UNITED STATES
CIVILIAN BOARD OF CONTRACT APPEALS

APPELLANT'S MOTION TO EXCLUDE GRANTED: August 17, 2016

CBCA 3246, 4356

REGENCY CONSTRUCTION, INC.,

Appellant,

v.

DEPARTMENT OF AGRICULTURE,

Respondent.

S. Leo Arnold and Matthew W. Willis of Ashley, Ashley & Arnold, Dyersburg, TN, counsel for Appellant.

Danny L. Woodyard, Office of the General Counsel, Department of Agriculture, Little Rock, AR, counsel for Respondent.

SULLIVAN, Board Judge.

On November 11, 2014, appellant, Regency Construction, Inc. (Regency), filed a motion to exclude the report and testimony of a geotechnical expert offered by respondent, Department of Agriculture, Natural Resources Conservation Service (NRCS), because respondent was untimely in identifying the expert witness and providing the expert report.[1] After considering the briefing and convening a conference call to discuss the motion, on December 3, 2014, the Board summarily granted Regency's motion in a pre-trial order and

[1] The appeal was transferred to the undersigned on November 26, 2014.

promised that a separate order explaining the basis for the decision would be issued in the future. NRCS was not permitted to present the expert or his opinions at the hearing in this matter, and the expert's report is stricken from the record.

Background

Regency filed its notice of appeal in February 2013. By order dated April 24, 2013, the Board directed the parties to conclude discovery activities by August 30, 2013. This date was subsequently extended in response to several enlargement requests to June 30, 2014. The Board's orders only specified the date for the close of discovery and not interim dates for the production of expert reports. After the close of discovery, the Board convened a teleconference with the parties on July 17, 2014, and set December 9-12, 2014, for a hearing on the merits.

During discovery, Regency served an interrogatory seeking the identity of expert witnesses that may be asked to testify on behalf of NRCS. In August 2013, NRCS responded that its expert witnesses have "yet to be identified." It does not appear that NRCS ever amended its response to this interrogatory.

Regency provided two expert reports to NRCS, including one prepared by a geotechnical expert, Dr. Traughber, on February 10, 2014. By letter dated February 24, 2014, NRCS acknowledged receipt of Dr. Traughber's report and advised that it would be submitted for "geotechnical review and comment," without indicating specifically to whom it would be submitted. Respondent forwarded Dr. Traughber's report to the NRCS National Design, Construction & Soil Mechanics Center for review, where NRCS' proffered expert was assigned to review it. The expert advised the project office that he would not be able to "start on the project" until June 9, 2014. The lab testing for the expert's report was completed on August 1, 2014, and the expert completed his report on August 15, 2014. During this period, Regency's counsel inquired several times as to the status of the review of Dr. Traughber's report and stated that appellant likely would seek to depose the author of any report prepared in response.

Counsel for NRCS received the expert's report on August 17, 2014. Counsel scheduled a meeting with NRCS employees to review the report the week of October 20, 2014. Counsel explained that he was unable to arrange the meeting sooner because of "scheduling conflicts." NRCS counsel did not produce the proposed expert's report to counsel for Regency until October 31, 2014, only five-and-a-half weeks before the scheduled four-day hearing. According to the parties, the report was thirty-three pages long, with 138 pages of attachments. As noted, on November 11, 2014, Regency filed its motion to strike the report.

Discussion

The Board's decision on appellant's motion is guided by both the Rules of the Civilian Board of Contract Appeals and the Federal Rules of Civil Procedure. Although not binding upon the Board, the Board looks to the federal rules for guidance and instruction. *See, e.g.*, *Gardner Zemke Co. v. Department of the Interior*, CBCA 1308, 09-1 BCA ¶ 34,081, at 168,501. It is appropriate to apply the federal rules in this matter because of the tardiness of NRCS's disclosure and its failure to update its response to an interrogatory specifically seeking the identify of its experts.

Board Rule 13 provides that the parties may engage in discovery only as permitted by Board order and requires that the parties cooperate with each other during discovery. Rule 13(d), (g) (48 CFR 6101.13(d), (g) (2015)). Rule 33(c) permits the Board to impose sanctions upon parties failing to abide by Board orders. Permitted sanctions include prohibiting a party from introducing into evidence designated documents or items of testimony. Rule 33(c)(4). The Board may not direct the payment of costs as a sanction for disobeying Board orders. *Mountain Valley Lumber, Inc. v. Department of Agriculture*, CBCA 95, 07-2 BCA ¶ 33,611, at 166,444.

The Federal Rules of Civil Procedure at issue are Rules 26(a) and 37(d). Rule 26(a)(2) sets forth the requirements for the disclosure of expert testimony, including the information that is to be contained in an expert report. Fed. R. Civ. P. 26(a)(A-C). The rule also provides that, "absent a stipulation or a court order, the disclosures must be made (i) at least 90 days before the dates set for trial or for the case to be ready for trial; or (ii) if the evidence is intended solely to contradict or rebut evidence on the same subject matter [as opposing party's expert report] within 30 days after the other party's disclosure." Fed. R. Civ. P. 26(a)(2)(D). Notably, the requirements for the disclosure of expert witnesses are separate and apart from the requirements for pre-trial disclosures. *Compare* Fed. R. Civ. P. 26(a)(2) *with* 26(a)(3).

Rule 37(d) provides the sanction for failing to comply with the requirements of Rule 26(a) in a timely manner:

> **Failure to Disclose or Supplement**. If a party fails to provide information or identify a witness as required by Rule 26(a) or (e), the party is not allowed to use that information or witness to supply evidence on a motion at a hearing, or at a trial, unless the failure was substantially justified or harmless.

Fed. R. Civ. P. 37(d). Courts have interpreted this rule to provide for automatic exclusion unless the failure to disclose can be shown to be substantially justified or harmless. *Zoltek*

Corp. v. United States, 71 Fed. Cl. 160, 167 (2006). When considering a motion to strike pursuant to this rule, courts will consider several factors:

> (1) the surprise to the party against whom the witness was to have testified; (2) the ability of the party to cure that surprise; (3) the extent to which allowing the testimony would disrupt the trial; (4) the explanation for the party's failure to name the witness before trial; and (5) the importance of the testimony.

MicroStrategy Inc. v. Business Objects, *S.A.*, 429 F.3d 1344, 1357 (Fed. Cir. 2005) (quoting *Southern States Rack & Fixture, Inc. v. Sherwin-Williams Co.*, 318 F.3d 592, 596 (4th Cir. 2003)). NRCS, as the party charged with an untimely disclosure, bears the burden of establishing substantial justification or harmlessness. *K-Con Building Systems, Inc. v. United States*, 106 Fed. Cl. 652, 660 (2012) (citing *Scott Timber, Inc. v. United States*, 93 Fed. Cl. 221, 226 (2010); *Zoltek Corp.*, 71 Fed. Cl. at 167).

NRCS's disclosure of the identity of its expert and the substance of his opinions was untimely. After several extensions, discovery closed on June 30, 2014. This is the date by which evidence regarding the matter was to have been exchanged. NRCS should have disclosed the expert's opinions in advance of this date or sought an enlargement of the close of discovery until those opinions could be finalized. Rather than take these actions, NRCS counsel only told Regency's counsel that Dr. Traughber's report was under review, failed to timely supplement respondent's response to appellant's interrogatory, and remained silent on this issue during a teleconference with the Board on July 17, 2014, to schedule the dates for hearing.

NRCS asserts that the report was timely pursuant to the Board's October 2, 2014, pre-hearing order that required, among other items, the parties to identify all witnesses and provide a description of their testimony. The order provides that "in lieu of a written statement of expected testimony, a party may submit a written report prepared by that expert witness that forms the basis for his or her testimony." This language parrots the language of Rule 26 of the Federal Rules of Civil Procedure, which provides that such reports be provided before the close of discovery. The pre-hearing order does not state that this report may be produced for the first time as part of the pre-trial submissions. Moreover, as noted above, Rule 26 draws a distinction between expert disclosures and pre-trial disclosures. The items required by the Board's October 2, 2014, order are pre-trial disclosures and do not alter the requirement to provide timely disclosure of expert opinions.

NRCS attempts to cast the dealings between the parties as providing sufficient notice to appellant that a responsive expert was possible so that appellant is not at a disadvantage. NRCS explains that "[Regency] was well aware early on that respondent was obtaining a

geotechnical review and comments with regard to [D]r. Traughber's report." NRCS also asserts that because Regency made a decision not to depose the fact witnesses, it would have made the same decision with regard to any expert witness that it identified.

The Board views the dealings between the parties differently. Regency attempted to identify the individual or individuals who might testify as an expert witness in response to Dr. Traughber's opinions, through interrogatories and inquires regarding the state of the review of Dr. Traughber's report. Further, as recited by NRCS, Regency's counsel stated that Regency would want to depose any author of a report prepared in response to Dr. Traughber's report. It is too much to assume that, just because Regency decided not to depose fact witnesses, Regency would have made the same decision with regard to an expert witness. Moreover, Regency's stated reason for not seeking additional depositions was that Regency did not want to further delay the hearing date. NRCS's failure to timely disclose the identity of its expert witness eliminated Regency's opportunity to make the determination as to whether to depose an expert witness. To put a party in a position to have to choose between going to trial in accordance with the scheduling order or deposing an expert witness and postponing trial is not harmless within the meaning of Rule 37(d). The Board was unwilling to require Regency to make that choice.

NRCS failed to make a showing that its late disclosure was substantially justified. Although NRCS's counsel received the report on August 17, 2014, counsel was unable to review and consider the report until the week of October 20, 2014, due to the press of other work. When asked, NRCS counsel did not know why NRCS did not seek an enlargement of the discovery period to allow the agency time to evaluate this issue. While we understand that NRCS's counsel disclosed the report just as soon as he had the opportunity to review the report with agency personnel, the press of other work is not substantial justification sufficient to overcome the need for timely disclosure in this circumstance.

While describing its proposed expert as an expert, NRCS also asserted that the expert should be permitted to testify as an agency employee regarding "geo-technical testing and reporting." NRCS asked that the expert be permitted to testify as to the geotechnical testing that was performed by other engineers that formed a basis for his report. As described, the expert's proposed testimony on this subject would be based upon "scientific, technical or other specialized knowledge" and therefore fall outside the ambit of Federal Rule of Evidence (FRE) 701. For testimony covered by FRE 702, 703, or 705, NRCS was still required to make a timely disclosure regarding the subject matter of the expert's testimony, which it did not do. Fed. R. Civ. P. 26(a)(2)(C). For this reason, the expert also was not permitted to testified pursuant to FRE 701.

During a teleconference on December 2, 2014, to discuss the motion, NRCS counsel

also inquired as to whether NRCS could present the expert's testimony as "rebuttal testimony." The disclosure of the expert's report for solely rebuttal purposes is still untimely. As noted above, when opinions are offered to "contradict or rebut evidence on the same subject matter identified by another party," to be timely, it must be disclosed within thirty days of the opposing party's disclosure. Fed. R. Civ. P. 26(a)(2)(D)(ii). Moreover, NRCS misapprehended the nature of rebuttal testimony. Rebuttal testimony disclosed for the first time at trial is only proper when a party did not know the nature of the testimony or evidence sought to be introduced by the opposing party. *See Stockton East Water District v. United States*, 109 Fed. Cl. 460, 482, *aff'd in part, vacated in part by, and remanded*, 761 F.3d 1344 (Fed. Cir. 2014) (citing *Lubanski v. Coleco Industries, Inc.*, 929 F.2d 42, 47 (1st Cir. 1991)). Here, NRCS knew Dr. Traughber's opinions and the basis for them in February 2014.

The sanction of excluding the expert's testimony was harsh but, given the imminence of the hearing date, the Board had no alternatives to cure the late disclosure. It would have been unfair to postpone the hearing to allow time for the expert's deposition to be taken. It also would have been unfair to require the parties to conduct that deposition within the week remaining before the hearing and incur the additional expense of expediting the production of a transcript of that deposition.

Decision

The Board **GRANTS** appellant's motion to exclude. Respondent's expert was not permitted to testify as an expert at the hearing in this matter, and the expert's report and *curriculum vitae* (tabs 48 and 70 of respondent's supplemental Rule 4 file) were stricken from the record.

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MARIAN E. SULLIVAN
Board Judge