

ARMED SERVICES BOARD OF CONTRACT APPEALS

Appeal of --)
)
Environmental Safety Consultants, Inc.) ASBCA No. 53485
)
Under Contract No. N62472-90-C-5164)

APPEARANCE FOR THE APPELLANT: Mr. Peter C. Nwogu
President

APPEARANCES FOR THE GOVERNMENT: Fred A. Phelps, Esq.
Navy Chief Trial Attorney
Ellen M. Evans, Esq.
Trial Attorney
Engineering Field Activity
Chesapeake
Washington, DC

OPINION BY ADMINISTRATIVE JUDGE TODD
ON APPELLANT' S MOTIONS TO STRIKE, FOR A MORE DEFINITE STATEMENT,
AND TO DISMISS FRAUD PLEA FOR LACK OF JURISDICTION

Appellant Environmental Safety Consultants, Inc. (ESCI) has filed a motion to strike the Government's pleading of a right to setoff a sum against any amount the Board awards appellant herein. Appellant also filed a motion for a more definite statement of the Government's allegation that appellant failed to segregate its contract costs and expenses from its claimed increased costs. Appellant also moved to dismiss for lack of jurisdiction the Government's pleading that appellant had engaged in fraud. The Government has filed a response to each of appellant's motions.

The Board sustained the appeal in part in *Environmental Safety Consultants, Inc.*, ASBCA No. 47498, 00-1 BCA ¶ 30,826, and remanded the matter to the parties for consideration of the amount of equitable adjustment to which appellant was entitled. When the parties were unable to resolve the matter, appellant requested a Board determination on quantum. The Board's docketing notice of this appeal directed the parties to comply with the Board's standard Order on Proof of Costs. The pleadings have been completed.

Motion to Strike

Appellant has moved to strike the Government's right of setoff that was asserted as an affirmative defense. The Government alleged a right to setoff the sum of \$289,000 plus interest against any amount the Board awards appellant and reserved its right to amend its setoff defense in the event there are other Government claims against appellant. This amount was quantified for procurement costs and liquidated damages under a different contract in a contracting officer's final decision, dated 24 September 2001. Appellant argues that the Government's allegations are immaterial, irrelevant, and contain scandalous and prejudicial matter. Appellant alleges that the Government intentionally withheld payments due in retaliation for the entitlement litigation in ASBCA No. 47498 that is related to this appeal. According to appellant, the issues of whether the contracting officer properly terminated a different contract and whether the amount of \$347,921.98 allegedly due appellant was wrongfully withheld by the Government are being litigated in another pending appeal docketed as ASBCA No. 51722.

The Government has replied that it did not intend to have Government claims litigated in this appeal, but only provided notice of the Government claims against appellant under Contract No. N62470-95-C-2399. The Government states its agreement that any litigation of those claims would be in ASBCA No. 51722 or the United States Court of Federal Claims.

Under the provisions of the Contract Disputes Act (CDA), we have jurisdiction to consider the appeal of a contracting officer's decision relative to a contract. 41 U.S.C. § 607(d); *Weststar Engineering, Inc.*, ASBCA No. 52484, 02-1 BCA ¶ 31,759. That jurisdiction does not extend to rights arising independently of the contract that is the subject of an appeal. Claims that may arise for improper withholding under a different contract that is the subject of litigation that is separately docketed are not part of an appeal. *See General Dynamics Corporation*, ASBCA No. 33633, 87-1 BCA ¶ 19,607 at 99,204; *Corbett Technology Company, Inc.*, ASBCA No. 49478, 00-2 BCA ¶ 31,049. In this instance, the Government has claims for procurement costs and assessed liquidated damages for delay in completion of a different contract that was terminated for default. The Government has the common law right of setoff. *United States v. Munsey Trust Co.*, 332 U.S. 234, 239 (1947); *Triad Microsystems, Inc.*, ASBCA No. 48763, 00-1 BCA ¶ 30,876. The Government's allegations pertaining to a right to a setoff are not, however, within the scope of this appeal, and are accordingly, immaterial.

Motion for a More Definite Statement

Appellant has filed a motion for a more definite statement. More specifically, appellant has stated:

The government has alleged that ESCI has failed to segregate its contract costs and expenses from those alleged to be claimed costs. ESCI states the government pleading is so [sic] vague or [sic] ambiguous.

(App. resp. at 11) The Government asserted in its pleading that “contract costs are erroneously included in appellant’s claim” and that appellant failed to “segregate contract costs from costs allegedly associated with extra work” (Gov’ t resp. ¶ B. at 16). In its response to the motions, the Government further stated its position that “[a]ppellant has not established what, if any, costs it actually incurred for contract work or alleged claim related costs” (Gov’ t resp. at 4).

Board Rule 7 provides for requiring a party, at the initiative of either the Board or the other party to make a more definite statement of matters alleged in its pleading. The main purpose of pleadings under our rules is to frame and join the issues. *RCA*, ASBCA No. 33866, 87-2 BCA ¶ 19,797. Where allegations are stated in reasonable detail, a motion for more definite statement will be denied. *Kato Corporation*, ASBCA No. 51513, 02-1 BCA ¶ 31,669 at 156,494. Furthermore, where information is available through discovery, we have considered that motions for more definite statements should be denied. *LGT Corporation*, ASBCA No. 44066, 94-2 BCA ¶ 26,607. We conclude that the Government’s defenses in its answer were stated with reasonable detail for the Board and appellant to have been adequately informed of the facts and issues.

Motion to Dismiss Fraud Plea for Lack of Jurisdiction

Appellant has filed a motion to dismiss for lack of jurisdiction the Government’s plea of fraud or misrepresentation amounting to fraud on the grounds that the Board may not have jurisdiction of fraud and the Government cannot prove fraud. The Government alleged that appellant had submitted a certified claim for costs which were never paid and for which appellant was under no liability to pay. The Government stated its belief that many, if not all aspects of appellant’s claim were based in fraud. In its response to appellant’s motion, the Government argued that the Board will be required to determine whether the claimed costs were incurred and whether appellant has a legal obligation to pay certain costs that it is claiming. The Government confirmed that its assertions are in the nature of affirmative defenses and not affirmative claims.

When an appellant files a motion to dismiss an affirmative defense contending that the Board lacks jurisdiction to entertain the defense because it involves fraud issues, the Board will treat the motion as a motion to strike. *Danac, Inc.*, ASBCA Nos. 30227, 33394, 88-3 BCA ¶ 20,993. The Board does not have jurisdiction over criminal or civil fraud and would not have jurisdiction over a claim of fraud. *Janice Cox d/b/a Occupro Limited*, ASBCA No. 50587, 01-1 BCA ¶ 31,377, *motion for reconsid. denied*, 01-2 BCA ¶ 31,619;

ORC, Inc., ASBCA No. 49693, 96-2 BCA ¶ 28,371 (motion to strike denied where no claim, but allegation of fraud was raised as a defense).

The Board has jurisdiction to decide the amount of a contractor's quantum recovery. That fraud allegedly may have been practiced in the preparation and submission of claims does not deprive the Board of jurisdiction under the CDA. *AAA Engineering & Drafting, Inc.*, ASBCA No. 47940 *et al.*, 01-1 BCA ¶ 31,256 at 154,366; *Nexus Construction Co., Inc.*, ASBCA No. 51004, 98-1 BCA ¶ 29,375. The allegation of fraud in this appeal is not a Government claim asserted as the Government's own right, but a response which raises a defense to appellant's claim for a quantum recovery. The Government's defense places in issue the amount of out-of-pocket expenses and legal obligations to appellant's subcontractors, suppliers, employees or others that could constitute recoverable costs. Thus it is plainly relevant to the merits of appellant's claim and within the jurisdiction of the Board.

Conclusion

Appellant's motion to strike the Government's allegations of setoff is granted. Appellant's motion for a more definite statement is denied. The motion to dismiss the plea of fraud for lack of jurisdiction is denied.

Dated: 26 June 2002

LISA ANDERSON TODD
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. 53485, Appeal of Environmental Safety Consultants, Inc., rendered in conformance with the Board's Charter.

Dated:

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