

ARMED SERVICES BOARD OF CONTRACT APPEALS

Appeal of --)
)
Consolidated Defense Corporation) ASBCA No. 52315
)
Under Contract No. N00024-92-C-4188)

APPEARANCE FOR THE APPELLANT: Raymond M. Hassett, Esq.
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Hartford, CT

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OPINION BY ADMINISTRATIVE JUDGE REED
ON GOVERNMENT'S MOTION TO DISMISS IN PART AND
TO STRIKE PORTIONS OF THE REVISED AMENDED COMPLAINT

In a previous decision concerning ASBCA Nos. 52315 and 52719, the Board dealt with a Government motion to dismiss ASBCA No. 52315 and for summary judgment as to ASBCA No. 52719. We treated both motions as for summary judgment and denied both. There, the Government alleged that the termination for convenience settlement proposal (TFCSP) submitted by Consolidated Defense Corporation (appellant) was untimely and that the Government was entitled to judgment on its unilateral determination. *Consolidated Defense Corporation*, ASBCA Nos. 52315, 52719, 01-2 BCA ¶ 31,484. In that decision, the Board noted that the complaint demanded punitive damages, that the record revealed no claim for punitive damages, and that the matter of punitive damages was not yet before the Board for resolution. *Id.* at 155,428.

Following that decision, both parties obtained new counsel and commenced discovery. Appellant opted to submit an amended complaint and a revised amended complaint. In the revised amended complaint, appellant makes extensive averments regarding the Government's alleged lack of good faith and asserts bad faith. The relief requested includes, among other things, punitive damages.

The Board, *sua sponte*, directed appellant to show cause why the bad faith assertions and/or the punitive damages request should not be stricken from the revised amended complaint, dismissed as premature because no claim to that effect had been submitted to the contracting officer (CO), or dismissed for lack of subject matter jurisdiction because the Board lacks the authority to adjudicate a claim for punitive damages. Order Concerning Revised Amended Complaint and to Show Cause (18 June 2002), ¶ II.

The Government then submitted its motion to dismiss in part so much of the appeals as concerns punitive damages and to strike portions of the revised amended complaint “relating to the request for punitive damages,” specifically challenging ¶¶ 18, 29, 33-34, 36, 41-42, and 44c.-e. and request for relief ¶ 5 of the revised amended complaint (Government motion at 1, 8).

Appellant submitted a response (app. resp.) to the show cause order and to the Government motion. The Government replied. This decision resolves the Board’s show cause order and the Government’s motion.

STATEMENT OF FACTS FOR PURPOSES OF THE MOTION

1. Contract No. N00024-92-C-4188 (the contract) was awarded to appellant by the Government on 17 March 1992. The contract includes by reference, among others, the following standard provisions:

- a. FAR 52.233-1 DISPUTES (APR 1984); and
- b. FAR 52.249-2 TERMINATION FOR CONVENIENCE OF THE GOVERNMENT (FIXED-PRICE) (APR 1984)

(R4/SR4, tabs 50, 53)

2. By contract Modification No. P00009, dated 16 March 1993, effective upon receipt by appellant, the Government terminated the contract in its entirety for the Government’s convenience. Appellant’s TFCSP dated 31 October 1993 and revised TFCSP dated 30 April 1994, were submitted on standard forms and claimed payment for cost items typical of a TFCSP (purchased parts, work-in-process, special tooling and test equipment, other property and equipment costs, G&A, settlement expenses, subcontractor settlements, and a credit for disposal) plus profit on certain costs. (R4, tabs 38, 47-48; Revised Amended Complaint and Answer to Revised Amended Complaint (revised amended C&A), ¶¶ 2) No request for punitive damages or costs associated with alleged Government lack of good faith or Government bad faith are explicitly stated in the TFCSP.

3. The termination CO offered to settle the TFCSP on 22 November 1994. In memoranda dated 15 December 1994, appellant's president for the first time in this record mentions "that the DCAA . . . harbored an animus" and had taken a "punitive attitude" toward appellant which allegedly adversely affected progress payments during performance and after the TFC. Further, according to appellant's president, a DCAA auditor "accused [appellant] of acts designed to knowingly defraud the government [and that the] accusations were months later withdrawn as being DCAA errors." One effect of these matters, says appellant's president, was delay in resolution of the TFC. Appellant's president characterizes some DCAA actions after the TFC as "bad faith." (C&A, ¶¶ 13; revised amended C&A, ¶¶ 19; R4, tab 30). Other than the TFCSP, the record reveals no claims that have been submitted to the CO by appellant related to alleged late progress or other payments, costs related to the asserted delayed resolution of the TFC, or costs arising from claimed bad faith on the part of the Government after the TFC.

4. In its complaint, at ¶ 11, appellant asserted "bad-faith" on the part of the Government in resolving the TFCSP after its submittal. Paragraph 17 averred, in part, that the Government engaged in "bad faith in the negotiation and [proposed] settlement of the terminated contract." At ¶¶ 18-20, appellant alleged that Government investigative activities in connection with resolution of the TFCSP were intended to humiliate, embarrass, create dread and fear, threaten, emotionally and psychologically torment, and intimidate appellant, a corporation, and the individuals required to respond to the investigation. At ¶ 29, appellant submitted, in pertinent part: "In addition to the actual costs claimed by Appellant, the Appellant also seeks an award of punitive damages in an amount the [Board] deems reasonable. The Government has, at every opportunity since the Appellant rejected [the Government's] initial [TFC settlement] offer [on or after 22 November 1994], used the unequalled power and resources of the United States Government to punish the Appellant for its decision." Paragraph 31 claims "compensatory and punitive damages."

5. Paragraphs 18, 29, 33-34, 36, 41-42, and 44c.-e. and request for relief ¶ 5 of the revised amended complaint assert as follows:

18. After years of repeated audits, purported investigation and refusal to negotiation [sic] in good faith, the Government sought to deny the Appellant an opportunity to have its claim adjudicated fairly in accordance with the Government's obligation under the FARs, therefore supporting a claim of the [sic] bad faith.

....

29. After refusing the Government's offer and citing what the Appellant believed to be serious bad faith in the negotiation and

settlement of the terminated Contract, the Appellant's proposal was coincidentally referred to the Division of Criminal Investigation Services.

....

33. In addition to the infliction of emotional and psychological pain and torment caused by such an investigation, the Appellant was forced to engage a criminal lawyer.

34. The Government's arbitrary and capricious criminal investigation resulted in a self-imposed Government delay to the termination settlement procedure; this resulted in an additional and unnecessary two-year period, escalating the costs to the Government.

....

36. The Government arbitrarily and capriciously seeks to disallow any costs resulting from the delay as being related to the Contract, yet the delay was imposed by the Government.

....

41. The Government has, at every opportunity since the Appellant rejected its initial offer, used the unequalled power and resources of the United States Government to punish the Appellant for its decision.

42. The Government has acted improperly through unnecessary audits, investigations, undisclosed and secret guidelines, phantom conclusions, inexplicable arbitrary conclusions, withdrawing offers and transferring files to new people who then claim a need to familiarize themselves with the file.

....

44. The Government's actions have caused severe financial hardship for many associated with this Contract, beyond [appellant], including but not limited to:

....

c. Mr. Longo,* who used all his ability to provide the Government with a good environmental product to protect the Seas, was forced to endure the dread associated with a Department of Justice Criminal Investigation, including visits from Special Agents, Grand Jury Subpoenas, and the prospect of criminal and civil penalties; and

d. Slandered by the Government when it insinuated that even though no penalties or adverse consequences resulted from the in-depth investigation, it really should have in their opinion. The author of that statement, of course, is never identified by the [termination] CO.

e. Mr. Longo's personal integrity was attacked [sic, attacked?] when a claim was made against his credit for obligations of the Appellant.

....

WHEREFORE, the Appellant seeks:

....

5. Punitive Damages

DECISION

Scope of the Appeals and Decision

The Board's show cause order and the Government's motion are captioned for both of the consolidated appeals, ASBCA Nos. 52315 and 52719. For clarity, we note that the appeal arising from appellant's claim under the TFCSP is ASBCA No. 52315. ASBCA No. 52719 is a Government claim for return of money allegedly overpaid to appellant on account of the TFC. We conclude that the matters to be resolved here relate only to appellant's claim, ASBCA No. 52315.

Punitive Damages

* Appellant alleges that Joseph F. Longo, appellant's president at certain times, played a central role in performance of the contract and TFC actions (R4/SR4, tabs 6-7, 20, 25, 30-31, 33-35, 38, 41, 43-44, 46-47, 50-54; revised amended C, ¶¶ 6, 9-10, 54c., 69a.iii.).

In its show cause order, the Board questioned whether it had the authority to adjudicate a claim for punitive damages, assuming any such claim had been submitted to the CO.

The Government argues that the Board lacks the authority and thus lacks jurisdiction to award punitive damages. Therefore, suggests the Government, the portion of the appeals that relates to punitive damages should be dismissed. Appellant cites no authority to the contrary.

The Board has no authority to award punitive damages; therefore, a claim for such damages must be dismissed for lack of subject matter jurisdiction. *Janice Cox d/b/a Occupro Ltd.*, ASBCA No. 50587, 01-1 BCA ¶ 31,377 at 154,930-31, *recon. denied*, 01-2 BCA ¶ 31,619; *Envtl. Safety Consultants, Inc.*, ASBCA No. 47498, 00-1 BCA ¶ 30,826 at 152,147-48. To that extent, the Government's motion to dismiss in part is granted.

Damages for Bad Faith

Appellant contends that the claim for punitive damages should be construed "as compensation for the Government's bad faith and not simply a demand for a penalty" (app. resp. at 6), citing *Envtl. Safety Consultants, supra*; *Apex Int'l Mgmt. Servs., Inc.*, ASBCA Nos. 38087 *et al.*, 94-2 BCA ¶ 26,842, *aff'd on recon.*, 94-2 BCA ¶ 26,582; and *Uni-Sys., Inc.*, ASBCA No. 25066, 84-2 BCA ¶ 17,292. Appellant further asserts the claim is not a new claim because it "was initially raised in the original appeal . . . (Complaint . . . [¶] 31)" (Statement of Facts 4; app. resp. at 4).

Pursuant to the Contract Disputes Act of 1978, as amended (the CDA), and the Disputes provision of the contract, a contractor's claim must first be submitted to the CO for decision as a condition precedent to Board jurisdiction. A claim cannot properly be raised for the first time in the pleadings before the Board. 41 U.S.C. § 605(a); *D.L. Braugher Co. v. West*, 127 F.3d 1476, 1480 (Fed. Cir. 1997); *Contel Advanced Sys., Inc.*, ASBCA No. 49072, 02-1 BCA ¶ 31,808 at 157,140; *William F. Klingensmith, Inc.*, ASBCA No. 52028, 01-2 BCA ¶ 31,589 at 156,095; FAR 52.233-1 (Statement of Facts 1a.); *see United States v. Newport News Shipbuilding and Dry Dock Co.*, 933 F.2d 996, 998 n.1 (Fed. Cir. 1991) (deficient pleading by the Government before the Board did not waive an issue of the Board's jurisdiction as it related to claim certification).

"[T]he CDA recognizes that a single government contract may give rise to more than one claim If the [Board] will have to review the same or related evidence to make its decision, then only one claim exists. . . . On the other hand, if the claims as presented to the CO [or potential claims to be presented to the CO] will necessitate a focus on a different or unrelated set of operative facts as to each claim, then separate claims exist" *Placeway Constr. Corp. v. United States*, 920 F.2d 903, 907 (Fed. Cir. 1990).

There is a distinction between a claim under the TFC provision and a claim for a breach of contract. To recover on a breach of contract theory, appellant must show a valid contract between the parties, an obligation or duty of the Government arising out of the contract, a breach of that duty, and damages caused by the breach that were reasonably foreseeable at the time of contract award. *San Carlos Irrigation and Drainage Dist. v. United States*, 877 F.2d 957, 959 (Fed. Cir. 1989); *Enrique (Hank) Hernandez*, ASBCA No. 53011, 01-2 BCA ¶ 31,550 at 155,832. In contrast, under the TFCSP claim in this case, entitlement is established by the Government-directed TFC and the TFC provision. Appellant need only prove the quantum of its reasonable, allowable, and allocable costs incurred during performance of the contract, plus profit, and any other costs recoverable pursuant to the TFC provision and applicable regulations at FAR Parts 31 and 49. *Lisbon Contractors, Inc. v. United States*, 828 F.2d 759, 767 (Fed. Cir. 1987); *Gen. Dynamics Land Sys., Inc.*, ASBCA No. 52283, 02-1 BCA ¶ 31,659 at 156,411.

Proof of the elements of the TFC claim, compared with the elements of a potential breach of contract claim, requires an examination of differing sets of unrelated operative facts. Therefore, to the extent that appellant suggests a potential claim for breach of contract or for extra costs or damages, caused by a lack of good faith and/or bad faith on the part of the Government, that varies from the costs and profit claimed under the TFCSP, the Government's motion is granted. Accordingly, any such matters are hereby dismissed without prejudice to their submission to the CO as a breach of contract claim. *Trepte Constr. Co.*, ASBCA No. 38555, 90-1 BCA ¶ 22,595 at 113,386.

Appellant's Revised Amended Complaint

The Government further seeks to have the Board strike from the revised amended complaint what the Government characterizes as matters related to appellant's demand for punitive damages. The specific paragraphs are quoted above. (Statement of Facts 5)

We have separated the allegations in the revised amended complaint that the Government finds objectionable into two groups. In one group, ¶¶ 29, 34, 36, and 42, are those that are part of the narrative that explains the TFC claim or which could be read to place into issue a lack of cooperation, deliberate delay, and/or an unfruitful investigation by the Government that, if true, may, by the passage of time or otherwise, increase appellant's costs to protect, preserve, and dispose of property related to the contract, the costs to settle terminated subcontracts, the reasonable costs of settlement of the work terminated, and/or costs to defend against an investigation that did not result in a conviction or other adverse disposition. FAR 52.249-2(b)(6),(8)-(9), (c), (f)(2)(ii), (3), (g). (Statement of Facts 2-3, 5). The other group, ¶¶ 18, 33, 41, 44c.-e., and ¶ 5 of the request for relief, are those that, in essence, bear only on a potential claim of bad faith, relate only to a criminal investigation, concern only alleged punitive action by the Government, or assert personal harm to Mr. Longo, not appellant (Statement of Facts 5).

Matters related to the former group of paragraphs may properly be before the Board as a part of the TFCSP claim to be adjudicated and which concern the quantum due appellant under the TFC. To that extent, the Government's motion to strike is denied in part.

The latter group of paragraphs concern matters over which the Board has no authority either because no claim has been submitted to the CO or they can only be construed to address bases for punitive damages, unallowable consequential damages, an alleged tort, or potential disputes between parties other than the contractor and the Government. Assertions in the original complaint and the revised amended complaint make clear that, in some measure, appellant seeks damages "[i]n addition to the actual costs claimed by [a]ppellant" (Statement of Facts 4 (C, ¶ 29)-5 (revised amended C, request for relief ¶ 5). *Hubsch Industrieanlagen Spezialbau GmbH*, ASBCA No. 51937, 02-1 BCA ¶ 31,740 at 156,807-08; *LA Limited, LA Hizmet Isletmeleri*, ASBCA No. 52179, 00-1 BCA ¶ 30,865 at 152,361.

Paragraphs 18, 33, 41, and 44c.-e. and ¶ 5 of the requested relief in the revised amended complaint are hereby stricken. To that extent, the Government's motion to strike is granted in part. *Robert K. Adams*, ASBCA No. 34519, 87-3 BCA ¶ 20,205 at 102,348-49.

SUMMARY

The portion of ASBCA No. 52315 that seeks punitive damages is dismissed for lack of jurisdiction. The portion of ASBCA No. 52315 that asserts a claim for breach of contract or for extra costs or damages, caused by a lack of good faith and/or bad faith on the part of the Government, that differs from the costs and profit claimed under the TFCSP, is dismissed without prejudice to submission of a claim to the CO. To that extent, the Government's motion to dismiss in part is granted. In all other respects, the motion is denied.

We strike ¶¶ 18, 33, 41, and 44c.-e. and ¶ 5 of the requested relief from appellant's revised amended complaint. To that extent, only, the Government's motion to strike portions of the revised amended complaint is granted. It is otherwise denied.

Dated: 21 November 2002

STEVEN L. REED
Administrative Judge
Armed Services Board
of Contract Appeals

I concur

I concur

MARK N. STEMLER
Administrative Judge
Acting 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. 52315, Appeal of Consolidated Defense Corporation, rendered in conformance with the Board's Charter.

Dated:

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