had, in fact, secretly streamed the deposition of Linda Ford in ASBCA No. 56022 to PWC’s counsel in the criminal case” (Mot. 1, ex. D). The email went on to say “[i]n light of the pending motion being litigated in the District Court, we believe it would be inappropriate for the parties to schedule depositions at this time. Hence, we propose that we defer any further depositions until the motion in the District Court is resolved.” (*Id.*)

26. PWC counsel’s 11 July 2012 email did not agree that depositions should be deferred. It argued that DOJ’s motion to prevent the use of civil discovery had no bearing on whether discovery on ASBCA No. 56022 should continue; and that “Judge Ting ruled on the government’s objections from the Ford deposition regarding the issues that are discoverable...and he remains the appropriate arbiter if the parties require further guidance.” The email said PWC was prepared to file a motion to compel if DLA refused to cooperate. (Mot. 1, ex. E)

27. DLA counsel’s 13 July 2012 email took the position that since DOJ’s discovery motion before the District Court was “directly related to PWC’s actions in the deposition in ASBCA Appeal No. 56022...holding further depositions in the same appeal is inappropriate...until the motion is resolved” (mot. 1, ex. F). The email stated DO No. 1 was issued before revelation that PWC’s defense counsel in the District Court cases “were participating in the deposition of Ms. Ford” and “misusing the Board’s civil process to obtain discovery for the criminal case pending against PWC” (*id.*). While

acknowledging PWC was free to file a motion to compel, the email stated that DLA was considering asking for a stay of discovery “[g]iven...PWC’s actions in the Ford deposition have raised significant questions concerning the purposes for which PWC seeks to conduct the depositions, a stay is appropriate at least until the motion pending in the District Court is decided” (*id.*).

*The Parties’ Motions Before the Board*

28. PWC filed Appellant’s Motion to Compel Depositions on 24 July 2012. It argues that while the District Court is empowered to decide whether evidence obtained during the Ford deposition is admissible in the False Claims Act cases, the District Court has no jurisdiction or authority to control discovery in ASBCA No. 56022. It argues also that since the Board has already ruled on the parties’ disagreements in DO No. 1, and there is no pending objection or motion, “there is no basis for suspending depositions while the DOJ’s Motion is pending” and DLA could not “unilaterally stay discovery.” (Mot. 1 at 7, 8)

29. In response, DLA filed the Government’s Combined Motion to Dismiss and in the Alternative Motion to Stay Depositions, and Response to PWC’s Motion to Compel Depositions (Mot. 2) on 6 August 2012. Although it acknowledges that dismissal of an appeal should be reserved “for only the most severe abuses on the discovery process,” DLA argues this sanction is appropriate because PWC “developed a systematic and methodological plan to exploit Ms. Ford’s deposition for purposes of obtaining evidence in the criminal case—including covertly bringing PWC’s criminal defense attorneys into the deposition and misleading the government concerning the multiple purposes of the deposition” (*id.* at 23). DLA tells us that even after it was caught, PWC continued to “stonewall” and only after DOJ filed a motion in the District Court did PWC “reveal that it was, in fact, streaming the deposition to Skadden attorneys,” and PWC still has not “come clean” and identified to whom the deposition was being streamed and “what the role of the Skadden attorneys [played] in developing and asking deposition questions” (*id.* at 24). Should the Board not dismiss the appeal, DLA proposes that we grant a short stay in deposition discovery until the District Court rules on DOJ’s motion to enjoin the use of, and to suppress the evidence obtained from, CO Ford’s deposition (*id.* at 30-33). If we decide to let depositions proceed before the District Court rules on DOJ’s motion, DLA proposes a number of “limitations and requirements” that “would help minimize the risk that PWC would misuse future depositions” (*id.* at 34).

30. PWC’s 31 August 2012 opposition contends that “there is no legal or factual basis for dismissing this Appeal because PWC has not engaged in sanctionable conduct” (mot. 3 at 2). PWC argues “there has been no violation of a Board order by PWC, as is required by Rule 35 in order to impose sanctions” (*id.* at 6). It maintains that none of the factors that warrant sanctions such as willfulness, prejudice, delay, burden and expense

incurred by the movant, are present (*id.*). It also argues that DLA's motion to stay depositions should be denied because it has not established the factors favoring a stay (*id.* at 12). It urges the Board to reject the restrictions DLA proposed should depositions be allowed to proceed (*id.* at 16-17).

31. In its 20 September 2012 reply, DLA argues that "Rule 35 does not prohibit sanctions" in this case, and "dismissal remains the only appropriate remedy" when PWC "deceive[d] a federal agency concerning the purpose and scope of a deposition, deceive[d] the agency concerning who [was] attending and participating in the deposition, and secretly use[d] civil discovery as a subterfuge for obtaining discovery in a criminal case" (Mot. 4 at 11-12). Acknowledging that its motion to stay depositions does not fit the traditional factors the Board considers in deciding whether to stay proceedings, DLA argues that the Board should "give the District Court a reasonable time to consider the issue before allowing PWC to conduct further depositions" when PWC "sees nothing wrong with using the Board's civil discovery process for improper purposes and sees nothing wrong with hiding who is participating in a deposition" (*id.* at 12). Finally, DLA argues that the restrictions it proposed would afford "some protection from further problems or misuse of the deposition" in light of what occurred (*id.* at 13).

## DECISION

### *DLA's Motion to Dismiss*

Moving to dismiss PWC's appeal with prejudice, DLA tells us that "PWC intentionally abused the discovery process and knowingly failed to engage in fair dealing with DLA during voluntary discovery when it surreptitiously streamed Ms. Ford's deposition" and "PWC was not forthcoming after its conduct was discovered" (Mot. 2 at 13). Recognizing that Board Rule 35 requires failure or refusal to obey a Board order,<sup>4</sup> DLA argues the Rule "does not, however, prohibit sanctions in a case such as this," pointing, as precedent, to our decision in *Charles G. Williams Constr. Inc.*, ASBCA No. 33766, 89-2 BCA ¶ 21,733 (*id.* at 14).

A sanction of dismissal "is a harsh remedy, which should be reserved for only the most severe abuses of the discovery process." *Hendler v. United States*, 952 F.2d 1364,

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<sup>4</sup> PWC correctly points out that, generally, sanctions or a motion to dismiss will not be granted absent failure or refusal to obey a Board order. *Shah Constr. Co.*, ASBCA No. 50411, 00-2 BCA ¶ 30,984 at 152,923 (motion to dismiss denied because "there is no Board order which the appellant has failed or refused to obey"); *Taisei Rotec Corp.*, ASBCA No. 50669, 98-2 BCA ¶ 30,070 at 148,787 ("As we cannot identify such an order, the severe penalty of Rule 31 dismissal is inappropriate."); *Philadelphia Biologics Center*, ASBCA No. 44578, 95-2 BCA ¶ 27,805 at 138,641.

1382 (Fed. Cir. 1991). There is a “strong policy favoring a trial on the merits and against depriving a party of his day in court.” *Ingalls Shipbuilding, Inc. v. United States*, 857 F.2d 1448, 1451 (Fed. Cir. 1988). Because dismissal is universally recognized as a sanction of last resort, we are required, before imposing that sanction, to consider fully all the surrounding circumstances, such as the degree of culpability, the amount of prejudice, and the availability of less drastic sanctions. *Genentech, Inc. v. U.S. Int’l Trade Comm’n*, 122 F.3d 1409, 1423 (Fed. Cir. 1997).

In *Charles G. Williams*, the contractor submitted a claim on its maintenance and repair contract. About a week after receiving the claim, the CO sent it to the Civil Engineering office (CE) for technical evaluation. To protect the technical evaluation from discovery, CE sent its completed technical evaluation to the legal office rather than the CO. Instead of claiming privilege, however, the government repeatedly told the contractor when asked that no technical evaluation had been prepared. At the hearing when it was revealed that a technical evaluation in fact was prepared, the contractor moved for entry of judgment on entitlement on the basis of bad faith in deliberately concealing the technical evaluation.

In that case, the Board concluded that “by falsely denying the existence of a technical evaluation,” “some sanction is due.” *Charles G. Williams*, 89-2 BCA ¶ 21,733 at 109,249. Recognizing that the contractor could not have asked for a Board order when it was told no technical evaluation existed, the Board did not let the lack of a Board order stand in the way of applying sanction where the government subverted its “fundamental obligation of fair dealing which underpins voluntary discovery.” *Id.* In determining the appropriate sanction to apply, the Board looked to see if the concealed documents were of any substantial importance to the parties. Finding the technical evaluation of value to the government in defense of the contractor’s claim, but the information did not prejudice the contractor’s ability to prove its case, the Board concluded not having the evaluation report was not “of such importance or its withholding so prejudicial, as to justify the entry of a judgment for appellant.” The Board then decided that the proper remedy was to take away the government’s defense by barring it from using the technical evaluation and to refuse to give weight to the testimony related to the evaluation. *Id.* at 109,250.

In this case, given PWC counsel’s assurance that they “will not question Ms. Ford concerning matters involved in the criminal and civil fraud cases pending in Atlanta” (SOF ¶ 11), we agree that DLA counsel had no reason to seek a protective order from the Board since the parties were engaging in voluntary discovery at the time. Live-streaming depositions may be commonplace; that was not the problem. Live-streaming the deposition to defense counsel representing PWC in its criminal case unrelated to ASBCA No. 56022—which PWC acknowledged occurred—is not commonplace. Also, live-streaming the deposition to criminal defense counsel not of record before the Board and perhaps have them participate in the deposition—which PWC has not acknowledged—is not commonplace.

When DLA discovered live-streaming was taking place, and when PWC refused to disclose to whom CO Ford's deposition was being streamed, the parties sought a ruling from the Board by telephone. PWC stopped streaming immediately upon the Board's ruling that live-streaming would be permitted to continue only if PWC disclosed to whom the deposition was being streamed. When DLA complained the next day of its concern that the videotaped<sup>5</sup> deposition could potentially be misused, the Board ruled that the deposition could only be used for purposes of ASBCA No. 56022.

Moreover, DLA's lead counsel was vigilant in objecting to deposition questions that appeared to encroach on the District Court cases. As instructed by the Board on 5 April 2012, PWC submitted those questions CO Ford was directed not to answer at her deposition, and the Board ruled on the questions. In sustaining 7 out of 11 questions in DO No. 1, the Board was mindful that the separation between ASBCA No. 56022 and the District Court cases must be maintained. The Board made clear that its rulings were based on this parameter: "Given the criminal and civil fraud cases pending before the District Court in Atlanta, and given the prosecutorial misconduct case before that Court, any inquiry which encroaches or appear to encroach on the issues raised in those cases, are unnecessary and counterproductive for purposes of proceeding with ASBCA No. 56022" (Bd. corr. file, DO No. 1, ¶ 4).

Thus, unlike the situation in *Charles G. Williams* where the government's concealment was discovered too late to prevent an injustice, the parties in this case sought and obtained from the Board rulings immediately after discovery issues surfaced. Consequently, DLA's case before the Board has not been prejudiced to warrant imposition of the "sanction of last resort," dismissal of ASBCA No. 56022 with prejudice.

#### DLA's Motion to Stay Depositions

If we deny its motion to dismiss, DLA asks us to stay further depositions to "give the Court time to rule on motions that are relevant to this appeal" (Mot. 2 at 32-33). The factors we generally weigh in considering a request to stay a Board proceeding based upon potential interference with criminal proceedings are "(1) whether the facts, issues, and witnesses in both proceedings are substantially similar; (2) whether the on-going investigations would be compromised in going forward with the case; (3) whether the proposed stay could harm the non-moving party; and (4) whether the duration of the requested stay is reasonable." *PWC* 1 at 167,227; *Kellogg Brown & Root Services, Inc.*, ASBCA Nos. 56358, 57151, 11-1 BCA ¶ 34,614 at 170,603. Acknowledging that "a mechanical application of these factors is inappropriate in this matter" (Mot. 2 at 30),

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<sup>5</sup> FED. R. CIV. P. 30(b)(3)(A) provides, in part, "Unless the court orders otherwise, testimony may be recorded by audio, audio-visual, or stenographic means."

DLA asks us to “go outside the normal factors” because the depositions in this ASBCA appeal “are the subject of litigation before a federal court” (*id.* at 32). DLA argues even though the District Court lacks the authority to “direct actions of the Board, it would have the authority to enjoin PWC’s conduct” (*id.* at 32).

We are not persuaded. First, as DLA itself acknowledged, “the pending criminal fraud case in Atlanta and ASBCA Appeal 56022 were not parallel cases involving the same issues, although both involve the same contract, SPO300-03-D-3061” (Mot. 2 at 23). Indeed, since the appeal was first docketed and up until CO Ford’s deposition in March 2012, neither DLA nor DOJ has requested a stay of proceeding. And, even as DOJ filed its motion in June 2012 to enjoin PWC from using civil discovery to gather evidence for use in the criminal case and to suppress evidence derived from the Ford deposition, DOJ told the Court upfront that ASBCA No. 56022 was “unrelated to the issues in the criminal or civil fraud cases pending before this Court” (*id.*, tab 1 at 1-2). Thus far, DOJ has not asked us to stay proceedings in ASBCA No. 56022.

Second, whether the District Court grants or denies DOJ’s motion to enjoin the use of, and to suppress the evidence derived from, the Ford deposition, the Court’s decision would only affect proceedings in that Court, not at the Board. No purpose, therefore, would be served by staying the remaining depositions in ASBCA No. 56022 pending the Court’s ruling on the DOJ motion.

Third, the Board has its own case management authority. It is recognized that the authority of the ASBCA Judge “is no different from that of federal trial courts which, by virtue of their case management authority, are given broad discretion to manage the litigation on their dockets.” *Metadure Corp. v. United States*, 6 Cl. Ct. 61, 67 (1984); *Turbomach*, ASBCA No. 30799, 87-2 BCA ¶ 19,756 at 99,953 (“this Board has the inherent power to control the discovery process in appeals before it”). As it did in the past, going forward, the Board will ensure depositions are taken without hidden agendas and focusing on the issues involved in ASBCA No. 56022.

#### Future Depositions

In inviting DLA to respond to PWC’s Motion to Compel, the Board’s 26 July 2012 letter asked DLA to “propose alternatives short of a flat refusal to proceed with depositions pending a ruling from the District Court.” DLA’s 6 August 2012 motions proposed a number of limitations on future depositions that “would help minimize the risks that PWC would misuse future depositions” if the Board allows depositions to resume. (Mot. 2 at 33-34) We have considered DLA’s proposals and PWC’s objections. In light of what occurred, and consistent with our case management authority, we order the resumption of depositions under Board Rule 14, with the stipulation that depositions are to be taken with no streaming to PWC’s defense counsel in the District Court cases allowed and without them present at the deposition.

CONCLUSION

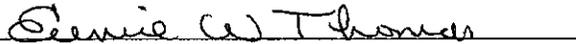
DLA's motion to dismiss is denied. DLA's motion to stay further depositions pending a ruling from the District Court is denied, and DLA's motion to put in place certain limitations in future depositions is granted to the extent indicated. PWC's motion to compel depositions, subject to the limitations set out in this decision, is granted.

Dated: 3 December 2012



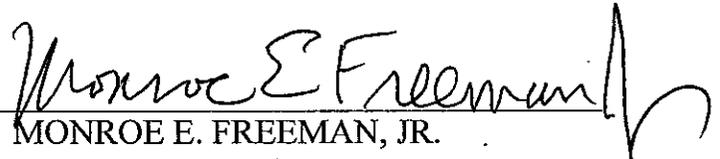
PETER D. TING  
Administrative Judge  
Armed Services Board  
of Contract Appeals

I concur



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

I concur



MONROE E. FREEMAN, JR.  
Administrative Judge  
Acting Vice Chairman  
Armed Services Board  
of Contract Appeals

I certify that the foregoing is a true copy of the Opinion and Decision of the Armed Services Board of Contract Appeals in ASBCA No. 56022, Appeal of The Public Warehousing Company, K.S.C., rendered in conformance with the Board's Charter.

Dated:

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