



In the Matter of:

**BHATT CONTRACTING
COMPANY, INC.,
Contractor
and**

ARB CASE NO. 96-124

(ALJ CASE NO. 93-DBA-65)

**VIJAY A. BHATT
Individually and as President**

DATE: September 6, 1996

**ORDER DENYING ADMINISTRATOR'S MOTION TO DISMISS
AND ORDER OF REMAND**

This case arises under the Davis-Bacon and Related Acts (DBRA) and 29 C.F.R. Part 7. The underlying dispute in this case was resolved pursuant to an April 25, 1996 ALJ Order that adopted Consent Findings executed by the parties and dismissed the case. On August 24, 1995 an Administrative Law Judge (ALJ) issued an order denying the petition of Bhatt Contracting Company, Inc. and Vijay Bhatt (collectively, Bhatt) requesting that the department of Labor be prohibited from placing them on the debarment list. Bhatt appealed that denial and the Administrator, Wage and Hour Division (Administrator), filed a Motion to Dismiss. We have thoroughly reviewed the submissions and the arguments of the parties and, for the following reasons, deny the Administrator's Motion to Dismiss. We also enter the following Order on Bhatt's petition for review.

BACKGROUND

In 1993, the Administrator charged Bhatt with certain violations of the DBRA. On August 14, 1995 those charges were settled pursuant to the agreement of the parties. *Consent Findings and Order of Dismissal* (Consent Order), August 14, 1995. Bhatt thereby voluntarily agreed to debarment under the DBRA and 29 C.F.R. § 5.12(a)(1). The Consent Order stated that "[Bhatt] shall be ineligible for a period not to exceed 3 years (from the date of publication by the Comptroller General of the name or names of said contractor or subcontractor on the ineligible list as provided [in pertinent portions of Section 5.12]) to receive any contracts or subcontracts subject to any statutes listed in § 5.1. " The Secretary's regulations state that the Administrator "promptly shall forward to the Comptroller General the name of any respondent found to have committed aggravated or willful violations" 29 C.F.R. § 6.35. Also pursuant to the settlement, the parties agreed to "waive any further procedural steps before the Office of Administrative Law Judges and the Wage Appeals Board concerning matters which are the subject of this agreement. The parties also waive[d] any right to challenge or contest the validity of then findings and Order based thereon." *Consent Order*, paragraph 5.

29 C.F.R. § 5.12(c) provides that "[a]ny person or firm debarred under § 5.12(x)(1) may in writing request removal from the debarment list after six months from the date of publication by the Comptroller General of such person or firm's name on the ineligible list." On or about February 15, 1996 Bhatt requested removal from the ineligible list pursuant to this provision. Bhatt was informed approximately one month later that the Administrator had not promptly forwarded their name to the Comptroller General as required by 29 C.F.R. § 6.35. According to Bhatt's uncontradicted assertion in the record, their name did not appear on the ineligible list until "approximately nine (9) months" after the order to do so was entered. The Administrator argues that, despite the delay in placing them on the ineligible list, Bhatt is not presently eligible for relief under § 5.12(c) and will not be eligible for relief from debarment until they have been on the list for six months.

DISCUSSION

A. Motion to Dismiss

The Administrator's motion to dismiss based upon paragraph 5 of the Consent Order is misplaced. In the case cited by the Administrator in support of her position, *Jesse Fence and Construction Company*, WAB¹ Case No. 95-01, June 29, 1995, slip op. at 2, the question at issue involved the proper interpretation of a provision of the consent decree, not the enforcement of the decree. In *Jesse Fence* the ALJ's Consent Decree specifically held that "DOL will not seek debarment of Respondents." *Id.* Thereafter the Administrator filed a motion to amend the Consent Decree based upon an interpretation of the agreement that differed from the ALJ's interpretation. The ALJ denied this motion and the Administrator sought review before the Wage Appeals Board. *Jesse Fence* moved to dismiss the appeal. The WAB held that language similar to that contained in paragraph 5 of the Consent Order in this case, prohibited the Administrator from seeking review of the ALJ's Consent Decree. The Wage Appeals Board noted that:

[A] prime motivation for entering into consent findings is to bring finality to a matter in litigation. A party gives up the right to litigate further in return for the savings that come with the final resolution of the matter.

Jesse Fence, slip op. at 4. Thus, the Wage Appeals Board granted the motion to dismiss by noting that to allow the appeal "would defeat the desired objective of finality. . . one cannot settle a case and then appeal that same case." *Id.* But, in this matter, Bhatt does not seek *review* of the ALJ's interpretation of the parties agreement. Bhatt seeks *enforcement* of the provisions of the Consent Order issued by the ALJ. Bhatt has prayed for an order finding the Consent Order to have been breached and for appropriate redress. The language of paragraph 5 of the Consent Order cannot be interpreted as prohibiting the parties from seeking enforcement of the settlement agreement. The Supreme Court noted in *United States v. Armour & Co.*, 402 U.S. 673, 681 (1971) that:

Consent decrees are entered into by parties to a case after careful negotiation has produced agreement on their precise terms. The parties waive their right to litigate

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Wage Appeals Board; *see*, 29 C.F.R. Part 7 (1995).

the issues involved in the case and thus save themselves the time, expense, and inevitable risk of litigation. Naturally the agreement reached normally embodies a compromise: in exchange for the saving of cost and elimination of risk, the parties give up something they might have won had they proceeded with the litigation.

Thus, the Consent Order is a binding agreement between the parties that can be enforced. *See, England v. Kemp*, 976 F.2d 662, 665 (11th Cir. 1992)(after entering into a consent decree Plaintiff would be barred from bringing another claim under Title VII, but could bring a claim based upon obligations contained in the consent decree) and the cases cited therein. The Administrator's motion to dismiss Bhatt's request to enforce the provisions of the Consent Order is Denied.

B. Breach of the Consent Order

Bhatt performed the material duties required of them pursuant to the Consent Order; The Administrator did not. The Administrator had a material duty to promptly place Bhatt on the ineligible list. *See* 29 C.F.R § 6.35. A nine month delay between entering into an agreement that calls for the placement of contractors' names on the ineligible list, and the actual placement of those names on the list, cannot be found to be prompt.² This is especially true in light of the provisions of 29 C .F. R. § 5.12(c) that allow for potential relief from debarment after only six months.

The Administrator argues that "the- department aims for promptness . . . but . . . events occasionally intervene. In this case, the required notice from the Office of Administrative Law Judges [(OALJ)] that . . . the decision had become final was not sent to Wage and Hour until January 30, 1996."³ First, the Administrator did more than "aim" for promptness, the Administrator entered into an agreement that required promptness. Second, having a good reason for the delay does not excuse noncompliance with the Consent Order. Finally, the breach involved a routine ministerial act that, pursuant to an agreement between the parties, was to-be performed "promptly" by the Administrator. The result of taking nine months to perform such an act, even if the delay is caused by another arm of the Department of Labor, is a breach of the

² *See*, section 5(a) of the Service Contract Act of 1965. as amended, 41 U.S.C. § 351 *et seq.*, a prevailing wage statute applicable to federal service contracts. Section 5(a) imposes a time of 60 days for the Secretary of Labor (or his or her designee) to transmit the names of parties debarred to the Comptroller General of the United States for placement on the list of debarred bidders. 41 U.S.C. § 354(a). Although the act of transmitting the names of debarred bidders is ministerial -- and the time limit more probably precatory than mandatory -- the Service Contract Act's 60-day time is instructive as to the meaning of "prompt" in the context of the instant matter.

³ It is here noted that counsel for the Administrator ostensibly had a copy of the Consent Order soon after issuance by the ALT; the parties had waived their rights to appeal the Order: and that the Wage Appeals Board never received a petition for review seeking to appeal the Consent Order. (During its existence, the Wage .Appeals Board promptly notified all known parties and interested persons upon the filing of each petition for review.)

agreement. Therefore, we find that by not promptly placing Bhatt on the ineligible list, the Administrator breached a material term of the Consent Order.

C. Remedy for Breach

After concluding that a material breach of the settlement agreement has occurred, the potential remedies generally are: 1) rescission of the settlement agreement; 2) payment of damages; or 3) specific performance. *See*, 94 ALR 2d 504 § 2. Bhatt has not sought rescission of the Consent Order. We are reluctant to follow this path because Bhatt has allegedly refrained from seeking government contracts for almost a year now and has been on the ineligible list since April. Therefore, if we take no action to remedy the breach, Bhatt will be eligible to seek removal from the debarment list within a short period of time. Forcing Bhatt to take the risk of losing the underlying litigation and thereby face another six months or more on the ineligible list does not seem to be an appropriate remedy. Further, this Board has no authority to award damages, and the Consent Order has now been complied with, so the second and third remedies identified above are not appropriate.

On the other hand, we are mindful of the fact that Bhatt did agree to be debarred for up to three years, and that we do not have a sufficient record to determine if the requirements for relief from this sanction set out in 29 C.F.R. § 5.12(c) have been met. Therefore, we decline to adopt Bhatt's suggested remedy of immediate removal from the ineligible list. Further, case precedent, and our desire not to limit the Administrator's ability to appropriately sanction violators of the DBRA, prohibit us from treating the undue delay in placing Bhatt on the ineligible list as a *de facto* debarment. *Mark S. Harris, Inc.*, WAB Case No. 88-40, March 28, 1991; *Vento Construction*, WAB Case No. 87-51, Oct. 17, 1990. Finally, the language of 29 C.F.R. § 5.12(c) clearly states that a request for relief from debarment can only be made after six months from the date of publication of Bhatt's name on the ineligible list. This Board is bound by the Secretary's regulations. Secretary's Order 2-96 (Apr. 17, 1996), 62 Fed. Reg. 19978, May 3, 1996.

However, 29 C.F.R. § 5.12(c) does not require that the Administrator wait until a request has been filed prior to conducting the review that is necessary to determine if Bhatt is eligible for relief from debarment. We therefore order the Administrator to commence immediately, and fully complete within thirty days, the review required by 29 C.F.R. § 5.12(c). We further order the Administrator to issue the decision as to whether Bhatt shall be granted relief from debarment

immediately upon receipt of such a request. We note that a denial of Bhatt's request by the Administrator can be reviewed by this Board pursuant to 29 C.F.R. § 5.12(c) and 29 C.F.R. Part 7.

SO ORDERED.

DAVID A. O'BRIEN

Chair

KARL J. SANDSTROM

Member

JOYCE D. MILLER

Alternate Member