UNITED STATES
CIVILIAN BOARD OF CONTRACT APPEALS

CONSOLIDATION GRANTED: November 9, 2017

CBCA 5814, 5815, 5816

HARRIS IT SERVICES CORPORATION,

Appellant,

v.

DEPARTMENT OF VETERANS AFFAIRS,

Respondent.

J. Scott Hommer, III of Venable LLP, Tysons Corner, VA, and Keir X. Bancroft and Michael T. Francel of Venable LLP, Washington, DC, counsel for Appellant.

Benjamin M. Diliberto and Jason A.M. Fragoso, Office of General Counsel, Department of Veterans Affairs, Washington, DC, and Frank DiNicola, Office of General Counsel, Department of Veterans Affairs, Eatontown, NJ, counsel for Respondent.

**O'ROURKE**, Board Judge.

ORDER

Pending before the Board is the parties' joint motion to consolidate CBCA 5814, CBCA 5815, and CBCA 5816. According to the parties, the appeals involve common questions of law and fact and consolidation would serve to alleviate unnecessary administrative burdens and expenses.

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." 48 CFR 6101.2(d) (2016). Our rule is based upon and involves the same considerations that underlie Rule 42 of the Federal Rules of Civil Procedure, which governs consolidation of actions in federal courts. *See*

*Ace-Federal Reporters, Inc.*, GSBCA 13298-REM, et al., 02-2 BCA ¶ 31,912, at 157,647 n.7 (noting similarity of federal rule and predecessor board's similar rule). Like courts subject to the federal rule, the Board "has broad discretion in the exercise of its inherent power over the administration and supervision of its own business to consolidate actions or portions thereof." *Algernon Blair, Inc.*, GSBCA 5920, et al., 82-2 BCA ¶ 15,859, at 78,626; *see Beacon Oil Co.*, EBCA 215-6-82, et al., 88-2 BCA ¶ 20,767, at 104,907 ("The decision to consolidate is discretionary with the forum"); *Armstrong & Armstrong, Inc.*, IBCA 1061-3-75, et al., 76-1 BCA ¶ 11,826, at 56,469 (consolidation is discretionary). Nevertheless, boards encourage the parties to seek consolidation when they recognize that consolidation would create litigation efficiencies. *Goss Fire Protection, Inc.*, DOT BCA 2782E, 98-1 BCA ¶ 29,713, at 147,343-44.

In exercising its discretion to determine whether consolidation is appropriate, the Board should employ the following two-step analysis: (1) "determine whether both cases present 'a common question of law or fact'" and (2) "consider whether 'the interests of judicial economy' outweigh 'the potential for delay, confusion and prejudice that may result from consolidation.'" *Lowry Economic Redevelopment Authority v. United States*, 71 Fed. Cl. 549, 553 (2006) (quoting *Lucent Technologies Inc. v. United States*, 69 Fed. Cl. 512, 513 (2006)); *see Algernon Blair, Inc.*, 82-2 BCA at 78,626 ("There is for consideration not only the avoidance of extra costs and delay to the parties, but also the avoidance of waste of adjudicative resources"). Further, to the extent that consolidation would likely waste adjudicative resources, that "consideration can take precedence over the desires of" the party or parties requesting consolidation. *Algernon Blair, Inc.*, 82-2 BCA at 78,626.

Here, the appeals share common questions of law and fact, including whether the Service Contract Act (SCA) applied to Harris' subcontractor's employees, whether Harris failed to notify the Department of Veterans Affairs of any personnel subject to the SCA, whether Harris is entitled to the back wages it reimbursed its subcontractor, and what the parties' obligations were under the contract. In addition, according to the contracting officer's final decision, all three claims, which are the basis of each appeal, are "based on the same legal theories." Although each appeal concerns a separate task order, each task order is under the same contract, and at least two task orders appear to call for the same work and employees. According to the contracting officer's final decision, "all three claims are almost the same language verbatim, with only minor differences between the documents."

Based on the record thus far, the Board finds that discovery for each appeal would substantially overlap, and if the appeals proceed to a hearing, the same witnesses would be utilized to testify. Furthermore, if the Board were to make a determination as to entitlement in one appeal, such determination would resolve the other appeals. The Board concludes that neither party would be prejudiced from consolidation. Consolidation is permissible as a

matter of convenience and economy in administration, and each appeal would not lose its separate identity or merge into one single appeal because of consolidation. *Johnson v. Manhattan Railway Co.*, 289 U.S. 479, 496-97 (1933); 9A Charles Alan Wright & Arthur R. Miller, *Federal Practice & Procedure* § 2382, at 10 (3d ed. 2008).

For the foregoing reasons, we grant the motion to consolidate the appeals.

KATHLEEN J. O'ROURKE
Board Judge