UNITED STATES
CIVILIAN BOARD OF CONTRACT APPEALS

MOTIONS FOR CONSOLIDATION DENIED;
COORDINATED DISCOVERY PROCEDURES ADOPTED:
July 26, 2018

CBCA 6001, 6049

COLLECTO, INC. dba EOS CCA,

Appellant in CBCA 6001,

and

TRANSWORLD SYSTEMS INC.,

Appellant in CBCA 6049,

v.

DEPARTMENT OF EDUCATION,

Respondent.

Joseph J. Petrillo and Karen D. Powell of Petrillo & Powell, PLLC, Washington, DC, counsel for Appellant in CBCA 6001.

Paul A. Debolt and Chelsea B. Knudson of Venable LLP, Washington, DC; and James Y. Boland of Venable LLP, Tysons Corner, VA, counsel for Appellant in CBCA 6049.

Sara Falk, Office of the General Counsel, Department of Education, Washington, DC, counsel for Respondent.

Before Board Judges **BEARDSLEY** and **LESTER**.

LESTER, Board Judge.

ORDER

On June 13, 2018, respondent, the Department of Education (ED), filed motions seeking to consolidate the appeal docketed as *Transworld Systems Inc. v. Department of Education*, CBCA 6049, with the appeal docketed as *Collecto, Inc. d/b/a EOS CCA v. Department of Education*, CBCA 6001.[1] ED asserts that the task orders underlying both appeals are essentially the same and that the issues to be decided in the two appeals are the same. In considering ED's motion, the Board judges assigned to preside over the two appeals have consulted, have reviewed the briefing on consolidation that was filed in both appeals, and have reviewed relevant documents from the Rule 4 appeal file in each of the two appeals. For the reasons set forth below, the Board denies the current motions to consolidate, without prejudice to their renewal at a later date, but agrees that coordination of the appellants' discovery is warranted.

Background

Effective July 1, 2009, ED's Federal Student Aid Office (FSA) issued essentially identical task orders to several private collection agencies (PCAs), including Collecto, Inc. (Collecto), and the predecessor-in-interest to the appellant in this case, Transworld Systems Inc. (TSI),[2] through contract no. GS-23F-0240K under the General Services Administration's Financial and Business Solutions Schedule. *Compare Transworld* Exhibit 1 *with Collecto* Exhibit 1.[3] The task orders were for PCA debt collection and administrative resolution services associated with defaulted educational loans. Pursuant to the terms of those orders, ED transferred numerous defaulted student loan accounts to TSI and Collecto for collection and related activities. The terms of TSI's and Collecto's task orders regarding payment by

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[1] ED filed parallel motions in the *Collecto* and *Transworld* appeals on the same day.

[2] The task order at issue in the *Transworld* appeal was originally awarded to NCO Financial Services, Inc. (NCO). Effective November 1, 2014, ED recognized TSI as the successor-in-interest to NCO and novated NCO's task order accordingly.

[3] All exhibits referenced in this decision as "*Transworld* Exhibit __" are found in the appeal file for the *Transworld* appeal, docketed as CBCA 6049, and all exhibits referenced as "*Collecto* Exhibit __" are found in the appeal file for *Collecto*, CBCA 6001.

ED of fixed commissions or fees for various types of default resolution activities, with the precise amounts set forth in the task orders, were identical.

ED alleges that, when the various PCAs began performance under their task orders and for some time thereafter, ED generated data on commissions and fees payable to each PCA and sent that data on a monthly basis to TSI, Collecto, and the other contracted PCAs. According to ED, each PCA would review ED's data and, based upon that data, prepare and submit an invoice for payment.

In September 2011, ED alleges, ED implemented for its debt collection work a new data processing platform known as the Debt Management Collections System (DMCS). ED further alleges that, because of problems implementing the new system, the invoicing procedures that it had previously put in place for the task orders that were being performed were disrupted. ED contends that, because of its problems with the DMCS transition, it was unable to generate the invoice data for a period of time and had to instruct TSI, Collecto, and the other PCAs to submit invoices using data generated from their own systems. This new invoicing process, ED alleges, remained in place until August 31, 2013, when ED was able to renew its prior process of generating data upon which PCAs would base their invoices.

ED contends that, beginning in late 2013, it began working with the PCAs on an invoice reconciliation process to ensure that amounts billed during the disruption period were accurate and that any overpayments or underpayments that had occurred were corrected. At the conclusion of that process, ED presented TSI and Collecto with proposed task order modifications identifying invoice reconciliation procedures that were "effective for performance occurring from September 16, 2011, through August 31, 2013," the period during which ED contends its DMCS system had experienced problems. *Transworld* Exhibit 5 at 1; *Collecto* Exhibit 6 at 1. Nevertheless, the modifications contained language regarding accounting and payment for work performed during the first half of September 2011 – prior to ED's switch to DMCS – when FSA was still using a financial management tool called Legacy:

> Payments received in September, 2011 after Legacy shutdown (9/15/11). Payments received during this period would normally have an effective date ("date entered") in September, 2011. DMCS assigned them an effective date in October, 2011. For compensation purposes, FSA will use the system-assigned effective date and actual posting date.

Transworld Exhibit 5 at 4; *Collecto* Exhibit 6 at 4.

In an attachment to each proposed modification, ED listed the amounts that each PCA should have been paid for each collection action taken during the period covered by the modification, including, next to the title "Sep-11 Legal Invoice" in each of TSI's and Collecto's proposed modifications, amounts relating to those two contractors' early September 2011 work. *Transworld* Exhibit 5 at 18; *Collecto* Exhibit 5 at 17. The modifications then identified the *total* amounts that TSI and Collecto were due for *all* of their work during the *entire* disruption period (inclusive of the work covered by each "Sep-11 Legal Invoice") and the amounts that ED had already paid TSI and Collecto in response to their "PCA-Created Invoices." Comparing the previously paid figures to those to which ED had found TSI and Collecto entitled for the period of time covered by the modifications, the attachments to the modifications indicated that ED had *underpaid* both TSI and Collecto for the disruption period and that both TSI and Collecto were entitled to payment of additional monies. *Transworld* Exhibit 5 at 18; *Collecto* Exhibit 5 at 17.

On April 23 and 24, 2014, TSI and Collecto, respectively, executed the proposed modifications that the ED contracting officer had signed. Both TSI and Collecto submitted invoices for the amounts that the modifications indicated were due and owing to them, and ED paid those invoices.

ED alleges that it subsequently discovered that, in listing the "PCA-Created Invoices" in the proposed modifications, ED failed to account for previous payments from ED to TSI and Collecto. ED contends that, prior to sending the proposed modifications to TSI and Collecto, ED had worked with those task order holders to identify the amounts paid through prior PCA-created invoices and that the figures for those amounts came from TSI and Collecto. ED asserts that, had TSI and Collecto provided ED with the proper amounts of PCA-created invoices (inclusive of the "Sep-11 Legacy Invoice"), the invoice reconciliation process would have reflected that both TSI and Collecto had previously been *overpaid*, rather than underpaid, for the period covered by that process. ED contends that both TSI and Collecto knew, or should have known, of the errors in the modifications, yet never alerted ED to the errors prior to modification execution.

On March 6, 2017, the ED contracting officer sent letters to both TSI and Collecto demanding repayment of the amounts that ED asserts TSI and Collecto have been overpaid. According to ED, both TSI and Collecto denied that any overpayment occurred. On December 22, 2017, the ED contracting officer issued final decisions to both TSI and Collecto, finding ED entitled to recovery of the previously identified amounts from TSI and Collecto and notifying TSI and Collecto of their appeal rights under the Contract Disputes Act (CDA), 41 U.S.C. §§ 7101-7109 (2012).

Collecto appealed its contracting officer's decision to the Board on January 19, 2018, represented by attorneys associated with Petrillo & Powell, P.L.L.C. The Clerk of the Board docketed that appeal as CBCA 6001, and it was assigned to Judge Erica S. Beardsley. TSI subsequently filed its own appeal on February 26, 2018, represented by different attorneys at a different firm, Venable LLP, and the appeal, docketed as CBCA 6049, was assigned to Judge Harold D. Lester, Jr. TSI's appeal notice did not mention Collecto's appeal.

On February 27, 2018, the day after TSI's appeal was docketed, ED filed notices of related case in the *Collecto* appeal and in the *Transworld* appeal, indicating that the two cases "may have common issues of law or fact," but reserving for a future date a decision on whether to seek consolidation. Subsequently, on June 13, 2018, ED filed motions seeking to consolidate the two appeals. Both TSI and Collecto have filed oppositions to those motions, but neither appellant opposes the Board's coordination of their depositions of the Government's witnesses.

To date, the parties in both the *Collecto* and *Transworld* appeals have submitted appeal files and supplemental appeal files in accordance with Board Rule 4, and the complaint and answer have been filed in both appeals. At the parties' request, discovery commenced in the *Collecto* appeal on June 29, 2018, and in the *Transworld* appeal on July 2, 2018. Under the current scheduling order in *Collecto*, discovery is scheduled to close in the *Collecto* appeal on September 14, 2018 (with each party allowed to take no more than five depositions), but, by motion dated July 25, 2018, the parties in *Collecto* have requested an enlargement of the discovery period to November 16, 2018. In *Transworld*, discovery is currently scheduled to conclude on October 31, 2018 (without any current restriction on the number of depositions to be taken). Motions to dismiss and for summary relief are due in *Collecto* no later than September 28, 2018, but, by motion dated July 25, 2018, the parties in *Collecto* requested an enlargement of that deadline to December 12, 2018. The Board has not yet imposed a deadline for such motions in the *Transworld* appeal, although TSI has requested a deadline of November 30, 2018.

Discussion

"Under Rule 2(d) of the Board's Rules, we may order consolidation (or make any other orders concerning proceedings as needed to avoid unnecessary costs or delays) when two or more cases involve 'common issues of law or fact.'" *Harris IT Services Corp. v. Department of Veterans Affairs*, CBCA 5814, et al., 17-1 BCA ¶ 36,901, at 179,800 (quoting 48 CFR 6101.2(d) (2016)). In considering a request to consolidate two or more appeals, the Board must first determine whether there are, in fact, "common issues of law or fact" that bind the appeals. *Id.* If the Board finds that such common issues exist, "[t]he appropriateness of consolidating claims [then] depends on whether the interest of judicial

economy outweighs the potential for delay, confusion, and prejudice that may result from consolidation." *Karuk Tribe of California v. United States*, 27 Fed. Cl. 429, 433 (1993).

In evaluating a consolidation request, we apply the same considerations that underlie Rule 42 of the Federal Rules of Civil Procedure, which governs actions in federal courts. *Harris IT Services*, 17-1 BCA at 179,800. Like federal courts, the Board "has broad discretion to determine whether consolidation is appropriate." *Cienega Gardens v. United States*, 62 Fed. Cl. 28, 32 (2004). "In the exercise of discretion, courts have taken the view that considerations of judicial economy favor consolidation," but that "the discretion to consolidate is not unfettered." *Johnson v. Celotex Corp.*, 899 F.2d 1281, 1285 (2d Cir. 1990). "Considerations of convenience and economy must yield to a paramount concern for a fair and impartial trial." *Id.* "One of the primary objectives of consolidation is to prevent separate actions from producing conflicting results, which can occur when both cases require judicial determinations of the same facts." *Karuk Tribe of California*, 27 Fed. Cl. at 433. Nevertheless, consolidation may also be appropriate when it "would create litigation efficiencies." *Harris IT Services*, 17-1 BCA at 179,801. Those efficiencies relate not only to "the avoidance of extra costs and delay to the parties," but also "the avoidance of waste of adjudicative resources." *Algernon Blair, Inc.*, GSBCA 5920, et al., 82-2 BCA ¶ 15,859, at 78,626. "[T]hat latter consideration" – avoiding a waste of adjudicative resources – "can take precedence over the desires of one or more of the parties." *Id.*

In making its discretionary determination regarding consolidation, the tribunal should attempt realistically to assess, based upon the information before it, the relative overall benefits and disadvantages of consolidation, considering the factors identified below, and to weigh them against each other:

> [W]hether the specific risks of prejudice and possible confusion [are] overborne by the risk of inconsistent adjudications of common factual and legal issues, the burden on parties, witnesses and available judicial resources posed by multiple lawsuits, the length of time required to conclude multiple suits as against a single one, and the relative expense to all concerned of the single-trial, multiple-trial alternatives.

Hendrix v. Raybestos-Manhattan, Inc., 776 F.2d 1492, 1495 (11th Cir. 1985) (quoting *Arnold v. Eastern Air Lines, Inc.*, 681 F.2d 186, 193 (4th Cir. 1982)). "The outer limit of a tribunal's discretion to consolidate actions in whole or in part is the potential of prejudice to the rights of one or more of the parties whose actions have been consolidated." *Algernon Blair*, 82-2 BCA at 78,626. "Consolidation can be ordered despite opposition by the parties." *Cienega Gardens*, 62 Fed. Cl. at 32; *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.").

There are, without doubt, several factors that support consolidation of the two appeals at issue here: the fact that the contracts in both appeals are essentially the same, that the contract modifications that created the current disputes in both appeals contain identical language (but for listed dollar amounts), that the legal theories that ED is pursuing and that the Board will have to decide are the same, and that TSI and Collecto likely will seek at least some duplicative discovery. Those types of factors have supported tribunals' decisions in other circumstances to grant motions to consolidate cases. *See, e.g.*, *Cienega Gardens*, 62 Fed. Cl. at 33 (consolidating cases filed by two different plaintiffs where cases all involved contracts with the same terms and conditions, even though the properties at issue were located in different states); *Powerine Oil Co.*, EBCA 278, et al., 87-1 BCA ¶ 19,631, at 99,375 (discussing how the appeals of nine different appellants were consolidated because their oil sale contracts and arguments for recovery were virtually the same); *Truong Giang*, ASBCA 15278, et al., 71-2 BCA ¶ 9149, at 42,414 (discussing how ten appeals involving different appellants, but with identical or substantially similar contract clauses, were consolidated for decision).

Although TSI and Collecto argue, in opposing consolidation, that there will likely be differences in the evidence necessary to establish the quantum that ED asserts each of them owes, consolidation "does not require identical factual scenarios, only common issues of fact." *Munjak v. Signator Investors, Inc.*, No. 02-2108-CM, et al., 2003 WL 23506989, at *2 (D. Kan. Dec. 10, 2003). To the extent that (as appellants argue) ED might seek production of proprietary accounting records, which each appellant might want to keep from the other, appellants correctly assert that this concern can weigh against consolidation. *See Jackson v. Ford Consumer Finance Co.*, 181 F.R.D. 537, 540 (N.D. Ga. 1998) (denying consolidation in part because defendants "are competitors and the consolidation of these matters for pre-trial purposes raises additional concerns about the possible inappropriate disclosure of defendants' confidential commercial information"). Appellants' assertion about the discovery that ED might seek, however, is speculative at this point, and, in any event, "concerns regarding [appellants'] confidential and proprietary information can," at least in most cases, "be addressed through the entry of an appropriate protective order." *Smithkline Beecham Corp. v. Geneva Pharmaceuticals, Inc.*, No. 99-CV-2926, 2001 WL 1249694, at *6 (E.D. Penn. Sept. 26, 2001).[4]

[4] To the extent that TSI and Collecto argue against consolidation because they are separate entities and that forcing them to combine their appeals will complicate their litigation strategies, that complaint does not preclude consolidation. Although, in

Nevertheless, we do not believe that consolidation is necessary, at least at this point in time, to allow for the efficient development and presentation of these two appeals. It does not appear that the matters before the Board fall within the definition of what we would generally consider "complex litigation," which, even if "not capable of precise definition," generally tends to involve "multiple related cases, extensive pretrial activity, extended trial times, difficult or novel issues, [or] postjudgment judicial supervision." *First State Insurance Co. v. Superior Court of Los Angeles County*, 94 Cal. Rptr. 2d 104, 109 (Ct. App. 2000). At the present time, there are only two, rather than multiple, appellants, and ED has not indicated that there are likely to be any more related appeals filed with the Board. It appears from the submissions to date that the parties envision only minimal written discovery and depositions, even though the appellants apparently will seek to depose at least some of the same individuals, and it appears quite possible that the issues in play may be subject to resolution through dispositive motions rather than a hearing on the merits.

Were there a multitude of PCAs with identical task orders challenging the same type of ED refund demand, it is possible that consolidation would be warranted as a way to allow for efficient case development, to reduce the need for multiple judges to decide the same issues, and to preclude inconsistent resolutions. With only two appellants, though, in appeals in which only minimal discovery is anticipated, we believe that the Board, through the consultation of the two presiding judges, can easily coordinate the development of the appeals through discovery and briefing without the need to combine or consolidate them, at least given their current posture. *See Christopher Village, LP v. United States*, 50 Fed. Cl. 635, 645 n.10 (2001) ("The court has, on other occasions, worked with parties to coordinate discovery or briefing on related issues found in separate cases, where the cases share common legal issues but the individual claims for damages are predicated on very different factual questions."). Both TSI and Collecto have represented that they do not oppose coordinating the depositions that they wish to take. The presiding judges for both the *Transworld* and *Collecto* appeals, through this order, adopt parallel discovery schedules for the two appeals, with discovery to be complete in both appeals by November 16, 2018; will

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considering a motion to consolidate, the Board should take note of the burden that consolidation will impose upon parties, *Hendrix*, 776 F.2d at 1495, tribunals have not hesitated to consolidate cases, even though they were filed by different entities, where doing so was necessary to protect, or would assist in protecting, the overall integrity and efficiency of the dispute resolution process. *See, e.g.*, *Davenport v. Goodyear Dunlop Tires North America, Ltd.*, No. 1:15-CV-03751-JEC, et al., 2016 WL 6216200, at *3 (D.S.C. Oct. 25, 2016); *Soler v. G&U, Inc.*, 477 F. Supp. 102, 106 (S.D.N.Y. 1979); *Wolfchild v. United States*, 72 Fed. Cl. 511, 527 (2006); *Boston Edison Co. v. United States*, 67 Fed. Cl. 63, 67 (2005).

require TSI and Collecto to coordinate any depositions of ED or third-party witnesses to ensure that each witness need appear for deposition only once; and impose a limit on the number of depositions that the appellants, collectively, may take absent ED's agreement or a further order of the Board. The Board is also adopting a parallel deadline in both appeals for the submission of dispositive motions. If such motions are filed, the presiding judges can coordinate their panels' review of and decision on those motions.

If, after the conclusion of discovery, the parties decide that these appeals cannot be resolved by dispositive motion and will require resolution through a hearing, ED may renew its motion to consolidate or may propose other methods of case management if it believes that separate hearings in the *Transworld* and *Collecto* appeals would require duplicative testimony and/or create a risk of inconsistent outcomes. *See In re Levaquin Products Liability Litigation*, No. 08-1943, 2009 WL 5030772, at *4 (D. Minn. Dec. 14, 2009) (denying motion to consolidate without prejudice to its renewal at the close of discovery).

Decision

For the foregoing reasons, ED's **MOTION TO CONSOLIDATE** is **DENIED**, subject to renewal if ED determines that circumstances so warrant. The Board will coordinate discovery in the *Transworld* and *Collecto* appeals as follows:

1. Discovery will conclude in both appeals on November 16, 2018. This order supercedes the deadlines established by prior orders in *Collecto* and *Transworld*.

2. Because ED did not object to the commencement of written discovery prior to the Board's resolution of its consolidation motion and the parties in *Collecto* have apparently already exchanged written discovery requests, we will not require the appellants to coordinate their written discovery, but each party's interrogatories in each appeal will be limited to no more than twenty-five (not including subparts). Answers to any written discovery request will be provided within thirty calendar days of a party's receipt of the request. TSI and Collecto may share ED's responses with one another to the extent that they wish to do so, but shall notify ED in writing of the extent to which TSI and Collecto have exchanged ED's responses and/or document productions.

3. Depositions will not commence prior to October 15, 2018 (pursuant to the request of the parties in *Collecto*), and will conclude no later than November 16, 2018. ED may take up to five depositions of witnesses in the *Transworld* appeal and up to five depositions in the *Collecto* appeal. Because, as we understand it, the same ED employees worked on the TSI and Collecto task orders and were involved in

developing ED's claims against both TSI and Collecto, TSI and Collecto may, collectively, take no more than five depositions of ED employees and/or third-party witnesses. TSI and Collecto shall confer prior to October 15, 2018, and attempt to agree upon which individuals they wish to depose. No witness will be required to sit for a deposition in these appeals more than once. To the extent that both TSI and Collecto will depose the same witness, they shall depose that witness on the same day, shall question the witness *ad seriatim*, and shall make every effort to avoid asking questions that duplicate those asked by the other appellant. To the extent that the appellants cannot agree upon the five individuals whom they collectively wish to depose, the appellants, unless ED voluntarily agrees to allow more than five depositions, may apply to the Board (through motions filed in both *Transworld* and *Collecto*) for additional depositions, supported by an explanation of why either or both parties need the additional depositions.

4. Any dispositive motions must be filed in the *Transworld* and *Collecto* appeals no later than December 7, 2018. This order supercedes the deadline established by prior order in *Collecto*.

5. Further proceedings will be scheduled by subsequent orders. The parties' motion to amend the schedule in *Collecto*, filed July 25, 2018, is granted to the extent reflected above and otherwise denied as moot.

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

Erica S. Beardsley
ERICA S. BEARDSLEY
Board Judge