



In the Matter of:

U.S. Department of the Navy

ARB Case No. 96-185

**In Re: Unidyne Corporation/Fleet
Industrial Supply Center Contract No.
N00140-92-D-AD14 Naval Training Center,
Great Lakes, Illinois**

DATE: May 15, 1997

BEFORE: THE ADMINISTRATIVE REVIEW BOARD

FINAL DECISION AND ORDER

This case is before the Board pursuant to the Davis-Bacon and Related Acts (DBA), 40 U.S.C. § 276a *et seq.* (1994); the McNamara-O'Hara Service Contract Act of 1965, as amended (SCA), 41 U.S.C. § 351 *et seq.* (1994); and the implementing regulations at 29 C.F.R. Parts 7 and 8 (1996). On October 9, 1996, the United States Navy filed a Petition for Review of a final ruling that was issued by the Administrator of the Department of Labor's Wage and Hour Division on July 11, 1996. In response the Administrator filed a Motion to Dismiss the petition as moot. The Navy filed a brief in opposition to the Administrator's motion. Upon review we dismiss the case as moot and set aside the Administrator's July 11 ruling.

BACKGROUND

In 1992 the Navy awarded a contract to Unidyne for work including removal, assembly, modification, and installation of various types of naval training equipment designated to be moved from one site to another. Petition for Review at 5-6. Provisions of the SCA were incorporated into the contract. Under the contract the Navy periodically would issue Delivery Orders (DO) which described specific work to be performed. In 1995 the Navy issued a particular DO, 0272, for the installation of prefabricated and modified equipment into Building 520 of the Naval Training Center in Great Lakes, Illinois. The contract labor standards applicable to this DO were disputed by the Building and Construction Trades Council, which argued that the equipment installation should be covered by DBA provisions.

The Navy requested a review by the Administrator, and in a letter dated October 18, 1995, the Deputy Assistant Administrator concurred with the Navy's determination of contract labor standards. The Trades Council requested reconsideration. By letter dated July 11, 1996, the Administrator, based on a review of additional information submitted by the Council, granted reconsideration and found that the provisions of the DBA, not the SCA, were applicable to DO 0272. However, the Administrator stated that because the work for the project was over or near

completion and because the Navy's SCA coverage determination was reasonable in view of the Labor Department's earlier ruling, the Navy would not be required to apply the DBA provisions to the subject project. The Navy's appeal requesting review of the July 11 final ruling followed.

In its Motion to Dismiss, the Administrator argues that her unchallenged non-enforcement position rendered the case moot and that the Board should refrain from issuing merely an advisory opinion. The Navy argues that the Board is not bound by the federal mootness doctrine and should exercise discretion to review its petition. According to the Navy, if this case is adjudged as moot because it comes after the DO was completed, then the Administrator's final ruling also should not have been issued after the award. The Navy also points out that it was not afforded an opportunity to comment during the Administrator's reconsideration. Alternatively, the Navy requests that the Board set aside the July 11 ruling in the event it finds the case moot and, if appropriate, remand to the Administrator.

DISCUSSION

Although the Navy is correct that administrative proceedings are not bound by the constitutional requirement of a "case or controversy," the Department has considered the relevant legal principles and case law developed under that doctrine in exercising its discretion to terminate a proceeding as moot. *See, e.g., In re Applicability of Wage Rates Collectively Bargained by Harry A. Stroh Assocs., Inc.*, Case No. 84-CBV-2, Dep. Sec. Final Order, Apr. 8, 1988; *see also Asst. Sec. and Curlless v. Thomas Sysco Food Serv.*, Case No. 91-STA-12, Sec. Dec., Sept. 3, 1991, slip op. at 4-7, *vacated on other grounds sub nom., Thomas Sysco Food Servs. v. Martin*, 983 F.2d 60 (6th Cir. 1993). In federal court, a party's case or controversy becomes moot either when the injury is healed and only prospective relief has been sought or when it becomes impossible for the court, through the exercise of its remedial powers, to do anything to redress the injury. *Alexander v. Yale*, 631 F.2d 178, 183 (2d Cir. 1980). A federal court may not render advisory opinions upon moot questions. *Preiser v. Newkirk*, 422 U.S. 395, 401 (1975). Similarly, except under particular circumstances not present here, administrative appeals under the SCA and DBA have been dismissed where no practical relief is available and only advisory decisions for future applications could be issued. *See, e.g., In re PHCC Mechanical Contractors of Fairbanks, Inc.*, WAB Case No. 86-20, Nov. 26, 1986; *In re McGee Creek Project*, WAB Case No. 81-11, Dec. 24, 1982 (refusing to "adopt the procedure of issuing advisory decisions as to specific projects"); *In re American Overseas Marine Corp.*, BSCA Case No. 92-10, 11, Aug. 10, 1992; *In re Naval Supply Sys. Command*, WAB Case No. 78-24, Apr. 6, 1979 (finding petitions for review moot because no effective relief available).

Here, as in *Naval Supply Sys.*, the question of which labor standards properly were applicable is moot because the Board cannot at this time issue a decision which could affect the wage requirements of the contract or DO. *See Naval Supply Sys.*, slip at 3. The ordering period on the entire Unidyne contract ended on October 24, 1995, and work on DO 0272 was completed

on November 22, 1995. Whether or not the case was moot or untimely when it was before the Administrator, it is moot before us.^{1/}

The Navy's petition amounts to a request that the Board issue an advisory opinion to quash disputes that could possibly arise in the future. We decline. The Navy contends that the case should be reviewed because it falls within the “capable of repetition yet evading review” exception to the mootness doctrine. However, mere speculation that the parties will be involved in a dispute over the same issue does not rise to the level of “reasonable expectation” or “demonstrated probability” of recurrence necessary for application of the exception. *See Dennin v Connecticut Interscholastic Ath. Conf., Inc.*, 94 F.3d 96, 100-101 (2d Cir. 1996). There is nothing to preclude a contractor from raising the issue presented here in the context of a live case or controversy.

The Administrator has not objected to the Navy's alternative request that we vacate the July 11 final ruling, and we find no reason to deny it. For the reasons expressed in *Harry A. Stroh, Assocs., Inc.*, slip op. at 4-5, and because the Navy was never given an opportunity to comment or participate in the Administrator's reconsideration, we set aside the July 11 final ruling.^{2/}

Accordingly, this matter is DISMISSED without prejudice.

SO ORDERED.

DAVID A. O'BRIEN
Chair

KARL J. SANDSTROM
Member

JOYCE D. MILLER
Alternate Member

^{1/} It is unnecessary to address the Administrator's argument that her non-enforcement position renders the case moot.

^{2/} This procedure prevents a ruling, found unreviewable because of mootness, from spawning any legal consequences including precedential effect. *United States v. Munsingwear, Inc.*, 340 U.S. 36, 41 (1950).