

Board of Contract Appeals

General Services Administration
Washington, D.C. 20405

MOTION FOR SANCTIONS DISMISSED: December 6, 2004

GSBCA 15208, 16322-C(15208)

A & B LIMITED PARTNERSHIP,

Appellant in GSBCA 15208,
Applicant in GSBCA 16322-C(15208),

v.

GENERAL SERVICES ADMINISTRATION,

Respondent.

Daniel F. Schranghamer of Allen E. Ertel & Associates, Williamsport, PA, counsel for Appellant/Applicant.

Jeremy Becker-Welts, Office of General Counsel, General Services Administration, Washington, DC, counsel for Respondent.

Before Board Judges **DANIELS** (Chairman), **BORWICK**, and **NEILL**.

DANIELS, Board Judge.

The Board granted an appeal by A & B Limited Partnership (A&B) of a decision by a General Services Administration (GSA) contracting officer, awarding to A&B \$224,868. A & B Limited Partnership v. General Services Administration, GSBCA 15208, 04-1 BCA ¶ 32,439 (2003). We later granted in part an application by A&B for reimbursement of attorney fees and other costs incurred in the prosecution of the appeal, awarding to A&B an additional \$31,991.02. A & B Limited Partnership v. General Services Administration, GSBCA 16322-C(15208), 04-2 BCA ¶ 32,641.

Months after our decisions had become final, A&B filed a Motion for Sanctions and to Enforce Judgment. In the motion, A&B asserted that GSA had not paid the amounts awarded, the agency attorney assigned to the case had failed to respond to numerous letters and telephone calls seeking assistance in securing payment, and the agency general counsel had failed to respond to a written complaint about the attorney's inaction. A&B asked that we (1) order GSA to pay the amount awarded in the decision on the appeal and (2) sanction

GSA for its behavior by requiring it to reimburse A&B for the fees and costs incurred in attempting to be paid, an amount A&B estimated at \$2500.

We afforded GSA an opportunity to respond to the motion. The agency contended that we have no authority to grant the relief requested. We also gave A&B an opportunity to reply to GSA's opposition. A&B maintained that the Board has the inherent authority to make the requested orders. We later convened an oral argument on the motion to further explore the parties' positions and to make inquiry into the facts asserted. At the oral argument, A&B acknowledged that it has now been paid the amount due as a consequence of the Board's decision on the appeal, and that as a result, its request that we order GSA to pay that amount is moot.

We hold that we do not have the authority to impose a monetary sanction against GSA.

Background

The Board's decision in the appeal was issued on November 17, 2003. Under the Contract Disputes Act of 1978 (CDA), a decision of a board of contract appeals is final unless it is appealed to the Court of Appeals for the Federal Circuit within 120 days of a party's receipt of a copy of the decision. 41 U.S.C. § 607(g)(1) (2000). Because neither party appealed the decision, the decision became final 120 days after the parties' receipt of their copies of the decision – at the close of business on March 16, 2004.

The CDA provides that "[a]ny monetary award to a contractor by an agency board of contract appeals shall be paid promptly in accordance with the procedures [provided by section 1304 of title 31, United States Code]." 41 U.S.C. § 612(b). Further, "Payments made pursuant to [the above-quoted provision] shall be reimbursed to the fund provided by section 1304 of Title 31 by the agency whose appropriations were used for the contract out of available funds or by obtaining additional appropriations for such purposes." *Id.* § 612(c). Section 1304 of title 31 establishes a permanent indefinite judgment fund through which may be paid "final judgments, awards, compromise settlements, and interest and costs specified in the judgments or otherwise authorized by law when – (1) payment is not otherwise provided for; (2) payment is certified by the Secretary of the Treasury; and (3) the judgment, award, or settlement is payable [under various laws or] under a decision of a board of contract appeals." 31 U.S.C. § 1304(a). A&B read these statutes as providing that payment would be made through the judgment fund.

A&B noted, in reading 31 U.S.C. § 1304, that certification by the Secretary of the Treasury is a necessary prerequisite to payment through the judgment fund. The contractor reviewed the Treasury Financial Manual to learn how to secure that certification. Sections 3120, 3125, and 3130 of part 6 of that manual are relevant. They provide that before the Treasury Department will make payment from the fund, it must have in hand a submission from the agency which is authorized to settle the claim, and that submission must contain (a) a copy of the Board's decision and certifications of finality from the board and the contractor/claimant, (b) completed copies of various Treasury Department Financial Management Service forms, and (c) a certification from the agency as to the propriety and amount of the award. Treasury Financial Manual, pt. 6, ch. 3100 (Sept. 2000).

On April 6, 2004, counsel for A&B sent to the GSA counsel who had represented the agency in the appeal copies of the Treasury forms specified in the Treasury Financial Manual, completed insofar as A&B could complete them. Counsel for A&B enclosed a cover letter which concluded, "If you need any additional information from me in order to complete and submit these documents, please contact me immediately. Thank you for your prompt attention to this matter." GSA counsel never posed to counsel for A&B any questions about the letter or the documents – indeed, he never even acknowledged receipt of them.

The Board's decision on the cost application was issued on May 26, 2004. Under the Equal Access to Justice Act (EAJA), a decision of a board of contract appeals is final unless it is appealed to the Court of Appeals for the Federal Circuit by a party to the case "other than the United States" within thirty days after the decision is issued. 5 U.S.C. § 504(b)(1)(C), (c)(2).

On June 2, counsel for A&B forwarded to GSA counsel, with regard to the decision making the award of costs, the same forms as he had sent with regard to the appeal decision award and a cover letter with an identical closing to the correspondence he had sent with regard to that earlier award. He included a certificate of finality, stating that A&B would not appeal the Board's decision as to costs – thereby making that decision final. (The EAJA provides that awards made under that Act "shall be paid by any agency over which the party prevails from any funds made available to the agency by appropriation or otherwise." 5 U.S.C. § 504(d). Counsel for A&B evidently did not realize that this law, unlike the CDA, does not provide for the payment of awards through the judgment fund.) As with the other correspondence, GSA counsel never posed to counsel for A&B any questions about the letter or the documents regarding the cost award – and indeed, he never even acknowledged receipt of them.

During April, May, and June of 2004, counsel for A&B called GSA counsel on several occasions and left voicemail messages for him. GSA counsel did not respond to any of these messages. In July, counsel for A&B was finally successful in reaching GSA counsel by phone. GSA counsel stated that he was planning to get the award in the appeal decision paid by the appropriate agency regional office and that he would call back counsel for A&B the next day. Payment was not forthcoming, however. GSA counsel says that he was extremely busy at the time and forgot to return the call. GSA counsel had not spoken with counsel for A&B again by the date on which the motion was filed, September 10.

On August 2, 2004, counsel for A&B wrote to the GSA general counsel, seeking his assistance in securing payment of the amounts awarded in the two Board decisions. The letter recounted in detail the events described in this order. Counsel for A&B explained, "As I am sure you can appreciate, A&B is extremely frustrated and disappointed about the lack of progress that has been made in securing payment of the amounts awarded in both the [Appeal] Decision and the Fees Decision. This delay has tied up a substantial amount of A&B's capital that A&B cannot put to another productive use. This delay is also costing the American taxpayer in the form of interest that continues to accrue on a daily basis." Counsel for A&B specifically complained about GSA counsel's "inattentiveness to this matter." He noted that because the Treasury Department's procedures require requests for payment from

the judgment fund to be forwarded by the affected agency, "this system works if GSA's representative . . . does what he is supposed to."

The GSA general counsel never responded to this letter. Within his office, the letter was referred to the attorney who had handled the cases for the agency. That attorney prepared a draft response, which he forwarded within the office. The individual who was serving as general counsel when the letter arrived resigned his position on September 17. After that, according to GSA counsel, the matter "dropped into a void." Transcript of Oral Argument at 35.

A&B filed its motion for sanctions on September 10, 2004. GSA filed its response on September 24. In its response, the agency asserted that "[a]t all times following expiration of the appeal period, the contracting officer has been ready to pay the award out of Regional funds once a proper invoice has been received from Appellant." If such an invoice were presented, GSA intimated, payment would be made.

Later on September 24, A&B sent an invoice to the assistant regional administrator of GSA's Mid-Atlantic Region. GSA paid the amount of the appeal decision award (including interest) on October 12.

A&B did not send an invoice for the amount awarded in the cost application decision until October 29. At the date of oral argument on the motion for sanctions, November 19, 2004,¹ GSA had not yet paid the amount due.

Discussion

In its motion, A&B asked that we (1) order GSA to pay the amount awarded in the decision on the appeal and (2) sanction GSA for its behavior by requiring it to reimburse A&B for the fees and costs incurred in attempting to be paid, an amount A&B estimated at \$2500.

In the course of oral argument, counsel for A&B acknowledged that because payment of the amount awarded in the decision in the appeal has been made, the first request is moot. We consequently dismiss the motion to the extent that it seeks an order requiring payment.

During oral argument, we asked counsel to address the source, if any, of the Board's authority to sanction a Government agency by directing it to pay money to a contractor which is the other party in a case before us. A&B maintained that the Board has the inherent authority to impose such a sanction, and also that Rule 118(b) of the Board's Rules of Procedure (48 CFR 6101.18(b) (2003)) provides the necessary authority. GSA contended that the Board has already held, in Integrated Systems Group, Inc. v. Department of the Treasury, GSBCA 11336-C(11214-P), 95-1 BCA ¶ 27,308 (1994), that it has no such authority.

¹The transcript of the oral argument states that the argument occurred on November 15, 2004. That statement is in error.

GSA's contention is correct.

Federal courts possess inherent authority to impose sanctions – including monetary sanctions – against parties and their attorneys in appropriate circumstances. Chambers v. NASCO, Inc., 501 U.S. 32, 45-46 (1991); Roadway Express, Inc. v. Piper, 447 U.S. 752, 766-67 (1980); Alyeska Pipeline Service Co. v. Wilderness Society, 421 U.S. 240, 258-59 (1975). A board of contract appeals is not a court, however, and therefore does not have all the inherent authority of a federal court. SMS Data Products Group, Inc. v. Austin, 940 F.2d 1514, 1517 (Fed. Cir. 1991); ViON Corp. v. United States, 906 F.2d 1564, 1567 (Fed. Cir. 1990). This is not to say that a board's authority is necessarily less than a federal court's; it is to say, however, that a board's authority is different from such a court's. Sterling Federal Systems, Inc. v. Goldin, 16 F.3d 1177, 1186 (Fed. Cir. 1994). Applying the teaching of the Court of Appeals for the Federal Circuit in the last three cited cases, we held in Integrated Systems Group that we do not have a court's inherent authority to impose monetary sanctions against a litigant. 95-1 BCA at 136,111.²

The fact that our Rule 118(b) allows us to impose "such . . . sanctions as the Board deems appropriate" cannot convey authority where inherent authority is not present. This rule, like all our Rules of Procedure, was promulgated by the Board, see GSA Order OHR P 5440.1 CHGE 386, ch 3, pt. 1, ¶ 3 (July 23, 1993), so any authority contained in it derives from whatever authority we have, either through a grant from Congress or through inherent authority. Congress has not empowered us to impose monetary sanctions. Because we have no inherent authority to impose these sanctions, we cannot write or interpret a rule which permits their imposition.

We must therefore dismiss the motion for sanctions to the extent that it seeks an order that GSA make a monetary payment to A&B.

Although we cannot grant A&B either of the sanctions it has requested, we believe that the matters it has raised are serious and merit further comment.

The Contract Disputes Act plainly envisions that awards made to appellants by boards of contract appeals will be made from the permanent indefinite judgment fund. The Act says that such awards "shall be paid promptly in accordance with the procedures" provided by the statute concerning the fund, and that payments made pursuant to that provision "shall be reimbursed to the fund" by the agency involved. 41 U.S.C. § 612(b), (c). The legislative history confirms that understanding. The Senate committee report says that this section of the CDA "sets in motion the payment of all judgments, including those of the agency boards." "It constitutes a definite departure from the present procedure in the payment of judgments and awards of agency boards," in which awards were paid directly – and often

²Similarly, we held in Sysorex Information Systems, Inc., GSBCA 10642-P, et al., 90-3 BCA ¶ 23,083, that in light of the Federal Circuit's ruling in ViON, we could not dismiss a protest which was brought in bad faith. The Board's lack of authority to deal with persons who abuse the processes established by Congress for the resolution of Government contract disputes allows such abuse to continue. This is not a result we prefer, but it is one we are constrained to permit.

slowly – by agencies. S. Rep. 95-1118, at 32-33 (1978), reprinted in 1978 U.S.C.C.A.N. 5266-67. The House committee report says, "This means that the payments of [a]wards by agency boards of contract appeals will be paid out of the permanent indefinite appropriation." H. R. Rep. 95-1556, at 31 (1978).

It was therefore eminently reasonable for A&B to proceed as if payment would be made from the judgment fund. And by force of statute, it was incumbent on GSA counsel to complete and forward to the Treasury the paperwork necessary for payment to be made. There is no justification for counsel's failure to have performed this ministerial duty. No reason existed for A&B to have to submit an invoice to receive payment. The finality of the Board's decision made prompt payment mandatory as a matter of law.

In arguing to the contrary, GSA notes that the statute establishing the fund provides that payment shall be made only when three conditions are met. One of those conditions is that "payment is not otherwise provided for." See 31 U.S.C. § 1304(a). According to agency counsel, GSA has a policy or regulation (which is not clear – he mentioned both) which prevents GSA from applying to the judgment fund for payment if the agency has available project funds with which to make payment. Even if GSA has such a policy or regulation – and it has not shown us either – the most that could be said is that it requires the agency to make payment directly instead of processing paperwork for payment through the judgment fund. Because of the CDA's requirement for prompt payment, direct payment should be made at least as quickly as payment would be made if the judgment fund were used.

A&B never had any objection to GSA's making payment directly, and neither would any rational possessor of a Board award. For the agency to keep secret from the contractor its intention to use this alternative approach and the reason for that choice is, however, inappropriate. And if GSA chooses the alternative approach, it must make prompt payment. Leaving a successful appellant with a mere paper award, as A&B suggests, deprives the contractor of its property rights for an unwarranted amount of time and costs the Government money in eventual interest payments.³

Even if the law were not as we have concluded, the determination of GSA counsel not to respond to A&B's letters and telephone calls, seeking assistance in getting payment of the award, was inappropriate. His failure, once assigned the responsibility of drafting a response to A&B's letter to the agency's general counsel, to make strenuous effort to have a response sent, was also inappropriate. We have found that with rare exceptions, Government counsel are courteous to opposing litigants not only in explaining the basic procedures of Board practice, but also in performing ministerial functions to secure payment once litigation is concluded. In this case, counsel has argued, "To the extent that . . . the suggestion is being

³We note that as of the date of our oral argument, GSA had not yet paid to A&B the amount awarded by the Board in attorney fees and costs under the Equal Access to Justice Act. By that time, the EAJA award had been payable for more than four and one-half months. We were pleased to hear from GSA counsel that he expected payment to be made soon. Although the EAJA does not specifically mandate prompt payment of awards, as the CDA does, we expect that if payment of this award has not already been made, it will be in the very near future.

made that [our office] hold A&B's hand and walk it through the process on how to get its money, I believe that that's not what the taxpayer pays us to do." Transcript of Oral Argument at 33-34. We believe that this position is contrary to the usual, good practice of Government attorneys, including Government attorneys in the GSA general counsel's office, of showing courtesy to their fellow-citizens.

Decision

A&B's motion for sanctions and to enforce judgment is **DISMISSED**.

STEPHEN M. DANIELS

Board Judge

We concur:

ANTHONY S. BORWICK

Board Judge

EDWIN B. NEILL

Board Judge