UNITED STATES
CIVILIAN BOARD OF CONTRACT APPEALS

DISMISSED WITHOUT PREJUDICE: July 28, 2017

CBCA 5753-ISDA

RAMAH NAVAJO SCHOOL BOARD, INC.,

Appellant,

v.

DEPARTMENT OF THE INTERIOR,

Respondent.

Geoffrey D. Strommer of Hobbs, Straus, Dean & Walker, LLP, Portland, OR; F. Michael Willis of Hobbs, Straus, Dean & Walker, LLP, Washington, DC; and Adam P. Bailey of Hobbs, Straus, Dean & Walker, LLP, Sacramento, CA, counsel for Appellant.

Chaitna Sinha, Office of the Solicitor, Department of the Interior, Albuquerque, NM, counsel for Respondent.

LESTER, Board Judge.

ORDER

On July 14, 2017, appellant, Ramah Navajo School Board, Inc. (Ramah), and respondent, the Department of the Interior (Interior), filed a joint stipulated motion to dismiss this appeal without prejudice because the parties' dispute has become moot. Because the parties' request – to dismiss a moot case without, rather than with, prejudice – differs from our normal practice, we address the request below.

Background

Ramah holds a tribally controlled school grant that was awarded by the Secretary of the Interior under the auspices of the Tribally Controlled Schools Act (TCSA), 25 U.S.C. §§ 2501-2511 (2012). Section 2505 of the TCSA, 25 U.S.C. § 2505(b)(1)(B), requires each recipient of such a grant to complete an annual report that includes an independent financial audit satisfying the requirements of the Single Audit Act of 1984, 31 U.S.C. §§ 7501-7507, and Office of Management and Budget (OMB) Circular A-133. In compliance with that requirement, Ramah completed its report for the fiscal year ending December 31, 2014, accompanied by a report of its independent FY2014 audit, no. 2014-4279, that questioned costs of $350,011 from unsupported deferred revenue. Pursuant to the submission requirements of 25 U.S.C. § 2505(b)(4)(B), Ramah provided the report to Interior.

The Bureau of Indian Education (BIE) is responsible for making determinations regarding any cost issues or questions raised as a result of such audits. On June 30, 2016, after considering audit report no. 2014-4279, BIE issued findings and determinations (F&D) that Ramah's decision to amend various internal controls and update financial standards resolved the undeferred revenue issue. BIE elected not to question any of Ramah's FY2014 costs and recommended that audit report no. 2014-4279 be closed without any further action.

On March 3, 2017, however, BIE issued a new F&D indicating that "the questioned costs" of $350,011 "are reinstated" and asked for additional documents and information to allow for further review. That same day, the BIE awarding official issued a decision reinstating the $350,011 in questioned costs and notifying Ramah of its appeal rights under the Contract Disputes Act (CDA), 41 U.S.C. §§ 7101-7109. On May 23, 2017, Ramah filed its challenge to the F&D and decision of March 3, 2017, with the Board, arguing that the new F&D was untimely under 25 U.S.C. § 5325(f).

On July 14, 2017, the parties filed their joint motion to dismiss without prejudice, indicating that, on July 6, 2017, BIE issued yet another F&D effectively withdrawing the F&D of March 3, 2017, and reinstating the F&D of June 30, 2016. The parties agree that, because the F&D of March 3, 2017, which caused Ramah to file the instant appeal, has been "effectively rescinded," and because the new F&D of July 6, 2017, reinstates BIE's original decision not to question any of Ramah's FY2014 costs, the issues in this appeal are now moot. The Board conducted a telephonic status conference with the parties on July 18, 2017, in which the parties mutually agreed that, because of the new F&D of July 6, 2017, there are no issues remaining in dispute between the parties. They jointly request that we dismiss this appeal as moot, without prejudice.

Discussion

"A matter becomes 'moot when the issues presented are no longer "live" or the parties lack a legally cognizable interest in the outcome.'" *Sylvan B. Orr v. Department of Agriculture*, CBCA 5299, 16-1 BCA ¶ 36,522, at 177,929 (quoting *NEC Corp. v. United States*, 151 F.3d 1361, 1369 (Fed. Cir. 1998) (quoting *Powell v. McCormack*, 395 U.S. 486, 496 (1969))). Once a matter becomes moot, "it no longer presents a justiciable controversy over which a federal court may exercise jurisdiction." *Id.* (quoting *Humane Society of the United States v. Clinton*, 236 F.3d 1320, 1331 (Fed. Cir. 2001) (quoting *NEC Corp. v. United States*, 151 F.3d at 1369)).

There is no longer any dispute between the parties regarding the $350,011 costs that BIE questioned in its F&D of March 3, 2017. Pursuant to the F&D issued on July 6, 2017, BIE no longer questions those costs or any of Ramah's FY2014 costs. Even though the joint motion to dismiss states that the July 6 F&D "effectively" rescinded the March 3 F&D, the agency made clear during the July 18 telephonic status conference with the Board that the rescission was complete and eliminates any issues surrounding the $350,011 in previously questioned costs. We agree with the parties that this appeal is now moot, although it apparently remains possible (though unlikely) that BIE could attempt to modify its July 6 F&D (subject to Ramah's objections based upon timeliness). *See Safe Haven Enterprises, LLC v. Department of State*, CBCA 3871, et al., 15-1 BCA ¶ 36,117, at 176,324 n.6 ("Contracting officers clearly have the authority formally to withdraw their decisions on contractors' claims, at least until the decisions become unappealable and the parties' rights in them vest."). Were BIE to modify its current F&D and issue yet another revised F&D, it would have to provide Ramah with a new notice of its appeal rights, and Ramah would retain its right to appeal the new F&D.[1]

The parties have expressly asked that we dismiss this appeal as moot, but without prejudice. We have previously elected to dismiss appeals that became moot during their pendency before the Board with prejudice, rather than without prejudice, at least in situations in which the underlying dispute between the parties has been effectively resolved and will

[1] The possibility that a contracting officer might issue a new decision, restoring a dispute that previously existed, does not violate the principles of mootness. A case in which the issues are no longer "live" will not be considered moot if the action underlying the case "is capable of repetition, yet evading review." *Humane Society of the United States v. Clinton*, 236 F.3d 1320, 1331 (Fed. Cir. 2001). If BIE revises its current F&D in a manner that reinstitutes a dispute between the parties, Ramah will have an opportunity to challenge that F&D, meaning that BIE's action will not evade review.

not or cannot again be resurrected. *See, e.g.*, *Ralph Muhammad v. Department of Justice*, CBCA 5188, 16-1 BCA ¶ 36,541, at 178,018; *Orr*, 16-1 BCA at 177,930 (performance evaluation being challenged was withdrawn and became of no effect); *Air, Inc.*, GSBCA 7687, et al., 1985 WL 17107 (Nov. 5, 1985) (citing cases). Yet, it is clear that "a dismissal of an appeal as moot is without prejudice to its merits," even if the words "with prejudice" are used in the dismissal order, such that the "with prejudice" moniker should only preclude reinstatement of the same appeal or the filing of a new appeal based upon the contracting officer's decision that formed the basis of the appeal (here, the March 3 F&D that has been rescinded). *Combat Support Associates*, ASBCA 58945, 16-1 BCA ¶ 36,288, at 176,973; *see URS Federal Support Services, Inc.*, ASBCA 60364, 17-1 BCA ¶ 36,587, at 178,204.

Apparently because of confusion created by mootness dismissals "with prejudice," the Armed Services Board of Contract Appeals (ASBCA) in recent years has changed its prior practice of dismissing moot appeals "with prejudice" and now simply dismisses them "as moot." *See URS Federal Support Services*, 17-1 BCA at 178,204. Under our rules, however, every dismissal is considered to be "with prejudice" unless the dismissal order expressly states to the contrary. 48 CFR 6101.12(c) (2016). Accordingly, absent a "without prejudice" label, a dismissal by the Board of an appeal "as moot" will be considered as one with prejudice.

Here, the parties have specifically requested that we dismiss this appeal without prejudice, presumably to eliminate any confusion regarding whether the dismissal conclusively resolves the merits of the appeal. We have granted joint requests for dismissals without prejudice from parties in the past. *See, e.g.*, *CTA I, LLC v. Department of Veterans Affairs*, CBCA 5481 (Nov. 28, 2016); *Tibbs Information Systems, Inc. v. Department of Labor*, CBCA 3489 (Aug. 20, 2013); *Tarheel Specialties, Inc. v. General Services Administration*, CBCA 1720 (Sept. 17, 2009). Further, in situations in which the parties' underlying dispute may be resurrected through issuance of a new or revised contracting officer's decision or may be subject to continuing action or discussion by the parties, there is precedent permitting boards to dismiss the appeal without prejudice to ensure that the dismissal cannot be interpreted as deciding or limiting either party's future rights. *See, e.g.*, *Nathan Dal Santo*, PSBCA 1125, et al., 83-1 BCA ¶ 16,354, at 81,273; *General Motors Corp. Allison Division*, ASBCA 5206, et al., 61-1 BCA ¶ 2880, at 15,044 (1960). Although it is unlikely that a dismissal of a moot appeal "with prejudice" could be construed as an affirmative resolution of the underlying merits of the appeal, *see Combat Support Associates*, 16-1 BCA at 176,973, we defer to the parties' joint request in the circumstances here.

Decision

This appeal is **DISMISSED AS MOOT, WITHOUT PREJUDICE**.

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HAROLD D. LESTER, JR.
Board Judge