UNITED STATES
CIVILIAN BOARD OF CONTRACT APPEALS

ORDER: April 3, 2015

CBCA 2727, 2951, 3445, 3461, 3539, 3558, 3884, 4006

KEPA SERVICES, INC.,

Appellant,

v.

DEPARTMENT OF VETERANS AFFAIRS,

Respondent.

William L. Bruckner and Nicholas A. Arcamone of Bruckner Law Firm, APC, San Diego, CA; and Linda L. Shapiro, Timothy F. Noelker, and Scott F. Lane of Thompson Coburn LLP, St. Louis, MO, counsel for Appellant.

Cecily Chambliss, Office of General Counsel, Department of Veterans Affairs, Washington, DC; and Helen S. Henningsen, Office of General Counsel, Department of Veterans Affairs, Milwaukee, WI, counsel for Respondent.

LESTER, Board Judge.

Appellant, Kepa Services, Inc. (Kepa), filed a motion for a protective order on February 12, 2015, asking the Board to stop, or at least place limits upon, an audit being conducted by the Office of Inspector General (OIG) for the Department of Veterans Affairs (VA or agency). Kepa has declined to comply with the OIG's audit requests pending resolution of its motion.

Background

These consolidated cases encompass eight appeals of twenty-four separate claims, all of which arise out of a fixed-price contract with the VA, contract no. VA101CFM-C-0093 (contract 0093). That contract relates to work associated with gravesite expansion and cemetery development at the Abraham Lincoln National Cemetery in Elwood, Illinois. We previously discussed some of the discovery and schedule issues associated with these appeals in *Kepa Services, Inc. v. Department of Veterans Affairs*, CBCA 2727, et al., slip op. at 2-6 (Feb. 19, 2015), to which we refer for background. As we stated in that order, we deferred resolution of the current motion to allow the parties to provide the Board with further briefing relating to Kepa's request for a protective order. *See id.* at 2 n.1.

In December 2014, after these appeals had been filed, the VA contracting officer contacted the VA OIG, asking it to initiate an audit of Kepa's claims. Since 1993, the VA OIG's Office of Contract Review has conducted pre- and post-award audits of certain VA contracts pursuant to a memorandum of understanding between the VA and the OIG. In the most recent version of that agreement, now titled "Intra-Agency Agreement Between the Office of Inspector General and the Office of Acquisition, Logistics, and Construction," dated September 2014, the VA OIG, in exchange for reimbursement for its services from the VA, has agreed to conduct contract audits and compliance reviews as requested by the VA, including "reviews of claims as requested by VA [contracting officers]." Agreement ¶¶ 3(e), 5(a). The VA has indicated in a declaration from one of the Directors of the OIG's Office of Contract Review that "[a]n audit of a claim is only conducted at the request of a contracting officer." Declaration of Michael Grivnovics ¶ 3 (Mar. 3, 2015).

On February 3 and 4, 2015, the VA OIG issued at least three letters – one to Kepa; one to a subcontractor with claims in these consolidated appeals, Poettker Construction Company (Poettker); and one to a third-tier subcontractor – requesting information relating to the claims now pending before the Board. The OIG represented in the letters that the "objectives of [its] review" were "to (1) review the quantum (amount of the monetary adjustment) aspect of the claims and determine the reasonableness, allocability, and allowability of the claimed amounts, and (ii) determine if the claimed costs . . . are acceptable as a basis for negotiation or settlement based on the certified claim and supporting records." The VA OIG did not serve subpoenas along with the letters.

Kepa and its subcontractor, Poettker, immediately objected to the OIG letters, objecting to the scope of the OIG's requests and insisting that "any documentation requested or submitted needs to . . . come through the attorneys." Appellant's Motion, Exhibit E (e-mail message from Poettker counsel to VA counsel (Feb. 5, 2015)). Kepa has represented that, at a subsequent meeting between the parties and the VA OIG on February 11, 2015, the

OIG represented that its procedures were not negotiable, that the OIG would continue to communicate directly with third-tier subcontractors and would not include Kepa's or Poettker's counsel in those communications, and that it would not negotiate the scope of its requests. Appellant's Motion at 5.

On February 12, 2015, Kepa filed its motion for a protective order, asking the Board to stop the VA "from continuing to harass Appellants, as well as third-tier subcontractors, by circumventing the Board's rules on the conduct of discovery." Appellant's Motion at 1. It complained that "the VA is proceeding in its audit as if this litigation does not exist." *Id.* It asserted that field auditors were directly contacting employees of Kepa, Poettker, and third-tier subcontractors, "sidestepping the attorneys and needlessly duplicating and frustrating the parties' ongoing discovery efforts"; that they were "demanding documents and answers without regard to relevance, burdens, or that which has already been provided or requested through other means"; that the VA OIG was demanding responses to document production requests and written questions in eight or nine days, in violation of the Board's discovery rules; and that the VA OIG was essentially harassing Kepa and Poettker. *Id.* at 1-2. The VA responded that the VA OIG audit is proper.

Discussion

The VA's Right to Conduct an Audit

Kepa asks us to suspend the VA OIG's audit because it is intended to harass and that, to the extent that we do not suspend it, we require the VA OIG to go through counsel in conducting its audit and to comply with the Board's discovery rules. In response, the VA asserts that the VA OIG is entitled to conduct its audit in the manner that it wishes and that the VA OIG derives its authority to do so from three separate sources: (1) the Inspector General Act of 1978 (IG Act), 5 U.S.C. app. 3 §§ 1-13 (2012); (2) the contract clause at 48 CFR 52.215-2, Audit and Records – Negotiation (March 2009); and (3) the Board's general discovery rules. We address each of these sources below.

I. Authority under the Inspector General Act

First we consider the VA's assertion that the VA OIG is entitled to audit Kepa's claims, without running its audit requests through counsel, under the authority granted by the IG Act.

The main purpose of the IG Act is to ensure that the OIGs have the power to ferret out fraud, waste, and abuse in federally funded programs:

> The Inspector General Act of 1978 established an office of inspector general in 15 federal departments and agencies. 5 U.S.C. app. § 1 *et seq*. (1982). The enactment reflected congressional concern that fraud, waste and abuse in United States agencies and federally funded programs were "reaching epidemic proportions." S. Rep. No. 1071, 95th Cong., 2d Sess., *reprinted in* 1978 U.S. Code Cong. & Ad. News 2676, 2679. To attack the problem, audit and investigative functions within each of the departments were centralized under one high-level official, an Inspector General, who was given broad powers to seek out fraud and waste in agency operations and programs. 5 U.S.C. App. §§ 2, 4. In agencies with existing auditing or investigative units, the functions of these units were transferred to an Inspector General, 5 U.S.C. App. §§ 2, 4.

United States v. Westinghouse Electric Corp., 788 F.2d 164, 165 (3d Cir. 1986). Although the Act was amended in 1982, its purposes remained the same: to charge the OIG "with combating fraud, waste and abuse." *Id.*

Congress indicated that, to achieve this goal, the various OIGs would be able "to conduct and supervise audits and investigations relating to the programs and operations" of federal agencies, 5 U.S.C. app. 3 § 2(1) (2012), for the purpose of promoting "efficiency" and detecting "fraud and abuse." *Id.* § 2(2)(A), (B). The Act "grants inspectors general broad discretion to determine which investigations and audits are necessary to its mission, authorizing them 'to make such investigations and reports relating to the administration of the programs and operations of the applicable establishment as are, in the judgment of the Inspector General, necessary or desirable.'" *University of Medicine & Dentistry of New Jersey v. Corrigan*, 347 F.3d 57, 61 (3d Cir. 2003) (quoting 5 U.S.C. app. 3 § 6(a)(2)).

To allow each Inspector General to discharge his or her duties under the IG Act, "Congress gave the Inspector General broad subpoena power." *Westinghouse Electric*, 788 F.2d at 165; *see Burlington Northern Railroad Co. v. Office of Inspector General, Railroad Retirement Board*, 983 F.2d 631, 641 (5th Cir. 1993) (quoting *Westinghouse* with approval). The statute expressly permits the Inspector General to subpoena from private entities all information necessary for the OIG's performance of the functions assigned by the IG Act:

> In addition to the authority otherwise provided by this Act, each Inspector General, in carrying out the provisions of this Act, is authorized . . . to require by subpoena the production of all information, documents, reports, answers, records, accounts, papers, and other data in any medium (including electronically stored information, as well as any tangible thing) and documentary evidence necessary in the performance of the functions assigned

> by this Act, which subpoena, in the case of contumacy or refusal to obey, shall be enforceable by order of any appropriate United States district court.

5 U.S.C. app. 3 § 6(a)(4) (emphasis added).

Nevertheless, it is clear that the IG's authority is not unlimited, since, when Congress provided the OIGs with these powers, it "also prohibited any government agency from transferring its program operating responsibilities to an Inspector General." *Winters Ranch Partnership v. Viadero*, 123 F.3d 327, 330 (5th Cir. 1997); *see Burlington Northern Railroad*, 983 F.2d at 641 ("an Inspector General's investigatory powers generally [do not] extend to matters that do not concern fraud, inefficiency, or waste within a federal agency"); S. Rep. No. 95-1071, at 28 (1978), *reprinted in* 1978 U.S.C.C.A.N. 2676, 2703 ("Broad as it is, the Inspector and Auditor General's mandate is not unlimited."). *But see Westinghouse Electric*, 788 F.2d at 170-71 (finding that OIG subpoena issued to support Defense Contract Audit Agency audit was within purposes of, and authority granted by, the IG Act).

To the extent that an entity wants to challenge a subpoena that an OIG issues under the purported authority of the IG Act, or to the extent that an OIG wants to enforce such a subpoena, the IG Act specifically provides that such subpoenas are "enforceable by order of any appropriate United States district court." 5 U.S.C. app. 3 § 6(a)(4). Pursuant to that provision, the United States district courts have exclusive jurisdiction to decide whether to enforce, as well as whether to quash, an IG subpoena. *See, e.g.*, *University of Medicine & Dentistry of New Jersey*, 347 F.3d at 63; *Inspector General of the United States Department of Agriculture v. Glenn*, 122 F.3d 1007, 1009 (11th Cir. 1997); *Greene v. Philadelphia Housing Authority*, 789 F. Supp. 2d 582, 586 (E.D. Pa. 2011), *aff'd*, 484 F. App'x 681 (3d Cir. 2012). "As a general proposition, an investigative subpoena" of an Inspector General "will be enforced if the 'evidence sought . . . [is] not plainly incompetent or irrelevant to any lawful purpose' of the agency." *United States v. Aero Mayflower Transit Co.*, 831 F.2d 1142, 1145 (D.C. Cir. 1987) (quoting *Endicott Johnson Corp. v. Perkins*, 317 U.S. 501, 509 (1943)); *see Resolution Trust Corp. v. Frates*, 61 F.3d 962, 965 (D.C. Cir. 1995) (in extraordinary circumstances, court may inquire into the agency's motives "if the recipient of a subpoena makes 'an adequate showing that the agency is acting in bad faith or for an improper purpose, such as harassment'" (quoting *Aero Mayflower*, 831 F.2d at 1145)).[1]

[1] The OIG also has subpoena power to require access to records from contractors and subcontractors for audit purposes in certain circumstances under 41 U.S.C. § 4706(c). The VA does not rely upon that statute in its briefing, and we do not address it here.

We discuss the power that the OIGs have to compel compliance with their investigatory requests only to contrast it with the situation here. In this instance, the VA OIG did not issue a subpoena. Instead, it merely issued administrative audit letters, which, at most, request voluntary compliance by the recipient. Unlike a subpoena, there is nothing in the audit letters that could be construed as compelling Kepa to respond to the VA OIG's requests. Although Kepa challenges the allegedly harassing and inappropriate manner in which the VA OIG is seeking information, Kepa has the right – which it has exercised – simply not to comply. Unless and until the VA OIG issues subpoenas to Kepa and its subcontractors, the VA OIG has no ability under the IG Act to take any action against Kepa to compel compliance. *See United States ex rel. Richards v. De Leon Guerrero*, No. 92-00001, 1992 WL 321010, at *13 (D.N. Mar. I. July 24, 1992) (discussing how, absent its subpoena power under the IG Act, the OIG's auditing power would be illusory because the OIG would have no ability to compel compliance), *aff'd*, 4 F.3d 749 (9th Cir. 1993). If, in the future, the OIG issues subpoenas to Kepa and its subcontractors, we would lack authority to interfere with that exercise of authority or to decide whether the subpoenas were issued for a proper purpose. Kepa and/or its subcontractors would have to challenge those subpoenas, if they thought a challenge appropriate, before a United States district court. In the current circumstances, though, the VA OIG has not utilized his authority under the IG Act – through issuance of a subpoena – to compel Kepa or its subcontractors to submit to an audit. As a result, to the extent that the VA is seeking to compel Kepa's participation in an audit, it must find (unless and until the VA OIG decides to issue a subpoena) another source of authority to compel compliance.[2]

II. Authority under the "Audit and Records – Negotiations" Contract Clause

The VA asserts that it is entitled to compel Kepa to participate in an audit under 48 CFR 52.215-2(c), the "Audit and Records" clause contained in Kepa's contract.[3]

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[2] Kepa complains that the VA OIG may have sent audit letters to an unknown number of third-tier subcontractors and that those subcontractors should not have to respond to the letters. During a telephonic status conference on March 24, 2015, however, counsel for Kepa and the subcontractor assisting Kepa in this litigation, Poettker, indicated that they do not represent any of the third-tier subcontractors. Because they do not represent the third-tier subcontractors, there is no basis for them to complain about the VA OIG's possible contacts with those subcontractors or about the possibility that those subcontractors might voluntarily comply with OIG audit requests. *See* Model Rules of Prof'l Conduct R. 4.3, 4.4 (2013).

[3] The VA does not contend that it has any audit rights under 48 CFR 52.215-2(b). That provision entitles the contracting officer to examine the contractor's records and to audit

Subsection (c) of that clause provides that, if a contractor "has been required to submit certified cost or pricing data in connection with any pricing action relating to this contract, the Contracting Officer . . . shall have the right to examine and audit all of the Contractor's records" related to the proposal for, discussions conducted on the proposal for, pricing of, and performance of the contract, subcontract, or modification associated with the pricing action. *Id.* Federal Acquisition Regulation (FAR) 15.403-4 identifies the circumstances under which certified cost or pricing data is necessary, which include, as relevant to this order, "[t]he modification of any sealed bid or negotiated contract" that exceeds the current threshold of $700,000. *See* 48 CFR 15.403-4(a)(1)(iii). The clause at FAR 52.215-21, "Requirements for Certified Cost or Pricing Data and Data Other Than Certified Cost or Pricing Data – Modifications" (Alternate II), which is incorporated into Kepa's contract, *see* Appeal File, Tab 1 at 61, sets forth various exceptions that, depending on the circumstances, eliminate the need for certified cost or pricing data when a contract is modified. 48 CFR 52.215-21(a); *see id.* 15.403-1(b). It also indicates that no certified cost or pricing data is required for a modification meeting the $700,000 threshold until "after agreement on price." *Id.* 52.215-21(b)(2).

The VA does not allege that Kepa has ever previously submitted certified cost or pricing data under this fixed-price contract.[4] Instead, it contends that, under its contract, Kepa would have to submit such data for any contract modifications exceeding $700,000. Respondent's Response Brief at 5-6. Because one of the twenty-four claims at issue in these consolidated appeals exceeds the $700,000 threshold,[5] the VA contends, Kepa is required to submit certified cost or pricing data in support of that claim, which provides the VA

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incurred costs, but only under cost-reimbursement, incentive, time-and-materials, labor-hour, and price-redeterminable contracts. *Id.* Because Kepa's contract was for a fixed price, that provision does not apply here.

[4] Kepa indicates that, because the original contract award was based upon adequate price competition, there was no original requirement to submit certified cost or pricing data. Appellant's Reply at 3; *see* 48 CFR 15.403-1(b)(1) (prohibiting contracting officer from obtaining cost or pricing data after determining that prices are based on adequate price competition). It also asserts that it has never submitted certified cost or pricing data to support any of its claims in these appeals. Appellant's Reply at 3.

[5] Kepa indicates that, although one of its claims exceeds the $700,000 threshold, none of its subcontractor's claims meet that threshold, such that the VA has not identified any basis for the VA OIG's right to access its subcontractors' books and records. Appellant's Reply at 1.

contracting officer with a contractual right to audit all of Kepa's books and records relating to all of its pending claims. *Id.*

The VA has provided us with nothing to support its position that Kepa was required, is required, or will be required to submit certified cost or pricing data in the circumstances of these cases. For whatever reason (which the record does not reflect), Kepa was not required to, and did not, submit certified cost or pricing data before it submitted its claims to the contracting officer, perhaps because negotiations never reached the point where certified cost or pricing data would be required. That distinguishes these consolidated cases from the situation in *Aerospatiale Helicopter Corp.*, DOT BCA 1905, et al., 89-1 BCA ¶ 21,559, which the VA cites as support. In that case, one of our predecessor boards, in finding that the contract's "Audit" clause applied to require the contractor to submit to an audit, determined that the appellant and its subcontractor both "ha[d] submitted cost or pricing data to the [agency], within the meaning of paragraph (c) of the Audit clause, triggering the obligations flowing from that submission, as described in the Audit clause." *Id.* at 108,579. Because the contractor submitted cost or pricing data in support of a proposed contract modification, the "Audit" clause gave the Government a contractual basis for conducting an audit of the contractor's costs after the modification request ripened into a dispute. *Id.* at 108,580.

The VA has fallen short in establishing a current, or even a potential future, right to audit under FAR 52.215-2(c). The FAR clause to which the VA cites "pertain[s] to the need for a contractor to submit cost or pricing data in connection with the pricing of a contract change or modification . . . and the right of the Government to examine that data for a period of up to 3 years after final contract payment." *Hardrives, Inc.*, IBCA 2319, et al., 93-2 BCA ¶ 25,779, at 128,298 (1992). The VA has made clear that neither before nor during the pendency of these appeals has Kepa ever submitted such certified data. Now that the appeals are here before the Board, we, rather than the contracting officer, will decide the cases based upon actual evidence submitted to the Board, and, absent a negotiated amicable resolution of these appeals between the parties resulting in a formal contract modification, there will be no need for the contractor to submit certified cost or pricing data. *Id.* (the "action before this Board is an appeal from the contracting officer's . . . decision on [the contractor's] CDA claims and does not involve the pricing of a contract change or modification"). Because the audit provision of FAR 52.215-2(c) applies only if the contractor "has been required to submit certified cost or pricing data," and because Kepa has not and, at least in the present circumstances of these appeals, will not have to submit certified cost or pricing data, the clause does not currently give the VA a contractual right to audit.

The VA also asserts that it has a separate contractual right to audit under FAR 52.215-2(f)(2), which provides that "[t]he Contractor shall make available records relating

to appeals under the Disputes clause or to litigation or the settlement of claims arising under or relating to this contract until such appeals, litigation, or claims are finally resolved." 48 CFR 52.215-2(f)(2). Yet, FAR 52.215-2(f) makes clear that this provision applies only to "the records, materials and other evidence described in paragraphs (a), (b), (c), (d), and (e) of this clause." *Id.* 52.215-2(f). That is, paragraph (f) provides that the contractor must maintain and make available records subject to paragraphs (a) through (e) of the clause for three years after final payment, but paragraph (f)(2) extends that time if a matter covered by paragraphs (a) through (e) has been appealed under the Disputes clause, is in litigation, or is in settlement discussions. *Id.* Interpreting paragraph (f) as only extending the time for audit of materials covered in paragraphs (a) through (e) is consistent with the fact that FAR 52.215-2 implements the audit rights that Congress created in 10 U.S.C. §§ 2306a and 2313 and in 41 U.S.C. §§ 3501-3509 and 4706, which is plainly evident from the language of paragraphs (a) through (e) of FAR 52.215-2, as well as the three-year audit period language in paragraph (f). None of those statutes permits expanded audit rights – beyond the circumstances contemplated in paragraphs (a) through (e) of FAR 52.215-2 – if the contractor files an appeal or engages in litigation. The audit right provision in paragraph (f)(2) applies only if and after the Government establishes that paragraph (a), (b), (c), (d), or (e) of the clause applies.[6] Because the VA has not established that it has a right to audit

[6] That the scope of paragraph (f)(2) is limited by paragraphs (a) through (e) of FAR 52.215-2 is further evidenced by the clause's regulatory history. Earlier versions of the clause now at FAR 52.215-2 even more clearly stated that, although the contractor was required to make records available for audit by specific entities in certain circumstances for three years from final payment, the audit period for those particular records and by those particular entities was extended if the contractor filed an appeal under the contract's Disputes clause. *See, e.g.*, 45 Fed. Reg. 43741, 43754-55 (June 30, 1980) (NASA Procurement Regulation § 7-104.42 (contract clause): "materials described in (b), (c) and (d) above shall be made available" for three years from final payment "and for such longer period, if any, as is required . . . by (1) and (2) below," including "(2) Records which relate to appeals under the 'Disputes' clause of this contract . . . shall be made available until such appeals . . . have been disposed of"); 40 Fed. Reg. 48314, 48318 (Oct. 14, 1975) (Federal Procurement Regulation § 1-16.901-23A, Standard Form 23-A, General Provisions (Construction Contract): although paragraphs (b) and (c) provide Comptroller General access to records relating to agency contracts for three years after final payment, "[t]he periods of access and examination described in (b) and (c) [relating to Comptroller General access to contract records], above, for records which relate to . . . appeals under the 'Disputes' clause of this contract . . . shall continue until such appeals . . . have been disposed of."). Nothing that we see in the Federal Register notices promulgating FAR 52.215-2 indicates that its drafters intended, in making slight alterations to the language of paragraph (f), to expand the

under paragraphs (a) through (e) of FAR 52.215-2, it cannot rely upon paragraph (f)(2) as an independent basis for audit rights.

The VA has failed to establish its contractual right to audit Kepa's claims.

III. The Board's Discovery Rules

The VA finally asserts that, if nothing else, the VA OIG is entitled to conduct its audit pursuant to the Board's discovery rules. CBCA Rule 13(b) provides that "parties may obtain discovery regarding any matter, not privileged, which is relevant to the subject matter involved in the pending case, . . . including the existence, description, nature, custody, condition, and location of any books, documents, electronically stored information, or other tangible or intangible things." 48 CFR 6101.13(b) (2014). Kepa, however, argues that the Board's rules do not permit an audit because the express language of CBCA Rule 13(a) limits the available discovery tools to depositions, written interrogatories, requests for production of documents, and requests for admission. *See id.* 6101.13(a).

Contrary to Kepa's position, our rules do not preclude the Government from conducting an audit of Kepa's claims. Although our rules do not expressly mention the word "audit," we "construe our rules liberally to provide for the informal and just resolution of matters before us." *Safe Haven Enterprises, LLC v. Department of State*, CBCA 3871, et al., slip op. at 9 (Mar. 25, 2015) (citing 41 CFR 6101.1(c)). Further, "we are entitled to modify our rules when necessary to achieve those goals." *Id.* (citing 41 CFR 6101.1(d)).

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circumstances under which an audit was contractually available beyond those identified in paragraphs (a) through (e).

The Armed Services Board of Contract Appeals' decision in *Advanced Engineering & Planning Corp.*, ASBCA 53366, et al., 03-1 BCA ¶ 32,157, *aff'd in part on other grounds sub nom. Johnson v. Advanced Engineering & Planning Corp.*, 292 F. Supp. 2d 846 (E.D. Va. 2003), does not appear to be to the contrary. It is true that the board there "read [FAR 52.215-15(f)(2)] to provide that once a contractor's request for equitable adjustment [(REA)] reaches a claim or litigation stage, negotiation of the REA is subject to audit." *Id.* at 158,991. However, the REA there – seeking almost $2 million – far exceeded the threshold for the submission of cost or pricing data under paragraph (c) of the clause, suggesting that the contractor had, in fact, submitted such data at some earlier time. Accordingly, we do not read *Advanced Engineering* to indicate that paragraph (f)(2) creates an independent and expanded contractual right to audit records that is separate from and unrelated to paragraphs (a) through (e). Even if it did, it is not binding on us.

In *Aerospatiale Helicopter Corp.*, one of our predecessor boards examined the discovery rules that apply to the boards, as well as those that apply to federal courts, and it recognized both the need for contractors to prove quantum using actual financial records and the Government's right thoroughly to evaluate that financial evidence:

> [I]f [the contractor] does not offer [financial] records into evidence, so much of its claims as relates to expenses incurred . . . may have to be dismissed for a failure of proof.
>
> This creates a reasonable expectation that [the contractor] will seek to introduce all or a portion of such records at the trial, or testimony derived from trial witnesses' review of all or a portion of those records. A litigant, including the government, is entitled to inspect documents which the other party *might* offer into evidence or which *might* form the basis for witnesses' testimony, and to do so sufficiently in advance of trial to permit meaningful consideration of their contents.
>
> Even if the appellant does not contemplate offering any portion of its financial records into evidence to support its monetary claim, that material is nevertheless obtainable on discovery, as reasonably related to the subject matter of the litigation. The right to have documents produced and to examine them exists without regard to whether the claimant will offer those records into the Board's record and without regard to whether they will be admissible if offered.

Id. at 108,576 (citations omitted; italics in original). It then recognized that "[t]his right of a litigant to obtain, copy, and examine financial records as a part of discovery is broad enough to include the right to have financial records examined by a person possessing the special skills which may be required to properly examine and interpret those records, namely an auditor." *Id.*

Because the Government's right to take discovery includes the need for available discovery methods to be effective, the board in *Aerospatiale Helicopter* "conclude[d] that, under the Board's Rules of Procedure as well as under the general rules of discovery in federal courts, in a Board proceeding a litigant against whom a monetary claim is being prosecuted has a right to have the claimant produce for inspection and audit its records relating to the incurred costs which form the basis for the claim." *Id.* at 108,577; *see Allied Reclaiming Services*, AGBCA 99-140-1, et al., 00-2 BCA ¶ 31,028, at 153,242 (citing *Aerospatiale* in finding right to conduct audit during discovery); *Hardrives*, 93-2 BCA at 128,298 (audit "can be pursued during discovery, if necessary"); *Inslaw, Inc.*, DOT BCA

1609, et al., 88-1 BCA ¶ 20,368, at 103,009 (1987) ("We believe that the right to obtain, copy, and examine is broad enough to include the right to have financial records audited."); *Arcon Pacific Contractors*, ASBCA 25057, 81-2 BCA ¶ 15,225, at 75,403-04 (permitting the Government "to examine appellant's books and records to ascertain the amount of costs incurred to the extent they are claimed to be damages suffered by appellant").

Further, "from a purely practical standpoint . . . , it is in Appellant's best interest to provide the financial data requested to the Government." *Allied Reclaiming Services*, 00-2 BCA at 153,241. It is the appellant's burden to prove the quantum associated with its claims, and, without adequate financial support, it will not meet that burden. *Id.* "Moreover, the Government is entitled to protection from liability for unaudited amounts where it has properly requested and been refused permission to conduct an audit in furtherance of its discovery rights." *Arcon Pacific*, 81-2 BCA at 75,404. Because Kepa has a vested interest in ensuring that the VA has adequate access to Kepa's financial records, we will provide the parties an opportunity to develop an audit plan that meets their needs. If they are unable to agree on such a plan that provides reasonable access to the VA auditors, the Board will develop an audit plan itself based upon suggestions from the parties.

That being said, because the Board's discovery rules are the VA's only current means of compelling Kepa's participation in an audit, the VA must run that audit through Kepa's counsel, just as it would any other discovery request. Kepa complains that the VA OIG has contacted, and intends to contact, Kepa's and Poettker's employees directly without the involvement of Kepa's counsel. This the VA OIG cannot do, absent counsel for Kepa's express permission. Because the VA's counsel serves as the VA's representative before the Board, it is the VA counsel who is ultimately responsible for any and all discovery by the VA in these consolidated appeals. Rule 4.2 of the American Bar Association Model Rules of Professional Conduct (Model Rules) provides that a lawyer cannot "communicate about the subject of the representation with a party the lawyer knows to be represented by another lawyer in the matter, unless the lawyer has the consent of the other lawyer or is authorized by law to do so." Comment 7 to Model Rule 4.2 provides that, "[i]n the case of a represented organization, this Rule prohibits communications with a constituent of the organization who supervises, directs or regularly consults with the organization's lawyer concerning the matter or whose act or omission in connection with the matter may be imputed to the organization for purposes of civil or criminal liability." Although that comment limits the ban on contacts to specific categories of a represented corporation's current employees, the comment further provides that, "[i]n communicating with a current . . . constituent of an organization, a lawyer must not use methods of obtaining evidence that violate the legal rights of the organization." Accordingly, any effort to obtain documents from the company's files through company employees without the involvement of the company's counsel "effectively circumvent[s] the discovery process and prevent[s] the company from being able to argue against production."

In re Shell Oil Refinery, 143 F.R.D. 105, 108 (E.D. La. 1992); *see Inslaw, Inc.*, DOT BCA 1609, et al., 89-1 BCA ¶ 21,238, at 107,118 (1988) ("It is the general rule in discovery that one litigant cannot interview and query key employees of an opposing party except with consent of or in the presence of the latter's counsel.").

Even if (without deciding) there may be times when Rule 4.2 itself would not bar an attorney from contacting low-level employees to obtain documents from an opposing corporate party's files, the attorney's "receipt of [another party's] proprietary documents in this manner" would still be "inappropriate and contrary to fair play." *Shell Oil*, 143 F.R.D. at 108.[7] Further, because the VA's counsel is barred from gathering documentary evidence from Kepa's files by directly contacting Kepa's employees, the VA's counsel, to the extent that the Board's rules provide the authority for compelling audit compliance, cannot permit a VA investigative auditor to do so. *See* Model Rules of Prof'l Conduct R. 5.3, 8.4(a); *see also* ABA Comm. on Ethics & Prof'l Responsibility, Formal Op. 95-396 (July 28, 1995) ("A lawyer may not direct an investigative agent to communicate with a represented person in circumstances where the lawyer herself would be prohibited from doing so.").[8]

As a result, to the extent that the VA wants to discover documents from Kepa under the Board's discovery rules, it either has to do so through Kepa's counsel or has to obtain Kepa counsel's permission to deal with a particular individual or individuals in seeking materials responsive to audit requests. We recognize, as did one of our predecessor boards, that "[i]t is impracticable for [a contractor] to multiply its legal costs by having an attorney present throughout a prolonged audit. Undeniably, in conducting an audit, auditors may need to make inquiries as to how books and records are maintained in order to comprehend those documents and to more efficiently perform the audit." *Inslaw*, 89-1 BCA at 107,118. Were there a contractual right to audit, "by accepting the contract with the Audit clause, [the contractor would have] assumed the burden of having auditors at its place of business, possibly for extended periods, notwithstanding the pendency of litigation," so that auditors arguably might not need counsel's permission before seeking specific supporting financial documentation from contractor employees. *Id.* Here, though, the VA has not identified a viable basis for applying the contract's Audit clause, leaving the Board's discovery rules as

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[7] We make no judgment as to the application of this rule in fraud investigations or criminal matters during active pending litigation. Our focus is solely upon the type of civil commercial litigation pending before us.

[8] For the reasons previously discussed, if the OIG were conducting this audit by subpoena under its IG Act authority, we would have no authority to comment upon the extent to which the OIG's direct contact with contractor employees, without involvement of counsel, would be appropriate. That would be a matter for the district court to address.

the only means of compelling Kepa's compliance. Although the practicalities of an audit make it seem likely that Kepa would want to agree to an audit procedure through which the constant involvement of counsel was not necessary, that is Kepa's decision to make in consultation with its counsel. Nevertheless, to the extent that, in developing a proposed audit plan with the VA, Kepa is unreasonable in accommodating the necessities of an efficient financial audit or insists upon a procedure that is unwieldy, the Board will entertain a request by the VA to extend the existing discovery completion deadline to account for the auditing inefficiencies that may result.

The Scope of the Existing Audit Requests

Kepa requests that, if we permit an audit as a part of discovery, we limit the VA OIG's requests because they are "overly broad" and "go beyond records that are relevant to these appeals." Appellant's Reply at 9. Kepa further asserts that many of the documents sought are "already in the VA's possession." *Id.*

We see no need to limit the scope of the current audit requests at this time. On their face, the requests seem fairly typical, and some are very narrowly tailored to ask for a specific document. Our rules provide that a party may "obtain discovery regarding any matter, not privileged, which is relevant to the subject matter involved in the pending case" or that is "reasonably calculated to lead to the discovery of admissible evidence." 48 CFR 6101.13(b). We generally apply the principles favoring discovery, and the concept of relevance in discovery, broadly. *Dawson Construction Co.*, VABCA 1967, 85-3 BCA ¶ 18,209, at 91,390. Although the Board can limit discovery that is "unreasonably cumulative or duplicative, or is obtainable from some other source that is more convenient, less burdensome, or less expensive," 48 CFR 6101.13(c)(1), "[t]he fact that the moving party is already in possession of documents it seeks to obtain by inspection, is not necessarily a sufficient reason for denying discovery." *Cook v. Rockwell International Corp.*, 161 F.R.D. 103, 105 (D. Colo.1995); *see Evergreen Trading, LLC v. United States*, 80 Fed. Cl. 122, 136 & n.20 (2007) ("the fact that a discovery request may lead to the discovery of documents already possessed does not necessarily bar that discovery"). Here, the VA OIG has indicated that its process includes an effort to obtain information from the contracting officer and the existing contract files before going to the contractor. Grivnovics Declaration ¶¶ 7, 9, 12. In the context of an audit, it would seem too burdensome on the process to insist that the auditors make sure that they seek only those documents that the VA does not already possess. To the extent that, during the audit, Kepa finds the process unwieldy, it can renew its request for some type of scope limitation, with more concrete examples of discovery abuse.

Decision

For the foregoing reasons, the Board **GRANTS IN PART** Kepa's motion for a protective order and otherwise **DENIES** that motion. The VA is entitled to undertake an audit of Kepa's claims at issue in these consolidated appeals, but, unless and until the VA OIG issues a subpoena under the authority of the Inspector General Act, that audit is to take place under the auspices of the Board's discovery rules. The parties shall confer and jointly propose a plan for permitting the VA OIG to conduct an efficient audit of Kepa's claims no later than **Tuesday, April 14, 2015**. To the extent that the parties cannot agree upon a joint proposal, they may submit separate responses to this order by that date.

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HAROLD D. LESTER, JR.
Board Judge