ARMED SERVICES BOARD OF CONTRACT APPEALS

Appeal of --	)	
	)	
Adventure Group, Inc.	)	ASBCA No. 53097
	)	
Under Contract No. DABT31-98-C-0010	)	

APPEARANCE FOR THE APPELLANT: Thomas J. Kelleher, Jr., Esq.
Smith, Currie & Hancock LLP
Atlanta, GA

APPEARANCES FOR THE GOVERNMENT: COL Michael R. Neds, JA
Chief Trial Attorney
CPT Ryan M. Zipf, JA
Trial Attorney

OPINION BY ADMINISTRATIVE JUDGE YOUNGER
ON RESPONDENT'S MOTION TO DISMISS

Respondent has moved to dismiss this appeal as premature pending the outcome of Department of Labor wage classification proceedings. Appellant contends that those proceedings have no effect on its request for mistake-in-bid relief, on which it should be entitled to proceed. We grant the motion.

BACKGROUND

By date of 23 June 1998, respondent awarded Contract No. DABT31-98-C-0010 to appellant for the installation of radiator and pump bypass valves in various areas of Ft. Leonard Wood, Missouri. The contract contained various standard clauses, including FAR 52.222-7 WITHHOLDING OF FUNDS (FEB 1988); FAR 52.222-13 COMPLIANCE WITH DAVIS-BACON AND RELATED ACT REGULATIONS (FEB 1988); and FAR 52.222-14 DISPUTES CONCERNING LABOR STANDARDS (FEB 1988). (R4, tab 1 at 1, 2, I-17, I-22)

By fax transmittal dated 7 June 1999, the contract administrator informed the Department of Labor that the State of Missouri had alleged that appellant had misclassified pipefitters working on the contract as plumbers/laborers (*id*., tab 8 at 1). Thereafter, the Department of Labor advised the contracting office that it had opened an investigation into the allegations (*id*., tab 12).

By fax transmittal dated 26 August 1999, the contracting officer advised the Department of Labor that he had received the final two invoices from appellant. He inquired whether, "[b]ased on your investigation at this point, is there evidence that would justify my

withholding payments [equal to the estimated wage underpayments] under the provisions of FAR 22.406-9?" (*Id*., tab 13) In response, the Department of Labor asked the contracting officer "informally that all funds be withheld until all [of appellant's] certified payrolls are reviewed and closer estimates of back wages are computed" (*id*., tab 14 at 1). Thereafter, by letter dated 1 September 1999, the contracting officer advised appellant that he was withholding payment of two invoices aggregating $95,121.39 for use of erroneous wage classifications (*id*., tab 15).

By undated letter to the contracting officer, appellant submitted a certified claim for $105,690.65 for "post award bid mistake relief" because, at the time of bid, "both [appellant] and the Government had similar interpretations of the wage classifications." Appellant sought "reformation of the contract price and an increase in the contract price of $105,690.65," the amount then said to have been withheld by the contracting officer. (*Id*., tab 21 at 1, 4, 5, 6)

By letter dated 21 January 2000, the contracting officer declined to render a decision because the "Department of Labor has not made a final determination on what classifications should have been utilized under subject contract" (*id*., tab 22). Thereafter, on 16 March 2000, appellant filed a petition with the Board seeking an order directing the contracting officer to render a decision (*id*., tab 23), and by Order dated 28 June 2000, we directed him to issue a decision within 30 days. *Adventure Group, Inc.*, ASBCA No. 52687-877, 00-2 BCA ¶ 30,994 at 153,039. The contracting officer rendered his decision by date of 18 July 2000 denying appellant's claim "as being premature because the Department of Labor has not completed its investigation" (R4, tab 27). Appellant subsequently brought this timely appeal and respondent moved to dismiss.

The parties have filed status reports regarding the Department of Labor proceedings. It is undisputed that appellant "has requested a further hearing with the Department of Labor" and the proceedings remain pending. (Appellant's Supplemental Status Report at 1)

DISCUSSION

In its motion papers, respondent contends that the appeal is premature because the Department of Labor has not rendered a final determination regarding the wage classifications on the contract. Respondent also urges that appellant has neither waived nor exhausted its appeal rights before the Department of Labor. (Government's Motion to Dismiss Appellant's Appeal as Premature at 6-9) For its part, appellant argues that its reformation claim is ripe for decision, even though it relates to wage classifications, because the Department of Labor proceedings will entail no more than a "final monetary calculation" of appellant's position. (Response to Motion to Dismiss at 5-6)

We grant the motion and dismiss the appeal without prejudice. We have previously dismissed as premature appeals in which contract claims were integrally related to wage classification disputes pending before the Department of Labor. *E.g., Source AV, Inc.*,

ASBCA No. 45192, 94-1 BCA ¶ 26,293 at 130,783 (dismissing counts of complaint without prejudice as premature because "it appears that a final [Department of Labor] decision has not been issued as to the alleged misclassification violations"); *M.A. Mortenson Co.*, ASBCA No. 45584, 93-3 BCA ¶ 26,238 at 130,543 (same). While appellant relies upon *Burnside-Ott Aviation Training Center, Inc. v. United States*, 985 F.2d 1574, 1580 (Fed. Cir. 1993), we distinguished that case in both *Source AV* and *Mortenson*. By contrast to the pending wage classification proceedings here, the contractor in *Burnside-Ott* had "accepted the [Department of Labor] ruling and paid its employees" and, by its contractual claims, "simply request[ed] the Claims Court to determine the effect that the . . . classification ha[d] on its contract rights." We reached a similar conclusion in *Hunt Building Corp.*, ASBCA No. 50083, 97-1 BCA ¶ 28,807 at 143,699 (finding 14), 143,700, upon which appellant also relies, where we determined that the Department of Labor proceedings were ended, and hence we could proceed to determine "whether appellant is to be reimbursed under the contract for added costs ensuing from [those] proceedings."

The record leaves no doubt that appellant's mistake-in-bid claim revolves around the still-disputed wage classifications. As articulated in the claim document itself, the premise is that, at the time of bid, both parties "had similar interpretations of the wage classifications," which were mistaken. Given this premise, until the Department of Labor proceedings have laid to rest whether the wage classifications were right or wrong, our work in this appeal would be premature.

CONCLUSION

Respondent's motion to dismiss is granted. Pursuant to our Rule 30, the appeal is dismissed without prejudice to its reinstatement either when appellant has waived further proceedings before the Department of Labor, or when that Department has rendered its decision.

Dated: 28 September 2001

ALEXANDER YOUNGER
Administrative Judge
Armed Services Board
of Contract Appeals

(Signatures continued)

I concur

MARK N. STEMPLER
Administrative Judge
Acting 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. 53097, Appeal of Adventure Group, Inc., rendered in conformance with the Board's Charter.

Dated:

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