ARMED SERVICES BOARD OF CONTRACT APPEALS

Appeals of --	)	
	)	
CANVS Corporation	)	ASBCA Nos. 57784, 57987
	)	
Under Contract No. USZA22-03-C-0027	)	

APPEARANCE FOR THE APPELLANT: Joseph J. Zito, Esq.
DNL ZITO
Washington, DC

APPEARANCES FOR THE GOVERNMENT: Jeffrey P. Hildebrant, Esq.
Air Force Deputy Chief Trial Attorney
Chun-I Chiang, Esq.
Joel B. Lofgren, Esq.
Trial Attorneys

OPINION BY ADMINISTRATIVE JUDGE PEACOCK
ON APPELLANT'S MOTION TO RECUSE

Appellant has filed a "request" (hereinafter motion) for Administrative Judge Robert Peacock, the presiding judge assigned to these appeals, to recuse himself from further proceedings regarding these appeals. Appellant alleges that the Board has "prematurely judged" quantum as evidenced by statements made in post-trial *ex parte* settlement discussions, conducted with the parties with their permission to promote and encourage settlement. The government opposes the motion. We deny the motion. Appellant's allegations are unsupported and baseless. The scope of the trial encompassed solely entitlement and jurisdictional issues. The Board has not received any quantum evidence and perforce has formed no opinions on the details of appellant's quantum methodology. The so-called "quantum" discussions with appellant were generalized and focused broadly on the need for appellant to greatly reduce its $100 million claim demand for settlement purposes. Appellant also alleges that it was appellant's "understanding" that the Board gave the government "legal advice" regarding instigation of a fraud investigation related to appellant's claim computation during the Board's *ex parte* discussions with the government. The basis for this "understanding" is not indicated and also is unsupported by affidavit or other sworn statement. The government opposes the motion and has categorically denied that fraud was ever mentioned or discussed at any time between the Board and the four government representatives who participated in the settlement discussions with the Board. The charges lack any rational foundation. An intervening Air Force Office of Special Investigations investigation is based on an "in court" statement that has no relationship to appellant's quantification of its claim.

Background and Procedural Summary

Appellant's accusations that the Board has prematurely judged the case should be placed in the context of the posture of the case when the *ex parte* discussions with the parties occurred (and with their permission). Appellant's allegations regarding recusal were made in June 2016. The principal appeal (ASBCA No. 57784) was docketed in September 2011. In February 2012, the second appeal (ASBCA No. 57987) was docketed. Appellant sought $100 million in damages for alleged improper disclosure of its allegedly proprietary data.

The judge who initially was assigned the appeals retired and, on 18 December 2012, the appeals were reassigned to Judge Peacock. In a pre-trial order dated 28 January 2013, the appeals were scheduled for trial on entitlement only, commencing 20 November 2013. Quantum issues were bifurcated for possible future proceedings in the event that the Board sustained the appeal with respect to entitlement and further assuming that decision was upheld on any appeal.

However, on 20 August 2013, the government filed a "Motion for Summary Judgment for Lack of Jurisdiction." On 20 September 2013, appellant filed Appellant CANVS Corporation's Memorandum of Law in Opposition to Respondent's Motion for Summary Judgment and a Motion to Compel Discovery or in the Alternative, Motion to Extend the Discovery Schedule and the Hearing Date (app. opp'n). On 23 October 2013, the government filed an opposition to Appellant's Motion to Compel discovery (resp. opp'n) seeking a protective order.

On 25 October 2013, Judge Peacock convened a teleconference with parties and issued the following determinations and orders:

> 1. The Board will reserve its rulings on "Respondent's Motion for Summary Judgment for Lack of Jurisdiction" and conduct a hearing on issues related to the Board's jurisdiction, as well as entitlement to recover.
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> 2. Appellant will be afforded the opportunity to review [resp. opp'n], dated 23 October 2013. Appellant shall file its response to the Resp.'s Opposition no later than 20 November 2013. In addition, no later than 20 November 2013, the government will file its response to [app. opp'n] dated 23 October 2013.
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> 3. The scope of discovery was limited to issues relating solely to jurisdiction and entitlement. Because quantum issues related to damages for alleged breaches of

> appellant's intellectual property rights will not be addressed or decided pending the Board's decision on jurisdiction and entitlement, discovery relating to quantum issues will be deferred for later resolution if jurisdiction and entitlement are established. Accordingly, appellant's review of the Resp.'s Opposition and the government's review of appellant's Memorandum of Law in Opposition shall consider the delimited scope of discovery in their analyses.
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> 4. The hearing scheduled to commence on 20 November 2013 was postponed. The parties will confer and propose revised date[s] for the completion of discovery and accomplishment of the pre-trial activities set forth in the Board's PRETRIAL ORDER of 28 January 2013. In addition, the parties shall provide the Board with a separate schedule detailing the dates for accomplishment of any further discovery.
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> With respect to discovery generally, the parties were encouraged to cooperate voluntarily in assessing and defining the scope of discovery and the parties' respective responsibilities related to appellant's electronic databases.

Following completion of discovery, the Board issued a revised pre-trial order on 16 September 2014, setting, *inter alia,* a new hearing date commencing 7 April 2015 addressing solely jurisdictional issues and entitlement, not quantum. The hearing was scheduled to be conducted over four days based on the parties' estimates and preferences. The allotted four days proved insufficient for completion of the hearing. The Board and the parties agreed to continue the hearing and it was scheduled to recommence over a five-day period beginning 4 May 2015. As a consequence of various issues that arose during the second hearing session, it was deemed necessary to further continue the hearing an additional two days over the period 17-18 November 2015. The evidentiary record was eventually closed in the appeals on 18 November 2015, the final day of trial, awaiting solely the parties' post-trial briefing of the appeals.

Following conclusion of the hearing and closing of the record, Judge Peacock concluded, based on his initial very tentative reactions to the voluminous record, that there were litigation risks and uncertainties for both parties and, consequently, urged them to consider settlement. To promote and facilitate possible settlement negotiations, Judge Peacock requested the parties' permission to engage in *ex parte* discussions separately with each party. Both parties gave their consent for the Board to engage in those discussions. Accordingly, the Board indicated it would not set a briefing schedule at that time and encouraged the parties to devote their resources to settlement negotiations.

Eventually, two *ex parte* settlement conferences were convened by Judge Peacock with each party. The first of these conferences occurred following the hearing in November 2015 and the second conference occurred in mid-June 2016. The initial conference with appellant was conducted after conclusion of and on the final day of the hearing and the initial teleconference with the government was conducted on 24 November 2016.

The Board prefaced its discussions with the parties by emphasizing that, given the extensive record as well as the complexities inherent in the case, any discussions would necessarily be generalized based only on some of the Board's initial, very tentative reactions to the case. The Board informed both parties that neither had a "sure winner" and that this uncertainty alone warranted a careful reassessment of their litigations risks. The parties were further advised that all final Board determinations manifestly must await detailed factual analyses and full consideration of the record and merits of the parties' positions by a panel of three (as a minimum) judges, not solely Judge Peacock.

An initial period of communications between the parties failed to result in settlement. On 17 January 2016, appellant transmitted a letter to the Board expressing frustration with the pace of negotiations and requested that the Board order the government "to engage in good faith settlement discussions." On 20 January 2016, the government responded that it was "not adverse to resolving" the dispute via settlement but considered that "the monetary offer advanced by Appellant was inordinately high when compared to Respondent's own assessment" and further that the government could not meet certain unidentified "nonmonetary requests" by appellant "due to statutory and regulatory limitations."

Given the lack of progress toward a settlement, Judge Peacock, on 19 January 2016 issued a briefing order requiring the exchange of simultaneous initial and reply briefs. The initial briefs were to be filed on 31 March 2016 and reply briefs were due on 30 June 2016. After granting of a one-week extension, the initial briefs were filed on 7 April 2016. As a result of filings related to the recusal request that is the subject of this decision, the filing date for reply briefs was eventually extended indefinitely.

A second round of agreed *ex parte* discussions was initiated by Judge Peacock essentially at appellant's urging based on its expressions of its dissatisfaction with the perceived lack of any substantive negotiations with the government and its burdensome and growing litigation expenses. Following filing of the initial briefs, Judge Peacock determined in early June 2016 that he would attempt to reestablish communication between the parties to encourage further settlement discussions based on the possibility that the parties may have reassessed their litigation risks as they were preparing their reply briefs and were more fully apprised of the strength of the opposing parties' positions on key factual and legal issues. To that end, Judge Peacock on 9 June 2016 convened a teleconference with both parties and again obtained their consent for Judge Peacock to conduct *ex parte* discussions with each party again to explore generally their litigation risks and promote settlement.

The second *ex parte* discussion with CANVS occurred immediately following the joint teleconference with both parties on 9 June 2016. During that *ex parte* conference with appellant the only "fraud-related" comment made by Judge Peacock to appellant was in the context of possible actual *quantum phase* proceedings potentially *several years into the future*. The Board merely observed that if no settlement was timely reached and, *assuming arguendo, that the Board found that it had jurisdiction and sustained the appeals on entitlement, and further assuming that the Board's decision was upheld on appeal,* that there would *at that time* be concentrated and particularized focus on the details of appellant's $100 million quantum methodology. Special care should be made to ensure that the claim was not exaggerated or inflated. *See Daewoo Engineering and Construction Co. v. United States*, 557 F.3d 1332 (Fed. Cir. 2009). The Board noted generally and without regard to the specifics of appellant's claim that during this entire "pre-quantum" period and throughout any future quantum phase proceedings, fraud investigations conceivably might preclude the contracting officer from engaging in settlement discussions whether ultimately warranted and justified or not. Judge Peacock also noted generally that, in the Board's own experience, the intervention of fraud investigations can preclude consummation of settlements. Judge Peacock encouraged appellant to move forward with the current negotiations and expressed his opinion that the government might favorably respond to substantially reduced offers to settle.

After arranging a mutually agreeable date and time that fit the Board's schedule and that of the two government trial counsel, the contracting officer, and his command legal representative, the Board conducted its second *ex parte* teleconference with the four government representatives on 16 June 2016. The Board reiterated and reemphasized many of the points made in the initial November 2015 conference with the government and encouraged the government to "put an offer on the table."

On 21 June 2016, appellant's counsel transmitted a letter to the Board that stated in pertinent part as follows:

> Subsequent to the telephone conference between the parties on June 9, 2016, counsel for CANVS again reached out three times to counsel for The Government to engage in discussions to resolve the above matter. Counsel for the Government stated that they would not discuss resolution due to a "hick-up" [sic] internal to the Government.
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> Counsel for the Government would provide no details as to the nature of the "[hiccup]" the duration of the "[hiccup]" nor to explain why the "[hiccup]" is preventing discussions at this time.

> As the Board has been made aware in letters from undersigned counsel, CANVS reached out to the Government beginning in November of 2015, following the final day of hearings and offered to resolve this matter for a small fraction of its actual value. CANVS state[d] in writing that CANVS was willing to be extremely flexible in its position. CANVS has attempted in good faith for six months to engage The Government in discussions with no response.
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> To date, the Government has flatly refused to engage in any discussions whatsoever, has refused to make any offer of settlement has refused to respond to CANVS's written offer and is now continuing to refuse discussions, directly contrary to the Government's representations to the Board on several occasions.
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> Counsel for CANVS demands to know the full details of the "[hiccup]" referenced by counsel for The Government.

Government counsel responded by letter to the Board of the same date in pertinent part as follows:

> Relative to counsel for Appellant's letter to the Board, dated 21 June 2016, Respondent wishes to inform the Board, as we had so informed counsel during our telephone conversation of 20 June 2016, that the Government is presently unable to participate in any discussion directed to a resolution of this matter due to a pending AFOSI (Air Force Office of Special Investigations) investigation. See 41 U.S.C. § 7103(c). The undersigned specifically informed counsel about the existence of this AFOSI investigation after the initial comment regarding a "hiccup" in this attempt to resolve this appeal. The undersigned is only authorized to disclose the existence of this AFOSI investigation.

At no time after either *ex parte* conference with appellant or prior to 27 June 2016 did appellant allege that Judge Peacock had prejudged the merits of the appeals in any way.

Sometime between the government's 21 June 2016 letter and 27 June 2016, appellant allegedly reached an "understanding" as to what transpired during Judge Peacock's second *ex parte* teleconference with the government. At no time prior to 27 June 2016 had appellant voiced any concerns about Judge Peacock's impartiality or

"pre-Judgement" of issues in dispute whether during the trial or during the approximately five-year pre-trial processing of the appeals.

On 27 June 2016 after receiving notice of the AFOSI investigation, appellant's counsel filed a three-page "ex parte communication" with the Board containing the instant "request" that Judge Peacock "recuse himself from this matter," based on Judge Peacock's alleged "pre-judgment of the damages aspect of this matter." The letter also asserted that it was appellant's "understanding that, during [the 16 June 2016 *ex parte* conference with the government], your honor suggested that the U.S. Air Force open a fraud investigation against CANVS." In addition, appellant asserted, "Further, Your Honor has provided ex parte legal advice to The Government's counsel as to strategic legal decisions in advising or suggesting that the Air Force to open a fraud investigation against CANVS Corporation. Your Honor's participation as an advocate for The Government in these proceedings also independently warrants your recusal." Although the letter was written as an "ex parte communication" appellant stated "you are free to share it with counsel for The Government."

The Board forwarded the letter/motion to government counsel under cover of letter dated 28 June 2016 requesting a response by 28 July 2016. On the latter date, the government responded in pertinent part as follows:

> During the Board's 9 June 2016 telephonic conversation with the undersigned, co-counsel..., USSOCOM contracting officer..., and USSOCOM counsel..., there was no discussion regarding any fraud investigation concerning CANVS. The Board did not suggest the opening of such a fraud investigation, and the Government did not refer to any fraud investigation. During the Board's previous telephonic conversation with the same four Government representatives on 24 November 2015, there was no discussion regarding any fraud investigation concerning CANVS. Further, the four Government employees had no other contacts with the Board during which discussions took place regarding any fraud investigations concerning CANVS.
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> As for counsel's statement in the first paragraph of Page 3 that "Your Honor has provided ex parte legal advice to the Government's counsel as to strategic legal decisions in advising or suggesting that the Air Force to open [sic] a fraud investigation against CANVS Corporation," it is also incorrect. As stated above, the Board provided no legal advice to the four Government representatives during the telephonic conversation of 16 June 2016, and, in particular,

> provided no legal advice concerning any fraud investigation against CANVS. During the Board's previous telephonic conversation with the same four Government representatives on 24 November 2015, there was no discussion regarding any fraud investigation concerning CANVS. Further, the four Government employees had no other contacts with the Board during which discussions took place regarding any fraud investigations concerning CANVS.
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> As indicated in counsel for Respondent's letter to the Board, dated 21 June 2016, the Government currently is unable to participate in any discussion directed to a resolution of this matter due to a pending AFOSI investigation. That investigation was prompted by in-court testimony. That investigation is not directed towards Appellant's initial damages assessment asserted in Paragraph 44 of its Complaint or the calculation of damages set forth in Appellant's letter to USSOCOM contracting officer dated 25 July 2011. (R4, tab 14).
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> ....
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> Irrespective of the assertions set forth in counsel for Appellant's 27 June 2016 letter, Respondent holds the strong view that Appellant has presented no evidence to support recusal. More importantly, recusal predicated upon Appellant's baseless accusations would be detrimental to Respondent whether it results in a re-trial or encumbering other Board members to review the record without the benefit of any in-court assessment of witness credibility.

There is no further evidence regarding the AFOSI investigation including when it was initiated. There is also no evidence as to whether the "in court" testimony which is the focus of the AFOSI investigation was given during the instant Board proceeding or a court proceeding where CANVS may currently have, or had, litigation pending. However, there is no known, relevant AFOSI investigation to date that is focused on appellant's calculation, quantification, and certification of the amount claimed in these appeals.

On 29 July 2009, appellant requested, *inter alia,* that the Board direct "full disclosure" by the government of the details of the AFOSI investigation, without addressing the government's categorical denial of appellant's allegations and "understanding" of what transpired during Judge Peacock's *ex parte* discussions with the government.

On 3 August 2016, the Board requested that appellant provide its response to the government's letter of 28 July 2008 as relevant to recusal and/or advise of any withdrawal of its recusal request. The response was to be submitted by 11 August 2016. By letter of 11 August 2016, CANVS indicated that it declined to withdraw its request.

DECISION

Appellant has cited no statutory provisions, cases or other legal guidelines, standards or authorities for recusal in its three-page motion in support of its request. The Board has previously looked to standards, *inter alia,* established in 28 U.S.C. § 455(a) for guidance where a party seeks disqualification of the presiding administrative judge. Section 455(a) provides that "[a]ny justice, judge or magistrate judge of the United States shall disqualify himself in any proceeding in which his impartiality might reasonably be questioned." While strictly speaking the statute is inapplicable to administrative judges appointed pursuant to the Contract Disputes Act (CDA), 41 U.S.C. §§ 7101-7109, the Board has case law interpreting that provision to be useful guidance in deciding recusal motions in analogous circumstances. *See, e.g., Johnson & Son Erector Co.*, ASBCA No. 23689, 86-2 BCA ¶ 18,931 at 95,590; *AEI Pacific, Inc.*, ASBCA No. 53806, 04-2 BCA ¶ 32,635 at 161,483; *see also Liteky v. United States*, 510 U.S. 540, 555-56 (1994); *Corners and Edges, Inc.*, ASBCA No. 55611 *et al.,* 10-1 BCA ¶ 34,326 at 169,530; *Environmental Safety Consultants, Inc.*, ASBCA No. 58343, 14-1 BCA ¶ 35,737. Here, however, extensive analysis of the case law is not warranted. The motion is baseless, unsupported by any persuasive evidence, and is without merit. The alleged bases and lack of evidentiary support for recusal offered by appellant wholly fail to reasonably bring into question Judge Peacock's impartiality.

Appellant's motion is based on Judge Peacock's alleged "prematurely formed" opinions regarding the quantum of appellant's claim. It is founded almost exclusively on appellant's alleged, but wholly unsubstantiated, "understanding" that fraud related to the quantum of appellant's claim was discussed with the government during pre-approved, *ex parte* discussions* expressly authorized by each party to promote settlement. Appellant's allegations lack any foundation. As unequivocally stated by the government there was no mention of fraud in either of its two *ex parte* teleconferences with the Board or at any other time. There could have been no rational "understanding" to the contrary. Not only was there no mention of fraud by any participant, any such comments allegedly made by

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* It should be emphasized that both parties freely consented to Judge Peacock's conferring separately with each party in an effort to further the CDA's goals of "informal, expeditious and inexpensive" resolution of disputes. *See* Judicial Canon 3.A(4)(d) which in part states: "A judge may with the consent of the parties confer separately with the parties and their counsel in an effort to mediate or settle pending matters." Appellant does not object to the conduct of such *ex parte* conferences, only their alleged content.

Judge Peacock would contravene the very purpose of conducting the *ex parte* conferences with the government, i.e., to encourage and promote post-trial settlement negotiations. The allegations that Judge Peacock or any government participant in the *ex parte* teleconferences discussed fraud have been categorically rejected by the government and are unsupported by affidavits as to how appellant reached its "understanding" regarding what allegedly transpired in *ex parte* discussions with the government. Even in the face of the government's categorical rejection of appellant's contentions, appellant failed to respond with any basis for its accusations. Any settlement discussions were not "curtailed" as a consequence of any *ex parte* comments. They ended because of the pending AFOSI investigation as to which the Board had no knowledge prior to the government's 21 June 2016 letter to the Board.

All *ex parte* comments to both parties were made solely in the context of promoting settlement and from the perspective of litigation risks associated with entitlement and jurisdiction. As appellant emphasizes, quantum evidence was not presented at trial because it was confined to those jurisdictional and entitlement issues. The Board has received no quantum-related evidence and perforce has no opinions on the details and methodology of appellant's quantification of the amount claimed. The Board's entitlement decision will not encompass any such details.

During both *ex parte* discussions of "quantum" with appellant, the remarks were simply generic and pragmatic observations that appellant should earnestly consider reducing significantly the $100 million amount claimed for serious settlement discussions to move forward at the entitlement stage of the litigation. The focus of the "quantum" discussions with appellant simply and generally was to promote reasonable settlement offers considerably below the $100 million claimed, particularly given the uncertainties and complexities of the jurisdictional and entitlement issues presented as well as the realistic length of time that would elapse before commencement of any actual quantum proceedings, assuming *arguendo* that such quantum proceedings ultimately occurred.

It should also be noted that the alleged "premature" conclusions in its *ex parte* discussions with the parties were purportedly drawn after extensive motion practice, after 11 days of trial and the closing of the voluminous record, and after filing of initial briefs, over 5½ years after the docketing of the principal appeal. *Cf. AEI Pacific,* 04-2 BCA ¶ 32,635 at 161,486 (the Board deemed presiding judge's comments on testimony and record developed in the course of trial prior to its completion to be "normal in settlement negotiations" and that, "A reasonable and informed person would not infer, from the fact that the judge communicated her impressions as of a certain point in time, that she could not decide (or participate in deciding) the appeal after the record was complete"). All remarks by Judge Peacock were preliminary and tentative and prefaced by the express proviso that Judge Peacock reserved all final factual and legal determinations until the full chronology of critical events were thoroughly analyzed in context by the Board, after full briefing of the appeals. *See Goya Foods, Inc. v. Unanue-Casal*, 275 F.3d 124, 130 (1st Cir. 2001), *cert denied*, 532 U.S. 1022 (2002).

In short, there were (and are) no "prematurely formed" opinions on any issues in the appeals. Any Board decision will be based solely on the merits.

The grounds for disqualification raised by appellant have no merit. It is well settled that "[t]here is as much obligation upon a judge not to recuse himself where there is no occasion as there is for him to do so when there is." *In re Union Leader Corp.*, 292 F.2d 381, 391 (1st Cir. 1961); *Hinman v. Rogers*, 831 F.2d 937, 939 (10th Cir. 1987); *Brody v. President & Fellows of Harvard College*, 664 F.2d 10, 12 (1st Cir. 1981), *cert. denied*, 455 U.S. 1027 (1982).

The motion is denied.

Dated: 28 September 2016

ROBERT T. PEACOCK
Administrative Judge
Armed Services Board
of Contract Appeals

I concur

MARK N. STEMPLER
Administrative Judge
Acting Chairman
Armed Services Board
of Contract Appeals

I concur

RICHARD SHACKLEFORD
Administrative Judge
Vice Chairman
Armed Services Board
of Contract Appeals

I certify that the foregoing is a true copy of the Opinion and Decision of the Armed Services Board of Contract Appeals in ASBCA Nos. 57784, 57987, Appeals of CANVS Corporation, rendered in conformance with the Board's Charter.

Dated:

JEFFREY D. GARDIN
Recorder, Armed Services
Board of Contract Appeals