

ARMED SERVICES BOARD OF CONTRACT APPEALS

Appeals of -- )  
)  
M.A. Mortenson Company ) ASBCA Nos. 52881, 52882, 52883,  
) 53397, 53713, 53796,  
) 53797  
Under Contract No. DACA85-94-C-0031 )

APPEARANCES FOR THE APPELLANT:

William R. Joyce, Esq.  
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Minneapolis, MN

David R. Trachtenberg, Esq.  
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APPEARANCES FOR THE GOVERNMENT:

Thomas H. Gourlay, Jr., Esq.  
Engineer Chief Trial Attorney  
Toni B. London, Esq.  
Engineer Trial Attorney  
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OPINION BY ADMINISTRATIVE JUDGE JAMES  
ON GOVERNMENT MOTION TO STAY PROCEEDINGS

On 20 May 2003 respondent moved to stay the proceedings in these seven consolidated appeals for 180 days, asserting that the Federal Bureau of Investigation (FBI), Army Criminal Investigation Command (ACIC), Air Force Office of Special Investigations (AFOSI) and Defense Contract Audit Agency (DCAA) are jointly investigating “suspected fraud in connection with the submission of these claims to the Government.”

In its 11 June 2003 response to the motion, appellant “does not oppose a delay in the proceedings,” but requests the Board to (1) delay the proceedings for 120 days and schedule a status conference in 90 days to evaluate the progress of the Government’s investigation, (2) order that all previous Board rulings remain in effect pending the outcome of such investigation, (3) order the Government to seal and return promptly any “seized information that is protected by the attorney-client or any other privilege” and order Government counsel not to review any of the documents seized or subpoenaed, and (4)

award sanctions of \$150,000 to \$200,000 for the Government's egregious conduct and knowing waste of appellant's time and resources (app. resp. at 1).

### STATEMENT OF FACTS (SOF)

1. U.S. Fabrication & Erection, Inc. (USFE) was a subcontractor for the welding and erection of steel members at the Elmendorf Composite Medical Facility under the captioned Corps of Engineers contract with M. A. Mortenson Co. (MAM) (mot. at 1).

2. Between 1999 and 2002 MAM submitted six claims for welding and erection of structural steel under the captioned contract for itself and its subcontractors, including USFE (mot. at ¶ 1).

3. The contracting officer (CO) denied four of those claims, from which decisions MAM appealed timely to the ASBCA. The CO issued a final decision claiming weld inspection costs incurred by respondent, which decision MAM appealed to the U.S. Court of Federal Claims and which was transferred therefrom to the ASBCA. MAM took appeals to the ASBCA from the CO's deemed denials of two other claims. On 19 July 2002, the Board consolidated the seven captioned structural steel appeals.

4. On 16 November 2000 DCAA began to audit the first of the claims that are the subject of these appeals (mot. ex. 1, ¶¶ 2-3).

5. Between 3 and 9 September 2002, DCAA auditors signed a "Suspected Irregularity Referral Form," designated Form 2000, with respect to USFE listing five "irregularities": "Denial of Access/Obstruction of Audit—Enclosure 1," "False or Unsupported Claim—Enclosure 2," "Manipulation of Contract Records—Enclosure 3," "Other Possible Irregularities—Enclosure 4" and "Ethical Violations/Bid Rigging—Enclosure 5" (mot. ex. 6). Those five enclosures were not included in the motion, or provided to appellant or to the Board.

6. In December 2002 the AFOSI advised the Engineer Trial Attorney that it had begun investigating DCAA's allegations, and soon thereafter brought the FBI, ACIC and DCAA into the investigation (mot. ex. 3, ¶ 5).

7. On 30-31 January 2003, without advising the deponent of the ongoing criminal investigation, respondent deposed USFE's owner, Gene B. Letts (app. resp., ex. A, ¶ 2; ex. A-91 at 1, 7) with regard to USFE's bid to higher-tier subcontractor Waiward (ex. A-91 at 61-65), time cards (*id.* at 50, 184, 301-08), daily reports of on-site workers (*id.* at 113-14, 135-37, 194-95, 250-51, 272, 281, 301-08), work hours and shifts (*id.* at 131-32, 161-62, 166, 207, 250-51, 260-64, 269-70, 273-76, 280, 297-98, 301, 313, 335-36, 271-72, 391), welding procedures and sequence (*id.* at 89, 145-46, 150-53, 156-57, 186, 204-05, 208-09, 212-13, 225-26, 231, 254-56, 356, 381) and sequence of erecting steel members

(*id.* at 58-61, 67-70, 83, 91, 140, 159-60, 163-55, 169-71, 184-85, 252, 271, 281-82, 310-11, 399).

8. On 15 April 2003, without advising the deponents of the ongoing criminal investigation, respondent deposed: (a) John S. Hunt, partner in Hunt Coburn & Associates (HCA) (app. resp., ex. A, ¶ 3; ex. A-76 at 1, 5) with regard to USFE’s payroll data, man-hours and time cards (*id.* at 13, 27-28, dep. ex. 1 at 2), daily reports (*id.* at 13, 22, 43, 56-58), welding dates, times and sequencing (*id.* at 12, 26) and the dates and sequence of erecting steel members (*id.* at 12, 14, 20-22, 26, 34-36, 41, 53-55, dep. ex. 1 at 1); and (b) Marcia Hunt, an employee of HCA (app. resp., ex. A, ¶ 3; ex. A-89 at 1, 4), with regard to USFE’s payroll data base and man-hours (ex. A-89 at 7-11, 15-16), daily reports and welding time cards (*id.* at 13, 15-18, 20-24, 26, 30), welding durations (*id.* at 19-24) and erection dates of steel members (*id.* at 6-7, 12, 14).

9. The 16 May 2003 affidavit of FBI investigator Ricki Ortega (mot. ex. 7)<sup>\*</sup> described DCAA’s September 2002 “irregularity” allegations as follows: (i) “Denial of Access/Obstruction of Audit” – delayed and disordered USFE document production and absence of financial statements during ASBCA discovery (app. resp., ex. G at ¶ 32a); (ii) “False or Unsupported Claim” – a 1 August 1996 USFE memorandum showed staffing level adjustments in March 1996 due to a Waiward “communication that did not exist until May,” unreliable USFE production and cost data, and a 2 April 1998 HCA memorandum stated that USFE’s claim rates “are often considerably higher than our existing rates” (*id.*, ¶ 32b); (iii) “Manipulation of Contract Records” – Marcia Hunt manipulated USFE’s construction records to support its claims by revising a weld sequence, generating planned steel erection dates, and adjusting weld sequence numbers to match the erection sequence (*id.*, ¶ 32c); (iv) “Other Possible Irregularities” – invalid USFE employee time cards and check registers, missing data and records, and conflicting statements about the existence of USFE’s 1992-1996 financial statements (*id.*, ¶ 32d); and (v) “Ethical Violations/Bid Rigging” – USFE’s 28 September 1994 document and an undated document to Waiward showed bid-rigging (*id.*, ¶ 32e; ex. A-91, dep. exs. 5, 1).

10. On 16 May 2003 the U.S. District Court, District of Alaska, issued search warrants for hardware, software and documents at the residence of Gene B. Letts and USFE’s offices in Alaska (mot. ex. 8).

11. On 20 May 2003 the U.S. Government seized 129 items of USFE materials. In the FBI inventory of material seized, items 77-80 and 87 are designated “legal documents.” (App. resp., ex. A, ¶ 5, ex. B)

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<sup>\*</sup> On or about 6 June 2003 respondent sent the Ortega affidavit to appellant (app. resp., ex. G).

12. In 21 May and 30 May 2003 conference calls with the Board, respondent stated that a federal grand jury has not been impaneled to consider the indictment or information of USFE or its owner or employees, and the “targets” of the criminal investigation are Mr. Letts, USFE, Mr. Hunt and Ms. Hunt.

### DECISION

Appellant does not oppose respondent’s motion to stay the proceedings in these ASBCA appeals. Respondent seeks a 180-day stay. Appellant suggests a 120-day stay, because DCAA has been auditing USFE’s claims since November 2000 and the FBI, ACIC and AFOSI have been investigating the fraud allegations since December 2002. Although appellant’s suggestion has some merit, we do not believe that there will be a practical difference between 120 and 180 days. Therefore, we grant a 180-day stay of these ASBCA proceedings, ending Monday 17 November 2003. The parties shall (1) provide a status report to Administrative Judge James not later than Friday 17 October 2003 and (2) promptly advise the Board if Mr. Letts, USFE, or any owner, employee or prospective witness in these ASBCA appeals has been indicted by a federal grand jury with respect to any of the allegations in the Government’s motion to stay.

Appellant requests that all previous Board rulings remain in effect during the stay of proceedings. Appellant has not cited, and the Board is not aware of, any rule or legal authority by which its interlocutory rulings would lose effect or be vacated by the stay of proceedings.

Appellant requests that this Board order the Government to return promptly any privileged materials seized from USFE on 20 May 2003 and to order Government counsel not to review such privileged materials. Assuming, without having any means to know, that items 77-80 and 87 in the FBI inventory include attorney-client or other privileged materials, appellant has cited no statute or legal precedent, and none is known to the Board, authorizing us to order the U.S. Attorney or FBI to take any action with respect to materials seized in accordance with a federal search warrant in the course of the criminal investigation. Appellant’s response does not indicate that Ms. Toni London, respondent’s trial attorney in these appeals, has sought or seen any privileged materials seized pursuant to such search warrant. We deny that aspect of appellant’s request as premature.

Appellant finally requests the Board to impose monetary sanctions against respondent for what it describes as egregious conduct and knowing waste of appellant’s time and resources during discovery when the fraud investigation was known to respondent’s attorney, but was undisclosed to appellant or its attorneys. The ASBCA has consistently held that it lacks authority to assess monetary sanctions against the Government. *See E-Systems, Inc.*, ASBCA No. 46111, 97-1 BCA ¶ 28,975 at 144,301 (Board does not have authority to impose monetary sanctions for Government failure to comply with Board’s discovery order); *Stemaco Products, Inc.*, ASBCA No. 45469, 94-3

BCA ¶ 27,060 at 134,843 (no authority for monetary sanctions against Government); *Southwest Marine, Inc.*, ASBCA No. 39472, 94-1 BCA ¶ 26,487 (ASBCA rules do not authorize monetary sanctions against Government); *Turbomach*, ASBCA No. 30799, 87-2 BCA ¶ 19,756 at 99,954 (without Congressional waiver of sovereign immunity, Board lacks authority to award monetary sanctions for Government's "lackadaisical" responses in discovery). We deny appellant's request for monetary sanctions.

CONCLUSION

We grant respondent's motion to stay proceedings for 180 days ending 17 November 2003, grant appellant's request and order the status report and advice as set forth above, and deny the balance of appellant's requests for the reasons stated above.

Dated: 19 June 2003

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DAVID W. JAMES, JR.  
Administrative Judge  
Armed Services Board  
of Contract Appeals

I concur

I concur

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

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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. 52881, 52882, 52883, 53397, 53713, 53796, and 53797, Appeals of M. A. Mortenson Company, rendered in conformance with the Board's Charter.

Dated:

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**EDWARD S. ADAMKEWICZ**  
Recorder, Armed Services  
Board of Contract Appeals