ARMED SERVICES BOARD OF CONTRACT APPEALS

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| Appeals of -- | ) | |
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| Kellogg Brown & Root Services, Inc. | ) | ASBCA Nos. 57530, 58161 |
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| Under Contract No. DAAA09-02-D-0007 | ) | |

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OPINION BY ADMINISTRATIVE JUDGE DELMAN ON THE GOVERNMENT'S MOTION TO SUSPEND OR DISMISS

In these appeals, Kellogg Brown & Root Services, Inc. (KBR or appellant) challenges the government's disallowance of certain subcontract settlement costs incurred by KBR that were billed to the government under Task Order 0059 of the captioned contract. These costs were incurred by virtue of KBR's settlement of two Requests for Equitable Adjustment (REAs) submitted by subcontractor First Kuwaiti

Trading Company (First Kuwaiti).[1] We have jurisdiction under the Contract Disputes Act (CDA), 41 U.S.C. §§ 7101 -7109.

ASBCA No. 57530 was docketed in February, 2011. ASBCA No. 58161 was docketed in June, 2012. Based upon the input of the parties, the Board issued a pretrial order governing discovery and set the appeals for trial on 11 February 2013.[2]

On 19 November 2012, the United States filed suit in U.S. District Court for the Central District of Illinois against KBR and First Kuwaiti, alleging, *inter alia*, that the REAs and the related settlement costs billed to the United States and claimed by KBR were knowingly inflated and false and violated the False Claims Act (FCA), 31 U.S.C. § 3729, and the CDA, 41 U.S.C. § 7103(c)(2). On 23 November 2012, the Board received the "Government's Motion to Suspend or Dismiss These Appeals" until resolution of the FCA action in federal district court. The government's motion was supported by among other things, a letter from the Acting Director, Commercial Litigation Branch, Department of Justice. Appellant has filed in opposition to the government's motion and the government has filed a reply.

We recently cited the criteria that guide us when addressing a motion of this nature. *Kellogg Brown & Root Services,* 11-1 BCA ¶ 34,614 at 170,603:

> We have said 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." The cases reflect that we generally consider four principal factors in weighing a stay request. Those factors are: "(1) whether the facts, issues, and witnesses in both proceedings are substantially similar; (2) whether the on-going investigations [or parallel proceedings] would be compromised in going forward with [our] case; (3) whether the proposed stay could harm the non-moving party; and (4) whether the duration of the requested stay is reasonable." We have also considered

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[1] The settlement costs, in the amount of roughly $48,754,547 plus burden, were billed to and originally paid by the government. Subsequently, DCAA disapproved these costs (R4, tab 13), a contracting officer (CO) issued an interim determination allowing roughly half of the settlement amount (R4, tab 17), but a later CO overruled that interim determination (R4, tab 20). KBR's certified claim, dated 4 November 2010, claims that all settlement costs, plus interest, are allowable and reimbursable (R4, tab 30 at G-000354).

[2] The Board cancelled the hearing by orders dated 29 and 31 January 2013.

judicial efficiency in evaluating stay motions.
[Citations omitted]

We address these factors below.

We find that there is a substantial similarity of facts, issues and witnesses in these parallel proceedings. Indeed, it is the same REAs underlying our appeals that are alleged to be false under the FCA. While this fact does not necessarily oust us from jurisdiction under the CDA, *see Anlagen-und Sanierungstechnik GmbH*, ASBCA No. 37878, 91-3 BCA ¶ 24,128 at 120,753, it is inevitable that in addressing the reasonableness of KBR's settlement of these REAs we will be considering evidence related to the merits of the REAs and finding facts that are also part of the government's claim of REA fraud. The legal issues before us are somewhat more limited than those before the federal district court, but where that evidentiary line would be drawn at a trial at the Board is not altogether clear, and this would likely result in unnecessary confusion. In addition, having the court and Board proceed in tandem would serve to materially prejudice both KBR and the government by virtue of the additional time and resources that would be required to litigate in both forums concurrently and by virtue of the likely confusion that would result from the concurrent litigation of common issues.

We believe that a dismissal without prejudice will not work damage to, or prejudice appellant with respect to the money it seeks to recover in these appeals. If we were to proceed at the Board and KBR was to prevail on the merits, it is unlikely that the government would pay the disputed claim amounts to appellant. Rather, it is likely that certain fraud issues would remain open after our decision, and the agency would be prohibited from paying the claim under the CDA, *see* 41 U.S.C. § 7103(c)(1), pending resolution of the FCA action. In addition, since the issues before the Board are more limited than those before the federal district court, any Board findings on less than a complete record may have the effect of compromising the government's efforts in the FCA action.

On the other hand, since First Kuwaiti and KBR are before the court as parties, unlike at the Board, the parties in the FCA action will be able to develop a full and complete record with respect to the REAs and how they were prepared, submitted and settled. Under such circumstances there is a greater chance that resolution of the FCA action will resolve all outstanding issues. It follows that the interests of judicial economy and comity point towards allowing the FCA action to proceed without a parallel Board proceeding. We also believe that a dismissal without prejudice, subject to reinstatement within three years under Board Rule 30, allows a reasonable period of time for the resolution of the FCA action and all related matters.

We have the inherent authority and discretion to manage our docket and to stay, suspend or dismiss appeals without prejudice in appropriate circumstances, applying our

judgment to weigh the competing interests of the parties and assess any prejudice. *See KiSKA Construction Corp.-USA and Kajima Engineering and Construction, Inc., A Joint Venture*, ASBCA Nos. 54613, 54614, 05-1 BCA ¶ 32,922 at 163,082. In so doing, we are mindful of our statutory mandate to provide informal, expeditious and inexpensive resolution of disputes "to the fullest extent practicable." CDA, 41 U.S.C. § 7105(g). Under the circumstances presented here and having duly considered and weighed the factors prescribed by our case law, we conclude that the most expeditious and inexpensive road to the final resolution of this dispute goes through the federal district court. We have considered appellant's arguments and its cited cases, but they are distinguishable from the facts before us.

CONCLUSION

For reasons stated, we hereby exercise our discretion to dismiss these appeals without prejudice under Board Rule 30, subject to reinstatement if necessary within three years from the date of this decision. If the appeals are not reinstated within that time period, they will be deemed to be dismissed with prejudice. The government's motion is granted consistent with this opinion.

Dated: 20 February 2013

JACK DELMAN
Administrative Judge
Armed Services Board
of Contract Appeals

I concur

MARK N. STEMPLER
Administrative Judge
Acting Chairman
Armed Services Board
of Contract Appeals

I concur

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. 57530, 58161, Appeals of Kellogg Brown & Root Services, Inc., rendered in conformance with the Board's Charter.

Dated:

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