

ARMED SERVICES BOARD OF CONTRACT APPEALS

Appeal of --)
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Hubsch Industrieanlagen Spezialbau GmbH) ASBCA No. 51937
)
Under Contract No. DACA90-90-C-0410)

APPEARANCE FOR THE APPELLANT: Harry J. Kelly, Esq.
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OPINION BY ADMINISTRATIVE JUDGE PARK-CONROY
ON GOVERNMENT'S MOTION TO DISMISS

At issue is the Government's motion to dismiss three of the claim items pending in the above-captioned appeal. The three items are: (1) DM 145,270.20 for expenses, including legal expenses, of appellant's receiver in bankruptcy; (2) DM 750,000.00 for lost profits for Elektro-Spezialbau Gerhard Hubsch (Elektro); and (3) DM 2,408,157.60 for three different categories of loss incurred by Mr. Gerhard Hubsch. We grant the motion with respect to the lost profits claimed by Elektro and the costs associated with Mr. Hubsch's personal guarantee and the foreclosure procedures on his home, and otherwise deny it.

STATEMENT OF FACTS FOR PURPOSES OF THE MOTION

Contract No. DACA90-90-C-0410 in the amount of DM 8,067,269.00 for the construction of a dispensary/dental clinic, Patch Barracks, Stuttgart, Germany was awarded to appellant on 9 January 1990. The contract contained the standard Disputes clause, FAR 52.233-1 (APR 1984) and a special clause, UIA 52.233 (120) LAW GOVERNING CONTRACTS (NOV 1977) (USAREUR), which provides that disputes be decided under the law of the United States. (R4, tabs 3, 4)

Appellant was required to obtain a Bank Letter of Guaranty (BLG) for its performance bond (R4, tab 3). The BLG submitted by appellant in the amount of 10 percent of the contract price, DM 806,730.00, was approved by the Government on 5 February 1990. The BLG was issued by Winterthur Versicherungen (Winterthur). (R4, tab 5)

Appellant signed the Notice to Proceed (NTP) on 5 March 1990, shortly after it was issued (R4, tab 6). There were a number of changes issued during contract performance and a major delay after NTP caused by the Government's cancellation of the adjacent Child Development Center which was to be built on the site occupied by the existing clinic (R4, tabs 7 through 13, 32).

By a letter dated 4 March 1992, appellant advised the Government that it had financed approximately DM 2.4 million of the Government's contract changes and that the Government's actions had "endanger[ed] the existence of . . . [the] company" (R4, tab 13). As of 31 August 1992, appellant calculated that the amount it had financed had risen to DM 4,696,333.00 (R4, tab 16).

The Government notified appellant by a letter dated 29 September 1992 that its performance was unsatisfactory, its "primary difficulties relat[ing] to timeliness of performance and the ability to capitalize and finance ongoing performance" (R4, tab 15).

Shortly thereafter, the Government issued multi-part modifications compensating appellant for its extended overhead resulting from Government-caused delay: Part 1 was issued on 30 October 1992 as P00010 in the amount of DM 916,700.00; Part 2 was issued on 23 December 1992 as P00011 in the amount of DM 618,000.21 and Part 3 was issued on 19 April 1993 as P00013 in the amount of DM 464,369.79. Multi-part modifications were issued because of the limitation of available funds. (R4, tabs 18, 24, 37)

Appellant's financial difficulties nevertheless continued and it repeatedly attempted to obtain payment/settlement for the changes it claimed it had financed (R4, tabs 17, 19, 21, 22, 27-29, 33, 34, 40). Its letter dated 11 March 1993 refers to its "difficult financial situation, known to the Government" (R4, tab 27). The Government was aware that appellant was having "serious financial problems and [was] on the verge of bankruptcy" (R4, tab 32).

The complaint alleges that the delay appellant experienced in receiving payment from the Government on the Stuttgart dispensary/dental clinic contract had an adverse "ripple effect" upon two other contracts appellant was performing for the Government: DACA90-91-C-0014 involving upgrades to the commissary in Heidelberg (ASBCA No. 49840) and DACA90-90-C-0405 relating to the replacement of the medical/dental clinic at the Rhein Main Airbase (ASBCA No. 49841) (comp. ¶¶ 22-32).

Substantial completion of the Stuttgart dispensary/dental clinic contract occurred on 26 March 1993 (R4, tab 57). The BLG had been reduced to five percent of the contract award, DM 403,365.00 on 21 December 1992 (R4, tab 23) and, in a letter dated 12 July 1993, appellant advised the Government that it could complete the Stuttgart contract if the BLG performance bond was returned; otherwise it would have to file for bankruptcy (app. supp. br. and attach. 2). In two letters dated 16 July 1993, appellant advised the Government that appellant's Director, Gerhard Hubsch, had filed a petition to institute bankruptcy proceedings and that, by law, it could not complete the Stuttgart contract (R4, tabs 45, 46). Mr. Ulrich Kneller was appointed the receiver in bankruptcy (app. supp. br. at 4). It is alleged that, also on 16 July 1993, appellant's bank, BfG Frankfurt/Main, terminated its line of credit (comp. ¶ 36).

By letter dated 23 July 1993, the Government demanded payment on the BLG issued by Winterthur. Appellant objected to this demand on grounds that only minor warranty work remained and requested that the Government suspend it. (Comp. ¶ 39; R4, tabs 47 through 49) The Government, however, pressed forward and collected the full amount of the BLG, DM 403,365.00, on 16 September 1993 (R4, tab 54).

The complaint alleges that the BLG issued by Winterthur was secured by BfG Frankfurt/Main and that, when Winterthur paid the Government, it called the security held by the bank. This, together with the earlier termination of appellant's line of credit, resulted in the inability of appellant's affiliate Elektro to obtain credit. Appellant further alleges that Mr. Hubsch, as personal guarantor, incurred costs when the bank demanded that he repay the full amount of appellant's line of credit and that he also incurred costs to prevent the loss of his home to foreclosure and in the use of his home as office for Hubsch. (Comp. ¶¶ 44-45)

By unilateral Modification No. P00015, issued on 31 August 1993, the Government deleted "all currently known work that was not performed under [appellant's] contract" and reduced the contract amount by DM 190,321.83 (R4, tab 51). By unilateral Modification No. P00016, also issued 31 August 1993, the Government deleted "all currently known contract underruns from the unit priced portion of the contract" and reduced the contract amount by DM 100,719.00 (R4, tab 51a). Winterthur then requested return of the full BLG amount, DM 403,365.00, and offered the Government a warranty bond instead (R4, tab 56). It asserted that the money had not been used to complete the contract and that it had an "actionable right to restitution" (R4, tab 58). All contract deficiencies were corrected by 28 June 1995 (R4, tab 62, ex. 19). The full BLG amount was returned to Winterthur on 10 May 1996 (R4, tab 61).

By a letter dated 11 May 1998, appellant submitted a certified claim in the total amount of DM 5,534,512.60 which included the three items now at issue:

- (1) "[f]inancing expenses of [the] receiver, legal expenses," a total of DM 145,270.20;
- (2) Elektro's claim for lost profits (DM 150,000 a year for five years) totaling DM 750,000.00 allegedly resulting from Winterthur's "calling of the counter-security

at the firm's bank" and the "withdrawal of all credits at the firm's bank;" and (3) Mr. Hubsch's claim for DM 2,408,157.60 as compensation for costs associated with office and workshop rental in his home, the calling of the personal guaranty by the bank and the institution of the foreclosure on his home. The claim was certified by both Gerhard Hubsch and Ulrich Kneller. (R4, tab 62)

The contracting officer denied the claim in its entirety in a final decision dated 17 September 1998 (R4, tab 2). A timely appeal was docketed as ASBCA No. 51937.

The complaint alleges in paragraph 52.II. that the receiver is the "successor in interest to Hubsch" and "incurred expenses relating to Hubsch's duties under the contract for the Stuttgart Project, including legal expenses in the amount of DM 145,270.00." In paragraph 52.V. it is alleged that the Corps is liable for Elektro's lost profits in the amount of DM 750,000.00. And, in paragraph 52.VI. it alleges entitlement to "[p]ersonal damages incurred by Mr. Hubsch" in the amount of DM 2,408,157.60 consisting of: the cost of office and workshop rental in his home, damages from the calling of his personal guarantee by BfG Frankfurt/Main, and losses from the proposed foreclosure sale of his home by the local court.

DISCUSSION

The Government has moved to dismiss the portion of the appeal that alleges entitlement to recovery of expenses incurred by the receiver in bankruptcy, lost profits for Elektro and the personal losses incurred by Mr. Hubsch. It asserts that the Board should avoid the time and cost of litigating matters that are not compensable under the contract, or otherwise as a matter of law, even if all of the factual allegations presented in support of these three claim items are proved. (Gov't br. at 9) *See Keco Industries, Inc.*, ASBCA Nos. 15061, 15131, 71-1 BCA ¶ 8698. Appellant's position is that it is entitled to recover breach of contract damages that place it in as good a position as if the Government had fully performed, so long as the damages are foreseeable. It asserts that all three damages items were triggered directly by the actions of the Government. (App. br. at 8)

Although styled as a motion to dismiss, we treat the Government's motion as one for summary judgment to the extent it relies upon matters outside the pleadings and apply the familiar rules which require us to draw the requisite inferences and apply the applicable evidentiary standard to determine whether a reasonable fact finder could decide the issues raised by the Government in favor of appellant. *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 255 (1986).

The Receiver in Bankruptcy

The Government asserts that the expenses incurred by the receiver in bankruptcy, including legal fees, are unallowable if they are not directly related to contractual

requirements or performance. Appellant responds that the receiver incurred professional fees and, standing in appellant's shoes, costs related to the completion of the remaining warranty work, which are allowable contract costs. It further argues that there is no general prohibition against the payment of legal fees. It asserts that it should be permitted to make a showing of entitlement on the basis of a more fully developed record.

Paragraph 52.II. of the complaint alleges that the receiver is the "successor in interest" to Hubsch and "incurred expenses relating to Hubsch's duties under the contract for the Stuttgart Project, including legal expenses." The Government concedes that, when the receiver was appointed by the German Bankruptcy court, he became, "for all intents and purposes," the appellant (Gov't br. at 5). Drawing all inferences in favor of appellant, we are satisfied that appellant has alleged entitlement to costs that may be recoverable under the contract.

The Government offers no factual support for its assertions that the receiver's costs could be related to the prosecution of this claim or to the bankruptcy proceedings. The same is true of its speculation that the claimed legal expenses are unallowable under FAR 31.205-33(d), that they are premature under the Equal Access to Justice Act (EAJA) and that they may be attributable to the preparation of the claim. The Government's motion with respect to the claims of the receiver is denied.

Elektro-Spezialbau Gerhard Hubsch

The Government asserts that Elektro was not a party to the contract and that appellant has not alleged that the lost profits it seeks are for work performed by Elektro on the Stuttgart dispensary/dental clinic (Gov't br. at 12 and reply at 5). It further asserts that appellant's claim for the lost profits of its "affiliate" is speculative and not recoverable as a matter of law (Gov't br. at 12). It also points to the deposition testimony of Mr. Kneller which reflects that he did not consider the Elektro claim for lost profits to be part of the claim he filed as receiver acting as appellant (Gov't supp. br. at 6-7). Appellant responds that lost profits are recoverable as breach damages and that the losses suffered by Elektro were the direct result of the Government's demand for payment under the BLG which made it impossible for Elektro to obtain funding for its operations (app. br. at 11). It further responds that the deposition of a Government employee establishes that the Government was aware that appellant had "other business entities" and that the BLG was likely backed by other security and collateral so that the calling of the BLG would impact Mr. Hubsch and his other businesses (app. supp. br. at 9 and attach. 1).

It is undisputed that Elektro is not a party to the contract. It, therefore, cannot bring suit on the contract. See *United States v. Johnson Controls, Inc.*, 713 F.2d 1541, 1551 (Fed. Cir. 1983). Further, to the extent that appellant is seeking the lost profits of its affiliate Elektro, the claimed damages are not recoverable. In *Cox & Palmer*, ASBCA Nos. 37328 *et al.*, 89-3 BCA ¶ 22,197, we observed that the speculative alleged loss of future

contracts and work fell within the kind of losses of outside business, outside contracts and general company work that are too remote and consequential for recovery and concluded that the loss of future, possible contracts was too remote and speculative to be compensable damage for a breach of contract as a matter of law. 89-3 BCA at 111,666. *See A-1 Garbage Disposal and Trash Service, Inc.*, ASBCA No. 43006, 93-1 BCA ¶ 25,465 at 126,832 (“Lost anticipated profits resulting from the collapse of the contractor’s overall operation or in subsequent ventures, are too remote to be viewed as a natural result of the breach”). Here, the loss of future profits resulting from future, possible contracts of a non-party affiliate of appellant are even more speculative; they are not recoverable as a matter of law.

Personal Losses of Gerhard Hubsch

The Government contends that the personal damages claimed by Mr. Hubsch, who was appellant’s Director, are also consequential in nature and unrecoverable (Gov’t br. at 13). It asserts that appellant has not come forward with any evidence which suggests that the Government knew at the time of contracting that appellant did not have adequate resources to complete the contract without guaranteed progress payments and would have to borrow money from Mr. Hubsch (Gov’t supp. br. at 3). It again points to the deposition testimony of Mr. Kneller which indicates that he understood Mr. Hubsch’s personal claims were not related to the duties of the receiver (Gov’t supp. br. at 6-7).

Quoting from the discussion in *Cox & Palmer, supra*, relating to the financial and credibility losses alleged there, appellant responds that it is “impossible to say” that the injuries allegedly suffered by Mr. Hubsch “cannot be shown at trial to have been a direct and foreseeable consequence of a delay on contract payments” and should not be dismissed (app br. at 12). It asserts that the Government undoubtedly knew that its draw-down of the BLG would trigger action by Winterthur that would ultimately lead to losses by appellant and then explains that the damages sought by Mr. Hubsch actually represent amounts appellant owes to him for advances he made to the firm (app. br. at 13, fn. 3). It points to testimony by a Government employee which indicates knowledge that Mr. Hubsch had personally obtained financing to provide financial support for appellant and that the Government knew that calling the BLG would cause a “cascade of financial injuries to . . . Appellant” (app. supp. br. at 5-6 and attachs. 1, 6).

The Government responds that, unlike Mr. Hubsch, the appellants in *Cox and Palmer*, had a contractual relationship with the Government. We agree that, as with *Elektro*, any personal claim by Mr. Hubsch is barred for lack of privity of contract. *United States v. Johnson Controls, Inc., supra*. Further, to the extent these items may be claimed by appellant, we are persuaded that the costs associated with the calling of Mr. Hubsch’s personal guarantee and the institution of foreclosure on his home are not recoverable as a matter of law.

The damages claimed by Mr. Hubsch when he allegedly was required to repay the full amount of appellant's line of credit after BfG Frankfurt/Main called his personal guarantee are consequential and not recoverable. We addressed an analogous claim for damages in *D.E.W. & D.E. Wurzbach, A Joint Venture*, ASBCA No. 50795, 98-1 BCA ¶ 29,385. In *D.E.W.*, appellant claimed entitlement to interest on money borrowed from its president and a bank for completion of other projects. We concluded that the immediate cause of appellant's need to borrow money was the surety's decision to stop issuing bonds, not the Government's wrongful termination for default. Relying upon *Ramsey v. United States*, 101 F.Supp. 353 (Ct. Cl. 1951), *cert. denied*, 343 U.S. 977 (1952), we denied the claim because recovery for loss or reduction of bonding capacity is barred as a consequential damage. In this case, it is undisputed that the damages claimed are those of a non-party to the contract, Mr. Hubsch, and are the result of the bank's demand that he, as guarantor, repay the full amount of the line of credit advanced to appellant. Applying the rationale of *D.E.W.*, recovery of costs associated with Mr. Hubsch's personal guarantee is a recovery for the loss of the BLG and appellant's line of credit. Recovery of such losses is barred as a matter of law.

The claim for damages associated with losses related to the foreclosure of Mr. Hubsch's home is also barred. In *Tele-Sentry Security, Inc.*, GSBCA Nos. 8950, 9093, 92-3 BCA ¶ 25,088, the Board considered a claim for breach damages which included the value of a home and jewelry that the president of the company sold to pay business debts allegedly incurred as a result of the Government's mismanagement of the contract. The Board concluded that the claimed damages were consequential and unforeseeable. We see no difference between damages based upon the sale of a home and jewelry and the damages based upon costs allegedly resulting from the proposed foreclosure sale of Mr. Hubsch's home. As in *Tele-Sentry Security*, the damages are not recoverable.

Remaining is Mr. Hubsch's claim for the cost of office and workshop rental in his home. Apart from the Government's general contention that Mr. Hubsch was not a party to the contract, the Government has not come forward with any basis for dismissal of this part of appellant's claim and it may well be that the evidence will demonstrate that these are business expenses incurred by appellant that are recoverable under the contract. We cannot say on this record that these are these costs are not recoverable as a matter of law.

CONCLUSION

The Government's motion is granted with respect to the lost profits claimed by Elektro and the damages associated with the bank's calling of Mr. Hubsch's personal guarantee and the foreclosure proceedings on his home. These claim items are not recoverable as matter of law.

The Government's motion is denied with respect to the damages claimed by the receiver in bankruptcy and the costs of the office and workshop.

Dated: 1 February 2002

CAROL N. PARK-CONROY
Administrative Judge
Armed Services Board
of Contract Appeals

I concur

I concur

PAUL WILLIAMS
Administrative Judge
Chairman
Armed Services Board
of Contract Appeals

EUNICE W. THOMAS
Administrative Judge
Vice Chairman
Armed Services Board
of Contract Appeals

I certify that the foregoing is a true copy of the Opinion and Decision of the Armed Services Board of Contract Appeals in ASBCA No. 51937, Appeal of Hubsch Industrieanlagen Spezialbau GmbH, rendered in conformance with the Board's Charter.

Date:

EDWARD S. ADAMKEWICZ
Recorder, Armed Services
Board of Contract Appeals