

ARMED SERVICES BOARD OF CONTRACT APPEALS

Appeal of --)
)
Freedom NY, Inc.) ASBCA No. 55465
)
Under Contract No. DLA13H-85-C-0591)

APPEARANCES FOR THE APPELLANT: Bruce M. Luchansky, Esq.
Bart A. Garry, Esq.
Bruce M. Luchansky, P.A.
Baltimore, MD

Jay L. Cohen, Esq.
Jay L. Cohen, P.C.
Chevy Chase, MD

APPEARANCE FOR THE GOVERNMENT: Michael L. McGlinchey, Esq.
Chief Trial Attorney
Defense Supply Center (DLA)
Philadelphia, PA

OPINION BY ADMINISTRATIVE JUDGE JAMES
ON APPELLANT’S MOTION FOR RECONSIDERATION

On 16 January 2008 the Board received appellant’s timely motion for reconsideration of our 13 December 2007 decision, *Freedom NY, Inc.*, ASBCA No. 55465, 08-1 BCA ¶ 33,750, denying its claim for “working capital” interest of \$15,775,892.91 on a loan allegedly from Bankers Leasing Association (BLA). Familiarity with the decision is assumed.

Movant disagrees with our holding that the operative, causal facts underlying FNY’s working interest claim arose on 14-15 February 1985 and thus were released by contract Mod. 25 (08-1 BCA at 167,071). Movant contends that the “operative facts relevant to this particular claim arose after Mod 25” and “[a]ll of the interest costs sought here were incurred after Mod 25” (29 May 1986), and such costs “needed to be included under said [29 December 2000] Termination for Convenience Settlement” (app. mot. at 3-4). Movant further contends that “from June 1986 through March 1987, due to factors occurring after Mod. 25, [FNY] borrowed another, approximately. . . (\$7,000,000) in working capital . . . and repaid, approximately. . . (\$3,500,000) of said sum [leaving FNY’s] balance due . . . after Mod 25 of . . . (\$3,500,000)” (emphasis in original). Movant points to the declaration of Jordan Fishbane and a marked-up copy of exhibit FT345 in *Freedom II*, attachments 1 and 2 to the motion, as “additional evidence”

supporting movant's foregoing contentions about incurrence of post-Mod. 25 interest (*id.* at 6).

Respondent's 10 March 2008 opposition to the motion argues that the motion must be denied because it is not based on newly discovered evidence or on any error in fact or law in the decision, and that the attachments to the motion should be stricken (gov't opp'n at 2-3). We agree that attachment 1 should be stricken because it is not newly discovered evidence. Attachment 2 is already in the record and accordingly, we do not strike it. However, the handwritten markings were not on the original exhibit and they are stricken.

As we found, FNY obtained the original commitment for financing from BLA as a result of the pre-Mod. 25 breach, namely ACO Liebman's February 1985 insistence that FNY obtain outside financing as a condition to his approval of FNY's progress payment invoices (finding 7). Assuming, *arguendo*, that the additional financing to which movant now points us came from BLA and was not caused by said pre-Mod. 25 breach, then, according to appellant, such borrowings "needed to be included under said Termination for Convenience Settlement" (app. mot. at 4, ¶ 18). Mod. A00004 represents a final and binding settlement with respect to the termination for convenience, with certain stated exceptions. Note 6 to ¶ 2 of the MOA to Mod. A00004 set forth the following reservation of rights (R4, tab 10 at 7-8):

. . . This agreement does not affect Freedom's . . .
right to recover interest, which Freedom claims resulted from
late payment of invoices, including progress payment
requests, or the recoupment of unliquidated progress
payments by the Government. The agreement not to include
interest as part of the recovery under this termination
settlement does not negate Freedom's right to pursue interest
in another forum, nor does it affect the Government's right to
deny it.

Movant's post-Mod. 25 additional borrowings do not come within that reservation because, by movant's present theory, such borrowings do not track back to Mr. Liebman's February 1985 breach, which we construe as the predicate for the above-quoted reservation of FNY's rights. Therefore, interest on such additional borrowings was released by Mod. A00004.

For the foregoing reasons, we deny the motion for reconsideration.

Dated: 26 March 2008

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
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. 55465, Appeal of Freedom NY, Inc., rendered in conformance with the Board's Charter.

Dated:

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