



UNITED STATES  
CIVILIAN BOARD OF CONTRACT APPEALS

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**THIS ORDER WAS INITIALLY ISSUED UNDER PROTECTIVE ORDER AND  
IS BEING RELEASED TO THE PUBLIC IN ITS ENTIRETY ON  
FEBRUARY 20, 2018**

MOTION TO COMPEL GRANTED: February 2, 2018

CBCA 3506

FIRST KUWAITI TRADING & CONTRACTING W.L.L.,

Appellant,

v.

DEPARTMENT OF STATE,

Respondent.

Peter F. Garvin, III, Grant H. Willis, Nicholas R. Reaves, and Ryan P. McGovern of Jones Day, Washington, DC, counsel for Appellant.

Thomas D. Dinackus, John C. Sawyer, and Erin M. Kriynovich, Office of the Legal Adviser, Buildings and Acquisitions, Department of State, Washington, DC, counsel for Respondent.

**SULLIVAN**, Board Judge.

Respondent, the Department of State (DOS), moves to compel the production of four years of audited financial statements of appellant, First Kuwaiti Trading & Contracting W.L.L. (FKTC), asserting that the statements are necessary for the analysis to be performed by its damages expert. DOS also requests that FKTC be required to produce the documents within seven days of resolution of its motion. FKTC opposes the motion, arguing that the documents are not relevant, their production is unduly burdensome, and DOS's motion is untimely. The Board grants DOS's motion.

### Background

In 2013, FKTC appealed to the Board the denial of its claims for millions of dollars arising from the construction of a new embassy in Iraq. Pursuant to the Board's order issued June 26, 2017, the Board will convene the hearing in this appeal in January 2019.

In 2014, DOS propounded production requests that sought audited financial statements for the years of performance of the contract:

Request No. 66: FKTC's complete financial statements for the years 2005, 2006, 2007, and 2008, including but not limited to notes to the financial statements, completed and uncompleted contract schedules, reporting data related to the Project, general and administrative and/or other indirect expense details, and any other supplemental information. In addition, provide any documents needed to reconcile the financial statements to the job cost report for each of the years listed.

Appendix to Respondent's Motion to Compel Production of Appellant's Financial Statements at 62.<sup>1</sup> FKTC objected that the documents were not relevant to the issues presented in the appeal and stated that it would produce responsive, non-privileged documents:

Response: FKTC objects to this request to the extent it seeks documents for subject matters that are not relevant to claims or defenses at issue in this case, or that are not reasonably calculated to lead to admissible evidence. Subject to these objections and the general objections noted above, FKTC will produce non-privileged documents responsive to this request.

*Id.* at 65.

In June 2015, DOS propounded another set of production requests that again sought financial reports and documents, including audited financial statements:

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<sup>1</sup> Although DOS's original request appears to be broader than a request for the audited financial statements for the years 2005-2008, DOS clearly states in its motion that it seeks to compel the production of just these four documents. Respondent's Motion at 1, 10.

97. All documents identified in the categories below for the time period 2004-2008:

....

- iv. Company-wide (e.g. audited, reviewed) financial statements, trial balance reports, general ledger reports for each year that there was project performance or activities . . . .

*Id.* at 68. FKTC objected, in part, that the documents were not relevant and stated that it would produce responsive, non-privileged documents:

Response: FKTC objects to this request to the extent it seeks documents that never existed for the project or that are not in FKTC's possession, custody, or control. FKTC also objects to this request as overbroad, unduly burdensome, and vague to the extent it seeks "all documents" identified in the categories above "for the time period of 2004-2008." FKTC further objects to this request to the extent it seeks documents for subject matters that are not relevant to the claims or defenses at issue in this case, or that are not reasonably calculated to lead to admissible evidence. Subject to these objections and general objections noted above, FKTC will produce non-privileged documents it identifies as responsive to this request.

Respondent's Appendix at 71.

In an exchange of e-mails in May 2017, counsel for DOS requested the production of audited financial statements that were sought with production request number 66. Respondent's Appendix at 74. Counsel for FKTC noted FKTC's previous objection that these statements were not relevant to the claims or defenses at issue. *Id.* In December 2017, counsel for DOS reiterated the request for the financial statements, indicating that DOS would file a motion to compel the production and attaching a draft declaration from DOS's damages expert explaining why the expert believed the documents were necessary. *Id.* at 2. Counsel for FKTC stated that, "[f]or the reasons previously described, FKTC does not intend to produce the requested financial statements." *Id.* at 1.

During a deposition in October 2017, the owner of FKTC testified that financial statements for FKTC existed for the years 2005-2008. *Id.* at 89-91.

The Board entered a protective order on January 13, 2014, that permits the parties to produce documents containing sensitive or confidential information subject to a requirement that the receiving party limit distribution of the documents.

### Discussion

#### The Board's discovery rules.

Before the Board, “parties may obtain discovery regarding any matter, not privileged, which is relevant to the subject matter involved in a pending case, whether it relates to the claim or defense of a party.” Rule 13(b) (48 CFR 6101.13(b) (2017)). “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.’” *Bryan Concrete & Excavation, Inc. v. Department of Veterans Affairs*, CBCA 2882, 16-1 BCA ¶ 36,339, at 177,187 (quoting *LFH, LLC v. General Services Administration*, CBCA 395, et al., 07-1 BCA ¶ 33,537, at 166,141). “[D]iscovery should ordinarily be allowed under the concept of relevancy unless it is clear that the information sought can have no possible bearing upon the subject matter of the action.” *Southwest Marine, Inc.*, DOT CAB 1497 et al., 86-2 BCA ¶ 18,773, at 94,548. FKTC, as the party opposing the production of the documents being sought, bears the burden of demonstrating the non-relevance of the materials. *Bryan Concrete*, 16-1 BCA at 177,187 (citing *Shostak Construction Corp.*, VABCA 3671, et al., 94-2 BCA ¶ 26,791, at 133,248). The Board and its predecessor boards have often found a contractor’s financial records to be sufficiently relevant to the proceedings for the purposes of discovery, even if the contractor does not plan to use those records to support its claims. *See, e.g., Allied Reclaiming Services*, AGBCA 99-140-1, et al., 00-2 BCA ¶ 31,028, at 153,242.

The Board may place limits upon discovery if it determines that:

- (1) The discovery sought is unreasonably cumulative or duplicative, or is obtainable from some other source that is more convenient, less burdensome, or less expensive;
- (2) The party seeking discovery has had ample opportunity by discovery in the case to obtain the information sought; or
- (3) The discovery is unduly burdensome and expensive, taking into account the needs of the case, the amount in controversy, limitations on the parties’ resources, and the importance of the issues at stake.

Rule 13(c). This portion of the Board's rule is similar to Rule 26 of the Federal Rules of Civil Procedure, which requires the tribunal to weigh the burden to the objecting party against the need for the documents as a matter of proportionality. Federal Rule of Civil Procedure 26(b)(1).

The relevance of the documents.

Both parties have submitted declarations from their damages experts, in which the experts seek to explain the relevance or non-relevance of the financial statements DOS seeks. FKTC disputes that the documents are relevant to its claims because it has chosen to support its claims through contractually agreed-upon contract rates, support for which will not be found in the company's financial statements. FKTC has produced the contemporaneous business records for any actual costs included in its claim. FKTC's expert also explains that DOS's expert should be able to glean any required information and perform any analysis with the nominal ledger for the project, a document that has been produced.

DOS states that the financial statements are necessary to evaluate FKTC's assertions that job cost data were not maintained, thereby requiring the compilation of the damages claim based upon established contract rates. DOS's expert would like to know whether FKTC's financial statements were issued with a qualified or unqualified auditor's opinion. According to DOS's expert, whether the auditors's statements were qualified or unqualified will provide insight into the nature of the cost records and cost control systems that FKTC maintained. FKTC's expert disputes this contention, asserting that an auditor could issue an unqualified opinion based upon other cost information made available to the auditor, but does not indicate whether the financial statements have been issued without a qualified opinion. DOS's expert also expects to be able to glean other information from the notes to the financial statements, including information relating to insurance claims and intercompany billings. FKTC challenges DOS's right to offer alternative damages formulations based upon information that may be gleaned, but does not dispute that the information DOS seeks is often found in the notes to financial statements. DOS's expert disputes the usefulness of the nominal ledger produced by FKTC, based upon testimony of FKTC witnesses regarding how the nominal ledger was used and maintained.

The Board finds that the documents are sufficiently relevant to the analysis of DOS's expert to require their production. While FKTC's expert identifies other documents that may contain the same or better information, FKTC has not shown that the information contained in the financial statements will not be relevant. Further, the Board is not able to determine, based upon the current record, whether FKTC's use of contractually agreed-upon rates is proper or whether DOS may offer alternative damages calculations. DOS's expert will be

allowed the financial statements for analysis and the Board will decide the challenges related to the calculations of damages, if and when they are presented in the appeal.

The burden of production.

FKTC asserts that the production of the documents is burdensome because FKTC has already produced more than 423,000 documents, comprising approximately 1.3 million pages. FKTC also notes that the documents will be located in Kuwait. Because most of the relevant documents to be produced are in Kuwait, the parties agreed early on in the litigation to extend the requirement for production to sixty, instead of thirty, days. Finally, FKTC expresses concerns about maintaining the confidentiality of the documents, noting news reports about the hacking of DOS computers in 2014.

The relevance of the documents outweighs any burdens that FKTC may face in the production of these four documents. FKTC, through the testimony of its owner, has acknowledged that these documents exist and has not made any representation that they will be difficult to reproduce for production. Although FKTC has produced numerous documents already, FKTC has not shown the production of these documents to be unreasonably cumulative or duplicative. The number and dollar amount of the claims weigh against any burdens that FKTC may experience in the production of these documents.

To the extent that FKTC is concerned about making public what it views as confidential information, the Board previously entered a protective order in this appeal under which FKTC can produce those documents. Such a protective order “allow[s] parties ‘to exchange confidential or sensitive documents’ while ‘limit[ing] distribution to only a narrow group of individuals.’” *Golden Key Group, LLC v. Department of Veterans Affairs*, CBCA 5092, 16-1 BCA ¶ 36,318, at 177,071 (quoting *Yates-Desbuild Joint Venture v. Department of State*, CBCA 3350, et al., 15-1 BCA ¶ 36,027, at 175,982). If FKTC believes that the protections of the current protective order are insufficient to guard the confidentiality of the documents, FKTC may seek reasonable modifications to the protective order within the time required for their production. FKTC should attempt to obtain the agreement of DOS counsel to these changes before filing a motion with the Board.

The timeliness of DOS’s motion.

FKTC also challenges the motion as untimely because DOS waited to file the motion until December 2017, even though it received FKTC’s objections to the requests in 2014 and 2015.

The Board will not deny the motion on this basis. Discovery is permitted currently until March 16, 2018, and the parties agreed to produce expert reports at the end of the discovery period. FKTC's responses to the production requests did not put DOS on notice that it would not provide the requested documents. DOS was not aware of the dispute regarding the production of the financial statements until May 2017, when, in response to a direct inquiry, FKTC stated that it would not produce the financial statements. Although the Board enjoys some discretion in considering whether to deny as untimely a motion to compel filed well after the close of discovery, *see Suntrust Bank v. Blue Water Fiber, L.P.*, 210 F.R.D. 196, 200-01 (E.D. Mich. 2002) (citing cases in which motions to compel were denied as untimely), our rules do not identify any specific deadlines for filing motions to compel, and the parties did not request that we issue an order imposing such a deadline in this appeal. In such circumstances, we have no basis for denying a motion to compel filed before the close of discovery as untimely.

The Board denies DOS's request that FKTC be required to produce the documents within seven days. As it requested, FKTC is permitted thirty days for the production of these documents. If the Board's resolution of this motion requires alteration of the current date for the close of discovery, the parties may move for a change after conferring as to an appropriate schedule. In its consideration of any such motion, the Board will not alter the date for the conference to discuss pre-hearing filings, May 4, 2018, or the date for the start of the hearing, January 22, 2019.

#### Decision

The motion to compel is **GRANTED**. FKTC shall produce its audited financial statements for 2005-2008, within thirty days of the date of this order.

This decision is issued under seal. On or before February 15, 2018, the parties shall provide any redactions to the decision or advise the Board that no redactions are necessary before the decision is made publicly available.

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MARIAN E. SULLIVAN  
Board Judge