UNITED STATES
CIVILIAN BOARD OF CONTRACT APPEALS

MOTION TO VACATE DENIED: June 5, 2008

CBCA 105-R

HEDLUND CONSTRUCTION, INC.,

Appellant,

v.

DEPARTMENT OF AGRICULTURE,

Respondent.

Jon E. Cushman of Cushman Law Offices, P.S., Olympia, WA, counsel for Appellant.

Mary E. Sajna, Office of the General Counsel, Department of Agriculture, Portland, OR, counsel for Respondent.

Before Board Judges **GOODMAN**, **McCANN**, and **DRUMMOND**.

McCANN, Board Judge.

The parties have jointly moved to vacate the Board's decision pursuant to a settlement agreement. We deny the motion.

Background

On February 19, 2008, the Board issued its decision in this case. That decision held that Hedlund was entitled to $377,979.24 out of its claimed $466,825.58. On May 12, 2008, the parties filed a joint request for amended decision, withdrawal of Equal Access to Justice Act (EAJA) fee application, and stipulation for the entry of judgment. In that request the parties asked that the Board replace the decision in its entirety with the an amended decision. The amended decision indicated that appellant was to recover $399,999 from the Government as full and final payment. Presumably, this payment included attorney fees.

On May 19, 2008, respondent filed its supplemental memorandum in support of the joint request for amended decision. In this memorandum respondent asserts that the decision is both problematic for respondent and incorrect in a number of ways. In its response dated May 20, 2008, appellant indicated simply that it did not agree with respondent's memorandum, and that its only interest in this matter was to bring the case to a rapid conclusion and to receive the settlement amount agreed upon by the parties.

Discussion

From a review of respondent's supplemental memorandum, it would appear that respondent is arguing more for reconsideration or amendment of the decision than for a vacatur. Pursuant to Board Rule 26, parties have only thirty days after the decision to file a motion for reconsideration or a motion to amend the decision. That time is long since past. We do not consider the motion one for reconsideration or for amendment of the decision.

We do, however, consider the motion as one for vacatur. Even so, neither party has briefed the reasons why vacatur would be appropriate under the circumstances of this case. Although no specific rule of the Board covers vacatur, it is clear that there is precedent for vacatur at the Board under the appropriate circumstances. *Federal Data Corp. v. SMS Data Products Group, Inc*., 819 F.2d 277 (Fed. Cir. 1987).

The issue then is whether the circumstances of this case support vacatur. It seems clear that in this case respondent wants the decision vacated because it wishes to expunge the precedential effect the decision may have. On the other hand, appellant only wants vacatur to end the litigation by settlement without further appeal, thus expediting payment of the money to which it is entitled. Presumably, both parties would like to forgo the cost and time involved in an appeal. We do not know whether the Department of Agriculture or the Department of Justice would agree to proceed with an appeal.

In *U.S. Bancorp Mortgage Co. v. Bonner Mall Partnership*, 513 U.S. 18, 25 (1994), the Supreme Court expressed its view on vacatur of decisions through settlement. It stated:

> Where mootness results from settlement, however, the losing party has voluntarily forfeited his legal remedy by the ordinary processes of appeal or certiorari, thereby surrendering his claim to the equitable remedy of vacatur. The judgment is not unreviewable, but simply unreviewed by his own choice. The denial of vacatur is merely one application of the principle that "[a] suitor's conduct in relation to the matter at hand may disentitle him to the relief he seeks." [*Citations omitted.*]

The Supreme Court in *Bancorp* further explained why vacatur is disfavored. It opined that Congress set forth the primary route of appeal through which parties may seek relief, and that vacatur after decision would allow for a collateral attack upon the orderly operation of the judicial system. 513 U.S. at 27. The Court indicated that it had granted relief in the form of vacatur when orderly procedure could not be honored. *Id.* (citing *United States v. Munsingwear*, 340 U.S. 36, 41 (1950)). Conversely, the Court felt that "the public interest requires those demands [of orderly procedure] to be honored when they can." *Id.*

In further discussing the appropriateness of vacatur, the Court indicated:

> [M]ootness by reason of settlement does not justify vacatur of a judgment under review. This is not to say that vacatur can never be granted when mootness is produced in that fashion. As we have described, the determination is an equitable one, and exceptional circumstances may conceivably counsel in favor of such a course. It should be clear from our discussion, however, that those exceptional circumstances do not include the mere fact that the settlement agreement provides for vacatur -- which neither diminishes the voluntariness of the abandonment of review nor alters any of the policy considerations we have discussed.

513 U.S. at 29.

In this case, respondent was the losing party and is voluntarily forfeiting its legal remedy of appeal. Accordingly, its conduct disentitles it to the vacatur it seeks. Appellant, on the other hand, is not really seeking vacatur; it only wants to be paid its money as soon as possible. Vacatur in these circumstances is an unacceptable collateral attack on orderly procedure without good reason. Further, the record in this case fails to reveal the existence of any "exceptional circumstances" sufficient to support vacatur.

Decision

The motion is **DENIED**.

R. ANTHONY McCANN
Board Judge

We concur:

ALLAN H. GOODMAN
Board Judge

JEROME M. DRUMMOND
Board Judge