UNITED STATES
CIVILIAN BOARD OF CONTRACT APPEALS

November 13, 2014

CBCA 3300, 3354, 3538

BRASFIELD & GORRIE, LLC,

Appellant,

v.

DEPARTMENT OF VETERANS AFFAIRS,

Respondent.

Laurence Schor, Dennis C. Ehlers, and Robert D. Pratt of Asmar, Schor & McKenna, PLLC, Washington, DC; and Axel Bolvig III, Luke D. Martin, and J. Christopher Selman of Bradley Arant Boult Cummings, LLP, Birmingham, AL, counsel for Appellant.

Stacey North-Willis, Beth Chesney, Benjamin Diliberto, and Charlma Quarles, Office of the General Counsel, Department of Veterans Affairs, Washington, DC; and Ogochukwu Ekwuabu, Office of Regional Counsel, Department of Veterans Affairs, West Palm Beach, FL, counsel for Respondent.

DANIELS, Board Judge (Chairman).

ORDER

Brasfield & Gorrie, LLC (B&G), appellant, moves the Board to impose sanctions against the Department of Veterans Affairs (VA), respondent, for abuse of the discovery process. B&G urges the Board to impose two particular sanctions: first, order the VA to pay the costs (including reasonable legal fees) that B&G has incurred as a result of the VA's discovery failures; and second, allow B&G or an independent third party access to the VA's

computer system, at the VA's expense, to collect electronically-stored information (ESI) which is responsive to discovery requests but the agency has failed to produce.

Background

As B&G has comprehensively documented, the VA's response to B&G's discovery requests has been discourteous to B&G, has violated repeated promises made to B&G and the Board, and has disregarded Board orders. We state here a summary of relevant instances.

B&G served its first request for production of documents on the VA on February 11, 2014. The documents included a considerable amount of ESI. The parties discussed the outlines of an ESI discovery protocol. On March 11, B&G sent the VA a draft of the protocol, which was based on B&G's understanding of agreements reached during the discussions. The VA did not respond until two months later, at which time it requested major changes. The protocol was not finalized until July 18, and in the interim, virtually no ESI was produced by the VA.

Meanwhile, on March 6, the VA notified B&G that its Clearwell electronic document discovery platform was being "migrated" and that the agency would not be able to begin production of e-mail and other electronic documents until May. By May 20, however, no information had been collected for loading onto Clearwell, and a month later, the VA said that it was still collecting documents.

On July 16, the parties concluded six weeks of negotiations regarding date ranges for certain ESI. The next day, the Board convened a telephonic conference to discuss the VA's production of ESI. The VA proposed dates between August 1 and October 10 for production of various tiers of ESI. The Board established deadlines which were slightly more stringent than those proposed by the VA. The VA has failed to meet every one of the deadlines it proposed, as well as, of course, every one of the deadlines the Board established. The VA has never asked the Board to modify any of the deadlines.

When the Board convened another conference, on August 27, the VA reported that it had not provided ESI because its information technology department, at the request of agency management, had prioritized other document requests. The Board directed the VA to submit weekly progress reports on the status of its efforts to produce ESI. In these reports, the VA has continually established new deadlines, reorganized tiers of custodians in different ways from those it had agreed to with B&G, and missed even its self-imposed deadlines.

The VA has reported other problems as well. For example, the agency tells us that during the week of September 5, Clearwell experienced a system malfunction, and on

October 10, the agency said that it was unable to produce documents because its Clearwell administrator had taken unexpected leave. In its most recent weekly report, the VA says that it has produced a considerable number of documents, but that it is having difficulty restoring ESI from several custodians. The VA says that it "is hoping to have discussions with a consultant the week of November 10, 2014, after which, VA would have a better idea of when the remaining documents loaded into Clearwell can be produced."

The VA has also failed to take necessary steps to ensure that ESI contained on Multivista software is made available to B&G on a read-only basis, even though that information is clearly relevant to these appeals. Similar information on other software, ProjNet/Dr. Checks, was finally made available on October 28.

Discussion

As enunciated in our Rule 33, 48 CFR 6101.33 (2013), the Board as a judicial tribunal possesses the power to sanction parties for unacceptable behavior. The authority to impose monetary penalties against a party is not among those powers, however. As one of our predecessor boards explained:

> Federal courts possess inherent authority to impose sanctions – including monetary sanctions – against parties and their attorneys in appropriate circumstances. *Chambers v. NASCO, Inc.*, 501 U.S. 32, 45-46 (1991); *Roadway Express, Inc. v. Piper*, 447 U.S. 752, 766-67 (1980); *Alaska Pipeline Service Co. v. Wilderness Society*, 421 U.S. 240, 258-59 (1975). A board of contract appeals is not a court, however, and therefore does not have all the inherent authority of a federal court. *SMS Data Products Group, Inc. v. Austin*, 940 F.2d 1514, 1517 (Fed. Cir. 1991); *ViON Corp. v. United States*, 906 F.2d 1564, 1567 (Fed. Cir. 1990). This is not to say that a board's authority is necessarily less than a federal court's; it is to say, however, that a board's authority is different from such a court's. *Sterling Federal Systems, Inc. v. Goldin*, 16 F.3d 1177, 1186 (Fed. Cir. 1994). Applying the teaching of the Court of Appeals for the Federal Circuit in the last three cited cases, we held in *Integrated Systems Group*[*, Inc. v. Department of the Treasury*, GSBCA 11336-C(11214-P), 95-1 BCA ¶ 27,308 (1994)] that we do not have a court's inherent authority to impose monetary sanctions against a litigant.

A&B Limited Partnership v. General Services Administration, GSBCA 15208, et al., 05-1 BCA ¶ 32,832, at 162,445 (2004); *see also Navigant SatoTravel v. General Services Administration*, CBCA 449, 08-1 BCA ¶ 33,821, at 167,406 (citing *A&B*); *Mountain Valley Lumber, Inc. v. Department of Agriculture*, CBCA 95, 07-2 BCA ¶ 33,611 (citing *A&B* and

other board decisions which came to the same conclusion). As the board said in *A&B*, "The Board's lack of authority to deal with persons who abuse the processes established by Congress for the resolution of Government contract disputes allows such abuse to continue. This is not a result we prefer, but it is one we are constrained to permit." 05-1 BCA at 162,446 n.2.

B&G contends that this prior reasoning and conclusion are not correct. Appellant maintains that the Contract Disputes Act, 41 U.S.C. §§ 7101-7109 (2012), our Rule 33, and our inherent authority give us the power to impose monetary sanctions. B&G also maintains that the Government has waived its sovereign immunity with regard to monetary sanctions for discovery abuses. Appellant says that the legislative history of the Equal Access to Justice Act, 28 U.S.C. § 2412(b), and the fact that boards may grant the same "relief" as the Court of Federal Claims – which does have the power to impose monetary sanctions – dictate that we have that power as well. These are all arguments that were considered and rejected in the decisions cited above. We see no reason to reverse course and accept those arguments now. No matter how egregious discovery abuses may be, we may not impose monetary sanctions on parties for committing them.

And we agree with B&G that the VA's abuse of the discovery process has been egregious. The agency's approach to discovery in this case is reminiscent of the approach it took in *Ocwen Loan Servicing, LLC v. Department of Veterans Affairs*, CBCA 1073, 09-1 BCA ¶ 34,102: we'll get you the documents you're looking for whenever we get around to it, and if the Board issues orders directing production earlier, we won't pay any attention to them. The VA maintains here, as it did in *Ocwen*, that difficulties with its computer systems prevent it from responding to discovery requests more promptly. The agency tells us that it has nearly 300,000 employees, and that delivering technology services to an organization this large is a complex task. We have no doubt that these assertions are true. The complexity of the task is not an excuse for abusing the discovery process, however. It should be instead an incentive for the VA to master the challenge of using technology. Large government agencies, like other litigants, must use whatever tools they have available to respond to reasonable discovery requests in a prompt, complete way. Whether the VA's failure to meet this objective is due to incompetence, inattention, or purposefulness, it is sanctionable conduct.

Over the better part of a year, the VA has made and broken commitments to provide to B&G ESI which the VA acknowledges is likely to be, or to lead to, evidence relevant to these appeals. The agency has not abided by Board orders to produce this information and has failed to request enlargements of time in which to meet prescribed deadlines. Reasons given for the failure to produce documents include slow collection of ESI, computer system malfunctions, and inadequate staffing of information technology professionals. Most

recently, the VA confesses that it must seek help from a consultant in order to get its computer systems to do what they are supposed to do with regard to ESI which is discoverable in these appeals. Meanwhile, little progress is being made toward resolution of the appeals, which involve claims for nearly $50 million on a major medical center construction project.

Generally, a party from which documents are requested in discovery is allowed to search its own records to produce those documents. *In re Ford Motor Co.*, 345 F.3d 1315, 1317 (11th Cir. 2003) (citing Fed. R. Civ. P. 34(a)). "[D]irect inspection of an opponent's hard drive is not routine, but may be justified in some circumstances." *White v. Graceland College Center for Professional Development & Lifelong Learning, Inc.*, 2009 WL 722056, at *7 (D. Kan. Mar. 18, 2009). The reason that direct inspection is not routine is that it risks improper exposure of privileged and confidential material. *John B. v. Goetz*, 531 F.3d 448, 459 (6th Cir. 2008). Inspection of computers by an opposing party – even mirror imaging of computers – has been deemed appropriate, however, where "the opponent's document production has been inadequate," *Diepenhorst v. City of Battle Creek*, 2006 WL 1851243, at *3 (W.D. Mich. June 30, 2006), "where the court has cause to believe that a responding party . . . lacks the expertise necessary to search and retrieve all relevant data," *Henderson v. U.S. Bank, N.A.*, 2009 WL 1152019, at *2 (E.D. Wis. Apr. 29, 2009), and "if there is non-compliance with a court order, notwithstanding a lack of wilfulness or bad faith," *U&I Corp. v. Advanced Medical Design, Inc.*, 251 F.R.D. 667, 674 (M.D. Fla. 2008). In these situations, "sanctions are imposed not only to prevent unfair prejudice to the litigants but also to insure the integrity of the discovery process," *U&I Corp.*, 251 F.R.D. at 674, and to preserve evidence, *Balboa Threadworks, Inc. v. Stucky*, 2006 WL 763668, at *3 (D. Kan. Mar. 24, 2006).

The Board concludes, from the long history of discovery abuses in these appeals, that the VA's document production has been inadequate, that the agency lacks the expertise necessary to search and retrieve relevant data, and that the agency has not complied with Board orders (or its own commitments). The sanction proposed by B&G, allowing appellant or an independent third party access to the VA's computer system, at the VA's expense, to collect ESI which has not been forthcoming though it is responsive to discovery requests, is merited. We direct the parties to propose to the Board, no later than Monday, December 1, 2014, the name and affiliation of an independent third party who will perform this task. If the parties are unable to agree on an independent third party, each party shall, on Tuesday, December 2, 2014, nominate an individual or entity to be the independent third party and shall concurrently provide an explanation of why that individual or entity is qualified to perform the task; the Board will then select one of the nominees to be the independent third party.

The VA is concerned that the ESI with which we are concerned may contain confidential procurement information, attorney-client privileged material, and, in e-mail messages among medical center personnel, data protected as private by the Health Insurance Portability and Accountability Act of 1996, Pub. L. No. 104-191, 110 Stat. 1936 (HIPAA). As B&G points out, these concerns can readily be allayed. Any confidential procurement information will be subject to the protective order already issued by the Board in these appeals, and the Board requires that the independent third party comply with the terms of that order before beginning work. Any attorney-client privileged material can be protected subject to the terms of the clawback agreement which the parties have already entered into. As B&G suggests, HIPAA information must by regulation be encrypted, 45 CFR 164.312 (2013), and the VA's own VHA Privacy Policy Training manual requires that e-mail messages which contain individually-identifiable information must be encrypted, VHA Privacy Policy Training, Text Version - FY2011, Course No. 07.MN.RP.PRIV.A, at 24, *available at* http://www.vmrf.net/VA-Education/privacy_fy11.pdf.

Of course, this sanction will be unnecessary if, by December 1, 2014, the VA produces all the ESI which it agreed many months ago is discoverable.

We also direct the VA to take whatever actions are necessary to allow B&G to review Multivista documentation, on a read-only basis. The agency has provided no compelling reason to prevent B&G from seeing that material.

_____

STEPHEN M. DANIELS
Board Judge