

ARMED SERVICES BOARD OF CONTRACT APPEALS

Appeals of --)
)
Kellogg Brown & Root Services, Inc.) ASBCA Nos. 56358, 57151
)
Under Contract No. DAAA09-02-D-0007)

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OPINION BY ADMINISTRATIVE JUDGE YOUNGER ON THE GOVERNMENT'S
MOTIONS FOR A STAY OF PROCEEDINGS

In these appeals regarding a contract to provide support services for various Army operations, appellant Kellogg Brown & Root Services, Inc. (KBR) seeks to recover costs allegedly incurred for private force protection services. The first appeal, ASBCA No. 56358, relates to the cost of security services incurred by KBR's dining facilities subcontractor. The second appeal, ASBCA No. 57151, relates to indirect security costs for KBR personnel. The government has now moved to stay both appeals pending the resolution of a suit under the False Claims Act, 31 U.S.C. § 3729. The government generally contends that these two appeals are substantially similar to the False Claims Act suit, that pursuit of the appeals will prejudice the government, and that KBR will not be harmed by an indefinite stay. KBR opposes the motions, arguing that the government has failed to meet its burden in seeking a stay. We deny the motions.

BACKGROUND

A. ASBCA No. 56358: Costs of ESS' Private Security

By date of 14 December 2001, the government, acting through the Army Sustainment Command, awarded Contract No. DAAA09-02-D-0007 to implement the Logistics Civil Augmentation Program (the LOGCAP III contract) as a cost plus award

fee, indefinite delivery, indefinite quantity contract “to provide the Army with an additional means to adequately support the current and programmed force by performing selected services in wartime and other operations” worldwide (ASBCA No. 56358 (ASBCA 56358) R4, tab 1 at 1, 5-26, 56).

The LOGCAP III contract incorporated by reference various standard clauses common to cost-type contracts, including clause I-27, FAR 52.216-7, ALLOWABLE COST AND PAYMENT (MAR 2000) (ASBCA 56358, R4, tab 1 at 37). *See* 48 C.F.R. § 52.216-7 (2001).

The LOGCAP III contract also contained various Special Provisions that the Army says are relevant to the need for a stay. Clause H-13, MANAGEMENT, required the contractor to “ensure that all personnel hired by [and] for the contractor will comply with all guidance, instructions, and general orders applicable to U.S. Armed Forces and DoD civilians as issued by the Theater Commander and his/her representative.” (ASBCA 56358 R4, tab 1 at 96) Clause H-16, FORCE PROTECTION, obligated the Service Theater Commander “to provide force protection to contractor employees commensurate with that given to...civilians [employed by DoD components] in the operations area unless otherwise stated in each task order” (*id.* at 98). Clause H-21, WEAPONS AND TRAINING, provided that “Contractor personnel will not possess personally owned firearms” in the area of operations. Clause H-21 permitted the government, at its discretion, to issue weapons and ammunition to contractor personnel, but provided that contractor employees were “legally [responsible] for any use that is not in accordance with the rules of engagement.” (*Id.* at 101)

It is undisputed that, between July 2003 and June 2005, the Army issued four task orders to KBR to operate dining facilities in Kuwait and Iraq under the LOGCAP III contract (ASBCA 56358 compl. and answer ¶¶ 12-16). It is further undisputed that each task order incorporated FAR 52.216-7 (*id.* ¶ 17).

KBR alleges that, to meet its obligations under the four task orders, it awarded eleven subcontracts to Eurest Support Services Worldwide (ESS), a dining facilities contractor, in 2004 (ASBCA 56358 compl. ¶¶ 18, 24, 29, 34, 39). KBR alleges that each subcontract was awarded on a firm, fixed price basis (ASBCA 56358 compl. ¶¶ 22, 27, 32, 37), and included supplementary agreements providing that ESS “must travel in convoys in Iraq that were under the protection of military escorts” (ASBCA 56358 compl. ¶¶ 21, 26, 31, 36). In its complaint in ASBCA No. 56358, KBR takes the position that the Army knew that ESS employed private force protection services in Iraq. Thus, KBR alleges that “[s]ince early 2003, the Army, six days each week,” held teleconferences in Iraq and Kuwait, in which the participants addressed “the need to provide armed force protection to vehicles moving materials and supplies into and throughout Iraq.” (ASBCA 56358 compl. ¶ 40) KBR further alleges, on information and belief, that, as a result of

discussions with officials of the Defense Contract Management Agency, both they and “Army commanders at all echelons” were “aware that KBR’s subcontractors were using armed private force protection,” but failed to indicate that such use was unacceptable (ASBCA 56358 compl. ¶¶ 42-45).

It is undisputed that, on 6 February 2007, the Defense Contract Audit Agency (DCAA) issued Form 1, Notice 127, suspending \$19,652,815 in private armed security costs solely “related to the eleven subject ESS subcontracts” (ASBCA 56358 compl. ¶ 47, answer ¶ 47). By letter dated the same day, the contracting officer invoked clause H-16, notified KBR that the government’s initial assessment indicated that it had overpaid KBR in the \$19,652,815 amount, and asserted that “costs associated with privately acquired security should not be charged or paid under the contract in accordance with [the] Allowable Cost and Payment” clause and the cost principles (ASBCA 56358 R4, tab 53 at 1-2; compl. ¶¶ 44-47).

By date of 22 October 2007, KBR submitted a certified claim to the contracting officer for the \$19,652,815 in ESS private armed security costs, plus interest, and requested a contracting officer’s final decision (ASBCA 56358 R4, tab 59 at 4). After the contracting officer failed to render a decision on its claim (ASBCA 56358 compl. ¶ 5, answer ¶ 5), KBR filed the two-count complaint in ASBCA No. 56358. In count I, KBR sought recovery for breach of contract, alleging that the government failed to pay allowable costs as required by the LOGCAP III contract (ASBCA 56358 compl. ¶ 68).

The allegations in count I look to the contracting officer’s duty under the Allowable Cost and Payment clause of the contract to pay costs “determined to be allowable...in accordance with Subpart 31.2 of the Federal Acquisition Regulation” (FAR). FAR 52.216-7(a); 48 C.F.R. § 52.217-7. KBR further alleges that each of its relevant subcontracts with ESS was a firm, fixed price subcontract and that “[n]othing in the LOGCAP III Contract, statute, or regulation prohibits KBR’s incurrence to pay ESS the firm fixed-price under the eleven subject subcontracts” (ASBCA 56358 compl. ¶ 53). In count II, KBR sought recovery in the alternative on the grounds of waiver and ratification, alleging that the contracting officer’s actual or constructive knowledge of KBR’s use of private armed security constituted either waiver of the contractual prohibitions regarding the use of such protection, or ratification of such use (ASBCA 56358 compl. ¶¶ 79, 82-83).

The Army filed a 45-page answer, denying liability. In its answer, the Army made no allegation regarding fraud.

Concurrently with filing its answer, the Army moved to stay proceedings until December 2008 “due to issues raised in this appeal which are the subject of an on-going fraud investigation by the Department of Justice” (Government’s Motion for a Stay of

Proceedings (2008 stay mot.) at 1). The government subsequently withdrew its motion, and the parties jointly moved in July 2008 for a 90-day stay until October 2008, which the Board granted.

The parties thereafter engaged in document discovery.

Upon the expiration of the 90-day stay, the Board issued a scheduling order. In its order, the Board set a discovery cutoff date of 26 February 2009. The Board also set the case for a five-day trial beginning on 3 May 2010.

On 6 November 2009, KBR filed a motion for judgment on the pleadings. In its motion, KBR sought judgment on count I of its complaint. KBR contended broadly that no provision of the LOGCAP III contract prohibited the use by ESS of private armed force protection and the contract does not prohibit KBR from recovering such costs when they were incurred by its subcontractors. KBR asserted that “the Army’s withhold[ing] breached the Contract and...KBR is entitled to recover the full amount of its claim - \$19,652,815 - plus Contract Disputes Act interest.” (ASBCA 56358 Appellant’s Motion for Judgment on the Pleadings at 14)

The Army’s response to the motion for judgment on the pleadings was due to be filed on 24 November 2009. At the Army’s request, the Board granted an extension to 18 December 2009. Two days before the Army’s response to the motion for judgment on the pleadings was due, both parties filed a motion for a 90-day stay to discuss settlement. The Board granted the motion, staying proceedings to and including 17 March 2010. Thereafter, the parties jointly agreed that the Army would respond to the pending motion for judgment on the pleadings on 1 April 2010. On that date, however, the government filed the False Claims Act suit in the district court, and the Army thereafter filed the present motion for an indefinite stay pending disposition of that action. In view of the pending stay motion, the Board cancelled the trial set for 8 May 2010.

There is no allegation in the pleadings or motion papers in ASBCA No. 56358 that the appeal involves any KBR subcontractor other than ESS.

B. ASBCA No. 57151: Indirect Costs of Private Security Services to KBR

ASBCA No. 57151 also involves a dispute regarding the LOGCAP III contract, but relates to a Revised Form 1 issued by DCAA by date of 3 August 2009, two years after the claim in ASBCA No. 56358. While the dispute in ASBCA No. 56358 relates to ESS, the dispute in ASBCA No. 57151 relates to the indirect costs of private security services to KBR.

It is undisputed that, in the Revised Form 1, DCAA disapproved of \$103,397,086 in costs for private security services associated with five task orders under the LOGCAP III contract (ASBCA 57151 compl. ¶ 19; ASBCA 57171 Government Motion for a Stay of the Proceedings (ASBCA 57151 mot.) ex. 5 at 2 of 7). It is also undisputed that, of this total amount, DCAA disapproved of \$20,371,798 in indirect private security costs “to provide movement protection and other security services to [KBR] personnel in the Middle East” (ASBCA 57151 mot., ex. 5 at 6 of 7). KBR alleges that, based on DCAA’s methodology of calculating a total burdened amount, the total disapproved amount for indirect private security services is \$21,131,743 (ASBCA 57151 compl. ¶ 21).

KBR alleges that it submitted a certified claim to the contracting officer on 20 October 2009 for \$21,131,743, representing the withheld amount of indirect costs disapproved on the Revised Form 1 relating to private security services under the LOGCAP III contract (ASBCA 57171 compl. ¶¶ 4, 19-21, 23-35). KBR further alleges that “[n]o provision of the LOGCAP III contract prohibits the use of private security services,” and that government officials “knew that KBR was using private security services for movement of KBR personnel and resources” into and throughout Iraq from 2003 and after (ASBCA 57171 compl. ¶¶ 10, 26, 29). KBR alleges that the contracting officer failed to render a decision on its 20 October 2009 claim, and it thereafter brought this appeal as a deemed denial (ASBCA 57171 compl. ¶ 6).

Instead of filing an answer, the Army brought the present motion to stay proceedings in ASBCA No. 57171.

C. False Claims Act Suit

By date of 1 April 2010, the government filed suit against KBR in district court. *United States v. Kellogg Brown & Root Services, Inc.*, No. 1:10-cv-00530 (D.D.C.). In its four-count complaint, the government seeks recovery under the False Claims Act, and, in the alternative, at common law under theories of breach of contract, unjust enrichment and payment by mistake.

The government alleges that, under the LOGCAP III contract, KBR and its subcontractors were “absolutely prohibited” from possessing or using privately owned weapons unless authorized by the relevant military command (compl., *United States v. Kellogg Brown & Root Services, Inc.* (FCA compl.) ¶ 9). The government further alleges that KBR “never obtained” the required military authorization for itself or its subcontractors (FCA compl. ¶ 10). The government alleges that KBR presented claims for payment “knowing that they included the costs of private, armed security services prohibited by LOGCAP III” (FCA compl. ¶ 12).

The allegations regarding the details of the security costs are divisible into two categories. In the first category, the government alleges that “more than 30 of KBR’s other subcontractors used private armed security in Iraq without required authorization” (FCA compl. ¶ 23). Comparable allegations regarding “more than 30 other companies,” “30 of KBR’s other subcontractors,” and “more than 30 companies” appear elsewhere in the complaint (FCA compl. ¶¶ 11, 23, 27).

In context, it appears that ESS is one of the referenced “30 companies.” The government alleges that ESS “routinely hired private armed security companies to shuttle managers, personnel, and payroll around Iraq, rather than arrange to travel with military convoys as required by LOGCAP III” (FCA compl. ¶ 24). According to the government, ESS “also used private armed security to provide static guards for its offices in Iraq” and “either knew or should have known that the cost of these services inflated the cost of ESS’s subcontracts” (*id.*). The government adds that KBR “awarded the subcontracts without adequate price competition and with reckless disregard for the costs that it would be passing on to the Army” (*id.*).

In the second category, the government alleges that, without authorization, KBR hired three private security contractors “to provide personal security for its executives in Iraq,” billing “the dominant portion of the costs” to the Army (FCA compl. ¶¶ 22, 24, 32).

Count I of the complaint seeks recovery under the False Claims Act. The government alleges that, “[b]eginning in 2003, and continuing through at least 2006, KBR knowingly presented or caused to be presented...false or fraudulent claims for payment under LOGCAP III” in that “KBR then knew that they contained costs for services...that included improper use of private armed security” (FCA compl. ¶ 34). As a result, the government paid the claims and suffered undetermined damages (FCA compl. ¶ 35). The second count of the complaint alleges breach of contract based upon the same facts (FCA compl. ¶¶ 36-38). The third count is for unjust enrichment. The government alleges that KBR has “received profit and other monies to which it is not entitled” (FCA compl. ¶ 40). Finally, the government seeks recovery for payment by mistake (FCA compl. ¶ 42).

Significantly, in its complaint in the False Claims Act suit, the government does not seek to have the LOGCAP III contract voided on the ground of fraud.

DISCUSSION

A. Contentions of the Parties

The Army’s stay motions in ASBCA No. 56358 and ASBCA No. 57171 are substantially identical. In each appeal, the Army seeks a stay “indefinitely, until the

conclusion of the False Claims Act suit.” (ASBCA 56358 Government’s Motion for A Stay of The Proceedings (ASBCA 56358 mot.) at 3; ASBCA 57171 Government’s Motion for A Stay of The Proceedings (ASBCA 57151 mot.) at 3).

In its motions, the Army argues that such a stay is warranted because the False Claims Act suit “involves the same facts, issues and witnesses as” these appeals, as well as “the same improper costs” and “ same contractual prohibitions.” Hence, the Army maintains, proceeding with these appeals would prejudice the government in the district court. (ASBCA 56358 mot. at 3; ASBCA 57171 mot. at 3)

The Army supports its motions chiefly with the complaint in the False Claims Act suit, together with a declaration from the Department of Justice attorney assigned as lead counsel. He characterizes the issues in ASBCA No. 56358 as “whether KBR and its subcontractors were authorized...to hire private armed security and whether KBR could pass those costs on to the Army, in particular the \$19,652,815 in costs attributable to ESS” (ASBCA 56358 mot., ex. 3, ¶ 2). He opines that “the issues, relevant facts, and witnesses in the Government’s civil fraud case are the same as those in KBR’s ASBCA Appeal [No. 56358]” (ASBCA 56358 mot., ex. 3, ¶ 8). He expresses his “belief that holding parallel ASBCA proceedings involving the same issues, facts, and witnesses would interfere with the Government’s civil fraud action...and needlessly expend the time and effort of the parties and the Board” (ASBCA 56358 mot., ex. 3, ¶ 9). The Army filed the declaration of the Department of Justice attorney from ASBCA No. 56358 without change in ASBCA No. 57171 (ASBCA 57171 mot., ex. 3).

In opposing the motions, KBR contends that the requested stay is “overly broad, given the pendency of Appellant’s Motion for Judgment on the Pleadings” in ASBCA No. 56358 (ASBCA 56358 Appellant’s Opposition to Government’s Motion for a Stay of the Proceedings (ASBCA 56358 app. opp’n) at 2). KBR insists that the Army has failed to meet its burden for imposing a stay. KBR asserts that the touchstone issue in the False Claims Act suit -- whether KBR breached the LOGCAP III contract – is properly before the Board, which has the expertise to resolve it. (ASBCA 56358 app. opp’n at 5) KBR also stresses that it will be harmed by the proposed stay, given the Army’s withholding of substantial contract proceeds, and urges that a stay would frustrate the orderly resolution of disputes (ASBCA 56358 app. opp’n at 7-9). Finally, KBR contends that the requested stay is overbroad (ASBCA 56358 app. opp’n at 9-10).

B. *Discussion*

Our inherent authority to stay proceedings “calls for the exercise of judgment...which must weigh competing interests and maintain an even balance.” *Landis v. North American Co.*, 299 U.S. 248, 254-55 (1936). In exercising this discretion, we have recognized that, under the Contract Disputes Act, 41 U.S.C.

§§ 601-13, “a contractor is entitled to have a properly asserted appeal litigated before, and decided by, the Board.” *TRW, Inc.*, ASBCA Nos. 51172, 51530, 99-2 BCA ¶ 30,407 at 150,332. We have said that, where the government seeks a stay pending the outcome of False Claims Act litigation, “it must demonstrate a clear case of hardship or inequity in being required to go forward.” *Id.* The cases reflect that we generally consider four principal factors in weighing a stay request. Those factors are: “(1) whether the facts, issues, and witnesses in both proceedings are substantially similar; (2) whether the on-going investigations [or parallel proceedings] would be compromised in going forward with [our] case; (3) whether the proposed stay could harm the non-moving party; and (4) whether the duration of the requested stay is reasonable.” *Public Warehousing Co., K.S.C.*, ASBCA No. 56116, 08-1 BCA ¶ 33,787 at 167,227. We have also considered judicial efficiency in evaluating stay motions. *See Kaman Precision Products, Inc. formerly dba Kaman Dayron, Inc.*, ASBCA No. 56305 *et al.*, 10-2 BCA ¶ 34,499 at 170,153.

After considering these factors in the context of the record before us, we conclude that the motions must be denied. We address the factors in turn below.

1. *Similarity.* The Army asserts that “the False Claims Act suit involves the same contract, parties, events and many of the same claims as the Board proceeding” (ASBCA 56358 mot. at 10). For its part, KBR does not seriously contest this characterization, but instead contends that the False Claims Act suit “is nothing but a plain vanilla breach of contract action that essentially regurgitates the issues before the Board; those issues are properly before the Board, which has the expertise necessary to resolve them” (ASBCA 56358 app. opp’n at 5).

We agree that both appeals are similar to some portions of the False Claims Act suit, but we do not regard this similarity to compel us to exercise our discretion to grant the requested stay. ASBCA No. 56358 is confined, in the words of Justice Department counsel, to “the \$19,652,815 in costs attributable to ESS” (ASBCA 56358 mot., ex. 3, ¶ 2). By contrast, the False Claims Act suite has a much wider scope. While it relates to ESS, it also embraces “more than 30 of KBR’s other subcontractors [that are alleged to have] used private armed security in Iraq without authorization” (FCA compl. ¶ 23).

With respect to ASBCA No. 57171, while the Army insists that resolution of the False Claims Act suit “will involve substantially the same issues, facts, and witnesses” as that appeal (ASBCA 57171 mot. at 10), the claimed similarity extends to a small part of the False Claims Act suit. ASBCA No. 57171 is confined to indirect costs “to provide movement protection and other security services to [KBR] personnel in the Middle East,” as stated on the on the Revised Form 1 (ASBCA 57171 mot., ex. 5 at 6). In context, these allegations comprise a minor portion of the allegations regarding KBR in the district court complaint.

A stay is not the necessary result of this limited similarity. There is no compelling reason offered or evident for requiring 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" (FCA, compl. ¶ 23). There is also no reason why KBR also should be compelled to refrain from proceeding here for adjudication of other issues unique to False Claims Act liability but not relevant to contract liability in these appeals. *See United States ex rel. Wilson v. Kellogg Brown & Root, Inc.*, 525 F.3d 370, 378 (4th Cir. 2008) (holding that the "false or fraudulent claim" formulation in the False Claims Act "surely cannot be construed to include a run-of-the-mill breach of contract action that is devoid of any objective falsehood").

Two other considerations also counsel against a stay despite similarity. The first is the availability of less drastic means. "A general stay is just one of several procedures available. Other options may be utilized in lieu of imposing a stay. These alternate tools include the imposition of protective orders, sealed interrogatories, a stay for a finite period of time, or a stay limited to a specific matter." *CFS-Related Securities Fraud Litigation*, 256 F. Supp. 2d 1227, 1236 (N.D. Okla. 2003) quoted with approval in *Palm Springs General Trading and Contracting Establishment*, ASBCA Nos. 56290, 56291, 08-2 BCA ¶ 34,007 at 168,178 (noting that stipulations regarding scope of discovery can be employed to avoid intrusion into criminal investigation); *see also E-Systems, Inc.*, ASBCA No. 32033 *et al.*, 88-2 BCA ¶ 20,753 at 104,871 (cancelling scheduled hearing but allowing evidentiary depositions to proceed to preserve testimony while criminal investigation continued); *Ingalls Shipbuilding Division, Litton Systems, Inc.*, ASBCA No. 22645, 78-2 BCA ¶ 13,350 at 65,261 (stressing that, despite a parallel criminal prosecution, civil litigation could proceed, "subject to some limitation such as a protective order to narrow the range of discovery" to ameliorate harm of protracted stay).

The second additional consideration is the order of filing. The complaint in ASBCA No. 56358 was filed in April 2008, two years before the district court action commenced in April 2010. We exercised jurisdiction, the parties engaged in discovery in ASBCA No. 56358 and there is a pending motion for judgment on the pleadings in that appeal. In these circumstances, according priority to our own proceedings is appropriate. *Cf. Ambrosia Coal & Construction Co. v. Morales*, 368 F.3d 1320, 1331 (11th Cir. 2004) (giving weight, under abstention doctrine, to "the order in which the fora obtained jurisdiction").

2. *Compromise of On-Going Investigations.* The second factor is no longer relevant. While the potential harm to a pending investigation figured prominently in its 2008 stay motion, the Army now tells us that the investigation has "culminated with the filing of [the False Claims Act] suit" (ASBCA 56358 mot. at 7).

On this stay motion, the Army has also “failed to demonstrate how it would be prejudiced by continuation of [the] appeals.” *TRW, Inc.*, 99-2 BCA ¶ 30,407 at 150,332. The Army has offered speculation that these appeals could “interfere with the Government’s civil fraud action” (ASBCA 56358 mot., ex. 3, ¶ 9), but we are unwilling to conclude from these generalities that any problems could not be adequately addressed through a protective order or comparable device.

3. *Possibility of Harm to Non-Movant.* In its 2008 motion, the Army brushed aside considerations of harm, stressing that “[a] stay of a short 6-month duration would not significantly harm KBR” (2008 stay mot. at 19). Now, in seeking a stay of indefinite duration, the Army tells us that KBR will not be harmed “given the billions that [it] is reaping from LOGCAP III” and given the interest that it can recover if it ultimately prevails (ASBCA 56358 mot. at 13).

We reject this dismissive approach. The relevant inquiry is whether “there is even a fair possibility that the [proposed] stay...will work damage” to KBR. *Landis*, 299 U.S. at 255. Unsubstantiated assertions regarding “billions” in profits, and assurances regarding interest, do not answer the inquiry. We have no basis for concluding that KBR is reaping profits from the LOGCAP III contract. In addition, interest or not, KBR suffers harm if contract proceeds to which it may be entitled are withheld during a stay that will last “indefinitely.”

4. *Reasonableness of the Duration of the Requested Stay.* As noted, the Army seeks a stay “indefinitely, until the conclusion of the False Claims Act suit being litigated in the U.S. District Court” (ASBCA 56358 mot. at 3).

“[A] stay of indefinite duration in the absence of a pressing need” is an abuse of discretion. *Landis*, 299 U.S. at 255. We have refused indefinite stays before to allow other litigation to go forward. *See Donat Gerg Haustechnik*, ASBCA No. 41197 *et al.*, 96-1 BCA ¶ 27,977 at 139,735 (rejecting the government’s “manifestly unfair demand” to stay pending appeals until after the contractor had finished defending itself against newly-initiated civil fraud actions); *see also Systems & Electronics, Inc.*, ASBCA No. 47811, 95-1 BCA ¶ 27,530 at 137,204 (finding the government’s argument unconvincing that “a dismissal or indefinite stay of the proceedings [was] necessary” to permit completion of a criminal investigation only in a preliminary stage).

While the Army “has offered no estimate of the expected length of the stay,” *Donat*, 96-1 BCA ¶ 27,977 at 139,735, caseload statistics compiled by the Administrative Office of the United States Courts afford some insight. These statistics reveal that, as of 31 March 2009, the median time interval from filing to disposition by trial for civil cases in the U.S. District Court for the District of Columbia was 35.6 months. Administrative Office of the United States Courts, Federal Judicial Caseload Statistics (2009), Table C-5,

Time Intervals from Filing to Disposition of Civil Cases Terminated, by District and Method of Disposition, available at

<http://www.uscourts.gov/Statistics/FederalJudicialCaseloadStatistics/FederalJudicialCaseloadStatistics2009.aspx>. We take judicial notice of these statistics. *See Toland v. Walsh*, No. 9:04-CV-0773 (GLS), 2008 U.S. Dist LEXIS 17645, 2008 WL 657247, at *2 (N.D.N.Y. Mar. 7, 2008) (relying on Administrative Office of the United States Courts caseload statistics to ascertain median time between filing and disposition of civil cases in district); *see also Rothe Development Corp. v. Department of Defense*, 545 F.3d 1023, 1045-46 (Fed. Cir. 2008) (taking judicial notice of U.S. Geological Survey and Census Bureau statistics). Thus, assuming that the False Claims Act suit goes to trial, it foreseeably will not go to judgment until April 2013. Considering judicial efficiency, *Kaman Precision Products*, 10-2 BCA at 170,153, we cannot justify such a lengthy, open-ended stay, particularly when ASBCA No. 56358 was filed two years before the False Claims Act suit.

CONCLUSION

The Army's motions for a stay of the proceedings are denied.

Dated: 23 November 2010

ALEXANDER YOUNGER
Administrative Judge
Armed Services Board
of Contract Appeals

I concur

I concur

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

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. 56358 and 57151, Appeals of Kellogg Brown & Root Services, Inc., rendered in conformance with the Board's Charter.

Dated:

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