ARMED SERVICES BOARD OF CONTRACT APPEALS

Appeal of --	)	
	)	
ADT Construction Group, Inc.	)	ASBCA No. 55125
	)	
Under Contract No. DACA09-03-C-0009	)	

APPEARANCE FOR THE APPELLANT: John W. Ralls, Esq.
Thelen Reid & Priest, LLP
San Francisco, CA

APPEARANCES FOR THE GOVERNMENT: Thomas H. Gourlay, Jr., Esq.
Engineer Chief Trial Attorney
Lawrence N. Minch, Esq.
District Counsel
Gilbert H. Chong, Esq.
Engineer Trial Attorney
U.S. Army Engineer District,
Los Angeles

OPINION BY ADMINISTRATIVE JUDGE STEMPLER
ON THE PARTIES' POST DECISION MOTIONS

On 10 March 2006, the Board issued its decision in the subject appeal. The government received the decision on 16 March 2006. Appellant received the decision on 17 March 2006. On 20 March 2006, the Board received government counsel's praiseworthy 18 March 2006 motion to supplement the Rule 4 file[1] with tabs 28, 29, and 30. The motion states that the three emails were located at the beginning of March 2006 while compiling the Rule 4 file for another appeal under the same contract. The documents are represented to be material to the issues decided in our 10 March 2006 decision. Government counsel represented that appellant's counsel concurred in the motion to supplement.

[1] Board Rule 4 provides in part:

> (a) Duties of Contracting Officer – Within 30 days of receipt of an appeal, or notice that an appeal has been filed, the contracting officer shall assemble and transmit to the Board an appeal file consisting of all documents pertinent to the appeal . . . .

On 21 March 2006, the Board inquired whether either or both the parties, since our decision had already been issued, intended the motion to supplement to be a motion for reconsideration under Rule 29. By letter dated 24 March 2006, appellant responded that it did not wish the motion to supplement (which it concurred in) to be considered a motion for reconsideration. On 28 March 2006, the Board informed the parties that it would not consider their motion to supplement the record unless a timely motion for reconsideration was filed.

On 14 April 2006, appellant filed: (1) a motion to further supplement the Rule 4 file with tabs 31 and 32; (2) a motion to compel the production of documents; and/or, (3) a motion for an adverse inference. The motions were supported by affidavits from counsel and the senior manager—IT operations for counsel's firm. Also on 14 April, appellant timely moved for reconsideration pursuant to Rule 29. The motion for reconsideration was supported by an affidavit from appellant's senior vice president.

On 26 April 2006, appellant filed a motion to further supplement the Rule 4 file with tab 33. Tab 33 is a 13 April 2006 response from a U.S. Senator to appellant, enclosing the Corps' response to an inquiry from the Senator. The inquiry was not included in the proposed tab 33.

On 18 May 2006, the government replied to appellant's: (1) motion for reconsideration; (2) motions to supplement the Rule 4 file; (3) motion to compel production of documents; and, (4) motion for an adverse inference. The government also moved to strike appellant's senior vice president's affidavit in support of the motion for reconsideration. The government supplied government counsel's declaration in support of its various positions.

On 19 June 2006, appellant filed a "COMBINED REPLY IN SUPPORT OF ITS (I) MOTION FOR RECONSIDERATION; (II) MOTION FOR ADVERSE INFERENCE; (III) MOTION TO COMPEL; (IV) SECOND MOTION TO SUPPLEMENT; AND OPPOSITION TO (V) THE GOVERNMENT'S MOTION TO STRIKE." The reply was supported by several exhibits and an affidavit from appellant's counsel.

JOINT MOTION TO SUPPLEMENT THE RECORD

The government's motion of 18 March 2006 to supplement the Rule 4 file with tabs 28, 29, and 30 is, in essence, a joint motion since appellant has concurred in the motion. In light of the fact that the parties agree that the record should be reopened to admit the three documents, we exercise our discretion pursuant to Rule 13(b) and admit these documents into the Rule 4 file. We grant the motion and will consider them in our decision on appellant's motion for reconsideration.

APPELLANT'S FIRST MOTION TO SUPPLEMENT THE RECORD

On 14 April 2006, appellant filed its first motion to supplement the record, requesting that Rule 4 tabs 31 and 32 be added to the record. These documents were provided to appellant on 9 March 2006, when the government filed its Rule 4 file in ASBCA No. 55307, arising out of the same contract. (App. first motion to supplement at 2; Ralls aff., ¶ 5)

Rule 4, tab 31, is a 10-page handwritten document entitled "RFIs discussed @ 7/31 meeting." The document is not signed and does not appear to be notes of any one meeting since it appears to be some sort of listing of communications of various dates between 20 June 2003 and June 2004.

Rule 4, tab 32 is a series of emails and replies thereto dating from 17 September 2003, and culminating in an email dated 2 October 2003 from Donald E. Brown. The document was apparently filed by the government in the Rule 4 file for ASBCA No. 55307. Appellant states (app. first motion to supplement at 2) that Mr. Brown is a "U.S. Air Force representative." The government stipulates that Mr. Brown, "was an employee of Nellis Air Force Base Office of the Base Civil Engineer" (gov't reply to motion for reconsideration at 4, n.4). This email is addressed to Michael J. Weber. The government has stipulated that Mr. Weber is an employee of the Corps in Los Angeles and that he was the contracting officer's representative on the subject contract from June 2003 until February 2004 (gov't motion to supplement at 1-2).

Appellant's counsel states in his affidavit in support of its 14 April motions that government counsel informed him on 10 March 2006, that three internal emails had been discovered that relate to the issue present in the subject appeal and provided such emails to him (proposed Rule 4 tabs 28, 29, 30, *supra*) (Ralls aff., ¶ 2). The day before, he had received the government's Rule 4 file in ASBCA No. 55307 and appellant now seeks to reopen the record on reconsideration and further supplement the Rule 4 file in this appeal with Rule 4 tabs 31 and 32, taken from the Rule 4 file submitted by the government in ASBCA No. 55307 (Ralls aff., ¶¶ 5-6). It is appellant's position that the government did not search its computer system for emails[2] in preparing the Rule 4 file in the subject appeal and therefore the record should be reopened on reconsideration to supplement the Rule 4 file now (Ralls aff., ¶¶ 7-8; Kitterman aff.).

The government states that the documents appellant seeks to reopen the record to admit were all readily available to appellant prior to the closing of the record in the

[2] As opposed to producing emails for which hard copies were in the contract file.

subject appeal and are not newly discovered evidence not reasonably available.[3] The reason appellant did not have them according to the government, is that the parties decided to forego discovery and therefore, appellant did not file any discovery requests (gov't reply to motion for reconsideration at 1, 5; Chong decl., ¶ 2).[4] The government avers that it made a good faith attempt to include all relevant documents in its Rule 4 submission in the appeal (gov't reply to motion for reconsideration at 5; Chong decl., ¶ 1). Mr. Chong's declaration also states that had he realized the relationship of proposed tabs 31 and 32 to the subject appeal when he reviewed them for the Rule 4 file in ASBCA No. 55307, he would likely have included them in the motion to supplement the record he filed on 18 March 2006 (Chong decl., ¶ 8). Finally, somewhat in conflict with other portions of its filings, the government states that it does not oppose appellant's first motion to supplement (gov't reply to appellant's first motion to supplement at 1).

We conclude that since government counsel has stated that had he realized the materiality of tabs 31 and 32 at the relevant time, he would have likely included them in the joint motion to supplement the record, that basic fairness compels us to treat tabs 31 and 32 as if they were included in the joint motion. Since we grant the joint motion, we likewise grant appellant's first motion to supplement the record and tabs 31 and 32 will be considered on reconsideration.

MOTION TO COMPEL

Also on 14 April 2006, appellant filed a motion to compel the production of documents. It is appellant's position that when the government prepared the Rule 4 file in the subject appeal it did not search its computer records, and that it still has not searched these records for emails dated before 14 July 2003. It deduces this fact from its IT specialist's examination of the emails that have been produced (motion to compel at 3; Kitterman aff.) and government counsel's statement that in compiling the Rule 4 file he "made a cut at Monday, July 14, 2003" (app. 19 June 2006 combined reply, Ralls aff., ex. A at 2). On 11 April 2006, appellant's counsel sent an email to government counsel which stated:

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[3] The government seems to be arguing that Rule 4 tabs 28, 29 and 30 are also not newly discovered evidence and also should not be admitted (gov't reply to motion for reconsideration at 4). Since the motion to supplement the record with Rule 4 tabs 28, 29 and 30 was joint, if that is the government's position, we will not hear the government's argument that the record should not be reopened to admit these tabs.

[4] The government's statement is confirmed by appellant's 28 December 2005 filing with the Board in which it stated that "no discovery is needed for this appeal" (app. 28 December 2005 filing, ¶ 3).

> We insist that the Corps immediately run the same kind of search of its E-mail system as it did for the period preceding July 14, 2003 (especially for the period April 1, 2003 through July 13, 2003) and forward the results to us electronically for our immediate review.

(Chong decl., ¶ 9 and attachment)

Government counsel has denied that the government has an obligation to conduct such a search at this stage in the proceedings and has objected to performing it (gov't reply to appellant's motion to compel at 2-3; Chong decl., ¶ 10).

Appellant's motion requests us to "[c]ompel the Government to produce all F-22 MMF Project related documents (including emails on its computer system that are pertinent to this appeal (including, without limitation, emails dated before July 13, 2003 and the September 28, 2003 email referenced in Tab 31)" (motion at 3). Appellant's motion cites no authority.

The record in this appeal has been closed, and the decision rendered. However, it is readily apparent that the adjudicative process did not operate as intended in this instance. We are faced with a situation (contributed to by both parties) where almost simultaneously with our decision, additional material evidence was located. We have dealt with the documents located to date in our decision *supra*. It is not our opinion that appellant has made its case for post-decision discovery when none was conducted pre-decision. It is also not our opinion that the government fully discharged its duties under Rule 4. However, we are loath to allow our decision on reconsideration (in these unique circumstances) to be without the benefit of so much allegedly relevant evidence. Therefore, pursuant to our discretion and Rules 13(b) and (c), we order the government to retain all relevant emails and to make a reasonable search of its relevant email records (to the extent not already performed) and provide the additional emails found as supplements to the Rule 4 file, within 30 days of the date of this decision. This order does not permit the filing of any additional affidavits in this Rule 11 appeal by either party, except to the extent such affidavits are directly related to documents supplementing the record pursuant to this decision.

Appellant's 14 April 2006 motion to compel also requests a copy of the 28 September 2003 email referenced in Rule 4, tab 31 (at 3). Government counsel's 18 May 2006 declaration in reply to appellant's motion to compel asserts attorney-client privilege as to the document without further explanation (at 7). We do not have the information necessary to decide whether the government's privilege assertion is valid. The government is directed to submit the document to the Board for *in camera* review within one week of receipt of this decision.

MOTION FOR AN ADVERSE INFERENCE

On 14 April 2006, appellant also moved for an adverse evidentiary inference "based on the failure by the Government to produce relevant documents on anything approaching a timely basis" (motion at 3). Appellant requests that we infer that any missing documents "would show the Government had actual and constructive knowledge of ADT's qualification of its proposal concerning the use of on-site material as fill and that the evidence submitted by the Government in its Rule 11 submissions is not reliable" (motion at 4).

The sanction appellant seeks effectively amounts to a directed verdict. It seeks this sanction despite the fact that it does not identify any order that the government has violated or evidence of deliberately withholding relevant material or other misconduct, and despite government counsel's 18 March 2006 motion attempting to partially rectify the Rule 4 file's incompleteness. In invoking sanctions for a more serious violation (spoliation), it has been held that before invoking such a serious sanction, the following should be considered: 1) the degree of fault of the offending party; 2) the degree of prejudice suffered by the non-offending party; and 3) whether there is a lesser sanction that will suffice to prevent unfairness. *Schmid v. Milwaukee Electrical Tool Corp.*, 13 F.3d 76, 79 (3rd Cir. 1994). As to the degree of fault, we have been presented with no evidence of misconduct. Appellant elected to proceed here under Rule 11, and the documents will, pursuant to this decision, be before the Board for a decision on the motion for reconsideration. We see little, if any, prejudice to appellant. Finally, although we have not called it a sanction, we have taken action in ordering the supplementation of the record that serves the purpose of promoting fairness. In so holding, we note that the government should have provided a more complete Rule 4 file, but that appellant is not without its part in the situation that has developed.

APPELLANT'S SECOND MOTION TO SUPPLEMENT THE RULE 4 FILE

On 26 April 2006, appellant filed a second motion to supplement the Rule 4 file, with proposed tab 33. The document is a 13 April 2006 letter from an U.S. Senator to appellant, providing the Senator's office's reply to an inquiry from appellant. The letter encloses a 4 April 2006 letter from the Corps of Engineers to the Senator, replying to his 8 February 2006 inquiry. These documents have no probative value in this litigation and appellant's motion with respect to them is denied.

GOVERNMENT'S MOTION TO STRIKE

Appellant's motion for reconsideration dated 14 April 2006 is supported by the affidavit of its senior vice president, Jess J. Franco. The government moved on 18 May

2006 to strike the affidavit. The government's motion is well taken. The affidavit states at paragraph 2 that:

> I have reviewed the Board's Opinion dated March 10, 2006. The purpose of this Affidavit is to provide the Board with certain information relating to ADT's Motion for Reconsideration of the Opinion.

The affidavit is, by-and-large, the affiant's comments on our decision, providing explanations and testimony concerning various points. It is improper testimony after the record is closed and we grant the government's motion to strike.

MOTION FOR RECONSIDERATION

In view of our order *supra*, we order a re-briefing of the motion for reconsideration. Thirty days from the date the record is supplemented in accordance with our order *supra*, appellant shall refile its brief in support of its motion for reconsideration, paying particular attention to all the Rule 4 supplemental documents and how it alleges they should change our 10 March 2006 decision. This brief will be a stand-alone document, not requiring reference to its previous post-decision filings. The government will be given an opportunity to reply thereafter.

Dated: 14 July 2006

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

I concur

CARROLL C. DICUS, JR.
Administrative Judge
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 No. 55125, Appeal of ADT Construction Group, Inc., rendered in conformance with the Board's Charter.

Dated:

CATHERINE A. STANTON
Recorder, Armed Services
Board of Contract Appeals