

ARMED SERVICES BOARD OF CONTRACT APPEALS

Appeals of -- )  
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Palm Springs General Trading and )  
Contracting Establishment ) ASBCA Nos. 56290, 56291,  
) 56890  
Under Contract No. W90F6P-05-A-0001 )

APPEARANCE FOR THE APPELLANT: Iliaura Hands, Esq.  
Miller & Williamson LLC  
New Orleans, LA

APPEARANCES FOR THE GOVERNMENT: Craig S. Clarke, Esq.  
Army Chief Trial Attorney  
Geraldine Chanel-Carpenter, Esq.  
Trial Attorney

OPINION BY ADMINISTRATIVE JUDGE TING

Shortly before a hearing on these appeals was to start, the Department of Justice (DOJ) filed a complaint in the United States District Court for the Western District of Texas, charging the appellant – Palm Springs General Trading and Contracting Establishment (Palm Springs) – and other defendants for violations of the False Claims Act, 31 U.S.C. §§ 3729-3733, and asserting claims of bribery, common law fraud and other claims (Civil Action No. SA09CA0895XR). Upon advice from the DOJ that the appeals “involve the same contract, parties, claims and events” as pled in the complaint, the Army (government) moves to stay or suspend proceedings before the Board to allow for resolution of the DOJ’s claim before the Court.

BACKGROUND

1. ASBCA No. 56290 involves a \$2,516,105.53 claim from appellant for unpaid invoices for removal of black and gray water at Camp Arifjan in Kuwait between 1 January and 30 September 2006. Appellant appealed pursuant to 41 U.S.C. § 605(c)(5) and the Board docketed the appeal on 14 January 2008.

2. ASBCA No. 56291 involves a \$746,516.34 claim from appellant for unpaid invoices for dumpster services rendered at Camp Arifjan between 1 October 2006 and 22 January 2007. Appellant appealed pursuant to 41 U.S.C. § 605(c)(5) and the Board docketed the appeal on 14 January 2008.

3. ASBCA No. 56890 involves a \$685,559.89 claim from appellant for unpaid invoices for removal of black and gray water between 1 August and 30 September 2005 at Camp Arifjan. The claim was submitted by letter dated 31 March 2009 and the contracting officer (CO) denied the claim by decision issued on 10 July 2009<sup>1</sup>. Appellant appealed by notice dated 22 July 2009, and the Board docketed the appeal on 28 July 2009.

4. In July 2008, the government moved to stay proceedings on ASBCA Nos. 56290 and 56291. According to the government, the stay was necessary for the DOJ and the Army Criminal Investigation Command to investigate allegations that appellant had engaged in criminal conduct under the contract involved in the two appeals. Appellant opposed the motion. In moving to stay proceedings before the Board, the government relied principally on the fact that Major John J. Cockerham (Cockerham) and Captain James Momon, Jr., (Momon) who awarded and administered certain BPAs pled guilty to certain criminal charges. The captioned contract (BPA 0001) was not implicated at that time. On 30 October 2008, we denied the government's motion because it failed to show any connection between Cockerham's and Momon's guilty pleas and BPA 0001 at issue before the Board. The Board's decision also directed the parties to finish discovery. *See Palm Springs General Trading and Contracting Establishment*, ASBCA Nos. 56290, 56291, 08-2 BCA ¶ 34,007.

5. On 7 April 2009, the Board issued an Order on Discovery resolving certain discovery disputes between the parties. After discussion with counsel, the Board issued a pre-hearing order on 14 August 2009. This order required completion of certain depositions, exchange of witness lists and hearing exhibits, and scheduled a one-week hearing for all three appeals to start on 30 November 2009. The Board issued a Notice of Hearing on 31 August 2009.

6. On 1 October 2009, the Board received a letter dated 29 September 2009 from Selma Saikaly, Esq. (Saikaly) of Legal Consultant Group, Inc., in Pasadena, California. Saikaly, who practices out of Kuwait, stated she was an attorney representing Green Valley Company (Green Valley) and it had been brought to her attention that Palm Springs had filed a claim for unpaid invoices. She asked that Palm Springs' claim be denied and the government "launch an investigation" of Palm Springs. The letter alleged that Palm Springs "conspired with Major Cockerham to obtain the Blanket Purchase

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<sup>1</sup> Appellant initially sought leave to amend its complaint in ASBCA No. 56290 by adding the invoices for the months of August and September 2005. These invoices, allegedly remaining unpaid, were discovered upon receipt and review by appellant of some of the documents produced by the government in its response to appellant's request for production (*see* appellant's Motion for Leave to Amend Complaint filed 18 March 2009).

Agreement and to place it in the name of Green Valley since Palm Springs was blacklisted by the US Government under a previous name of Gulf Group General Enterprises.” Saikaly asserted that Green Valley had no knowledge that the Blanket Purchase Order (BPA 0001) was in its name and was always led to believe that Palm Springs obtained the contract and hired it as its subcontractor to perform services and provide equipment. Faced with these allegations, the Board by letter dated 2 October 2009 sought input from Palm Springs and the government.

7. Because the hearing was expected to require the testimony of witnesses located in Kuwait through video teleconferencing equipment (VTC), the Board initiated a telephone conference with counsel for the parties and counsel for Green Valley to discuss the sequence of witness testimony. Shortly before the call on 6 November 2009, the Board received a FAX from government counsel forwarding a civil complaint filed by the DOJ in the U.S. District Court for the Western District of Texas, San Antonio Division, on 5 November 2009, the day before. The complaint named as defendants John Cockerham, Jr., Saud Al Tawash (Al Tawash), Green Valley, Mohammed Howaiji, Joseph E. Nakouzi, Jireh Springs General Trading and Contracting Establishment (Jireh Springs), Jamal Al Dhama, and Palm Springs.

8. The complaint alleges that Al Tawash, a Kuwaiti citizen, along with members of his family, owned, controlled or otherwise had an interest in several companies, including Gulf Telecom and Gulf Group General Enterprises Co. W.L.L., Palm Springs, Green Valley, and Jireh Springs (compl. ¶ 9); that Green Valley is a Kuwaiti company that provides sewage and fuel services (compl. ¶ 10); that Mohammed Howaiji served as Green Valley’s assistant manager (compl. ¶ 12); that Joseph E. Nakouzi served as Green Valley’s lead supervisor (compl. ¶ 13); and that Jireh Springs is a Kuwaiti company owned by Mona A. Dhama and managed by Jamal A. Dhama, Al Tawash’s uncle (compl. ¶¶ 14, 29).

9. The DOJ complaint alleges that Cockerham arrived at Camp Arifjan around June 2004, that he asked his sister to relocate to Kuwait to assist him in collecting bribe payments from contractors to whom he awarded BPAs, and that to carry out the scheme, his sister was hired by Al Tawash to work at Gulf Telecom and subsequently at Jireh Springs (compl. ¶¶ 26-29). The complaint alleges that in October 2004, Cockerham awarded BPA 0001 to Green Valley for black and gray water removal, dumpster and other services (compl. ¶ 38), and in November 2004, Green Valley and Palm Springs purportedly entered into a joint venture to perform wastewater removal services under the BPA (compl. ¶ 39). The complaint alleges that in December 2005, Cockerham purported to substitute Palm Springs as the sole contracting party in place of Green Valley in violation of 41 U.S.C. § 15(a) (compl. ¶¶ 63-64) and 48 C.F.R. subpart 42.12 (compl. ¶¶ 65-68). The complaint alleges that the purported transfer of BPA 0001 from Green Valley to Palm Springs resulted in annulment of the contract by operation of law

and therefore neither Green Valley nor Palm Springs was entitled to receive payment from the Army under BPA 0001 following the purported transfer (compl. ¶ 69).

10. Until Saikaly's 29 September 2009 letter and DOJ's 5 November 2009 complaint filed in the District Court for the Western District of Texas, the government had not questioned Palm Springs' status as the contractor in the appeals before us. The Rule 4 file before the Board shows that Blanket Purchase Agreement No. W90F6P-05-A-0001 (BPA 0001) was awarded to Green Valley on 18 October 2004. The BPA bore only Cockerham's signature as CO. (R4, tab 1) On 29 December 2004, Cockerham issued Administrative Modification No. 00001 "to add Name of Parent company for payment" and to "Change the name of the Parent company to Palm Springs for Payment Purposes." Block 8 of the modification shows the contractor name was changed from "Green Valley Company" to "Green Valley & Palm Springs Gen Trading." The contractor address remained unchanged. Modification No. 00001 shows only the signature of Cockerham as CO. (R4, tab 4) On 20 December 2005, CO Cockerham issued Modification No. 00002. This modification was issued to "change the company name to better facilitate the manage [sic] of your contract." The contractor name (Block 8) was changed to "Palm Springs General Trading." The contractor address was also changed. Modification No. 00002 contained only Cockerham's signature as CO. (R4, tab 7) The Rule 4 file documents do not show to what extent, if at all, Green Valley, the original named contractor, was involved in the name and address changes.

11. DOJ's complaint contains nine counts. Count I is the government's claim against Cockerham, Al Tawash, Green Valley, Palm Springs and others for violation of the False Claims Act, 31 U.S.C. § 3729(a)(1) (presenting a false or fraudulent claim for payment or approval); Count II is the government's claim against Cockerham, Jireh Springs and Jamal Al Dhama for violation of the False Claims Act, 31 U.S.C. § 3729(a)(1) (presenting to the government false claims for compensation for bottled water awarded by Cockerham through bribery); Count III is the government's claim against Cockerham, Al Tawash, Green Valley, Palm Springs and others for violation of 31 U.S.C. § 3729(a)(3) (conspiracy to defraud the Government by getting a false or fraudulent claim allowed or paid); Count IV charges Cockerham, Green Valley and others for violation of 18 U.S.C. § 209(a) (supplementation of salary from other than government source) and § 216(b) (civil penalty for violation of § 209); Count V charges Cockerham, Al Tawash, Green Valley and others for breach of fiduciary duties or for inducing a breach of fiduciary duty. The remaining counts are common law claims against Green Valley and Palm Springs alleging breach of contract (Count VI), contract cancellation and restitution (Count VII), unjust enrichment (Count VIII), and payment by mistake (Count IX).

12. For relief, DOJ's complaint seeks treble the damages sustained by the United States, plus civil penalties allowed by law in the amount of between \$5,500 and \$11,000

per violation, post-judgment interest and costs for Counts I, II and III<sup>2</sup>. For Count IV, the complaint seeks civil penalties against four of the defendants (Cockerham, Green Valley and others) in the total amount of \$2.73 million. For Count V (against Green Valley and others for inducing breach of fiduciary duty) and Count VI (against Green Valley and Palm Springs for breach of contract), the complaint seeks the amounts equal to the damages suffered by the United States, plus pre- and post-judgment interest and costs. For Count VII, the complaint seeks “cancellation of all contracts obtained by defendants [Green Valley and Palm Springs] through bribery, conflict of interest, and fraud” and seeks restitution “of all monies...paid under such contracts.” For Count VIII, the complaint seeks “the sums by which defendants [Green Valley and Palm Springs] have been unjustly enriched,” plus pre- and post judgment interest and costs. For Count IX, the complaint seeks repayment of monies paid to Green Valley and Palm Springs by mistake pursuant to calls including BPAs 0001, plus pre- and post-judgment interest and costs.

13. All nine unpaid invoices appellant claimed under ASBCA No. 56290 and all four unpaid invoices appellant claimed under ASBCA No. 56291 are included in DOJ’s list of invoices in Exhibit A of its False Claims Act complaint as “false or fraudulent claims for payment or approval” submitted by Green Valley and Palm Springs (DOJ complaint, ¶ 97; Exhibit A at 36). The two 2005 unpaid invoices (Invoice Nos. GV 032/05, GV 034/05) added under ASBCA No. 56890 are not listed in Exhibit A of DOJ’s complaint.

14. As a result of discussions held with counsel for the parties, including Assistant U.S. Attorney Harold E. Brown, Jr., of the U.S. Attorney’s Office in San Antonio, and John A. Kolar, Esq., of the Civil Division, DOJ, at the 6 November 2009 telephone conference, the Board cancelled the scheduled hearing and advised the parties that in light of the developments, it will entertain a motion from the government to stay or suspend proceedings.

### CONTENTIONS OF THE PARTIES

On 13 November 2009, the government moved to stay or suspend proceedings at the Board “to allow for the complete resolution of the fraud action in the United States District Court for the Western District of Texas against Appellant” (mot. cover ltr.). The motion points out that all three appeals before the Board seek payment for unpaid invoices under BPA 0001 and that in order for Palm Springs to be entitled to payment under BPA 0001, “there must be a valid and enforceable contract” (mot. at 9). The government points out that in the District Court action, the DOJ has taken the position that “BPA 0001 is void and unenforceable inasmuch as the contract was induced by fraud

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<sup>2</sup> Green Valley and Palm Springs are both implicated in Counts I and III; Cockerham in Count II.

and bribery” (*id.* at 9). Relying on precedents, the government says were the DOJ to prevail on the fraud action, BPA 0001 would be found “null and void” and it follows that neither Palm Springs nor Green Valley would be entitled to payment under BPA 0001 (*id.* at 12). Separately, the government contends that since matters involving fraudulent and false claims are specifically assigned to the Attorney General of the United States, 31 U.S.C. § 3730(a), and since the DOJ in this instance has exercised its authority in filing an action in the United States District Court for the Western District of Texas, implicating BPA 0001, the Board now lacks jurisdiction over the appeal as provided in 41 U.S.C. § 605(a) (*id.* at 12-13).

Palm Springs’ 4 December 2009 reply urges us to deny the government’s motion because the government has not advanced a “persuasive justification for holding these appeals in abeyance pending resolution of the civil matter in federal court” (reply at 1). Palm Springs argues that the issues before the Board and the District Court are not the same because its claim for compensation for services performed but remaining unpaid is not before the district court (reply at 2). Palm Springs also argues that its entitlement to payment for services rendered “does not depend on the resolution of the federal district court because even if that Court resolves that the contract was obtained by fraud, Palm Springs would still be entitled to compensation under an implied in fact contract for the services it actually provided” (reply at 2-3). Palm Springs tells us that the government has offered mere allegations of fraud, and neither its motion nor the civil suit filed is supported by “any credible or admissible evidence” (reply at 3 n.2). Its reply went on to dispute the government’s allegations that (1) Al Tawash owned Green Valley (reply at 3); (2) Al Tawash had anything to do with award of the contract to Green Valley; and (3) it overcharged the government (reply at 4).

### DECISION

We have inherent authority to stay proceedings. In exercising this authority in connection with parallel proceedings, we “weigh competing interests and maintain an even balance.” *Public Warehousing Company, K.S.C.*, ASBCA No. 56116, 08-1 BCA ¶ 33,787 at 167,226 *citing Landis v. North American Co.*, 299 U.S. 248, 254-55 (1936); *see also Afro-Lecon, Inc. v. United States*, 820 F. 2d 1198 (Fed. Cir. 1987). We have followed this same approach even when the DOJ has filed a False Claims Act case against an appellant. *Government Business Services Group, LLC*, ASBCA Nos. 54588, 54973, 05-2 BCA ¶ 33,059 at 163,869 (“In weighing the parties competing interests here, the commonality of issues in the parallel actions and judicial efficiency warrant suspending proceedings.”).

In this case, the government had initially moved to stay proceedings in ASBCA Nos. 56290 and 56291 in July 2008. At that time, the government argued that a stay was necessary “to allow the Department of Justice and the Army Criminal Investigation

Command to investigate allegations that Appellant has engaged in criminal conduct under the contract involved in the current appeals.” 08-2 BCA ¶ 34,007 at 168,174. In making its case, the government relied principally on the fact that Cockerham and Momon who awarded and administered certain BPAs pled guilty to certain criminal charges. BPA 0001, the contract involved in ASBCA Nos. 56290 and 56291, was not implicated. We denied the government’s motion because it failed to show any connection between Cockerham’s and Momon’s guilty pleas and BPA 0001.

The False Claims Act complaint the DOJ provided has given us new information relevant to our determination on whether to continue proceedings in the appeals before us. First, until information surfaced in November 2009, the government had not questioned Palm Springs’ status as the contractor in the appeals. The DOJ complaint implicates BPA 0001 and alleges that it might have been awarded as a result of bribery. According to DOJ’s complaint, Cockerham’s subsequent substitution of Palm Springs in lieu of Green Valley as the contractor through issuance of a number of modifications resulted in annulment of the contract by operation of law. Second, although the District Court case is far more sweeping in scope, it does cover all 13 invoices appellant claimed under ASBCA Nos. 56290 and 56291. The specific invoices before us are included in DOJ’s list of invoices in Exhibit A of its False Claims Act complaint as “false or fraudulent claims for payment or approval” submitted by Green and Palm Springs. Third, as relief, the DOJ complaint has sought against Green Valley and Palm Springs treble damages, civil penalties, damages for breach of contract, cancellation of all contracts obtained through bribery, conflict of interest and fraud, restitution of all monies paid under such contracts, monies by which defendants have been enriched, and repayment of monies paid by mistake. Thus, even if appellant were to prevail before us, the CO will not be in a position to pay appellant so long as the False Claims Act case is pending before the District Court. 41 U.S.C. § 605(a).

When the government revealed that the DOJ had filed a False Claims Act case in the District Court, the Board cases had proceeded to the point of commencing a hearing within a few weeks. Notwithstanding this, given the information provided in the DOJ complaint raising a question as to the enforceability of BPA 0001 and establishing that the invoices implicated in the False Claims Act case are some of the same unpaid invoices claimed under ASBCA Nos. 56290 and 56291, we conclude that to proceed with the three appeals with these overlapping issues would interfere with the District Court case and would be counterproductive in terms of time and effort. Under the circumstances, we conclude that it is in the best interests of all parties that proceedings before us are halted.

CONCLUSION

Given it is impossible for us to anticipate when and how the District Court case may ultimately be resolved, and given our reluctance to suspend proceedings indefinitely, we dismiss these appeals without prejudice, provided that a motion to reinstate is filed no later than 90 days after a decision in the civil action filed in the District Court for the Western District of Texas (Civil Action No. SA09CA0895XR) becomes final.

Dated: 17 March 2010

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PETER D. TING  
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. 56290, 56291, 56890, Appeals of Palm Springs General Trading and Contracting Establishment, rendered in conformance with the Board's Charter.

Dated:

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