



UNITED STATES
CIVILIAN BOARD OF CONTRACT APPEALS

ORDER CONSOLIDATING APPEALS AND
SETTING PRELIMINARY SCHEDULE:
April 3, 2020

CBCA 6683, 6761, 6762

4K GLOBAL-ACC JOINT VENTURE, LLC,

Appellant,

v.

DEPARTMENT OF LABOR,

Respondent.

Karl Dix, Jr., Lochlin B. Samples, and Jonathan R. Mayo of Smith, Currie & Hancock LLP, Atlanta, GA, counsel for Appellant.

José Otero and Joshua L. Caplan, Office of the Solicitor, Department of Labor, Washington, DC, counsel for Respondent.

LESTER, Board Judge.

ORDER

This order addresses (1) whether consolidation of three appeals, all arising out of the same contract, is warranted and (2) a schedule for further proceedings in the three appeals.

Background

On March 6, 2020, the Board docketed two appeals from 4K Global-ACC Joint Venture, LLC (4KG-ACC), each of which involves a Department of Labor (DOL)

contracting officer's denial of a monetary claim by 4KG-ACC arising under contract no. 1630DC-17-C-0024 (contract 0024) for construction of the Atlanta Job Corps' Center. The first appeal, docketed as CBCA 6761, seeks payment of \$501,749.57 for the costs of removing rock at a hydronic trench, as well as a 128-calendar-day time extension. In the second appeal, docketed as CBCA 6762, 4KG-ACC complains that, in violation of a memorandum of understanding (MOU) that effectively settled various matters associated with contract performance, DOL improperly withheld \$582,200 from Pay Application 21 based upon an alleged prior overpayment for work at building D, areas A and C, of the project.

When the Board received 4KG-ACC's notices of appeal, it assigned them to the same judge who is overseeing another appeal that 4KG-ACC previously filed, which the Board had docketed on December 17, 2019, as CBCA 6683. That appeal challenges the DOL contracting officer's decision of December 6, 2019, terminating contract 0024 for default. Proceedings in CBCA 6683 are still in their initial stages, with 4KG-ACC having filed its complaint on January 16, 2020, and DOL having filed its answer on February 19, 2020. The Board issued an order on March 4, 2020, temporarily suspending discovery in CBCA 6683 pending the parties' submission of a proposed schedule of proceedings in the appeal. The Board issued that order in response to DOL's motion indicating that 4KG-ACC had served written discovery requests on January 24 and 31, 2020, and was refusing to allow DOL any extension of its response time to allow DOL to conduct what it believed would have to be a significant document search effort.

By order dated March 6, 2020, recognizing that CBCA 6683, 6761, and 6762 all arise out of the same contract, and before issuing initial procedures orders in CBCA 6761 and 6762, the Board asked the parties to address whether the issues in the three appeals were sufficiently interrelated to warrant consolidation of the appeals into a single action. In its response, 4KG-ACC objected to consolidation, asserting its belief "that maintaining separate appeals for these three matters will allow for a more timely resolution of the issues." 4KG-ACC recognized that there was "some overlap" between the allegations of improperly withheld funds in CBCA 6762 and the default termination in CBCA 6683, but that the "discrete and relatively simple issues" in CBCA 6762 "require little discovery and can proceed quickly" and, if decided in 4KG-ACC's favor, can greatly simplify CBCA 6683. It also asserted that CBCA 6761 has no bearing on the default termination decision and that no efficiencies would be gained by consolidation. For its part, DOL responded that it does not object to consolidation should the Board believe it would promote an efficient resolution of these cases, although it contests allegations in 4KG-ACC's complaint suggesting that the issues in CBCA 6761 and 6762 are relevant to DOL's default termination decision.

The parties have also proposed separate schedules of proceedings in CBCA 6683 limited to resolving the default termination issues. DOL contends that it will take it at least

nine months to review all of the electronically stored information (ESI) that may be responsive to 4KG-ACC's written document production requests in that appeal. Accordingly, it requests that the Board set a document production deadline of December 18, 2020, in CBCA 6683; a fact discovery cut-off of March 19, 2021; and an expert witness discovery cut-off of June 4, 2021. Conversely, 4KG-ACC asks us to require that all documents in CBCA 6683, including ESI, be produced by May 15, 2020; that fact discovery conclude by August 3, 2020; and that expert discovery conclude by October 12, 2020. It asserts that "DOL's contention that 270 plus days are needed merely to complete document production is preposterous."

Discussion

Consolidation

Board Rule 2(f) provides that "[t]he Board may consolidate cases wholly or in part if they involve common questions of law or fact." 48 CFR 6101.2(f) (2019). That rule is based upon and involves the same considerations that underlie Rule 42 of the Federal Rules of Civil Procedure, which governs consolidation of actions in federal courts. *Harris IT Services Corp. v. Department of Veterans Affairs*, CBCA 5814, et al., 17-1 BCA ¶ 36,901, at 179,800.

The Board has broad discretion in deciding whether to consolidate appeals. *Algernon Blair, Inc.*, GSBCA 5920, et al., 82-2 BCA ¶ 15,859, at 78,626. In exercising that discretion, the Board generally considers two factors: (1) whether the cases at issue present a common question of law or fact, and (2) whether the interests of judicial economy outweigh the potential for delay, confusion, and prejudice that may result from consolidation. *Harris IT Services*, 17-1 BCA at 179,800; see *Algernon Blair*, 82-2 BCA at 78,626 ("There is for consideration not only the avoidance of extra costs and delay to the parties, but also the avoidance of waste of adjudicative resources"). "[T]o the extent that consolidation would likely waste adjudicative resources, that 'consideration can take precedence over the desires of' the party or parties requesting consolidation." *Harris IT Services*, 17-1 BCA at 179,800 (quoting *Algernon Blair*, 82-2 BCA at 78,626). Further, the parties need not agree to consolidation: "[c]onsolidation can be ordered despite opposition by the parties." *Cienega Gardens v. United States*, 62 Fed. Cl. 28, 32 (2004); see *Entergy Nuclear Indian Point 2, LLC v. United States*, 62 Fed. Cl. 798, 802 (2004) ("The court should take the positions of the parties into account in its analysis but need not accord the parties' views dispositive weight."). The fact that the appeals all involve the same contract weighs in favor of consolidation. *Glendale Joint Venture v. United States*, 13 Cl. Ct. 325, 327 (1987),

In addition to the fact that all three appeals arise out of the same contract, the two new appeals, both involving monetary claims by 4KG-ACC, appear to raise issues upon which

4KG-ACC intends to rely as a defense to the default termination at issue in CBCA 6683. In several places in the complaint that 4KG-ACC filed in CBCA 6683 on January 16, 2020, 4KG-ACC identified DOL's breach of the MOU that forms the basis of 4KG-ACC's argument in CBCA 6762 as one of the reasons that the default termination at issue in CBCA 6683 must be overturned. Further, at paragraph 23 of that complaint, 4KG-ACC alleges as a defense to the default termination that, during performance, there were "undisclosed site conditions, including rock," an allegation that appears to refer to the claim at issue in CBCA 6761. In addition, in CBCA 6761, 4KG-ACC is seeking a time extension of 128 calendar days. Given that part of the reason for DOL's default termination was 4KG-ACC's alleged failure to make timely progress, it would seem likely that the claim at issue in CBCA 6761, despite 4KG-ACC's assertion to the contrary, could play into 4KG-ACC's defense to the default termination.

In such circumstances, we can see no reason not to consolidate the three appeals, all of which arise out of the same contract, "to avoid multiple litigation of substantially similar facts." *Allied Repair Service, Inc.*, ASBCA 26619, 82-1 BCA ¶ 15,785, at 78,163. Although 4KG-ACC suggests that it would be more efficient to litigate CBCA 6762 separately from CBCA 6683 so that, if we decide CBCA 6762 first, it can use that decision to help resolve CBCA 6683, there is no guarantee that one appeal will be decided before another. Consolidation will better ensure that the cases are coordinated in a manner that reduces duplicative discovery and proceedings. Contrary to 4KG-ACC's concern, the mere fact that the three cases are consolidated does not mean that the Board cannot segregate issues to streamline each of them. *See* 9A Charles Alan Wright & Arthur R. Miller, *Federal Practice & Procedure* § 2382, at 10 (3d ed. 2008). CBCA 6683, 6761, and 6762 are consolidated.

ESI Production

The parties have proposed very different schedules for further proceedings in these appeals, with each proposed schedule dependent in large part upon the amount of time that DOL needs to produce documents responsive to 4KG-ACC's production requests. 4KG-ACC asserts that DOL should produce all documents responsive to those requests within less than two months from now, whereas DOL asserts that it needs at least nine months to produce those documents. As DOL describes it, "the key, perhaps sole, disagreement appears to be the period needed for assemblage, review and production of [ESI] in response to document requests." DOL claims that "[t]he volume of ESI to be assembled, reviewed, and prepared for production will be very large." It asserts that, based upon its initial efforts to identify documents responsive to 4KG-ACC's January 2020 document production requests, "the return from those searches exceeds 200 gigabytes of data and more than 600,000 documents," each of which DOL believes needs an "'eyes-on' review by DOL counsel or its agents" before each is produced.

The days in which a party can justify adding extensive periods of time to the discovery schedule to deal with ESI are past. “Lawyers love to think that there is no substitute for their reviewing each document page by page.” John M. Facciola, Foreward to *The Grossman-Cormack Glossary of Technology-Assisted Review*, 7 Fed. Cts. L. Rev. 1, 4 (2013). Yet, “the ‘cost and time required to have legal professionals read documents closely’ for responsiveness, privilege, and other confidentiality concerns, especially ‘in the context of cases involving hundreds of thousands (or even millions) of pages of records, can be astronomical.’” Mia Mazza, Emmalena K. Quesada, & Ashley L. Sternberg, *In Pursuit of FRCP 1: Creative Approaches to Cutting and Shifting the Costs of Discovery of Electronically Stored Information*, 13 Rich. J.L. & Tech. 11, 19 (2007) (quoting Steven C. Bennett, *E-Discovery by Keyword Search*, 15 Prac. Litigator 7, 9 (May 2004)). Such review, particularly when it covers extremely large volumes of ESI, does not necessarily result in accurate productions. “Not only is there a substitute [to personalized attorney document review], but an improvement. It is now indubitable that technology-assisted review is an appreciably better and more accurate means of searching a set of data.” Facciola, *supra*, at 4. Although DOL tells us that it “will consider the use of available techniques as its review proceeds,” the time for identifying an effective method of ESI searching, privilege and responsiveness review, and production is now, not months from now after much time has been wasted. See Mazza, Quesada, & Sternberg, *supra*, at 82 (it is important to make decisions about ESI “early in the discovery process”).

Although “[t]he underlying principles governing discovery do not change just because ESI is involved,” *Brown v. Tellermate Holdings Ltd.*, No. 2:11-CV-1122, 2014 WL 2987051, at *2 (S.D. Ohio July 1, 2014), “disclosure of documents need not be perfect.” *City of Rockford v. Mallinckrodt ARD Inc.*, 326 F.R.D. 489, 492 (N.D. Ill. 2018). Further, the current discovery rules, as set forth in the Federal Rules of Civil Procedure (FRCP), no longer envision “scorched earth” document searches, but provide for discovery that is relevant “and proportional to the needs of the case, considering,” among other things, “the importance of the discovery in resolving the issues” and “whether the burden or expense of the proposed discovery outweighs its likely benefit.” Fed. R. Civ. P. 26(b)(1). The Federal Rules also create specific limitations applicable to ESI, allowing a tribunal to consider whether certain information should be considered reasonably inaccessible “because of undue burden or cost.” *Id.* 26(b)(2)(B). Under Board Rule 13, we apply the same scope of discovery as under FRCP 26(b)(1), and we retain the right to “limit the frequency or extent of discovery for a reason stated in [FRCP] 26(b)(2).” 48 CFR 6101.13(b), (c).

DOL has not shared with us what the breadth of 4KG-ACC’s document production requests is or how much of the volume of ESI that it has identified is likely responsive to those requests, but it is clear that appellant is going to have to be willing to assist DOL in narrowing and tailoring the ESI search process if 4KG-ACC wants faster production. DOL tells us that, on February 25, 2020, it shared with 4KG-ACC preliminary search terms that

it planned to use to search its ESI for potentially responsive documents, but that, as of March 19, 2020, 4KG-ACC had not responded. “Keyword searching can, at least in theory, assist in all aspects of e-discovery.” Bennett, *supra*, at 10. Without input and agreement from 4KG-ACC defining and potentially narrowing the scope and amount of information that DOL, either by its lawyers or with technical assistance, will have to review, 4KG-ACC will leave DOL in an impossible position. DOL might conduct what it thinks is a thorough review and production, only to have 4KG-ACC complain after the fact that something was missing from the searches and demand that DOL do it all over again. Further, neither party has requested that the Board enter an order providing for any kind of “clawback” on privileged documents that might inadvertently be produced as a result of review errors, leaving DOL with concerns about the necessity of a full privilege review. *See In re Coventry Healthcare, Inc. (ERISA Litigation)*, 290 F.R.D. 471, 475-76 (D. Md. 2013) (discussing benefits of clawback agreements in ESI discovery). All of that leaves DOL in an untenable position.

4KG-ACC cannot reasonably demand immediate production of all ESI in an expedited time frame without participating in a process to assist in narrowing the scope of required search and review efforts. At the same time, DOL cannot fairly think that it will be able to delay activities in these appeals for months to give it time to review every single piece of ESI that it possesses for responsiveness and privilege. The parties are going to have to work together to create an ESI search, review, and production plan with which both of them can live. To the extent that 4KG-ACC wants the Board to order a more expedited ESI production process, 4KG-ACC may want to consider offering to share with DOL the costs associated with using a technology-assisted review system. *See Black Love Resists in the Rust v. City of Buffalo*, No. 1:18-CV-719, 2019 WL 6907294, at *6 (W.D.N.Y. Dec. 19, 2019) (discussing cost sharing). The parties should recognize, however, that, to the extent that either party abuses the ESI discovery process either by making overwhelmingly burdensome demands or by failing to consider ways of expediting ESI production, the Board, in whatever order it eventually issues on ESI production, will consider whether to penalize the recalcitrant party. *See Brasfield & Gorrie, LLC v. Department of Veterans Affairs*, CBCA 3300, et al., 14-1 BCA ¶ 35,806, at 175,117-18 (sanctioning agency for ESI review and production failures); Kenneth K. Dort & George R. Spatz, *Discovery in the Digital Era: Considerations for Corporate Counsel*, 20 Computer & Internet Law. 11, 11 (2003) (discussing ESI sanctions).

To the extent that it has not already done so, 4KG-ACC shall respond to DOL’s proposed ESI search terms no later than **April 14, 2020**. The parties shall then confer and attempt to agree upon ESI search protocols and an overall ESI production plan, which they shall submit to the Board no later than **April 30, 2020**. If the parties cannot agree upon a mechanism for ESI production, each shall submit an individual proposal to the Board by that

date identifying, in detail, the ESI protocol that it wants the Board to impose. The Board encourages the parties to attempt to work cooperatively together.

A Schedule of Proceedings

Although the parties have submitted a complaint and answer in CBCA 6683, 4KG-ACC has not yet filed complaints in CBCA 6761 or 6761. 4KG-ACC shall file a joint complaint in the two appeals, now consolidated here, on or before **April 30, 2020**, and DOL shall file its answer to that complaint within thirty days of its receipt of the complaint.

The parties submitted their pending discovery schedule proposals before stay-in-place orders were imposed as a result of the current pandemic in many parts of the United States, including Washington, D.C., where counsel for DOL is located. We presume that those circumstances will affect DOL's ability, if not 4KG-ACC's ability, to produce paper copies of documents in the near term and may slow other discovery activities. Rather than adopting a specific schedule for the completion of discovery and the establishment of a hearing date at the present time, the Board will await the parties' draft ESI review and production procedures before adopting a more complete discovery schedule, with the hope that time will make more clear when active discovery will be able to occur. In the meantime, though, the Board lifts the restriction on discovery in CBCA 6683 that it imposed in its order of March 4, 2020, and will allow for the service of additional written discovery in all of the three appeals. DOL, to the extent possible, shall produce the documents (other than ESI) that it previously promised to 4KG-ACC in response to the pending written discovery requests no later than **May 29, 2020**. To the extent that DOL now needs additional time to do so because of current stay-in-place orders, it may file a motion with the Board seeking additional time if 4KG-ACC is unwilling to agree to the additional time.

It is so **ORDERED**.

Harold D. Lester, Jr.
HAROLD D. LESTER, JR.
Board Judge