



In the Matter of:

BIOSPHERICS, INC.

ARB CASE NO. 98-141

and

In re: General Services Administration
Contract Nos. GS00K90AFC2893 and
GS00K94AFD2465, Cumberland,
Allegheny County, Maryland

ARB CASE NO. 98-027
(Formerly Case No. 97-086)

DATE: September 2, 1998

ORDER

These cases are before this Board pursuant to the McNamara-O'Hara Service Contract Act of 1965, as amended, 41 U.S.C. §351, *et seq.* (1994) (SCA), and the regulations at 29 C.F.R. Part 8 (1998). Petitioner Biospherics, Inc. has filed a Second Petition for Review, docketed as ARB Case No. 98-141, and several preliminary motions -- Motion to Consolidate, Motion for Protective Order, Motion to Strike Brief, and Motion for Hearing -- which the Board will address *seriatim* before establishing the briefing schedule in ARB Case No. 98-141.

A. Biospherics' Motion to Consolidate is granted.

In its Second Petition for Review Biospherics seeks review of the June 22, 1998 letter issued by the Wage and Hour Division regarding the applicability of wage determinations to the above-described contracts. Copies of the Second Petition for Review (exhibits not included) and the June 22, 1998 letter are attached. Biospherics asks that the Board consolidate this Second Petition for Review with an earlier petition that it filed in ARB Case No. 98-027, which is pending review by the Board. In Case No. 98-027 Biospherics seeks review of Wage and Hour's February 14, 1997 decision denying conformance rates that it had requested for certain wage categories under the above-referenced contracts. No opposition to Biospherics' request for consolidation has been filed.

In view of the common facts and related issues presented in these two cases, and in the interest of administrative efficiency, Biospherics' unopposed request is granted. Accordingly, the cases are hereby consolidated for review and decision. See 29 C.F.R. §8.14.

B. Biospherics' Motion for Protective Order is denied.

Referring to Fed. R. Civ. P. 26(c)(7), which provides qualified protection for confidential commercial information in the civil discovery context, Biospherics has moved for a protective order to prevent "any person or entity from disseminating to any third party any pleadings which they receive" in these cases. According to Biospherics, the pleadings contain proprietary wage rate

information, which if disseminated to competitors could result in a severe competitive disadvantage to Biospherics. Biospherics adds that, on information and belief, Darlene Summerfield (an interested party in the action) is disseminating this sensitive information to other parties and employees of Biospherics, who in turn may be distributing the information to competitors. For the reasons discussed below, we deny the motion.

Background

Biospherics filed its initial Petition for Review in ARB Case No. 97-001 in September 1996, and the appeal was dismissed as untimely. Following reconsideration by the Wage and Hour Administrator, Biospherics filed another appeal, docketed as ARB Case No. 97-086, in April 1997. The Board established a briefing schedule, but at Biospherics' request the matter was stayed three times, ultimately until April 1998. During that time, Summerfield, who asserts that she is an employee of Biospherics, filed with the Board a number of status inquiries and comments regarding the case. On April 3, 1998, the Board responded to a congressional inquiry made on Summerfield's behalf, and served on the parties a copy of the response, together with copies of Summerfield's most recent correspondence to the Board.

On April 21, 1998, the Board issued an order establishing an amended briefing schedule in ARB Case No. 98-027.^{1/} The order instructed Biospherics and the Acting Administrator to file briefs and also permitted parties and interested persons to file reply briefs. The Board served this order on Summerfield as an "interested person," and in response, she filed a brief "from the employees of Biospherics," dated May 28, 1998. Because there was no indication on the face of the brief that Summerfield had forwarded a copy to either Biospherics or counsel representing the Acting Administrator of the Wage and Hour Division, the Board served a copy of her brief on these parties. Biospherics moved to strike the brief as not representative of the employees, unsworn and unsupported, factually inaccurate, and irrelevant. Biospherics served a copy of its motion on Summerfield. In response, Summerfield filed a document purporting to represent approval of her brief by numerous employees of Biospherics. In the meantime, Biospherics filed a motion for leave to file a surreply and the surreply, which addresses the merits of the Acting Administrator's reply brief.

In a letter dated July 8, 1998, attached to its Motion for Protective Order, Biospherics requests that neither the Motion for Protective Order nor its surreply brief be distributed to Summerfield until the motion for a protective order is ruled upon. Biospherics similarly requests that the Second Petition for Review, filed on July 13, 1998, not be served on Summerfield until the Board resolves the Motion for Protective Order.

Discussion

^{1/} The order also dismissed as premature Biospherics' November 10, 1997 Amended Petition for Review, and remanded the matter to the Wage and Hour Division for reconsideration. In response, the Wage and Hour Division issued the June 22, 1998 ruling letter, which is now the subject of Biospherics' Second Petition for Review, ARB Case No. 98-141.

As a preliminary matter, to the extent that Biospherics is challenging the Board's notification of Summerfield as an "interested person" in this case, *see* Petitioner's Motion for Protective Order at 2 n.2, we reject the challenge and provide this clarification. Section 8.11(a) directs the Board, following receipt of a petition for review, "to notify the parties known or believed to be interested in the case." 29 C.F.R. §8.11(a). For purposes of Subpart B of Part 8, Section 8.2(b) expressly defines "interested party" to include employees, as well as any other party whom the Board finds to have sufficient interest. Having identified herself as an employee with an interest in the proceeding, Summerfield was entitled to notification about this case and is entitled to participate and file a statement presenting her views to the Board. 29 C.F.R. §8.11(a).

In filing this Motion for Protective Order, Biospherics apparently assumes that because Summerfield is designated as an interested person in the proceeding, she must be served with copies of all pleadings and documents. That assumption is incorrect. As indicated in the Board's April 1997 and November 1997 briefing schedules, "[o]nly Parties and Interested Persons filing a notice of intervention and participation need be served with pleadings or briefs." (emphasis added).^{2/} The Board does not require that copies of all pleadings and documents filed with the Board be served on all interested persons -- only that the pleadings and documents be served on all parties and intervening interested persons. While the Board will relax or modify certain procedural rules when doing so does not impair the respective rights of the parties involved, *see In re General Services Admin.*, ARB Case No. 97-052, Nov. 21, 1997, slip op. at 4, the Board expects any interested person who wishes to attain the elevated status of "intervening interested person" to file with the Board a notice of intent to intervene and to serve that notice on all other parties, intervening interested persons, and interested persons. Not only are the parties entitled to prior notice and the opportunity, should they desire, to contest a request for intervention, but also the notice of intent to intervene promotes administrative order and economy in the reproduction and service of documents.

Although Summerfield has filed a statement with the Board, she has never indicated a clear intent to participate as an intervenor in these proceedings, as required by the Secretary's regulations. 29 C.F.R. §8.12. Nor has Summerfield ever requested copies of any pleadings or documents. Accordingly, neither the parties nor the Board has been obligated to forward copies of any documents to her, and Biospherics' motion to protect its Motion for Protective Order and its surreply brief is moot. If Summerfield wishes to participate under applicable rules and regulations and receive status as an intervening interested party in this case, she must file with the Board a notice of intent to intervene and provide copies of that notice to the other parties. Until the Board, in turn, issues a notice of Summerfield's request for a status change, the parties in this case are not required to serve copies of any of their pleadings or submissions on her.

The Board's practice upon receipt of a petition for review in any SCA case is to serve on all parties, intervening interested persons, and interested persons an order establishing a briefing schedule, attaching copies of the petition for review, exhibits excluded, and the challenged ruling. Because Summerfield is an interested person with respect to Biospherics' Second Petition for

^{2/} The regulation at 29 C.F.R. §8.12 directs the Board to permit any interested party, for good cause shown, to "intervene or otherwise participate" in any Board proceeding.

Review, we now rule on Biospherics' motion to protect the Second Petition for Review before issuing an order establishing the briefing schedule in that case.

As a basis for its motion, Biospherics claims that the petition contains confidential, proprietary wage rate information. After carefully reviewing the petition, exhibits excluded, we disagree. Biospherics has not cited case law to support its position, and we have not found any. The wage information referenced in the petition is information generated by the government pertaining to consummated contracts between the government and Biospherics, information which is not purely proprietary. Accordingly, we deny the motion to protect the Second Petition for Review.

C. Biospherics' Motion to Strike Brief is denied.

Biospherics' motion to strike the May 28, 1998 brief filed by Summerfield is denied, and the brief is received into the record. However, the Board will consider Biospherics' arguments regarding inaccuracies and irrelevancies in assessing the weight or credibility, if any, to be given the brief.

D. Biospherics' Motion for a Hearing.

We decline to rule on Biospherics' Motion for Hearing at this time. The motion will be considered upon the conclusion of briefing.

E. The following briefing schedule is established for ARB Case No. 98-141:

1. The Acting Administrator, Wage and Hour Division, shall file the administrative record of this case and a brief -- not to exceed 30 double-spaced pages -- in response to the Second Petition for Review **on or before October 2, 1998. A copy of the administrative record shall be served upon all parties and Intervening Interested Persons.**

2. Petitioner and all other parties and Interested Persons may file a reply brief -- not to exceed 30 double-spaced typed pages -- **on or before November 2, 1998.**

3. All pleadings and briefs in this matter shall be filed with the Board and served upon all Parties and Intervening Interested Persons.

4. **All pleadings and briefs are expected to conform to the stated page limitations unless prior approval of the Board has been granted and should be prepared in Courier (or typographic scalable) 12 point, 10 character-per-inch type or larger, double-spaced, with minimum one-inch left and right margins and minimum 1.25-inch top and bottom margins, printed on 8½ by 11 inch paper. An original and four copies of all pleadings and briefs shall be filed with the Board under the requirements of 29 C.F.R. Part 8.**

5. Only Parties and Interested Persons filing a notice of intervention and participation need be served with pleadings or briefs.

6. Docket entries for this matter shall be filed by directing submissions to:

Melissa Jo Joyce, Esq.
Executive Director
Administrative Review Board
200 Constitution Avenue, N.W.
Room S-4309
Washington, DC 20210

SO ORDERED.

Paul Greenberg
Member

Cynthia L. Attwood
Acting Member