UNITED STATES
CIVILIAN BOARD OF CONTRACT APPEALS

MOTION TO WITHDRAW OR AMEND RESPONSES
TO REQUESTS FOR ADMISSION GRANTED:
November 15, 2022

CBCA 6683, 6762, 6919, 6920, 6921, 7025, 7026

4K GLOBAL-ACC JOINT VENTURE, LLC,

Appellant,

v.

DEPARTMENT OF LABOR,

Respondent.

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

José Otero, Joshua L. Caplan, C. Cleveland Fairchild, and Christopher L. Sanders, Office of the Solicitor, Department of Labor, Washington, DC, counsel for Respondent.

LESTER, Board Judge.

ORDER

Pending before the Board is the Government's request to withdraw or amend three responses to requests for admission (RFAs) that it previously provided appellant, 4K Global-ACC Joint Venture, LLC (4KG-ACC). For the reasons set forth below, we grant the Government's motion.

Background

4KG-ACC served 322 RFAs on the Department of Labor (DOL) on October 2, 2020, to which DOL responded on or about November 19, 2020. Approximately seventeen months later, on June 30, 2022, DOL filed a motion seeking to withdraw or amend three of the 322 responses. DOL stated that, through inadvertence and as the result of an oversight, its original responses to RFAs 56, 107, and 108 were faulty. DOL then attempted to show by reference to documentary evidence that its admissions as originally written conflict with the evidence and should be corrected, but DOL provided no further explanation of why it took so long for it to identify the errors in its responses.

4KG-ACC opposes DOL's motion, arguing that DOL has not shown good cause for the withdrawal and that it would be prejudiced by the withdrawal.

Discussion

Board Rule 14(d)(3) (48 CFR 6101.14(d)(3) (2021)) provides that "[t]he Board may allow a party to withdraw or amend an admission for good cause." Although the Board's Rules do not define "good cause," a leading treatise defines it generically as "[a] legally sufficient reason" or "the burden placed on a litigant . . . to show why a request should be granted or an action excused." Black's Law Dictionary 266 (10th ed. 2014). Without any particular standards in our rules to apply in evaluating a request to withdraw or amend a response to a request for admission, we may look for guidance to the portion of the Federal Rules of Civil Procedure (FRCP) addressing RFAs. *J.R. Roberts Corp.*, DOT BCA 2499, 94-2 BCA ¶ 26,763, at 133,143; *see Space Age Engineering Inc.*, ASBCA 25761, et al., 83-2 BCA ¶ 16,789, at 83,439-41 (discussing Federal Rules in considering amendment of admission).

FRCP 36(b) allows a tribunal to permit withdrawal or amendment of a response to a request for admission if two conditions are satisfied: (1) withdrawal or amendment "would promote the presentation of the merits of the action" and (2) withdrawal or amendment would not prejudice the other party in maintaining or defending the action on the merits. "[T]he rule seeks to serve two important goals: truth-seeking in litigation and efficiency in dispensing justice." *Conlon v. United States*, 474 F.3d 616, 622 (9th Cir. 2007). The two-prong test "directs the [tribunal] to consider the 'effect upon the litigation and prejudice to the resisting party' rather than focusing on the moving party's excuses for an erroneous admission." *Federal Deposit Insurance Corp. v. Prusia*, 18 F.3d 637, 640 (8th Cir. 1994) (quoting *Mid Valley Bank v. North Valley Bank*, 764 F. Supp. 1377, 1391 (E.D. Cal. 1991)). It is not designed to impose some kind of a "penalty" on a party who initially made a mistake in responding to RFAs. *Marshall v. Sunshine and Leisure, Inc.*, 496 F. Supp. 354, 356 (M.D.

Fla. 1980). Accordingly, even though DOL here has provided scant (if any) explanation of the reason for its error in responding to RFAs 56, 107, and 108, we will not bar withdrawal or amendment simply because DOL "did not offer an explanation or excuse for its mistake." *Prusia*, 18 F.3d at 640.

With regard to the first prong of the two-part test, the party seeking to withdraw admissions—here, DOL—bears the burden of establishing that withdrawal would promote the presentation of the merits of the action. *Gerrie v. County of San Bernardino*, No. 5:19-cv-1435, 2021 WL 8825251, at *2 (S.D. Cal. Dec. 15, 2021); 1 Steven S. Gensler & Lumen N. Mulligan, Federal Rules of Civil Procedure, Rules and Commentary, Rule 36 (2022). Here, DOL's admissions, when compared to the facts as DOL now believes them to be, impair DOL's ability to present the merits of its case, which is sufficient to satisfy the first prong. *See Mid Valley Bank*, 764 F. Supp. at 1391; *see also Gallegos v. City of Los Angeles*, 308 F.3d 987, 993 (9th Cir. 2002) (allowing withdrawal of an admission that affected an issue in the case). In RFA 56, DOL was asked to admit that it "did not start reviewing Pay Application 20 until after it had finalized Pay Application 19," and 4KG-ACC views DOL's alleged delay in reviewing pay application 20 as a prior material breach of a memorandum of understanding (MOU) that the parties executed. 4KG-ACC believes that this prior material breach excuses later alleged breaches by 4KG-ACC that apparently are part of the basis of the default termination. Because the admission is a key element of 4KG-ACC's defense, the merits of DOL's case would be impaired by refusing to allow DOL to contest 4KG-ACC's argument with what it views as the true facts. In RFAs 107 and 108, 4KG-ACC asked DOL to agree that work which the United States Army Corps of Engineers (USACE), which was serving as a third-party inspector on the project, had identified in its inspection assessment as needing to be performed did not constitute "repairs," as that term was used in the MOU, that 4KG-ACC had agreed through the MOU to perform without cost to DOL. That argument is a key element of 4KG-ACC's defense to DOL's default termination, and DOL should be entitled to contest it based upon the facts as it actually believes them to be.[1] "[A]llowing [DOL] to withdraw the deemed admissions . . . promotes the truth-seeking aim of Rule 36(b)." *Saenz v. Branch*, No. 16-5959, 2017 WL 6343485, at *2 (N.D. Cal. Dec. 12, 2017). DOL has met its burden of showing that it satisfies the first prong.

The second prong of the two-part test—prejudice to the other party—is "[t]he key element in permitting . . . the modification or withdrawal of a timely response." *Space Age*

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[1] Moreover, RFAs 107 and 108 seem to focus mainly on promoting a particular interpretation of the language in a particular document (the USACE assessment). The Board does not need a stipulation to tell it what the third-party document says or means.

Engineering, 83-2 BCA at 83,443. "The prejudice contemplated by [FRCP] 36(b) is 'not simply that the party who obtained the admission will now have to convince the factfinder of its truth. Rather, it relates to the difficulty a party may face in proving its case, e.g., caused by the unavailability of key witnesses, because of the sudden need to obtain evidence' with respect to the questions previously deemed admitted." *Hadley v. United States*, 45 F.3d 1345, 1348 (9th Cir. 1995) (quoting *Brook Village North Associates v. General Electric Co.*, 686 F.2d 66, 70 (1st Cir. 1982)). Accordingly, tribunals "should focus on the prejudice that the nonmoving party would suffer at trial" in undertaking the prejudice analysis. *Conlon*, 474 F.3d at 623. 4KG-ACC, as the party who obtained the admission, has the burden of proving that withdrawal of the admission would prejudice its case. *Prusia*, 18 F.3d at 640. Here, when DOL requested permission to withdraw the three admissions at issue, 4KG-ACC had not begun taking or even issuing notices for depositions. 4KG-ACC has engaged in extensive document discovery, and it does not appear that it has lost access to evidence or witness testimony that it would have used to attempt to prove the factual statements at issue in RFAs 56, 107, or 108. 4KG-ACC's assertion that DOL's "belated about-face" on these three RFAs "negatively affects" 4KG-ACC by "re-impos[ing] on [4KG-ACC] the burden to prove three, critical facts to which the DOL had admitted almost two years ago," Appellant's Response at 3, is not the type of "prejudice" that FRCP 36(b) recognizes. Because 4KG-ACC has not established prejudice to its ability to present evidence at a hearing, DOL satisfies the second prong.[2]

Decision

Having found that both prongs of the two-part test under FRCP 36(b) favor DOL, we exercise our discretion to **GRANT** DOL's motion to withdraw RFAs 56, 107, and 108. DOL

[2] To the extent that Board Rule 14(d)(3) might be viewed as incorporating a "good cause" requirement into the two-part FRCP 36(b) test, it would not change our analysis. "Even where the moving party's neglect is unjustified, a refusal to permit withdrawal of . . . admissions may be an overly harsh sanction when a[n] . . . admission would be dispositive of the litigation" or a significant issue in the litigation "and no unfair prejudice would result from withdrawal." *River Light V, L.P. v. Lin & J International, Inc.*, 299 F.R.D. 61, 64 (S.D.N.Y. 2014).

shall serve amended or replacement responses to those three RFAs within ten calendar days of the date of this order.

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