

ARMED SERVICES BOARD OF CONTRACT APPEALS

Appeal of --)
)
Wimberly, Allison, Tong & Goo) ASBCA No. 56432
)
Under Contract No. NAFBA4-01-C-0001)

APPEARANCES FOR THE APPELLANT: Brian W. Bennett, Esq.
Lee N. Bernbaum, Esq.
Nicholas A. Shannin, Esq.
Page, Eichenblatt, Bernbaum
& Bennett, P.A.
Orlando, FL

APPEARANCES FOR THE GOVERNMENT: Craig S. Clarke, Esq.
Army Chief Trial Attorney
CPT John J. Pritchard, JA
Trial Attorney

OPINION BY ADMINISTRATIVE JUDGE YOUNGER ON APPELLANT'S
MOTION FOR RECONSIDERATION

Appellant Wimberly, Allison, Tong & Goo (Wimberly) has moved for reconsideration of our decision dismissing its appeal for lack of jurisdiction. *Wimberly, Allison, Tong & Goo*, ASBCA No. 56432, 09-2 BCA ¶ 34,301. Familiarly with our decision is presumed. We grant the motion and, on reconsideration, affirm our original decision.

In its motion, Wimberly advances two arguments. First, it contends that we erred in dismissing the appeal without holding a hearing on the Fund's motion. Second, Wimberly insists that, in concluding that we lack jurisdiction, we disregarded a line of cases in which we had "retained jurisdiction despite efforts by the Government to rescind its claim after an appeal has been filed." (Appellant Wimberly, Allison, Tong & Goo's Rule 29 Motion for Reconsideration of Opinion Granting Dismissal for Lack of Jurisdiction (mot.) at 2-5)

We evaluate Wimberly's motion under the familiar standard "of whether the motion is 'based upon any newly discovered evidence or legal theories which the Board failed to consider in formulating its original decision.'" *Danac, Inc.*, ASBCA No. 33394, 98-1 BCA ¶ 29,454 at 146,219.

Wimberly's first argument focuses upon the second sentence of our Rule 5(a), which provides that a hearing on a motion addressed to the Board's jurisdiction "shall be afforded on application of either party." Wimberly tells us that the terms are mandatory, not precatory, and that hence we must allow the parties to be heard "prior to deliberation and ruling" on the Fund's motion (mot. at 3).

Our original decision did not address Rule 5(a), and we consider it now. We reject Wimberly's argument that our disposition of the government's motion to dismiss contravened the rule. We have long construed Rule 5(a) to require a hearing on a jurisdictional motion only where there is a "showing of the existence of a genuine dispute as to [a] material fact relevant to [the] motion." *General Connectors Corp.*, ASBCA No. 32298, 87-2 BCA ¶ 19,751 at 99,942. This construction comports with Federal practice. See FED. R. CIV. P. 78(b) (prescribing that, "[b]y rule or order, the court may provide for submitting and determining motions on briefs, without oral hearings"). Absent abuse, the practice does not implicate due process. *E.g., Wilkins v. Rogers*, 581 F.2d 399, 405 (4th Cir. 1978) (holding that denial of oral argument on motion to dismiss was "unquestionably constitutional").

On the government's motion here, there were only two relevant facts: (a) the contracting officer's 7 March 2008 purported final decision; and (b) her 30 January 2009 withdrawal letter. Both facts were and are undisputed. In addition, Wimberly was afforded "ample opportunity...to submit written arguments." *General Connectors Corp.*, 87-2 BCA at 99,942. Given these considerations, disposition without oral hearing was proper.

Wimberly's other argument affords no basis for a different result. Wimberly articulates anew its argument that we retain jurisdiction despite the contracting officer's withdrawal of her decision. (Mot. at 3-5) As we held in our original decision, the contracting officer's rescission leaves no claim before us and no relief to be granted. See *Lasmer Industries, Inc.*, ASBCA No. 56411, 09-1 BCA ¶ 34,115, *aff'd without opinion*, No. 09-1316 (Fed. Cir. January 5, 2010). We recognize, however, that, depending upon particular circumstances, a contracting officer cannot divest the Board of jurisdiction over an appeal. See *Triad Microsystems, Inc. by Daff, Trustee in Bankruptcy*, ASBCA No. 48763, 96-1 BCA ¶ 28,078 at 140,196. Nonetheless, we lack jurisdiction because the purported government claim in issue does not demand a sum certain. Paragraph (d) of the Disputes clause requires a "demand or written assertion by one of the contracting parties seeking, as a matter of right, the payment of money in a sum certain." *Wimberly*, 09-2 BCA at 169,436. Instead of demanding the requisite "sum certain," the contracting officer served "formal notice" that the Fund would in the future seek payment "to the extent" that the Fund may be liable to Whiting-Turner for some or all of the \$12,000,000 claimed by the general contractor "to the maximum amount allowed plus interest" (*id.*). She also seemingly asserted that the Fund would seek reimbursement "to the extent" that Wimberly was responsible for the "estimated" \$5,000,000 and \$4,500,000 figures,

respectively (*id.*). These multiple amounts, dependent upon a host of contingencies in the Whiting-Turner litigation (*see id.*), do not equate to a “sum certain.” *See Southwest Marine, Inc.*, ASBCA No. 39472, 91-3 BCA ¶ 24,126 at 120,744 (holding that, under Contract Disputes Act, a “pick one’ claim is not a claim for a sum certain”); *cf. Hom-Russ, Inc.*, ASBCA No. 46142, 94-2 BCA ¶ 26,635 at 132,477 (holding that “a demand for an amount that ‘exceeds \$10,000’...[does] not satisfy the [Act’s] quantification requirement”).

Wimberly’s motion for reconsideration is granted and, upon reconsideration, our original decision is affirmed.

Dated: 28 January 2010

ALEXANDER YOUNGER
Administrative Judge
Armed Services Board
of Contract Appeals

I concur

I concur

MARK N. STEMLER
Administrative Judge
Acting Chairman
Armed Services Board
of Contract Appeals

EUNICE W. THOMAS
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. 56432, Appeal of Wimberly, Allison, Tong & Goo, ASBCA No. 56432, rendered in conformance with the Board's Charter.

Dated:

CATHERINE A. STANTON
Recorder, Armed Services
Board of Contract Appeals