UNITED STATES
CIVILIAN BOARD OF CONTRACT APPEALS

MOTION TO COMPEL GRANTED IN PART: September 11, 2025

CBCA 7915, 8303

VENERGY GROUP, LLC,

Appellant,

v.

DEPARTMENT OF VETERANS AFFAIRS,

Respondent.

John M. Manfredonia of Manfredonia Law Offices, LLC, Cresskill, NJ, counsel for Appellant.

Jared M. Levin, Office of General Counsel, Department of Veterans Affairs, Brockton, MA, counsel for Respondent.

**LESTER**, Board Judge.

ORDER[1]

Respondent, the Department of Veterans Affairs (VA), filed a motion on July 11, 2025, to compel appellant, Venergy Group, LLC (Venergy), to produce additional documents

[1] This order is being published to assist in providing greater transparency to the public about the manner in which the Board has addressed issues in cases before it. Nevertheless, although single-judge orders like this one are binding in the appeals in which they are issued, they are, consistent with Board Rule 1(d) (48 CFR 6101.1(d) (2024)), not precedential in other appeals before the Board.

in response to nine document production requests that the VA previously served. After the parties completed briefing on the motion, the Board conducted a status conference with the parties to discuss the outstanding discovery disputes and to ensure that the Board understood exactly what the VA was seeking, the basis and scope of Venergy's objections, and the relevance of the requested documents. Following that conference, and based upon the Board's additional review of the record, the Board grants the motion to compel in limited part but otherwise denies the motion.

## Background

These two consolidated appeals arise out of contract no. 36C24818D0112 and, more specifically, task order no. 36C24819N1141 (the task order) under that contract. Under the task order, which the VA awarded on September 30, 2019 (with performance beginning in December 2019), Venergy was to design and construct major renovations to Research Building No. 2 at the James A. Haley VA Medical Center in Tampa, Florida.

In CBCA 7915, Venergy challenges the VA contracting officer's July 28, 2023, decision terminating the task order for default and asks us to convert it to a termination for convenience. In CBCA 8303, Venergy seeks an equitable adjustment of just over $4 million for 989 days of excusable and compensable delay to Venergy's performance of the contract, for which Venergy claims that the VA is responsible. As damages for these alleged delays, Venergy seeks to recover general conditions costs (plus an overhead markup) and unabsorbed home office overhead pursuant to the formula set forth in *Eichleay Corp.*, ASBCA 5183, 60-2 BCA ¶ 2688 (plus a profit markup), as well as attorney fees, consultant and expert witness fees, and interest under the Contract Disputes Act (CDA), 41 U.S.C. § 7109 (2018). In the contracting officer's decision denying the claim at issue in CBCA 8303, dated December 13, 2024, the VA contracting officer asserted a government claim in the amount of $1,842,960.31, which he determined represented the "actual damages [to the VA] because of Venergy's failure to complete the Project by the agreed-upon Contract completion date." Both Venergy's equitable adjustment request and the VA's monetary claim are at issue in CBCA 8303. Venergy has not submitted a termination for convenience settlement proposal to the VA.

The parties have been engaged in active discovery since November 2024.

On July 11, 2025, the VA filed a motion to compel Venergy to produce additional documents in response to nine previously served production requests, which were labeled request nos. 8, 12, 16, 28, 33, 34, 35, 40, and 42.

Requests nos. 8, 16, 28, 34, and 42 all seek the production of financial or cost information for the contract, including (i) labor reports, manpower reports, payroll records, and job cost reports; (ii) all support for the amounts claimed in CBCA 8303, including all unabsorbed home office overhead rates, equipment rates, labor rates, and subcontractor costs; (iii) a transaction detail report for all costs that Venergy incurred on the project; (iv) all labor and timekeeping records, such as time cards, for Venergy's employees who worked on the project; and (v) transaction-level detail for Venergy's home office overhead, general conditions, and other indirect cost pools. Because convenience termination settlement costs are not at issue in these appeals, Venergy does not believe that most of the information that these requests seek are relevant to the damages claims before us. Nevertheless, in response to the requests, Venergy produced various documents, including a 250-page job cost report for the project, that it believes satisfy the requests. Importantly, in response to the VA's objections that the production is incomplete, Venergy has invited the VA to search its accounting system (which relies on the Foundation construction accounting software program) for any additional information, beyond what Venergy has already produced, that the VA believes it needs.

Request no. 12 seeks production of "all documents related to any labor" that either Venergy or its subcontractors and/or suppliers provided on the project, including "salary and benefits data, payroll data, timesheets, timecards, payroll reports, work reports, invoices, purchase orders, quotations, receipts, cancelled checks, bills, accounting records, and expense reports." Similarly, request no. 33 seeks "all labor and timekeeping documents (e.g., timecards) and data (electronic export) maintained by Venergy for the duration of the Project." In response, Venergy produced accounting ledgers for its labor costs as well as time reports and daily logs showing when and what work was done. The VA claims that the reports and logs actually produced contain gaps and are missing the time of individuals that, elsewhere in the appeals, Venergy has identified by name and number of hours. Although Venergy did not in its response to the VA's motion to compel indicate that the VA would be allowed to search for such information in Venergy's Foundation accounting system, we were told during the recent status conference that the types of documentation sought here would be found there.

Requests nos. 35 and 40 seek, for the period from 2017 to 2024, "all audited and/or unaudited financial statements prepared for or by Venergy" and "all company financial forecasts and budgets prepared by or for Venergy . . . for all work Venergy was performing or expecting to perform," including "any company or board meeting minutes related to company forecasts and plans to pursue new jobs." Venergy produced responsive documents for the years 2020 through 2024, but it objects to requests for such documents from 2017, 2018, and 2019 as irrelevant to a task order under which performance did not commence until December 2019. In its reply brief, the VA complained that, for some of the audit

reports and documents that were produced, Venergy (without explanation) redacted information, even though there is a protective order in these appeals that would allow Venergy to shield and protect any sensitive information from further disclosure. Venergy has indicated that it will fix that and provide unredacted copies.

Venergy filed its response to the motion to compel on August 5, 2025, and the VA, following a request for an enlargement of time, filed its reply on September 4, 2025. The Board conducted a conference with the parties on September 8, 2025, to discuss the parties' disputes. During that conference, each party made some concessions that are reflected below.

## Discussion

### I. Standards of Review in Discovery Disputes

Rule 26(b)(1) of the Federal Rules of Civil Procedure provides that "[p]arties may obtain discovery regarding any nonprivileged matter that is relevant to any party's claim or defense and proportional to the needs of the case, considering the importance of the issues at stake in the action, the amount in controversy, the parties' relative access to relevant information, the parties' resources, the importance of the discovery in resolving the issues, and whether the burden or expense of the proposed discovery outweighs its likely benefit." Since September 17, 2018, Rule 13(b) of the Board's rules have provided that "[u]nless otherwise ordered, the scope of discovery is the same as under Rule 26(b)(1) of the Federal Rules of Civil Procedure." 48 CFR 6101.13(b) (2024). Accordingly, the two factors that we consider when resolving a discovery dispute are (1) relevance and (2) proportionality.

Proportionality "'focuses on the marginal utility of the discovery sought,'" and it "goes hand-in-hand with relevance, such that 'the greater the relevance of the information in issue, the less likely its discovery will be found to be disproportionate.'" *In re Zimmer M/L Taper Hip Prosthesis or M/L Taper Hip Prosthesis with Kinectiv Technology & Versys Femoral Head Products Liability Litigation*, No. 18-MD-2859, et al., 2020 WL 1812801, at *2 (S.D.N.Y. Apr. 9, 2020) (quoting *Vaigasi v. Solow Management Corp.*, No. 11-Civ.-5088, 2016 WL 616386, at *14 (S.D.N.Y. Feb. 16, 2016)).

### II. Requests for Production Nos. 8, 16, 28, 34, and 42

Five of the production requests—nos. 8, 16, 28, 34, and 42—seek to have Venergy conduct additional searches for, locate, and physically produce additional financial and project cost documents from Venergy's accounting systems. Venergy has represented on several occasions that Venergy will make its Foundation accounting system available to the

VA and that the VA may review that system to determine what other information, beyond what Venergy has already produced, it wants. Venergy's concession makes it unnecessary for us to consider either relevance or proportionality in resolving this discovery dispute.

Venergy's offer to make its system available for the VA to search for what it wants is not an unusual way of responding to a document production request and of satisfying the responding (or producing) party's production obligation. Rule 34 of the Federal Rules of Civil Procedure provides that "[u]nless otherwise stipulated or ordered by the court, . . . [a] party must produce documents as they are kept in the usual course of business or must organize and label them to correspond to the categories in the request." Fed. R. Civ. P. 34(b)(2)(E)(i). This rule "expressly grants the producing party the choice"—it can produce documents as kept in the usual course of business, *or* it can organize and label them. *Rowlin v. Alabama Department of Public Safety*, 200 F.R.D. 459, 462 (M.D. Ala. 2001). Although a requesting party "may specify the form or forms in which electronically stored information is to be produced," Fed. R. Civ. P. 34(b)(1)(C), the producing party is not necessarily obligated to honor that request. *See id.* 34(b)(2)(D). Although Rule 34 encourages parties ultimately to agree on the form in which documentation will be produced, *see* Fed. R. Civ. P. 34(b) advisory committee's note to 2006 amendment, ultimately, "it is up to the producing party to decide how it will produce its records, provided that the records have not been maintained in bad faith." *Rowlin*, 200 F.R.D. at 462; *see Doe v. District of Columbia*, 231 F.R.D. 27, 36 (D.D.C. 2005) ("As long as [the producing party] produced the documents 'as they are kept in the usual course of business,' he was in compliance with the discovery rules." (quoting Fed. R. Civ. P. 34(b))); 8B Charles A. Wright, Arthur R. Miller, & Richard L. Marcus, *Federal Practice & Procedure* § 2213, at 190 (3d ed. 2010) ("[I]n the first instance the producing party should retain the right to choose between the production formats authorized by Rule 34(b)."); Fed. R. Civ. P. 34(b) advisory committee's note to 2006 amendment (The producing party's production should generally be viewed as adequate if the manner of production makes the material "reasonably usable" and available to the requesting party.).

The VA's request mirrors the requesting party's document production objection in *Reid v. Richardson-Merrell, Inc.*, 37 F.R.D. 363 (N.D. Ga. 1964), which the court there ultimately rejected. The producing party had "offered to make a *complete* microfilm of [its] records available to [the requesting party] for inspection." *Id.* at 363. The requesting party objected on several grounds, the "most noteworthy and material" of which was "that many of the documents sought [were] not specifically identified and [were] contained in some 107,000 pages of [the producing party's] records." *Id.* The court, considering the version of Rule 34 then in effect, "deem[ed] such a procedure [providing microfilm copies of records as maintained in the ordinary course of business] fair and advantageous to both parties *to enable [the requesting party] to more specifically identify the documents* sought in" its

various production requests "while at the same time relieving [the producing party] of the cost of searching its records." *Id.*

The VA asserts that it should not have to expend the "time and energy" to conduct searches in Venergy's accounting systems and that, because "the requested discovery is reasonably accessible [to Venergy]" and "is not unduly burdensome," it is only fair that Venergy put in the effort to find more documents and that making the VA conduct searches "improperly shifts the burden of production to the requesting party." Respondent's Motion to Compel (July 11, 2025) at 2. The VA's vision is not, however, what the Federal Rules of Civil Procedure contemplate. "The plain language of [Rule 34] indicates that [the [producing party] need only have made the requested documents *available* for the [requesting party] to inspect and" that the requesting party will then have to arrange "to make [its] own copies" of the documents that it selects to add to its discovery files. *In re Application for Water Rights of Hines Highland Limited Partnership*, 929 P.2d 718, 727 (Colo. 1996) (en banc) (emphasis added) (citing *Obiajulu v. City of Rochester*, 166 F.R.D. 293, 297 (W.D.N.Y. 1996) ("Rule 34 allows the plaintiff 'to inspect and copy' relevant documents and does not require a responding party to pay for copying costs of voluminous materials."); *Delozier v. First National Bank*, 109 F.R.D. 161, 164 (E.D. Tenn. 1986) (If, after an inspection of records requested for production, the requesting party desires that portions be photocopied, then such expense will be borne by the requesting party); *Lenard v. Greenville Municipal Separate School District*, 75 F.R.D. 448, 451 (N.D. Miss. 1977) (The availability for inspection and/or copying of requested records will satisfy the request for production.)).[2]

Even if we could require Venergy to conduct more fulsome searches of documents and information contained in Venergy's accounting systems, it is not clear from the VA's motion or its reply brief exactly what "more" it is looking for. The VA has not identified a specific document or category of documents that it contends is missing from the existing production. We see no basis for compelling Venergy to spend extensive amounts of time

---

[2] A tribunal may, in limited circumstances, shift some of the costs of searching for and producing documents from the *producing* party to the *requesting* party to protect the producing party "under Rule 26(c) [of the Federal Rules of Civil Procedure] . . . from 'undue burden or expense' . . . , including orders conditioning discovery on the requesting party's payment of the costs of discovery." *Oppenheimer Fund, Inc. v. Sanders*, 437 U.S. 340, 358 (1978). We see nothing in the Rules that contemplates shifting document production costs normally covered by the requesting party *away* from the *requesting* party and *to* the *producing* party. The requesting party always has the ability to limit its discovery costs by narrowing and limiting the scope of documents that it wants the producing party to make available. The producing party does not always have the same capability.

conducting random searches of its systems without the benefit of search terms that the VA wants Venergy to use or the identification of missing information. Here, Venergy is giving the VA the ability to conduct such searches itself. By making its systems available to the VA, Venergy has fulfilled its production obligation in response to requests for production nos. 8, 16, 28, 34, and 42.

III. Request Nos. 12 and 33

Request nos. 12 and 33 are not seemingly very different from the production requests that were just discussed above—they seek labor and timekeeping records. Yet, Venergy, in its response to the VA's motion to compel, did not offer to make its accounting system available for searches for documents responsive to request nos. 12 and 33. Given that Venergy is making its accounting system available to the VA to search for documents responsive to request nos. 8, 16, 28, 34, and 42, we direct it to allow the VA to search for additional documents responsive to request nos. 12 and 33 at the same time.

The one category of information that, during the Board's conference with the parties, counsel for Venergy identified as something that would be missing from the Foundation accounting system is the names of individuals who billed time to Venergy's home office and whose time is included in Venergy's unabsorbed home office overhead claim. The Board accepts Venergy's offer at the conference to obtain those names, to the extent that it can locate such information, and provide to the VA the names and any other related, but undisclosed, responsive information about charges to home office overhead.

IV. Request Nos. 35 and 40

Request nos. 35 and 40 deal with financial audit reports and related information from 2017 through 2024. Venergy asserts that it produced responsive documents from 2020 through 2024 but does not see the relevance of documents from 2017, 2018, or 2019. In response, the VA indicated that some of the reports that Venergy produced were redacted.

To the extent that Venergy previously produced reports that remain redacted, it shall produce unredacted copies of those reports, subject, if needed, to the protective order that the Board previously entered in these appeals.

With regard to reports and related information from 2017 through 2019, the VA argues that these documents are relevant to these appeals because of Venergy's home office overhead claim. The VA asserted at the conference that it needs audit reports from 2017, 2018, and 2019 because it is looking for trends in how Venergy bills and/or accounts for its home office overhead. Alas, the financial audit reports that the VA seeks do not target home

office overhead costs—they are much broader and general than that—and we cannot see what useful information the VA could glean about home office overhead from them. Even if the VA could find something relevant in them, it has not explained how information about past "trends" in home office overhead is necessary or relevant to the home office costs that Venergy incurred from 2020 through 2024. The *Eichleay* formula upon which Venergy is relying to support its unabsorbed home office overhead claim is a cost construct involving a mathematical formula, with an additional "standby" requirement. *Jackson Construction Co. v. United States*, 62 Fed. Cl. 84, 96-97, 99 (2004). The VA did not provide any explanation as to why or how pre-2020 "trends" could affect Venergy's 2020 through 2024 home office overhead calculations.

"[W]hen relevancy [of a production request] is not readily apparent, the party seeking discovery has the burden to show the relevancy of the request." *Cunningham v. Standard Fire Insurance Co.*, No. 07-CV-02538, 2008 WL 2668301, at *4 (D. Colo. July 1, 2008). The VA has not met that burden here. Venergy need not produce financial audit reports or related information for 2017, 2018, and 2019.

## Decision

For the foregoing reasons, the VA's motion to compel is **GRANTED IN PART**.

In response to request nos. 8, 12, 16, 28, 33, 34, and 42, Venergy shall make project-related materials in its Foundation construction accounting system available to the VA at a mutually convenient time and place, but no later than September 30, 2025, to allow the VA to conduct searches for documents responsive to those requests. Venergy shall also, no later than September 30, 2025, provide the VA with the names of employees who billed their time to home office overhead pools. The VA's motion to compel with regard to these document production requests is otherwise **DENIED**. To the extent that, in any of these requests, the VA seeks information from 2017, 2018, and 2019, its motion to compel such production is **DENIED.**

In response to request nos. 35 and 40, to the extent that Venergy has previously produced redacted copies of financial audit reports and related information, it shall, no later than September 30, 2025, again produce those documents but without redactions (subject to the existing protective order, if needed). The VA's motion to compel further production through request nos. 35 and 40 is otherwise **DENIED**.

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