ARMED SERVICES BOARD OF CONTRACT APPEALS

Appeals of --	)	
	)	
KiSKA Construction Corp.-USA and	)	
Kajima Engineering and Construction, Inc.,	)	
A Joint Venture	)	ASBCA Nos. 54613, 54614
	)	
Under Contract No. 1E0023	)	

APPEARANCE FOR THE APPELLANT: William J. Postner, Esq.
Postner & Robin
New York, NY

APPEARANCES FOR THE GOVERNMENT: Carol B. O'Keeffe, Esq.
Acting General Counsel
Donald A. Laffert, Esq.
Associate General Counsel
Washington Metropolitan Area
Transit Authority

OPINION BY ADMINISTRATIVE JUDGE JACK DELMAN
ON MOTION TO SUSPEND APPEALS

The Washington Metropolitan Area Transit Authority (WMATA) has moved to suspend these appeals pending resolution of a related matter before the U.S. District Court for the District of Columbia. The contractor joint venturers, KiSKA Construction Corp. – USA and Kajima Engineering and Construction, Inc. (appellant), oppose the suspension. In accordance with a Board order, the parties have submitted briefs in support of their positions.

We have jurisdiction pursuant to a Memorandum of Understanding (MOU) executed by WMATA and the ASBCA in January, 2001, in which the ASBCA has been designated as the forum for the administrative resolution of contract disputes under WMATA contracts containing a "Disputes" article. The Contract Disputes Act, 41 U.S.C. § 601 *et seq.*, does not apply to these appeals.

FINDINGS OF FACT FOR PURPOSES OF THE MOTION

1. Appellant was awarded a contract on or about 25 February 1994 by WMATA to construct, among other things, two tunnels for a subway system, described as the "Greenbelt Route, 14th Street Tunnels" (Rule 4, tab 9). According to WMATA, contract completion occurred on 22 May 1997 (R4, tab 1 at 2).

2. Disputes arose during contract performance. On or about 10 November 1997, appellant filed an action in the U.S. District Court for the District of Columbia against WMATA, claiming fraudulent misrepresentation, negligent misrepresentation, quantum meruit, unilateral mistake, and breach of contract.[1] There is no dispute that the court dismissed the first two causes of action, granted summary judgment to WMATA on the third, and held the latter two over for trial.

3. After a jury trial, the jury found for WMATA on the remaining counts (app. opp'n ex. 1), and judgment was entered for WMATA (R4, tab 8). Thereafter, appellant filed an appeal with the United States Court of Appeals for the D.C. Circuit, and the Court affirmed. *KiSKA Construction Corp. v. Washington Metropolitan Area Transit Authority*, 321 F.3d 1151 (D.C. Cir. 2003), *cert. denied*, 540 U.S. 939 (2003).

4. By letter to the contracting officer dated 5 January 2004, appellant claimed payment of contract price retainage and sought equitable adjustments under the Changes, Suspension of Work, and Variations in Estimated Quantities articles in the contract. According to appellant, these matters had not been adjudicated in the above litigation. (R4, tab 3)

5. By letter to appellant dated 15 April 2004, the contracting officer stated that appellant had placed in contention all contract claims and costs in the federal court proceedings, and the judgment in WMATA's favor precluded any further payments by WMATA. The contracting officer concluded as follows:

> All issues associated with contract 1E0023, both those "arising from" and "related to" that contract, have been resolved. Your request does not give rise to a controversy or

[1] Section 81 of The WMATA Compact, D.C. Code § 9-1107.01 (2001) states as follows: "The United States District Courts shall have original jurisdiction, concurrent with the courts of Maryland, Virginia, and the District of Columbia, of all actions brought by or against the Authority and to enforce subpoenas issued under this Title. Any such action initiated in a State or District of Columbia court shall be removable to the appropriate United States District Court in the manner provided by 28 U.S.C. 1446."

> dispute, so there is no requirement to issue a decision. I decline to do so.

(R4, tab 1 at 2)

6. Appellant deemed said letter a contracting officer's decision denying the claim under the Disputes article, and filed a timely appeal with this Board. The appeal as it related to the claim for retainage was docketed as ASBCA No. 54613; the appeal as it related to the claims for equitable adjustment was docketed as ASBCA No. 54614. The Board consolidated the appeals.

7. Appellant filed a complaint in accordance with the Board's rules.[2] In lieu of an answer, WMATA filed a letter dated 19 July 2004, stating that it had filed an action for declaratory judgment in the U.S. District Court for the District of Columbia, seeking a judgment that the ASBCA claims were barred by *res judicata* and/or collateral estoppel. WMATA requested that the Board suspend the appeals until the court entered judgment. Appellant opposed any suspension or stay.

DECISION

The Board has the inherent authority to manage its docket and to stay or suspend proceedings in appropriate circumstances. In exercising this authority, we must apply our judgment to weigh the competing interests of the parties and to assess any relevant prejudice. *See Afro-Lecon, Inc. v. United States*, 820 F.2d 1198 (Fed. Cir. 1987). *See also Landis v. North American Co.*, 299 U.S. 248 (1936).

Under the Disputes article, a contractor has the right to a hearing and decision by the Board within a reasonable time. *Ingalls Shipbuilding Division, Litton Systems Inc.*, ASBCA No. 22645, 78-2 BCA ¶ 13,350. *See also*, Board Rules, Section II, Statement of Purpose, which states in pertinent part as follows:

> These rules will be interpreted so as to secure just and inexpensive determination of appeals without unnecessary delay.

Clearly, a suspension along the lines requested by WMATA will materially delay these proceedings and appellant's rights therein. As moving party, WMATA must show a demonstrable need for the requested suspension that would outweigh the resultant delay

[2] The ASBCA rules that govern non-CDA appeals were approved 15 July 1963, as revised 1 May 1969, 1 September 1973.

to these appeals. *See also Donat Gerg Haustechnik*, ASBCA Nos. 41197 *et al.*, 96-1 BCA ¶ 27,977 (motion for stay of CDA appeals denied).

We believe WMATA has not done so. WMATA argues that we should defer to the district court because that court is the appropriate forum to determine the preclusion effect of its own judgment. However, the law is to the contrary. As stated in 18 CHARLES ALAN WRIGHT, ARTHUR R. MILLER & EDWARD H. COOPER, FEDERAL PRACTICE AND PROCEDURE § 4405 (2d ed. 2002):

> Ordinarily both issue preclusion and claim preclusion are enforced by awaiting a second action in which they are pleaded and proved by the party asserting them. The first court does not get to dictate to other courts the preclusion consequences of its own judgment [footnote omitted], although it should have the authority to make an explicit and binding disclaimer of preclusion. [Footnote omitted]

See also Midway Motor Lodge of Elk Grove v. Innkeepers' Telemanagement and Equipment Corp., 54 F.3d 406, 409 (7th Cir. 1995): "In the law of [issue] preclusion, however, the court rendering the first judgment does not get to determine that judgment's effect; the second court is entitled to make its own decision, ..." Applying this principle to the facts of this case, we believe that the Board, as the tribunal in the second action, is the appropriate forum to rule on the preclusion issue based upon the pleadings and the record developed by the parties. *See DWS, Inc.*, ASBCA No. 33245, 87-3 BCA ¶ 20,133 at 101,925, *aff'g* 87-3 BCA ¶ 19,960 (the extent to which Board findings and conclusions may collaterally estop a contractor in parallel Claims Court proceedings is to be determined by the latter tribunal). That the Board's decision may be subject to appeal to a district court does not change that fact.

WMATA also contends that a suspension of our proceedings is necessary because a district court ruling will bring finality to the preclusion issue. We do not agree. A district court ruling will not end the litigation; that ruling will be subject to appeal to the D.C. Circuit. It may take years for this process to conclude. Even so, there is no certainty that a D.C. Circuit ruling will bring finality. Other court actions may also be possible.[3] *See, e.g., Norair Engineering Corp. v. Washington Metropolitan Area Transit Authority*, 33 F. Supp. 2d 422 (D. Md. 1998); *Washington Metropolitan Area Transit Authority v. Buchart-Horn, Inc.*, 886 F.2d 733 (4th Cir. 1989). It is the course of action proposed by WMATA that has the real potential for unnecessary delay and uncertainty.

---

[3] Article 6, Disputes, provides for judicial review of a board decision by either party in a court of competent jurisdiction, *i.e.*, the relevant U.S. district courts. (R4, tab 9 at GP-4)

We likewise find unpersuasive WMATA's related arguments that a grant of a suspension will reduce litigation cost and promote judicial economy. We believe that the orderly prosecution of these appeals – not their suspension – will best serve these interests.

We have reviewed the cases cited by WMATA but they are distinguishable and do not support suspension under the circumstances of this case. Having weighed the competing interests of the parties, and having assessed the relevant prejudice, we conclude that WMATA has failed to make a requisite showing to support the suspension of these appeals. Its motion is denied. WMATA is ordered to file a responsive pleading to appellant's complaint no later than 30 days from receipt of this decision.

Dated: 29 March 2005

JACK DELMAN
Administrative Judge
Armed Services Board
of Contract Appeals

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 Nos. 54613, 54614, Appeals of KiSKA Construction Corp. – USA and Kajima Engineering & Construction, Inc., A Joint Venture, rendered in conformance with the Board's Charter.

Dated:

CATHERINE A. STANTON
Recorder, Armed Services
Board of Contract Appeals