

U.S. Department of Labor

Board of Contract Appeals
1111 20th Street, N.W.
Washington, D.C. 20001-8002



July 25, 1990

Appeal of:

Operative Plasterers and Cement Masons
International Association,
Appellant,

v.

Case No.: 89-BCA-6

Department of Labor,
Appellee.

(Contract Nos. 99-4-0380-35-004
 99-4-0380-35-038)

ORDER REGARDING SECOND MOTION TO DISMISS

The Department of Labor filed a Motion to Dismiss on January 18, 1990 stating that "[t]he Contracting Officer has determined not to demand repayment of the \$580,420 in costs disallowed in the above-captioned case." An Order of Dismissal dated January 26, 1990 was issued by the Board. The appellant filed a Motion for Reconsideration on February 6, 1990 arguing that a failure to adjudicate this timely appeal on the merits would be "extremely prejudicial" in that "[i]t will permit the government to relitigate the same issue all over again and it prejudices the appellant's rights to recover its counsel fees and costs against the government in this matter". An Order and Notice of Hearing was then issued by the Board on May 4, 1990 which overturned the Order of Dismissal dated January 26, 1990 and reinstated this matter for hearing.

The government filed a second Motion to Dismiss on June 7, 1990. The appellant subsequently filed an Opposition to Second Motion to Dismiss on June 18, 1990 in conjunction with a Motion of Appellant to Grant Appeal for Government's Failure to Prosecute. The Board finds no authority in the Contract Disputes Act of 1978 allowing it to grant an appeal for failure to prosecute.

With respect to the second motion to dismiss, a telephone conference between the undersigned and the parties in this matter was held on June 8, 1990. The issue discussed was whether the Board was divested of its jurisdiction over the above matter as a consequence of the contracting officer's withdrawal of previously disallowed costs. The appellant argued that this Board does have jurisdiction over the first audit dated March 2, 1989 and noted that in a second audit dated March 27, 1990 "the Government is trying to . . . continue to go after a disallowance on the same subject matter, i.e., materials provided to the job corp center, while abandoning this position and going after [the Appellant] on another audit, in another contract officer decision, on another theory on the same item." Tr. at 17. The record indicates that the second audit covered the contract at issue in this matter as well as a contract which is not included in this appeal.

The appellant urges that it should not be denied a hearing on the merits of the first audit merely because the contracting officer withdrew it and disallowed the costs on a second audit and under another theory. However, the appellant noted that it has not appealed the second audit and, when questioned, indicated that it does not want the second audit consolidated for adjudication by this Board. The government, on the other hand, submits that the Board is without jurisdiction over this case because the contracting officer withdrew the disallowances under the first audit thereby rendering this appeal moot.

The appellant advises the Board, in substance, that the withdrawal of the first audit by the government was in bad faith inasmuch as the government has filed a second audit with disallowances which covers a similar area compared to the first audit disallowance. The Board directs the attention of the parties to Zisken Construction Co., (ASBCA) 66-2 BCA 26,940 (August 25, 1966), in which the Armed Services Board of Contract Appeals held that its jurisdiction over an appeal was not "affected by the contracting officer's withdrawal, reconsideration, and modification of [his] decision or by the failure of the contractor to re-appeal, because to do so would permit contracting officers to indefinitely suspend adjudication of disputes and jeopardize contractors, rights to such adjudication.,, See also Thomas J. Murray, Jr., (GSBCA) 84-1 BCA 17,080 (February 8, 1983); Time Contractors, Joint Venture, (DOT CAB) 85-3 BCA 18,271 (July 31, 1985). Consequently, it is arguable that the Board may not be divested of its jurisdiction respecting the second audit disallowances if a dispute exists between the parties with respect to the second audit. Moreover, the Board in Zisken indicated that it "would have to be convinced that both parties clearly considered the first decision and the appeal therefrom to be a complete nullity" in order to allow a divestiture of its jurisdiction. Id. at 26,943 (emphasis added).

The Board in this case has indicated a willingness to exercise jurisdiction over the first and second audits. However, some indication from the appellant that it objects to the second audit disallowances and wishes this Board to hear its case on the second disallowance is required.

IT IS THEREFORE ORDERED that, within 30 days of the date of issuance of this Order, the appellant submit a copy of the second audit with this office along with a letter evidencing that the disallowances therein are in dispute or, in the alternative, IT IS HEREBY ORDERED that this matter be dismissed with prejudice and the appellant must file an application for attorney's fees and costs with this office pursuant to the Equal Access to Justice Act within 30 days of the date of issuance of this Order and concomitantly the hearing scheduled for October 23, 1990 will be cancelled.

Glenn Robert Lawrence

Member of the Board of
Contracts Appeals