

ARMED SERVICES BOARD OF CONTRACT APPEALS

Appeal of -- )  
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Asahi General Trading & Cont. Co. W.L.L. ) ASBCA No. 62445  
)  
Under Contract No. 49065890 *et al.* )

APPEARANCE FOR THE APPELLANT: Fred T. Pribble, Esq.  
Valrico, FL

APPEARANCES FOR THE GOVERNMENT: Daniel K. Poling, Esq.  
DLA Chief Trial Attorney  
Robin E. Walters, Esq.  
Michael J. Kerrigan, Esq.  
Trial Attorneys  
DLA Disposition Services  
Battle Creek, MI

OPINION BY ADMINISTRATIVE JUDGE MELNICK DENYING THE  
GOVERNMENT’S MOTION TO DISQUALIFY APPELLANT’S COUNSEL

Asahi General Trading & Contracting Co. W.L.L. (Asahi) seeks compensation arising from an alleged settlement requiring the extension of the terms of a scrap removal agreement in Kuwait. Before we address jurisdictional or merits issues, the government requests that we disqualify Asahi’s counsel, who is a former General Counsel of the Defense Logistics Agency (DLA). The government contends Asahi’s counsel possesses confidential information that he would necessarily use to its disadvantage or disclose. We deny the motion.

STATEMENT OF FACTS FOR PURPOSES OF THE MOTION

I. Asahi’s Allegations

The following allegations are taken from the relevant claims and complaint.

In July of 2015, the Defense Logistics Agency, Disposition Services (DLA-DS or government) awarded Asahi related contracts for the removal of different types of scrap materials in Kuwait (the Kuwait contract). Then on February 12, 2016, DLA-DS issued related contracts for scrap removal in Qatar (the Qatar contract).<sup>1</sup> (Compl. ¶¶ 5, 7)

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<sup>1</sup> Presumably for ease of reference, the parties referred to each set of related contracts as a single contract.

On October 8, 2017, Asahi submitted a certified claim to the contracting officer for \$1,347,625 allegedly due under the Qatar contract. Among other things, Asahi claimed that, despite the government's promise that its defense cooperation agreement with Qatar authorized Asahi to purchase and resell scrap domestically, Qatar customs officials delayed and obstructed its removal, while also barring resale of some of the scrap within the country. Asahi suggested the government was contractually responsible for the customs officials' acts. Asahi also alleged that the government had previously encountered problems with Qatar's customs officials and did not disclose those facts. (R4, tab 11; compl. ¶ 7)

In July of 2018, the parties settled the Qatar contract claim. Asahi promised to withdraw the claim in return for an extension of the Kuwait contract's performance period (compl. ¶¶ 9-15). The parties agreed the new Kuwait extension would provide Asahi with sufficient business to cover its Qatar contract losses (compl. ¶¶ 11, 13). Later in July, the contracting officer notified Asahi that the Kuwait contract had not been extended because the settlement was not approved by government lawyers (compl. ¶ 16). In September of 2018, the parties resumed settlement discussions. At that time, the contracting officer's counsel refused Asahi's request for a three year extension of the Kuwait contract, countering with an offer of six months. The government assured Asahi that more than sufficient scrap would be generated to compensate Asahi for the Qatar claim. (Compl. ¶ 22) On September 20, 2018, the parties entered another settlement agreement. Again Asahi dropped its Qatar contract claim in return for a six month extension of the Kuwait contract. (Compl. ¶ 24)

The government did not provide Asahi with the volume of scrap Asahi expected during the Kuwait contract extension (compl. ¶ 27). In February of 2019, the government unilaterally extended the Kuwait contract again for four more months (compl. ¶ 28). Nevertheless, the volume of scrap remained below Asahi's expectations (compl. ¶ 30). Asahi requested a third extension of the Kuwait contract but that was denied. The government told Asahi that a new scrap contract for Kuwait would be awarded to another contractor, Royal Bridge International (RBI), in settlement of a claim brought by that company upon a Qatar scrap contract awarded to it in 2014. (Compl. ¶ 31)

On September 11, 2019, Asahi submitted another certified claim. This submittal renewed the original Qatar contract claim but also advanced a new claim that the government breached the July 2018 settlement promise to extend the Kuwait contract and provide the agreed volume of scrap. Additionally, Asahi contended that the subsequent September 20, 2018 settlement was null and void but should be reformed to a no cost transfer of scrap. Asahi demanded the \$1,347,625 it originally sought under the Qatar contract claim, plus additional costs. Alternatively, it requested reformation, disgorgement of payments, and other performance. (R4, tab 28; compl. ¶ 35) The contracting officer denied the claim on January 10, 2020 (R4, tab 31).

Asahi has appealed only the portion of the contracting officer's decision denying the new claim based upon the settlement.

## II. Asahi's Counsel

The parties do not dispute that Asahi's counsel, Mr. Fred T. Pribble, was the General Counsel of DLA from 2006 until his retirement on May 1, 2016. As General Counsel, he oversaw the activities of DLA's 140 attorneys, including those supporting DLA-DS (gov't mot. ex. B ("Malcom decl.") ¶¶ 4, 8; app. opp'n ¶ 38). He advised the Director of DLA regarding the agency's activities and missions (Malcom decl. ¶ 5). He participated in confidential discussions about numerous topics with the Chief Counsel of DLA's subordinate commands, including DLA-DS. Those conversations covered management, contract, and operations issues in Qatar and Kuwait. He also talked about personnel matters. (*Id.* ¶ 2) Additionally, Mr. Pribble received reports from DLA-DS and other confidential sources about disposition and customs activities in Qatar, as well as coordination with the United States military and Qatar government (*id.* ¶ 6). Mr. Pribble was knowledgeable about DLA processes and workings, legal and contracting offices, and about particular individuals (*id.* ¶ 7). Mr. Pribble had access to all DLA attorney performance evaluations between 2008-2010 (app. opp'n ¶ 37; gov't reply at 19-20). Prior to joining DLA, Mr. Pribble was the Staff Judge Advocate for the United States Central Command (CENTCOM) between 2003-2006 (app. opp'n ¶ 26). Between 1997-1999, he was a staff attorney at CENTCOM who advised in the effort to re-negotiate the defense cooperation agreement with Qatar (*id.* ¶ 27).

## DECISION

The government argues that Mr. Pribble is ethically barred from representing Asahi. It maintains that, while General Counsel of DLA, he gained extensive access to confidential information that he would use to the government's disadvantage. The government cites Mr. Pribble's awareness of agency practices and procedures, his receipt of reports about customs issues in Qatar, his knowledge of agency contracts and the agreement between the United States and Qatar, and his familiarity with the prior performance of the contracting officer's counsel. Relying upon Rules 1.9(c) and 1.11(a) of the American Bar Association (ABA) Model Rules of Professional Conduct (Model Rules), the government seeks the Board to disqualify Mr. Pribble from this appeal.

### I. Applicable Standards

The Board functions in a judicial capacity. *United States v. Utah Constr. & Mining Co.*, 384 U.S. 394, 422 (1966); *SWR, Inc.*, ASBCA No. 56708, 12-1 BCA ¶ 34,988 at 171,945. Inherent in that role is the discretion to regulate attorney conduct in order to control the Board's proceedings, protect its exercise of judicial authority,

and preserve the integrity of its process. See *In re Bailey*, 182 F.3d 860, 864 n.4 (Fed. Cir. 1999); *Kenosha Auto Transport Corp. v. United States*, 206 Ct. Cl. 888, 891 (1975); *Quantico Tactical Inc. v. United States*, 148 Fed. Cl. 440, 445 (2020); *Suffolk Constr. Co. v. GSA*, CBCA No. 2953, 17-1 BCA ¶ 36,717 at 178,797 (finding the board statutorily empowered to protect the integrity of its proceedings). Accordingly, the Board has entertained motions to disqualify counsel. See *AEC Corp.*, ASBCA No. 42920, 95-2 BCA ¶ 27,750. Although the Board’s rules have not expressly adopted a specific code of professional responsibility, the Model Rules provide a broadly accepted set of standards for the legal profession. Model Rules of Prof’l Conduct Preface (Am. Bar Ass’n 2020). Along with relevant case law, they provide a guide for considering a disqualification motion. *Quantico Tactical Inc. v. United States*, 148 Fed. Cl. at 445.

Model Rule 1.11(a)(1) provides, in relevant part, that a lawyer who previously served as a public officer or employee of the government “is subject to Rule 1.9(c).” Model Rules of Prof’l Conduct r. 1.11(a)(1).<sup>2</sup> Rule 1.9(c) states the following:

(c) A lawyer who has formerly represented a client in a matter . . . shall not thereafter:

(1) use information relating to the representation to the disadvantage of the former client except as these Rules would permit or require with respect to a client, or when the information has become generally known; or

(2) reveal information relating to the representation except as these Rules would permit or require with respect to a client.

Model Rules of Prof’l Conduct r. 1.9(c).

A 1997 formal opinion by the ABA elaborates upon Rule 1.9(c)’s applicability to former government lawyers. ABA Comm. on Ethics & Prof’l Responsibility, Formal Op. 97-409 (1997), Westlaw ABA Formal/Op. 97-409. It explains that, though not automatically disqualified because of prior government work, a former government lawyer wishing to represent a private client against his previous employer

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<sup>2</sup> Another part of the rule states that the lawyer “shall not otherwise represent a client in connection with a matter in which the lawyer participated personally and substantially as a public officer or employee” unless the government consents. Model Rules of Prof’l Conduct r. 1.11(a)(2). The government does not contend that Mr. Pribble has violated this part of the rule.

is generally prohibited from using to the government's disadvantage, or disclosing, information relating to his former representation. The question turns upon whether the information relating to the prior representation would "necessarily be used or revealed in a new client's cause." If zealous and competent representation of the new client would require such use or disclosure to the government's disadvantage, the lawyer may not undertake the new representation. Westlaw ABA Formal/Op. 97-409 at 7-9.

The moving party bears the burden of proving that we should disqualify counsel. *Quantico Tactical Inc. v. United States*, 148 Fed. Cl. at 445. Mere surmise is inadequate. See *H2O Plus, LLC v. Arch Personal Care Prods., L.P.*, No. 10-3089 (WJM), 2010 WL 4869096 at \*6 (D.N.J. Nov. 23, 2010). Instead, the government must show that there is a reasonable probability that confidential information will be used or disclosed by Mr. Pribble. See *Waterloo Capital Partners, LLC v. BWX Ltd.*, No. 18-CV-6542 (RA), 2020 WL 1489813 at \*2 (S.D.N.Y. March 27, 2020). We will decide the question based upon the established record and the parties' submissions. See *AEC Corp.*, 95-2 BCA ¶ 27,750 at 138,352.

We are reluctant to disqualify counsel because it is such a drastic act. It separates the client from his counsel of choice and is often sought for tactical reasons. See *Minn. Chippewa Tribe v. United States*, 991 F.2d 810 (Fed. Cir. 1993) (Table), available at 1993 WL 68052 at \*3 (quoting *Bd. of Educ. v. Nyquist*, 590 F.2d 1241, 1246 (2d Cir. 1979)); see also *United States v. Quest Diagnostics Inc.*, 734 F.3d 154, 166 (2d Cir. 2013) (explaining that because disqualification may impede the pursuit of meritorious litigation, remedies should be limited for ethical violations to those necessary to avoid tainting the trial); *Andersen v. Valley Cty.*, No. 1:16-cv-00554-CWD, 2017 WL 2311668 at \*3 (D. Idaho May 26, 2017) (stating that disqualification motions require particularly strict scrutiny because of the misuse of the process for tactical purposes and any remedy should assure fairness to the parties and the integrity of the judicial process); *Hulzebos v. City of Sioux Falls*, No. 13-4024, 2013 WL 5297152 at \*2 (D.S.D. Sept. 19, 2013) (noting disqualification is a drastic device that courts should hesitate to implement except when absolutely necessary); *H2O Plus, LLC v. Arch Personal Care Prods., L.P.*, No. 10-3089 (WJM-MF), 2011 WL 1078584 at \*3 (D.N.J. March 21, 2011) (stating that motions to disqualify are generally disfavored due to their drastic consequences and therefore the movant must meet a high standard of proof); *United States v. Philip Morris, Inc.*, 312 F.Supp.2d 27, 43-44 (D.D.C. 2004) (observing that disqualification is drastic and courts should hesitate to impose it except when absolutely necessary, noting that such motions must be scrutinized given their increasing use for strategic purposes). Mr. Pribble undoubtedly accessed a range of confidential information while General Counsel of DLA. Our task is to consider whether the government has satisfied its heavy burden of proving he possesses information that would necessarily be used or disclosed in this appeal, and that disqualification is absolutely necessary.

## II. Mr. Pribble's General Knowledge of DLA's Practices and Procedures

First, the government contends that Mr. Pribble should be disqualified because he generally possesses knowledge of DLA's contracting activities, as well as its litigation practices and procedures. It complains that knowledge would be used against it in both the discovery and trial phases of the appeal. That argument could be advanced against numerous former government attorneys handling cases involving their former agencies. However, the ABA has clarified that general knowledge of agency policies and practices are ordinarily not disqualifying under Rule 1.9(c). Model Rules of Prof'l Conduct r. 1.9 cmt. 3. "[A] former government lawyer will almost always have general knowledge of policies and practices of her former agency" as well as "information about the inner workings of the client, but we do not suppose such information is necessarily disqualifying under Rule 1.9(c)." ABA Formal Op. 97-409 n.17. If general knowledge of agency practices disqualified a former lawyer from representing clients against it, Rule 1.9(c) would become a near blanket bar. We conclude it was not intended to apply so broadly.

## III. Mr. Probble's Knowledge of Qatar Customs Issues and the United States' Defense Cooperation Agreement With Qatar

The government's more specific contentions primarily focus upon Asahi's Qatar scrap contract and its October 8, 2017 claim upon it. That claim alleged that, given the terms of a defense cooperation agreement with Qatar, the government was responsible for preventing Qatar's customs officials from interfering with Asahi's performance. Also, the government failed to disclose facts about earlier problems it encountered with those officials. The government suggests the merits of that claim remain at issue in this appeal. It says Mr. Pribble's knowledge of information about Qatar customs matters learned while at DLA, and his familiarity with the cooperation agreement between the government and Qatar gained while at CENTCOM, preclude him from representing Asahi now.

The government has misstated the nature of the appeal. The underlying merits of Asahi's October 8, 2017, Qatar contract claim are not before us. According to the complaint, the parties settled that claim in 2018 when they extended the term of the Kuwait contract and the government promised Asahi enough scrap in Kuwait to compensate it for the \$1,347,625 it had sought in the Qatar contract claim (compl. ¶¶ 9-24). Although Asahi's later September 11, 2019 submittal purported to both renew the Qatar contract claim and advance a new claim based upon the 2018 settlement, Asahi only appeals the denial of the new claim.<sup>3</sup> Asahi's demand here for

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<sup>3</sup> We express no opinion in this decision on the government's motion to disqualify counsel as to whether the Board may exercise jurisdiction over an appeal from that claim.

damages that include the \$1,347,625, as well as other associated costs and losses, is based upon the settlement agreement's alleged promise to extend the Kuwait contract's performance period and provide Asahi with scrap worth that amount of money. Thus, the complaint describes the alleged settlement's terms. It details Asahi's reliance upon the settlement, government repudiation, government pressure to accept alternate terms, government delays, the government's curtailment of the time allowed to remove scrap, the government's failure to provide the required volume of scrap, and the government's misapplication of applicable law to the transaction. All of these alleged events occurred after Mr. Pribble retired in 2016 and have nothing to do with affairs in Qatar. (Compl. ¶¶ 9-32, 47-67) The government has failed to show that Mr. Pribble's knowledge about matters in Qatar would necessarily be used or revealed by him in this appeal.

#### IV. Mr. Pribble's Knowledge of the Contracting Officer's Counsel

The government's contentions are no more convincing when they regard the matter before the Board. The government refers to an extraneous comment embedded by Asahi in the complaint's description of the breached settlement saying that, at some point during the parties' negotiations in 2018 through 2019, the contracting officer's counsel introduced advocacy and bias into the discussions (compl. ¶ 61). According to the government, its counsel will have to testify about this allegation and Mr. Pribble will be able to question her with the benefit of confidential knowledge of her past performance evaluations. The government suggests this knowledge will provide Mr. Pribble with evidence of other occasions where counsel advocated or displayed bias that can be used to its disadvantage.

The relevance of Asahi's incidental remark that the contracting officer's counsel advocated for her client is not apparent to us. Putting that aside momentarily, Mr. Pribble admits that he had access to all of the performance evaluations in the General Counsel's office prior to the abolishment of the National Security Personnel System (NSPS), a short lived Department of Defense pay system that the government says applied to DLA between 2008-2010 (app. opp'n ¶ 37; gov't reply at 19-20 n.11).<sup>4</sup> But the possibility that Mr. Pribble's knowledge of counsel's performance reviews from over a decade ago will somehow assist in either discovery or at trial to prove an allegation about her conduct during the last two years seems very remote, especially given the tenuous nature of the allegation in question. It does not dictate disqualifying

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<sup>4</sup> The government has not proven that Mr. Pribble had any additional access. It has only presented vague testimony that Mr. Pribble discussed evaluations of DLA attorneys with other supervisors, and possessed knowledge about particular individuals. But it conspicuously fails to identify the contracting officer's counsel as one of those attorneys. (Malcom decl. ¶¶ 2, 7) Mr. Pribble denies any access to, or knowledge of, performance evaluations after NSPS was repealed (app. opp'n ¶ 37).

Mr. Pribble. *See Waterloo Capital Partners, LLC v. BWX Ltd.*, 2020 WL 1489813 at \*2 (rejecting disqualification under Rule 1.9(c) when the motion was based only upon generalized, conclusory allegations).

V. Mr. Pribble's Knowledge of the Qatar Contract's Origins

Finally, the government quibbles about an opinion Asahi included in a footnote to the complaint characterizing the Qatar scrap contracts as “poorly conceived and executed” (compl. ¶ 65 n.9). Speculating that this thought might have been informed by inside information possessed by Mr. Pribble, the government insists he must go. We are unconvinced. At best the remark is peripheral to the actual thrust of the complaint at that point, which is that the government misapplied applicable statutory law settling with Asahi, though it appears to have correctly applied that law in the RBI settlement (compl. ¶¶ 65-67). The government does not suggest Mr. Pribble possesses confidential information relevant to those allegations, which is not surprising because he had retired from DLA prior to the negotiation of the settlements. A fair reading of the complaint leads us to conclude that how well conceived the Qatar contracts might have been is beside the point that Asahi actually seeks to establish.

In sum, the government has not met its heavy burden to show that Mr. Pribble possesses confidential information that would necessarily be used or revealed in this appeal, much less that it is absolutely necessary that we impose the drastic sanction of disqualification.

CONCLUSION

The motion is denied.

Dated: December 18, 2020



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MARK A. MELNICK  
Administrative Judge  
Armed Services Board  
of Contract Appeals

(Signatures continued)



I concur



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

I concur



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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 No. 62445, Appeal of Asahi General Trading & Cont. Co. W.L.L., rendered in conformance with the Board's Charter.

Dated: December 18, 2020



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