ARMED SERVICES BOARD OF CONTRACT APPEALS

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| Appeal of -- | ) | |
| | ) | |
| Ver-Val Enterprises, Inc. | ) | ASBCA No. 49892 |
| | ) | |
| Under Contract No. N00163-89-D-0003 | ) | |

APPEARANCE FOR THE APPELLANT: Marc Lamer, Esq.
Kostos and Lamer, P.C.
Philadelphia, PA

APPEARANCES FOR THE GOVERNMENT: Fred A. Phelps, Esq.
Navy Chief Trial Attorney
Stephanie Cates-Harman, Esq.
Assistant Director
John A. Dietrich, Esq.
Senior Trial Attorney

OPINION BY ADMINISTRATIVE JUDGE KIENLEN
ON APPELLANT'S MOTION FOR SUMMARY JUDGMENT

The contract was terminated for default because of the appellant's failure to deliver. The appellant thereafter filed for a Chapter 11 bankruptcy. The Government filed a claim in the bankruptcy proceedings for the unliquidated progress payments. The reorganization plan listed the amount due on the claim as "$0.00." One year after confirmation of the plan by the Bankruptcy Court, the contracting officer issued a final decision demanding return of $208,519.15 in unliquidated progress payments. The appellant appealed to this Board. The appellant moves for summary judgment, asserting that the discharge in bankruptcy was a bar to any claim the Government may have for unliquidated progress payments.

In support of its motion the appellant has offered a statement of undisputed material facts (Appellant's Proposed Findings of Undisputed Fact) (PFUF), supplemented by affidavits and references to other documents in the record. In its response, the Government admits all of the PFUF (correcting citation errors), quotes additional language from the reorganization plan, and attaches the final decree and docket sheet from the Bankruptcy Court. The Government has not offered any affidavit or other document that offers a genuine dispute of the facts submitted by the appellant. The relevant undisputed facts are set forth in the statement of facts which follows. We find for the appellant.

STATEMENT OF FACTS

The Naval Warfare Center, Aircraft Division (NAVAIR), awarded the contract, as part of the Small Business 8(a) program, to the appellant, Ver-Val Enterprises. The contract required the appellant to manufacture and deliver an indefinite quantity of bomb racks, bomb rack mounting adapters, and pin and ball bar assemblies for the bomb racks. The Government issued several delivery orders to the appellant. (PFUF 1-4)

On 7 August 1992 the NAVAIR contracting officer issued a final decision terminating the contract for default, along with the undelivered balance under the outstanding delivery orders. The appellant was directed, pursuant to the default clause (located at FAR 52.249-8 (APR 1984)), to transfer title and deliver to the Government any completed supplies and inventory. The final decision stated, *inter alia,* as follows:

> The terminated quantities under contract N00163-89-D-0003, delivery orders 0004; 0005; and 0006 are still required and will be reprocured against Ver-Val's account. Ver-Val Enterprises will be notified of any excess reprocurement costs resulting from this reprocurement when the reprocurement is complete.
>
> Ver-Val Enterprises is also liable to the government for unliquidated progress payments made under the contract, if any.

(PFUF 5, 6, 7)

On 13 August 1992 the appellant filed a Chapter 11 Petition (No. 92-04911) in the United States Bankruptcy Court for the Northern District of Florida. The Government filed a proof of claim. Ver-Val filed its formal objection on 16 December 1994. (Gov't resp., Bankruptcy Docket entry) On 23 December 1994, the Government filed an amended proof of claim for over $2 million in unliquidated progress payments under 11 contracts or delivery orders, including $530,519.96 in unliquidated progress payments under the instant contract. The Government's proof of claim, filed on 23 December 1994, by Associate Counsel, Regional Defense Contract Management District South, Marietta, Georgia, asserted, *inter alia,* as follows:

> The above named debtor is currently indebted to the Claimant, United States of America, in the sum of $2,007,753.83, plus interest for unliquidated progress payments on the following contracts:
>
> . . . .
>
> N00163-89-D-0003/0001 $11,289.96
> N00163-89-D-0003/0004 $358,464.00
> N00163-89-D-0003/0005 $160,766.00

. . . .

> The claimant, United States of America, does not hold, and has not had not [sic] received, any security for the debt, nor has any person by the claimant's order, to the knowledge and belief of the undersigned, had or received any security for the claimant's use.

(PFUF 8, 9, 10; app. mot., appendix, Smith Decl., ¶¶ 2, 3; ex. A)

Appellant's original plan of reorganization was filed on 15 February 1994. It was twice amended and modified. The final Modified and Amended Plan of Reorganization, dated 24 March 1995, was filed with the Bankruptcy Court pursuant to 11 U.S.C. § 1121(a) on 27 March 1995. The purpose of the plan was "to provide for the orderly distribution of payments to creditors over time and preserve Debtor [Ver-Val Enterprises, Inc.] as an ongoing concern engaged in business after consummation of this Plan." (PFUF 12; app. mot., appendix, Smith Decl., ex. B at 1; Gov't resp., attach. 1)

The final plan defined "disputed claim" as follows:

> "Disputed Claim" and "Disputed Interest" means a Claim or interest to the extent that proof of which has been timely filed or deemed timely filed under applicable law or under this Plan, as to which an objection, if timely filed, has not been withdrawn on or before any date fixed by the Plan or Order of the Court for the filing such objections and has not been denied by a Final Order. To the extent an objection related to the allowance of only a part of a Claim or Interest has been timely filed or deemed timely filed, such Claim or Interest shall be a Disputed Claim or a Disputed Interest (as the case may be) only to the extent of the objection.

(PFUF 12; app. mot., appendix, Smith Decl., ex. B at 4-5)

Article V of the plan, entitled "Provisions for Payments to Creditors" provided, *inter alia,* as follows:

> Section 5.1 Disputed Claims. Notwithstanding any other provision of this Plan, no property shall be distributed under this plan on account of any Disputed Claim until such dispute is resolved and becomes an allowed claim.

(PFUF 13; app. mot., appendix, Smith Decl. at 17)

Ver-Val disputed the Government's claim for unliquidated progress payments. In accord with the way disputed claims were represented under the plan, the plan provided a claim reconciliation and listed the amount of "$0.00" as the amount due to the Department of Defense. Thus, the plan provided that no money would be paid to the Department of Defense on its claim for unliquidated progress payments. (PFUF 14; app. mot., appendix, Smith Decl. ¶ 5, appendix at 34)

Further, the plan represented that Ver-Val expected to recover funds from the National Aeronautics and Space Administration and from the Department of Defense:

> Debtor retained as special counsel for the purpose of negotiating government contracts the law firm of Howell Roger Riggs, Jr. During the course of his representation of the Debtor, Mr. Riggs has filed claims with the National Aeronautics and Space Administration for the recovery of funds Ver-Val maintains are due for General and Administrative Expenses and unbilled allowable and allocable direct costs. Additionally, Mr. Riggs is negotiating with the Department of Defense (DOD) certain claims for set off against the amount claimed by DOD. Ver-Val anticipates a favorable result from these negotiations but the actual amount anticipated to be recovered and the final results are difficult to project and may not be fully realized for some time. In the event of a recovery, Ver-Val will use any funds recovered to cover operating expenses or fund the pay out to creditors. This firm has previously been awarded and paid $9,352.50 in fees and $268.62 in costs. Unpaid fees and costs through the date of confirmation are expected to be approximately $27,000.00. All Court approved fees will be paid out of Ver-Val's operating account. This claim, as allowed by the Court, shall be paid in full no later than six (6) months from the effective date of the Plan.

(App. mot., appendix, Smith Decl. at 16) (section of the plan discussing administrative expenses, including debtor's attorneys' fees)

A vote on the plan by the creditors was taken by ballots due on 20 April 1995. On 26 April 1995, Ver-Val filed the results of the creditor's vote. The Department of Defense did not vote on the plan. (App. mot., appendix, Smith Decl. at 49) However, on 27 April 1995 the Government filed a formal objection to the plan, setting forth specific objections concerning the debts owed for taxes and certain secured obligations. That objection did not

object to, nor mention, the disposition by the plan of the debts owed to the Department of Defense. (App. mot., appendix, Smith Decl. at 63)

The hearing on the plan was scheduled for 1:30 p.m. on 27 April 1995. After considering the Government's "objection to confirmation of Debtor's Plan of Reorganization, the argument of counsel, and all other relevant matters" the plan was confirmed as presented with only two exceptions, not pertinent because they related only to taxes due to the Internal Revenue Service and to the Okaloosa County Tax Collector. The order confirming the plan was filed at 2:04 p.m. on 27 April 1995 by the Bankruptcy Court. (PFUF 15; app. mot., appendix, Smith Decl. ¶ 7, appendix at 74-75)

Pursuant to Bankruptcy Rules 8001 and 8002 the confirmation order became final after the ten day appeal period, or 7 May 1995. In accordance with § 8.1 of the plan, the plan became effective 30 days after the order became final, or on 6 June 1995:

> Section 8.1. Effective Date. The Effective Date of this Plan shall occur, and this Plan shall take effect, on the thirtieth (30th) day following the day on which the confirmation order becomes a Final Order, or the first Business Day thereafter if the thirtieth day is not a business day.

(App. mot., appendix, Smith Decl. at 19, 27)

Notwithstanding the finality of the plan, § 7 of the plan provided for the Bankruptcy Court to retain jurisdiction over the case until the case was closed:

> Section 7.1. Post-confirmation Jurisdiction of the Court. Until the Case is closed, the Court shall retain jurisdiction over all matters arising out of or relating to the Case, including, but not limited to, the following matters:
>
> a. To determine the allowance or classification of Claims or Interests under this Plan and to determine any objections thereto;
>
> b. To construe and to take any action to enforce this Plan and to issue such orders as may be necessary for the implementation, execution and consummation of this Plan;
>
> . . . .
>
> f. To determine all applications, motions, adversary proceedings, contested matters and other litigated matters that

> may be pending in this Court on or initiated after the Effective Date;
>
> . . . .
>
> k. To consider and act on the compromise and settlement of any claim against Debtor-in-Possession.

(App. mot., appendix, Smith Decl. at 26-27)

On 30 May 1995, prior to the effective date of the plan, Ver-Val filed formal objections to the amended proof of claim filed by the Department of Defense. The formal objection stated in relevant part:

> Debtor, Ver-Val Enterprises, Inc., by and through its undersigned attorneys, files this objection to the Amended Proof of Claim of United States of America (#121) and states in support thereof that the Amended Proof of Claim of the United States of America sets forth that Debtor is indebted to the Claimant in the sum of $2,007,253.83, plus interest, for unliquidated progress payments on eleven enumerated contracts. These claims would mature only in the event Debtor defaulted on the contracts. Most of the contracts have in fact been completed with all payments due having been made. However, with respect to contract nos. N00163-89-D-0003 and F42600-90-C-1586, there remains a claim for unliquidated progress payments totaling $519,230.00 and $689,424.37, respectively. Debtor objects to this portion of the Amended Proof of Claim of the United States of America on the grounds that Debtor is in possession of inventory in which the United States has a secured interest pursuant to Federal Acquisition Regulation Clause 52.232.163 valued in excess of the amount due on the unliquidated progress payments and Debtor is in fact entitled to a credit for the excess value.
>
> Additionally, two other contracts listed on the Amended Proof of Claim are contracts in progress. In filing this Objection to Claim No. 121, Debtor in no way waives its right to amend this Objection or object to claims on other contracts listed by the Department of Defense.

> WHEREFORE, Debtor requests this Court sustain Debtor's objection to the Claim No. 121 and grant such other and further relief as is just and appropriate.

(PFUF 16; app. mot., appendix, Smith Decl. at 77-78) Neither party petitioned for an adversary hearing with respect to the Government's proof of claim. No further action was taken by either party in the bankruptcy proceeding with respect to the proof of claim by the Department of Defense. (PFUF 17; app. mot., appendix, Smith Decl. ¶ 9)

Meanwhile, NAVAIR and the appellant continued discussions concerning the value of the termination inventory. The parties never reached an agreement. (PFUF 18, 19; app. mot., appendix, Smith Decl. ¶ 10)

On 22 May 1996, the contracting officer issued a final decision setting the value of the inventory at $305,203.55 and demanding payment of unliquidated progress payments in the amount of $208,519.15. The final decision also advised the appellant of its appeal rights to this Board. (PFUF 20, 21; R4, tab 2) The Government does not contend that this action was coordinated with the Bankruptcy Court.

By letter of 5 June 1996, the appellant appealed to this Board from the 22 May 1996 final decision of the contracting officer. The appellant has delivered the termination inventory to NAVAIR. (PFUF 22, 23)

On 11 December 1997 a final decree was issued closing the bankruptcy case. The Court noted that the debtor's plan was confirmed on 27 April 1995 and that payments had commenced. The order stated that a case may be deemed "fully administered even though not all payments have been made as required by the confirmed plan." Further, the Court stated that it retained jurisdiction "to interpret or enforce its orders." The Court entered a final decree and deemed the case fully administered. (Gov't resp., attach. 1)

## POSITION OF THE PARTIES

The appellant contends that the Government's claim for unliquidated progress payments was discharged in the bankruptcy proceedings. Since the Government's claim for unliquidated progress payments was discharged in bankruptcy, the appellant argues that the Government's claim must be denied and the appellant's appeal sustained.

The Government argues that the claim was not discharged in bankruptcy. It contends that the bankruptcy plan preserved the disputed claim for resolution by the parties, outside of the Bankruptcy Court. The Government argues that the parties' intentions as to the interpretation of the plan is a question of fact which the parties dispute.

## DECISION

Summary judgment is appropriate when there is no genuine issue of material fact and the movant is entitled to judgment as a matter of law. *Celotex Corp. v. Catrett,* 477 U.S. 317, 323-24, 327 (1986); *Mingus Constructors, Inc. v. United States,* 812 F.2d 1387, 1390 (Fed. Cir. 1987). The movant has the burden of showing the absence of a genuine issue of material fact. *Adickes v. Kress & Co.,* 398 U.S. 144, 157 (1970); *Celotex Corp. v. Catrett,* 477 U.S. 317, 323-25 (1986).

The nonmovant must respond by setting forth specific facts showing that there is a genuine and material factual issue for trial. Disputes concerning irrelevant or immaterial facts are insufficient. *Algernon Blair, Inc.,* ASBCA No. 45369, 94-2 BCA ¶ 26,638. Likewise, conclusory statements or completely insupportable, specious, or conflicting explanations or excuses will not suffice to raise a genuine issue of fact. *Paragon Podiatry Laboratory, Inc. v. KLM Laboratories, Inc.,* 984 F.2d 1182, 1190 (Fed. Cir. 1993). As the Federal Circuit said in *Mingus Constructors, Inc. v. United States,* 812 F.2d 1387, 1390-91 (Fed. Cir. 1987), "the party opposing summary judgment must show an evidentiary conflict on the record; mere denials or conclusory statements are not sufficient."

Nevertheless, the evidence of the nonmoving party is to be believed, and all reasonable factual inferences are to be drawn in its favor. *Anderson v. Liberty Lobby, Inc.,* 477 U.S. 242, 255 (1986). However, the genuineness of a dispute as to a material fact arises only when the nonmovant presents sufficient evidence upon which a reasonable fact finder, drawing the requisite inferences and applying the applicable evidentiary standard, could decide the issue in favor of the nonmovant. *Anderson v. Liberty Lobby, Inc.,* 477 U.S. 242, 254-55 (1986); *C. Sanchez and Son, Inc. v. United States,* 6 F.3d 1539, 1541 (Fed. Cir. 1993). Moreover, even if material facts are in dispute, summary judgment may nonetheless be granted if, after all factual inferences are drawn in favor of the party opposing summary judgment, that party still could not prevail. *Anderson v. Liberty Lobby, Inc.,* 477 U.S. 242, 255 (1986).

The issue in this case is whether or not the asserted debt for unliquidated progress payments was discharged in the bankruptcy proceedings. If so, the discharge defeats the Government's affirmative claim for that debt under the Contract Disputes Act.

The appellant asserts that the Government's claim was discharged under the provisions of 11 U.S.C. § 1141(d)[*] . That provision provides that, except as specified in the

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[*] 11 U.S.C. § 1141 reads in pertinent part as follows:

> §1141. Effect of confirmation
>
> (a) Except as provided in subsections (d)(2) and (d)(3) of this section, the provisions of a confirmed plan bind the debtor, any entity issuing securities under the plan, any entity

debtor's reorganization plan or as otherwise provided in the section, the confirmation of a plan "discharges the debtor from any debt that arose before the date of such confirmation, . . . whether or not – (i) a proof of the claim based on such debt is filed . . . [or] the holder of such claim has accepted the plan . . . ."

The statute is quite clear. The confirmation of the plan discharges debts in accordance with the plan. The appellant cites *Sanders Confectionery Products, Inc. v. Heller Financial, Inc.*, 973 F.2d 474 (6th Cir. 1992) and *In re Weidel*, 208 BR 848 (Bnkr. MD 1997), for its position that the debt to the Government for unliquidated progress

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> acquiring property under the plan, and any creditor, equity security holder, or general partner in the debtor, whether or not the claim or interest of such creditor, equity security holder, or general partner is impaired under the plan and whether or not such creditor, equity security holder, or general partner has accepted the plan.
>
> (b) Except as otherwise provided in the plan or the order confirming the plan, the confirmation of a plan vests all of the property of the estate in the debtor.
>
> (c) Except as provided in subsections (d)(2) and (d)(3) of this section and except as otherwise provided in the plan or in the order confirming the plan, after confirmation of a plan, the property dealt with by the plan is free and clear of all claims and interests of creditors, equity security holders, and of general partners in the debtor.
>
> (d) (1) Except as otherwise provided in this subsection, in the plan, or in the order confirming the plan, the confirmation of a plan –
>
> (A) discharges the debtor from any debt that arose before the date of such confirmation, and any debt of a kind specified in section 502(g), 502(h), or 502(i) of this title, whether or not –
>
> (i) a proof of claim based on such debt is filed or deemed filed under section 501 of this title;
>
> (ii) such claim is allowed under section 502 of this title; or
>
> (iii) the holder of such claim has accepted the plan; and
>
> (B) terminates all rights and interests of equity security holders and general partners provided for by the plan.
>
> (2) and (3) [Omitted. The government has not alleged that these subsections exempt its claim from discharge.]

payments was discharged. The confirmation of the reorganization plan constitutes the final judgment in the bankruptcy proceedings. *See Stoll v. Gottlieb*, 305 U.S. 165 (1938). The Government was a party to the bankruptcy proceeding and did not appeal the court's order. The final judgment of that bankruptcy binds the Government with respect to the Government's claim for unliquidated progress payments under the contract and delivery orders at issue in this appeal. *See Hawxhurst v. Pettibone Corp.,* 40 F.3d 175, 180 (7th Cir. 1994).

It is undisputed that the plan itself provided that the Government was entitled to no payment ($0.00) on its claim for unliquidated progress payments. Notwithstanding what the plan provided on its face, Government counsel contends that the unliquidated progress payment claims were removed from the plan by agreement of the parties, and those claims were to be considered and resolved separately outside of the plan. Counsel for the Government contends that there is a dispute of fact concerning the intention of the parties to remove those Government claims from the plan.

In order to show, contrary to the plan, that the Government's claim was intended to be removed from the bankruptcy proceeding the Government needs to make a showing that both parties intended to remove the Government's claim. That is, the Government must produce "sufficient evidence upon which a reasonable fact finder, drawing the requisite inferences and applying the applicable evidentiary standard," could find that the parties agreed to remove the Government's claim from the bankruptcy proceeding. *Anderson v. Liberty Lobby, Inc.,* 477 U.S. at 254-55. In order to establish a dispute, it is up to the Government to produce or point to conflicting evidence. *Mingus Constructors, Inc. v. United States,* 812 F.2d at 1390-91. Notwithstanding this burden of producing evidence, the Government has not provided, or pointed to, any evidence that there was an agreement between the parties to remove the Government's claims from the bankruptcy proceeding.

There is no contemporaneous statement by the parties, there is no statement by the Bankruptcy Court, there is no document filed in the bankruptcy proceeding, and there is not even an affidavit filed before the Board, which states an intention by any party to remove the claims relating to the contract from the bankruptcy proceeding. The Government needs to do more than merely deny that the unliquidated progress payment claims were discharged in bankruptcy. As the Federal Circuit stated in *Barmag Barmer Maschinenfabrik AG v. Murata Machinery, Ltd.,* 731 F.2d 831, 835-36 (Fed. Cir. 1984):

> A critical factor in a motion for summary judgment in a patent case, as in any other, is the determination by the court that there is no *genuine* issue of *material* fact. With respect to whether there is a genuine issue, the court may not simply accept a party's statement that a fact is challenged. *Union Carbide Corp. v. American Can Co.,* 724 F.2d at 1571, 220 USPQ at 588. The party opposing the motion must point to an

> evidentiary conflict created on the record at least by a counter statement of a fact or facts set forth in detail in an affidavit by a knowledgeable affiant. Mere denials or conclusory statements are insufficient.

*See also Applied Companies v. United States,* 144 F.3d 1470 (Fed. Cir. 1998); *Wanlass v. General Electric Company,* 148 F.3d 1334 (Fed. Cir. 1998); *Rosemount, Inc.,* ASBCA No. 37520, 95-2 BCA ¶ 27,770 at 138,456. The Government does not dispute the facts, it merely argues for a different interpretation of those facts.

Nevertheless, we consider the arguments made by the Government. The Government first argues that the plan "does not disallow the obligation to the Government, but expressly recognizes that it is a matter in dispute and subject to further resolution." The Government relies on the following language in the amended plan:

> Debtor has retains [sic] as special counsel for the purpose of negotiating government contracts the law firm of Howell Roger Riggs, Jr. . . . Additionally, Mr. Riggs is negotiating with the Department of Defense certain claims for set off against the amount claimed by DOD. Ver-Val anticipates a favorable result from these negotiations but the actual amount anticipated to be recovered and the final results are difficult to project and may not be fully realized for some time.

From all of this the Government argues that the appellant's motion must fail "for the simple reason that the plan expressly does not disallow the Government's claim." (Gov't resp. at 4)

The inference which the Government urges us to draw is not a reasonable one when the following more comprehensive statement is considered:

> Debtor retained as special counsel for the purpose of negotiating government contracts the law firm of Howell Roger Riggs, Jr. During the course of his representation of the Debtor, Mr. Riggs has filed claims with the National Aeronautics and Space Administration for the recovery of funds Ver-Val maintains are due for General and Administrative Expenses and unbilled allowable and allocable direct costs. Additionally, Mr. Riggs is negotiating with the Department of Defense (DOD) certain claims for set off against the amount claimed by DOD. Ver-Val anticipates a favorable result from these negotiations but the actual amount anticipated to be recovered and the final results are difficult to project and may

> not be fully realized for some time. In the event of a recovery, Ver-Val will use any funds recovered to cover operating expenses or fund the pay out to creditors.

(App. mot., appendix, Smith Decl. at 16) This statement from the plan language occurs in that portion of the amended plan which discusses administrative expenses of the bankruptcy proceeding. The last sentence quoted above makes it clear that the debtor was explaining that it saw the Defense Department as a source of additional funds. The debtor saw these negotiations, not as resolving the amount owed to the Government, but as resolving the amount the Government owed to the debtor. When read together with the attached schedule of the pay out which the creditors could receive, it is clear that the Department of Defense would receive, under all possible alternatives, no payment whatsoever. The only issue was the amount of money that the Department of Defense would owe to the appellant. The amended plan cannot reasonably be read, as the Government urges, to expressly "not disallow the Government's claim."

The Government next argues that "subsequent events demonstrate that the intent of the plan was to permit the present claims to survive outside the other provisions of the plan." (Gov't resp. at 5) The Government points to the fact that the Government's objections to the confirmation of the plan made no objection with regard to the discharge of the Government's claim for unliquidated progress payments. From this fact the Government argues that resolution of those claims must have been saved for later resolution. The Government's argument is specious. Just the contrary is true. The absence of an objection is evidence of nothing more than a failure to, or an election not to, object. The Government is bound by the consequences of that failure or election.

The Government next points to the fact that the appellant filed a claim with the contracting officer for a constructive change, currently the subject of ASBCA No. 49308, on the same day as the Bankruptcy Court's Order was issued, *i.e.,* 27 April 1995. The Government argues that this claim "ties into the language of the plan addressing certain claims for set off against the amount claimed by DOD." On the contrary, the filing of that contractor claim says nothing about the resolution of the Government's claims. Moreover it says nothing - it is silent - about counsel's main contention – that the Government's claim was removed from the bankruptcy proceeding.

The Government also points to the fact that the debtor filed an objection to the Government's claim on 30 May 1995, after the plan had been confirmed on 27 April 1995. The Government argues that there would have been no need to file the objection if the Government claim had been discharged. However, pursuant to the terms of the plan, the Court retained jurisdiction over such matters until the case was closed. Thus it was consistent with the plan for the debtor to file such an objection. Contrary to counsel's argument, the filing of the appellant's objection to the Government's claim emphasizes that

the appellant was contesting the Government's claim in the Bankruptcy Court - not removing the Government's claim from the bankruptcy proceeding.

The Government next points out that the debtor did not move for an adversary hearing with respect to the Government's claim. The Government then argues that the fact of the debtor not moving for an adversary hearing is evidence that the debtor was taking "every action it could to hear the action before the Board, not the court." (Gov't resp. at 6) It is true that there was no adversary hearing with respect to the Government's claim for unliquidated damages; however, the burden of proof on a claim to which there has been an objection is upon the claimant. Furthermore, the plan provided that no payment would be made to the Government with respect to this claim. It was up to the Government to demand a hearing or file an objection to this aspect of the plan if it objected to the no payment treatment it was going to receive by confirmation of the plan. It was the Government that took no action.

The fatal difficulty with the Government's position is that it is merely an argument as to what the Government's intention could have been. There is simply no evidence as to what the Government intended. There is no filing in the Bankruptcy Court, no statement from the contemporary record, and no affidavit as to the Government's intention at the time of the bankruptcy proceeding.

The Government states that this case is like *San Antonio Management Corp., d/b/a Advance Health Systems,* ASBCA No. 40415, 95-2 BCA ¶ 27,785, where we denied a motion for summary judgment. In that case the issue was whether the appellant was entitled to be paid for the services of its nurses during the nurses' lunch break. The contract was silent on the issue and the motion for summary judgment was not supported by a statement of undisputed facts from which we could interpret the contract. This case is different, because the plan clearly states that the Government is to be paid nothing on its claim for unliquidated progress payments. Additionally, in this case the appellant has provided a statement of undisputed facts, which the Government does not contest.

The Government asserts that both the Bankruptcy Court and the Board have concurrent jurisdiction over the Government's claim, citing *Quality Tooling, Inc. v. United States,* 47 F.3d 1569, 1572, 1577 (Fed. Cir. 1995). Thus, argues the Government, a hearing by this Board is consistent with the argued for interpretation of the plan - leaving resolution of the Government's claim to be resolved outside of the Bankruptcy Court. The Government cites *Pettibone Corp. v. United States,* 34 F.3d 536, 539 (7th Cir. 1994) for the argument that the plan left the determination of the Government's claim to be determined by the normal Contract Dispute Act process. In *Pettibone* the Court read the bankruptcy plan as providing for "an agreement to pay taxes as determined by normal IRS operating procedures." *Pettibone Corp. v. United States,* 34 F.3d at 539. What is of crucial interest, however, is the fact that the bankruptcy plan itself provided that Pettibone was "to pay 'Unsecured Tax Claims' in the 'full amount, of such Allowed Claims' plus

interest 'at such rate as may be approved by the Bankruptcy Court.' It did not, however, quantify these 'Allowed Claims.'" *Pettibone Corporation v. United States,* 34 F.3d at 538. Clearly, the plan in *Pettibone* is different from the plan in the appellant's bankruptcy. In *Pettibone* the plan provided for the payment of "Allowed Claims," while the appellant's plan provided for the payment of "$0.00."

The Government asserts that the Government retains a right of recoupment, even though the claims are discharged. *See In re Davidovich,* 901 F.2d 1533, 1537 (10th Cir. 1990); *In re Holford,* 896 F.2d 176, 178 (5th Cir. 1990). The Government also contends that it retains the right of set off under 11 U.S.C. § 553. Those issues may be relevant in defending against the appellant's claim in ASBCA No. 49308, but they are irrelevant in considering whether the Government's claim was discharged in bankruptcy.

The undisputed material facts establish that the Government's claim for unliquidated progress payments was discharged in the bankruptcy proceeding. *See Gary Aircraft Corp. v. United States,* 226 Ct. Cl. 568 (1981). Under these undisputed facts, we must grant the appellant's motion for summary judgment. The appeal is sustained.

Dated: 16 July 2001

RONALD A. KIENLEN
Administrative Judge
Armed Services Board
of Contract Appeals

I concur

PAUL WILLIAMS
Administrative Judge
Chairman
Armed Services Board
of Contract Appeals

I concur

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. 49892, Appeal of Ver-Val Enterprises, Inc., rendered in conformance with the Board's Charter.

Dated:

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