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	)	
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	)	
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RULING ON MOTIONS TO INTERVENE

August 26, 2004

Opinion for the Board by Administrative Judge POLLACK.

This matter arises out of an appeal filed by S. Powell Construction Company (Powell or Appellant) of Weirton, West Virginia. The appeal arises out of Contract No. 50-3D47-9-1, Little Whitestick Channel Modification, between Powell and the Natural Resources Conservation Service (NRCS) of the U. S. Department of Agriculture. The appeal is from a final decision dated December 1, 2003. In addition to the appeal in issue, docketed as AGBCA No. 2004-122-1, Powell has four other docketed appeals before the Board arising out of this contract. The motions in issue involve solely AGBCA No. 2004-122-1.

Although much of the work on the Powell contract involved modifications of a channel, a significant portion of the work also involved sanitary sewer construction for the City of Beckley and its Sanitary Board (City and Sanitary Board). Among Powell's obligations were relocating portions of the City and Sanitary Board sewer system affected by the modifications and affected by the moving of the channel. The sanitary sewer work was conducted under a sponsorship agreement (Project Agreement) between NRCS and various local sponsors, which included the City and Sanitary Board, as well as the Southern Conservation District (Conservation District). In its role as a local sponsor, the City and Sanitary Board handled many of the contract administration duties including inspections.

Soon after the Board docketed the Powell appeals, the Board received two separate Motions for Intervention. One was filed by the City and Sanitary Board and the other by the Conservation District. The motions solely addressed AGBCA No. 2004-122-1 for which Powell seeks $686,959.90 relating to sewer construction and an additional $28,496.10 for other items associated with that work.

In their motions, the proposed intervenors indicated that they were filing due to concerns over the effect of a decision by the Board on their ultimate rights and obligations, as well as concerns they had regarding assuring that evidence crucial to the defense would be put forward in any proceeding on the appeal. Under the sponsorship agreement for the project, the local sponsors appear to be liable to reimburse NRCS for costs relating to the sewer work, including costs, which could be found as a result of a Board decision in favor of Powell's claims. The local sponsors represent, and NRCS has confirmed, that NRCS has put the local sponsors on notice that NRCS intends to file a claim against them in the event of an adverse decision of the Board with respect to any portion of recovery that can be attributed to the local share. The agreement between the local sponsors and NRCS is not an agreement covered by the Contract Disputes Act. As such, the Board has no jurisdiction over any claims or disputes between NRCS and the local sponsors arising from that agreement. The matter before us solely involves the CDA appeal.

In addition to filing motions to intervene, the City and Sanitary Board and the Conservation District filed proposed Answers to the Complaint filed by Appellant. In its Answer, the City and Sanitary Board included a counterclaim which described the amount requested as in excess of $40,000.

NRCS supports the motions to intervene, stating that the City of Beckley and its Sanitary Board, as well as the Southern Conservation District are the real parties in interest in the claim. Appellant

filed an opposition to the motions to intervene. On August 17, 2004, the Board held a telephone conference with counsel for Powell, NRCS, and the two proposed intervenors.

The Board has jurisdiction of the underlying appeal pursuant to the Contract Disputes Act of 1978 (CDA), 41 U.S.C. §§ 601-613, as amended.

DISCUSSION

NRCS and the proposed intervenors cite the Federal Rules of Civil Procedure (FRCP), Rule 24(a) and (b) as authority for allowing intervention in this proceeding. They also cite us to this Board's decision in Kodiak Lumber Mills, Inc., AGBCA Nos. 81-214-5 and 81-215-5, 82-2 BCA ¶ 15,902 where this Board allowed intervention under FRCP 24. Some of the same matters raised in the above noted Kodiak case again came up in a later proceeding on Kodiak (85-3 BCA ¶ 18,248), where another party attempted to add itself to the proceedings. Appellant, in contrast, has cited the Board to authority from various Armed Services Board of Contract Appeals' (ASBCA) proceedings, where the ASBCA has uniformly held that intervention is not available under the CDA. See Bravo Manufacturing, ASBCA No. 45293, 94-3 BCA ¶ 27,236; Plum Run, Inc., ASBCA Nos. 46090, 46091, 49203, 49207, 97-1 BCA ¶ 28,724; Brutoco Engineering & Construction, Inc., ASBCA No. 32068, 88-2 BCA ¶ 20,610.

It has been well established that while CDA boards can use the Federal Rules of Civil Procedure for guidance, boards are not bound to follow those Federal Rules. It is also clear that a CDA board does not have authority to mandate joinder of a non-contractual party. Additionally, the rules of this Board, as well as other contract appeal boards, do not address the intervention into a CDA proceeding by a non-party to the contract, nor do they provide for such action.

Since we are not bound by the Federal Rules of Civil Procedure, it follows that if an entity seeks to intervene in a CDA proceeding, it cannot do so as a matter of right, even if it would otherwise qualify under the matter of right provision of Rule 24. To the extent that intervention could or would be allowed for a party not in privity with the Government, it must be done as a permissive action on the part of the Board. Allowing the intervention sought by the local sponsors would confer on them the rights of a party, and as such, put them on an equal footing with the Appellant and NRCS as to settlement and other aspects of the matter before us.

As has been noted above, there is conflicting authority on whether or not in a CDA appeal, a board can even allow intervention. I agree with the ASBCA as to the unavailability of intervention where an entity not in privity with the Government is seeking to pursue a claim against the Government. The case before us here, however, presents a different situation from the cases dealt with by the ASBCA. In this case, the primary impetus for the local sponsors seeking intervention was to protect their rights as party defendants. The City and Sanitary Board did, however, file a counterclaim and that is addressed separately in this ruling.

The situation here is more on line with Kodiak than the situations dealt with by the ASBCA. However, there are a number of significant differences between this appeal and Kodiak. First, there

was no mention of the CDA in Kodiak. The dates of the final decisions and appeals, which are referenced in the Board rulings in Kodiak case, indicate that the contract was pre-CDA. Moreover, the first of the appeals was filed prior to the implementation of the CDA while the second appeal was filed in 1979 after the CDA was in effect. At the time of CDA passage, a contractor that appealed a matter, after the enactment, had the option of electing to proceed under the Disputes clause or under the CDA. It is not clear whether the contractor elected to proceed with the later Kodiak appeal as a CDA appeal. From the context, however, it appears that no CDA election was made.

Further, the Kodiak appeal involved very different facts. It involved an extension on a sale, where the Forest Service (FS) property on which the timber sat was being transferred, under federal legislation conveying FS land to local Alaskan Native Villages, from the FS to the party seeking to intervene. In Kodiak, the contract had not yet been performed and the contractor was seeking an extension of the time during which it could harvest timber. If the appeal was successful, then the contract would have run into the time frame where the Alaskan Native Villages would have owned the land subject to the timber sale contract. The Alaskan Native Villages would have succeeded the United States as the contractor. Under the facts in Kodiak, the party seeking intervention had no connection to the original contract. It had succeeded to the status of owner because of legislation. In contrast, in the Powell appeal, the proposed intervenors have been involved in the project since its inception. Additionally, unlike Kodiak, where the United States was to cede all authority to the Native Villages, here the United States through NRCS remains engaged in the contract and litigation. We see the situation here to be less compelling than the case in Kodiak.

That all being said, however, it is not necessary to resolve here whether this Board would in some instance exercise authority to allow intervention of a party as a defendant. That is because, even if I were to conclude that the Board could allow permissive intervention (using Rule 24 as guidance), I would decline in this case to exercise that discretion. I come to that conclusion, because I find that the interests of the proposed intervenors can be adequately accommodated through allowing them to participate in the proceedings, but not with the status of a party intervenor. The Board has long allowed participation by a party not in privity, when that participation is conducted in conjunction with the party in privity. The party in privity, however, remains ultimately responsible for either defending or pursuing the claim. That is the case even where a prime essentially cedes control of a case to a subcontractor, who pursues the claim in the prime's name. NRCS has verbally agreed to allow the local sponsors to participate in various aspects of the legal defense, including participation in discovery, in examining witnesses and in briefing.

Appellant has expressed opposition to allowing intervention or, alternatively, allowing broad participation, contending that it should not be subjected to having to deal with multiple parties and asserting that NRCS should be capable of marshaling the interests of the proposed intervenors into NRCS's defense. Appellant's concerns are not without some merit. However, those concerns can be dealt with through management of the proceedings by the presiding judge. The details regarding the participation, and any limitations thereon, will fall within the reasonable discretion of the presiding judge, who is tasked with managing the appeal.

While not an absolute, intervention could create problems as to settlement, accountability and the ultimate responsibility over various procedural matters. As the Court of Federal Claims pointed out in Orion Scientific Systems v. United States, 28 Fed. Cl. 669, a case involving a protest (admittedly a different basis for jurisdiction), "the allowance of intervention carries with it practical and legal consequences." The court noted that an intervenor that is accorded full party status, could among other things, have the power to interfere or burden a proceeding by expanding the scope of discovery, filing motions, and opposing and preventing a settlement agreed to by the original parties.

I have weighed the respective arguments of the proposed intervenors, as well as, NRCS and the Appellant. On balance I decline to allow intervention. While the local sponsors will not be permitted to participate as intervenors, it is my intention (subject to there being an agreement between NRCS and the local sponsors) to allow the local sponsors to participate in the proceedings subject to procedural constraints set by the Board. Those constraints, which will be addressed in a separate memorandum, will balance the interests of the local sponsors (to assure that their interests are protected) with the rights of Appellant not to be unduly burdened and with the responsibility and obligation of NRCS to be the ultimate responsible party for defense of the appeal.

Finally, the Board notes that the City and Sanitary Board submitted an Answer to Appellant's Complaint in which they set out a counterclaim. That claim cannot and will not be addressed in this proceeding. The Board clearly has no jurisdiction under the CDA to impose a monetary judgment against Powell in favor of non-parties to the contract.

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HOWARD A. POLLACK
Administrative Judge

Issued at Washington, D. C.
August 26, 2004