

ARMED SERVICES BOARD OF CONTRACT APPEALS

Appeal of --)
)
Janice Cox d/b/a Occupro Limited) ASBCA No. 50587
)
Under Contract Nos. 240-BPA-91-494)
240-BPA-92-458)

APPEARANCE FOR THE APPELLANT: Janice L. Cox
President

APPEARANCE FOR THE GOVERNMENT: Richard S. Brown, Esq.
Trial Attorney
Department of Health and
Human Services
Rockville, MD

OPINION BY ADMINISTRATIVE JUDGE SHACKLEFORD
ON GOVERNMENT'S MOTION FOR PARTIAL SUMMARY JUDGMENT
AND RELATED MOTIONS

Janice Cox d/b/a/ Occupro Limited (appellant), appealed from a deemed denial of her \$95,949.04 claim under two Blanket Purchase Agreements (BPAs). The Government filed a Motion to Dismiss or in the Alternative Motion for Partial Summary Judgment under one of the BPAs alleging that appellant's claim for anticipated costs is not recoverable, as a matter of law. Appellant in turn filed a Motion to Suppress Respondent's Motion. We treat appellant's motion to suppress as a reply to respondent's summary judgment motion. In connection with its reply to the summary judgment motion, appellant also filed an amended pleading which was actually an amended claim and a "Motion to Refer Selected Actions to the General Accounting Office and the Department of Justice and Grant Appellant Summary Judgment for Tort." The Government moved to dismiss appellant's amended claim for lack of jurisdiction.

FINDINGS OF FACT FOR PURPOSES OF THE MOTIONS

1. On 13 May 1991, the United States Department of Health and Human Services, Health Resources and Services Administration, awarded BPA No. 240-BPA-91-494 (BPA 494) to appellant to provide industrial hygienist services to the Division of Federal Occupational and Beneficiary Health Services (FOH) if and when requested by the contracting officer.

2. The Statement of Work (SOW) for BPA 494 dated 10 May 1991 and labeled "E01," stated in pertinent part:

G. EQUIPMENT AND FURNISHINGS:

The FOH program shall provide equipment necessary for the performance of the services to be provided under this contract with exceptions noted elsewhere in the contract . . .

....

K. CONTRACTOR PROVIDED EQUIPMENT/SUPPLIES

The contractor shall supply his/her name tag, professional reference materials and obtain at his/her own cost continuing education required . . .

....

M. PROJECT OFFICER:

The Contracting Officer's technical representative (Project Officer) . . . shall be responsible for coordinating with the contractor the technical aspects of the contract in accordance with the terms and conditions specified in the contract. The Project Officer is not authorized to make any changes which affect the contract amount, terms or conditions. The Agency Contracting Officer is the only party authorized to commit the Government.

The project officer was listed as Mr. Gregory Zaharias. The SOW did not name the agency contracting officer (CO). (R4, tab 14)¹

3. A later BPA, 240-BPA-92-458 (BPA 458), awarded to appellant on 5 November 1991, was to run six months to 5 May 1992. The Government contends that BPA 458 was extended unilaterally by the contracting officer for an additional two months, to 5 July 1992. Appellant argues, however, that the BPA was never extended. The record includes a

¹ During pretrial proceedings appellant objected to the entire Rule 4 file pursuant to Rule 4(e). The presiding judge sustained the objection noting that the Government could move the admission of one or more documents from the file at the hearing. The Government has relied upon the Rule 4 file for purposes of its motions and we consider the file part of the record for that purpose.

copy of unilateral Amendment Number 1 effective 10 May 1992 which purports to extend BPA 458 an additional two months. We are unable to determine from the evidence before us whether the CO ever signed and dated the amendment.

4. Under BPA 458, appellant's hourly pay was \$65 per hour, the service provision area was "Regionwide," and expenditures were not to exceed \$50,000. Article I provided, like BPA 494, that the contractor would perform work "if and when requested by the contract officer." The BPA did not include a termination for convenience clause or a cancellation clause. (R4, tab 15; SR4, tabs 9S, 9U)

5. According to documents in the Government's Rule 4 file, the SOW included with BPA 458 was different from the SOW included with BPA 494. The new SOW was undated and was labeled "E10." Pertinent parts that were changed from the earlier SOW included:

F. EQUIPMENT AND SUPPLIES:

Some equipment and supplies are available from FEOH . . . the contractor is expected to utilize this equipment and supplies whenever possible. . . .

. . . .

K. CONTRACTOR-PROVIDED EQUIPMENT AND SUPPLIES:

Equipment and supplies not available from FEOH shall be provided by the contractor . . .

The project officer was listed as Mr. Clifford L. Moseley. The SOW did not name a CO. Appellant contends that the SOW included with the BPA 458 she signed was the same SOW, labeled "E01" and dated 10 May 1991, as had been included with BPA 494. Indeed, appellant's R4 file (AR4) at tab 2, includes this SOW with BPA 458. (R4, tabs 14, 15; AR4, tab 2)

A. GSA Task Order

6. Services under the two BPAs were ordered by Task order. On 12 December 1991, appellant was issued a task order to perform General Services Administration (GSA) “Annual Safety and Health Inspections for Maintenance and Custodial Employees” located at 29 sites (GSA Task Order). (R4, tab 2, ex. I)

7. On 27 January 1992, the work assigned under this task order was reassigned to another contractor due, according to the Government, to appellant’s unavailability for a preliminary meeting on Friday, 24 January 1992. At that meeting, four contractors who were involved with the GSA program, including appellant, were to plan procedures for the project. (R4, tab 12) On the morning of 24 January 1992, appellant informed Mr. Moseley that she could not attend the meeting due to unexpected car problems. She offered to come the following Monday. The Government contends that time was of the essence and that appellant’s participation in the meeting was imperative. Appellant’s unavailability for the meeting caused the Government to become concerned that appellant would be unable to perform. As a result, Mr. Moseley asked another contractor who attended the meeting to perform the work. Mr. Moseley, in a 20 March 1992 memorandum to the CO states:

At that time I decided, in consideration of the timetable for completion of the inspection project, and other considerations which I will detail later in this memorandum, to reassign Mrs. Cox’s portion of the inspection project to the other contractor.

...

(R4, tab 12, Moseley Memo, at 4)

8. Appellant was paid \$845.05 for 13 hours of work she had already completed on the GSA Task Order before the work was reassigned (R4, tabs 9, 12; AR4, tabs 9G, 9I, 9O). As part of her claim, appellant is requesting damages in the amount of \$49,364.93 “incurred as a result of the Government’s taking the December 10, 1991 work assignment away from me.” (R4, tab 2 at 10)

B. CDC Noise Survey and GSA Respiratory Survey

9. Appellant failed to complete work on two projects assigned to her under BPA 458: (1) a Centers for Disease Control Noise Survey at several locations in Atlanta, Georgia, and (2) a GSA Southeast Distribution Center Respiratory Protection Program in Palmetto, Georgia (CDC Noise Survey and GSA SEDC Respiratory Survey respectively). According to the Government, the CDC Noise Survey task order was issued orally. It is not clear from the record how the task order for the GSA SEDC Respiratory Survey was issued.² No copies of written task orders for these two projects are included in the record.

² Attachment 1 to the Government’s motion is a contractor delivery order form. The Government contends that despite a different contract number listed on the form,

Appellant asserts that she failed to complete both of these projects because the Government failed to provide equipment which it was obligated to provide under the SOW. Appellant claims \$8,475.96 for 130.4 hours of work performed from 18 April 1992 through 5 May 1992 on the CDC Noise Survey and \$9,162.35 for 140.96 hours of work performed on the GSA SEDC Respiratory Survey between 16 October 1991 and 5 May 1992. She was never paid for this work. However, in two letters dated 19 February and 18 May 1993, the Government did offer partial payment of \$8,696.79 for the work she had completed. In addition, appellant claims \$15,600 for work she estimates she would have done to complete the CDC Noise Survey, and \$5,200 to complete the GSA SEDC Respiratory Survey, had the Government provided the necessary equipment. (R4, tab 9) The total claimed under BPA 458 is \$87,803.24.

C. Appellant's Claim and Appeal

10. By letter dated 14 July 1994, appellant submitted a \$95,949.04 certified claim to the contracting officer, which included the \$87,803.24 claimed under BPA 458 plus additional amounts for claims not the subject of this motion for partial summary judgment (R4, tab 2).

11. Appellant appealed to the Board on a deemed denial basis by letter dated 18 February 1997 and said appeal was docketed as ASBCA No. 50587. On 14 May 1997, the contracting officer issued a decision granting appellant \$8,696.79, the same amount appellant had been offered in the 19 February and 18 May 1993 letters from the Government (*see* finding 9). The contracting officer denied the remainder of the claim.

12. By letter to the Board dated 15 July 1998, appellant amended her claim as follows:

Appellant amends her claim to include damages for both contract and tort on the basis of a material misrepresentation of fact and a tortuous [*sic*] breach of the contract of good faith, fair dealings, and public trust as

which the Government contends is a mistake, this is the work order for the GSA SEDC Respiratory Survey. We conclude that this is not the applicable work order: not only does it list the wrong contract number but it is dated 13 November 1992 and includes a completion date of 27 November 1992. Both dates are well after the ending date for BPA 458.

presented in her MOTION TO REFER SELECTED ACTIONS
TO THE GENERAL ACCOUNTING OFFICE
AND THE DEPARTMENT OF JUSTICE AND TO GRANT
APPELLANT SUMMARY JUDGEMENT FOR TORT . . .

Appellant requests damages as follow:

- (1) **Compensatory: General Damages** in the amount of **\$25,782.11** as in Pleading.
- (2) **Expectation Damages for Breach**, i.e., the fair market value of the promised performance in the amount of **\$70,166.93**, as in Pleading.
- (3) **Incidental Damages**, i.e., expenses and loss [sic] interest, presently in the amount of **\$267,000.00**.
- (4) **Treble Damages** pursuant to statutory offenses committed by the Government's agents (**per conviction, settlement, or other plea bargain arrangement**).
- (5) **Punitive Damages** for the willful, malicious, egregious, collusive an [sic] conspiratorial misconduct of the Government's agents, i.e., **intentional tort for conspiracy to violate Appellant's Constitutional Rights** with punitive damages calculated a follows: **\$100.000** (value of the dollar limit stated on the **two** BPAs) **x 7 years of intentional harm** (1991-1998) **x number of conspirators/co-conspirators - (per conviction, settlement or other plea bargain arrangement) or an amount of \$7,000,000.00 whichever is the greater.** [emphasis in original]

Appellant's amended claim was not certified.

DECISION

Government Motion for Partial Summary Judgment

The Government moves for partial summary judgment alleging that there are no disputed issues of material fact as to the claims for unperformed work on the GSA Task Order (\$49,364.93), CDC Noise Survey (\$15,600), and the GSA SEDC Respiratory Survey (\$5,200), and that it is entitled to judgment as a matter of law. According to the Government, (1) the BPA was not a contract, (2) appellant is claiming unallowable "anticipated costs", and (3) her breach claims are for more than the ceiling price on the BPA.

Summary judgment in favor of a party is not proper if disputes exist as to material facts. The burden is on the movant to establish the absence of any genuine issues of material fact. *See Mingus Constructors, Inc. v. United States*, 812 F.2d 1387, 1390 (Fed. Cir. 1987). Factual inferences are drawn in favor of the party opposing the motion. *See United States v. Diebold, Inc.*, 369 U.S. 654, 655 (1962). In deciding a motion for summary judgment, we do not resolve factual issues, but ascertain whether genuine disputes of material fact are present. *See General Dynamics Corp.*, ASBCA Nos. 32660, 32661, 89-2 BCA ¶ 21,851. A material fact is one which may affect the outcome of the case. *See Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 248 (1986).

The Government first argues that a BPA is not a contract, therefore it is only responsible to appellant for breach of contract claims for task orders actually placed. Here, the Government admits for purposes of the motion that it had placed orders and appellant had partially performed on all three task orders at issue. All of appellant's claims at issue here arise from breach of contract claims on task orders that the Government had issued to appellant. The Government cites *Dr. Chauncey L. Duren d/b/a Chesapeake Orthopedics*, ASBCA No. 35773, 90-1 BCA ¶ 22,386 and *CardioMetrix*, DOT BCA Nos. 2571, 2591, 94-1 BCA ¶ 26,269 in support of its argument. These two cases can be distinguished in that both involved termination of BPAs not orders under BPAs. Accordingly, the Government's initial argument fails.

The Government secondly argues that appellant is claiming unallowable anticipatory costs for work she never performed under the GSA, CDC Noise Survey, and GSA SEDC Respiratory Survey task orders. As to the GSA Task Order, appellant claims anticipatory costs for breach of contract based on improper action of the Government including bad faith and unauthorized actions on the part of Government personnel, by taking the work, which she had already started, away from her. As to the CDC Noise Survey and the GSA SEDC Respiratory Survey, appellant claims improper action on the part of the Government by providing her with a different SOW than that which the Government asserts was applicable to the BPA. "Allegations of misconduct or bad faith, including an allegation that a contract termination was the product of conspiracy by Government personnel, have been heard and decided by the Board." *See Environmental Safety Consultants, Inc.*, ASBCA No. 47498, 00-1 BCA ¶ 30,826 at 152,147 (citations omitted). Moreover, as we stated in *Advance Engineering Corporation*, ASBCA No. 46889, 95-1 BCA ¶ 27,475 at 136,869:

This Board has jurisdiction to determine damages for breach of contract which were foreseeable at the time of contract award, including loss of anticipatory profits, where a contractor can establish and prove such damages.

See also Ace-Federal Reporters, Inc. v. Barram, 226 F.3d 1329 (Fed. Cir. 2000).

We conclude that there are disputed issues of material facts related to appellant's breach of contract claims that preclude us from granting partial summary judgment. There

remains, at a minimum, material facts in dispute as to the propriety of the Government actions when it assigned the work to another contractor including the proper authority of the project officer. With regard to the claims for breach of contract as to the Government's failure to provide equipment which, according to appellant, was required under the contract's SOW, material facts are in dispute as to what SOW was provided to appellant with BPA 458 and what the Government's and appellant's obligations were under that SOW. Furthermore, it is unclear from the present record whether BPA 458 was actually extended two months to 5 July 1992, a material fact which remains in dispute.

Finally, the Government, citing no authority, argues that partial summary judgment should be granted because appellant seeks damages greater than the ceiling price of the BPA. This argument is without merit. Material facts are in dispute which go to the actual amount, if any, of appellant's damages.

The Government's motion for partial summary judgment is denied.

Government Motion to Dismiss

The Government moves to dismiss, in its entirety, appellant's 16 July 1998 amended claim for lack of jurisdiction on the ground that it presents three new claims which appellant never presented to the contracting officer as required by the Contract Disputes Act of 1978 (CDA), 41 U.S.C. § 601 - 613, as amended. We deem the Government's motion to be a motion to strike those three claims which are for incidental damages, treble damages and punitive damages.

Under the CDA, the Board has jurisdiction over disputes arising from claims which have first been presented to the contracting officer. We lack jurisdiction over claims which are raised for the first time before us. *See Trepte Construction Company, Inc.*, ASBCA No. 38555, 90-1 BCA ¶ 22,595 at 113,385. We must determine whether appellant's amended claim represents new claims or is merely an extension of claims already presented to the contracting officer. Such a determination turns on whether the amended claim presents matters which differ from the essential nature or the basic operative facts of the original claim. *Id.* at 113,385-86 (citations omitted).

Appellant's original claim seeks compensation for work completed, but allegedly not fully paid for, and breach of contract damages resulting from improper Government actions including failure to provide required equipment. Appellant's original claim does not request damages for statutory offenses or punitive damages for intentional tort committed by Government agents. Regarding the first two requests for damages in the amended claim: (1) Compensatory: General Damages and (2) Expectation Damages for Breach, we see these as merely requesting the same amounts based on the same operative facts that appellant asserted in her original claim.

The claims for (3) Incidental Damages, (4) Treble Damages and (5) Punitive Damages, represent uncertified claims that were not stated in appellant's original claim

submitted to the contracting officer. Furthermore, these claims represent causes of action beyond the Board's jurisdiction. The Board does not have jurisdiction over criminal or civil fraud or claims of tortious conspiracy. *Environmental Safety Consultants, Inc.*, ASBCA No. 47498, 00-1 BCA ¶ 30,826 at 152,146-7. As to appellant's claim for punitive damages, the Board cannot make any award of punitive damages. Absent express consent of Congress, no punitive damages can be recovered against the United States. *See Advance Engineering Corporation*, ASBCA No. 46889, 95-1 BCA ¶ 27,475 at 136,870, *aff'd on reconsider.*, 96-1 BCA ¶ 28,003.

Where the Board has no jurisdiction, it has no power to do anything but strike the matter from its docket. *Johns-Manville Corp. v. United States*, 893 F.2d 324, 327 (Fed. Cir. 1989). Accordingly, we strike appellant's request for incidental damages, treble damages and punitive damages from the amended claim.

Motion to Refer Selected Actions to the General Accounting Office and the Department of Justice and to Grant Appellant Summary Judgment for Tort

It is the decision of the Board that the motion to refer matters to GAO and the Department of Justice is denied. The matters for which appellant seeks referral are related to the claims for incidental, treble, and punitive damages which we have stricken. Moreover, appellant has failed to demonstrate an adequate evidentiary basis for such referrals, even assuming we have authority to make them. Appellant's motion for summary judgment for tort is likewise denied for lack of jurisdiction over the amended claim as set forth above.

Dated: 12 April 2001

RICHARD SHACKLEFORD
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. 50587, Appeal of Janice Cox d/b/a Occupro Limited, rendered in conformance with the Board's Charter.

Dated:

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