

ARMED SERVICES BOARD OF CONTRACT APPEALS

Appeal of --)
)
TRRS Research) ASBCA No. 51712
)
Under Contract No. DAAA08-94-C-0096)

APPEARANCE FOR THE APPELLANT: Edward J. Hoffman, Esq.
Blank Rome Comisky &
McCauley LLP
Philadelphia, PA

APPEARANCES FOR THE GOVERNMENT: COL Michael R. Neds, JA
Chief Trial Attorney
MAJ David Newsome, Jr., JA
Trial Attorney

OPINION BY ADMINISTRATIVE JUDGE DELMAN

In this appeal TRRS Research (appellant) seeks \$183,717.45 in breach of contract damages under a fixed-price contract to supply cargo containers to the U.S. Army. We have jurisdiction under the CDA, 41 U.S.C. §§ 601 *et seq.* The parties waived hearing and agreed to submit their positions on the record on entitlement only, pursuant to Board Rule 11. For reasons stated, we sustain the appeal in part and deny it in part.

STATEMENT OF FACTS

1. The Department of the Army, Rock Island Arsenal (Army or Government), awarded Contract No. DAAA08-94-C-0096 to appellant on 23 September 1994. As modified, the contract provided for the sale of a basic quantity of 400 and an option quantity of 3,600 cargo containers at fixed unit prices. The Government timely exercised this option. Contract deliveries were to be made at designated foreign and domestic locations. In accordance with the contract, payment was to be made within 30 days of receipt of a proper invoice or the acceptance of the units, whichever was later. FAR 52.232-1 PAYMENTS (APR 1984); FAR 52.232-25 PROMPT PAYMENT (MAR 1994).

2. Between October 1994 and October 1995, appellant submitted over 131 invoices for delivered and accepted containers, and the record reflects that those invoices were paid in a timely fashion. After October 1995, however, the Government refused to pay appellant's invoices, despite the fact that appellant continued to make deliveries in accordance with contract schedules. Unpaid invoices totaled \$1,358,097. As

far as this record shows, these invoices covered deliveries of conforming units that were duly accepted by the Government.

3. According to the Government, its decision to suspend contract payment stemmed from allegations that appellant had defrauded the Government in performing the contract. These allegations were the subject of an investigation commenced by the Army's Criminal Investigation Division and were referred to the U.S. Department of Justice. The agency investigation commenced in October 1995 — the same month in which the Government stopped paying appellant's invoices — and concluded on 23 August 1996, when the U.S. Attorney's Office for the Central District of Illinois declined to proceed with any prosecution of appellant (R4, tabs 12, 18).

4. With respect to the suspension of contract payments, the contract and the pertinent DOD regulations provided as follows:

Section I, clause I.56, DFARS 252.232-7006 REDUCTION OR
SUSPENSION OF CONTRACT PAYMENTS UPON FINDING OF
FRAUD (AUG 1992)

(a) 10 U.S.C. 2307(e) permits the head of the agency to reduce or suspend further payments to the Contractor upon a written determination by the agency head that substantial evidence exists that the Contractor's request for advance, partial, or progress payments is based on fraud. The provisions of 10 U.S.C. 2307(e) are in addition to any other rights or remedies provided the Government by law or under contract.

(b) Actions taken by the Government in accordance with 10 U.S.C. 2307(e) shall not constitute an excusable delay under the Default clause of this contract or otherwise relieve the contractor of its obligations to perform under this contract.

....

DFARS 232.173 Reduction or Suspension of Contract
Payments upon Finding of Fraud.

....

232.173-4 Procedures.

(a) In any case in which an agency's remedy coordination official finds substantial evidence that a

contractor's request for advance, partial, or progress payments under a contract awarded by that agency is based on fraud, the remedy coordination official shall recommend that the agency head reduce or suspend further payments to the contractor. The remedy coordination official shall submit to the agency head a written report setting forth the remedy coordination official's findings that support each recommendation.

(b) Upon receiving a recommendation from the remedy coordination official under paragraph (a) of this subsection, the agency head shall determine whether substantial evidence exists that the request for payment under a contract is based on fraud.

(c) If the agency head determines that substantial evidence exists, the agency head may reduce or suspend payments to the contractor under the affected contract(s). Such reduction or suspension shall be reasonably commensurate with the anticipated loss to the Government resulting from the fraud.

....

(e) Before making a decision to reduce or suspend further payments, the agency head shall, in accordance with agency procedures –

(1) Notify the contractor in writing of the action proposed by the remedy coordination official and the reasons therefore; and

(2) Provide the contractor an opportunity to submit information within a reasonable time, in response to the action proposed by the remedy coordination official.

The record does not contain a written determination by the agency head supporting the decision to suspend contract payments as required by the contract. Nor does the record contain any notification to appellant of the proposed action to suspend payments, nor was appellant given an opportunity to respond to any proposed action as required by the regulations.

5. By letter to the contracting officer dated 14 December 1995, appellant demanded payment on its invoices, and stated that the Government's nonpayment was

causing financial hardship (R4, tab 13). There is no evidence that appellant received any reply to this letter. By letter to the Government dated 29 February 1996, appellant notified the Government that it was suspending deliveries under the contract on account of the Government's breach and until it got paid (R4, tab 16). This letter likewise provoked no response from the Government.

6. On 5 January 1996, appellant submitted to the contracting officer a duly certified claim for breach of contract, demanding payment of unpaid invoices for goods accepted (R4, tab 15). The contracting officer did not issue a decision, nor provide any response to appellant's claim, and this deemed denial of the claim became the subject of an appeal docketed by this Board under ASBCA No. 50086 on 12 August 1996.

7. In ASBCA No. 50086, appellant contended that the Government had breached the contract by refusing to make contract payment for containers delivered and accepted, and appellant sought to recover the unpaid amounts it invoiced to the Government.

8. The U.S. Department of Justice's decision to decline prosecution of appellant was made shortly after ASBCA No. 50086 was docketed. Thereafter, the parties settled that appeal. The Government paid appellant the outstanding balance due on its invoices in October, 1996 (R4, tab 19). The Government also paid appellant interest for late payment, in 1997 (R4, tab 9). Upon the parties' joint request, the Board dismissed ASBCA No. 50086 with prejudice on 23 June 1997.

9. On 22 July 1997, appellant filed a petition pursuant to the Equal Access to Justice Act (EAJA), 5 U.S.C. § 504, arguing that it was entitled to recover its attorney's fees as the prevailing party in ASBCA No. 50086. On 19 May 1998, the Board granted appellant's EAJA petition on grounds that the Government's decision to withhold payment on 1995 invoices until "well into 1997[] was manifestly unreasonable and not substantially justified." *TRS Research*, ASBCA No. 50086, 98-2 BCA ¶ 29,780 at 147,564.¹

10. On 19 February 1997, while ASBCA No. 50086 was still pending, appellant submitted to the contracting officer a second claim under this contract which was revised on 9 June 1998 (R4, tab 26). It is this claim that forms the basis for the instant appeal. According to appellant, this claim is for additional costs incurred as a result of the Government's suspension of contract payments, including (1) costs for temporary storage of undelivered units; (2) additional handling of undelivered containers; (3) losses on the resale of units dedicated to the contract; and (4) costs to transport undelivered containers

¹ In the EAJA action, the Government did not assert that its suspension of contract payment was attributable to a fraud investigation.

from contractually-designated foreign and domestic locations to domestic storage facilities.

11. The claim also seeks reimbursement of interest paid to the IRS on unspecified tax liabilities, due to the Government's breach of contract. It appears that the IRS sought to obtain payment of appellant's overdue taxes from the Army out of appellant's contract proceeds. According to appellant it had reduced the amount owing to IRS, but the Army failed to verify this fact. The Army then paid IRS the original amount owed, which IRS rejected and returned to the Army. This caused appellant's tax obligation to remain outstanding for an additional period of time, and appellant was responsible to pay additional interest to IRS until the Army sent IRS the correct payment.

12. The contracting officer did not issue a decision on appellant's claim. Appellant filed this appeal challenging the Government's deemed denial of its claim on 25 August 1998.

13. After the Government tendered full payment to appellant on all unpaid invoices plus interest in 1997, it appears that performance recommenced under the contract. The parties executed Modification No. P00007, effective 13 February 1997 which realigned certain deliveries and extended the deliveries to 30 May 1997 (R4, tab 8). Under Modification No. P00008, the Government unilaterally extended deliveries to 30 August 1997. Under Modification No. P00009, certain containers were redirected by the Government (R4, tab 10). There is nothing in the record to suggest that appellant waived or abandoned its claims against the Government through this continued performance.

DISCUSSION

This appeal presents three major issues for our review: First, whether the dismissal of ASBCA No. 50086 operated to extinguish appellant's present claim under the doctrine of *res judicata*; if not, whether the Government's suspension of contract payment for over one year constituted a material breach of contract and justified appellant's cessation of deliveries; and third, whether appellant's claimed damages were reasonably foreseeable and recoverable as a matter of law. We address these issues *seriatim*.

A. Res Judicata

Under the doctrine of *res judicata* or claim preclusion a valid final judgment on the merits bars further claims by the same parties or their privies based on the same set of transactional facts. *Jet, Inc. v. Sewage Aeration Systems*, 223 F.3d 1360 (Fed. Cir. 2000); *Premiere Building Services, Inc.*, ASBCA No. 51804, 00-1 BCA ¶ 30,696 at 151,639.

On the surface, there appears to be a basis for the application of *res judicata* here. First, ASBCA No. 50086 and this appeal involved identical parties. Second, both appeals arose from the same cause of action (*i.e.*, breach of contract as a result of the Government's suspension of contract payment). Third, the Board's dismissal of ASBCA No. 50086 with prejudice, entered into by consent of the parties, constitutes a valid, final judgment on the merits for purposes of *res judicata*, even though the underlying issues were never litigated before the Board. See *Young Engineers, Inc. v. United States International Trade Commission*, 721 F.2d 1305, 1314 (Fed. Cir. 1983); 3 MOORE'S FEDERAL PRACTICE AND PROCEDURE, § 30.04[8] at 30-71, 72 (LEXIS 2000).

Under the facts of this case, however, we decline to hold that our dismissal of ASBCA No. 50086 bars this appeal. Appellant's claim herein was presented to the contracting officer on 19 February 1997, when ASBCA No. 50086 was still pending. At the time the parties stipulated to dismissal of ASBCA No. 50086, the Government was fully aware of appellant's pending claim. The record contains no evidence that the Government objected to appellant's presentation of the second claim, or that the parties in executing their settlement intended to dispose of all claims arising under the contract. Where "[t]he parties have agreed in terms or in effect that the plaintiff may split his claim, or the defendant has acquiesced therein," *res judicata* will not apply. RESTATEMENT (SECOND) OF JUDGMENTS § 26(1)(a) and cmt. 1 (1982). Because the Government has not satisfied its burden of proving that *res judicata* applies, we proceed to consider the appeal on its merits.

B. Breach of Contract

The Government concedes that it suspended contract payments to appellant of roughly 1.3 million dollars for over a year, but contends that this action was justified pending the outcome of a fraud investigation, and hence was not a breach of contract. This contention is without merit. While the Government is authorized under the contract and pertinent regulations to suspend contract payments under such circumstances, the Government failed to follow these contract and regulatory requirements (finding 4). It follows that the Government also breached its obligations under the payment clauses. Given the amount of money involved and the duration of the suspension, we conclude that these breaches were material. *Northern Helix Company v. United States*, 455 F.2d 546 (Ct. Cl. 1972). Appellant was justified in suspending deliveries in the face of the Government's material breach. See *Consumers Oil Company*, ASBCA No. 24172, 86-1 BCA ¶ 18,647.²

² While it is true, as argued by the Government, that the contracting officer is not authorized to pay a claim involving fraud, FAR 33.210(b), the contract and the regulations, *supra*, require the Government to follow specific procedures under these circumstances which serve to protect the interests of the contracting parties. The Government breached these requirements here.

C. The Damages Claimed by Appellant

We conclude that certain of the costs claimed by appellant — storage, handling, transportation and inventory-related costs — were reasonably foreseeable at the time of contract award and flowed naturally from, and were a probable consequence of the Government’s unexplained and unjustified cessation of contract payments. *Prudential Insurance Company of America v. United States*, 801 F.2d 1295, 1300-01 (Fed. Cir. 1986), *cert. denied*, 479 U.S. 1086 (1987). *See also* UCC § 2-710, which states that a seller’s incidental damages for a buyer’s breach of contract:

include any commercially reasonable charges, expenses or commissions incurred in stopping delivery, in the transportation, care and custody of goods after the buyer’s breach, in connection with return or resale of the goods or otherwise resulting from the breach.

As quantum is not before us, we decline to address the amount of the damages claimed, or whether appellant acted reasonably to mitigate those damages. These, and other quantum-related issues, are remanded for negotiation.

We deny appellant’s claim for additional interest paid to the IRS. It is hornbook law that in order to recover on a breach of contract theory, appellant must show that the Army owed appellant a contract duty; that the Army breached that duty and caused damage to appellant; and that said damage was reasonably foreseeable at the time of contract award. Appellant’s claim here fails on all accounts. Appellant fails to suggest, let alone prove the contract provision or principle that establishes the contractual duty purportedly owed to appellant by the Army vis-à-vis the IRS, to whom appellant owed back taxes. Assuming, for argument’s sake that such a duty existed, appellant has provided no evidence showing that the Government breached that duty under the circumstances. Lastly, we are not persuaded that appellant’s claimed damage — an additional interest payment made to IRS — was reasonably foreseeable at the time of the award of this contract. This portion of appellant’s claim must be denied.

DECISION

The appeal is sustained in part and denied in part in accordance with this opinion.

Dated: 24 October 2000

JACK DELMAN
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. 51712, Appeal of TRS Research, rendered in conformance with the Board's Charter.

Dated:

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