

BOARDS OF CONTRACT APPEAL HAVE INHERENT AUTHORITY TO DIMISS AN APPEAL WITHOUT PREJUDICE

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Can an appellant request and obtain a dismissal without prejudice in a Board of Contract Appeals case? The Armed Services Board of Contract Appeals (“Board”) answered “yes” in *Wolverine Tube, Inc.*, ASBCA No. 63877, March 26, 2026.

Wolverine appealed from a deemed denial of its termination for convenience costs. The government and Wolverine filed a notice that they jointly elected to proceed under Board Rule 11 (Submission Without a Hearing) on the issue of the claimed costs. The parties then filed cross motions for entitlement, and the Board granted in part Wolverine’s summary judgment motion and denied the government’s cross motion. After reviewing that Board decision, the government recognized that FAR 31.201-3(a) required a determination of the “nature and amount” of questioned costs, and notified Wolverine and the Board that it intended to proceed to a hearing under Board Rule 10 (Hearings), rather than on a written record in Board Rule 11.

Wolverine, however still wanted to proceed under Board Rule 11, and the Board gave the contractor a choice: (1) proceed with a hearing under Rule 10 or (2) a hybrid whereby Wolverine would proceed with its case on the written record under Rule 11, and the government would present its case in a hearing under Rule 10.

Wolverine then filed a motion to dismiss the appeal without prejudice, stating that it lacked the resources to pursue the appeal under Rule 10, and found the hybrid approach unsatisfactory. The government responded by saying Wolverine had demonstrated no good cause for dismissal without prejudice, or an indefinite stay pursuant to Board Rule 18 (meaning dismissal would be subject to a one year limit on reinstatement).

The Board held that dismissal under Rule 18 was not necessary because the Contract Disputes Act requires the Board to “issue a decision in writing or take other appropriate action on each appeal submitted[.]” 41 U.S.C. Sec. 7105(g). The Board concluded that the Contract Disputes Act provides that the Board “may grant any relief that would be available to a litigant asserting a contract claim in” the U.S. Court of Federal Claims, and that court possesses the authority to grant an unconditional dismissal under its rules. Therefore this Board possess that authority also, and could grant an unconditional dismissal without prejudice.

Finally, the Board examined when an appellant may withdraw an appeal, for which it looked for guidance in the Federal Rules of Civil Procedure, Rule 41(a)(2), which recognize that certain standards must be met for withdrawal. The first standard indicated that dismissal without prejudice should be allowed unless the defendant would suffer some plain prejudice other than the mere prospect of a second lawsuit. The other standard considered five non-exclusive factors, which need not be enumerated here. The Board held that *both* standards weighed in favor of dismissal without prejudice, and the Board granted such a dismissal.

Takeaway. The Boards of Contract Appeal have inherent authority to dismiss an appeal without prejudice. The courts will examine the Federal Rules of Civil Procedure dealing with an appellant's withdrawal of appeal in considering this decision.

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