ALLIED RECLAIMING SERVICES,	)	**AGBCA Nos. 99-140-1**
	)	**99-153-1**
Appellant	)	**2000-129-1**
	)	
Representing the Appellant:	)	
	)	
Phil Patterson	)	
Allied Reclaiming Services	)	
404 North Main Street	)	
Butler, Missouri 64730	)	
	)	
Representing the Government:	)	
	)	
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RULING ON GOVERNMENT'S MOTION TO COMPEL DISCOVERY

July 19, 2000

Before WESTBROOK, Administrative Judge.

Opinion for the Board by Administrative Judge Westbrook.

These appeals arise out of Contract No. 50-6424-8-009 for the construction of five earthfill flood water retarding dams in the Troublesome Creek Watershed, Lewis County, Missouri, awarded by the Natural Resources Conservation Service (NRCS) to Appellant February 26, 1998. AGBCA No. 99-140-1 is the docket number for the appeal of the Contracting Officer's (CO's) decision denying Appellant's claims 1-6. AGBCA No. 99-153-1 is the appeal of the CO's decision terminating for default Appellant's right to proceed under the contract. AGBCA No. 2000-129-1 is the appeal of the CO's decision denying Appellant's claims 7-9.

The Board has before it the Government's Motion to Compel Discovery.

FINDINGS OF FACT

The Discovery Requests and Appellant's Discovery Responses

1. The Government served both its First Request for Production of Documents (Exhibit (Ex.) A.) and its First Interrogatories (Ex. C.) on Appellant April 20, 2000.

2. Document Request No. 2 sought all documents, correspondence, memoranda, agreements, and any other materials which set out the salaries or wages paid, including certified payrolls, of or produced by the Appellant. Request No. 3 asked for copies of all financial statements, including corporate or individual state or Federal tax returns of Appellant showing its assets, gross income, net income, liabilities and net worth prepared for the years from January 1985 to the present. Request No. 9 was to obtain all pleadings and discovery, including depositions, transcripts, filed by all parties in every action which involved any allegation regarding construction work performed by Appellant or Phil Patterson. Request No. 10 sought copies of all subcontract agreements for this construction contract. (Ex. A.)

3. Appellant objected to producing the documents requested in Request No. 2 on the grounds that the request did not describe the items requested with sufficient particularity to enable Appellant to determine what was sought. Appellant objected to the production of the financial documents requested in No. 3 as irrelevant and privileged. Appellant's objection to producing the pleadings and other records of construction related litigation was on the grounds of irrelevance and attorney-client privilege. Appellant objected to producing subcontracts on the grounds that the Government already possessed the information sought. (Ex. B.)

4. Interrogatory No. 7 asked that Appellant identify other earthen embankments Appellant had constructed by location, date and entity for which they were built. As a follow up, Interrogatory No. 8, in the event that the response to No. 7 included structures built for the U. S. Department of Agriculture (USDA), asked Appellant to identify the Contracting Officer, construction inspector, government representative and/or technical representative of the contracting party. Interrogatory No. 13 asked what equipment Appellant had represented as being available for this contract at inception of the work. Interrogatory No. 14 asked Appellant to identify the equipment on site for performance of the work under this contract by days the equipment was on site as well as make, model and serial number. Interrogatory No. 15 inquired whether Appellant or Phil Patterson had ever been a party to a civil lawsuit or arbitration and if so, sought additional information related thereto. Interrogatory No. 16 asked Appellant to identify all businesses or companies owned by Phil Patterson within the last 20 years including the dates and percentages of ownership. Interrogatory No. 17 asked the compensation paid to all workers, whether employees, subcontractors or family members of Phil Patterson on this contract. Interrogatory No. 19 asked whether all equipment on site for the contract was owned by Appellant; if not, Appellant was asked to identify the arrangement whereby the equipment was leased. If leased, Appellant was asked to include all supporting documentation evidencing cost and lease terms. Interrogatory No. 20 sought a listing of each and every occupation

of Phil Patterson or his spouse from 1990 to the present, identifying for whom they worked, if applicable and the time periods for each occupation. (Ex. C.)

5. Appellant's answer to Interrogatory No. 7 was that it had constructed earthen embankment dams in New York, Florida, Illinois, and Missouri, dating back to 1973. Appellant further stated that records on specific dates no longer existed and that the entities for whom they were built were both private and conservation department projects. Appellant was to answer Interrogatory No. 8, only if the answer to No. 7 included structures built for USDA. The answer to No. 8 stated merely that as many of these structures were built in the 1970s and 1980s, records "have long been destroyed," begging the question of whether any dams were built for USDA. It also provides no response for any earthen dams which might have been built in the 1990s. (Ex. D.)

6. Appellant's response to Interrogatory Nos. 13 and 14 was that the Government was already in possession of that information and that it was included in the Government's Appeal File. Appellant objected to Interrogatory Nos. 15 and 16 on grounds of relevancy. Appellant objected to Interrogatory No. 17 on the grounds that it did not describe the items requested with sufficient particularity to allow Appellant to determine what was being sought. Appellant responded to Interrogatory No. 19 that the rollers used on the contract were not owned by Appellant; one was loaned and the other rented. Appellant did not provide the requested documentation. Appellant's reply to Interrogatory No. 20 is that Phil Patterson has been self-employed in the construction business since 1990. Appellant objected to the remainder of Interrogatory No. 20 on the grounds of lack of relevancy. (Ex. D.)

The Motion to Compel Discovery

7. The Government has filed a Motion to Compel Discovery as to both Appellant's objections to production of documents and Appellant's failures and refusals to answer interrogatories. The Government argues that documents requested contain relevant and material evidence, the production of which is necessary for the Government to prepare for hearing. The Government contends that the interrogatory answers would produce relevant and material evidence and that compelling the answers is necessary for the Government's preparation for hearing. The Motion itself sought no more than the requested discovery responses. However, in the May 30, 2000 transmittal accompanying the Motion, the Government argued that Appellant had abused the judicial process and wasted the resources of the parties and the Board. Therein, the Government urged the Board to consider a dismissal with prejudice.

Appellant's Responses to the Motion

8. Appellant has responded to the Government's Motion. Appellant addresses certain document requests and interrogatories together. These findings track Appellant's response in that manner. As to document Request No. 10 and Interrogatory Nos. 13 and 14 concerning subcontracts and equipment rental or ownership, Appellant states that these are requests for material provided to the Government at the start of the contract. Appellant also contends that the requested documents have

been included in the Appeal File. In addition, Appellant states the following: "the government as well as the Appellant will both be allowed to question and cross this evidence if or when it is presented at the hearing." (Appellant's Response to Government Motion to Compel Discovery (Response).)

9. Regarding Interrogatory Nos. 7 and 8, Appellant responds that it has no records that would have allowed a different response and that the response previously provided was based on Appellant's memory. As to document production Request No. 2 and Interrogatory No. 17, concerning labor costs on the contract, Appellant responds that it will be willing to produce the information only to the extent that it concerns this contract. However, Appellant goes on to object to compensation paid to family members "as it is included in a pre-arranged agreement between family members that is set out in my personal will which is indeed protected by attorney-client privilege." (Response.)

10. Appellant provides a combined response for document Request No. 3 related to financial records and Interrogatory Nos. 16 (seeking identification of companies owned wholly or in part by Phil Patterson) and 20 (seeking occupations of Phil Patterson and his spouse since 1990). Appellant relies on the definition of relevant evidence in Federal Rule of Evidence 401; Missouri law of quantum meruit; and his own past use of rental rates provided by local suppliers in the area where work took place. Appellant contends that its claims are based on the reasonable value of services provided, asserting that the Government's request for its financial statements, tax returns, gross and net income liabilities and net worth from 1985 are irrelevant. In addition, while Appellant argues that other affiliations are irrelevant, Appellant also provides the information that in the last 20 years he has been involved in three businesses (1) Patterson Contracting 100 percent ownership; (2) Sassy Racing 33-1/3 percent ownership and (3) Allied Reclaiming Services which he identifies as "family owned equally." Appellant does not identify the co-owners nor does he state how many family members own a share. Appellant argues that he answered Interrogatory No. 20, relying on the use of the word "or" as offering it a choice as to whether to provide an answer regarding Patterson or his spouse.[1]

11. Regarding document Request No. 9, Appellant stated in the Response that "no action against ARS or Phil Patterson regarding construction work has ever been filed." Appellant provided an answer to Interrogatory No. 15. In response to Interrogatory No. 19, Appellant stated that it has no documentation as to lease terms for any equipment that was rented.

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[1] This Response was written after the Board's June 1 telephonic conference with the parties in which discovery disputes; the fact that the Government had filed a Motion to Compel Discovery; and, the fact that Appellant had refused to accept a Federal Express delivery from the Government were discussed at length. During that conference, the Board emphasized that it expected the parties to deal with each other courteously and cooperatively in all aspects of the litigation, including discovery. Appellant was also reminded that it had the burden to prove its actual costs and that it would not be permitted to place into evidence financial records which it had refused to produce to the Government in discovery.

Government's Reply to Appellant's Response

12. The Government responded to Appellant's response in a letter dated June 16, 2000, addressing Appellant's continued refusal to provide financial data; information concerning equipment represented as available pre-award and equipment actually; and information concerning Appellant's experience in the construction of earthen embankments. The Government argues that the parties to date have disputed equipment availability and usage. The purpose of the interrogatory was to narrow the areas of dispute. The Government also differs with Appellant's contention that the hearing is the place to make that determination. According to the Government, Appellant's principal has placed in issue its own experience by his job-site comments comparing his expertise with that of Government personnel. Finally, the Government argues that Appellant's continued refusal to provide financial information other than equipment rates entitles the Government to dismissal with prejudice.

13. Rule 14, Discovery-Depositions, of the Rules of Procedure of the Agriculture Board of Contract Appeals, 7 C.F.R. § 24.21, states a general policy of encouraging the parties to an appeal to engage in voluntary discovery procedures. Rule 15, Interrogatories to Parties, Admission of Fact, and Production and Inspection of Documents, allows service of written interrogatories and requests for production, inspection and copying of documents. Rule 15 specifically makes discovery requests thereunder subject to the general policy of Rule 14(a) and to Rule 33 with respect to sanctions. Rule 33, Sanctions, allows the Board to make such orders as it considers necessary to the just and expeditious conduct of an appeal where any party fails or refuses to obey an order issued by the Board.

14. The Board conducted a telephonic conference with the parties on June 1, 2000. The Appellant was represented by Mr. Phil Patterson and the Government by Ms. Jane P. Cornwell. The purpose of the call was to discuss the discovery dispute which had culminated in the Government's Motion to Dismiss. Also a topic of discussion was the fact that the transmittal of the Government's pre-trial submission had been refused at Appellant's office address. There was a discussion of the lack of response to interrogatories requesting financial data. The Board explained that Appellant has the burden of proving the amount of money, if any, to which it was entitled and that the financial data offered to prove costs would not be admitted unless provided to the Government in discovery. The parties were directed to deal with each other cooperatively and courteously in discovery. The Government stated that witness lists submitted by Appellant had not included addresses, telephone numbers and summaries of expected testimony. Appellant was directed to provide that information.

DISCUSSION

The discovery requests at issue here fall into three general categories: (1) financial data; (2) information regarding Appellant's past experience building earthen embankments; and, (3) subcontract agreements. Appellant's responses have generally been that no one remembers the answers, or it has no documents. In some cases, Appellant has objected based on privilege; a claim that the information was in the Government's possession; or lack of relevancy, or privilege.

The very purpose of the discovery process in which the parties are now engaged is to facilitate an exchange of the evidence each party may place in the record to allow each to defend against the contentions of the other. One possible sanction against discovery abuse is to prohibit the recalcitrant party from placing in the record any evidence on the subject of that which was withheld. To prevail on its claims, Appellant must prove by contemporaneous records to some degree of certainty, even if some imprecision is allowed, the amount of damage it suffered. Such proof will be difficult, if not impossible, without use of its own financial records. If they are not provided to the Government in discovery, Appellant runs a very great risk of not being allowed to place any proof of costs whatsoever in the record. Without proof of quantum, certain of its claims may well be doomed. This risk was explained in the June 1, 2000 conference.

Rule 14(a) provides general policy for all discovery, stating that the parties are encouraged to engage in voluntary discovery procedures (Finding of Fact (FF) 13). This policy was reiterated to the parties in the Board's June 1, 2000 telephonic conference (FF 14). Rule 15 governs discovery in the form of interrogatories and requests for production of documents. Rule 15 provides that any discovery engaged in thereunder is subject to both Rule 14(a) and to Rule 33 allowing for sanctions in cases where any party fails or refuses to obey a Board order. (FF 13.)

This Board generally construes liberally the requirement for relevancy in discovery as embodied in Federal Rule of Civil Procedure 26(b), i.e., that it need not be admissible if the information sought is reasonably calculated to lead to the discovery of admissible evidence. Tranco Industries, Inc., AGBCA No. 77-151, 78-2 BCA ¶ 13,498. Appellant has objected to the following discovery requests or interrogatories as lacking relevancy: (1) request for production No. 3 seeking financial statements, tax returns and other financial data from 1985 to the present; (2) Interrogatory No. 15 asking about civil lawsuits or arbitrations; (3) Interrogatory No. 16 asking the identity of other businesses or companies owned by Phil Patterson in the past 20 years; and, (4) Interrogatory No. 20 seeking a listing of each and every occupation of Phil Patterson or his spouse between the years 1990 through the present along with identity of employer and time periods. (FF 3, 6, 10.) Appellant's financial records for the years 1998-2000 are relevant to this appeal. It is possible that financial records for preceding years may lead to the discovery of admissible evidence. The Board finds it less likely that financial records for the entire 15-year period from 1985 forward will lead to the discovery of admissible evidence. As the contract was awarded in early 1998, the Board finds that financial data for the preceding year 1997 may also lead to the discovery of admissible evidence and are thus discoverable. Appellant is to provide the requested financial records for the years 1997 through 1999.

The remaining discovery requests objected to on relevancy grounds pertain to the construction experience and expertise of Appellant's principal, Phil Patterson and his spouse, a co-owner of, or partner in, the business. As Appellant has placed its expertise in the area of earthen embankment construction at issue, these documents and interrogatory answers may lead to admissible evidence on that question. Appellant is to answer Interrogatory Nos. 15, 16 and 20 and provide the documents, if any, requested in Request No. 9.

Regarding Interrogatory No. 20 which asked for a listing of the occupations of Phil Patterson or his spouse from 1990 to the present, Appellant's Response to the Motion to Compel Discovery asserts that the interrogatory was answered just as written, i.e., Appellant provided that information for one of the two, Phil Patterson or his spouse. Appellant is correct that in a very technical use of semantics, the question as phrased may be read to have offered alternative questions. Appellant's response indicates an understanding that the question addressed the occupations of both individuals. Nonetheless, Appellant chose to read the interrogatory in a strained and legalistic manner to avoid providing a full answer. Discovery is not to be used in such a manner that a lawsuit becomes more of a battle for deception and surprise than a search for truth. Hickman v. Taylor, 329 U.S. 495 (1946). Assuming that Phil Patterson's spouse is an active part of the company, or that she has been held out to be, the interrogatory should be answered for her as well. If she is not a partner, officer, or employee of the company, her occupations are not relevant.

Appellant objected to Request for Production No. 2 (seeking copies of all financial statements, including corporate or individual state and Federal income tax returns, of Appellant showing its assets, gross income, net income, liabilities and net worth prepared for the years 1985 to the present) on the grounds that it failed to specify with sufficient particularity the documents sought (FF 3). Interrogatory No. 17 asked for the compensation paid to all workers employed on the contract whether employees, subcontractors or family members of Phil Patterson.

Appellant later agreed to furnish the information sought in Request No. 2 and Interrogatory No. 17, except as relating to family members, basing its objection on a prearranged agreement set out in "my personal will" claimed to be protected by the attorney-client privilege. Appellant provides no authority for its contention that it is not required to produce in discovery payroll records for family members. The answer to Interrogatory No. 3 states that Appellant is not incorporated. The answer to Interrogatory No. 4 states that Appellant is equally owned by Phil Patterson, Cecelia Patterson, Ryan Patterson, James Brown, and Tammie Brown. If not a corporation or a sole proprietorship, Appellant is presumably a partnership. Thus, it is unclear what relevance one individual's personal will would have to any more than one equal share of the partnership. It is clear that a will, a document affecting future rights only, would have no relevance to the compensation paid under a 1998 contract. Further, Appellant has cited no authority in support of its contention that the contents of a will are protected by the attorney-client privilege. The Board is aware of none. There has been no request to produce a will. The Board does not here rule that a will is discoverable in a contract action. The Board rules that payroll information is not protected on the grounds that it is mentioned in a will. There has been a discovery request for payroll and other labor cost evidence. As stated above, financial data of a contractor seeking an equitable adjustment of claims under its contract are relevant. Appellant is to produce the documents requested in document Request No. 2 and to answer Interrogatory No. 17. Pertinent income tax returns would be those of the partnership and the partners.

Moreover, from a purely practical standpoint and as pointed out in the Board's June 1 telephonic conference with the parties, it is in Appellant's best interest to provide the financial data requested

to the Government. The burden of proof is on an Appellant to sustain his claim for extra costs. Eagle Paving, AGBCA No. 75-156, 78-1 BCA ¶ 13,107; Joe Stewart Construction Co., AGBCA No. 352, 76-1 BCA ¶ 11,673. A contractor must provide evidence to support a recovery in the amounts claimed. Allegations without more do not constitute proof. Claims may be denied where the quantum portion is unsubstantiated. Dore & Associates Contracting, Inc., AGBCA No. 92-236-1, 95-1 BCA ¶ 27,517. What the Government now seeks in discovery are the records from among which Appellant will have to collect its proof of quantum if it is to prove the amount of the equitable adjustment which it claims.

Even if an appellant does not contemplate offering any portion of its financial records into evidence to support its monetary claim, the material is nevertheless discoverable, 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 financial records into evidence and without regard to whether they will be admissible if offered. The right of a litigant to have financial records examined by a person possessing the special skills which may be required to properly examine and interpret those records, namely a auditor. Aerospatiale Helicopter Corp., DOT BCA Nos. 1905, et al., 89-1 BCA ¶ 21,559.

Appellant has objected to providing copies of all subcontracts as requested in Request No. 10 on the grounds that the Government has copies of them. The Government, on the other hand, has not conceded that it possesses the subcontracts. Whether it does or not is not controlling. The fact that information is in the possession of a party does not bar it from seeking it in discovery. A purpose of discovery is to narrow issues for trial. Full and open discovery tends to eliminate issues where discovery proves there are no differences and to illuminate remaining differences. See generally Tranco Industries, 78-2 BCA ¶ 13,498 at 66,064-65. Appellant is to provide the requested copies of subcontracts.

Interrogatory No. 7 asked Appellant to identify other earthen embankments constructed by location, date or construction and entity for which built. Interrogatory No. 8 sought the identity of the Government representatives on any contract where Appellant built such structures for the USDA. Appellant provided a general response that it had constructed such dams in several named states dating back to 1973. No owners were specifically identified and Appellant states that no records exist. (FF 5.) If there are no records and if no employee of Appellant has any recollection beyond that contained in the answer, it seems unlikely that Appellant will be able to provide additional testimony as to its experience in building earthen embankment dams.

Interrogatory Nos. 13 and 14 relate to equipment represented as being available for use on the project and equipment actually on site identified as to make, model and serial number. Appellant has objected to answering these interrogatories on the ground that the Government is in possession of the information requested (FF 6). It is immaterial whether matters sought in discovery are as much within the knowledge of the party initiating discovery as within that of the adverse party. If the party to whom the interrogatory has the information or it is available to him, he must answer the interrogatory. Tranco Industries, 78-2 BCA ¶ 13,498 at 66,066.

In its transmittal, although not in the Motion, the Government has asked the Board to consider the sanction of dismissal with prejudice. Board Rule 33 provides authority for the imposition of sanction for failure to obey a Board order (FF 13). This and other Boards have held that before sanctions are imposed, an order should be issued compelling the responses to interrogatories or other discovery requests. Alisa Corp., AGBCA No. 84-193-1, 86-3 BCA ¶ 19,139; Able Contracting Co., ASBCA No. 27411, 85-2 BCA ¶ 18,017; Murray Walter, Inc., VABCA No. 1848, 85-3 BCA ¶ 18,017. This Board has held that the decision to dismiss for failure to comply with an order is within its discretion. In James R. Sloss, AGBCA No. 434, 79-2 BCA ¶ 13,893, the Board said, in pertinent part:

> The cavalier fashion in which he responded to the interrogatories would indicate at best an attitude of indifference as to the significance and dignity of these proceedings.... [T]he responses were evasive and totally inadequate.

Dismissal at this time is inappropriate. However, should Appellant fail to comply with this ruling, dismissal of the claims for equitable adjustment is an available sanction. Another possible sanction would be the refusal to admit into evidence at the hearing any evidence here ordered to be provided to the requesting party and not subsequently provided.

RULING

Appellant is ordered to respond to Request Nos. 2, 3, 9, and 10 and Interrogatory Nos. 7, 8, 13, 14, 15, 16, 17, 19, and 20 as explained above. Failure to respond, in whole or in part, may result in the imposition of sanctions.

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ANNE W. WESTBROOK
Administrative Judge

Issued at Washington, D.C.
July 19, 2000