ARMED SERVICES BOARD OF CONTRACT APPEALS

Appeals of --	)	
	)	
General Dynamics Ordnance and	)	
Tactical Systems, Inc.	)	ASBCA Nos. 56870, 56957
	)	
Under Contract No. W52P1J-05-G-0002	)	

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OPINION BY ADMINISTRATIVE JUDGE DELMAN ON APPELLANT'S MOTION FOR SANCTIONS

In these appeals under the Contract Disputes Act (CDA), 41 U.S.C. §§ 7101-7109, General Dynamics Ordnance and Tactical Systems, Inc. (appellant) seeks $18,193,894 to recover unanticipated costs based upon claimed inadequate government estimates of ammunition quantities under the subject contract. This contract was to serve as a "second source" to supply small caliber ammunition to the Department of the Army for a base year plus option years, beyond those quantities furnished by the Army's primary supplier, Alliant Techsystems, Inc. (ATK). This opinion addresses appellant's motion for sanctions for the Army's refusal to comply with the Board's discovery orders.

Background

Early in these proceedings, appellant sought the discovery of documents that the government identified in its Rule 4 file as "Reserved-Possible Trade Secrets." On 22 October 2009, appellant filed a motion for entry of a protective order, seeking a limited disclosure of these documents. On 14 December 2009, the Army filed an opposition to appellant's request for a protective order, objecting to the release of these Rule 4 documents in any manner, contending that the documents were irrelevant to these appeals or not reasonably calculated to lead to admissible evidence; that the material

constituted "trade secrets" under the Trade Secret Act (TSA), 18 U.S.C. § 1905; and that disclosure of trade secrets under a Board protective order would violate the TSA.[1]

Pursuant to Board order, the parties briefed the issues and the presiding administrative judge reviewed the withheld documents, *in camera*. For the most part, these documents consisted of e-mails between government employees that referred to ATK unit prices and production capacity for specified rounds of ammunition at the government-owned, contractor-operated facility known as the "Lake City Army Ammunition Plant" (LCAAP), or related to information from which this type of information could be derived.

On 1 June 2010, the presiding judge issued "Order on Appellant's Motion for Protective Order," which granted appellant's motion for a protective order seeking a limited disclosure of the documents.[2] The Board held, *inter alia*, that the documents were deemed to contain trade secrets but were relevant to appellant's case for purposes of discovery; that the Board was authorized by the CDA and the Board's Rules, duly published in the Code of Federal Regulations, 48 C.F.R., Chapter 2, Appx. A, Part 2 (2010), to issue protective orders in connection with the disclosure of confidential business information, including trade secrets; and that any such disclosure in response to a Board protective order was "authorized by law" and hence did not violate the TSA in accordance with its express terms. The Board concluded:

> Having duly considered and weighed appellant's need for this information and its relevancy to its claim in these appeals, the government's burden of producing the information and any resulting harm to ATK in the disclosure

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[1] Insofar as pertinent, the TSA provides: "Whoever, being an officer or employee of the United States or of any department or agency thereof...publishes, divulges, discloses, or makes known *in any manner or to any extent not authorized by law* any information coming to him in the course of his employment or official duties...which information concerns or relates to the trade secrets, processes, operations, style of work, or apparatus, or to the identity, confidential statistical data, amount or source of any income, profits, losses, or expenditures of any person, firm, partnership, corporation or association...shall be fined under this title, or imprisoned not more than one year, or both; and shall be removed from office or employment." (Emphasis added)

[2] The Board's Order dated 1 June 2010 covered 30 documents (R4, tabs 1, 2, 3 , 5-8, 10, 12-14, 16, 17, 20, 22, 28, 35, 37, 40, 42-46, 56, 59, 62, 66, 67, 82). By letter to the Board dated 17 January 2012, the government asserts that it has released to appellant, unredacted, Rule 4, tabs 8, 40, 44, 45 and 46, and has released to appellant redacted versions of the other 25 documents. The redacted documents remain in dispute and are the subject of this Decision.

> of the information, it is concluded that a protective order, limiting the disclosure to certain persons and under limited circumstances, is a reasonable accommodation of these competing interests.
>
> Appellant's motion for a protective order is GRANTED. The parties are ordered to confer and to agree to a protective order for the Board's signature no later than 30 days from receipt of this Order. If the parties are unable to agree upon the terms and conditions of a protective order by that time, they may file their own proposed terms and conditions for the Board's review and the Board shall issue the protective order.
>
> *Failure to comply with Board orders may result in the imposition of sanctions under Board Rule 35.* [Emphasis added]

The Army did not confer with appellant for purposes of reaching agreement on the terms and conditions of a protective order for the Board's signature and did not file its own proposed terms and conditions for the Board's review as directed by the Board. Rather, by letter to the Board dated 7 June 2010, the Army advised that it intended to appeal the Board's interlocutory discovery order and requested a stay of appeal proceedings pending resolution of its anticipated appeal to the Federal Circuit. Appellant filed in opposition to a stay. The Army replied, reiterating, *inter alia*, its request for a stay of proceedings and also requesting the Board to certify its discovery order for appeal under 28 U.S.C. § 1292(b).

By opinion dated 26 July 2010, the Board denied the Army's request that it certify the interlocutory order for appeal; denied the Army's motion to stay all Board proceedings pending appeal; but stayed the application of the Board's order for 60 days. *General Dynamics Ordnance and Tactical Systems, Inc.*, ASBCA Nos. 56870, 56957, 10-2 BCA ¶ 34,525. The Board incorporated the 1 June 2010 order into that opinion.

By letter to the Board dated 22 September 2010, the Army advised as follows:

> By order dated 1 June 2010, the Board required the Government to produce documents containing Alliant Techsystems Inc.'s (ATK) proprietary information to General Dynamics Ordnance and Tactical Systems (GD-OTS) once the Board issues a protective order. By order dated 27 July 2010, the Board granted the Government a sixty day stay to review its options.

> *The Government declines to follow the Board's order of 1 June 2010 requiring the production of documents to GD-OTS, or its counsel subject to a protective order.* The Government will continue to make third party proprietary information available to the Board *in camera. In the event that the Board determines that evidentiary sanctions are necessary, the Board will have the documents available and be able to craft an appropriate order.*

(Emphasis added)

On or about 13 October 2010, appellant filed a motion for evidentiary sanctions for the Army's refusal to enter into a protective order, as ordered by the Board, for the limited disclosure of these documents. Appellant requested that the Board sustain these appeals, or alternatively, determine that certain facts be conclusively established for purposes of the appeals, including conclusive findings that the subject contract was a requirements contract, and that the estimates in the solicitation documents were inaccurate (mot. at 7-8). The Army filed in opposition to appellant's motion, and appellant filed a reply.

On 3 June 2011, the presiding administrative judge issued a protective order in accordance with Board Rule 14(a), which authorizes the Board to issue protective orders to protect "the secrecy of confidential information or documents."[3] Insofar as pertinent, the Board's order stated as follows:

> The Board's 1 June 2010 Order expressed the Board's intention to ultimately sign and issue a protective order in the event the parties failed to agree on the terms of a protective order for the Board's signature. Given that the parties have failed to reach such an agreement, the undersigned hereby executes and issues the attached Protective Order pursuant to Board Rule 14(a).

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[3] Insofar as pertinent, "**Rule 14. Discovery–Depositions**" provides as follows:

> (a) *General Policy and Protective Orders*–The parties are encouraged to engage in voluntary discovery procedures. In connection with any deposition or other discovery procedure, the Board may make any order required to protect a party or person from annoyance, embarrassment, or undue burden or expense. *Those orders may include limitations on the scope, method, time, and place for discovery, and provisions for protecting the secrecy of confidential information or documents*" (emphasis added). 48 C.F.R., Chapter 2, Appx. A, Part 2 (2010).

> The government is hereby directed to disclose to appellant the disputed documents identified in the 1 June 2010 Order as "Confidential Material" defined by and subject to this Protective Order no later than 30 days from the date of this Order.
>
> ....
>
> *Failure to comply with Board orders may result in the imposition of sanctions.* [Emphasis added]

Insofar as pertinent, the Board's protective order required the Army to disclose the disputed documents to appellant's attorneys and other persons shown to be necessary for the conduct of the litigation. *See* Bd. Order of 3 June 2011, ¶ 4(c) at 3 (attached as Appendix hereto).

The Army refused to disclose the disputed documents to appellant's counsel in the limited manner prescribed by the Board's protective order. By letter to the Board dated 7 July 2011, appellant renewed its motion for evidentiary sanctions.

By letter dated 9 August 2011, appellant advised the Board that it had not received any interrogatory answers or documents from the Army in response to appellant's interrogatories and request for production of documents dated 3 September 2010. Appellant stated that "The Army's failure to respond to these requests for almost a year is a violation of the Board's rules which require interrogatories and requests for production to be answered within 45 days of service. ASBCA Rule 15." Appellant requested that "the Board consider this discovery delay as part of its judgment on the pending sanctions motion, which relates to the Army's refusal to produce Rule 4 documents." Appellant also requested that its letter be deemed a motion to compel discovery. (Bd. corr.)

The Army ultimately provided interrogatory answers in August 2011, and documents in November 2011.[4] As part of this document production, the Army provided the currently disputed 25 Rule 4 documents to appellant, but redacted the information that is the subject of appellant's motion for sanctions (see note 2).

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[4] From the flow of recent correspondence, it appears that the parties have also joined issue on the responsiveness of the government's production of documents in November, 2011. This Decision relates only to the Rule 4 documents -- and the disputed matter contained therein -- that are the subject of the Board's Orders dated 1 June 2010 and 3 June 2011, and that have been released to appellant in redacted form.

DECISION

It is undisputed that the Army has refused to obey the Board's orders dated 1 June 2010 and 3 June 2011 related to the production and limited disclosure of the information under protective order. It is also undisputed that the Board put the Army on written notice that its failure to comply with Board orders may result in the imposition of sanctions.

Board Rule 35 authorizes the Board to issue sanctions for the violation of Board orders:

> **Rule 35. Sanctions**
>
> If any party fails or refuses to obey an order issued by the Board, the Board may then make such order as it considers necessary to the just and expeditious conduct of the appeal.

48 C.F.R., Chapter 2, Appx. A, Part 2 (2010).

A tribunal is afforded considerable discretion in determining whether sanctions are appropriate, and if so, what particular sanctions are appropriate under the circumstances of each case. We have not hesitated to impose sanctions when warranted by the circumstances. As we stated in *Turbomach*, ASBCA No. 30799, 87-2 BCA ¶ 19,756 at 99,953-54:

> It cannot be disputed that this Board has the inherent power to control the discovery process in appeals before it. We have implemented this authority, in part, with Rules 31 and 35. Our power to impose sanctions is broad and may even extend to dismissal of an appeal. We have issued orders prohibiting the introduction of evidence; prohibited the calling of witnesses, and drawn adverse inferences. Thus, the Board has available to it, and has used, a variety of sanctions designed to enforce compliance with our Rules and orders and secure the just and expeditious resolution of the disputes before us. [Citations omitted]

We have considered the following factors in determining whether sanctions should be imposed in Board appeals: the willfulness of the offending party; the degree of prejudice involved; the delay, burden and expense incurred by the movant; and evidence of the offending party's lack of compliance with other Board orders. *Lockheed Martin Corp.*, ASBCA No. 45719, 99-1 BCA ¶ 30,312 at 149,884. We address these factors below.

Willfulness of the Army's Actions

The definition of "willful" depends upon the context and circumstances. For purposes of determining whether a party has willfully violated a board or court order we find the following definition instructive from *United States v. Straub,* 508 F.3d 1003, 1012 (11th Cir. 2007): "Willfulness 'means a deliberate or intended violation, as distinguished from an accidental, inadvertent, or negligent violation of an order' [citations omitted]."

The Army contends that in order to support evidentiary sanctions it is necessary for the moving party to show government misconduct such as improper motives, malicious behavior, evil intent or bad faith (gov't opp'n at 11-12). We do not agree, and our cases do not so hold. In support of its position, the Army cites *McDonnell Douglas Helicopter Systems*, ASBCA No. 50341, 99-2 BCA ¶ 30,546 (no adverse inference taken where no misconduct shown to hide or destroy work papers), but the facts of that case are clearly distinguishable from our own.

The Army contends that its refusal to comply with the Board's orders is tempered by its good faith "belief" that the TSA precludes disclosure of the disputed material under a Board protective order (gov't opp'n at 12). We are not persuaded that a party's good faith belief, however strongly held, justifies its refusal to comply with Board orders. If this were the law, the Board's discovery orders could be violated with impunity whenever a party sincerely believed it was right and the Board wrong. Such would quickly lead to the emasculation of the Board's authority and its statutory charge under the CDA.

The Board duly considered the Army's position here but rejected it on the merits. Thereafter, as the Army well understood, it had the choice to comply with the Board's orders and disclose the disputed information subject to the Board's protective order or to refuse to comply and risk sanctions. The Army–knowingly, intentionally and willingly–made the latter choice.[5]

The Army also contends that its refusal to comply with the Board's orders is tempered by the fact that it provided the disputed documents to the Board for inspection, *in camera,* as directed by the Board (gov't opp'n at 11-12). While the Army did in fact

[5] The Army's choice was not a "Hobson's Choice." Despite the Army's many position papers, briefs and letters on this subject, it has never made any persuasive showing, through case law or otherwise, that government counsel, the contracting officer and/or ASBCA judges were at risk of criminal prosecution related to the disclosure of the disputed information pursuant to the Board's protective order.

comply with this order, such compliance fails to provide any reasonable justification for its failure to comply with the Board's orders that resulted from the *in camera* inspection.

In conclusion, we believe that the Army's refusal to comply with the Board's orders was neither accidental, inadvertent or negligent, nor was the Army's action impetuous or without aforethought. The Army's refusal was knowing, deliberate and intentional and was submitted to the Board in writing. The Board gave the Army every reasonable opportunity to reconsider its position—staying operation of the order of 1 June 2010 for 60 days and later providing the Army with additional time to comply with the protective order dated 3 June 2011. At each juncture, the Army refused to comply with the Board's orders, and did so with full knowledge of the consequences.

We conclude that the Army willfully refused to comply with the Board's orders.

Prejudice

As part of its case, appellant contends that the Army failed to use reasonable care to develop the estimates included in the solicitation, which it characterizes as one for a requirements contract. If a requirements contract is established by the evidence,[6] the data available to and/or used by the Army for the estimates becomes relevant to appellant's case. As we previously held, the withheld discovery information is "relevant to appellant's claim or may lead to the discovery of admissible evidence in these appeals," *General Dynamics Ordnance and Tactical Systems, Inc.*, 10-2 BCA at 170,260. By letter to the Board dated 2 December 2011, the Army quotes, at page 8, an internal email from a government estimator stating that in developing Best Estimated Quantities the government looked at, among other things, "LCAAP capacities" (Bd. corr.). The Army is withholding capacity and pricing data here. We believe the Army's failure to disclose to appellant's counsel the unredacted documents, in the limited manner prescribed by the Board's orders, materially prejudices appellant's case.

Delay, Burden and Expense

It cannot be seriously disputed that the Army's refusal to comply with the Board's orders has materially delayed the discovery phase of these appeals and has consumed the time and resources of all parties concerned. The ASBCA typically enters protective orders protecting confidential business material in a matter of days or weeks, depending upon how quickly the parties can agree on the language of the protective order. This

[6] The government's motion for summary judgment, contending that the parties entered a non-binding Basic Ordering Agreement, was denied. *General Dynamics Ordnance and Tactical Systems, Inc.*, ASBCA Nos. 56870, 56957, 11-2 BCA ¶ 34,774.

discovery dispute has been pending for over two years, and during this time appellant and the Army have filed numerous briefs, position papers and letters addressing the subject. The Army's refusal to comply with the Board's orders has caused this delay, burden and expense.

Other Compliance Failures

On 3 September 2010, appellant provided to the Army its first set of document requests and interrogatories. ASBCA Rule 15 requires that the receiving party provide responses in writing, under oath, within 45 days of service. The Army failed to timely provide answers to this discovery. It was only after appellant filed a motion to compel discovery on 9 August 2011 that the government provided this discovery. The Army did not violate any Board discovery order in this respect, but violated the spirit if not the letter of Board Rule 15 through this inordinate delay.

Having duly considered and weighed all the circumstances of this case and the parties' contentions, we believe that it is appropriate to impose sanctions upon the Army for its willful failure to comply with the Board's discovery orders. We address the nature of these sanctions below.

The Sanctions

Appellant asks us to sustain its appeals by virtue of the Army's behavior. Appellant fails to cite to any ASBCA authority to support such a sanction under circumstances similar to those here, nor are we aware of any such case law. We do not believe that the Army's conduct–albeit willful–warrants such a sanction. *Compare National Hockey League v. Metropolitan Hockey Club, Inc.*, 427 U.S. 639 (1976) (dismissal of complaint affirmed by reason of party's flagrant bad faith and callous disregard of responsibilities).

Alternatively, appellant seeks evidentiary sanctions. An evidentiary sanction serves to insure that the offending party does not profit or obtain undue advantage by frustrating the legitimate litigation rights of its adversary. In vindicating these rights, the evidentiary sanction should bear some reasonable relationship to the evidentiary matter to which access has been impermissibly denied. *See, e.g., Ralph Construction, Inc.*, ASBCA No. 35633, 88-2 BCA ¶ 20,731, *aff'd on recon.*, 88-3 BCA ¶ 21,136 (sanction issued barring two witnesses from testifying due to government refusal to make them available for pre-trial interview in accordance with Board orders).

Applying these principles to the facts of this case, we believe the following sanction is appropriate to the circumstances. We draw an adverse inference from the Army's refusal to provide the disputed discovery information to appellant's counsel, specifically, that said evidence, if disclosed, would show that there was relevant

information available to the Army that it failed to consider when developing the estimates in question for the solicitation documents, thereby causing the estimates to be inadequately or negligently prepared. *Rumsfeld v. Applied Companies, Inc.*, 325 F.3d 1328 (Fed. Cir. 2003); *Medart v. Austin*, 967 F.2d 579 (Fed. Cir. 1992); *S.P.L. Spare Parts Logistics, Inc.*, ASBCA Nos. 51118, 51384, 02-2 BCA ¶ 31,982. Our finding is conclusive.

CONCLUSION

We have carefully considered the parties' positions and the attendant circumstances in imposing sanctions here. We believe that the sanction imposed is reasonably tailored to the Army's violation of the Board's orders requiring the limited disclosure of the disputed information, and is "necessary to the just and expeditious conduct of the appeal." Board Rule 35. Appellant's motion for sanctions is granted to the extent provided herein.[7]

Dated: 3 February 2012

JACK DELMAN
Administrative Judge
Armed Services Board
of Contract Appeals

I concur

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

I concur

EUNICE W. THOMAS
Administrative Judge
Vice Chairman
Armed Services Board
of Contract Appeals

[7] Appellant has not persuaded us that there is a reasonable connection between the Army's refusal to disclose the disputed information and appellant's proposed sanction seeking a conclusive finding that the contract was a requirements contract. Accordingly, we decline to impose such a sanction under this motion for failure to disclose the disputed information.

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. 56870, 56957, Appeals of General Dynamics Ordnance and Tactical Systems, Inc., rendered in conformance with the Board's Charter.

Dated:

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

Attachment:
Bd. Order dated 3 June 2011

APPENDIX

ARMED SERVICES BOARD OF CONTRACT APPEALS

Appeals of --	)	
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General Dynamics Ordnance and Tactical Systems, Inc.	)	ASBCA Nos. 56870, 56957
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Under Contract No. W52P1J-05-G-0002	)	

PROTECTIVE ORDER

By Order dated 1 June 2010, the undersigned granted appellant's motion for protective order, and said Order was adopted and published in the Board's decision denying certification for interlocutory appeal and granting a 60-day stay, *General Dynamics Ordnance & Tactical Systems, Inc.*, ASBCA Nos. 56870, 56957, 10-2 BCA ¶ 34,525. The Board's Order concluded as follows:

> Having duly considered and weighed appellant's need for this information and its relevancy to its claim in these appeals, the government's burden of producing the information and any resulting harm to ATK in the disclosure of the information, it is concluded that a protective order, limiting the disclosure to certain persons and under limited circumstances, is a reasonable accommodation of these competing interests.
>
> Appellant's motion for a protective order is GRANTED. The parties are ordered to confer and to agree to a protective order for the Board's signature no later than 30 days from receipt of this Order. If the parties are unable to agree upon the terms and conditions of a protective order by that time, they may file their own proposed terms and conditions for the Board's review and the Board shall issue the protective order.
>
> Failure to comply with Board orders may result in the imposition of sanctions under Board Rule 35.

As stated, the Board granted appellant's motion for protective order and ordered a limited disclosure of the disputed documents, subject to a protective order with terms and conditions to be agreed upon by the parties. The government declined to agree to a protective order for the disclosure of the disputed documents in accordance with the Board's order. This resulted in a number of filings by the parties that ultimately led to appellant's motion for sanctions that is currently before the Board.

The Board's 1 June 2010 Order expressed the Board's intention to ultimately sign and issue a protective order in the event the parties failed to agree on the terms of a protective order for the Board's signature. Given that the parties have failed to reach such an agreement, the undersigned hereby executes and issues the attached Protective Order pursuant to Board Rule 14(a).

The government is hereby directed to disclose to appellant the disputed documents identified in the 1 June 2010 Order as "Confidential Material" defined by and subject to this Protective Order no later than 30 days from the date of this Order.

The Board is aware that the parties have fully briefed appellant's motion for sanctions as related to the government's failure to comply with the Board's Order of 1 June 2010. If necessary, these briefs may be incorporated into whatever filings are made by the parties with respect to this current Order.

Failure to comply with Board orders may result in the imposition of sanctions.

Dated: 3 June 2011

/s/ Jack Delman
JACK DELMAN
Administrative Judge
Armed Services Board
of Contract Appeals

Attachment

ARMED SERVICES BOARD OF CONTRACT APPEALS

Appeals of --	)	
	)	
General Dynamics Ordnance and Tactical Systems, Inc.	)	ASBCA Nos. 56870, 56957
	)	
	)	
Under Contract No. W52P1J-05-G-0002	)	

PROTECTIVE ORDER

In accordance with Board Rule 14(a), which authorizes the Board to issue protective orders to protect "the secrecy of confidential information or documents," the foregoing Protective Order is hereby issued to restrict the disclosure of "Confidential Material" to a limited number of persons under limited circumstances as defined herein.

1. The term "Confidential Material" shall refer to any proprietary material, trade secrets, privileged or competitively-sensitive material, records or testimony designated in the manner as described in Paragraph 2 below, or as otherwise designated by the Board. All copies, summaries, extracts or compilations in whatever form or medium that contain Confidential Material shall be considered and shall be treated as Confidential Material in accordance with this Order.

2. A party shall designate material as "Confidential Material" for purposes of this Order by placing or affixing on the item the following: **"Confidential Material – To Be Disclosed Only In Accordance with ASBCA Protective Order."**

3. Each person receiving Confidential Material shall maintain such Confidential Material in his or her possession in a manner sufficient to protect the material against unauthorized disclosure.

4(a). Confidential Material disclosed to Appellant under this Protective Order shall be used by the Appellant solely for the purpose of conducting the above-entitled Appeals and not for business or any other purpose whatsoever.

4(b). Subject to 4(d) below, Confidential Material disclosed to the Department of the Army under this Protective Order shall be used by the Department of the Army solely for the purpose of conducting the above-entitled Appeals and not for business or any other purpose whatsoever.

4(c). Confidential Material that is disclosed to Appellant shall be disclosed only to attorneys for Appellant, attorneys for the United States, persons regularly employed in

such attorneys' offices or, subject to the provisions of Paragraph 5 below, other persons who are necessary for the conduct of the litigation of these appeals, such as outside consultants and experts retained for purposes of these appeals.

4(d). Nothing contained in this Protective Order shall prevent or limit the right of the Department of the Army to disclose to any agency of the United States any Confidential Material obtained under this Order for purposes of investigating, assessing or determining any potential violation of law or regulation, or prevent or limit the use of any such material by any such agency in any proceeding regarding any potential violation of law or regulation.

5. With the exception of Appellant's attorneys in these appeals, the Army's attorneys in these appeals and persons regularly employed in such attorneys' offices, any person to whom Confidential Material is to be disclosed shall – before disclosure is provided -- be advised by an attorney in these appeals that pursuant to this Protective Order such person may not disclose or divulge any such Confidential Material to any person not authorized under Paragraph 4 above. The attorney shall secure from each person a Declaration in the form attached hereto, stating that such person has read this Protective Order and agrees to be bound by it, and a copy of this Protective Order shall be attached to the Declaration. The original executed Declaration with attachment shall be maintained in the official files of the party in these appeals that obtained possession of the Confidential Material.

6. If a party in these appeals discovers that previously produced material inadvertently was not identified as containing Confidential Material, the producing party shall give prompt notice in writing to the other party that the material is to be treated as containing Confidential Material, and thereafter the designated material shall be treated in accordance with this Order, or shall be returned to the producing party upon written request if the material is identified as privileged.

7. Nothing in this Protective Order shall be deemed to preclude Appellant or the Department of the Army from objecting to the designation of material as "Confidential Material." In such event, the party objecting to the designation of the material as Confidential Material shall have the burden to file a motion with the Board demonstrating that there is good cause to remove this designation. The material shall remain confidential until otherwise ordered by the Board.

8. Within sixty (60) days of the date that the litigation of these appeals is finally concluded, whether through a dismissal with prejudice by the Board, a final nonappealable judgment of the Board, the United States Court of Appeals for the Federal Circuit or a final decision of the U.S. Supreme Court, each party that has received Confidential Material under this Order shall return all such material to the disclosing party as defined in Paragraph 1, or in the alternative shall certify in writing to the

disclosing party that all such Confidential Material has been destroyed, except for disclosures that may have been made under Paragraph 4(d) of this Order.

9. Upon written request of the disclosing party after final disposition of the litigation and any appeals, the Board shall return all Confidential Material in its possession to the disclosing party.

10. Nothing in this Protective Order shall limit the Board and any Board personnel from viewing, using or disclosing Confidential Material in accordance with official duty. This Order also shall not limit or restrict the Board's disclosure of Confidential Material to a Court for purposes of judicial review or in response to a Court order.

Dated: 3 June 2011

/s/ Jack Delman
JACK DELMAN
Administrative Judge
Armed Services Board
of Contract Appeals

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DECLARATION REGARDING CONFIDENTIAL MATERIAL UNDER ASBCA PROTECTIVE ORDER

I, (NAME OF PERSON), HEREBY ACKNOWLEDGE RECEIPT OF CONFIDENTIAL MATERIAL AS DEFINED IN THE ATTACHED PROTECTIVE ORDER. I HAVE READ THE ATTACHED PROTECTIVE ORDER AND AGREE TO COMPLY WITH AND BE LEGALLY BOUND BY ITS TERMS.

_____ _____

(SIGNATURE) (DATE)