UNITED STATES
CIVILIAN BOARD OF CONTRACT APPEALS

February 15, 2018

CBCA 5911

J.R. MANNES GOVERNMENT SERVICES CORP.,

Appellant,

v.

DEPARTMENT OF JUSTICE,

Respondent.

Jerry R. Mannes II of J.R. Mannes Government Services Corporation, Holland, MI, appearing for Appellant.

Jack R. Cordes, Jr., Federal Bureau of Investigation, Department of Justice, Washington, DC, counsel for Respondent.

SOMERS, Board Judge (Chair).

ORDER

J.R. Mannes Government Services Corporation moves to compel the deposition of Paul Courtney, the Chief Contracting Officer of the Federal Bureau of Investigation, Department of Justice (the FBI). The FBI opposes the motion and has requested a protective order. Because appellant has not shown that it could not obtain the information sought by less intrusive means, we deny the motion to compel and grant the request for a protective order.

Background

This case is proceeding on an expedited basis under Board Rule 52. After an initial status conference, the parties jointly proposed a schedule for future proceedings on January 29, 2018. We adopted the proposed schedule that same day.

On January 29, 2018, appellant notified the FBI of its intent to depose Mr. Courtney on February 16, 2018. On February 5, 2018, the FBI told appellant that "absent a court order to the contrary, we will not make Paul Courtney available to you for a deposition . . . . He is the Chief Contracting Officer for the FBI and had no involvement in the decision to terminate your contract . . . . "

On February 8, 2018, appellant asked the FBI to reconsider. Appellant tried to persuade the FBI of the importance of deposing Mr. Courtney, pointing to a letter signed by Mr. Courtney that had been sent to the Office of the National Ombudsman, U.S. Small Business Administration. The letter responds to allegations made by Jerry R. Mannes II, CEO, that the FBI had improperly terminated two of appellant's task orders for convenience.

The FBI told appellant that it would not make Mr. Courtney available for deposition because Mr. Courtney had no personal knowledge of the underlying facts. In response to appellant's motion to compel, the FBI explained that FBI counsel had drafted the letter and that Mr. Courtney had signed it without personal knowledge of the underlying facts. In our teleconference discussing this motion, the FBI noted that the letter was signed one month after the claim had been filed.

In its motion to compel, appellant focuses on the last paragraph of the letter:

> In conclusion, the FBI acknowledges that it terminated the two task orders at issue for the convenience of the Government. However, the FBI believes that it has been responsive to Mr. Mannes' inquiries, and both claims are being processed in accordance with applicable Federal Acquisition Regulation (FAR) procedures and Federal law. I hope this letter is responsive to your concerns and I welcome any additional questions you have in connection with this matter.

Appellant says that this paragraph proves that Mr. Courtney had knowledge of, and was in a position to be aware of, the decision to terminate the contract. When asked at the teleconference why Mr. Courtney should be deposed, appellant's representative stated that it hoped to gain Mr. Courtney's high-level focus (or a bird's eye view) of the procurement. Beyond that, appellant could not explain precisely why it could not obtain discovery from another source more closely tied to the contract.

Noting that it had responded to twenty-one interrogatories, thirty requests for admissions, and eight requests for the production of documents from appellant, the FBI indicated that it had agreed to make four other FBI employees available for deposition, including the contracting officer who signed the letter advising appellant that the FBI did not

intend to exercise the option on the task order.[1] The FBI opposes appellant's request to depose Mr. Courtney because he played no role in the contract and has no personal knowledge of the facts underlying the appeal. The FBI seeks a protective order to eliminate the need for Mr. Courtney to comply with the deposition notice.

Discussion

We encourage liberal, voluntary discovery between the parties where it appears the information sought is relevant to the matters in dispute or reasonably calculated to lead to the discovery of admissible evidence. *Kepa Services, Inc. v. Department of Veterans Affairs*, CBCA 2727, et al., 15-1 BCA ¶ 35,889; Fed. R. Civ. P. 26(b)(1) (permitting parties to seek discovery that is "relevant . . . and proportional to the needs of the case"). Board Rule 13(c) allows us to limit discovery for good cause.

The need to limit access to high-ranking government officials in the discovery process is well established. In *United States v. Morgan*, 313 U.S. 409 (1941), the Supreme Court indicated that the practice of calling high ranking government officials as witnesses should be discouraged. Other courts have concluded that top executive department officials should not, absent extraordinary circumstances, be called to testify or deposed regarding their reasons for taking official action. *Id*. at 422; *see* Bogan *v. City of Boston*, 489 F.3d 417, 423 (1st Cir. 2007) (citing *Simplex Time Recorder Co. v. Secretary of Labor*, 766 F.2d 575, 586 (D.C. Cir. 1985) (citations omitted)). This is because "high-ranking officials have greater duties and time constraints than other witnesses" and that, without appropriate limitations, such officials will spend an inordinate amount of time tending to pending litigation. *Id*. (citing *In re United States (Kessler)*, 985 F.2d 510, 512 (11th Cir. 1993); *Kyle Engineering Co. v. Kleppe*, 600 F.2d 226, 231 (9th Cir. 1979)(trial court did not err in vacating deposition notice for high ranking government contracts official).

To determine if extraordinary circumstances exist, courts consider whether or not the party seeking the deposition has shown that: (1) the official's testimony is necessary to obtain relevant information that is not available from another source; (2) the official has first-hand information that could not be reasonably obtained from another source; (3) the testimony is essential to that party's case; (4) the deposition would not significantly interfere with the

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[1] During the teleconference, FBI counsel raised security concerns arising from appellant's plan to take video depositions using a online streaming platform through the FBI's network. Ultimately, when informed that appellant would have to make other arrangements to take the proposed depositions, appellant "waived" these depositions, citing cost concerns.

ability of the official to perform his government duties; and (5) that the evidence sought is not available through any alternative source or less burdensome means. *Bogan*, 489 F.3d at 423 (citing *In re United States (Holder)*, 197 F.3d 310, 314 (8th Cir. 1999)); *Energy Capital Corp. v. United States*. 60 Fed. Cl. 315, 318 (Fed. Cl. 2004) (noting that both current and former high-ranking government officials are subject to depositions if they have personal knowledge of the facts at issue).

Our rules and precedent require more than an assertion that Mr. Courtney could provide a "higher-level perspective" on the case. Appellant must show that Mr. Courtney was involved in the contract at issue, had personal knowledge of the events that could not be gleaned from others, or that appellant could not use a less disruptive means to obtain the potentially relevant information. Appellant has not done so here.[2]

Decision

Appellant's motion to compel is **DENIED**. Respondent's motion for a protective order is **GRANTED**.

JERI KAYLENE SOMERS
Board Judge

[2] Notably, appellant has chosen to vary the processing of its appeal by using the small claims procedure in Rule 52. This procedure permits the Board to establish a schedule meant to encourage the timely, expedited resolution of the appeal. With that in mind, we issued an order that shortened deadlines for discovery and limited the number of depositions, as requested by appellant. Appellant has propounded extensive discovery and has received the agency's responses. If appellant believed that Mr. Courtney had additional information not provided in the agency's responses, it should have identified the missing information with more specificity.