UNITED STATES
CIVILIAN BOARD OF CONTRACT APPEALS

APPELLANT'S MOTION TO COMPEL IS DENIED AS PREMATURE; RESPONDENT'S MOTION TO AMEND COMPLAINT GRANTED: April 8, 2016

CBCA 2882

BRYAN CONCRETE & EXCAVATION, INC.,

Appellant,

v.

DEPARTMENT OF VETERANS AFFAIRS,

Respondent.

Bradley W. Andersen of Landerholm, Vancouver, WA, appearing for Appellant.

Brian R. Reed, Kristin Langwell, Glenn Sebesta, and Brent Pope, Office of Regional Counsel, Department of Veterans Affairs, Chicago, IL, counsel for Respondent.

SOMERS, Board Judge.

Pending before the Board is Bryan Concrete & Excavation, Inc.'s (BCE or appellant) motion to compel discovery, the Department of Veterans Affairs (VA)'s objection to appellant's second request for production of documents, and the VA's motion to amend its complaint. For the reasons set forth below, we deny appellant's motion to compel discovery as premature. We grant respondent's motion to amend its complaint.

In addition, the status conference currently scheduled to be held on April 12 is cancelled. A status conference will be scheduled after April 15, 2016 , after our review of the revised proposed schedule that the Board has ordered the parties to submit.

Motion to Compel Denied

There is no indication that the parties have attempted to resolve these discovery issues before appellant filed its motion to compel. Pursuant to CBCA Rule 13(f)(2) (48 CFR 6101.13(f)(2) (2015)), the parties are required to make a good faith effort to resolve the matter informally. In addition, the party filing the motion to compel must provide a "representation that the moving party has tried in good faith, prior to filing the motion, to resolve the matter informally." Until the parties make a good faith effort to resolve discovery issues, it is premature for the Board to rule on a motion to compel.

That said, correspondence between the parties (and, unfortunately, also submitted to the Board through the e-file system) reflects some confusion as to the permissible scope of discovery. The Board permits parties in litigation to "obtain discovery regarding any matter, not privileged, which is relevant to the subject matter involved in the pending case, whether it relates to the claim or defense of a party." Rule 13(b). We generally apply the priniciples favoring discovery, and the concept of relevance in discovery, broadly. *See Kepa Services, Inc. v. Department of Veterans Affairs*, CBCA 2727, 15-1 BCA ¶ 35,942, at 175,667; *Dawson Construction Co.*, VABCA 1967, 85-3 BCA ¶ 18,209, at 91-390. The initial burden of demonstrating the non-relevance of materials being requested is on the party opposing the production of the information being sought. *Shostak Construction Corporation*, VABCA 3810, 94-2 BCA ¶ 26,791, at 133,248. The phrase "relevant information" "has been construed broadly to encompass any matter that bears on, or that reasonably could lead to other matter that could bear on, any issue that is or may be in the case." *LFH, LLC v. General Services* Administration, CBCA 395, 2007 WL 994514 (citing *Oppenheimer Fund, Inc. v. Sanders*, 437 U.S. 340, 351 (citations omitted)).

The parties should keep this guidance in mind as they attempt to resolve all discovery issues. In the future, before filing any additional discovery motions, the parties are ordered to work in good faith to narrow the issues and then schedule a conference call so that this issues can be fleshed out. Not until those steps are accomplished will the Board entertain further discovery motions.

Motion to Amend Granted

The VA moved to amend its complaint to include additional grounds to support the termination for default action, based upon new evidence primarily presented by BCE's attorney through affidavit submissions. At a status conference held on March 25, 2016, BCE objected to the motion on the grounds that it would be prejudiced because it would not have

sufficient time to propound discovery or adjust its theory of the case before the trial, then scheduled to be held from May 17-19, 2016. [1]

A grant or denial of an opportunity to amend a complaint is within the sound discretion of the Board, and the key factor to be evaluated in deciding whether to grant the motion is prejudice to the non-moving party. *Trans-World Manufacturing Corp. v. Al Nyman & Sons, Inc.*, 750 F.2d 1552 (Fed. Cir. 1984). Here, because the trial has been postponed, appellant will have ample time to prepare. Accordingly, finding no other grounds for prejudice, the VA's motion to amend the complaint is granted.

JERI KAYLENE SOMERS
Board Judge

[1] In light of the various issues presented by the parties, it became clear that additional time would be needed by the parties to prepare for trial. Accordingly, we postponed the trial and requested that the parties submit a revised proposed schedule.