

ARMED SERVICES BOARD OF CONTRACT APPEALS

Appeal of --)
)
Freedom NY, Inc.) ASBCA No. 52438
)
Under Contract No. DLA13H-85-C-0591)

APPEARANCE FOR THE APPELLANT: Mr. Henry Thomas
President

APPEARANCES FOR THE GOVERNMENT: Stephen R. Dooley, Esq.
Chief Trial Attorney
Kathleen P. Malone, Esq.
Trial Attorney
Defense Contract Management
District East (DLA)
Boston, MA

OPINION BY ADMINISTRATIVE JUDGE JAMES
ON RESPONDENT'S MOTION TO DISMISS

Respondent moves to dismiss the captioned appeal based on the pleadings on the ground that appellant's claim herein is already currently pending in another appeal of Freedom NY, Inc., ASBCA No. 43965, and thus should be dismissed as duplicative. Appellant opposes the motion, and submitted a motion for summary judgment in ASBCA No. 52438, which motion will be resolved separately.

STATEMENT OF FACTS

In 1984 DLA awarded Contract No. DLA13H-85-C-0591 (the contract) to appellant for the supply of 620,304 cases of Meals, Ready to Eat (MREs) for the firm, fixed price of \$17,197,928 (compl. ¶ 5). Between 13 March 1986 and 3 April 1987 appellant submitted 33 DD Form 250 invoices for payment (compl. ¶ 10).

On 22 June 1987 the contracting officer terminated the balance of the contract for default (compl. ¶ 17). The contracting officer also issued a final decision claiming repayment of \$1,630,747.28 in allegedly unliquidated progress payments. Appellant timely appealed both decisions, which the Board adjudicated in *Freedom NY, Inc.*, ASBCA No. 35671, 96-2 BCA ¶ 28,328 at 141,472 (finding 92).

On or about 1 May 1991 appellant submitted to the contracting officer a claim for damages in the amount of \$21,959,311 based on alleged constructive changes and breaches by Government officials. Appellant timely appealed from the 7 October 1991 denial of that claim, which appeal was docketed as ASBCA No. 43965. *Freedom NY, Inc.*, ASBCA No. 35671, 96-2 BCA ¶ 28,502 at 142,325 (finding 93).

On 7 May 1996 the Board converted the termination for default into a termination for convenience of the Government. *Freedom NY, Inc.*, ASBCA No. 35671, 96-2 BCA ¶ 28,328 at 141,479; compl. ¶ 19. On 15 August 1996 the Board vacated that portion of its 7 May 1996 decision which had denied appellant's affirmative monetary claim, and reinstated appeal No. 43965 to the Board's active docket. *Freedom NY, Inc.*, ASBCA No. 35671, 96-2 BCA ¶ 28,502 at 142,325.

The Board directed appellant to file a more definite statement of its complaint, setting forth with particularity the amount of the adjustment or damages it claims with respect to each and every allegedly compensable Government act or omission, in *Freedom NY, Inc.*, ASBCA No. 43965, 98-1 BCA ¶ 29,382 at 146,040.

Appellant filed such More Definite Statement in ASBCA No. 43965 on 18 May 1998 (motion, ex. 1). Appellant alleged that: (a) “[a]s of October 1986, with the Government . . . over \$1.9 million late in paying for DD 250 shipments of MRE cases, Appellant put the PCO on notice of *conflicting demands*” (¶ 44); (b)—

46. On Oct. 29, 1986, . . . contracting officers . . . ordered liquidation of all outstanding progress payment requests at 100%, thereby suspending, abandoning and breaching the said contract. This was done in total bad faith with the intent to destroy Appellant Thus this action . . . is the root cause of our Claim for Business destruction of over \$55,000,000. to date.

47. The nonpayment of progress payments and 100% liquidation of 34 DD250 invoices of \$1,907,979.05 . . . is [sic] a *material breach* of the contract.

and (c) appellant's prayer for relief stated: “A. That the Board . . . instruct DLA to immediately pay the mandatory DD 250 shipment payments for MRE's delivered” (motion, ex. 1; emphasis in original).

Appellant submitted a letter dated 29 September 1997 which mentioned, without explanation, “34” unpaid invoices totaling \$1,907,979.05 of which appellant alleged 5%,

or \$95,398.95, was unpaid. That claim letter did not mention and did not constitute a termination for convenience settlement proposal.

On 27 October 1999 appellant appealed from the “deemed denial” of its 29 September 1997 “claim.”

Appellant’s complaint in ASBCA No. 52438 alleges that appellant has never received any net payment against the 33 invoices submitted between the period 13 March 1986 and 3 April 1987 in the total amount of \$1,907,979; appellant seeks payment of \$95,398.95, which is five percent of \$1,907,979 under a 95% “liquidation rate” (compl. ¶¶ 14, 30-62, 64, prayer for relief); and –

28. As part of that claim before the Board under ASBCA Docket No. 43965, Freedom had included its claim for the unpaid DD Form 250s. That claim was made as part of an overall breach of contract claim and made while matters under the Contract were still controlled by the default clause.

29. As a result of the conversion to a termination for convenience, payment of the unpaid DD Form 250 invoices is properly pursued as an administrative remedy under the Contract and as part of the overall convenience termination settlement of the Contract. Accordingly, to the extent that the due and owing monies are now paid to Freedom for the unpaid invoices, Freedom will adjust its claim before the Board under Docket No. 43965 and so advise the Board regarding the disposition of this matter.

CONTENTIONS OF THE PARTIES

Respondent argues that the Board has authority to dismiss duplicative appeals, citing *Thompson Aerospace, Inc.*, ASBCA Nos. 51548, 51904, 99-1 BCA ¶ 30,232 at 149,570 (second appeal dismissed as duplicative); *Viktoria Schaefer Internationale Spedition*, ASBCA Nos. 47792, 48283, 97-1 BCA ¶ 28,805 at 143,680, *aff’d*, 168 F.3d 1316 (Fed. Cir. 1998) (table) (protective appeal dismissed as duplicative).

Appellant argues that there is no duplication because:

Prior to the termination being converted from one of default to one of convenience by the Board, Appellant could not make demand for the payment of the unpaid DD 250s since

there existed an alleged indebtedness for outstanding progress payments in the approximate amount of \$1.6M and a demand for repayment had been made by the Government. However, upon conversion of the Contract, the demand was **abrogated**, to wit, the Board noted in its opening opinion in ASBCA No. 35671 that “*Only the propriety of the default termination and entitlement to repayment of unliquidated progress payments is before us in ASBCA No. 35671.*” Accordingly, Appellant has now liquidated all outstanding progress payments in its termination settlement proposal before the TCO

Thus, payment of the unpaid DD 250s is now . . . under the termination for convenience settlement and under the jurisdiction of the TCO. There is no longer a legitimate reason to maintain this issue as part of ASBCA No. 43965 since there is no dispute on Appellant’s entitlement to payment for the unpaid DD 250s. The only issue relative to the non-payment which is part of that Appeal and which should remain a part of that Appeal is the wrongful act of imposing a 100% liquidation of progress payments on 29 October 1986 by the ACO and related failure to make timely payments by the ACO This impact is **separate** from the payments due for shipments made and accepted by the Government.

(App. resp. at 5) Appellant also contends that its right to receive payment of the unpaid DD 250s is “not central to the Appeal in 43965 nor need be disposed of in that Appeal” since the Board’s 7 May 1996 decision affirmed appellant’s right to payment on the DD 250 invoices (*id.* at 6-7).

Respondent’s reply to the opposition denies appellant’s assertions that respondent’s demand for return of unliquidated progress payments has been “abrogated,” appellant has “liquidated” the outstanding progress payments, and “there is no dispute on Appellant’s entitlement to payment” on the invoices (Gov’t reply br. at 2, nn, 1, 2).

DECISION

Appellant’s first premise is unsound and its arguments are not convincing. On 1 May 1991 appellant demanded payment on the DD 250 invoices before our 7 May 1996 decision converted the default termination to one for convenience. The argument that in ASBCA No. 43965 appellant seeks not only the \$95,398.95 withheld from its DD Form

250 invoices, but the additional alleged impact of the ACO's wrongful act of imposing a 100% liquidation of progress payments on 29 October 1986 and related failure to make timely payments, which allegedly are the root causes of its claim for business destruction of over \$55,000,000, does not establish, in fact or in logic, that the \$95,398.95 claim is not duplicated in both ASBCA Nos. 43965 and 52438.

We grant respondent's motion to dismiss ASBCA No. 52438 without prejudice.

Dated: 11 April 2000

DAVID W. JAMES, JR.
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
Acting 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. 52438, Appeal of Freedom NY, Inc., rendered in conformance with the Board's Charter.

Dated:

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