ARMED SERVICES BOARD OF CONTRACT APPEALS

Appeal of --	)	
	)	
Public Warehousing Company K.S.C.	)	ASBCA No. 58078
	)	
Under Contract No. SPM300-05-D-3128	)	

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OPINION BY ADMINISTRATIVE JUDGE TING
ON THE GOVERNMENT'S MOTION TO DISMISS

Defense Supply Center Philadelphia's (DSCP) Prime Vendor contract with Public Warehousing Company, K.S.C. (PWC) contained a clause which incentivized PWC to perform at an optimal level to achieve customer satisfaction. Based upon DSCP's review under the clause every six months, PWC's standard distribution fees for the period could be increased, decreased or stay the same. The standards for evaluation included PWC's fill rate and its Contract Performance Assessment Report (CPAR) rating for the appropriate period.

Because of a criminal and a False Claims Act case the Department of Justice (DOJ) brought in the U.S. District Court for the Northern District of Georgia, Atlanta Division, the contracting officer (CO) repeatedly promised to issue her decision on PWC's $119 million (revised to $158 million) claim (*see* SOF ¶¶ 37-38, 44-50) by a specific date. All promises, however, were contingent upon the outcome of the District Court cases. When the CO failed to issue her decision on 8 June 2012, the latest date promised, PWC appealed on the basis that its claim was deemed denied pursuant to

41 U.S.C. § 7103(f)(5). DSCP moved to dismiss the appeal for lack of jurisdiction. PWC opposed the motion. We deny DSCP's motion.

STATEMENT OF FACTS (SOF) FOR PURPOSES OF THE MOTION

1. PWC, now known as Agility, is a logistics company organized under the laws of Kuwait. DSCP, now known as DLA Troop Support, is a component of the Defense Logistics Agency (DLA), an agency within the Department of Defense (DoD). (Compl. and answer ¶¶ 1, 2)

2. On 28 May 2003, DSCP awarded PWC a "Prime Vendor" contract – Contract No. SPO300-03-D-3061 (PV1 Contract) – for delivery of subsistence items to U.S. and allied forces in Kuwait and Qatar. The period of contract performance was from 1 July 2003 through 15 February 2005. (Compl. and answer ¶ 7)

3. Bilateral Modification No. P00001 (Mod. 1), effective 27 June 2003, added the "Iraq Deployment Zone" to the PV1 Contract requiring PWC to make deliveries to additional Authorized Customers in active combat zones. Under the contract PWC was reimbursed for the cost of food it purchased for the military plus a distribution price, including profit.[1]

4. DSCP continued PWC's performance of the Prime Vendor work without full-and-open competition from 16 February to 15 December 2005 by issuing Contract No. SPM300-05-D-3119. This bridging contract has been referred to as the "PV Bridge" Contract. (Compl. and answer ¶ 8)

5. DSCP awarded Contract No. SPM300-05-D-3128 (PV2 Contract) to PWC on 7 July 2005 (compl. and answer, ex. 1). The PV2 Contract included an 18-month base year and 3 options. The first and second options were for 12 months each and the third option was for 18 months. (*Id.* at 4) Performance of the PV2 Contract began on 5 December 2005. DSCP exercised all three options and thus extended the PV2 Contract performance period to 4 December 2010. In all, PWC performed the PV contracts continuously for approximately seven and a half years. (Compl. and answer ¶ 9)

6. Unlike the PV1 and PV Bridge Contracts, the PV2 Contract contained the "PERFORMANCE BASED DISTRIBUTION FEES" clause (PBDF clause). The purpose of the PBDF clause was to incentivize PWC to perform "at an optimal level" to achieve "customer satisfaction." (Compl., ex. 1 at 5) This clause defined the distribution

[1] Pending resolution of the government's motion to dismiss, the Board granted DSCP's motion to defer submission of a Rule 4 file in this appeal (*see* Board ltr. of 15 May 2012). This finding is derived from findings ¶¶ 3 and 4, *The Public Warehousing Company*, ASBCA No. 56022, 11-2 BCA ¶ 34,788 at 171,220.

fees negotiated for each category at the time of award as "standard contract distribution fees." The clause told PWC that "[t]he actual distribution fees paid, however, have the potential to be greater or lesser based on the performance of the vendor as measured by fill rate and current CPARS." (*Id.*, ¶ 2) The clause provided that if PWC's performance was at an "excellent" level, it would receive a distribution fee increase, at a "fair" or below level it would receive a reduction, and at a "good" level it would receive standard fees (*id.*, ¶ 3).

7. Paragraph 4 of the PBDF clause establishes a six-month distribution fee review cycle:

> Upon performing a six-month review subsequent to the completion of implementation, and again every six months thereafter, the contracting officer may determine to either maintain the standard distribution fees, or to invoke a distribution fee increase or decrease for the subsequent period.... After six months of receiving an adjustment, the vendor will return to the standard fees unless/until notified by the Contracting Officer of any future 6 month adjustments.

(Compl., ex. 1 at 5)

8. Paragraph 10 of the PBDF clause sets out the standards that "will be used by the Contracting Officer in evaluating the application of distribution fee increases/decreases":

> **Excellent** – (Vendor receives distribution fees increased by 5% for the period) Vendor's fill rate after excepted data is 97.51% or higher and CPARS rating is "would definitely," award to this vendor today given that I had the choice.
>
> **Good** – (Vendor receives standard fees for the period) Vendor's fill rate after excepted data is 96.50% or higher and CPARS rating is "would definitely," award to this vendor today given that I had the choice.
>
> **Fair** – (Vendor receives distribution fees decreased by 5% for the period) Vendor's fill rate after excepted data is 96.50% or less or CPARS rating is "probably would not," award to this vendor today given that I had the choice.
>
> **Poor** – (Vendor receives distribution fees decreased by 10% for the period. Repetitive "poor," ratings should be viewed as

a red flag.) Vendor's fill rate after excepted data is less than 96.5% and CPARS rating is "probably would not" or "would not," award to this vendor today given that I had the choice.

(Compl., ex. 1 at 6)

9. Paragraph 5 of the PBDF clause set out how the CO should determine fill rate:

> 5. The contracting officer will review the fill rate metric. Fill rate calculation will be based on the total number of cases shipped and accepted divided by the total number of cases ordered. Fill rate will be calculated within each zone for an overall zone calculation (includes all orders for all customers within that zone). For the purpose of calculating the fill rate, the vendor should detail at least two decimal places without rounding.

(Compl., ex. 1 at 5)

10. After paragraph 10, the PBDF clause continued on the next page with the following "Performance Indicators":

> PWC's performance will be reviewed/evaluated every six (6) months. Evaluations are anticipated to include (but are not limited to) the following:
>
> ACO/COR Reports
> DCMA Reports
> Customer Satisfaction Surveys
> Food Audit Reports
> CPAR Data
> Fill Rates
> NIS Reports
> Rejection Reports
> Recalls (proper notification/action taken)
>
> **NOTE**: These Performance Indicators are listed in descending order of importance.

(Compl., ex. 1 at 7)

Contractor Performance Assessment Reporting System (CPARS)

11. "CPARS" refers to the "Contractor Performance Assessment Reporting System." An individual evaluation under CPARS is a "Contract Performance Assessment Report" or CPAR. Multiple evaluations are called "CPARs." (Compl. and answer ¶ 18) In response to the Board's inquiry, DSCP forwarded DLA's CONTRACTOR PERFORMANCE ASSESSMENT REPORTING SYSTEM (CPARS) of January 2002 (DLA's 2002 CPARS Guide). DSCP's cover letter explained that although DoD had issued a DoD CPARS Guide in 2007 and revisions in 2009 and 2011, DSCP believed DLA's 2002 CPARS Guide would have been used for guidance for CPAR assessments under the PV2 Contract. The letter added "the guide was for agency guidance only, was not mandatory, and it was never incorporated into the contract." (*See* gov't ltr. of 31 October 2012)

12. The Federal Acquisition Regulation (FAR) requires that Past Performance Information (PPI) be collected (FAR Part 42) and used in source selection evaluations (FAR Part 15). The CPARS process establishes procedures for collecting and use of PPI for various specified business sector contracts. "Troop Support" is one of the business sectors listed in DLA's 2002 CPARS Guide (Attachment 1 at A1-3). CPARS-generated PPI is one of the many tools used to communicate contractor strengths and weaknesses to source selection officials and COs. Primary distribution of CPARS is made through use of the on-line CPARS Automated Information System (AIS). Access to the CPARS AIS and other PPI is restricted to those with an official need to know. (DLA's 2002 CPARS Guide at i).

13. The purpose of the CPARS and how CPARS assessment must be done are set out in SECTION A – POLICY of DLA's 2002 CPARS Guide:

> 1.1 The primary purpose of the CPARS is to ensure that data on contractor performance is current and available for use in source selections. Performance assessments will be used as an aid in awarding contracts and/or task orders to contractors that consistently provide quality, on-time products and services that conform to contractual requirements. CPARS can be used to effectively communicate contractor strengths and weaknesses to source selection officials. During the source selection process, the offeror should be notified of relevant past performance data derived from CPARS that requires clarification or could lead to a negative rating. Information derived from the CPARS may also be used by Senior DoD and contractor officials for other management purposes consistent with DoD guidance and

policy. Individual CPARs will not be used for any purpose other than as stated in the paragraph; however, summary data may be used as outlined in paragraph 1.5.

1.2 The CPARS assesses a contractor's performance and provides a record, both positive and negative, on a given contract during a specific period of time. Each assessment *must be based on objective facts* and be supportable by program[2] and contract management data, such as cost performance reports, customer comments, quality reviews, technical interchange meetings, financial solvency assessments, construction/production management reviews, contractor operations reviews, functional performance evaluations, and earned contract incentives, etc. Subjective assessments concerning the cause or ramifications of the contractor's performance may be provided; however, speculation or conjecture shall not be included. The attachments to this document contain the specific areas to be evaluated for the identified business sectors.

(DLA's 2002 CPARS Guide at 1)

14. Because of the sensitive and confidential nature of the CPARs, DLA's 2002 CPARS Guide imposed certain internal and external protections. Section 9.2.1, Internal Government Protection, instructs:

9.2.1.1 CPARs must be treated as source selection information at all times. Information contained in the CPAR must be protected in the same manner as information contained in completed source selection files.

9.2.1.2 CPAR data will not be used to support pre-award surveys, debarment proceedings or other internal government reviews.

(DLA's 2002 CPARS Guide at 10)

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[2] Program means "the program, project, or task/job order for which the procurement was made" (*see* DLA's 2002 CPARS Guide at 1 n.1).

15. Given that the primary purpose for CPARS assessment was for source selection, and given that CPAR data was not to be used for "other government review," DSCP has not explained why CPARS was used as a standard in the PBDF clause for determining PV2 contract distribution fees. Nor has the government explained if CPARS was used in this case for any "management purposes" consistent with DoD guidance and policy (*see* SOF ¶ 13).

16. With CO Linda L. Ford (CO Ford) as the assessing official, and Gary Shifton (Shifton), DSCP's Section Chief and CO Ford's immediate supervisor as the reviewing official, DSCP issued the CPAR for the PV1 Contract on 29 November 2004, 10 months after the contract was completed (compl., ex. 2). This PV1 CPAR stated, in part:

> ADDITIONAL/OTHER: Based upon PWC's performance during each contract period it is evident that PWC is a highly competent, dedicated, professional organization focused on providing quality products in a timely manner. PWC has [consistently] demonstrated committment [sic] to a high level of customer satisfaction.
>
> RECOMMENDATION: Given what I know today about the contractor's ability to execute what they promised in their proposal, I definitely would award to them today given that I had a choice.

(*Id.* at 4)

17. On 18 July 2005, DSCP issued what appears to be another CPAR on the PV1 Contract. This CPAR, with Shifton as the assessing official, contained this recommendation:

> Given what I know today about the contractor's ability to execute what they promised in their proposal, I definitely would award to them today given that I had a choice.

(Compl., ex. 4 at 4) The 18 July 2005 CPAR contained the remark "INCOMPLETE-RATED" at the upper left corner of the DD Form 2846 indicating it was not a "a final or complete document," and the document did not show a response from PWC (answer ¶ 41).

18. On 18 November 2005, a few weeks before the end of the PV Bridge Contract performance period, Kamal Sultan, a former PWC employee, filed under seal a complaint in the name of the United States, a False Claims Act (FCA) suit, 31 U.S.C. § 3732(a), in the United States District Court for the Northern District of Georgia. The FCA complaint

contained, *inter alia*, allegations relating to PWC's pricing practices with one of its LMRI[3] suppliers – The Sultan Center (TSC). The complaint remained under seal until November 2009. (Answer ¶ 44)

19. Exhibit 10 of PWC's complaint shows that CO Timothy B. Dlugokecki (CO Dlugokecki) prepared a nine-page Performance Evaluation on PWC's first six months (December 2005 to May 2006) performance under the PV2 Contract (compl., ex. 10). This Performance Evaluation noted that "this contract [PV2] incorporates provisions for 'performance based distribution fees, (PBDFs)'" and that "PWC's performance will be reviewed/evaluated every six (6) months." This Performance Evaluation also noted that evaluations were to include, but were not limited to the nine Performance Indicators listed in the PV2 Contract in descending order of importance. (*Id.* at 2) After a detailed evaluation of each of the nine Performance Indicators, PWC received an overall rating of "GOOD" for the first six months of the PV2 Contract (*id.* at 9). Fill rate for each month between December 2005 and May 2006 exceeded 99% (*id.* at 8). The Performance Evaluation received the concurrence of Shifton who signed as Program Manager (*id.* at 9). On 15 December 2006, CO Dlugokecki emailed the Performance Evaluation to PWC as well as DSCP personnel stating:

> Attached is the first 6 month evaluation for the period that ended May 2006. The overall rating for the period is a "good".
>
> ....
>
> CPARS data will be input shortly for your review and comment.

(Compl., ex. 9) While this Performance Evaluation was not an official CPARS evaluation, it reflected DSCP's understanding of its legal obligations under the PBDF clause.

20. In March 2007 (*see* compl., ex. 25 at 2), with knowledge that PWC was under DOJ investigation, DSCP notified PWC that the government intended to exercise its first option under the PV2 Contract extending the contract for one year from 3 June 2007 through 2 June 2008 (*id.*). In CO Dlugokecki's Determination and Findings (D&F) he examined six areas of performance: (1) On-Time Delivery; (2) Fill Rate; (3) Customer Surveys; (4) Contract Terms and Conditions Conformance; (5) Food Audit; and, (6) Price (*id.* at 2-5). The D&F concluded "Based upon the analysis of price as described above

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[3] "LMRI" is the acronym for "local market ready items" (gov't mot. to dismiss, tab 2, ¶ 3).

and an examination of the market, the exercise of the option is the most advantageous to the government" (*id.* at 6).

21. On 4 April 2007, CO Dlugokecki forwarded draft 2 of a PV Bridge CPAR to various DSCP officials including CO Ford and two of her supervisors (compl., ex. 11 at 1). The PV Bridge Contract by then was 100% complete (since December 2005). The draft CPAR assessed PWC's performance in these five areas: (1) TECHNICAL (QUALITY OF PRODUCT); (2) SCHEDULE; (3) MANAGEMENT; (4) MANAGEMENT RESPONSIVENESS; and, (5) PROGRAM & OTHER MANAGEMENT. The draft gave this recommendation:

> RECOMMENDATION: Given what I know today about the contractor's ability to execute what they promised in their proposal, I definitely would award to them today given that I had a choice.

(*Id.* at 3, 4) CO Ford's 4 April 2007 email reply indicated she made "Three minor changes in blue" (compl., ex. 12 at 1).

22. In her 4 April 2007 email to CO Dlugokecki, COs Ford and Shifton, DSCP's Assistant Counsel, referencing an earlier telephone conversation, asked the COs to confirm that "a final interim CPARS Evaluation was not prepared for the Iraq PV2 contract." CO Dlugokecki's email reply the same day stated "there was no initial (only a draft) CPARS Evaluation for the PV2 (SPM30005D3128) contract." His email went on to explain "[t]he choices in CPARS are Initial, Intermediate, Final Report, Out of Cycle, Addendum." (Compl., ex. 13)

23. In a separate email regarding the PV Bridge CPAR, DSCP's Assistant Counsel instructed COs Ford, Dlugokecki and others to "[p]lease *do not* complete the CPARS evaluation until you have received explicit instructions that DSCP can complete and publish the evaluation." The email also asked if there were concerns in incorporating the following language into the PROGRAM & OTHER MANAGEMENT section of the PV Bridge draft CPAR:

> In November, 2005, the government opened an investigation of PWC regarding allegations of overcharging, kickbacks, and security problems. To date, the investigation supports these allegations. Given the confidentiality of the investigation, DSCP is not privy to all information stemming from the investigation and is also precluded from sharing more information at this time.

In addition, DSCP counsel asked CO Ford if she would "consider selecting a different recommendation?" (Compl., ex. 14 at 1)

24. In response to DSCP counsel's email, Shifton's 4 April 2007 email replied "I can't ask my team to support. Not sure we want to go in this direction." He also said "Finally, 'no' on changing the recommendation. This is CPARs – let's not pick and choose the parts we like and dislike." (Compl., ex. 15)

25. By email on 12 April 2007, the Associate General Counsel at DLA headquarters advised CO Ford that he would like the following paragraph be included in the PV Bridge CPARS that she was working on:

> The Department of Justice and the Defense Logistics Agency have advised DSCP that in or around November 2005, the Department of Justice began an investigation of PWC regarding allegations of overcharging, kickbacks, security problems, and other price-related issues. The investigation, which is both civil and criminal, is currently being conducted by DOJ and the U.S. Attorney's Office in Atlanta, Georgia.

(Compl., ex. 18)

26. Upon receiving this email, CO Ford by email on 12 April 2007 asked CO Dlugokecki to "Please insert the below language into the draft 3119 [PV Bridge] CPAR" and to "[s]elect the might or might not award option, reprint the CPAR and forward to legal for review" (compl., ex. 18).

27. CO Ford issued the CPAR on the PV Bridge Contract on 12 April 2007. She included the investigation paragraph in the PROGRAM & OTHER MANAGEMENT section. In the RECOMMENDATION section, she wrote "Given what I know today about the contractor's ability to execute what they promised in their proposal, I might or might not award to them today given that I had a choice." (Compl., ex. 19)

28. The DD Form 2848 on which CO Ford issued her PV Bridge CPAR allowed PWC to comment. PWC's comments, dated 3 May 2007, said it did not concur with the assessment and requested reevaluation. (Compl., ex. 19 at 7) On the PROGRAM AND OTHER MANAGEMENT section, PWC commented:

> PWC takes exception to DSCP's references to the DOJ investigation. This investigation is based on unsubstantiated allegations and has not resulted in legal or administrative action of any kind. Reference to an unproven series of allegations is not appropriate in a CPAR that must be based

> upon objective, verifiable and factual information. The allegations in the investigation satisfy none of these criteria. Indeed, you advised us to comment only on "objective facts" in the narrative, yet you took the opportunity to downgrade PWC on pure speculation.

On the RECOMMENDATION section, PWC commented:

> If you refused to recommend PWC for award solely because of the investigation, that conclusion would have been entirely inappropriate and in violation of your own rules for basing CPARs on objective, verifiable and factual data.... PWC requests the Contracting Officer's recommendation be consistent with the requirements for CPARs and not influenced by the existence of an unsubstantiated DOJ investigation. At a minimum, your recommendation should make clear that, but for the investigation, you would recommend PWC for award.

(Compl., ex. 19 at 6-7)

29. On 24 April 2007, CO Dlugokecki sent an email to DSCP's legal department on the upcoming CPAR evaluation on the PV2 Contract. The email said that as of 25 January 2007, the May 2006 six months evaluation was complete but had not been issued, and DSCP was told no further evaluation was to proceed. The email said that under the PV2 Contract's PBDF clause, DSCP was required to evaluate PWC's performance every six months for purposes of determining the appropriate distribution fees, and "[i]t is obvious that we are not doing it." The email asked "are we breaching our agreement?" and "what relief and recovery plan could the legal department offer?" (Compl., ex. 23) The CO did prepare a draft CPAR under the PV2 Contract in June 2007 but it was not issued (*see* app. opp'n at 11, attach. C).

30. PWC brought suit in the United States Court of Federal Claims under the Tucker Act to enjoin DSCP from basing the PV Bridge CPAR on DOJ's investigation, *Public Warehousing Co. v. United States*, Docket No. 07-366C (compl., ex. 20). PWC successfully obtained a Temporary Restraining Order (TRO) on 13 June 2007 (compl. and answer ¶ 85).

31. Judge Thomas C. Wheeler explained his reasons during a transcribed telephone proceeding held on 13 June 2007:

> And so I think it would be improper for the Agency to rely upon information it may have received as a result of the

> investigation in their current performance ratings of the Plaintiff....
>
> ....
>
> ...[W]e don't want this case to be akin to the Duke lacrosse scandal, where we rush to judgment about the Plaintiff before anything has really happened. And so I think that's what we're trying to achieve in the performance evaluations that are furnished to other source (ph) selection agencies.
>
> ....
>
> So in a nutshell, I think it would be inappropriate for Agency personnel to rely upon information obtained at this stage during the investigation as a basis to color their evaluation of the Plaintiff.

(Compl., ex. 20 at 7-8)

32. Rejecting DOJ's argument that agency officials might not distinguish what was performance-related information from what was learned from the investigation, Judge Wheeler said at the TRO proceeding:

> I would think that Agency personnel in responding to inquiries or in posting CPAR information quite readily could divorce the performance-related information about this contractor with anything that they've learned because of the investigation. And that's all that we want to do at the present time.

(Compl., ex. 20 at 13)

33. The TRO was subsequently vacated pursuant to the parties' settlement agreement under which DSCP promised to reissue the PV Bridge CPAR and to amend the RECOMMENDATION section of the CPAR so that it was "not based upon the investigation or any facts made known to the agency solely as a result of the investigation" (compl. and answer ¶ 89). On 27 August 2007, CO Ford revised the PV Bridge CPAR to state:

> PROGRAM & OTHER MANAGEMENT: PWC was recognized by DLA/DSCP for "outstanding customer service" (January 25, 2005, Business Alliance Awards). They

> employ a continuous improvement program that produces process and system enhancements. One example is PWC[']s real-time vehicle and cargo tracking system.
>
> The Department of Justice and the Defense Logistics Agency have advised DSCP that the Department of Justice is conducting an investigation of PWC relating to the Prime Vendor contracts. This evaluation is not based upon any information obtained from that investigation and should not be construed as reflecting in any way information that may be obtained from that investigation. No inference should be drawn by virtue of the existence of an investigation.
>
> RECOMMENDATION: Given what I know today about the contractor's ability to execute what they promised in their proposal, I probably would award to them today given that I had a choice.

(Compl., ex. 22 at 3) The PV Bridge Contract CPAR reported "Fill Rates continue to range between 98.5% before subs[4] and 99.8% after subs (97.5% is the contract minimum)" (*id.* at 2).

34. In March 2008, with knowledge that PWC was under DOJ investigation, DSCP notified PWC that the government intended to exercise its second option under the PV2 Contract extending the PV2 Contract for one year from 3 June 2008 to 2 June 2009 (compl., ex. 26 at 2). CO Dlugokecki's D&F examined the same six areas of performance again and concluded that "the analysis of price as described above and an examination of the market, the exercise of the option is the most advantageous to the Government" (*id.* at 6).

35. Even though DSCP issued the CPAR on the PV1 Contract on 29 November 2004 (SOF ¶ 16) and the CPAR on the PV Bridge Contract on 12 April 2007 (revised 27 August 2007) (SOF ¶¶ 26, 38), DSCP acknowledged that it did not issue any CPARs under the PV2 Contract. DSCP denied that its failure to do so was based on the DOJ's "directive" (answer ¶ 106).

36. In March 2009, with knowledge that PWC was under DOJ investigation, DSCP notified PWC that the government intended to exercise its third option under the PV2 Contract extending the PV2 Contract for 18 months from 3 June 2009 to 4 December 2010 (compl., ex. 27 at 2). CO Dlugokecki's D&F examined the same six areas of performance again and concluded that "the analysis of price as described above

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[4] "Subs" means substitutions.

and an examination of the market, the exercise of the option is the most advantageous to the Government" (*id.* at 6).

37. On 27 April 2009, while PWC was still performing Option 2 of the PV2 Contract, CO Ford received a certified claim from PWC seeking alleged accumulated unpaid PBDFs in the amount of $119,853,882.61 (compl., ex. 28 at 1; compl. and answer ¶ 107). The claim was certified by Sam McCahon (compl., ex. 28 at 12) and stated "as performance under the Contract continues, damages will continue to accrue as PWC meets the performance targets for the PBDF" (*id.* at 10). The claim alleged that DSCP breached the PV2 Contract because "PWC began to perform under the Contract on December 5, 2005, and despite the Contract's mandate that DSCP assess PWC's performance for purpose of awarding a PBDF every six months, DSCP has never done so" (compl., ex. 28 at 4, 9).

38. CO Ford acknowledged receipt of PWC's claim by letter dated 26 June 2009. She acknowledged that determination of whether PWC should receive PBDFs required an evaluation under the CPARS for each period and that "no CPARS ratings have been provided concerning PWC's performance under the contract." Her letter went on to say "because the fraud investigation is on-going and I have not been made privy to all the evidence and facts that have been developed by DOJ thus far, there is insufficient information available to me at this time to evaluate PWC's performance under the contract." The letter nonetheless concluded that "[b]ased on the discussion above, I expect to issue a final decision on the claim on or before Thursday, December 3, 2009." (Compl., ex. 29 at 1-2)

39. By notice dated 23 July 2009, PWC appealed to the Board on the basis that its claim was deemed denied. The Board docketed the appeal as ASBCA No. 56888. DSCP moved to dismiss for lack of jurisdiction. The Board granted DSCP's motion on 25 September 2009 holding that, given the complexity of the PV2 Contract PBDF CPAR assessments, the CO's commitment to issuing a decision by a specific date – 3 December 2009 – was reasonable. *See Public Warehousing Co., K.S.C.*, ASBCA No. 56888, 09-2 BCA ¶ 34,265.

District Court Proceedings

40. After the Board dismissed ASBCA No. 56888, the DOJ filed criminal and civil actions against PWC in the United States District Court for the Northern District of Georgia. On 9 November 2009, a grand jury for the Northern District of Georgia returned a six-count indictment alleging that PWC had fraudulently overcharged the United States under the PV Contracts. The indictment alleged conspiracy to commit fraud (18 U.S.C. § 1031), making false statements (18 U.S.C. § 1001), making false, fictitious, and fraudulent claims (18 U.S.C. § 287), and wire fraud (18 U.S.C. § 1343). (Gov't mot. to dismiss, tab 3 at 3, 4) On 9 February 2010, a grand jury returned a

Superseding Indictment which charged PWC with the same six counts included in the original indictment, added Agility Logistics as defendant on all six counts, and charged Agility Holdings on Counts 2, 4 and 6 (*id.* at 5).

41. On 13 November 2009, the United States intervened in part and declined to intervene in part, pursuant to 31 U.S.C. § 3730(b)(2) and (4), in the *Qui Tam* action filed by Kamal Mustafa Al-Sultan in November 2005. On 5 January 2011, the DOJ filed a False Claims Act suit against PWC and The Sultan Center Food Products Company, K.S.C. (TSC) in the District Court for the Northern District of Georgia, Atlanta Division. *United States of America ex rel. Kamal Al-Sultan v. The Public Warehousing Company, K.S.C. a/k/a Agility, and The Sultan Center Food Products Company, K.S.C.,* No. 1:05-CV-2968-GET. (Gov't mot. to dismiss, tab 2 at 1, 8) In its 10-count complaint, the DOJ seeks recovery under the False Claims Act, common law fraud, payment by mistake, unjust enrichment and breach of contract. The complaint alleges that by manipulating the Delivered Price for LMRI (*see* n.3) in the PV Contracts' Unit Price formula, PWC and TSC submitted false and fraudulent claims to the United States for payment. (*Id.* at 2, 4, ¶¶ 3, 6) The complaint also alleges that PWC failed to report and return to DSCP various discounts, allowances and rebates that PWC negotiated with many of its vendors, as the PV Contracts required (*id.* at 4, ¶ 7).

42. In Count 1 of the False Claims Act suit (against PWC and TSC), DOJ's complaint alleges "TSC knowingly caused PWC to submit, and PWC knowingly submitted, falsely inflated invoices for LMRI" under the PV Contracts in violation of 31 U.S.C. § 3729(a)(1) (1986) (gov't mot. to dismiss, tab 2 at 38-39, ¶ 98). In Count 2 (against PWC and TSC), the complaint alleges "TSC knowingly caused PWC to submit, and PWC knowingly submitted, falsely inflated invoices for LMRI under the PV-II Contract" in violation of 31 U.S.C. § 3729(a)(1)(A) (2009) (*id.* at 39, ¶ 101). In Count 3 (against PWC and TSC), the complaint alleges that "TSC knowingly caused to be more [sic] or used, and PWC did make or use false records or statements to get false or fraudulent claims paid or approved by the Government by falsely representing TSC's inflated LMRI prices as the Delivered Prices for LMRI" under the PV Contracts in violation of 31 U.S.C. § 3729(a)(2) (1986) (*id.* at 40, ¶ 104). In Count 4 (against PWC and TSC), the complaint alleges that "TSC knowingly caused to be more [sic] or used, and PWC did make or use false records or statements material to false or fraudulent claims in falsely representing TSC's inflated LMRI prices as the Delivered Prices for LMRI" under the PV Contracts in violation of 31 U.S.C. § 3729(a)(1)(B) (2009) (*id.* at 41, ¶ 107). In Count 5 (against PWC and TSC), the complaint alleges that "PWC negotiated and obtained from its CONUS manufacturers/suppliers various sales-based price discounts, allowances and rebates that it should have returned to the United States, but did not" in violation of 31 U.S.C. § 3729(a)(1) (1986) (*id.* at 42, ¶ 110). In Count 6 (against PWC and TSC), the complaint alleges that "PWC negotiated and obtained from its CONUS manufacturers/suppliers various sales-based price discounts, allowances and rebates that it should have returned to the United States, but did not" in violation of

31 U.S.C. § 3729(a)(1)(A) (2009) (*id.* at 43, ¶ 113). In Count 7 (against PWC and TSC), the complaint alleges that PWC and TSC committed common law fraud when they "falsely represented...the Delivered Prices charged for LMRI" and submitted invoices that did not "reflect discounts, rebates and other allowances that should have been returned to the United States, but were not" (*id.* at 44-45, ¶¶ 116, 117). In Count 8 (against PWC) the complaint alleges that the United States made payments by mistake under the PV Contracts "in the erroneous belief that [PWC] was entitled to payment" (*id.* at 45-46, ¶ 124). In Count 9 (against PWC and TSC) the complaint alleges that PWC and TSC have been unjustly enriched "due to the false claims presented" under the PV Contracts (*id.* at 47, ¶¶ 130-31). In Count 10 (against PWC), the complaint alleges that PWC "breached its contractual obligations to submit accurate and true invoices to DSCP for subsistence items" in accordance with the PV Contracts (*id.* at 47-48, ¶ 134).

43. As to the False Claims Act Counts 1 through 6, the complaint seeks the following judgment for each count against all defendants:

> 1. Statutory damages in an amount to be established at trial;
> 2. Civil penalties for each false claim or false statement as provided by law;
> 3. The cost of this action, plus interest, as provided by law; and
> 4. Any other relief that this Court deems appropriate.

(Gov't mot. to dismiss, tab 2 at 48-50) In addition to "[t]he cost of this action, plus interest, as provided by law," and "[a]ny other relief that this Court deems appropriate," the complaint seeks, "[a]s against all Defendants" in Count 7, judgment in an amount equal to "[c]ompensatory damages in an amount to be established at trial"; "[a]s against PWC" in Count 8, "[t]he money paid by the United States to PWC, plus interest"; "[a]s against all Defendants" in Count 9 "[t]he money paid by the United States to, or received by, these Defendants, plus interest"; and "[a]s against PWC" in Count 10, (1) "All damages caused by PWC's breach of its contractual obligations in an amount to be established at trial"; and (2) "All reasonably foreseeable damages which flowed from PWC's breach of its contractual obligations in an amount to be established at trial." (*Id.* at 50-51)

44. Following up on her 26 June 2009 letter (*see* SOF ¶ 38) in which she said she would issue her decision on PWC's $119 million claim by 3 December 2009, CO Ford's 2 December 2009 letter to PWC noted that on 16 November 2009 PWC had been indicted and a Civil False Claims Act suit had been unsealed in the U.S. District Court for the Northern District of Georgia. Because of these developments, the CO's letter said:

> I am reviewing the situation to determine whether it would be appropriate for me to consider and rely on the information in

> the indictment in rendering CPARS evaluations, whether and when DOJ can provide me with information which I can use to render a final decision, or whether I will need to wait for a judicial determination in the civil or criminal cases before issuing a decision. In any case, it will take some time before I will be able to issue a final decision. I expect to issue a final decision on the claim on or before Friday, May 21, 2010.

CO Ford's letter asked PWC to confirm if Mr. McCahon was authorized to certify PWC's claim. (Compl., ex. 30 at 2)

45. CO Ford's 20 May 2010 letter notified PWC that she expected to issue her decision on or before 10 September 2010. She gave the same reasons she gave before for putting off her decision for the third time. Her letter also stated "I have not obtained or sought information from DOJ on which I could make an independent assessment of PWC's conduct." (Compl., ex. 31 at 1)

46. CO Ford's 9 September 2010 letter notified PWC that she expected to issue her decision on or before 28 January 2011. She gave the same reasons she gave before for putting off her decision for the fourth time. Even though she had unanswered questions, her letter said "I have not obtained or sought information from DOJ on which I could make an independent assessment of PWC's conduct." (Compl., ex. 32 at 2)

47. CO Ford's 28 January 2011 letter notified PWC that she expected to issue her decision on or before 29 July 2011. She gave the same reasons she gave before for putting off her decision for the fifth time. With her questions still unanswered, CO Ford again said "I have not obtained or sought information from DOJ on which I could make an independent assessment of PWC's conduct." (Compl., ex. 33 at 2)

48. PWC's 16 May 2011 letter amended its 27 April 2009 claim. The letter explained that since it filed its previous claim, "additional unpaid PBDFs have accrued." The letter also said that "PWC has since determined that Mr. McCahon was not 'duly authorized to bind [PWC] with respect to the claim,' as is required by...the CDA and FAR 33.207(e)." PWC furnished an amended claim in the amount of $158,979,385.06 and provided a certification signed by PWC's General Manager Mohammad H. Al-Kandari. (Compl., ex. 34)

49. CO Ford's 28 July 2011 letter notified PWC that she expected to issue her decision on or before 16 December 2011. She gave the same reasons she gave before for putting off her decision for the sixth time. Her letter again stated "I also have not obtained information from DOJ on which I could make an independent assessment of PWC's conduct." (Compl., ex. 35 at 2)

50. CO Ford's 14 December 2011 letter notified PWC that she expected to issue her decision on or before 8 June 2012. She gave the same reasons she gave before for putting off her decision for the seventh time (the second time since PWC amended its claim on 16 May 2011). As justification for inaction, she again acknowledged "I also have not obtained information from DOJ on which I could make an independent assessment of PWC's conduct." (Compl., ex. 36 at 1)

51. By notice dated 13 April 2012, nearly 11 months after it filed its amended certified claim (SOF ¶ 48), PWC appealed pursuant to 41 U.S.C. § 7103(f)(5) on the basis that the CO had failed to issue a decision within the time period required. PWC's complaint was filed at the same time. The Board docketed the appeal on 16 April 2012 as ASBCA No. 58078.

DECISION

Unlike the PV1 and PV Bridge Contracts, the PV2 Contract contained a PBDF clause. Under this clause, the CO may decide to maintain, increase (by 5%), or decrease (by 5% or 10%) the standard distribution fees for orders placed depending on whether PWC meets certain evaluation standards including (1) fill rate and (2) CPARS rating (Excellent, Good, Fair or Poor). (SOF ¶¶ 6, 8) Evaluation was required to be performed every six months after completion of implementation (SOF ¶ 7).

DSCP awarded the PV2 Contract to PWC in June 2005. The PV2 Contract included an 18-month base period and three options. PWC began performance on the PV2 Contract in December 2005. DSCP exercised all three options extending the contract performance period to December 2010. (SOF ¶ 5) Thus, PWC performed the PV2 Contract for five years. During those five years, DSCP did not issue a single CPAR (SOF ¶¶ 37, 38). It followed that no distribution fee review conducted in accordance with the PBDF clause was ever done under the PV2 Contract.

In November 2005, while PWC was performing the PV Bridge Contract, the DOJ and DLA began civil and criminal investigations of PWC on allegations of overcharging, kickbacks, security problems and other price-related issues (SOF ¶ 25). In April 2009, while performing Option 2 of the PV2 Contract, PWC submitted a $119 million claim for alleged accumulated unpaid PBDFs to CO Ford (SOF ¶ 37). CO Ford's 26 June 2009 letter advised PWC that she expected to issue a decision on 3 December 2009 (SOF ¶ 38). PWC appealed to the Board (ASBCA No. 56888) and DSCP moved to dismiss on the ground that, considering the size and complexity of the claim and the CO's commitment to issue a decision on or before a specific date – 3 December 2009 – was reasonable. The Board agreed with DSCP and, by decision issued on 25 September 2009, dismissed the appeal for lack of jurisdiction. *Public Warehousing*, 09-2 BCA ¶ 34,265.

In November 2009, shortly after the Board dismissed PWC's appeal, a grand jury indicted PWC on multiple counts of criminal violations. Also in November 2009, the DOJ filed a False Claims Act suit against PWC. Both the criminal and civil actions were filed in the U.S. District Court for the Northern District of Georgia, Atlanta Division. (SOF ¶¶ 40, 41)

CO Ford did not issue her decision on PWC's $119 million claim on 3 December 2009, as promised. She notified PWC that in light of the civil and criminal cases filed she expected to issue her decision on or before 21 May 2010. Among the justifications she gave for delaying her decision were (1) whether it would be appropriate for her to consider and rely on the information in the indictment in rendering CPARS evaluations, (2) whether and when the DOJ can provide information for use in rendering her decision, and (3) whether she needed to wait for a judicial determination in the civil or criminal cases before issuing a decision. (SOF ¶ 44)

Using the same justifications, and every six months projecting a date on or before which she expected to issue a decision, CO Ford has managed to put off issuing her decision for over four years: CO Ford's 26 June 2009 letter stated she expected to issue her decision on or before 3 December 2009 (SOF ¶ 38); her 2 December 2009 letter stated she expected to issue her decision on or before 21 May 2010 (SOF ¶ 44); her 20 May 2010 letter stated she expected to issue her decision on or before 10 September 2010 (SOF ¶ 45); her 9 September 2010 letter stated she expected to issue her decision on or before 28 January 2011 (SOF ¶ 46); her 28 January 2011 letter stated she expected to issue her decision on or before 29 July 2011 (SOF ¶ 47); her 28 July 2011 letter stated she expected to issue her decision on the updated $158 million claim on or before 16 December 2011 (SOF ¶¶ 48, 49); and finally, for the seventh time, her 14 December 2011 letter stated that she expected to issue her decision on or before 8 June 2010 (SOF ¶ 50). When no CO decision was issued, PWC appealed. And no decision has been issued since PWC appealed from a deemed denial 19 months ago.

Moving to dismiss this appeal, DSCP makes two arguments: First, DSCP argues that, the CO's 14 December 2011 letter stating that she "expect[s] to issue a final decision on the claim on or before Friday, June 8, 2012," is in compliance with 41 U.S.C. § 7103(f)(2)(B) because she "pinpointed a particular date within which a decision would be issued" (gov't mot. to dismiss at 16-17). Second, DSCP argues PWC's appeal is premature and the CO's failure to issue a final decision is reasonable so long as the civil and criminal cases are pending in the District Court (*id.* at 17-18).

For claims of over $100,000, the CDA requires the CO to issue a decision within 60 days of receipt of a submitted certified claim or notify the contractor of a reasonable time within which a decision will be issued. 41 U.S.C. § 7103(f)(2)(A) and (B). The Board has interpreted 41 U.S.C. § 7103(f)(2)(B) to require the CO to pinpoint or specify a date certain by which the decision will be issued. *Defense Systems Co.*, ASBCA

No. 50534, 97-2 BCA ¶ 28,981 (granting government's motion to dismiss a $71 million claim when the CO established a date certain – 11 July 1997 – to issue a decision); *Eaton Contract Services, Inc.*, ASBCA Nos. 52686, 52796, 00-2 BCA ¶ 31,039 at 153,273 (granting the government's motion to dismiss finding CO's letter stating she "expected to have a final decision no later than 1 September 2000" complied with the requirements of the CDA); *Cubic Defense Applications, Inc.*, ASBCA No. 56097, 07-2 BCA ¶ 33,695 at 166,790 (CO's letter advising that the government intends to respond to the contractor's claim "approximately December 14, 2007" held insufficient as a "fixed or specific date" for issuing a decision).

On the other hand, a CO's promise to issue a decision contingent upon the occurrence of a future event has been held not to comply with the requirements of 41 U.S.C. § 7103(f)(2)(B). *Northrop Grumman Corp.*, ASBCA No. 52263, 00-1 BCA ¶ 30,676 at 151,504 (appeal authorized on a deemed denial basis where CO letter stated a decision will be issued no later than 90 days if ADR did not result in resolution of all issues); *Aerojet General Corp.*, ASBCA No. 48136, 95-1 BCA ¶ 27,470 (CO's statement that his ability to issue a decision in early March time frame was contingent on the claimant's cooperation in supplying the requested cost and pricing data held not to comply with 41 U.S.C. § 605(c)(2)); *Inter-Con Security Systems, Inc.*, ASBCA No. 45749, 93-3 BCA ¶ 26,062 (appeal on a deemed denied basis allowed when CO advised that she would render a decision "within 60 days of receipt of the audit report" that she intends to request).

In this case, CO Ford has pinpointed 8 June 2012 as the latest date on or before which she would issue her decision. That date has come and gone, as had the six dates given before it, and no decision has been issued. The CO has now put off issuing her decision for over four years. The facts show, and DSCP's brief admits, the CO simply did not want to issue a decision "until the proper forum (the U.S. District Court in Atlanta) makes a determination of whether...fraud was committed" by PWC (gov't mot. to dismiss at 3). Thus, despite the fact that CO Ford promised to issue her decision on or before a specific date on seven separate occasions, her promise on each occasion was contingent upon the occurrence of future events beyond her control – resolution of the civil and criminal cases before the District Court in Atlanta. We conclude the CO's qualified commitment to issue her decision does not comply with the requirement of 41 U.S.C. § 7103(f)(2)(B). We therefore find the CO's serial postponement of a final decision to be unreasonable and PWC's appeal from a deemed denial to be within our jurisdiction.

We now turn to DSCP's second argument for dismissal for lack of jurisdiction on the alleged basis that the CO's failure to issue a final decision pending the outcome of the criminal and civil cases before the District Court in Atlanta is reasonable. We start by separating what we have jurisdiction to decide from what we do not.

The Board does not have jurisdiction over criminal and civil fraud. *Environmental Safety Consultants, Inc.*, ASBCA No. 53485, 02-2 BCA ¶ 31,904 at 157,613; *Toombs & Co.*, ASBCA Nos. 35085, 35086, 89-3 BCA ¶ 21,993 at 110,598 ("The Board has no jurisdiction to impose the civil and criminal penalties and forfeitures for fraudulent statement of claims."); *Martin J. Simko Construction, Inc. v. United States*, 852 F.2d 540, 547-48 (Fed. Cir. 1988) (the Board does not have jurisdiction to determine whether a contractor has violated the False Claims Act).

The Board does have jurisdiction under the CDA to decide the contract rights of the parties even when fraud has been alleged. For example, the Board has jurisdiction to decide the amount of a contractor's quantum recovery. *Environmental Safety Consultants,* 02-2 BCA ¶ 31,904 at 157,613 ("That fraud allegedly may have been practiced in the preparation and submission of claims does not deprive the Board of jurisdiction under the CDA."); *Nexus Construction Co.*, ASBCA No. 51004, 98-1 BCA ¶ 29,375 (Board has jurisdiction to decide contractor's entitlement under the termination for convenience clause when CO's decision denied the contractor's termination claim as tainted by fraud.). In *Toombs & Co.*, 89-3 BCA ¶ 21,993 at 110,598, we said "In determining the contractual rights of the parties, it is sufficient for the Board to determine whether statements made in claims are correct or incorrect. The Board need not, and does not, determine whether those statements which it finds incorrect were made knowingly with intent to deceive."

Despite the criminal and civil cases pending before the District Court, we have jurisdiction to interpret the PBDF clause and to determine what adjustments, if any, PWC is entitled to under that clause.

We have held above that we have jurisdiction over PWC's appeal from a deemed denial. Under the CDA, "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. As quasi-judicial tribunal, we have inherent authority to stay or suspend proceedings in appropriate cases. *Kellogg Brown & Root Services, Inc.*, ASBCA Nos. 56358, 57151, 11-1 BCA ¶ 34,614 at 170,603 (citing *Public Warehousing Co., K.S.C.*, ASBCA No. 56116, 08-1 BCA ¶ 33,787 at 167,227). The Supreme Court has instructed that exercise of this authority "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). When the government seeks to suspend board proceedings pending the outcome of criminal or civil proceedings, we have followed *Landis* and required the government to "make out a clear case of hardship or inequity in being required to go forward, if there is even a fair possibility that the stay...will work damage to some one else." *Id.* at 255; *Ingalls Shipbuilding Division, Litton Systems, Inc.*, ASBCA No. 22645, 78-2 BCA ¶ 13,350 (government's motion to suspend pending the outcome of allegedly related criminal case denied); *TRW, Inc.*, 99-2

BCA ¶ 30,407 (government motion to suspend pending the outcome of a related District Court *qui tam* False Claims Act case denied).

In *General Construction and Development Co.*, ASBCA No. 36138, 88-3 BCA ¶ 20,874 at 105,552 the Board said:

> If the Government believes that Board adjudication of the contractual rights of the parties will interfere with possible legal actions for the alleged fraud, it may request suspension, or dismissal without prejudice, pending resolution of the fraud issue in the appropriate forum. Any such request, however, should be supported by a statement of the U.S. Attorney as to its necessity, and a showing that the prejudice to the Government of proceeding with the appeal outweighs the prejudice to appellant of delay in the settlement of its contract rights.

In this case, the DOJ has not asked that Board adjudication of the contract rights of the parties be suspended or dismissed without prejudice pending resolution of the fraud cases in the District Court. Nor has the DOJ or DSCP shown that Board adjudication of the contract rights of the parties will interfere or prejudice the criminal and civil actions in the District Court.[5]

Moreover, despite DSCP's argument to the contrary, whether PWC committed fraud is not for the CO to decide. In completing CPARs we see no requirement, nor has DSCP pointed to any, for the CO to include allegations of fraud in her assessment. Indeed, as DLA's 2002 CPARS Guide instructs, CPAR assessment "*must be based on objective facts*" and not on "speculation or conjecture" (SOF ¶ 13). Nor would it be difficult for the CO to issue CPARs under the PBDF clause of the PV2 Contract. As demonstrated by the TRO action before the U.S. Court of Federal Claims in 2007 (SOF ¶¶ 30-32) and the parties' subsequent settlement, issuing CPARs without basing evaluation on, and drawing inferences from, "any information obtained from [the criminal and civil cases]" was doable then (SOF ¶ 33), and should be doable now. Indeed, the record shows that the CO was fully capable and did prepare a draft CPAR under the PV2 Contract in June 2007 which was not formally issued (SOF ¶ 29).

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[5] In February 2012, PWC's criminal defense attorney filed a motion to dismiss the indictment based on prosecutorial misconduct and request for an evidentiary hearing (gov't mot. to dismiss, tab 11). DOJ has not asked that the Board stay proceedings pending resolution of that motion. The parties' monthly updates have not reported the current status of that motion. The DOJ has not taken the position that the CO may not proceed with her normal contract administrative duties as a result of the motion.

Arguing in support of the CO's continuing inaction, DSCP also invokes the principles of comity between federal courts and argues that these principles "should apply...to an agency that needs to know whether a contractor has committed fraud," as to which DSCP says "the contracting officer should defer to the Court" (gov't mot. to dismiss at 21). In reply to PWC's argument that the principles of comity do not apply in this case, DSCP explained that the real point of its argument is that "the contracting officer should seek to avoid meddling in a matter before a United States District Court and avoid making a separate decision on whether PWC committed fraud" (gov't reply at 9).

As we have said before, whether PWC committed fraud is simply not the CO's call. We have received no indication from the DOJ that for the CO to fulfill her contractual obligations under the terms of the PV2 Contract would interfere or prejudice the ongoing civil and criminal cases before the District Court. We do not agree that the CO is excused from fulfilling her contractual duties in (1) issuing CPARs required under the PBDF clause; (2) performing the evaluations under the PBDF clause; and (3) issuing a decision on PWC's certified claim merely because civil and criminal cases filed against PWC are pending. The delay PWC has experienced in having contract rights enforced has now become, in the Supreme Court's words, "immoderate" and "oppressive." *Landis*, 299 U.S. at 256.

In weighing PWC's rights in having its contractual rights adjudicated against DSCP's unsupported case for an indefinite stay, we come down in favor of PWC and find the CO's failure to issue a final decision for over four years unreasonable.

CONCLUSION

Because the CO's commitment to issue a decision by a specific date – 8 June 2012 – was unreasonable, was not met and was in actuality contingent upon the resolution of the criminal and civil cases filed against PWC in the District Court and because this contingent commitment did not meet the requirement of 41 U.S.C. § 7103(f)(2)(B), DSCP's motion to dismiss this appeal is denied.

Because DSCP has failed to make out a clear case of hardship and inequities in being required to go forward, its alternate argument to dismiss this appeal as premature pending the outcome of the criminal and civil cases before the District Court is denied.

Dated: 12 November 2013

PETER D. TING
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

DIANA S. DICKINSON
Administrative Judge
Acting 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. 58078, Appeal of Public Warehousing Company, K.S.C., rendered in conformance with the Board's Charter.

Dated:

JEFFREY D. GARDIN
Recorder, Armed Services
Board of Contract Appeals