

ARMED SERVICES BOARD OF CONTRACT APPEALS

Appeals of --)
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The Boeing Company) ASBCA Nos. 54593, 56258
)
Under Contract No. DAAK20-82-C-0635)

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APPEARANCES FOR THE GOVERNMENT: Craig S. Clarke, Esq.
Acting Chief Trial Attorney
CPT John J. Pritchard, JA
Trial Attorney

OPINION BY ADMINISTRATIVE JUDGE DELMAN ON MOTION FOR
SUMMARY JUDGMENT

Under ASBCA No. 54593, appellant¹ seeks return of an offset taken by the Defense Finance and Accounting Service (DFAS) against an unrelated contract to recoup an alleged overpayment on the captioned contract. The government contends that it has rescinded the offset and returned the offset sums to appellant by check, and files this motion seeking summary judgment as a matter of law. Appellant opposes the motion, contending that the check it received represented a payment on the contract balance, and that its claim for the return of the offset amount erroneously held is still outstanding.

STATEMENT OF FACTS FOR PURPOSES OF MOTION

The subject contract was to provide the government with the “Advanced QUICK LOOK Intercept” system. This system was to intercept, identify and locate non-communications emitters. The intercepted signals were to be correlated with known emitter locations to provide emitter identification and classification. (Answer, ¶ 43)

By letter to appellant dated 5 September 2000, DFAS issued a demand notice to appellant, asserting that appellant owed the government \$1,208,952.95 under this contract, representing “Under recoupments of \$1,192,787.45 and unauthorized overruns

¹ The contract was awarded to UTL Corporation (UTL). UTL subsequently merged with ARGOSystems, Inc. (ARGOS), and ARGOS took over the contract (R4, tab 19). The Boeing Company is the successor-in-interest to ARGOS.

of \$16,165.50” (Bd. corr. ltr. dtd. 11 Jan. 2008, attach.). Appellant did not pay this amount to the government. On or about 20 March 2001, DFAS offset this amount in full against amounts owed to appellant under an unrelated contract. Specifically, DFAS offset \$1,208,952.95, plus interest in the amount of \$41,410.77, for a total of \$1,250,363.72. (R4, tab 36 at 3)

In March 2002, DFAS initiated action to provide appellant with a refund. The Chief, Debt Management Office, requested a disbursement check to appellant “to substantiate a refund” in the amount of \$1,233,594.80, representing principal in the amount of \$1,192,787.45, plus interest in the amount of \$40,807.35 (R4, tab 40 at 1 of 9). This request for disbursement did not represent a return in full of the principal amount that was offset pursuant to the demand notice in the amount of \$1,208,952.95. Rather, DFAS retained \$16,165.50 (\$1,208,952.95 less \$1,192,787.45). According to DFAS, this portion of the offset was still valid. *See* DFAS worksheet, Schedule C adjustment (\$8,376.50) and Schedule E adjustment (\$7,789.00) which total \$16,165.50, and the adjacent handwritten note, “Balance of demand valid.” (*Id.* at 4 of 9)

Accordingly, DFAS provided a check to appellant for \$1,233,594.80, representing a refund for \$1,192,787.45, plus interest of \$40,807.35. The DFAS documentation clearly identified the check as a “refund,” not as a partial payment of the contract price. See Standard Form (SF) 1045, “Public Voucher for Refunds” dated 5 April 2002, in the amount of \$1,233,594.80; the form was stamped “Mail with Check” (R4, tab 41 at 2 of 11). It is undisputed that appellant received and deposited this check at or about this time (*id.* at 3 of 11).

However, appellant did not treat this check as a refund related to the demand notice and subsequent offset. Appellant was of the view that the government had underpaid this contract in the first instance, and appellant applied this check and several smaller checks received throughout 2002 to amounts claimed as due and owing under this contract. By letter to the government dated 15 November 2002, appellant confirmed the above, and advised that it was submitting a separate claim for recovery for the full offset amount pursuant to the demand notice (R4, tab 38).

By letter to the contracting officer dated 11 July 2003, appellant submitted a certified claim, denying that it was overpaid and requesting “that the offset be retracted for \$1,208,952.95 . . .” (Bd. corr. Notice of Appeal, attach.). The contracting officer did not issue a decision on this claim. Appellant filed an appeal to this Board based upon the “deemed denial” of its claim, which was docketed as ASBCA No. 54593.² The government filed this motion on 21 March 2007.

² Appellant recently filed another claim under this contract, seeking full payment of the contract price. The contracting officer denied the claim, and appellant has

DECISION

We address motions for summary judgment under familiar legal principles. As we stated in *Lockheed Martin NESS-Akron*, ASBCA No. 54193, 04-2 BCA ¶ 32,728 at 161,896:

We grant summary judgment where there are no disputed material facts and the movant is entitled to judgment as a matter of law. *Mingus Constructors, Inc. v. United States*, [33 CCF ¶ 75,126] 812 F.2d 1387, 1390-92 (Fed. Cir. 1987). The burden is on the movant to establish the absence of any issues of material fact. A material fact is one that may make a difference in the outcome of the case. *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242 (1986). Factual inferences are to be drawn in favor of the party opposing summary judgment. *United States v. Diebold, Inc.*, 369 U.S. 654, 655 (1962); *Alvarez & Associates Construction Co., Inc.*, ASBCA No. 49341, 96-2 BCA ¶ 28,476. Our task is not to evaluate or weigh competing evidence but only to determine whether a genuine disputed issue of material fact exists that is suitable for resolution at trial. *Alvarez, supra*.

The record shows that DFAS took an offset against one of appellant's contracts to recoup an alleged overpayment on the subject contract in the amount of \$1,208,952.95. The record shows that DFAS returned by check most, but not all of this money to appellant, retaining \$16,165.50 for alleged overpayments under this contract. The record supports the government's position that the subject check was a refund related to the demand notice and offset, and was not a partial payment for the balance of the contract price. However, this does not entitle the government to summary judgment with respect to appellant's claim because based upon the above DFAS records, the government has not made a full return of the amounts withheld as demanded in appellant's claim. There is a genuine dispute of material fact on this record as to whether appellant owes the government \$16,165.50, the amount retained by DFAS.

Accordingly, the government has not shown it is entitled to judgment as a matter of law. The government's motion for summary judgment under ASBCA No. 54593 is denied.

appealed the contracting officer's decision under ASBCA No. 56258. The Board consolidated these appeals by Order dated 28 December 2007.

Dated: 23 January 2008

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 Nos. 54593 and 56258, Appeals of The Boeing Company, rendered in conformance with the Board's Charter.

Dated:

CATHERINE A. STANTON
Recorder, Armed Services
Board of Contract Appeals

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