



UNITED STATES
CIVILIAN BOARD OF CONTRACT APPEALS

MOTION TO ENFORCE ORDER DISMISSED: January 30, 2007

CBCA 389, 589, 590

AMEC CONSTRUCTION MANAGEMENT, INC.,

Appellant,

v.

GENERAL SERVICES ADMINISTRATION,

Respondent.

James D. Wareham, Kirby D. Behre, James E. Anklam, and Danielle W. Pierce of Paul, Hastings, Janofsky & Walker LLP, Washington, DC; and Barbara G. Werther and Ronan J. McHugh of Thelen, Reid, Brown, Raysman & Steiner LLP, Washington, DC, counsel for Appellant.

Dalton Phillips and Catherine Crow, Office of General Counsel, General Services Administration, Washington, DC, counsel for Respondent.

Before Board Judges **DANIELS** (Chairman), **BORWICK**, and **PARKER**.

DANIELS, Board Judge.

On December 26, 2006, AMEC Construction Management, Inc. (AMEC) filed a Motion to Enforce Order. The "Order" to which the motion is directed is a decision issued by the General Services Board of Contract Appeals (GSBCA) in three cases before that board, GSBCA 16163, 16183, and 16388. On January 6, 2007, pursuant to section 847 of the National Defense Authorization Act for Fiscal Year 2006, Pub. L. No. 109-163, the GSBCA was terminated and its cases, personnel, and other resources were transferred to a newly-established Civilian Board of Contract Appeals (CBCA). The CBCA redocketed the

cases as CBCA 389, 589, and 590, and is considering the motion under those docket numbers.

The GSBCA's decision, *AMEC Construction Management, Inc. v. General Services Administration*, GSBCA 16163, et al. (June 16, 2006), incorporated the terms of a stipulated judgment. It directed the respondent, the General Services Administration (GSA), to pay to AMEC the sum of \$6,700,000, together with interest if appropriate. The decision specified that "[p]ayment shall be made from the permanent indefinite judgment fund. 31 U.S.C. § 1304." The decision also recited stipulations of the parties, including one "[t]hat neither party will seek reconsideration or relief from final judgment or otherwise appeal the final judgment."

The permanent indefinite judgment fund is administered by the Department of the Treasury. On September 18, 2006, the manager of the Judgment Fund Branch of Treasury's Financial Management Service wrote to AMEC:

On August 25, 2006, the General Services Administration (GSA) submitted a request to the Judgment Fund Branch, Financial Management Service (FMS), Department of the Treasury, to certify a payment in the amount of \$6,700,000.00, plus interest, awarded in the matter of AMEC Construction Management Inc. v. General Services Administration, GSBCA Nos. 16163, 16183, 16388. GSA also provided notice that the entire payment amount should be withheld and set off against a debt owed by AMEC Construction Management Inc. (AMEC) to the United States.

Pursuant to 31 U.S.C. § 3728, the Department of the Treasury is required to collect a debt owed to the United States by taking a setoff against judgments awarded in actions against the United States. Accordingly, FMS is withholding the entire payment amount in the above-referenced matter in order to set off this payment against a debt owed by AMEC to the United States.

The Board's decision which is the subject of AMEC's motion involved a contract between AMEC and GSA for the renovation of the Interstate Commerce Commission, United States Customs Service, and Connecting Wing Buildings in Washington, D.C. The debt to which the Treasury letter refers involves a Government claim which was made under a contract between the same parties for the core and shell construction of the Thomas F. Eagleton Courthouse in St. Louis, Missouri. With respect to the latter contract, on March 21, 2006, a GSA contracting officer issued a final decision which states, "GSA has determined that [AMEC] is responsible under the . . . contract for the excess procurement costs, the costs to repair defective work installed by [AMEC] prior to the termination [for default], and

the assessment of liquidated damages through the date of substantial completion which total \$31,791,700.39.” By letter of May 1, 2006, the contracting officer corrected this amount to \$30,031,699.39, of which GSA demanded payment of \$28,496,723.05. By letter of October 10, 2006, the contracting officer revised the amount of the payment demand to \$28,496,731.05. On December 19, 2006, AMEC filed an action in the United States Court of Federal Claims appealing the contracting officer’s March 21, 2006 decision and her revised final decisions dated May 1 and October 10, 2006.

In its motion, AMEC asks the Board to “direct the GSA to honor the terms of the Order.” Motion at 5. AMEC says that GSA’s conduct in issuing the contracting officer’s decision in the St. Louis contract while negotiating a settlement of the cases involving the Washington contract was “duplicitous” and “strongly suggests that the GSA was not acting in good faith in this case.” *Id.* at 5, 6. AMEC also finds GSA’s actions “particularly disturbing” in that during 2005, the agency had paid a settled amount in other cases involving the Washington contract without asserting a right to setoff. *Id.* at 7. AMEC further contends that “[t]he purported setoff directly harms subcontractors” of AMEC on the Washington project in that “[a]n integral part of the [Board’s decision] was the release of settlement funds so that AMEC could make prompt payment to subcontractors.” *Id.* at 3, 6. “In sum,” says the contractor, “non-payment of the settlement amount was bad faith by the GSA.” *Id.* at 7.

AMEC also makes two principal legal arguments. First, it notes that boards of contract appeals have said that they have the authority to enforce settlement agreements. *See, e.g., East Coast Security Services, Inc. v. Department of Homeland Security*, DOT CAB 4469R, et al., 06-1 BCA ¶ 33,290; *Barnes, Inc.*, AGBCA 97-111-1, et al., 97-2 BCA ¶ 29,237. Therefore, says AMEC, the Board has authority to grant its motion. The contractor’s second principal legal argument is that “[b]ecause an appeal is already pending regarding the termination of the [St. Louis] Courthouse Contract, neither the GSA nor the Department of Treasury has the right to setoff under 31 U.S.C. § 3728.” Motion at 7. On this point, AMEC cites 31 U.S.C. § 3711(g)(2)(A)(i) (2000), which states that paragraph (g)(1)’s authorization to the Secretary of the Treasury to take action to collect a debt “shall not apply to any debt or claim that is in litigation or foreclosure.”

In response, GSA maintains that “[b]asically, AMEC is arguing that the Government’s exercise of its right of offset was improper.” Respondent’s Response to Motion at 1. The agency notes that “[t]he Government’s administrative offset was not performed by the contracting officer or any of the personnel who administered the contract [for the Washington project]” and that “the captioned appeal[s] ha[ve] been settled, the record has been closed and the Board has rendered its final order.” *Id.* at 1, 2. GSA cites several cases for the proposition that “[t]he Government’s common law right of setoff is well established” and that “[n]either the Contract Disputes Act (CDA) nor the [Debt Collection Act] limits

[that] right.” *Id.* at 3. GSA says that AMEC’s allegations of inappropriate behavior and bad faith “are untrue and totally unfounded.” *Id.* at 4. The agency also observes that AMEC’s own motion states that the contractor has already paid its subcontractors their agreed-upon shares of the amount provided in the Board’s decision, so any concern for how the setoff might affect the subcontractors is misplaced. *Id.* at 6. GSA also cites a practical reason for making the setoff: According to a stipulation in a case before the Court of Federal Claims, AMEC is “winding down its business” and its net assets had become negative by tens of millions of dollars by July 2005. If the agency prevails at the court, the agency says, “[t]his setoff may be GSA’s only opportunity to seek redress from AMEC for the taxpayers.” *Id.* at 7. Finally, GSA urges that two 1973 decisions of the Court of Claims -- *Dale Ingram, Inc. v. United States*, 475 F.2d 1177, 1188, and *Project Map, Inc. v. United States*, 486 F.2d 1375 -- support the proposition that the Government may set off moneys owed to a contractor against the Government’s contract claims, even if those claims are being challenged before a board of contract appeals.

We are puzzled by the motion because AMEC is not asking the Board to do anything other than what it did last June 16, as to the matters addressed in our decision of that date: order the Government to pay \$6,700,000 to AMEC. We took this action in a decision from which no motion for reconsideration or relief from decision, and no appeal, was possible. GSA has acknowledged a debt to AMEC in this amount. If we were to reissue the decision, saying, “This time we really mean it!” how would that affect anything? Because we issued a decision, rather than an order dismissing the cases in question, the situation is different from the ones in the cited *East Coast* and *Barnes* cases: we have already mandated the action that the contractor asks us to direct. The holdings in those cases consequently do not apply here.

AMEC has used the words “bad faith” in its motion. Could this be cause for reopening the matters addressed in the decision, notwithstanding the limitations placed in the decision at the parties’ request? We need not answer this question because even if we were to conclude in the affirmative, the assertions AMEC makes do not, on their face, show bad faith. Whatever actions GSA took in 2005 to pay the contractor in settlement of claims on the Washington project, when matters were not yet resolved on the St. Louis project, do not preclude the agency from acting differently in 2006; and the 2006 settlement on the Washington claims does not prevent GSA from asserting a setoff based on St. Louis claims. The contracting officer issued the decision asserting the St. Louis claim on March 21, before the parties settled the Washington claims on March 31 and well before the parties moved for a stipulated judgment on the appeals encompassing the Washington claims on June 14. AMEC had ample opportunity to propose rewriting the settlement agreement to exclude the possibility of the Government setting off one claim against the other, or to propose writing the motion for stipulated judgment to exclude this possibility, but it did not avail itself of

either opportunity. AMEC's subcontractors have by the contractor's admission been paid the amounts to which they were entitled pursuant to the settlement, so we cannot see how payment to them might be dependent on GSA's transmission of funds to AMEC.

As GSA points out, AMEC is really objecting to the determination of the Department of the Treasury, acting at the request of GSA, to set off against a claimed debt the amount of money the Board awarded in its decision. The Board's jurisdiction under the Contract Disputes Act is limited to hearing and deciding appeals by contractors of decisions issued by contracting officers on claims under contracts for the procurement of property (other than real property in being); services; construction, alteration, repair, or maintenance of real property; or disposal of personal property. 41 U.S.C.A. §§ 438(c)(1), 602, 605-607 (West 2007). We have no authority to decide, in the absence of such an appeal, whether GSA acted permissibly in requesting, or Treasury acted permissibly in determining, whether the setoff at issue was permissible. Whether AMEC is correct in maintaining that statute precludes such a setoff, and whether GSA is correct in maintaining that case law permits it, will have to be decided by a tribunal which has jurisdiction to consider these arguments.

Decision

AMEC's Motion to Enforce Order is **DISMISSED**.

STEPHEN M. DANIELS
Board Judge

We concur:

ANTHONY S. BORWICK
Board Judge

ROBERT W. PARKER
Board Judge