

ARMED SERVICES BOARD OF CONTRACT APPEALS

Appeal of -)
Exceed Resources, Inc.) ASBCA No. 61652
Under Contract No. NNJ15RA22B)

APPEARANCE FOR THE APPELLANT: Mr. Celsius Rebello
Director Government Services

APPEARANCES FOR THE GOVERNMENT: Scott W. Barber, Esq.
NASA Chief Trial Attorney
Warnecke Miller, Esq.
Trial Attorney
Johnson Space Center, TX
Vincent A. Salgado
Trial Attorney
NASA Headquarters
Washington, DC

OPINION BY ADMINISTRATIVE JUDGE O’CONNELL ON
APPELLANT’S MOTION TO RECTIFY ORDER OF DISMISSAL
AND CORRECT RULING OF SUMMARY JUDGMENT

Before the Board is the motion of appellant, Exceed Resources, Inc. (Exceed) “to rectify order of dismissal and correct ruling of summary judgment.” As the National Aeronautics and Space Administration (NASA) states in its response, Exceed has filed what is, in essence, a third motion for reconsideration. As described below, the Board has already dismissed this appeal twice – at Exceed’s request – but Exceed continues to file motions and other documents challenging the Board’s actions.

This appeal involved two issues: 1) whether Exceed could pursue a claim for about \$2.5 million in breach of contract damages notwithstanding a bilateral contract modification terminating the contract in which the parties agreed that Exceed would receive no money other than phase-in costs; and 2) whether Exceed could challenge the contracting officer’s rating of its performance in the government’s Contractor Performance Assessment Reporting System. *Exceed Resources, Inc.*, ASBCA No. 61652, 20-1 BCA ¶ 37,634 at 182,718. The Board granted the National Aeronautics and Space Administration (NASA) summary judgment on the former issue on June 11, 2020, *id.*, and denied Exceed’s motion for reconsideration on November 2, 2020. *Exceed Resources, Inc.*, ASBCA No. 61652, 20-1 BCA ¶ 37,725.

On January 28, 2021, Exceed filed a motion seeking “to withdraw the pending claims without prejudice, which are pending to be adjudicated, post the decision of the Board on November 2, 2020, in case No. 61652.” Despite this statement, Exceed has peppered the Board with numerous filings that, in large part, continue to dispute the Board’s summary judgment ruling, such that our docket contains more than 35 entries after Exceed’s request to withdraw the remaining claims on January 28, 2021.

While it is somewhat difficult to summarize Exceed’s numerous contentions, we believe that the following statements in its reply brief reflect the core of its arguments:

We are not arguing prior allegations. We are asking for our claim of **\$2,490,251, comprising lost profits on the JASS II Contract due to NASA's bad faith and breach of contract.**” [sic] to be adjudicated. It was not adjudicated at all so there was no previous opportunity to re-argue. . .

. . . .

The basis of our reconsideration motion is to point to the Board that it has not ruled on Exceed’s claim. The evidence we present is that the board’s previous rulings were decided on termination and not on breach of contract and bad faith.

(App. reply at 10) (emphasis in original)

Despite these contentions, the Board’s opinion granting NASA summary judgment did address Exceed’s breach of contract and bad faith contentions. As reflected above, the first page of our opinion identified the issue we were deciding as “whether Exceed could pursue a claim for about \$2.5 million in breach of contract damages. . .” *Exceed Resources*, 20-1 BCA ¶ 37,634 at 182,718. We further specified that the appeal arose from an Exceed claim “seeking, among other things, \$2,576,370 in breach of contract damages. The largest portion of this amount is \$2,490,251 in lost profits. . .” *Id.* at 182,719-20. The decision addressed at length Exceed’s contentions concerning NASA’s alleged bad faith, but rejected them. *Id.* at 182,720-22.

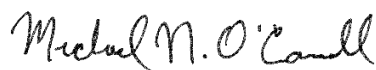
As the Board stated in our ruling on Exceed’s second motion for reconsideration, Board Rule 20 provides that a motion for reconsideration “must be filed within 30 days from the date of the receipt of a copy of the decision of the Board by the party filing the motion.” There is no provision in the Board’s Rules for a motion for reconsideration beyond this time, or for a second or third motion for reconsideration and, absent extraordinary circumstances that are not present here, we

would not consider one. *See Quality Trust, Inc.*, ASBCA No. 59983, 16-1 ¶ 36,529 at 177,948 (citing *Clyde P. Thomas*, ASBCA No. 28296, 88-3 BCA ¶ 21,179 at 106,881).

Finally, Exceed also requests that the Board modify the language in our February 22, 2021, dismissal order. The Board previously granted Exceed's January 28, 2021, motion to withdraw the remaining claims on February 10, 2021. This led to another set of filings from appellant, which led the Board to reinstate the appeal on February 17, 2021. This resulted in yet another set of filings from appellant, and the Board dismissed the appeal again on February 22, 2021, which only resulted in more filings from appellant, including the pending motion. As best we can tell, Exceed believes that it is entitled, in the dismissal order, to a more complete description of the claim addressed by the Board in the June 2020 summary judgment decision. However, that opinion speaks for itself, and the Board is not convinced that a lengthier description of the issues resolved in that opinion will serve any purpose.

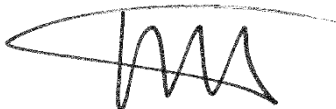
Appellant's motion is denied. Appellant is again directed to 41 U.S.C. § 7107(a)(1)(A) concerning further appellate review. The Recorder's office shall accept no further filings from appellant in this matter.

Dated: May 3, 2021



MICHAEL N. O'CONNELL
Administrative Judge
Armed Services Board
of Contract Appeals

I concur



RICHARD SHACKLEFORD
Administrative Judge
Acting Chairman
Armed Services Board
of Contract Appeals

I concur



J. REID PROUTY
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. 61652, Appeal of Exceed Resources, Inc., rendered in conformance with the Board's Charter.

Dated: May 5, 2021



PAULLA K. GATES-LEWIS
Recorder, Armed Services
Board of Contract Appeals