

ARMED SERVICES BOARD OF CONTRACT APPEALS

Appeal of --)
)
The Swanson Group, Inc.) ASBCA No. 53496
)
Under Contract No. N62472-90-D-0840)

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

APPEARANCES FOR THE GOVERNMENT: Fred A. Phelps, Esq.
Navy Chief Trial Attorney
Audrey Van Dyke, Esq.
Associate Counsel (Litigation)
Engineering Field Activity Chesapeake
Washington, DC

OPINION BY ADMINISTRATIVE JUDGE TODD
ON APPELLANT'S MOTION FOR RECONSIDERATION

Appellant has filed a timely request for reconsideration of the Board's 23 October 2003 decision awarding summary judgment for the government and dismissing the appeal. *The Swanson Group*, ASBCA No. 53496, 04-1 BCA ¶ 32,417. Familiarity with that decision is presumed. Appellant argues that the Board made an error in the amount of appellant's claim and that amounts withheld pursuant to appellant's consent agreement with the U.S. Department of Labor (DOL) in 1993 affect the amount of the wage adjustment that is payable under the contract pursuant to the Board's decision on entitlement. *The Swanson Group, Inc.*, ASBCA No. 47676, 95-1 BCA ¶ 27,472, *modified on reconsid.*, 95-2 BCA ¶ 27,708. Appellant maintains that grant of summary judgment for the government was improper. Appellant requests a hearing after time within which to locate the consent agreement. The government responded that the Board correctly considered all the record evidence and appellant's arguments and there is no new evidence or genuine issues of fact that warrant change in the original decision. Appellant has filed a reply to the government's response restating its position because it believes the government has not understood its motion for reconsideration.

First, appellant asserts that it is due \$73,369.88 on the basis that the amount of \$60,268.75 was approved, and interest should be added to that amount. The amount of \$60,268.75 was the amount of appellant's invoice. It did not require approval by either appellant or the government. The Board found appellant entitled to a lesser amount plus interest under the Contract Disputes Act (CDA), 41 U.S.C. § 611. Appellant did not present any calculation of interest that would increase the amount of its claim or differ from the

calculations that the government made in its contract modifications. Appellant did not dispute the amount of CDA interest that the government paid. We find no error in the Board's opinion with respect to the amounts of the payments made by the government.

Second, appellant argues that the calculation of the amount payable after the amount due the DOL is paid should differ because of a consent agreement under which approximately \$100,000 was withheld for DOL to make disbursements to compensate appellant's employees. Appellant maintains that the portion of appellant's wage adjustment in this appeal that the government turned over to DOL should have come from previously withheld funds. Appellant states that it does not have available a copy of the consent agreement and indicates that it intends to present it later as newly discovered evidence when it can be located.¹ DOL directed release of the amount of \$25,273.75 from funds remaining on the subject contract pursuant to a federal court order² for disbursement on behalf of unpaid employees to satisfy appellant's liability for labor violations (R4, tabs 7, 8). The government turned over \$25,273.75 of the \$41,295.60 wage adjustment provided by Contract Modification No. P00009. When DOL directed transfer of withheld funds, the government properly turned over available funds from amounts payable to appellant to DOL.

Appellant is in effect now seeking funds that were withheld pursuant to DOL order for payment of its claim for the wage adjustment. DOL has authority to order the government to withhold funds otherwise payable to offending contractors and, pursuant to 29 C.F.R. § 4.187(a) "such withheld funds shall be transferred to the Department of Labor for disbursement to the underpaid employees on order of . . . an Administrative Law Judge[.]" The Board does not have jurisdiction to determine a contractor's liability for violation of labor standards or whether a contractor is entitled to recovery of the contract withholdings for such violations. *Thomas & Sons Building Contractors, Inc.*, ASBCA No. 51577, 00-2 BCA ¶ 31,086 at 153,491.

¹ We have found the document appellant is apparently referring to in the Rule 4 file as "Consent Findings and Order of Dismissal." The document is dated 4 May 1993, and includes a total amount of \$97,708.35. It was signed by Mr. Swanson as consent to the entry of an order in a proceeding designated Case No. 89-SCA-72 before the DOL. (R4, tab 1) Appellant's allegations of a "consent decree" executed with the DOL "[i]n or about March 1993" with respect to withholding approximately \$100,000 suggest to the Board that this document is the evidence to which appellant has referred (app. mot. at 1). If not, appellant has failed to show that the agreement could not have been introduced into evidence before the record was closed. When evidence is in a party's possession prior to entry of judgment, it is not newly discovered evidence. *Sentara Health System*, ASBCA No. 51540, 01-1 BCA ¶ 31,198.

² This document is not part of the record in the appeal.

The Board previously considered all of the record evidence and appellant's arguments and finds nothing in appellant's motion that warrants any change in our original decision. We have concluded on review of the record that our conclusions are correct. Accordingly, we affirm our original decision dismissing the appeal.

Dated: 9 February 2004

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

EUNICE W. THOMAS
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 No. 53496, Appeal of The Swanson Group, Inc., rendered in conformance with the Board's Charter.

Dated:

DAVID V. HOUBE
Acting Recorder, Armed Services
Board of Contract Appeals