ARMED SERVICES BOARD OF CONTRACT APPEALS

Appeals of -	)	
	)	
J. R. Filanc Construction Company, Inc.	)	ASBCA Nos. 62580, 62581
	)	62616, 62645
	)	
Under Contract No. N62473-17-C-3403	)	

APPEARANCES FOR THE APPELLANT:	Kelly A. Floyd, Esq. Dustin R. Jones, Esq. Finch, Thornton & Baird, LLP San Diego, CA
APPEARANCES FOR THE GOVERNMENT:	Craig D. Jensen, Esq. Navy Chief Trial Attorney David M. Marquez, Esq. Trial Attorney

OPINION BY ADMINISTRATIVE JUDGE HERZFELD

Appellant, J.R. Filanc Construction Co., Inc. (Filanc), moves to compel respondent, the United States Department of the Navy (Navy), to respond to interrogatories and requests for admission. For the reasons discussed below, we grant-in-part and deny-in-part Filanc's motion to compel.

STATEMENT OF FACTS FOR PURPOSES OF THE MOTION

On November 30, 2016, the Navy (through the Naval Facilities Engineering Systems Command – Southwest) awarded contract No. N62473-17-C-3403 (Contract) to Filanc to construct facilities needed to produce, divert, transport, store, measure, and deliver raw water from the Santa Margarita River on Marine Corps Base Camp Pendleton, California, to the Fallbrook Public Utility District in Fallbrook, California. (R4, tab 14 at 3002-03, 3007)*

During the performance of the Contract, Filanc encountered problems and submitted several certified claims. On August 20, 2019 (as revised on February 12, 2020), Filanc submitted a certified claim for $441,515 (plus interest) due to alleged differing site conditions encountered in demolishing and re-paving asphalt. (R4, tab 35) On May 28, 2020, the Navy's contracting officer issued a final decision denying Filanc's

* The Navy submitted the Rule 4 file with bates numbering that includes the prefix "GOV" and three zeroes, which we leave out of our citations for ease of reference.

claim (R4, tab 36). The Navy also asserted that Filanc owed a $757,000 credit to the Navy for deviating from the Contract's requirements and gave Filanc 30 days to make the credit (R4, tab 36 at 7669). On June 15, 2020, Filanc filed two notices of appeal to the May 28, 2020 contracting officer' s final decision, challenging the denial of its claim (ASBCA No. 62580) and the Navy's assertion that Filanc owed the Navy a credit (ASBCA No. 62581).

On August 5, 2020, the Navy's contracting officer issued another final decision unilaterally modifying the Contract and reducing the contract value by $757,000, consistent with the statement in the May 28, 2020 final decision (R4, tab 38). On August 18, 2020, Filanc appealed the August 5, 2020 contracting officer's final decision (ASBCA No. 62645).

On February 6, 2020, Filanc submitted an additional certified claim to the Navy alleging Filanc incurred additional costs of $1,686,196 related to: (1) a differing site condition encountered in performing dewatering work due to rip rap (broken rock placed along the shoreline to prevent erosion) under the Santa Margarita River; (2) government-caused delays in obtaining permits and environmental monitoring of an endangered species and correcting defective designs; (3) government-caused delay in providing and then restricting access to several job sites; and (4) government changes regarding the Haybarn Pump Station controls (R4, tab 34). On July 8, 2020, the Navy's contracting officer denied Filanc's certified claim for these costs (R4, tab 37). On July 20, 2020, Filanc appealed that decision to this Board (ASBCA No. 62616).

As part of discovery in these appeals, Filanc served the Navy with 212 interrogatories and 247 requests for admission on November 25, 2020 (gov't mot. for protective order, ex. 1 – Filanc's Original Interrogs.; ex. 2 – Filanc's Original Req. for Admission). On December 8, 2020, the Navy moved for a protective order, arguing that Filanc should be limited to 25 interrogatories (consistent with Fed. R. Civ. P. 33) and 25 requests for admission. (Gov't mot. for protective order at 6) On January 14, 2021, the Board ordered that neither party could serve more than 40 interrogatories and 50 requests for admission.

On January 29, 2021, Filanc served the Navy with 40 interrogatories and 50 requests for admission, reaching the upper limit placed on those types of discovery by this Board's January 14, 2021 Order (app. mot., ex. 1 – Filanc's Revised Interrogs.; ex. 2 – Filanc's Revised Req. for Admission). On March 26, 2021, the Navy responded to Filanc's interrogatories and requests for admission, including answering the interrogatories and requests for admission subject to numerous objections and refusing to answer some of the requests for admission based on the objections (app. mot., ex. 3 – Navy Interrogs. Resp.; ex. 4 – Navy Req. for Admission Resp.). Filanc was not satisfied with the responses and the parties exchanged communications in a perfunctory attempt to resolve the discovery impasse. On June 22, 2021, Filanc moved to compel the Navy to

more fully respond to Filanc's interrogatories and requests for admission. The Navy opposed the motion on July 19, 2021, and Filanc replied on August 12, 2021.

DECISION

I. Legal Framework for Assessing Discovery Disputes

The Contract Disputes Act (CDA) permits a member of an agency board of contract appeals to "authorize depositions and discovery proceedings" for appeals before it. 41 U.S.C. § 7105(f). Under Board Rules 8(c)(1) and (2), the "Board may upon motion order . . . [w]ritten interrogatories to be answered separately in writing" and "[a] request for the admission of specified facts and/or of the authenticity of any documents, to be answered[.]"

"Although not binding on the Board, we also look to the Federal Rules of Civil Procedure (FED. R. CIV. P.), and decisions addressing those rules, for guidance in discovery disputes." *Sand Point Servs., LLC*, ASBCA Nos. 61819, 61820, 21-1 BCA ¶ 37,785 at 183,378 (citing *Thai Hai*, ASBCA No. 53375, 02-2 BCA ¶ 31,971 at 157,920; *Ingalls Shipbuilding Div. Litton Sys., Inc.*, ASBCA No. 17177, 73-2 BCA ¶ 10,205 at 48,094); *see also Corinthian-WBCM, J.V.*, ASBCA No. 62379, 21-1 BCA ¶ 37,864 at 183,862. In the circumstances presented here, where we have no reason to depart from them, the standards in FED. R. CIV. P. 33 (interrogatories) and FED. R. CIV. P. 36 (requests for admission) and case law interpreting those rules are helpful guidance in ruling on Filanc's motion to compel.

II. The Navy Must Respond to Filanc's Contention Interrogatories

"An interrogatory may relate to any matter that may be inquired into under Rule 26(b)." FED. R. CIV. P. 33(a)(2). "FED. R. CIV. P. 26(b) permits discovery 'regarding any nonprivileged matter that is relevant to a party's claim or defense and proportional to the needs of the case[.]'" *Corinthian*, 21-1 BCA ¶ 37,864 at 183,862 (quoting FED. R. CIV. P. 26(b)). Rule 26 broadly construes relevancy; information sought need not be admissible at trial, but only reasonably calculated to lead to discovery of admissible evidence. *Afro-Lecon, Inc. v. United States*, 820 F.2d 1198, 1203 (Fed. Cir. 1987); *Corinthian*, 21-1 BCA ¶ 37,864 at 183,862-63.

A. The Navy May Not Await the Conclusion of Discovery to Respond to Filanc's Contention Interrogatories

"An interrogatory is not objectionable merely because it asks for an opinion or contention that relates to fact or the application of law to fact, but the court may order that the interrogatory need not be answered until designated discovery is complete, or until a pretrial conference or some other time." FED. R. CIV. P. 33(a)(2). "Contention

interrogatories . . . serve an important purpose in helping to discover facts supporting the theories of the parties." *Woods v. DeAngelo Marine Exhaust, Inc.*, 692 F.3d 1272, 1280 (Fed. Cir. 2012). "Answers to contention interrogatories also serve to narrow and sharpen the issues thereby confining discovery and simplifying trial preparation." *Id.* "[A]nswers to contention interrogatories evolve over time as theories of liability and defense begin to take shape; answers to those interrogatories may not come into focus until the end of discovery." *Id.* As the Federal Circuit has recognized, however, "some courts have passed local rules limiting the extent to which parties are at liberty to defer answering contention interrogatories" while others lacking local rules have exercised "discretion to exclude evidence when a party acts in bad faith or prejudices its adversary by deliberately delaying, or wholly failing, to respond to contention interrogatories." *Id*. Such responses, if not deferred, "are amended as a matter of course during the discovery period[.]" *O2 Micro Int'l Ltd. v. Monolithic Power Sys., Inc.*, 467 F.3d 1355, 1365 (Fed. Cir. 2006).

Filanc moves to compel the Navy to answer interrogatories 15 and 35-39. These interrogatories requested "all facts supporting" contentions made by the Navy in the contracting officer's final decisions. (App. mot. to compel ex. 3 – Navy Interrog. Resp. Nos. 15, 35-39) The Navy refused to answer these interrogatories, asserting they were contention interrogatories and "it is necessary for sufficient discovery to be exchanged in order for the Navy to explain the factual bases for its defense" (app. mot. to compel ex. 3 – Navy Interrog. Resp. Nos. 15, 35-39 (citing *In re Convergent Techs. Sec. Litig.*, 108 F.R.D. 328, 337-39 (N.D. Cal. 1985)). The Navy asserts that the contentions made in the contracting officer's final decisions do not bind the Navy due to this Board's *de novo* review of the facts and, absent the Navy's express adoption of those contentions at the end of discovery, the Navy should not have to respond to these interrogatories (gov't resp. at 3-4 (citing *Wilner v. United States*, 24 F.3d 1397, 1401 (Fed. Cir. 1994) and *Parsons Evergreene, LLC*, ASBCA No. 58634, 18-1 BCA ¶ 37,137 (Shackleford, J., concurring), *aff'd in part, rev'd in part*, 968 F.3d 1359 (Fed. Cir. 2020)).

The Board agrees that we review appeals *de novo* and the contracting officer's findings are not binding in our proceedings. *Assurance Co. v. United States*, 813 F.2d 1202, 1206-07 (Fed. Cir. 1987); 41 U.S.C. § 7103(e) (stating that a contracting officer's "specific findings of fact are not binding in any subsequent proceeding"). Yet, the nature of our review does not make this information irrelevant and undiscoverable. To the contrary, following the Federal Circuit's guidance, the Navy cannot flatly refuse to respond to these interrogatories until the end of discovery. It unnecessarily prejudices Filanc's ability to obtain discoverable facts (even if those facts may not necessarily be the Navy's ultimate litigation position). *Woods*, 692 F.3d at 1280. Understanding the Navy's evolving position could be a part of Filanc's case (and inform its defense to the Navy's claim against Filanc). *O2 Micro*, 467 F.3d at 1365 ("[D]iscovery allows the plaintiff to develop facts to support the theory of the complaint and allows the defendant to develop facts to support its defenses."). Thus, given the discoverability of these facts,

the Navy must respond to interrogatory Nos. 15 and 35-39, and may not await the conclusion of fact discovery to do so (although the Navy should amend any responses to the extent the Navy's position differs from the contracting officer's final decision).

B. The Navy May Cite Specific Documents and Page Numbers in Response to Filanc's Contention Interrogatories, but the Navy's Current Response is Deficient Because it Only Cites to Pages in the Contracting Officer's Final Decisions

Filanc moved to compel further answers to interrogatory Nos. 10-14, 17-19, 22-25, 28-34, each of which also sought "all facts supporting" certain of the contracting officer's contentions in the final decisions (app. mot. to compel at 1; ex. 1 – Filanc Revised Interrog. Nos. 10-14, 17-19, 22-25, 28-34). The Navy made the same objections that it need not answer the contention interrogatories until the end of discovery, but also partially answered the interrogatories by referencing several pages from the contracting officer's final decisions and nothing else (app. mot. to compel ex. 3 – Interrog. Resp. Nos. 10-14, 17-19, 22-25, 28-34). Filanc asserts that the Navy's limited response fails to meet the requirements of FED. R. CIV. P. 33 and that the Navy could not respond to the interrogatories by simply citing pages of the contracting officer's final decision. (App. mot. at 5).

We agree that the Navy's responses should have been more fulsome to these interrogatories. "Federal courts strictly construe FED. R. CIV. P. 33 to require a responding party to specifically direct the requesting party to the documents which contain the answer to the interrogatory." *ABB Enter. Software, Inc.*, ASBCA No. 60314, 17-1 BCA ¶ 36,586 at 178,203 n.*; *see also AAB J.V. v. United States*, 75 Fed. Cl. 448, 452 (2007) ("A simple offer to produce unspecified documents or a general reference to a pile of documents will not suffice."); FED. R. CIV. P. 33(d)(1). We believe that the Navy should amend its interrogatory responses to, at the very least, identify any documents the contracting officer relied on in arriving at the facts in the contracting officer's final decisions referenced in each interrogatory and response.

We disagree with Filanc that referencing documents is *per se* non-responsive. Filanc mainly relies on decisions from the 1960s that pre-date the amendment to FED. R. CIV. P. 33 permitting parties to answer interrogatories by specifying responsive business records (app. mot. to compel at 5 (citing *Pilling v. Gen. Motors Corp.*, 45 F.R.D. 366, 369 (D. Utah 1968), *Life Music, Inc. v. Broad. Music, Inc.*, 41 F.R.D. 16, 26 (S.D.N.Y. 1966), *J.J. Delaney Carpet Co. v. Forrest Mills, Inc.*, 34 F.R.D. 152, 153 (S.D.N.Y. 1963); app. reply at 5-6) We do not believe that Filanc has made the "prima facie showing that the use of Rule 33(d) is somehow inadequate to the task of answering the discovery, whether because the information is not fully contained in the documents, is too difficult to extract, or other such reasons." *United States S.E.C. v. Elfindepan, S.A.*, 206 F.R.D. 574, 576 (M.D.N.C. 2002).

And, merely because Filanc has propounded contention interrogatories, does not negate the use of Rule 33(d). *United States v. Maverick Marketing, LLC*, 427 F. Supp. 3d 1386, 1399 n.15 (C.I.T. 2020) ("Rule 33(d) governs such 'contention interrogatories,' and, insofar as a contention interrogatory seeks material facts supporting allegations, courts have deemed them proper."). Filanc cites *United States ex rel. Landis v. Tailwind Sports Corp* to argue that a party may not answer contention interrogatories by citing "old business records" (app. reply at 5 (citing *United States ex rel. Landis v. Tailwind Sports Corp.*, 317 F.R.D. 592, 594 (D.D.C. 2016)). Unlike in *Landis*, the Navy's interrogatory responses did not rely on a list of "over two hundred deposition transcripts and for hundreds of other documents" produced during discovery. *Landis*, 317 F.R.D. at 593. Indeed, we agree that the Navy may not just cite a pile of documents to respond to these interrogatories, but must cite directly relevant documents and specify where in each document the responsive information may be found (and must cite more than in its current deficient responses, which cite just the contracting officer's final decisions). *ABB Enter. Software*, 17-1 BCA ¶ 36,586 at 178,203 n.*; *see also AAB J.V.*, 75 Fed. Cl. at 452. But, given that Filanc's interrogatories specifically asked for the Navy's contentions in "old business records" – the contracting officer's final decisions – and not contentions in pleadings or other filings in these appeals, we find it reasonable to allow the Navy to specifically cite documents to explain those contentions. Thus, the Navy's documents meet the definition of business records and it may cite the relevant documents (with page numbers) in the amended responses to these interrogatories consistent with FED. R. CIV. P. 33(d)(1).

Finally, Filanc asserts that the Navy has been evasive regarding interrogatory Nos. 9 and 27 (app. mot. to compel at 6). For interrogatory No. 27, the Navy simply quoted portions of a contracting officer's final decision in response. For the same reason mentioned above, the Navy should identify the documents that support the facts in the contracting officer's decision rather than simply citing the decision. As to interrogatory No. 9, the Navy's response took issue with the premise of Filanc's interrogatory, which states: "State all facts supporting YOUR contention that the presence of rip rap under the RIVER channel made FILANC's dewatering operation on the PROJECT less costly." (App. mot. to compel ex. 3 – Filanc Interrog. No. 9) The Navy responded that the contracting officer did not assert that the dewatering operation was "less costly" but that the dewatering costs "did not increase" Filanc's costs in performing. (Gov't resp. at 6-7; R4, tab 37 at 7722-23) While it is unclear what the appropriate conclusion will be on the merits, the contracting officer's decision does not appear to make this contention and the Navy appropriately responded, given the Navy's position in the contracting officer's final decision. *City of Fresno v. United States*, No. 16-1276C, 2021 WL 347750 at *2 (Fed. Cl. Feb. 1, 2021) ("An answer stating that the responding party does not make the contention presented in a contention interrogatory is a sufficient answer to that interrogatory.").

III. The Navy Does Not Need to Revise its Responses to Filanc's Requests for Admission

FED. R. CIV. P. 36 permits a party to serve another party with written requests to admit, among other things, "the truth of any matters within the scope of Rule 26(b)(1) relating to . . . facts, the application of law to fact, or opinions about either[.]" FED. R. CIV. P. 36(a)(1). In response, "[i]f a matter is not admitted, the answer must specifically deny it or state in detail why the answering party cannot truthfully admit or deny it." FED. R. CIV. P. 36(a)(4).

"The purpose of Requests for Admissions is to expedite trial by narrowing the issues to be litigated." *Rust Mfg., Inc.*, ASBCA No. 27511, 84-3 BCA ¶ 17,518 at 87,234. "Facts which are in real dispute are not proper subjects for a Request for Admission." *Id.*; *see also LaForte v. Horner*, 833 F.2d 977, 982 (Fed. Cir. 1987) ("[R]equests for admissions are designed to secure the just, speedy and inexpensive determination of actions by avoiding the time, trouble and expense required to prove undisputed facts which should be admitted."); *JZ Buckingham Investments LLC v. United States*, 77 Fed. Cl. 37, 46 (2007) ("[A] motion to determine the sufficiency of responses to requests for admission is not the time or place for cross-examination; rather, if the parties cannot agree on a matter, then they should await the opportunity to present evidence at trial."). "Federal courts have long required that requests for admission be simple, direct, and concise so that they can be admitted or denied with little or no explanation or qualification." *Sparton Corp. v. United States*, 77 Fed. Cl. 10, 18-19 (2007). "A denial is a perfectly reasonable response where issues in dispute are requested to be admitted, and such denial must be forthright, specific, and unconditional." *Algonquin Heights v. United States*, No. 97-582C, 2008 WL 2018814 at *4 (Fed. Cl. Feb. 29, 2008) (internal citations and quotations omitted). However, a responding party cannot evade the requirement to respond by raising "hypercritical objections" and engaging in gamesmanship. *S.A. Healy Co./Lodigiani USA, Ltd. v. United States*, 37 Fed. Cl. 204, 206 (1997).

A. The Navy Need Not Further Respond to Filanc's Requests for Admission That Ambiguously Use the Passive Voice or Include Multiple Statements Within Each Request

Filanc asserts that the Navy improperly failed to respond to Filanc's request for admission Nos. 1-2, 4, 9-15, 18-28, 34-35, 37, and 39-46, denying the requests because the Navy stated "it is not clear what exactly the Navy is being asked to admit" (app. mot. to compel at 6-7). However, that was not the Navy's sole objection; the other objections are not without some basis. Filanc offers request No. 2 as one of three examples of the Navy's objections and we include the full request and response below:

> Admit FILANC was required to mobilize a saw-cutting, loading, hauling, and stockpiling operation because there was PETROMAT in the existing AC PAVING on the PROJECT.
>
> Response: Navy objects to the request as vague and ambiguous and subject to different interpretations and contains more than one statement to be admitted or denied. The terms "required," "mobilize," and "saw-cutting, loading, hauling, and stockpiling operation" are subject to different meanings. Subject to that objection, the request is denied, because it is not clear what exactly the Navy is being asked to admit.

(App. mot. to compel, ex. 2 – Filanc's Revised Req. for Admission No. 2; ex. 4 – Navy Req. for Admission Resp. No. 2) This request and others use the passive voice relating to questions of causation, which phrasing contravenes providing simple, direct, and concise requests. *Sparton*, 77 Fed. Cl. at 18-19; *Burningham v. Wright Med. Grp., Inc.*, No. 17-92, 2019 WL 2206554 at *3 (D. Utah May 22, 2019) ("Plaintiffs' requests for admission no. 1-3 are phrased in the passive voice with respect to the recalls and do not identify the party responsible for the recalls. The court concludes that, even if Defendants have some knowledge of recalls for the identified devices, they could not be expected to provide an admission for such vaguely phrased requests for admission."). In this particular request, Filanc uses the term "was required," which the Navy cites as ambiguous, and begs the question: "required" by whom or what? (Gov't resp. at 8)

Moreover, the Navy objected because request No. 2 (as well as most of the additional requests at issue) included "more than one statement to be admitted." Indeed, when the Board limited the number of requests for admission to 50 (from the 247 originally propounded by Filanc), it was not an invitation for Filanc to simply compile multiple requests for admission into one (as it appears to have done in this example and some of the other requests for admission at issue here). *Compare e.g.*, app. mot. to compel, ex. 2 – Filanc's Revised Req. for Admission No. 2, *with* gov't. mot. for protective order, ex. 2 – Filanc's Original Req. for Admission Nos. 8-15. Thus, we credit these Navy objections as on-point (without the Navy's unnecessary flourish that "it is unclear what exactly the Navy is being asked to admit") and deny Filanc's motion to compel further answers from the Navy regarding request for admission Nos. 1-2, 4, 9-15, 18-28, 34-35, 37, and 39-46.

B. The Navy Appropriately Qualified Some of its Responses to Filanc's Requests for Admissions, Where Filanc's Requests Addressed Disputed Facts

Filanc also asserts that the Navy unreasonably responded to request for admission Nos. 17, 30-33, 38, and 47-48, because the Navy interpreted the terms "because" to be the "sole cause" and "prohibited" as "prohibited . . . solely because" in the Navy's responses (app. reply at 7). Filanc takes issue with the Navy's interpretations and likens the Navy's answers to those in *Holmgren*, a case where a party "flatly denied" several requests for admission without objection and relied on a "post hoc explanation for a blanket denial" in its appellate briefs appealing sanctions. *Holmgren v. State Farm Mut. Auto Ins. Co.*, 976 F.2d 573, 580 (9th Cir. 1992); (app. reply at 8) Unlike in *Holmgren*, however, the Navy did not flatly deny these requests but made several reasonable objections, including some of the same objections we have already found appropriate. The Navy made a good faith attempt to respond by qualifying its responses after objecting, which comports with the standard for answering requests for admission. FED. R. CIV. P. 36(a)(4) ("A denial must fairly respond to the substance of the matter; and when good faith requires that a party qualify an answer or deny only a part of a matter, the answer must specify the part admitted and qualify or deny the rest."). The qualified responses and objections also demonstrate that the admissions relate to disputed facts that are best left for resolution at a hearing. *Rust Mfg.*, 84-3 BCA ¶ 17,518 at 87,234; *JZ Buckingham Investments*, 77 Fed. Cl. at 46. Thus, we deny Filanc's motion to compel additional answers from the Navy regarding request for admission Nos. 17, 30-33, 38, and 47-48.

CONCLUSION

For the reasons discussed above, the Board grants-in-part and denies-in-part Filanc's motion to compel. Consistent with this decision, the Navy shall provide revised responses to Filanc's contention interrogatories on or before October 8, 2021.

Dated: September 16, 2021

DANIEL S. HERZFELD
Administrative Judge
Armed Services Board
of Contract Appeals

I concur

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

I concur

J. REID PROUTY
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. 62580, 62581, 62616, 62645, Appeals of J. R. Filanc Construction Company, Inc., rendered in conformance with the Board's Charter.

Dated: September 16, 2021

PAULLA K. GATES-LEWIS
Recorder, Armed Services
Board of Contract Appeals