UNITED STATES
CIVILIAN BOARD OF CONTRACT APPEALS

MOTION FOR COSTS AND ATTORNEY FEES DENIED: June 21, 2007

CBCA 95

MOUNTAIN VALLEY LUMBER, INC.,

Appellant,

v.

DEPARTMENT OF AGRICULTURE,

Respondent.

Alan I. Saltman and Richard W. Goeken of Saltman & Stevens, P.C., Washington, DC, counsel for Appellant.

Kenneth S. Capps, Office of the General Counsel, Department of Agriculture, Denver, CO; and Jennifer T. Newbold, Office of the General Counsel, Department of Agriculture, Missoula, MT, counsel for Respondent.

POLLACK, Board Judge.

Appellant seeks $40,330 in costs and attorney fees for discovery. That figure does not include the costs for the instant motion. Appellant says that absent such an award, the Board will be left with no effective remedy where the Government engages in extended procedural gamesmanship and where grudging compliance with orders of the Board unjustifiably impose large discovery costs on appellants. Moreover, appellant charges that failure to grant the motion will reward the Government for failing to comply in a timely manner with the Government's basic obligations in discovery and only encourage such conduct in the future.

This case arises out of appellant's attempt to secure documents, first from the Forest Service (FS) and then from the Department of Justice (DOJ). Appellant's attempts took

many fits and starts, with the FS and DOJ resisting attempts by appellant to secure the documents. Ultimately, after considerable time and after various filings and rulings by the Board, DOJ did provide a privilege log, the Board reviewed the log, and the documents were confirmed as privileged. For purposes of this decision, I need not address whether the actions of the Government, be it through the FS or DOJ, were of such a nature to constitute discovery abuse. I need not make a finding as to abuse, because I find that this motion is not sustainable based on the fact that the Board lacks the authority to impose the monetary sanctions on the Government for discovery abuse sought by appellant.

Appellant relies on language in the Contract Disputes Act (CDA or Act), 41 U.S.C.A. §§ 601-613 (2006), as the principal basis for it to claim Board authority to issue monetary sanctions. When initially passed in 1978, the Act specifically granted to the boards, "jurisdiction to decide any appeal from a decision of the contracting officer relative to a contract made by any agency. . . ." Section 8(d) of the Act also provided that the agency boards could grant "any relief that would be available to a litigant asserting a contract claim in the United States Court of Claims." *Id.* 607(d). Through later amendments the wording United States Court of Claims was changed to the United States Claims Court and thereafter to the United States Court of Federal Claims. It is the wording "any relief that would be available to a litigant in the United States Court of Federal Claims" (the current language) that is the focus of appellant's argument. For purposes of accuracy, in this ruling, I refer to this court as the United States Court of Federal Claims, unless I am addressing a court or board decision which cites one of the earlier court names.

Appellant recognizes that the matter of sanctions raises issues relating to the waiver of sovereign immunity by the Government. With that in mind, appellant says Congress has waived the Government's sovereign immunity so as to authorize the Civilian Board of Contract Appeals (CBCA) to grant the relief appellant asks. Appellant states, "This waiver of sovereign immunity comes from two sources: (1) the fact that the government has waived its sovereign immunity from costs and attorney's fees at the Court of Federal Claims (COFC) and (2) the Contract Disputes Act (CDA), which expressly provides the Board with authority to grant 'any relief" available at the COFC."

The FS disagrees with appellant. In defense of the motion, the FS cites a number of cases which it asserts establish that this Board cannot issue monetary sanctions against the Government for discovery abuses. Central to the issue of the authority of a board of contract appeals to exercise monetary sanctions is the decision in *Fidelity Construction Co. v. United States*, 700 F.2d 1379 (Fed. Cir. 1983). *Fidelity* involved a claim for attorney fees under the Equal Access to Justice Act (EAJA). It did not involve a claim for sanctions. In analyzing the claim before it, the Court first stated the following:

> We begin our analysis of the board's authority to award attorney fees against the United States, as we did in our analysis of the authority to award interest against the United States, by stressing that the doctrine of sovereign immunity must be overcome before there can be an award of such attorney fees. To overcome this doctrine, we must therefore find specific statutory language that expressly authorizes such an award. *Nibali v. United States*, 634 F.2d 494, 497 (Ct. Cl. 1980), and cases cited therein. The waiver of sovereign immunity must be unequivocally expressed. Neither this court nor any agency is authorized to award attorney fees against the United States by mere implication or by "negative inference."

700 F.2d at 1385.

The Court continued that if EAJA empowered the board to award attorney fees, the Court would expect to find that grant of authority in a specific statutory provision of that Act. It did not. The Court then turned to discussing attorney fees in relation to the CDA. There the Court expressly rejected the contention that the reference to the CDA in Section 204 of EAJA (28 U.S.C. § 2412(d)(3)) rendered EAJA applicable to decisions rendered by boards of contract appeals. The specific language in EAJA provided:

> In awarding fees and other expenses under this subsection to a prevailing party in any action for judicial review of an adversary adjudication, as defined in subsection (b)(1)(C) of section 504 of title 5, United States Code, or an adversary adjudication subject to the Contract Disputes Act of 1978, the court shall include in that award fees and other expenses to the same extent authorized in subsection (a) of such section, unless the court finds that during such adversary adjudication the position of the United States was substantially justified, or that special circumstances make an award unjust.

The Court noted that Section 204 of EAJA authorized a "court" to award fees and said nothing about an administrative tribunal. The Court focused on the point that there was no express language in EAJA granting a board of contract appeals authority to award fees and expenses against the United States and said that no such authority would be implied. *Id.* at 1386.

The Court then turned to an alternative argument put before it in *Fidelity*. This argument asserted that authority to issue relief under EAJA was incorporated through Section 8(d) of the CDA to the boards of contract appeals. The Court said:

> To this end, Fidelity contends that the EAJA may be applied to the board through section 8(d) of the CDA, which states that "the agency board is authorized to grant any relief that would be available to a litigant asserting a contract claim in the Court of Claims." 41 U.S.C. § 607(d). Although this argument is attractive and has been, in fact, successful in some board proceedings, we are not persuaded.

700 F.2d at 1387.

The Court later continued:

> Section 8(d) of the CDA was a floor amendment inserted to provide adequate authority to resolve breach of contract claims at the agency level. Nothing in the legislative history of EAJA suggests that Congress intended this general provision of the CDA to take precedence over its specific determinations respecting the powers of boards to award fees.
>
> As we noted previously, Congress must expressly authorize an award of fees against the United States with specific statutory language. In construing a statute waiving the sovereign immunity of the United States, great care must be taken not to expand liability beyond that which was explicitly consented to by Congress. It is an error to suppose that the ordinary canons of statutory construction are to be applied in this context, if they would add anything to what Congress has expressly said. Where, as here, a party's argument is "hopelessly dependent on implication and negative inferences," it ultimately must fail. *Nibali v. United States*, 634 F.2d at 497. The thrust of the Supreme Court's most recent decision, *United States v. Erika*, 456 U.S. 201, 102 S.Ct. 1650, 72 L.Ed.2d 12 (1982), is that broad and general language which might be construed as consenting otherwise, will not be so construed when Congress has elsewhere specified how and to what extent it consents to the specific liability to be enforced, or refuses consent.

Id.

I am mindful that the *Fidelity* decision dealt with the scope of EAJA and whether the language in EAJA made it applicable to boards, as well as to the COFC. The discussion as to Section 8(d) of the CDA was not the primary focus of the *Fidelity* decision, and the decision did not discuss the authority of a board to issue monetary sanctions due to discovery abuse. Nevertheless, the Court did address Section 8(d) in *Fidelity* and that discussion spread a wide net as to the need for specific and clear statutory language in order to waive

sovereign immunity. The decision made it evident that in order to succeed on a claim for attorney fees, be it through EAJA or any other route, the authority to secure monetary relief against the sovereign must be specifically and clearly provided. Where sovereign immunity is being waived, and that would be the case for monetary discovery sanctions by a board, the Court was clear that specific authority was needed and that relief could not be justified through inference and implication. As to the argument that this portion of *Fidelity* was dicta, I recognize that, but do not find that its status as dicta justifies the Board ignoring what is otherwise clear direction as to what is needed in order to waive sovereign immunity. Whether the discussion of Section 8(d) in *Fidelity* was dicta or not, that does not change the fact that the Court's reasoning still stands and is persuasive.

For purposes of historical perspective, it is noted that in 1985, Congress legislatively overruled *Fidelity* by amending EAJA to include proceedings at boards of contract appeals. Appellant argues that the legislative history of the amendment, giving the boards authority to grant EAJA recovery, strongly suggests that *Fidelity* was wrongly decided by the Court. Appellant asserts that the Court had erred, because the Court had improperly sought to draw a distinction between availability of costs and fees to contractors at the COFC and at the boards. Appellant asserts that to the extent cases indicate that Section 8(d) does not grant boards monetary sanction authority, those decisions are wrong. I will not here engage in an analysis of the accuracy of appellant's description of the legislative history as to the EAJA change. That is because such an analysis is not necessary, nor would it be particularly helpful for this decision. Even if one accepts appellant's contention as being fully accurate as to the legislative history of the EAJA change, and moreover conclude, as appellant does, that the Court was wrong in not understanding that EAJA was intended to cover the boards, the general legal standard of requiring an express delegation, rather than relying on implication and inference, remains good law and the benchmark we must follow.

Fidelity, however, does not exist in isolation. Since its issuance, numerous cases at our predecessor boards and at the Armed Services Board of Contract Appeals (ASBCA) have repeated that boards do not have jurisdiction to issue monetary sanctions for discovery abuses. As will be noted below, most do not directly address the effect of Section 8(d). The cases do, however, uniformly confirm the need for clear direction in the Congressional grant of authority.

In *Moore Mill & Lumber Co.*, AGBCA 90-210-10, 91-1 BCA ¶ 23,484 (1990), the Department of Agriculture Board of Contract Appeals (AGBCA) specifically noted that prior authority to the contrary in *Claude C. Wood Co.*, AGBCA 79-176-1, et al., 82-2 BCA ¶ 15,999, was implicitly overruled by *Fidelity.* Prior to *Fidelity*, the AGBCA had concluded that by virtue of CDA Section 8(d), the board had authority to grant attorney fees and costs to qualified litigants where the Government's position was not substantially justified

as provided in EAJA. In *Moore*, the board stated that *Fidelity* implicitly overruled the board's earlier holding. Accordingly, the board expressly declined to hold that Section 8(d) of the CDA provided a vehicle for awarding EAJA costs and fees under 28 U.S.C. § 2412(a), notwithstanding the fact that the Court of Claims had the authority to provide that remedy.

In *Turbomach*, ASBCA 30799, 87-2 BCA ¶ 19,756, the ASBCA addressed whether the assessment of attorney fees against the Government was available as a sanction tool in discovery. The board stated,

> It is beyond dispute that the sovereign is immune from suit filed without its consent and that without statutory authorization, attorneys' fees cannot be awarded against the United States. When sovereign immunity is held to be waived, such waiver cannot be implied but must be unequivocally expressed. *United States v. Testan*, 424 U.S. 392 (1976), *Fidelity Construction Co. v. United States*, 700 F.2d 1379 (Fed. Cir. 1983*), cert. denied,* 464 U.S. 826*; Nibali v. United States*, 225 Ct.Cl. 8, 634 F. 2d 494 (1980); *NAACP v. Civiletti*, 609 F.2d 514 (D.C. Cir. 1979), *cert. denied*, 447 U.S. 922 (1980). In order for this Board to have jurisdiction to award attorneys' fees, Congress must expressly authorize the award of fees against the United States with a specific statute. *Alyeska Pipeline Service Co. v. Wilderness Society*, 421 U.S. 240 (1975); *Fidelity*, *supra*.

Thereafter, the ASBCA continued to find no authority for monetary sanctions. *See Analysas Corp*., ASBCA 54183, 04-1 BCA ¶ 32,629 (no authority to award costs and attorney fees on interlocutory motions, such as motion to strike); *M.A. Mortenson Co.*, ASBCA 52881, et al., 03-2 BCA ¶ 32,293 (no authority to impose monetary sanctions for conduct during discovery); *E-Systems, Inc.*, ASBCA 46111, 97-1 BCA ¶ 29,975, at 144,301 (no authority to impose monetary sanctions for Government failure to comply with board order); *Stemaco Products, Inc.*, ASBCA 45469, 94-3 BCA ¶ 27,060, at 134,843 (no monetary sanction in discovery dispute).

Southwest Marine, Inc., ASBCA 39472, 94-1 BCA ¶ 26,487 (1993), merits specific comment, because there, in addition to agreeing with *Fidelity*, the ASBCA addressed the legislative history of the CDA as to breach claims and specifically rejected Southwest's attempt to bootstrap sanctions through the language of Section 8(d). In *Southwest*, the board discussed the fact that Congress included no language indicating an intent to establish uniform procedures between the court and board for handling discovery disputes and sanctions. The board pointed out, rather, that Congress recognized that each forum was unique and would operate by its own rules. The conclusion in *Southwest* and the ASBCA's discussion as to the uniqueness of the available forums is consistent with my view. Further, the ASBCA's

conclusions in *Southwest* are inconsistent with appellant's argument that, through Section 8(d), the COFC rules are essentially bootstrapped into the rules and procedures of the boards. If appellant's position is correct, then that would essentially create a merger of rules between the COFC and the boards. There is no basis or authority suggesting that Congress intended that.

In addition to the decisions of the ASBCA, civilian boards have also concluded that they did not have authority to grant monetary relief in motion or discovery disputes. It is noted that none of the cases cited to us, except for *Moore Mill & Lumber*, discussed above, address an argument involving the scope of Section 8(d). *Shorthaul Trucking Co.*, PSBCA 1046, 84-1 BCA ¶ 17,012 (no authority found, but Section 8(d) not raised); *Time Contractors*, *J.V.,* DOT BCA 1669, et al., 86-3 BCA ¶ 19,318 (for costs for preparing a motion to strike, no authority under 28 U.S.C. § 1927). Three cases, *C.S. Smith Training, Inc.*, DOT CAB 1273, 83-1 BCA ¶ 16,304; *Warwick Construction, Inc.,* GSBCA 6925, et al., 83-2 BCA ¶ 16,663; and *SEI Information Technology*, VABCA 1478, 83-2 BCA ¶ 16,651, involved attempts to secure EAJA fees, and in disallowing the fees, the boards followed *Fidelity*.

In *A & B Limited Partnership v. General Services Administration,* GSBCA 15208, 05-1 BCA¶ 32,832 (2004), the GSBCA discussed the issue of authority to impose monetary sanctions. The board said:

> Federal courts possess inherent authority to impose sanctions--including monetary sanctions--against parties and their attorneys in appropriate circumstances. *Chambers v. NASCO, Inc.*, 501 U.S. 32, 45-46 (1991); *Roadway Express, Inc. v. Piper*, 447 U.S. 752, 766-67 (1980); *Alyeska Pipeline Service Co. v. Wilderness Society*, 421 U.S. 240, 258-59 (1975). A board of contract appeals is not a court, however, and therefore does not have all the inherent authority of a federal court. *SMS Data Products Group, Inc. v. Austin*, 940 F.2d 1514, 1517 (Fed. Cir. 1991); *ViON Corp. v. United States*, 906 F.2d 1564, 1567 (Fed. Cir. 1990). This is not to say that a board's authority is necessarily less than a federal court's; it is to say, however, that a board's authority is different from such a court's. *Sterling Federal Systems, Inc. v. Goldin*, 16 F.3d 1177, 1186 (Fed. Cir. 1994). Applying the teaching of the Court of Appeals for the Federal Circuit in the last three cited cases, we held in *Integrated Systems Group* [*, Inc. v. Department of the Treasury*, GSBCA 11336-C (11214-P), 95-1 BCA ¶ 27,308 (1994)] that we do not have a court's inherent authority to impose monetary sanctions against a litigant. 95-1 BCA at 136,111.

> The fact that our Rule 118(b) allows us to impose "such . . . sanctions as the Board deems appropriate" cannot convey authority where inherent authority is not present. This rule, like all our Rules of Procedure, was promulgated by the Board, *see* GSA Order OHR P 5440l.1 CHGE 386, ch 3, pt. 1, ¶ 3 (July 23, 1993), so any authority contained in it derives from whatever authority we have, either through a grant from Congress or through inherent authority. Congress has not empowered us to impose monetary sanctions. Because we have no inherent authority to impose these sanctions, we cannot write or interpret a rule which permits their imposition.

Id. at 162,445.

There is no indication from the *A & B* decision that the board had before it any argument as to 8(d). Rather, the board addressed the arguments before it, which were that the board had inherent authority as a tribunal and that board rule 118(b) authorized monetary relief as a sanction.

Recently, the Court of Appeals for the Federal Circuit had the opportunity to address the matter of monetary sanctions in the context of the Court of International Trade (CIT). In *Yancheng Baolong Biochemical Products, Co. v. United States*, 406 F.3d 1377 (Fed. Cir. 2005), the Federal Circuit discussed whether the CIT could issue a contempt citation and whether it was authorized to impose attorney fees as a sanction. The Federal Circuit held that while the CIT might have authority to issue a contempt citation (a power boards do not have), the CIT lacked any clear waiver of sovereign immunity authorizing it to impose attorney fees as a sanction. In arguing that the CIT had the authority, appellant emphasized that the Federal Circuit had concluded in other litigation that the COFC had such authority. On that basis, plaintiff, Yancheng, argued that the CIT should have the same authority. The Federal Circuit distinguished that court precedent, stating that the COFC's rules were drawn in their entirety from the Federal Rules of Civil Procedure (FRCP). Because the FRCP has the force and effect of a statute, so too did the COFC rules. From that, the Federal Circuit concluded that the COFC had the authority to issue monetary sanctions. The Federal Circuit then noted that promulgation and adoption of the CIT rules were not comparable to promulgation and adoption of the COFC rules and therefore, the fact that the COFC had monetary sanction authority did not mean that the CIT did as well.

Appellant and the FS see *Yancheng* very differently. Appellant focuses on the conclusion of the Federal Circuit that the COFC rules have essentially adopted the FRCP and that the court decision in *Yancheng* found that the COFC had sanction authority on that basis. The FS essentially says, "so what," asserting that the power to sanction by the COFC does not

confer the same authority on the boards absent some specific direction setting out that authority.

Appellant has pointed to the decision of the AGBCA in *Alisa Corp*., AGBCA 84-193-1, 86-3 BCA ¶ 19,139, and asserts that it remains controlling law. There the AGBCA stated that it had authority to order payment of costs and fees when a party failed to comply with discovery obligations. It noted that such action was particularly appropriate when a party had demonstrated disregard of the discovery process. Appellant cites the board to language from the decision. The actual and more complete quote is set out below:

> The Contract Disputes Act in Section 8(d) gives Boards authority to grant any relief that would be available to a litigant asserting a contract claim in the United States Claims Court. Although Board Rule 33 is not specific as to costs we conclude under appropriate circumstances a Board could order payment of such costs by the party failing to comply with its order.

Id. at 96,742. Appellant says that the above language establishes that the CBCA, the successor Board to the AGBCA, has authority to use monetary sanctions for discovery.

The AGBCA decision, however, has to be read in context of the facts and later events. First, the board did not find that sanctions were warranted under the facts. The board was thus referring to some future situation. Second, since the board issued its decision in *Alisa*, I know of no instances where the AGBCA used the monetary sanction authority referred to. Additionally, sovereign immunity was not an issue in *Alisa*, since the sanction was to be applied against the appellant and not the Government. Finally, to the extent *Alisa* held that the AGBCA had authority, I find that statement legally incorrect and contrary to the current state of the law.

Finally, and in addition to its other arguments, appellant relies upon *Lane v. Pena*, 518 U.S. 187 (1996). Appellant asserts that *Lane* stands for the proposition that Congress may waive sovereign immunity for the award of costs and attorney fees in one statute by making general reference to the remedies available in another statute that provides for recovery of costs and attorney fees. Appellant argues that Congress did that with Section 8(d) of the CDA. I do not find the situations similar.

In *Lane*, the Court considered Section 504(a) of the Rehabilitation Act of 1973, which prohibits discrimination on the basis of disability under any program or activity conducted by any Executive agency. 518 U.S. at 189. Section 505(a)(2) of the Rehabilitation Act provides a remedy for violation of Section 504 as follows:

> The remedies, procedure, and rights set forth in title VI of the Civil Rights Act of 1964 shall be available to any person aggrieved by any act or failure to act by any recipient of Federal assistance or Federal provider of such assistance under section 504(a).

The language in the CDA relied upon by appellant, "may grant any relief," is much broader and clearly not as specific as language in the Rehabilitation Act. Appellant takes the terminology "general reference" a bit far in attempting to equate the "any relief" language in the CDA to the language in *Lane* authorizing relief. The reference in *Lane* is specific; the wording in Section 8(d) is not.

In addition to those arguments presented by appellant that I have specifically addressed in this decision, I have also considered the other arguments and contentions put forth by appellant in support of its request for monetary sanctions. I do not find any of those arguments controlling or convincing.

In summary, the Board does not have available the ability to issue monetary sanctions against the Government for discovery abuses. It is of note, however, and without suggesting the final result, that the Board does have authority under EAJA to award attorney fees. If appellant were to prevail and if it met the criteria for reimbursement through EAJA, the hours associated with discovery might be eligible for inclusion in an award. Recovery in that context is, of course, premature, since the appeal has not yet reached a point where it has been favorably decided for either party.

For almost twenty-five years, the ASBCA and various civilian boards of contract appeals have consistently disclaimed authority to issue monetary sanctions. I recognize that most of those cases have not directly addressed the role of Section 8(d). However, several have, and the consistent conclusions that the boards do not have such authority should not be ignored. That precedent when combined with the language in *Fidelity* makes it clear that the Board does not have authority to award monetary sanctions in this case. Moreover, for this Board to conclude that it has authority to issue monetary sanctions, the Board would have to make various interpretations and rely on inferences and implications. There is simply no clear direction providing monetary sanction authority. In the absence of such direction, the Board does not have authority to issue monetary sanctions.

Decision

Appellant's **MOTION FOR COSTS AND ATTORNEY FEES** is **DENIED**.

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HOWARD A. POLLACK
Board Judge