UNITED STATES
CIVILIAN BOARD OF CONTRACT APPEALS

MOTION TO EXCLUDE TESTIMONY DENIED:
June 4, 2015

CBCA 3350, 3672, 4658, 4659

YATES-DESBUILD JOINT VENTURE,

Appellant,

v.

DEPARTMENT OF STATE,

Respondent.

Douglas L. Patin and Thomas R. Lynch of Bradley Arant Boult Cummings LLP, Washington, DC, counsel for Appellant.

Thomas D. Dinackus, Office of the Legal Adviser, Buildings and Acquisitions, Department of State, Rosslyn, VA, counsel for Respondent.

LESTER, Board Judge.

Pending before the Board is appellant's motion to exclude the testimony of the Government's scheduling expert, Mark Boe, from the upcoming hearing in these appeals. For the reasons set forth below, the motion to exclude is denied.

Background

These appeals involve a contract that respondent, the Department of State (DOS), awarded to appellant, Yates-Desbuild Joint Venture (YDJV), in 2005 for the design and construction of a compound for the United States Consulate in Mumbai, India. Although the contract required substantial completion of the construction of nine buildings in Mumbai by

March 18, 2008, the Government did not certify the project as substantially complete until October 6, 2011.

On August 30, 2012, YDJV submitted a certified claim to the contracting officer, through which it requested a time extension of 1184 days, 868 of which it considered compensable. In a decision dated February 21, 2013, the DOS contracting officer denied YDJV's requests for additional time and compensation and demanded payment of over $11 million in liquidated damages. After YDJV appealed that decision to the Board, the DOS contracting officer issued another decision demanding payment of additional monies, which YDJV then appealed. YDJV also appealed two more contracting officer decisions denying additional monetary claims that YDJV had submitted. Those appeals were all consolidated and are now pending before the Board for hearing.

Both parties have indicated that, because of the nature of the construction contract at issue here and the type of delays for which both YDJV and the Government are seeking compensation, they will present testimony from expert witnesses in schedule delay analysis. On May 4, 2015, YDJV filed a motion to exclude the testimony of the Government's scheduling expert witness, Mark Boe, on two grounds. First, YDJV asserts that Mr. Boe should not be permitted to express any opinions on the Mumbai building permit process because he is not qualified to express such opinions. Second, YDJV asks the Board to exclude Mr. Boe's scheduling opinions in total, as well as the entirety of his expert report, because his methodology is flawed and not recognized in the industry.

Discussion

I. The Standard for Excluding Expert Testimony

The purpose of a motion *in limine* is "to prevent a party before trial from encumbering a record with irrelevant, immaterial, or cumulative matters." *J.R. Roberts Corp.*, DOT BCA 2499, 94-2 BCA ¶ 26,645, at 132,558 (quoting *Baskett v. United States*, 2 Cl. Ct. 356, 367-68 (1983)); *see Palmerin v. City of Riverdale*, 794 F.2d 1409, 1413 (9th Cir. 1986) ("Pretrial motions are useful tools to resolve issues which would otherwise 'clutter up' the trial."). "Such a motion enables a [tribunal] to rule in advance on the admissibility of documentary or testimonial evidence and thus expedite and render efficient a subsequent trial." *J.R. Roberts*, 94-2 BCA at 132,558 (quoting *Baskett*, 2 Cl. Ct. at 368).

The party seeking to exclude evidence on a motion *in limine* has the burden of demonstrating that "the evidence sought to be excluded is clearly inadmissible for any purpose." *Technical Systems Associates, Inc. v. Department of Commerce*, GSBCA 13277-COM, et al., 98-2 BCA ¶ 30,066, at 148,770; *see Peter Kiewit Sons' Co.*, IBCA

3535-95, et al., 00-2 BCA ¶ 31,044, at 153,303. "Unless evidence meets this high standard, evidentiary rulings should be deferred until trial so that questions of foundation, relevancy and potential prejudice may be resolved in proper context." *Hawthorne Partners v. AT&T Technologies, Inc.*, 831 F. Supp. 1398, 1400 (N.D. Ill. 1993).

Pursuant to Federal Rule of Evidence 702, so long as "scientific, technical, or other specialized knowledge will help the trier of fact to understand the evidence or to determine a fact in issue," a "witness who is qualified as an expert by knowledge, skill, experience, training, or education may testify in the form of an opinion or otherwise." As the Supreme Court established in *Daubert v. Merrell Dow Pharmaceuticals, Inc.*, 509 U.S. 579 (1993), and *Kumho Tire Co. v. Carmichael*, 526 U.S. 137 (1999), "reliability is the touchstone for expert testimony on 'scientific, technical, or other specialized knowledge.'" *Libas, Ltd. v. United States*, 193 F.3d 1361, 1366 (Fed. Cir. 1999). Although the Board's rules "are more flexible than the Federal Rules when it comes to the admissibility of evidence," an expert's opinion, even before the Board, "must be credible." *Universal Yacht Services, Inc.*, ASBCA 53951, 04-2 BCA ¶ 32,648, at 161,578-79 (discussing comparable Armed Services Board of Contract Appeals rule). "[T]o be credible, expert opinion must be reliable," and, "to be reliable, it must meet the same standards set forth for the admissibility of expert testimony" in the Federal Rules. *Id.* at 161,579.

In applying the evidentiary standards of *Daubert* and *Kumho Tire*, "[a] trial judge has a 'gatekeeping role' to screen proposed expert evidence for reliability and relevance." *Peter Kiewit*, 00-2 BCA at 153,303 (citing *Daubert*, 509 U.S. at 589, 597). Expert witness "'knowledge' connotes more than subjective belief or unsupported speculation." *Daubert*, 509 U.S. at 590. "Proposed [expert] testimony must be supported by appropriate validation – *i.e.*, 'good grounds,' based on what is known." *Id.* Accordingly, in evaluating a motion to exclude a particular individual's expert testimony from consideration, the Board "ha[s] to decide whether [that] particular expert ha[s] sufficient specialized knowledge to assist the [tribunal] 'in deciding the particular issues in the case.'" *Kumho Tire*, 526 U.S. at 156 (quoting 4 J. McLaughlin, *Weinstein's Federal Evidence* ¶ 702.05[1], at 702-33 (2d ed. 1998)).

Nevertheless, "a trial judge's inquiry is a flexible one, and the judge is accorded broad latitude in determining the reliability of, and whether to admit or exclude, expert evidence." *Peter Kiewit*, 00-2 BCA at 153,303 (citation omitted); *see Yamaha International Corp. v. Hoshino Gakki Co.*, 840 F.2d 1572, 1582 (Fed. Cir. 1988) (tribunal has "broad discretion to admit the testimony of . . . experts"). Further, the concerns about reliability and relevance that the Supreme Court addressed in *Daubert* and *Kumho Tire*, while still a necessary inquiry in cases before the Board, "are of lesser import in a bench trial" than in a jury trial, *Seaboard Lumber Co. v. United States*, 308 F.3d 1283, 1302 (Fed. Cir. 2002), "because the [judge in

a bench trial] is better equipped than a jury to weigh the probative value of expert evidence." *Traxys North America, LLC v. Concept Mining, Inc.*, 808 F. Supp. 2d 851, 853 (W.D. Va. 2011). "There is less need for the gatekeeper to keep the gate when the gatekeeper is keeping the gate only for himself." *United States v. Brown*, 415 F.3d 1257, 1269 (11th Cir. 2005). "[W]here the factfinder and the gatekeeper are the same, the [tribunal] does not err in admitting the evidence subject to the ability later to exclude it or disregard it if it turns out not to meet the standard of reliability established by [Federal] Rule [of Evidence] 702." *In re Salem*, 465 F.3d 767, 777 (7th Cir. 2006). Our hearing in these appeals, as in all of our cases, will be heard by a judge alone, without a jury.

With these standards in mind, we consider the two grounds upon which YDJV has asked us to exclude Mr. Boe's expert testimony and report.

II. Mr. Boe's Testimony Regarding the Permitting Process

Pursuant to Federal Rule of Evidence 702, a witness who provides expert testimony must be "qualified by knowledge, skill, experience, training, or education" to present that testimony, although tribunals interpret "Rule 702's qualification requirement liberally." *Pineda v. Ford Motor Co.*, 520 F.3d 237, 244 (3d Cir. 2008). YDJV complains that Mr. Boe should not be permitted to testify about the Mumbai building permit process as part of his schedule analysis because he lacks any qualifications to opine upon that subject.

In response, the Government acknowledges that Mr. Boe does "not consider [himself] an expert in any aspect of permitting in Mumbai." Declaration of Mark Boe ¶ 5 (May 15, 2015). Nevertheless, the Government asserts that Mr. Boe is not being proferred as an expert on the permitting process. Instead, it asserts, it is offering Mr. Boe to testify about the impact of the permitting process performance of the project at issue in this case and the contractual delays that accompanied it. The Government further asserts that YDJV's own expert, Charles V. Choyce, Jr., similarly relies on the permitting process in his own schedule analysis, even though he, too, lacks expertise in that process, and it argues that, if the Board excludes any testimony from Mr. Boe that touches upon the permitting process, it must similarly exclude such testimony from Mr. Choyce.

The Board will not preclude Mr. Boe from presenting a schedule analysis that includes a discussion of the effect of the permitting process upon the project. Under Federal Rule of Evidence 703, "[a]n expert may base an opinion on facts or data in the case that the expert has been made aware of." Some of those facts may be ones that counsel for a party has asked the expert to assume are true, and counsel may plan to establish the validity of those factual assumptions elsewhere in the case through other evidence, witnesses, or inferences. *See Williams v. Illinois*, 132 S. Ct. 2221, 2228 (2012) (plurality opinion) ("Under settled evidence

law, an expert may express an opinion that is based on facts that the expert assumes, but does not know, to be true."); *see also Childress v. Ozark Delivery of Missouri L.L.C.*, No. 09-CV-3313, 2014 WL 7181038, at *2 (W.D. Mo. Dec. 16, 2014) ("The language used in Rule 702 is 'broad enough to allow an expert to rely on hypothetical facts that are supported by the evidence.'" (quoting Fed. R. Evid. 702 Advisory Committee Notes, 2000 Amendment)); *Richman v. Sheahan*, 415 F. Supp. 2d 929, 942 (N.D. Ill. 2006) ("Experts routinely base their opinions on assumptions that are necessarily at odds with their adversary's view of the evidence."). This may be particularly true in construction delay cases, which can require a complex scheduling analysis in which a scheduling expert may have to identify and isolate the various interrelated subprojects necessary for full contract performance and completion, identify a baseline schedule by which these interrelated subprojects would have been performed had no delays occurred, evaluate how changes and delays on one subproject impacted the contractor's ability to commence or complete performance of other subprojects, assess the impact of each of the various delays (taken individually and in totality) upon the contractor's ability timely to complete performance, assess the extent of that impact throughout the contract performance period, and attempt to assign responsibility for and quantify the various delays. *See, e.g.*, *Haney v. United States*, 676 F.2d 584, 595 (Ct. Cl. 1982) (discussing requirements of critical path schedule analysis); *Mega Construction Co. v. United States*, 29 Fed. Cl. 396, 425 (1993) (same); J. Richard Margulies, "Delays, Suspension of Work, and Acceleration," in *Construction Contracting* 617, 662-67 (1991) (same).

It is highly unlikely that a scheduling expert would have expertise in every single underlying cause of delay on a construction project, and there would be, at most, a tiny pool of expert witnesses who would be available to assist parties in construction delay cases if such broad expertise were necessary. Thankfully, in creating a schedule delay analysis, the testifying expert does not necessarily need to have such specific expertise in every cause of delay. As long as the testifying witness has expertise in scheduling analysis itself, he can rely upon factual assumptions provided to him or upon opinions of other experts to address technical causes of delay that he himself cannot address. *See Williams*, 132 S. Ct. at 2228. If the expert assumes facts or relies upon other expert opinions that ultimately are not proven or are found to be unreliable, it may very well affect the viability of the expert's opinions in the case. But the Board will not preclude a party from presenting a complete schedule analysis showing the impact of various delays, from an expert qualified in scheduling techniques and analysis, simply because the expert, for lack of expertise on the technical elements underlying the cause of a particular delay, must assume facts associated with the cause of that delay – facts that the party presenting the expert analysis may ultimately prove through other means.

In this particular case, the Government has represented that Mr. Boe will not be testifying as an expert on the Mumbai building permit process, and we can find nothing in YDJV's briefing establishing that, in conducting his schedule analysis, Mr. Boe stepped outside his role as an expert in scheduling analysis. YDJV's own expert, Mr. Choyce, discusses the permitting process in his report, and he appears to reach opinions about YDJV's original expectations of that process – that "YDJV reasonably assumed no significant impediments that would prevent 'fast track' construction," among others – and the impact of the permitting process, as it actually happened, on the design and construction process. In his deposition transcript, Mr. Choyce, like Mr. Boe, disclaims any expertise in international permit processes. *See* Transcript of Deposition of Charles V. Choyce, Jr., at 46 (Mar. 24, 2015). Given the seeming similarity of the manner in which both parties' scheduling experts have evaluated the permitting process in their expert reports, we cannot see any basis for excluding this aspect of Mr. Boe's, but not Mr. Choyce's, opinions. To the extent that, during the hearing of this matter, YDJV believes that Mr. Boe is improperly providing a permit process opinion beyond his area of expertise, it can raise an objection at that time.

III. Mr. Boe's Schedule Analysis

YDJV next complains that Mr. Boe should not be allowed to present any of his schedule analysis, and that the Board should exclude the entirety of his expert report, because Mr. Boe's methodology is flawed and is not recognized in the industry. YDJV asserts that, in his report, Mr. Boe states that he has used a methodology supported by the Association for the Advancement of Cost Engineers International Recommended Practice for Forensic Schedule Analysis (RP), RP 29R-03, but that, in reality, his analysis is inconsistent with the RP. The Government, in response, argues that RP 29R-03 indicates that "[f]orensic schedule analysis . . . is both a science and an art" and that Mr. Boe's analysis fully complies with that RP.

YDJV's objections to Mr. Boe's methodology and analysis seem better resolved at a hearing on the merits than on a motion to exclude the entirety of the Government's schedule analysis. "Vigorous cross-examination, presentation of contrary evidence, and careful instruction on the burden of proof are the traditional and appropriate means of attacking shaky but admissible evidence." *Daubert*, 509 U.S. at 596. Here, both the Government's and YDJV's experts plan to present detailed and complex analyses evidencing the results of their study of documentation associated with the scheduling of this construction project. We believe that these competing expert analyses as to the impact of schedule delays "will help the trier of fact to understand the evidence or to determine a fact in issue." Fed. R. Evid. 702. YDJV can draw attention to any deficiencies in Mr. Boe's analysis and opinions through targeted cross-examination and through the presentation of Mr. Choyce's testimony, which

will provide a better record for challenging Mr. Boe's opinions than currently exists. In light of our broad discretion to permit expert testimony, *see Peter Kiewit*, 00-2 BCA at 153,303, our desire for a full record in support of each party's positions, and the non-jury nature of a proceeding before the Board, we deny YDJV's request that we exclude Mr. Boe's schedule analysis. To the extent that, during the development of testimony at the hearing of these appeals, YDJV believes that there is additional support for its motion, it may request alteration of the Board's *in limine* ruling at that time. *See Luce v. United States*, 469 U.S. 38, 41 (1984) (*in limine* rulings may be altered at trial).

Decision

YDJV's motion *in limine* to exclude Mr. Boe's testimony is **DENIED**.

HAROLD D. LESTER, JR.
Board Judge