

ARMED SERVICES BOARD OF CONTRACT APPEALS

Appeal of -- )  
 )  
SUFU Network Services, Inc. ) ASBCA No. 54503  
 )  
Under Contract No. F41999-96-D-0057 )

APPEARANCES FOR THE APPELLANT: Frederick W. Claybrook, Jr., Esq.  
Richard A. Zimmer, Esq.  
Crowell & Moring LLP  
Washington, DC

APPEARANCES FOR THE GOVERNMENT: COL Anthony P. Dattilo, USAF  
Chief Trial Attorney  
MAJ Max D. Houtz, USAF  
Brady L. Jones, III, Esq.  
Trial Attorneys

OPINION BY ADMINISTRATIVE JUDGE JAMES ON  
RESPONDENT'S MOTION TO DISMISS FOR LACK OF JURISDICTION

On 15 March 2004 respondent moved to dismiss the captioned appeal, alleging that the Board lacks jurisdiction to grant declaratory judgment relief sought by appellant. Appellant replied, opposing the motion on 25 March 2004.

STATEMENT OF FACTS (SOF)

1. In May 1996 the "AFNAF Purchasing Office" and USFI Network Services, Inc.<sup>1</sup> entered into the captioned contract to install and operate telephone networks at guest lodgings at designated Air Force bases in Germany and Italy for 10 years (compl. & answer, ¶¶ 14, 16; R4, tab 1 at F-4). Respondent has acted "through the United States Air Force Services Agency, a non-appropriated funds instrumentality [NAFI]" which "is not affiliated with the Army and Air Force Exchange Service" (compl. & answer, ¶ 9).

2. The contract (a) included clause I.2, Disputes, stating: "Except as otherwise provided in this contract, any dispute or claim concerning this contract which is not disposed of by agreement shall be decided by the Contracting Officer" (CO), and pending the contractor's appeal to the ASBCA and its decision thereon, "the Contractor shall

---

<sup>1</sup> In March 2001 the CO recognized the contractor's change of name to "SUFU Network Services, Inc." (R4, tab 10).

proceed diligently with the performance of the contract and in accordance with the [CO's] decision . . . .” and (b) incorporated by reference the FAR 52.243-1 CHANGES-FIXED-PRICE (AUG 1987) clause, which stated: “However, nothing in this clause shall excuse the Contractor from proceeding with the contract as changed” (R4, tab 1 at I-1, -8).

3. The contract required SUFI to dig underground trenches, lay the necessary telephone cable throughout each Air Force base, wire each lodging facility for telephone service, and provide telephone handsets in each guest room. SUFI constructed the foregoing telephone infrastructure at no cost to the Air Force. (Compl. & answer, ¶ 16) The only compensation SUFI receives under the contract is paid by guests who place local or long distance telephone calls from base lodging facilities, whose charges are collected by the Air Force and reimbursed to SUFI (compl. & answer, ¶ 7).

4. Contract § B, ¶ 5.5, stated the “USFI . . . will . . . levy the following fees . . . :  
5.5.1 Local calls to host nation telephone system: \$ .50 for the initial connection and first meter pulse, \$ .30 for each additional meter pulse” (compl., attach A at B-5).  
Modification No. 005 to the contract, signed by appellant on 9 June 1999, stated:

REFERENCE SEC B, 5.5.1

2. GERMANY: CALLS TO THE HOST NATION TELEPHONE SYSTEM: LOCAL CALLS, INCLUDING BASE INFORMATION, \$ .15 PER MINUTE, CALLS WITHIN A 50KM RADIUS ARE \$ .49 PER MINUTE, AND CALLS EXCEEDING THE 50KM RADIUS ARE \$ .99 PER MINUTE. . . . TOLL FREE CALLS: \$1.00 CONNECTION FEE. (SOME INTERNATIONAL “TOLL FREE” CALLS MAY BE SUBJECT TO BILLING, FOR EXAMPLE, INTERNATIONAL TOLL FREE CALLS TO OTHER COUNTRIES, WHERE A HOST NATION PASSES ALONG A CHARGE, WILL BE SUBJECT TO CONTRACTOR’S STANDARD PER MINUTE CHARGE FOR THAT COUNTRY.)

(Compl., attach. C at 2) In March 2000, bilateral contract Modification No. 008 extended the contract term to 15 years, ending 25 April 2011 (compl., attach. B at 1).

5. The CO’s 5 November 2003 letter to SUFI stated:

. . . [T]he Air Force has elected to open toll free calls, to include calling cards at the \$1.00 connection fee, as stated in Modification 5. . . . In reference to future expanded

services, USAFE [U. S. Air Forces in Europe] will select telephone services for new facilities it determines most advantageous to its business model.

Effective within 10 days of receipt of this letter, remove all restrictions on toll free calling. . . .

(Compl. & answer, ¶¶ 35, 37; compl., attach. G)

6. SUFI's attorney's 14 November 2003 letter to the CO stated that "SUFI disputes your contract interpretations" in the foregoing 5 November 2003 letter, requested a CO's final decision on three contract interpretation issues:

1. whether Modification 5 (or any other part of the Contract) requires SUFI to remove restrictions on toll-free calls accessing other long-distance carriers;
2. whether SUFI has the right under the Contract to service the new . . . facilities and any other additional lodging facilities on the bases SUFI services under the Contract;
3. whether, if the Air Force incorrectly takes the final position(s) that (a) SUFI must remove restrictions on access to other long-distance carriers and/or (b) SUFI may not service the new guest houses on bases it already services, the Air Force positions, both individually and in combination, are material breaches of contract that permit SUFI to cancel the Contract and stop work.

The letter stated that "opening the SUFI [telephone] network to other long-distance carriers through calling cards or otherwise will likely decimate SUFI's revenue immediately and bankrupt the company in short order," and requested the CO to suspend his direction for SUFI to remove all restrictions on toll-free calling by 15 November 2003 and to allow SUFI to service new guest houses on bases it serviced. (Compl. & answer, ¶ 38-39; compl., attach. H at 1, 6-7)

7. In his 15 January 2004 final decision, the CO denied all SUFI's claims and disputed each of SUFI's contract interpretations (compl. & answer, ¶ 41; compl., attach. J). The Air Force refused SUFI's request to suspend the CO's direction for SUFI to allow access to other long-distance networks, and SUFI has now opened up such access, which the Air Force has begun actively to advertise to guests (compl. & answer, ¶ 42). Respondent denies SUFI's allegations that the "wrongful interpretations by CO direction in the final decision will almost certainly cause severe economic harm to SUFI and

quickly extinguish its viability” and “the agency’s direction will shortly bankrupt SUFI” (compl. & answer, ¶¶ 1, 3).

8. On 6 February 2004 appellant timely appealed the CO’s final decision to this Board, which docketed the appeal as ASBCA No. 54503. There is no dollar amount at issue in this appeal, but only a request for contract interpretation relief. Monetary damage claims have not yet been submitted to the agency. (Compl. & answer, ¶ 2)

#### Preliminary Jurisdictional Inquiry

The Board’s 20 February 2004 Scheduling Order requested the parties to provide their views on what non-Contract Disputes Act (CDA) or pre-CDA legal authority empowers the Board to issue a declaratory judgment on the contract interpretation questions raised in this appeal under the NAFI contract. Appellant’s 3 March 2004 “Memorandum Re Jurisdiction” argued that the Board’s authority to provide declaratory judgment relief on contract interpretation questions was established by such cases as *Alliant Techsystems, Inc. v. United States*, 178 F.3d 1260, *reh’g denied*, 186 F.3d 1379, 1380 (Fed. Cir. 1999); *Dillingham Shipyard*, ASBCA No. 27458, 84-1 BCA ¶ 16,984; *McDonnell Douglas Corp.*, ASBCA No. 26747, 83-1 BCA ¶ 16,377, *aff’d in part and rev’d in part on other grounds*, 754 F.2d 365 (Fed. Cir. 1985); *Physics Technology Laboratories, Inc.*, ASBCA No. 17979, 77-1 BCA ¶ 12,301; *Teledyne Continental Motors, Division of Teledyne Industries, Inc.*, ASBCA No. 16516, 75-2 BCA ¶ 11,553; and *Catalytic Engineering and Manufacturing Corp.*, ASBCA No. 15257, 72-1 BCA ¶ 9342.

#### The Motion

Respondent’s 15 March 2004 answer to the complaint included a motion to dismiss the appeal for lack of jurisdiction of this Board to grant a declaratory judgment. According to movant, pre-CDA precedents held that the ASBCA lacked authority to issue declaratory judgments, citing *Alliance Properties, Inc.*, ASBCA No. 10471, 65-2 BCA ¶ 5210; *World Wide Tankers, Inc.*, ASBCA No. 20903, 77-1 BCA ¶ 12,302, and other cases. Respondent contended that the only statements that the Board had pre-CDA authority to provide declaratory relief are found in *obiter dicta* in *McDonnell Douglas*, *supra*, and in *Dillingham Shipyard*, *supra*. Appellant’s 25 March 2004 reply to the motion sought to distinguish *Alliance Properties* and *World Wide Tankers*.

## DECISION

### I.

The party who seeks the exercise of jurisdiction in its favor must carry throughout the litigation the burden of showing that it is properly in court. *See McNutt v. General Motors Acceptance Corp.*, 298 U.S. 178, 189 (1936).

The CDA does not apply to a contract entered into by a NAFI not affiliated with the agency exchange systems or services described in 28 U.S.C. §§ 1346, 1491. *See* 41 U.S.C. § 602(a); *Pacrim Pizza Co. v. Pirie*, 304 F.3d 1291, 1293-94 (Fed. Cir. 2002); *San Antonio Foam Fabricators*, ASBCA No. 36637, 88-3 BCA ¶ 21,058 at 106,352. ASBCA jurisdiction, if any, of an appeal arising under an unaffiliated NAFI contract derives from such contract's Disputes clause. *See PNL Commercial Corp.*, ASBCA No. 53816, slip op. at 3-4 (27 Feb. 2004).

### II.

*Alliant Techsystems, Inc. v. United States*, *supra*, noted that the Tucker Act, 28 U.S.C. § 1491(a)(2), as amended in 1992, defined the jurisdiction of the Court of Federal Claims (COFC) to render judgment in CDA disputes to include certain specific kinds of non-monetary disputes, “and other non-monetary disputes on which a decision of the [CO] has been issued under . . . the [CDA],” and held that the COFC had jurisdiction to issue a declaration of invalidity of the Army's exercise of an option in a 1995 contract. The court cited *Garrett v. General Electric Co.*, 987 F.2d 747, 750-51 (Fed. Cir. 1993), in support of its holding, and noted that *Garrett's* ruling “was consistent with the decisions of most of the boards of contract appeals, which have held that they have authority under the CDA, as they did under pre-CDA law, to grant declaratory relief when appropriate.” 178 F.3d at 1269-70.

In its decision on the contractor's petition for rehearing, the court stated that Alliant's argument that the boards' jurisdiction did not encompass requests for declaratory judgment on issues of contract interpretation, did not comport with the cases decided by the boards. Alliant's request for a contract interpretation arose under the contract as the pre-CDA boards understood those terms, and “historically and traditionally, the Board has assumed jurisdiction over issues involving disputes as to the interpretation of contract provisions and determination of the rights and obligations of the parties. . . .” *Alliant Techsystems, Inc. v. United States*, 186 F.3d at 1380, quoting *McDonnell Douglas Corp.*, *supra*.

It is clear that the ASBCA has decided appeals with respect to pre-CDA, non-monetary disputes. *See Physics Technology Laboratories*, *supra* (invention was reduced to practice under a defense contract so as to give the government a royalty-free license

thereto under the contract's PATENT RIGHTS (LICENSE) (OCT 1966) clause); *Teledyne Continental Motors, supra* (contractor was required to remove patent legends from technical drawings to which the government had unlimited data rights under the ASPR RIGHTS IN TECHNICAL DATA (FEB 1965) clause). It would be pedantic to cite the hundreds of ASBCA decisions on non-monetary, default termination disputes long before the CDA was enacted. See the reviews of pre-CDA decisional authorities in *Lisbon Contractors, Inc. v. United States*, 828 F.2d 759, 764 (Fed. Cir. 1987); *General Electric Co.*, ASBCA Nos. 36005 *et al.*, 91-2 BCA ¶ 23,958 at 119,944-45, *aff'd*, 987 F.2d 747 (Fed. Cir. 1993). It is immaterial that the ASBCA decisions in pre-CDA, non-monetary disputes did not state that they constituted a "declaratory judgment"; they interpreted the parties' rights and duties under contract clauses. We could do the same in the instant appeal without calling our decision a "declaratory judgment."

The Board concludes that it has jurisdiction to provide declaratory relief, in the sense of interpreting the parties' rights and obligations, under appropriate circumstances.

### III.

It remains to determine whether declaratory relief in the factual circumstances of this appeal is appropriate. The court in *Alliant* rejected the government's argument that non-monetary claims are outside the jurisdiction of the COFC because the contractor could convert such claims to monetary claims by doing the requested work and seeking compensation afterwards. The court continued, however:

This is not to say that the [COFC] (or an agency board of contract appeals) is required to issue a declaration of rights whenever a contractor raises a question of contract interpretation during the course of contract performance. In responding to such a request, the court or board is free to consider the appropriateness of declaratory relief, including whether the claim involves a live dispute between the parties, whether a declaration will resolve that dispute, and whether the legal remedies available to the parties would be adequate to protect the parties' interests.

While a contractor may want to know ahead of time how a contract issue will be resolved—such as whether the contractor will be entitled to additional compensation under the changes clause for a particular item of work directed by the [CO]—such cases do not ordinarily put into question whether the contractor is obliged to perform at all. . . .

The discretion to grant declaratory relief only in limited circumstances allows the court or board to restrict the occasions for intervention during contract performance to those involving a fundamental question of contract interpretation or a special need for early resolution of a legal issue.

178 F.3d at 1271.

The Board is mindful of our earlier decisions in which we declined to exercise the discretionary authority to decide a contract interpretation question independently before deciding a pending monetary dispute. *See Westinghouse Electric Corp.*, ASBCA No. 47868, 95-1 BCA ¶ 27,364 at 136,355-56; *Woodington Corp.*, ASBCA No. 37272, 89-2 BCA ¶ 21,602; and *Reflectone, Inc.*, ASBCA No. 34093, 87-1 BCA ¶ 19,656. To the extent that such decisions were based on pending monetary disputes, they remain viable precedent. Those precedents did not address the issue of “whether the contractor is obliged to perform at all” as articulated in *Alliant*, and as presented in this appeal.

Considering the *Alliant* criteria, SUFI’s and the CO’s opposing interpretations of the pertinent contract provisions involve a live dispute, not an academic debate. The facts SUFI alleges raise a fundamental question of contract interpretation – whether SUFI must perform as the CO directed for the remaining eight years of the contract’s term, or whether SUFI is entitled to cancel the contract. These facts are analogous to the issue in *Alliant*, whether the contractor was obligated to perform an option, and hence show a special need for early resolution of these legal issues. We hold that it is appropriate for the Board to render declaratory relief in this appeal.

We do not intimate any views on the validity of SUFI’s or the CO’s interpretations or the merits of the disputed issues in the present appeal record.

We deny the government’s motion to dismiss.

Dated: 22 April 2004

---

DAVID W. JAMES, JR.  
Administrative Judge  
Armed Services Board  
of Contract Appeals

(Signatures continued)

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. 54503, Appeal of SUFI Network Services, Inc., rendered in conformance with the Board's Charter.

Dated:

---

DAVID V. HOUBE  
Acting Recorder, Armed Services  
Board of Contract Appeals