GOVERNMENT OF THE DISTRICT OF COLUMBIA
CONTRACT APPEALS BOARD

APPEALS OF:

CENTEX-SIMPSON CONSTRUCTION)
) CAB Nos. D-929 and D-931
Under Contract No. JB/890070)

OPINION AND ORDER ON MOTION TO CONSOLIDATE

On October 28, 1992, Centex-Simpson Construction Company ("appellant") filed a notice of appeal with the Board from the "deemed denial" of its claim for an equitable adjustment in the amount of $3,262,737.00. This appeal was docketed as CAB No. D-929 and was assigned to Judge Terner. Thereafter, on November 9, 1992, appellant filed a notice of appeal from a "deemed denial" of its claim for an equitable adjustment in the amount of $534,000.00 for additional costs allegedly incurred as a result of differing site conditions. The appeal was docketed as CAB No. D-931 and was assigned to Judge Lee.

On December 1, 1992, appellant filed its complaint in CAB No. D-929. On December 7, 1992, appellee filed a motion to consolidate CAB Nos. D-929 and D-931.[1/] On December 14, 1992, appellant filed its complaint in CAB No. D-931.

[1/]On December 9, 1992, Chief Judge Bush temporarily assigned CAB No. D-929 to Judge Lee for the purpose of deciding appellee's motion to consolidate.

In its motion to consolidate, appellee contends that the appeals have so many common elements that to treat them separately would create an undue and costly burden on appellee. Appellee asserts that the issues in both appeals arise under the same contract and involve the same parties. Appellee also contends that for administrative and legal reasons, it is treating appellant's claims as indivisible.

In addition, appellee argues that it has been orally informed that appellant may file additional appeals on different issues arising under the same contract.

On December 21, 1992, appellant, through its counsel Sadur, Pelland & Rubinstein, P.C., opposed appellee's motion to consolidate in CAB No. D-931 on the following grounds: (1) the actions are entirely unrelated factually; (2) the same witnesses will not testify; (3) the documents and exhibits will also be different; (4) the two actions do not assert identical legal issues; and (5) the relief sought varies materially between the two appeals.

For the reasons set forth below, we must deny appellee's motion to consolidate.

Rule 118.1 of the Board's Rules of Practice[2/] states:

> When cases involving a common question of law or fact are pending before the Board, it may consolidate the cases in order to avoid unnecessary costs or delay.

[2/] 36 DCR 2697 (April 21, 1989).

However,

> [t]he determinative factor in understanding whether individual claims are merely various aspects of a single claim, involving a common set of operative facts, or are in fact separate claims, is . . . whether the demand for relief arose out of essentially interrelated conduct and services and the same, or closely connected, facts.

Richerson Construction, Inc., GSBCA No. 10653, 91-1 BCA ¶23,538, citing LDG Timber Enterprises, Inc. v. United States, 8 Cl. Ct. 445, 452 (1985).

A review of the complaint filed in CAB No. D-929 reveals that the claim for equitable adjustment arises under Contract No. JB/890070 for construction of an ambulatory and critical care center adjacent to the north wall of the main D.C. General Hospital complex. Appellant is sponsoring the claims of five (5) of its subcontractors and is also claiming additional costs as a result of failure of a sixth subcontractor to complete alleged cardinally changed electrical work. All of the claims concern costs of delay in various aspects of the contract work, from suspension of foundation wall activity to radiology area delays. Appellant also cites claims for other delays and contends that its work and that of its subcontractors was delayed, disrupted or suspended as a result of defective design and inadequate contract administration. Further, in CAB No. D-929, appellant is represented by Braude & Margulies, P.C. of Washington, D.C.

In contrast, a review of the complaint filed in CAB No. D-931 shows that the claim also arises under Contract No. JB\890070.

That, however, is where any commonality ends. In CAB No. D-931, appellant contends that it and its excavation subcontractor encountered a Type I differing site condition related to unanticipated subsurface debris which resulted in additional costs for dump fees, labor and equipment and contractor hauler expenses. The subcontractor involved in CAB No. D-931 is not included as one of the sponsored subcontractors in CAB No. D-929. Finally, appellant is represented by a different law firm, Sadur, Pelland & Rubinstein of Washington, D.C.

Based upon our review of the record thus far, we are wholly unpersuaded that the appeals are so interrelated that consolidation is necessary to permit a fair, reasoned and efficient resolution of these matters. The delay claims in CAB No. D-929 appear to be predicated in large measure on defective design and inadequate contract administration, all arising from actual construction of the facility. On the other hand, the claim in CAB No. D-931 seems to be based on differing site conditions related to excavation prior to the beginning of actual construction. Therefore, these claims are not inextricably intertwined.

Furthermore, it appears that these claims, while involving the same parties in one respect, i.e. appellant and appellee will not, in actuality, involve the same witnesses, documentary evidence and other facts and circumstances. Indeed, CAB No. D-929 involves issues much more extensive and complex than those in CAB No. D-931; and while "[t]here is for consideration . . . the avoidance of

extra costs and delay to the parties . . .," there is also ". . . the avoidance of waste of adjudicative resources, and that latter consideration can take precedence over the desires of one or more of the parties. . . ." Algernon Blair, Inc., Dawson Construction Company, Dawson Construction Company (Bonitz Insulation Company), Dawson Construction Company (Masonry Contractors), Dawson Construction Company (Floor Systems, Inc.), Atlantic Electric Company, Inc, Harrington Associates, Inc., GSBCA Nos. 5881, 5920-5951, 82-2 BCA ¶15,859.

Finally, we must consider the potential of prejudice to the rights of one or more of the parties whose actions have been consolidated. "Such prejudice may result from abrogation of one party's right to present its claim free from the conflicting and competing interests of the other parties." Algernon Blair, supra, at 77,968. Here, there do not appear to be common issues present in these appeals. Further, consolidation of pre-hearing activities might prejudice the parties in CAB No. D-931 in obtaining a more swift resolution of the matter than they can in CAB No. D-929, simply by virtue of the scope of the claims set forth in the latter docket. Further, it does not appear that determination of the facts and circumstances in one case will definitively drive the result in the other case.

With respect to potential, additional claims, appellee asserts that while the issues arise under the same contract, they will be

different. Consequently, common questions of law or fact may not even exist. That, however, remains to be seen.

In sum, appellee has not offered any compelling justification to consolidate these matters; and consequently, it is hereby

ORDERED, that appellee's motion to consolidate be, and the same is, DENIED; and it is

FURTHER ORDERED, that the appropriate Appeal Files and answers to the complaints in both dockets be submitted in accordance with the Board's Rules of Practice.

DATE: December 22, 1992

TERRY HART LEE
Administrative Judge

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