



UNITED STATES
CIVILIAN BOARD OF CONTRACT APPEALS

MOTION TO COMPEL MEDIATION DENIED: January 21, 2022

CBCA 6597

ACTIVE CONSTRUCTION, INC.,

Appellant,

v.

DEPARTMENT OF TRANSPORTATION,

Respondent.

Terry R. Marston II of Marston Legal, PLLC, Kirkland, WA, counsel for Appellant.

Rayann L. Speakman, Office of the Chief Counsel, Federal Highway Administration, Department of Transportation, Vancouver, WA, counsel for Respondent.

Before Board Judges **LESTER**, **VERGILIO**, and **GOODMAN**.

LESTER, Board Judge.

The parties in this appeal previously engaged in mediation efforts with a neutral assigned by the Chair of the Board under Board Rule 54 (48 CFR 6101.54 (2020)). Those efforts did not result in a resolution of the parties' dispute. Appellant, Active Construction, Inc. (ACI), has now requested that the Federal Highway Administration (FHWA) engage in a new mediation effort with a private mediator, but the FHWA is not amenable to ACI's request.

On January 18, 2022, ACI filed a motion with the Board seeking to compel the FHWA to participate in alternative dispute resolution (ADR) with a private mediator. In its motion, ACI represents that, while the FHWA is unwilling to engage a private mediator, the Board has the authority to compel the FHWA to participate in ADR under statutory

amendments to section 556 of the Administrative Procedures Act (APA), 5 U.S.C. § 556 (2018), that Congress created as part of the Administrative Dispute Resolution Act of 1990 (ADRA), Pub. L. No. 101-552, § 4(a), 104 Stat. 2736, 2737 (Nov. 15, 1990). As discussed below, we do not have the authority that appellant describes.

Discussion

ACI argues that the ADRA provides the Board with statutory authority to require mediation, even over a party's objection, through the following provision that was added to the APA through the ADRA's enactment:

Subject to published rules of the agency and within its powers, employees presiding at hearings may—

. . . .

(6) *hold conferences for the settlement or simplification of the issues by consent of the parties or by the use of alternative means of dispute resolution as provided in subchapter IV of this chapter;*

(7) inform the parties as to the availability of one or more alternative means of dispute resolution, and encourage use of such methods;

(8) *require the attendance at any conference held pursuant to paragraph (6) of at least one representative of each party who has authority to negotiate concerning resolution of issues in controversy;*

. . . .

5 U.S.C. § 556(c) (emphasis added). ACI asserts that sections 556(c)(6) and 556(c)(8) of the APA, when coupled together, provide the Board with the authority to compel the FHWA to engage in ADR, even if the FHWA objects.

The Contract Disputes Act (CDA), 41 U.S.C. §§ 7101–7109 (2018), not the APA, provides the basis of the Board's authority and “delineates the bounds of the Board's jurisdiction over contract disputes.” *Jane Mobley Associates, Inc. v. General Services Administration*, CBCA 2878, 16-1 BCA ¶ 36,209; *see White Buffalo Construction, Inc.*, IBCA 2918-F, et al., 91-3 BCA ¶ 24,221 (“CDA appeals are not pursuant to the APA.”).¹

¹ Section 556, the APA section upon which ACI relies, is contained within subchapter III of the APA and expressly “applies, according to the provisions thereof, to

ACI's misplaced reliance on the ADRA's amendments to the APA ignores the ADRA's amendment to the CDA that specifically applies to government contract claims and procedures of the boards of contract appeals. This amendment reads as follows:

Sec. 6. Government Contract Claims.

(a) Alternative Means of Dispute Resolution.— Section 6 of the Contract Disputes Act of 1978 (41 U.S.C. 606) is amended by adding at the end the following new subsections:

“(d) Notwithstanding any other provision of this Act, a contractor and a contracting officer may use any alternative means of dispute resolution under subchapter IV of chapter 5 of title 5, United States Code, or other *mutually agreeable procedures*, for resolving claims. . . . All provisions of subchapter IV of chapter 5 of title 5, United States Code, shall apply to such alternative means of dispute resolution.”

Pub. L. 101-552, § 6, 104 Stat. 2736, 2745-46 (Nov. 15, 1990) (emphasis added) (now codified at 41 U.S.C. § 7103(h)(1)).

As made clear in subchapter IV of chapter 5 of title 5 referenced in the above amendment to the CDA, “alternative means of dispute resolution . . . are voluntary procedures,” 5 U.S.C. § 572(c), and an agency “may” but is not required to “use a dispute resolution proceeding for the resolution of an issue in controversy . . . , if the parties agree to such proceeding.” *Id.* § 572(a). Although subchapter IV further provides that “[a]ny agency *may* enter into a contract with any person for services as a neutral, or for training in connection with alternative means of dispute resolution,” *id.* § 573(e) (emphasis added), it does not *require* an agency to do so.

In accordance with the ADRA's amendment to the CDA, Rule 54 of the Board's Rules establishes procedures through which parties in cases arising under the CDA can jointly request the assignment of an ADR neutral. For the Board to make such an assignment, both parties must be amenable. As the Board has previously held, Rule 54 provides no basis for requiring ADR where one of the parties is unwilling to participate:

hearings required by section 553 or 554” of the APA. 5 U.S.C. § 556(a). It has long been held that neither section 553 nor section 554 applies to the Board. *See, e.g., Ray & Ray's Carpet & Linoleum, Inc.*, GSBICA 5666, 83-1 BCA ¶ 16,184 (1982); *Claude C. Wood Co.*, AGBCA 79-176-1, et al., 82-2 BCA ¶ 15,999.

Participation in ADR at the CBCA is voluntary. CBCA Rule 54 requires the parties to jointly request ADR and to agree on an ADR method and procedures. The Government has not agreed to request or participate in ADR. While the CBCA makes ADR available to the parties as an alternative to litigation and often encourages the parties to resolve disputes using ADR, the Board will not, and has no authority to, compel the Government to participate in ADR.

S&DF Properties, LLC v. General Services Administration, CBCA 6809 (Aug. 13, 2020).

It is clear that the ADRA, by its amendments to the APA and the CDA, does not confer upon this Board the authority to compel mediation as requested by ACI.

Decision

For the foregoing reasons, ACI's motion to compel the FHWA to engage in mediation with a private mediator is **DENIED**.

Harold D. Lester, Jr.

HAROLD D. LESTER, JR.
Board Judge

We concur:

Joseph A. Vergilio

JOSEPH A. VERGILIO
Board Judge

Allan H. Goodman

ALLAN H. GOODMAN
Board Judge