ARMED SERVICES BOARD OF CONTRACT APPEALS

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

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OPINION BY ADMINISTRATIVE JUDGE DELMAN ON APPELLANT'S MOTION FOR RECONSIDERATION OF BOARD'S ORDER OF DISMISSAL WITHOUT PREJUDICE

Kellogg Brown & Root Services, Inc. (appellant or KBR) has filed a timely motion for reconsideration of our decision in *Kellogg Brown & Root Services, Inc.*, ASBCA Nos. 57530, 58161, 13 BCA ¶ 35,243, which dismissed these appeals without

prejudice under Board Rule 30 pending resolution of a False Claims Act (FCA) suit.[1] The government opposes reconsideration. Familiarity with our decision is presumed.[2]

Standard of Review

It is well settled that a motion for reconsideration must be based upon newly discovered evidence or error in fact-finding or law. *Bruce E. Zoeller*, ASBCA No. 56578, 11-1 BCA ¶ 34,720; *Robinson Quality Constructors*, ASBCA No. 55784, 09-2 BCA ¶ 34,171; *Zulco International, Inc.*, ASBCA No. 55441, 08-1 BCA ¶ 33,799. A motion for reconsideration that restates arguments previously raised and considered by the Board will be denied. *Bruce E. Zoeller*, 11-1 BCA ¶ 34,720 at 170,959. Based upon these legal principles, we address appellant's contentions below.

Burden of Proof

Appellant contends that the Board committed legal error by failing to apply the proper burden of proof and governing legal principles in analyzing the government's motion. We do not agree.

The Board cited *Kellogg Brown & Root Services, Inc.*, ASBCA Nos. 56358, 57151, 11-1 BCA ¶ 34,614 (*KBR I*) for the factors to consider when addressing a government motion to stay or dismiss without prejudice in the face of a FCA suit. Appellant does not suggest any different standard. In reaching our conclusion, while we did not expressly state that the government "met its burden of proof under *KBR I*," such language is not required. Rather, we concluded that we were persuaded by the circumstances presented, and this conclusion perforce was a conclusion that the government's burden was met. We reiterate here that the government has met its burden of proof on this record under *KBR I*, and we add the following to support this conclusion.

While the *KBR I* factors guide us when assessing a government motion to suspend, stay or dismiss an appeal without prejudice in the face of a FCA suit, we do not read *KBR I* to compel the Board to weigh each of the cited factors equally. In the exercise of our discretion we may give the relevant factors such weight as the facts dictate and as the circumstances warrant.

Here, we find particularly compelling that appellant's certified claim before us is the very same claim alleged to be a false or fraudulent in the FCA suit. The government alleges in the FCA action that the sum appellant seeks to recover, based upon its payment

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[1] Judge Eunice W. Thomas, Vice Chairman, who participated in the Board's decision, has retired.

[2] Appellant has requested that its motion be referred to the Senior Deciding Group. The Chairman has reviewed the matter, and has denied appellant's request.

of the subcontractor REAs, was knowingly false or fraudulent. Although the legal issues before the Board and court are different, the transactional facts are virtually identical. As we stated, given the commonality of the facts and the differing legal standards, there would likely be confusion at the Board as what evidence may be tendered at the Board and for what purpose.

In addition, the proponent of the REAs, First Kuwaiti, is a foreign subcontractor that is not a party before the Board, nor are its REAs before us as part of a contractor-sponsored claim. We obviously do not enjoy the same ability to require compliance with our orders for non-parties, particularly where the non-party is a foreign corporation, as we do with a party-claimant. Given the different postures of the two cases, this would work a hardship or inequity on the government's case before this Board, as compared to before the court. In the FCA action, First Kuwaiti is a party defendant, the legal issues are different and the court will have more tools available than the Board to enforce its orders against a party litigant.

Appellant has demonstrated no legal error in this regard.

Board Precedent

Appellant contends that the Board's decision to grant the government's motion contradicts Board precedent. We do not agree. As we stated in our opinion, the facts of the cases cited by appellant are readily distinguishable.

In *KBR I*, the Board denied a government motion for an indefinite stay of Board appeals in the face of an FCA suit. Under ASBCA No. 56358, the contractor sought recovery of subcontractor costs for private armed security. Under ASBCA No. 57151, KBR sought recovery for its own private armed security costs.

The Board, after assessing the relevant facts, concluded that there was only "limited similarity" between the facts at the Board and the court case. The Board noted that under ASBCA No. 56358, the FCA suit factually had a "much wider scope" than the Board appeal, embracing more than 30 of KBR's other subcontractors, and the record contained "no compelling reason" to "requir[e] KBR to stand aside and wait in these appeals while the district court adjudicates the merits of the government's allegations regarding 'more than 30 of KBR's other subcontractors.'" *KBR I*, 11-1 BCA ¶ 34,614 at 170,603. Similarly, with respect to ASBCA No. 57151, the Board stated that the relevant factual allegations under this appeal only "comprise a minor portion of the allegations regarding KBR in the district court complaint" (*id.*).

The factual differences between *KBR I* and our case are obvious. Compared to the limited similarity between the Board and FCA suits there, we have found that the

transactional facts at issue here between the Board and FCA actions are virtually identical. *KBR I* does not require us to reverse our decision.

In *TRW, Inc.*, ASBCA Nos. 51172, 51530, 99-2 BCA ¶ 30,407 (*TRW*), the Board denied the government's motion to stay Board proceedings in which the contractor sought interpretation of contract terms and cost principles regarding the allocability and allowability of certain indirect costs in the face of parallel FCA litigation. The Board weighed the facts appropriate to the case, concluding, *inter alia*, that the fact issues in the Board and court proceedings were not identical; that the government failed to demonstrate any prejudice; and that appellant showed that a lack of prompt resolution would negatively impact its treatment of these costs on numerous other contracts in various cost accounting periods. On the other hand, we have concluded here that the transactional facts in the two forums are virtually identical; that the record supports prejudice to the government; and that appellant has not shown any harm (*see below*). *TRW* also does not require us to reverse our decision.

Appellant has shown no legal error in this regard.

Whether the Board Failed to Consider Harm to Appellant

Appellant contends that the Board committed legal error by failing to consider whether a suspension would harm appellant. Appellant is not correct. The Board considered the element of damage or harm to appellant in its opinion. *KBR*, 13 BCA ¶ 35,243 at 173,021. That appellant may disagree with the Board's conclusion is not a basis for granting a motion for reconsideration.

Judicial Economy and Case Administration

Appellant claims legal error insofar as the Board's consideration of judicial economy was inconsistent with its administration of the appeals in the weeks leading up to the trial date. We do not agree.

It is true that there was a flurry of activity in these appeals in the weeks prior to the trial date. However that activity was driven by the parties, not by the Board. As appellant is well aware, discovery at the Board in the first instance is voluntary and consensual. The Board only gets involved in discovery matters when the parties do not cooperate, and a party seeks the Board's assistance. The Board's assistance was sought here, and it was sought late in the discovery period.

Accordingly, the reason why the parties had to "scramble" (appellant's term) to take multiple depositions in January, 2013 was because the government moved for an Order on Depositions on 5 December 2012 (which the Board granted on 19 December). In fact, this motion was based on appellant's refusal to provide contact information for a

number of the proposed deponents. Appellant will also remember that it was briefing the subject motion to suspend or dismiss the appeals in December 2012, concurrent with this deposition dispute.

Also included in this flurry of activity was the government's 14 January 2013 motion to revise the pretrial schedule and postpone the hearing date and appellant's opposition dated 22 January 2013, which motion the Board denied on 25 January 2013. The Board denied this motion based upon the grounds asserted by the government, i.e., that the government had insufficient time to prepare for trial. The Board's ruling had nothing to do with the FCA action. Given that the parties presented their motions and arguments to the Board on the eve of trial, it is not at all surprising that the Board's decisions were issued on the eve of trial.

Appellant also obscures the differences between discovery rulings and opinions issued by the Board. The former are issued by a single judge and may be issued relatively quickly; the latter are issued by a Board panel and take additional time and require additional consensus.

In sum, appellant's argument that the Board "requir[ed] both parties to undergo a Herculean effort to complete discovery" only to later "reverse course" (app. mot. at 11) is an unfair characterization, and fails to recognize that the parties were responsible for the compression of the schedule in the weeks prior to the trial date. Appellant has demonstrated no legal error in this regard.

With respect to other considerations of judicial economy by the Board, appellant contends that the Board committed legal error by concluding that the federal district court has jurisdiction to issue judgment on KBR's affirmative monetary claim under the Contract Disputes Act (CDA), 41 U.S.C. §§ 7101-7109. Appellant is incorrect. The Board did not conclude that the court has jurisdiction to issue judgment on KBR's affirmative monetary claim under the CDA. Rather, the Board noted that since the relevant parties and facts will be before the court the parties "will be able to develop a full and complete record with respect to the REAs and how they were prepared, submitted and settled" under which circumstances "there is a greater chance that resolution of the FCA action will resolve all outstanding issues." *KBR*, 13 BCA ¶ 35,243 at 173,021. For example, if the parties resolve the FCA action through settlement, there is a greater chance that the settlement will address the value of the REAs and the allowability of the costs under the contract so as to resolve the CDA claims. If the parties go to trial in the FCA action and the court finds that KBR acted properly in evaluating and/or paying on the REAs, there is a greater chance that such a finding will also resolve these CDA claims. On the other hand if the court finds that KBR committed fraud in the submission of the invoiced REA payments to the government, there is a greater chance that such a finding will also resolve the CDA claims.

Appellant has not demonstrated any legal error in this regard.

Concurrent Litigation

Appellant contends that the Board committed error in granting the government's motion because there will be no overlap of discovery or trial between the two forums. However the Board did not state that there would be any such "overlap." Rather, the Board stated that with the suits proceeding in tandem it would be "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," and there would be "likely confusion that would result from the concurrent litigation of common issues." *KBR*, 13 BCA ¶ 35,243 at 173,020-21. The terms "in tandem" and "concurrent" were used to recognize the obvious nature of the parallel proceedings addressing common fact issues, and did not mean that the parallel proceedings were moving forward in lockstep. Appellant has shown no legal error in this regard.

Duration of Dismissal Without Prejudice

The Board dismissed this appeal without prejudice, subject to reinstatement within three years from date of decision. This three-year period is a maximum period. It is not a suspension of "indefinite duration" as appellant suggests. Indeed, by fixing this maximum period, the Board rejected the government's request for an indefinite suspension. To the extent this rejection was not expressly stated, we hereby expressly reject the government's request for indefinite suspension.

The Board's decision also made clear that reinstatement of these appeals need not await three years; reinstatement may be had within the three-year period if and when necessary. The Board will consider reinstatement at any time, based on motion from appellant citing any material change in circumstances.

The Board was also of the view that a three-year period "allows a reasonable period of time for the resolution of the FCA action." *KBR*, 13 BCA ¶ 35,243 at 173,021. With respect to published federal court statistics, we take judicial notice of Table C-5, "U.S. District Courts–Median Time Intervals From Filing to Disposition of Civil Cases Terminated, by District and Method of Disposition, During the 12-Month Period Ending December 31, 2012," which indicates that the median time interval from filing to trial decision in the Central District of Illinois was 32.3 months. *See http://www.uscourts.gov/statistics*. Given the parties' recognition that some additional time may be required in the FCA action attributable to First Kuwaiti being a foreign co-defendant, these statistics support the Board's assessment that a maximum suspension period of 36 months is reasonable. Of course, if the FCA action is resolved earlier, then reinstatement may be sought earlier at the Board if necessary.

Appellant has not demonstrated any legal error regarding the duration of this dismissal without prejudice.

CONCLUSION

We have considered appellant's remaining arguments but are unpersuaded that they require reversal of our decision. For reasons stated herein and in our earlier decision, we believe that the government has met its burden of proof and we affirm the dismissal of this appeal without prejudice under Board Rule 30 for a maximum period of 36 months from the date of the original decision.

Dated: 6 August 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 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