

ARMED SERVICES BOARD OF CONTRACT APPEALS

Appeal of --)
)
The Swanson Group, Inc.) ASBCA No. 52109
)
Under Contract No. N68711-91-C-9509)

APPEARANCE FOR THE APPELLANT: Mr. Johnny Swanson, III
President

APPEARANCES FOR THE GOVERNMENT: Fred A. Phelps, Esq.
Navy Chief Trial Attorney
John S. McMunn, Esq.
Senior Trial Attorney
Engineering Field Activity West
Daly City, CA

OPINION BY ADMINISTRATIVE JUDGE TODD
ON CROSS-MOTIONS FOR RECONSIDERATION

Appellant has filed a motion to correct decision alleging that mathematical errors were made in the Board's computation of quantum. Upon receipt of appellant's application for reimbursement of litigation expenses under the Equal Access to Justice Act (EAJA), 5 U.S.C. § 504, which is pending in a separate proceeding, the Government responded to the motion with a request to reopen deliberations in this appeal to seek explanation from appellant on the appearance of fraud in its submission of costs to the Board. Appellant has filed objections to the Government's claim of the appearance of fraud. The Board has treated the parties' requests as motions for reconsideration.

STATEMENT OF FACTS

On 22 March 1999, appellant filed a timely appeal of a unilateral termination settlement made in a contracting officer's final decision. Appellant estimated its termination settlement costs in its complaint, itemized them in a supplement to the Rule 4 file, and introduced an exhibit of its costs in the total amount of \$2,359,608.78 at the hearing. Appellant substantiated portions of its termination settlement claim with contemporaneous accounting and payroll records and the sworn testimony of Mr. Swanson. The Government did not refute appellant's proof with competent evidence. On 28 March 2002, the Board issued a decision that held appellant entitled to a net termination settlement of \$249,840.38. *The Swanson Group, Inc.*, ASBCA No. 52109, 02-1 BCA ¶ 31,836. Familiarity with that decision is presumed.

Appellant received the Board's decision on 10 April 2002. The Government received the Board's decision on 8 April 2002.

On 29 April 2002, appellant filed a Motion to Correct Decision. Appellant contends that, in finding 29 of its decision, the Board inadvertently failed to add an amount for health and welfare benefits in finding the total amount of payroll costs incurred. It asserts that the omission of \$19,012.26 from the amount of termination costs affected the Board's conclusion of the amount of total incurred costs, profit, and the net termination settlement to which appellant was entitled. The Board notified the parties that it was treating appellant's motion as a Motion for Reconsideration, and it advised the corrections it intended to make and gave the Government the opportunity to respond.

The Board has reviewed its computations of payroll wages in finding 29 and found that the errors included the omission of the labor costs for training pay in the amount of \$4,788.08. In addition, the Board omitted the application of the FICA rate of 7.65 percent to the net pay amount of \$168,876.38 and the training pay amount of \$4,788.08. We added the net pay amount and the amount of \$19,012.26 for health and welfare benefits in finding that the total amount of payroll costs was \$187,888.64. That computation was in error. The correct total amount of payroll costs is \$205,962.05.

On 29 April 2002, appellant filed an application for attorney's fees under EAJA. Appellant's application attached financial statements for 1992 that included a balance sheet, summarized income statement, and consolidated income statement with supporting schedules.

On 23 May 2002, the Government filed a response to appellant's Motion for Reconsideration, which did not include any direct comment on the Board's proposed corrections. The Government asserted that its review of appellant's 1992 year-end financial statements in its EAJA application revealed major discrepancies between recorded contract costs and appellant's earlier claim for termination settlement costs. The Government requested that the Board reopen the record in this proceeding to "seek explanation from appellant on the appearance of fraud in its submission of costs to the Board in this matter" (Gov' t resp. at 4).

Appellant has opposed the Government's request to reopen the record and denied the fraud allegation.

DECISION

A motion for reconsideration not filed within 30 days of the party's receipt of the Board's decision is untimely and must be dismissed. Board Rule 29; *Swanson Products, Inc.*, ASBCA No. 48002, 96-2 BCA ¶ 28,486. Appellant's motion was filed within the required 30-day period. Appellant has demonstrated that our original decision contains an

error. The Government has chosen not to address that matter. Our opinion of 28 March 2002 is amended as follows:

1. In the Findings of Fact, finding 29, delete the sixth sentence and substitute the following: “Applying the FICA rate of 7.65 percent to wages paid, we find net pay of \$181,795.42 and training pay of \$5,154.37. Including the health and welfare benefits of \$19,012.26, we find payroll costs incurred in the total amount of \$205,962.05.”

2. In the Decision, paragraph four, after “\$168,876.38,” add “and for training pay was \$4,788.08,” replace “\$12,919.04” with “\$13,285.33,” and replace “\$187,888.64” with “\$205,962.05.”

3. In the next to the last paragraph of the Decision, replace “\$249,840.38” with “\$265,782.04,” in paragraph a., replace “\$439,055.51” with “\$453,547.93,” and in paragraph b., replace “\$43,905.55” with “\$45,354.79.”

Appellant’s motion to correct is granted.

The Government filed its request beyond the 30-day period for filing a motion for reconsideration. The Government’s request was to reopen the proceedings on the basis of evidence newly added to the record which, according to the Government, calls into question the Board’s decision sustaining the appeal and holding the appellant entitled to an additional termination settlement. The Government seeks the reopening of the appeal for the purpose of obtaining an explanation from appellant on the appearance of fraud in its submission of costs to the Board.

Appellant objects to any reconsideration of the Board’s decision. Appellant argues that the Government does not understand the document that it has examined because it does not know appellant’s accounting method and procedures that were used in compiling the financial statements. Appellant argues that the Government had the opportunity to obtain appellant’s financial reports during discovery and could have used them in cross-examination at the hearing. The Government failed to do so and should not be permitted to delay the proceedings alleging some ground for potential criminal action.

A request to reopen the record, which is similar to a motion for relief from judgment under Rule 60(b) of the Federal Rules of Civil Procedure, is granted only in exceptionally rare and unusual circumstances. *D.E.W., Incorporated and D.E. Wurzbach, A Joint Venture*, ASBCA No. 50796, 98-2 BCA ¶ 29,764. The moving party is required to show compelling reasons. *Marine Industries Northwest, Inc.*, ASBCA No. 51942, 01-1 BCA ¶ 31,201. In exercising its discretion to reopen the record the Board must be convinced that new evidence was discovered after the hearing, could not have been earlier obtained by the exercise of due diligence, is not merely cumulative, is material, and is such that the reception would probably produce a different result. *See* Board Rule 13(b); *BMY*,

Division of Harsco Corporation, ASBCA No. 36805, 94-2 BCA ¶ 26,725 at 132,943; *Dae Lim Industries Co., Ltd.*, ASBCA No. 28416, 87-3 BCA ¶ 20,110 at 101,833. As the Board stated in the *BMY* decision, quoting the Board in the *Dae Lim* case:

While we have a strong desire to see our awards become final and to have litigation come to an end, we must balance this desire against our need to render justice untainted by fraud or mistake.

94-2 BCA at 132,943.

The Government has not established that it exercised due diligence or has justification for its failure to discover and present appellant's year-end 1992 financial statements in prosecuting the appeal. The Government could have obtained the documents appellant later submitted in support of its EAJA application during discovery prior to hearing. The Government essentially seeks to relitigate the entire appeal. The accounting methodology appellant used was not addressed by the evidence at the hearing and is not apparent from the summary documents now in the record. The importance of the documents, if any, in light of appellant's actual cost records, is not apparent. We are not, therefore, persuaded that a rehearing would probably produce a different result.

The Board is reluctant to receive additional evidence into the record after the record has been closed because to admit additional evidence or rely on it in reconsideration invites the potential abuse of the adjudicative process. *BMY, Division of Harsco Corporation, supra*, at 132,952. The rationale applied in ruling upon a request to reopen the record has been stated as follows:

An opportunity to the losing party to offer additional evidence that it could easily have adduced earlier and have another "bite at the apple" after it has received an adverse decision is not to be granted lightly. As a matter of fairness the losing party should not be permitted to wait until after it receives an adverse decision before offering evidence that it could easily have presented before the adverse decision was rendered, except for the most compelling reasons.

Rainbow Valley Corporation, ASBCA No. 11691, 69-1 BCA ¶ 7655 at 35,519-20 (citation omitted). If we were to conduct additional proceedings with respect to appellant's accounting system, the burden imposed on appellant would be significant. In balancing our desire for finality against our need to render justice untainted by fraud or mistake, we are satisfied that the interests of justice are served by giving finality to our decision herein.

We grant appellant's Motion for Reconsideration and modify our decision as indicated above. The Government's Motion for Reconsideration is dismissed. Its request that we reopen deliberations is denied.

Dated: 1 July 2002

LISA ANDERSON TODD
Administrative Judge
Armed Services Board
of Contract Appeals

I concur

I concur

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

RONALD JAY LIPMAN
Administrative Judge
Acting 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 No. 52109, Appeal of The Swanson Group, Inc., rendered in conformance with the Board's Charter.

Dated:

EDWARD S. ADAMKEWICZ
Recorder, Armed Services
Board of Contract Appeals