ARMED SERVICES BOARD OF CONTRACT APPEALS

Appeals of -	)	
	)	
Tetra Tech EC, Inc.	)	ASBCA Nos. 62449, 62450
	)	
Under Contract Nos. N62473-10-D-0809	)	
N62473-12-D-2006	)	

APPEARANCES FOR THE APPELLANT:	Dorn C. McGrath, Esq. William M. Jack, Esq. Ken M. Kanzawa, Esq. Kelley Drye & Warren LLP Washington, DC
APPEARANCES FOR THE GOVERNMENT:	Craig D. Jensen, Esq. Navy Chief Trial Attorney Gregory E. Birkenstock, Esq. Trial Attorney

OPINION BY ADMINISTRATIVE JUDGE MCNULTY

These appeals involve claims challenging the propriety of the Navy's evaluation of appellant, Tetra Tech EC, Inc.'s (Tetra Tech), performance of task orders issued for investigation and possible radiological remediation of the Navy's Hunter Point facility (HPNS) located in San Francisco, California.[1] Before us are the Navy's motion to dismiss for lack of jurisdiction (hereinafter gov't mot.), Tetra Tech's motion to compel the submission of the Rule 4 file (hereinafter app. mot.), and the Navy's motion to suspend the proceedings (hereinafter gov't mot. suspend), which was submitted at the Board's request after a conference call, to discuss the appeals and the pending motions, was conducted.

[1] Appellant appeals from deemed denials of its claims. In response to the filing of the complaints, the Navy moved to dismiss for lack of jurisdiction. The appeals were consolidated shortly after the second complaint was received. The Navy has not filed an answer, nor has it submitted a Rule 4 file. We do not have the indefinite-delivery, indefinite-quantity (IDIQ) contract and task orders, the claims, contracting officer's final decisions, or a Rule 4 file. The facts set forth herein are taken from the parties' filings. Unless otherwise noted, the cited facts are undisputed.

STATEMENT OF FACTS (SOF) FOR PURPOSES OF THE MOTIONS

1. In 2010, Tetra Tech and the Navy,

> [E]ntered into the RAD EMAC, a multiple award, indefinite-delivery, indefinite-quantity (IDIQ) contract with a maximum value of $250 million. Its period of performance comprised a one-year base period, from February 24, 2010 to February 23, 2011, and four one-year option periods, the last of which was exercised and expired on February 23, 2015.

(Compl. ¶ 29)[2]

2. During the period 2010 to 2013, the Navy awarded four task orders, CTO 2, CTO 7, CTO 12 and CTO 15 to Tetra Tech. The task orders required Tetra Tech to survey, and if necessary, to conduct radiological remediation in accordance with Multi-Agency Radiation Survey and Site Investigation Manual (MARSSIM) based standards in accordance with a Base-wide Radiological Work Plan. (Compl. ¶¶ 30-31)

3. The work performed by Tetra Tech included:

> [T]hree types of radiological tasks at HPNS: (1) removal of contaminated sanitary sewers and storm drains, (2) surveys of buildings and former building sites, and (3) base-wide radiological support activities. This work included conducting thousands of surveys, the removal of over 22 miles of sewer and storm drains, and excavation and screening of over 228,000 cubic yards of soil.

This work was closely overseen and approved by the Navy. (Compl. ¶ 39)

4. In 2012, Tetra Tech and the Navy jointly addressed a soil sampling issue and a scan speed issue. "In October 2012, the Navy [had] found that a limited number of samples taken from a sampling area exhibited a lower than expected level of

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[2] Citation to "compl." is to the complaint filed in ASBCA No. 62449, unless otherwise noted. The allegations in the complaints of both appeals are similar, although a different base IDIQ contract and task order are involved and performance was completed in 2017 in ASBCA No. 62450, rather than 2015. Another significant difference, although not material to deciding the motions, is that no soil sampling was performed with respect to ASBCA No. 62450, only building scanning.

potassium 40 ("K-40"), a naturally occurring element in the sampling area." Tetra Tech,

> [I]n coordination with the Navy, immediately investigated this anomalous data to determine the source of the discrepancy. The investigation evaluated previous analytical results, identifying approximately 2,500 soil samples with low K-40, out of more than 50,000 samples. T[etra Tech] and the Navy identified 19 soil survey units (out of more than 600 total soil survey units) for further evaluation.

Tetra Tech further analyzed the 19 survey units and, where necessary, "conducted additional remediation under Navy oversight to ensure that the completed work met applicable cleanup requirements. By January 2013, within three months after the sampling discrepancy was identified, Tetra Tech had completed the implementation of corrective actions and remedial measures." "In 2013, the Navy expressly took the anomalous soil sampling and scan speed issues into account when issuing positive CPARS Final evaluations." (Compl. ¶¶ 40-43)

5. In November 2012, Tetra Tech submitted an Investigation Report to the Navy and the Nuclear Regulatory Commission (NRC),

> [S]ummarizing the investigation of the soil sampling issue and corrective actions taken. After review and revision by the Navy, T[etra Tech] submitted a Final Report in April 2014, which incorporated the comments provided by the Navy. In addition, the Navy and Tetra Tech continued their investigation, identifying 11 additional soil survey units for further evaluation. T[etra Tech] submitted several reports to the Navy describing this review. T[etra Tech] continued to implement corrective actions and remedial measures in coordination with the Navy.

A total of 30 soil survey units were ultimately investigated and remediated, where necessary. (Compl. ¶ 44)

6. The NRC conducted an investigation to determine whether Tetra Tech employees deliberately falsified soil sample surveys. "The NRC identified two former site workers who had been involved in sampling misconduct – a Radiation Control Technician (RCT) and a Radiation Task Supervisor (RTS)." The NRC found that the RCT and RTS deviated from established procedures. "On July 28, 2016, the NRC concluded that the misconduct was limited to the RCT and RTS, and did not involve

T[etra Tech] management. The final NRC Confirmatory Order, dated October 11, 2016, states that there were no subsequent violations by T[etra Tech] employees after June 4, 2012. T[etra Tech]'s NRC license remains in good standing, and was recently renewed for five years." (Compl. ¶¶ 45-46)

7. In late 2012, Tetra Tech's review of its data identified alpha radiological scans conducted in several buildings at HPNS that had exceeded the 1.37 cm/s guideline set forth in work plans for radiological Final Status Surveys (FSS) at some of the HPNS building sites. Tetra Tech reported this issue to the Navy. Tetra Tech conducted an analysis of the data and determined that it was compliant with the MARSSIM industry standard, and that the applied scan rate was more than adequate to support unrestricted release of the buildings. (Compl. ¶¶ 49-50)

8. In December 2013,

> [T]he Navy confirmed this analysis by issuing alpha scan guidance that allowed an increase in scan speed from 1.37 cm/s to approximately 4 cm/s, so long as the number of discrete static measurements were proportional to the allowed release limit. In a NAVFAC[3] HPNS Scan Speed PowerPoint dated September 17, 2014, NAVFAC concluded that the alpha surveys as performed were acceptable.

(Compl. ¶ 51)

9. In 2013,

> [A]fter taking into account T[etra Tech]'s responses to the anomalous soil sampling and scan speed issues, the Navy's Assessing Official (AO) credited T[etra Tech] with positive 'Final' evaluations and ratings for its work at HPNS under CTOs 2 and 7. These were, by definition, final evaluations issued upon completion of the relevant CTO performance in accordance with Federal Acquisition Regulations (FAR) 42.1502 (issued 'at the time the work under a contract or order is completed'). The Navy also

[3] Naval Facilities Engineering Command.

> issued positive Interim evaluations to Tetra Tech for its work under CTOs 7 and 12.

(Compl. ¶¶ 55-65)

10. Under the terms of the RAD EMAC and the task orders and through the parties' course of dealing, "the Navy was to pursue unrestricted free release of the remediated areas from the California Department of Toxic Substances Control (DTSC), California Department of Public Health (CDPH), and U.S. Environmental Protection Agency (EPA)." In 2014 the "CDPH suspended the Radiological Unrestricted Release Recommendations (RURR) for 22 buildings . . . until the building scan data was validated." It was agreed that Tetra Tech would rescan portions of six buildings for validation purposes, which it did. (Compl. ¶¶ 32, 52-53)

11. On February 23, 2015,

> [T]he same [AO] that issued the preceding positive evaluations and ratings issued negative CPARS Addendum reports for CTOs 2 and 7. Three years later, on February 7, 2018, the AO issued an additional negative Addendum CPARS evaluation for CTO 2. On April 4, 2018, the AO issued two more negative Addendum evaluations, for CTOs 7 and 15, as well as a negative Final evaluation for CTO 12. Lastly, the AO issued a negative Final evaluation on January 16, 2019 for CTO 15, *after* the April 4, 2018 Addendum evaluation.

(Compl. ¶¶ 66-67) (Emphasis in original)

12. After the rescan, the Navy found that no rework was required and presented the rescan data to the regulatory agencies in April, 2016. CDPH recommended reinstating the RURR for 12 of the buildings with the remaining 10 buildings pending. (Compl. ¶ 53)

13. In March and May 2017, two of Tetra Tech's former employees pled guilty for their misconduct in connection with the soil sample issue (compl. ¶ 47; gov't mot., exs. A-B). Also in 2017 the Navy confirmed that "the new sampling and cleanup work was complete, [and] independent analysis of the final data confirmed that radiological contamination had, in fact, been cleaned up properly"[4] (compl. ¶ 48).

[4] Quotation marks and brackets in original.

14. In May 2018, CDPH re-suspended the RURR despite acknowledging the rescan data demonstrated none of the re-surveyed buildings exceeded the radiological screening criteria (compl. ¶ 54).

15. In October 2019, Tetra Tech submitted two claims to the contracting officer requesting final decisions. In December 2019, the contracting officer advised Tetra Tech, that she lacked authority to issue the requested decisions "because the Contract Disputes Act (CDA), at 41 U.S.C. §7103(c)(1), provides that a contracting officer has no authority to settle, compromise, pay, or otherwise adjust any claim involving fraud." The contracting officer noted that litigation alleging violations of the False Claims Act, 31 U.S.C. §§ 3729-33, arising from Tetra Tech's radiological remediation work at HPNS was pending. (Gov't mot., exs. C-D) The government alleges Tetra Tech committed breaches of contract "by falsifying soil samples, falsifying building scan data and failing to perform full, complete and accurate investigations of radiological contamination" (gov't mot., ex. C ¶ 102).

16. Tetra Tech asserts the Navy violated the FAR concerning performance evaluations by being based upon something other than objective facts that reflect how it performed as required by FAR 42.1503(b)(1) and by failing to provide required Reviewing Official (RO) action. Tetra Tech alleges the **[R E D A C T E D]** evaluations include numerous, significant factual misstatements, and appear to have been written by someone other than the AO and were "inaccurate, unfair, arbitrary and capricious." (Compl. ¶¶ 68-108, 110, 120, 126, 129, 134, 138, 144, 155, 165-67, 174, 176, 180, 182, 190-93, 199, 207, 215, 222)

17. The complaint in ASBCA No. 62449 includes 12 counts: including two counts asserting the **[R E D A C T E D]** evaluations are based on unreasonable interpretations of the contract's requirements, two counts asserting the Navy irrationally reversed prior positions, one count that the **[REDACTED]** evaluations are based on unproven allegations rather than objective facts, one count that the **[REDACTED]** evaluations fail to reflect the AO's independent judgment, one count that the Navy violated FAR 42.1503(g), one count that the Navy improperly used addendum evaluations, one count that the Navy violated FAR 42.1503(b)(2) by misusing cost control as an evaluation factor, one count that the Navy violated FAR 42.1503(b)(2)(v) by misusing the Small Business Subcontracting factor in the **[REDACTED]** evaluations, one count that the Navy failed to provide for review above the contracting officer level in violation of FAR 42.1503(d) and one count that the Navy violated the duty to act in good faith and fair dealing. (Compl. ¶¶ 188-222) The complaint in ASBCA No. 62450 comprises six similar counts asserting violations of FAR 42.1503, a lack of good faith and fair dealing, and inaccurate, unfair, arbitrary and capricious performance evaluations (ASBCA No. 62450, compl. ¶¶ 94-171).

DECISION

Standard of Review for a Motion to Dismiss

The party invoking the Board's jurisdiction, appellant, Tetra Tech, in this instance, bears the burden of establishing it. *General Mills, Inc. v. United States*, 957 F.3d 1275, 1284 (Fed. Cir. 2020). Tetra Tech must do so by a preponderance of the evidence. *Reynolds v. Army & Air Force Exch. Serv.*, 846 F.2d 746, 748 (Fed. Cir. 1988). When deciding a motion to dismiss for lack of subject matter jurisdiction, we accept as true all undisputed facts in the complaint and draw all reasonable inferences in favor of the non-moving party. *Estes Exp. Lines. v. United States*, 739 F.3d 689, 692 (Fed. Cir. 2014); *see Cedars-Sinai Med. Ctr. v. Watkins*, 11 F.3d 1573, 1583-84 (Fed. Cir. 1993). Appellant, however cannot rely merely on allegations in the complaint, but must instead bring forth relevant, competent proof to establish jurisdiction. *Reynolds,* 846 F.2d at 748. We may also "look beyond the pleadings and 'inquire into jurisdictional facts'" to determine whether jurisdiction exists. *Environmental Safety Consultants, Inc.*, ASBCA No. 54615, 07-1 BCA ¶ 33,483 at 165,979 (citing *Rocovich v. United States*, 933 F.2d 991, 993 (Fed. Cir. 1991)). The facts supporting jurisdiction are subject to fact-finding by the Board based on our review of the record. *CCIE & Co.*, ASBCA Nos. 58355, 59008, 14-1 BCA ¶ 35,700 at 174,816 (citing *Raytheon Missile Sys.*, ASBCA 58011, 13 BCA ¶ 35,241 at 173,016).

Allegations of Fraud Do Not Necessarily Deprive The Board Of Jurisdiction

The Navy argues we lack jurisdiction over these appeals because the contracting officer had no authority to decide Tetra Tech's claims which (it alleges) cannot be separated from its fraud. It cites *Daff v. United States*, 78 F.3d 1566 (Fed. Cir. 1996) and the CDA at 41 U.S.C. §7103(c)(1) in support of this view.[5] (Gov't mot. at 1, 4-5) Moreover, argues the Navy, there can be no deemed denial of a claim when a contracting officer is divested of authority to issue a final decision (gov't mot. at 7 (citing the Civilian Board's decision in *Savannah River Nuclear Solutions v. Department of Energy*, CBCA No. 17-1 BCA ¶ 36,749)). The Federal Circuit, has held that jurisdiction under the CDA requires "both a valid claim and a contracting officer's final decision on that claim." *M. Maropakis Carpentry, Inc. v. United States*, 609 F.3d 1323, 1327 (Fed. Cir. 2010) (citing *James M. Ellett Constr. Co. v. United States*, 93 F.3d 1537, 1541-42 (Fed. Cir. 1996)).

But the Navy paints with too broad a brush, because we can consider claims when there are allegations of fraud in the contract, so long as there are not allegations of fraud in the claim, itself, and we need not make factual findings of fraud. As we

recently stated in *Mountain Movers/Ainsworth-Benning, LLC*, ASBCA No. 62164, 20-1 BCA ¶ 37,664 at 182,867 (citing *Joseph Morton Co. v. United States*, 757 F.2d 1273 (Fed. Cir. 1985)), the CDA jurisdictional prohibition applies to fraud related to the claim and does not apply to fraud believed to be involved somewhere else, in the formation or performance of the contract.

"We have often held we have jurisdiction over appeals involving allegations of fraud so long as we are not required to make factual determinations of fraud." *GSC Construction, Inc*., ASBCA No. 62530, 21-1 BCA ¶ 37,809 at 183,618 (citing *ESA South, Inc*., ASBCA Nos. 62242, 62243, 20-1 BCA ¶ 37,647 at 182,772). The facts in this appeal resemble those of our recent decision in *ESA*. In that appeal, the contracting officer also refused to issue a final decision on the basis of fraud suspected elsewhere in the performance of the contract. Although, *ESA* involved an appeal filed prior to the contractor officer's assertion that fraud was involved in the contract and this appeal was filed after the contracting officer identified fraud as the basis for failing to issue a final decision, we find this to not be a material distinction. So long as the suspected fraud is not intertwined with the basis for the claim and we are not required to make factual determinations of fraud, the contracting officer's assertion that he or she lacks authority to issue a final decision does not act to divest us of jurisdiction. *See ESA,* 20-1 BCA ¶ 37,647 at 182,772. In this appeal the alleged fraud, falsifying sampling and survey results, should not be an issue in determining whether the Navy complied with the contract requirements and regulations concerning performance evaluations. For these reasons we find *Savanah River* inapplicable in the circumstances of this appeal.

Although the Navy argues the claims cannot be separated from the fraud, we disagree because the issues raised in the complaints only concern whether the Navy properly complied with performance evaluations procedures. This does not appear to require any fraud related findings and the Navy has not established that it would. An exception possibly exists with respect to Count V in ASBCA No. 62449 and Count I in ASBCA No. 62450.

These two remaining counts potentially touch upon fraud because the complaints allege the Navy based its evaluation on unproven allegations rather than objective facts. The allegations in these two counts refer to the Navy's allegedly unproven allegations of fraud, including, "confirmed falsification," "alleged falsification," "data manipulation" and "wide-spread data falsification." The allegations in the complaints are not specific enough and the record currently before us does not include enough information to determine whether we will be required to make findings of fraud in deciding the merits of these counts. While it may turn out that is indeed the case, it is not possible to know that at this time. Giving Tetra Tech the benefit of all of the inferences it is entitled to as the non-moving party, we permit these counts to go forward to a hearing. It is possible after receiving all of the

evidence we will discover that deciding these two counts would require that we make determinations of fraud. If such is the case, we would then rule that we have no jurisdiction to decide these counts. The remaining counts do not require that we make determinations involving fraud to decide their merits.

Other Arguments

The Navy also argues Tetra Tech lacks standing unless it can establish that the evaluations would have been different but for the purported errors made in the evaluations, citing *PROTEC GmbH*, 19-1 BCA ¶ 37,362 and *GSC Constr.*, *Inc.*, 14-1 BCA ¶ 35,714 (gov't mot. at 6-7). Both *Protech GmbH* and *GSC* are factually distinguishable from the instant appeals. They involved situations where the contractor was challenging alleged procedural improprieties but failed to offer evidence that the procedural violations had any adverse impact on the ratings set forth in the violations. In these appeals, allegations have been made that the evaluations were initially acceptable and later changed. Accordingly, Tetra Tech may be able to establish the evaluations would have been different but for the alleged procedural errors.

Finally, the Navy argues that if the appeals are permitted to proceed it will argue that Tetra Tech's conduct constituted a material breach of the contract, necessarily requiring the Board to make factual determinations of fraud. The Navy cites *Laguna Constr. Co. v. Carter*, 828 F.3d 1364 (Fed. Cir. 2016) (gov't mot. at 6). Although this issue is not ripe for decision because the government has not answered the complaint and actually asserted the affirmative defense of material breach, we note that in *Laguna Constr. Co*., ASBCA No. 58324, 14-1 BCA ¶ 35,748, which involved cross motions for summary judgment, we found for the government, ruling that Laguna had breached its duty under the contract to perform in good faith by accepting kickbacks from subcontractors, *i.e*. committing fraud. On appeal, Laguna argued the Board had no jurisdiction over the government's defense of fraud. The Federal Circuit affirmed our ruling, specifically holding that we had jurisdiction to consider the material breach affirmative defense as we did not have to make any factual findings of fraud, because we had relied on the criminal conviction of one of Laguna's senior executives. *Laguna Constr. Co.*, 828 F.3d at 1368-69. These are circumstances that appear to be somewhat similar to those in the instant appeals, wherein the Navy is relying on the guilty pleas of two of Tetra Tech's former employees. Accordingly, depending on how the issue is ultimately presented, if it in fact is presented, *Laguna* may support our having jurisdiction rather than support the proposition that we do not as the Navy argues.

Suspension of Proceedings Is Not Appropriate In The Circumstances

It is not unusual in parallel civil and criminal proceedings involving related matters for one forum to suspend its proceedings while litigation in the other forum proceeds. *Public Warehousing Company, K.S.C.*, ASBCA No. 58088, 17-1 BCA ¶ 36,589 at 178,208 (noting the Federal Circuit and its predecessor, the Court of Claims have generally been amenable to requests for a stay when there is a parallel criminal matter). We have suspended appeals, particularly when allegations of fraud have been made by the government in federal district court. *See Kellogg, Brown & Root*, ASBCA Nos. 57530, 58161, 13 BCA ¶ 35,243, *recon. den*. 13 BCA ¶ 35,379[6] (dismissal without prejudice initially granted, further dismissal denied); *Kaman Precision Products, Inc.*, *formerly dba Kaman Dayron, Inc*., ASBCA No. 56305 *et al.,* 10-2 BCA ¶ 34,499 (suspension partially granted).

Although suspension was not initially requested by the government in this appeal, the Board, out of concern for proceeding as efficiently as possible, asked the parties to provide briefing regarding whether it was appropriate in the circumstances to suspend the appeals. The Navy, in response to this order, moved to suspend the appeals for a period of three years, or until the district court litigation was concluded. The Navy's suspension motion alleged additional facts not included in its original motion to dismiss: that Tetra Tech had commenced suit against five contractors in connection with the response to Tetra Tech's falsification of data at the site, alleging they had been negligent and had made negligent misrepresentations in the course of their work. (Gov't mot. suspend at 2) The Navy argued the appeals should be suspended to avoid "needless duplication of effort, waste of judicial resources and potentially inconsistent rulings" (*id.* at 3). We have stated that "where the government seeks a stay pending the outcome of False Claims Act litigation, 'it must demonstrate a clear case of hardship or inequity in being required to go forward.'" *KBR 5*, 11-1 BCA ¶ 34,614 at 170,603 (citing *TRW Inc*., ASBCA Nos. 51172, 51530, 99-2 BCA ¶ 30,407 at 150,332).

With this standard in mind, in, *KBR 5*, 11-1 BCA ¶ 34,614 at 170,603-04, we discussed four factors we consider when considering whether to suspend an appeal pending resolution of a related matter pending in federal district court: (1) whether the facts, issues and witnesses in the two proceedings were similar; (2) whether the

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[6] We cite several *Kellogg, Brown & Root* decisions in this opinion. To avoid confusion, we adopt the following shorthanded citation methodology: *Kellogg, Brown & Root*, ASBCA Nos. 57530, 58161, 13 BCA ¶ 35,243, *recon. den*. BCA ¶ 35,379 (*KBR 1* and *2* respectively); *Kellogg, Brown & Root*, ASBCA Nos. 57530, 58161, 16-1 BCA ¶ 36,449, *recon. den.* 16-1 BCA ¶ 36,554 (*KBR 3* and *4* respectively); *Kellogg Brown & Root Services*, ASBCA Nos. 56358, 57151, 11-1 BCA ¶ 34,614 (*KBR 5*)

parallel matter would be compromised by permitting the appeal to proceed; (3) whether the non-movant would be harmed by delaying the appeal; and (4) whether the delay sought was reasonable. *See also KBR 3*, 16-1 BCA ¶ 36,449 at 177,638. We address them below.

1. *Similarity of the Matters*. The Navy asserts the district court action involves identical facts and witnesses. It also asserts that Tetra Tech can be expected to challenge the work done by Navy contractors retained to respond to Tetra Tech's alleged fraud, which is the subject of the litigation filed by Tetra Tech shortly after the Navy filed its motion to dismiss (gov't mot. suspend at 4-5). These are merely speculative allegations. The Navy does not identify who the anticipated witnesses in the actions are likely to be, or demonstrate how their testimony is likely to be identical. On the surface, there does not appear to be similarity involved. The appeals before us challenge whether the Navy has conformed to the contract's and the FAR's requirements regarding performance evaluations. This requires us to compare the Navy's actions to the contract's requirements. That Tetra Tech may have committed fraud performing the contract has no bearing on this issue. Although the Navy argues we will be required to determine whether Tetra Tech committed fraud, with the exception of the two counts discussed above, we find no evidence or reason this would be true. Accordingly, we find there is little or no similarity between the two matters. We decline to suspend these appeals, involving 18 counts because two of the counts could possibly involve some similarity with the pending fraud litigation in the federal court in the absence of specific evidence of the purported similarity.

2. *Compromise of the Parallel Matter*. The Navy argues that, in the appeals before us, Tetra Tech can be expected to challenge work done by the Navy's contractors responding to Tetra Tech's fraud, which is the subject of the litigation Tetra Tech initiated subsequent to the Navy's filing of its motion to dismiss. The Navy notes that Tetra Tech itself has argued the matters are similar. (*Id.*) The Navy's argument ignores that Tetra Tech made this argument with respect to the False Claim Act litigation initiated by the government and the litigation Tetra Tech initiated against the Navy's contractors pursuant to Tetra Tech's moving to consolidate the litigation pending in the federal district court. Tetra Tech has not made this argument with respect to the issues raised in these appeals. There may very well be overlapping issues in the district court cases and good reason for consolidating them, but the Navy has provided no evidence here, only speculative allegations, of overlapping issues with the cases before the Board that could interfere with the district court cases. *See KBR 5*, 11-1 BCA ¶ 34,614 at 170,604.

3. *Harm To Tetra Tech*. The Navy argues Tetra Tech will not be harmed by suspension because the only alternative is dismissal for lack of jurisdiction. It otherwise fails to address the issue of harm to Tetra Tech. As discussed above, we disagree that we lack jurisdiction to consider the appeals. Tetra Tech argues a lengthy

suspension directly infringes on its statutory right to the expeditious resolution of its appeals citing *BAE Sys. Tactical Vehicle Sys., L.P.*, ASBCA Nos. 59491 *et al*., 16-1 BCA ¶ 36,450 and *Todd Shipyards Corp*., ASBCA No. 31092, 88-1 BCA ¶ 20,509 (app. resp. to gov't mot. suspend at 9-11). Tetra Tech further argues denial of its statutory rights constitutes material prejudice, citing *Gen. Dynamics Ordnance & Tactical Sys., Inc.*, ASBCA No. 56870, 10-2 BCA ¶ 34,525. We find Tetra Tech has demonstrated that it would be prejudiced by a suspension of the length, a minimum of three years, sought by the Navy.

4. *Reasonableness Of Attendant Delay*. The Navy moves to suspend the appeals for three years, "or until resolution of the [d]istrict [c]ourt proceedings" (gov't mot. suspend at 1). To support the three-year period the Navy relies on our decisions in *Public Warehousing Co*., ASBCA No. 58078, 14-1 BCA ¶ 35,574 and *KBR 1*, arguing that because we granted three-year suspensions in those appeals it is reasonable to do so here (*id.* at 6). First, we note that those appeals involved finite suspensions of three years. Here, because the Navy has asked for three years *or until the district court litigation is concluded*, it effectively moves to suspend the appeals indefinitely. While it is possible the district court cases could be resolved within three years, we agree with Tetra Tech that the complexity of the issues raised by the cases raises the likelihood that their resolution will require more than three years. Second, both *Public Warehousing* and *KBR1* were decided pursuant to former Board Rule 30, which specifically provided for three year suspensions. Since those appeals were decided we have revised our rules and current Rule 18, which corresponds to former Rule 30, now contemplates a one-year period. Most importantly though, the Navy is seeking what is essentially an indefinite suspension and has failed to provide any basis for a stay, much less a pressing need. *See KBR 3* at 177,638 (citing *Landis v. North Am. Co*., 299 U.S. 248, 255 (1936)). In the circumstances we find this to be an entirely unreasonable delay.

Finally, we note that in addition to the four factors discussed above, we have the discretion to suspend appeals, when a party can establish it would be prejudiced if an appeal were to proceed. *See TRW Inc*., 99-2 BCA ¶ 30,407 at 150,332. In that appeal, despite asserting that facts necessary to decide the appeals were intricately intertwined, or identical to those in the fraud matter pending in the district court, we declined to suspend the appeal, finding the issues in the appeal and the court litigation were not identical and that the government had failed to otherwise demonstrate how it might be prejudiced and that *TRW* had shown that a stay of the appeal would be prejudicial to it. In these appeals, the Navy has not established that it would be prejudiced if we permit the appeals to go forward. Consideration of the four factors in the circumstances of these appeals together with the lack of any evidence the Navy might be prejudiced if the appeals are permitted to proceed, weigh in favor of denying the motion to suspend.

With its response to the Navy's motion to suspend, Tetra Tech moved to strike the portions of the Navy's motion that relied upon jurisdictional arguments. Having denied the Navy's motion to suspend we need not address this issue.

CONCLUSION

On the record before us we find that the issues raised in the appeals will not necessarily require that we make findings of fraud. For the reasons discussed above, we deny the government's motion to dismiss. We also find that the circumstances do not merit suspending the appeals and therefore also deny the motion to suspend the appeals. Having denied the Navy's motions there is no reason the appeals should not proceed and therefore Tetra Tech's motion to compel the production of the Rule 4 file (which the Navy opposed solely on the grounds that we lacked jurisdiction over the appeal) is granted. The Navy is directed to file the answer and the Rule 4 file within 30 days of receipt of this decision.

Dated: June 8, 2021

CHRISTOPHER M. MCNULTY
Administrative Judge
Armed Services Board
of Contract Appeals

I concur

RICHARD SHACKLEFORD
Administrative Judge
Acting Chairman
Armed Services Board
of Contract Appeals

I concur

J. REID PROUTY
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. 62449, 62450, Appeals of Tetra Tech EC, Inc., rendered in conformance with the Board's Charter.

Dated: June 11, 2021

PAULLA K. GATES-LEWIS
Recorder, Armed Services
Board of Contract Appeals