ARMED SERVICES BOARD OF CONTRACT APPEALS

| | | |
|---|---|---|
| Appeal of -- | ) | |
| | ) | |
| ADT Construction Group, Inc. | ) | ASBCA No. 57322 |
| by Timothy S. Cory, Chapter 7 Trustee | ) | |
| | ) | |
| Under Contract No. DACA09-03-C-0009 | ) | |

APPEARANCES FOR THE APPELLANT:

John W. Ralls, Esq.
Aaron R. Gruber, Esq.
W. Samuel Niece, Esq.
Ralls Gruber & Niece LLP
San Mateo, CA

APPEARANCES FOR THE GOVERNMENT:

Thomas H. Gourlay, Jr., Esq.
Engineer Chief Trial Attorney
John F. Bazan, Esq.
Engineer Trial Attorney
U.S. Army Engineer District,
Los Angeles

OPINION BY ADMINISTRATIVE JUDGE SHACKLEFORD
ON THE GOVERNMENT'S MOTION FOR PARTIAL SUMMARY JUDGMENT

This quantum appeal arises from our entitlement decision in *ADT Construction Group, Inc.*, ASBCA No. 55307, 09-2 BCA ¶ 34,200 (*ADT V*),[1] in which we held that the government was responsible for 218 days of preconstruction delay under the captioned contract, 60 days of which were concurrent with contractor-caused delays. *Id.* at 169,086. The government moves for partial summary judgment on two issues: (1) whether appellant can recover damages due to the escalation of costs without an economic price escalation clause in the contract, and (2) whether our decision in *ADT Construction Group, Inc., by Timothy S. Cory, Chapter 7 Trustee*, ASBCA No. 55358, 13 BCA ¶ 35,307 (*ADT VI*), *recon. denied*, 14-1 BCA ¶ 35,508 (*ADT VII*), precludes appellant from seeking such escalation costs in this appeal.

[1] The Board had previously denied an appeal involving ADT's claim seeking additional costs for importing fill during the performance of the same contract. *ADT Constr. Grp., Inc.*, ASBCA No. 55125, 06-1 BCA ¶ 33,237 (*ADT I*), *opinion on post-decision motions*, 06-2 BCA ¶ 33,346 (*ADT II*), *recon. denied*, 07-1 BCA ¶ 33,501 (*ADT III*), *aff'd, ADT Constr. Grp., Inc. v. Geren*, 259 F. App'x 310 (Fed. Cir. 2007) (*ADT IV*).

STATEMENT OF FACTS FOR PURPOSES OF THE MOTION

1. On 21 April 2003, the United States Army Corps of Engineers (Corps), U.S. Army Engineer District, Los Angeles, issued Request for Proposals (RFP) No. DACA09-03-R-0004 requesting proposals for the negotiated procurement of an F-22 Munitions Maintenance Facility on Nellis Air Force Base, Nevada. The project was solicited as a design-build project requiring the contractor to both design and construct the new facility. (*ADT V*, findings 17-18) The solicitation contemplated a firm-fixed-price contract (*ADT VI*, finding 1).

2. Early drafts of the solicitation allowed for the use of a "fast track" approach, under which the contractor could begin construction on those portions of the work for which the design was complete while other portions of the work were still under design (*ADT V*, finding 10). In August 2002, government project managers learned that the required Department of Defense Explosives Safety Board (DDESB) approval of the project would be based on the final design of the entire facility, which was incompatible with a fast track approach (*ADT V*, findings 11, 13). The government therefore attempted to remove references to a fast track approach from the RFP (*ADT V*, findings 14-16). Despite the government's efforts, the solicitation that was issued contained references to a fast track approach, and contained both clauses that were consistent with a fast track approach and clauses that were inconsistent with a fast track approach (*ADT V*, findings 17-27).

3. ADT Construction Group, Inc. (ADT) submitted a pricing and technical proposal on 21 May 2003 indicating that ADT planned to use a fast track approach. After the government conducted in-depth reviews of the offerors' proposals, ADT submitted its final price proposal with no changes to its cost and pricing on 11 June 2003. (*ADT V*, findings 29, 31-32)

4. On 17 June 2003, the Corps awarded the project to ADT as Contract No. DACA09-03-C-0009. ADT's proposal was incorporated into the contract. The government issued a Notice to Proceed on 9 July 2003, establishing a contract completion date of 1 October 2004. (*ADT V*, finding 33)

**Preconstruction Delays**

5. On 31 July 2003, ADT submitted its initial design schedule, which reflected its intent to pursue a fast track approach (*ADT V*, findings 51, 53). ADT submitted a revised design schedule on 22 September 2003. Under the amended schedule, the 100% site/civil design was scheduled for completion on 29 September 2003, and the total design was scheduled for completion on 24 December 2003. (*ADT V*, finding 62)

6. On 1 October 2003, ADT submitted 60% design documents. Despite the label, design was further along than 60%. ADT's submission included the 100% site/civil design. (*ADT V*, finding 64)

7. Following a design review conference, ADT submitted the 100% site/civil design to the base engineering office on 4 November 2003 (*ADT V*, finding 85), which sent it to DDESB on 13 November 2003 (*ADT V*, finding 88).

8. On 27 February 2004, because the site/civil design did not comply with the contractually required drainage slope requirements, the Corps informed ADT that the Clark County, Nevada, standard for the finished floor elevation would no longer be used, requiring ADT to revise the 100% site/civil design package (*ADT V*, finding 108).

9. ADT submitted a revised 100% site/civil design on 18 March 2004 (*ADT V*, finding 112). The government did not provide its compliance review comments to ADT's revised site/civil design until a design review conference on 27 April 2004, outside the 21-day contractual period for such review (*ADT V*, findings 117, 118; *ADT VI*, finding 27).

10. ADT submitted its 100% design for the entire facility on 6 May 2004 (*ADT V*, finding 119). Over the next three months, the government raised questions about various matters and requested revised drawings (*ADT V*, findings 122, 124-26).

11. The project's final explosive site plan was submitted to DDESB for approval on 27 July 2004. DDESB granted "final safety approval" on 5 August 2004. The government notified ADT of DDESB's approval on 19 August 2004. (*ADT V*, findings 129-30, 133)

12. After learning of the DDESB final safety approval, ADT requested that the government grant approval of ADT's design so that it could finalize negotiations with subcontractors and lock in subcontractor prices (*ADT V*, finding 135).

13. During a 7 September 2004 meeting, ADT advised the government that ADT anticipated cost escalation due to government delays in the range of $1 million (*ADT V*, finding 138). The government was aware of construction cost escalation generally in southern Nevada (*ADT V*, finding 139).

14. The government informed ADT on 22 September 2014 that its design was accepted for construction (*ADT V*, finding 143). On 1 October 2004, ADT requested a notice to proceed with construction. The administrative contracting officer responded that he did not know of any requirement that the government grant approval for the start of construction. (*ADT V*, finding 145) The government issued a digging permit for the project site on 17 November 2004 (*ADT V*, finding 148). The government partially

approved ADT's contractor quality control plan, allowing ADT to begin earthwork, on 22 November 2004 (*ADT V*, finding 150).

15. On 12 July 2005, ADT submitted a certified claim for preconstruction delays, seeking a 278-day time extension, relief from liquidated damages, and $826,725.16 in damages. On 29 December 2005, the contracting officer (CO) issued a final decision on ADT's preconstruction delay claim. Except for finding entitlement to a time extension due to the late notice of design approval, the CO denied the claim. ADT timely appealed to the Board, which docketed the appeal as ASBCA No. 55307. (*ADT V*, findings 151, 153-54)

**Termination for Default**

16. Between 15 June 2005 and 2 February 2006, progress slowed on the F-22 Munitions Maintenance Facility project (*ADT VI*, finding 36).

17. The CO wrote to ADT on 17 August 2005 expressing the government's concern over the lack of progress. The CO's 17 August 2005 letter established a 4 January 2006 contract completion date for the purpose of measuring progress. (*ADT VI*, finding 39)

18. The CO issued a show cause notice on 21 December 2005 noting that ADT had not "performed any significant construction work" since the establishment of the new contract completion date. The CO stated that she was considering terminating the contract pursuant to the default clause due to the lack of satisfactory progress. (*ADT VI*, finding 43)

19. ADT responded on 16 January 2006, stating that delays to the project were the result of the government failing to live up to its contractual obligations (*ADT VI*, finding 45).

20. The CO terminated the contract for default on 2 February 2006. ADT timely appealed the termination, which the Board docketed as ASBCA No. 55358. The termination appeal was suspended pending the outcome of the preconstruction delay appeal, ASBCA No. 55307. (*ADT VI*, findings 46-47)

21. Following termination, ADT's surety took over the project. ADT incurred additional costs due to cost escalation both before and after the termination. Before the termination, ADT incurred the costs directly. After termination, ADT incurred these costs indirectly in connection with payments to its surety. (*ADT V*, finding 176)

**Procedural History**

22. The Board issued its Opinion in *ADT V* on 9 July 2009, sustaining in part ADT's preconstruction delay claim. We held that ADT was responsible for the delay from 1 October 2003 through 18 March 2004, that the government was responsible for 158 days of delay from 8 April 2004 until 22 September 2004 (excluding the period for DDESB review from 27 July 2004 and 5 August 2004), and that there were 60 days of concurrent delay from 23 September 2004 through 22 November 2004. *ADT V*, 09-2 BCA ¶ 34,200 at 169,084-86. We remanded to the parties to negotiate quantum. *Id.* at 169,086.

23. ADT provided the government a cost proposal quantifying the preconstruction delay damages in May 2010 (*ADT VI*, finding 54). The parties were unable to reach agreement on quantum, and on 11 August 2010 the Board docketed the instant quantum appeal as ASBCA No. 57322.

24. On 10 September 2010, appellant submitted its May 2010 cost proposal as its statement of costs in this quantum appeal. The May 2010 cost proposal consisted of a summary page and 11 supporting schedules. The cost proposal included an amount of $831,384 for trade subcontracts, which consisted of $310,309 for escalation and $521,075 for "Additional Markup and Risk." (Bd. corr. file; *ADT VI*, findings 55, 56) ADT revised its cost proposal twice in November 2010 (*ADT VI*, finding 55).

25. During the pendency of the quantum appeal, the Board issued its Opinion in *ADT VI* on 30 April 2013, upholding the government's termination for default. In upholding the default termination, we rejected ADT's various arguments that its default was excusable. As relevant here, ADT argued that its financial inability to perform the contract was caused by the government, mainly because the preconstruction delays we had found in *ADT V* "forced it to subcontract and perform at times when the cost to do so had greatly increased." *ADT VI*, 13 BCA ¶ 35,307 at 173,320. In rejecting ADT's argument, we addressed the increase in ADT's trade subcontract costs because it was the largest part of the total claimed increase and was what ADT had focused on in its post-hearing briefing (*ADT VI*, finding 57). Accepting the premise that "subcontracting before design approval would have left appellant with some uncertainties," we determined that ADT should have contemplated these inherent risks at the time of bid. *ADT VI*, 13 BCA ¶ 35,307 at 173,321. Although we acknowledged that costs were increasing in southern Nevada in 2004, we found nothing in the record demonstrating that ADT could not have subcontracted sooner. *Id.* We therefore held that ADT had "not shown that the [trade subcontract cost] increase was beyond its control." *Id.* We declined to further examine ADT's financial condition, in part because we had already found "that the apparent increase in subcontract costs was not caused by the government." *Id.*

26. ADT timely moved for reconsideration of the Board's decision in *ADT VI*. On 23 January 2014, the Board issued its Opinion in *ADT VII*, 14-1 BCA ¶ 35,508, denying ADT's motion for reconsideration.

27. On 30 May 2014, the government filed the present motion for partial summary judgment in this quantum appeal, asserting that ADT cannot recover escalation costs without an economic price escalation clause in the contract and that ADT is precluded from seeking such costs under the doctrine of *res judicata*. Appellant opposed and the government replied. The Board ordered supplemental briefing because the government raised, but did not address, the doctrine of issue preclusion in its reply. Both parties filed briefs.

## DECISION

Summary judgment is appropriate when there are no genuine issues of material fact and the movant is entitled to judgment as a matter of law. *Mingus Constructors, Inc. v. United States*, 812 F.2d 1387, 1390 (Fed. Cir. 1987); *MIC/CCS, Joint Venture*, ASBCA No. 58242, 14-1 BCA ¶ 35,612 at 174,434. The government's motion for partial summary judgment raises two issues: (1) whether appellant can recover damages for cost escalation under the contract, and (2) whether our decision in *ADT VI* precludes appellant from seeking such costs in this quantum appeal. We address each in turn.

**Recoverability of Cost Escalation Damages**

The government argues that, as a matter of law, appellant may not recover damages due to cost escalation because the contract did not contain an economic price escalation clause (gov't mot. at 6-7). We rejected the government's argument, albeit in a different context, in *ADT VI*, 13 BCA ¶ 35,307 at 173,320, and do not find it any more persuasive the second time. The government correctly notes that, absent a clause shifting the risk to the government, the general rule is that the risk of fluctuation of material or labor costs is borne by the contractor under a firm-fixed-price contract. *See, e.g., Thorington Elec. & Constr. Co.*, ASBCA No. 56997, 12-1 BCA ¶ 34,957 at 171,846. However, ADT does not rely simply on an increase in costs. Appellant asserts that the escalation in costs it suffered arose from the delays we found in *ADT V* (app. opp'n at 2-3). The lack of an economic price escalation clause in the contract does not preclude a contractor from recovering damages for cost escalation incurred due to government-caused delays. *See J.D. Hedin Constr. Co. v. United States*, 347 F.2d 235, 256 (Ct. Cl. 1965) (contractor may recover increase in wages incurred due to government-caused delays), *overruled on other grounds*, *Wilner v. United States*, 24 F.3d 1397 (Fed. Cir. 1994) (en banc); *see also Triple "A" South*, ASBCA No. 43684, 94-2 BCA ¶ 26,609 at 132,385 ("It is settled that when the Government causes a contractor to perform its work in a higher labor and indirect cost period than originally contemplated the contractor is entitled to recover the increased costs incurred during the extended

period, when performance would have been completed but for the Government-caused delay.") (citations omitted).

**Preclusive Effect of *ADT VI***

In order to recover an adjustment, appellant must prove three elements: (1) liability – that the government did something that changed the contractor's costs for which the government is liable; (2) causation – that there exists a causal nexus between the basis for liability and the claimed increase in costs; and (3) resultant injury. *RLB Contracting, Inc.*, ASBCA No. 57638, 14-1 BCA ¶ 35,486 at 173,980; *Gray Personnel, Inc.*, ASBCA Nos. 54652, 55833, 13 BCA ¶ 35,211 at 172,764. We decided the issue of liability in *ADT V*. The government maintains that our decision in *ADT VI* precludes appellant from litigating the causation element with respect to cost escalation in this quantum appeal. The doctrines of *res judicata* (claim preclusion) and collateral estoppel (issue preclusion) establish rules for determining the preclusive effect of a prior adjudication. *DCO Constr., Inc.*, ASBCA Nos. 52701, 52746, 02-1 BCA ¶ 31,851 at 157,403.

Under the doctrine of *res judicata*, "a judgment on the merits in a prior suit bars a second suit involving the same parties or their privies based on the same cause of action." *Jet, Inc. v. Sewage Aeration Sys.*, 223 F.3d 1360, 1362 (Fed. Cir. 2000) (quoting *Parklane Hosiery Co. v. Shore*, 439 U.S. 322, 326 n.5 (1979)). *Res judicata* precludes not only relitigation of claims raised in the first suit, but will also bar a second suit raising claims based on the same set of transactional facts. *Ammex, Inc. v. United States*, 334 F.3d 1052, 1055 (Fed. Cir. 2003); *see also Bowers Inv. Co. v. United States*, 695 F.3d 1380, 1384 (Fed. Cir. 2012) (Claim preclusion precludes "later litigation of issues that could have and should have reasonably been brought in the earlier case."). *Res judicata* applies when (1) the parties are identical or in privity, (2) the first suit proceeded to a final judgment on the merits, and (3) the second claim is based on the same set of transactional facts as the first. *Phillips/May Corp. v. United States*, 524 F.3d 1264, 1268 (Fed. Cir. 2008).

The doctrine of collateral estoppel bars a party from raising issues that have been litigated and decided in a prior proceeding. *Corners & Edges, Inc.*, ASBCA Nos. 55611, 55619, 09-2 BCA ¶ 34,174 at 168,923, *recon denied*, 10-1 BCA ¶ 34,326; *ATK Launch Sys., Inc.*, ASBCA No. 55395 *et al.*, 09-1 BCA ¶ 34,118 at 168,706. Collateral estoppel protects litigants from the burden of relitigating an identical issue and promotes judicial economy by preventing needless litigation. *Morgan v. Dep't of Energy*, 424 F.3d 1271, 1274 (Fed. Cir. 2005). Unlike *res judicata*, collateral estoppel does not require that the claim or cause of action in the two suits be identical; application of collateral estoppel "centers around whether an issue of law or fact has been previously litigated." *In re Freeman*, 30 F.3d 1459, 1465 (Fed. Cir. 1994). The moving party must establish the following: (1) the issue is identical to one decided in the prior proceeding; (2) the issue

was actually litigated; (3) the determination of the issue was necessary to the resulting judgment; and, (4) the party defending against preclusion had a full and fair opportunity to litigate the issue. *Laguna Hermosa Corp. v. United States*, 671 F.3d 1284, 1288 (Fed. Cir. 2012); *Jet*, 223 F.3d at 1366.

We conclude that *res judicata* is inapplicable here because the government cannot establish that the claim in this appeal is based on the same transactional facts as the termination for default in *ADT VI.* In *Ammex*, the Federal Circuit cited Supreme Court precedent that requires us to "first determine whether the 'same cause of action' is being sued upon." *Id.* at 1056 (quoting *Nevada v. United States*, 463 U.S. 110, 128-30 (1983)). This appeal is the quantum stage of *ADT V*, which involved appellant's claim for delays during the design stage of the project, prior to the start of construction. *ADT VI* was an appeal from the government's termination of the contract for default due to lack of progress in the construction of the F-22 Munitions Maintenance Facility. The facts underlying these claims do have some factual overlap but they place the burden of proof on different parties, involve different legal standards, and the default termination involves a much broader set of facts beyond the discrete issue of subcontractor cost escalation. *See ADT VI*, ¶ 35,307 at 173,315-22. Accordingly, it would be inaccurate to say that these two appeals involve the "same cause of action." The doctrine of *res judicata* does not apply to these appeals.

On the other hand, we conclude that all requirements for application of collateral estoppel are satisfied. As to the first requirement, the parties agree that ADT must show a causal nexus between the government's actions and ADT's cost escalation damages (gov't reply at 17; app. br. at 5). The Board addressed the issue of causation regarding cost escalation in *ADT VI*, holding that the government-caused delays were not the cause of the trade subcontractor cost escalation experienced by appellant. 13 BCA ¶ 35,307 at 173,321. Accordingly, there is an identity of issues.

As to whether the issue was actually litigated, the Board decided the issue of causation in response to ADT's argument that it was financially unable to perform mainly because the government-caused delays we had found in *ADT V* "forced it to subcontract and perform at times when the cost to do so had greatly increased." *ADT VI*, 13 BCA ¶ 35,307 at 173,320. The second requirement is satisfied because the subcontract cost escalation issue was raised and litigated by ADT. *See Shell Petroleum, Inc. v. United States*, 319 F.3d 1334, 1339 (Fed. Cir. 2003).

The third requirement for application of collateral estoppel – that the determination of an issue was necessary to the resulting judgment – prevents the incidental determination of a nonessential issue from precluding reconsideration of that issue in later litigation. *Freeman*, 30 F.3d at 1466 (citing *Mother's Rest., Inc. v. Mama's Pizza, Inc.*, 723 F.2d 1566, 1571 (Fed. Cir. 1983)). Appellant argues that our decision in *ADT VI* regarding the cause of ADT's trade subcontractor cost escalation was not

necessary to our ultimate judgment upholding the termination for default because "the Board considered and rejected multiple excuses offered by [ADT]" (app. br. at 3-4). We disagree. As we stated in *ADT VI*, a default will be set aside where a contractor's financial inability to perform was caused by the government. *ADT VI*, 13 BCA ¶ 35,307 at 173,320 (citing *Ricmar Eng'g, Inc.*, ASBCA No. 44260, 98-1 BCA ¶ 32,079 at 146,245); *see also P.R. Contractors, Inc.*, ASBCA No. 52937, 02-2 BCA ¶ 31,941 at 157,795 ("In order for a default termination to be excused on the basis of financial incapacity, the contractor must prove that its incapacity was caused by the Government."). Appellant's primary argument in this regard was that its financial incapacity was due to the cost escalation it incurred resulting from the government-caused delays we had found in *ADT V. ADT VI*, 13 BCA ¶ 35,307 at 173,320. The Board's finding that the cost escalation was not caused by the government was therefore necessary to our determination that ADT's financial incapacity did not excuse its default. That the Board also rejected other excuses proffered by ADT does not render our conclusion regarding the lack of a causal nexus between the government-caused delays and ADT's trade subcontract cost escalation unnecessary to our resulting judgment. *See Mother's Rest.*, 723 F.2d at 1571 ("[I]t is important to note that the requirement that a finding be 'necessary' to a judgment does not mean that the finding must be so crucial that, without it, the judgment could not stand.").

As to the fourth requirement, appellant argues that collateral estoppel cannot apply where the burden of persuasion differs between the two proceedings, relying on *Kosinski v. Comm'r of Internal Revenue*, 541 F.3d 671 (6th Cir. 2008). Appellant maintains that it did not have a full and fair opportunity to litigate the causation issue because we reviewed the default termination under an arbitrary and capricious or abuse of discretion standard. (App. br. at 2-3) Appellant misreads our decision. In *ADT VI*, we first determined that the CO's decision to terminate was reasonable and not an abuse of discretion. 13 BCA ¶ 35,307 at 173,312-15. Having so determined, we then examined each of ADT's proffered excuses. *Id.* at 173,315-22. It was ADT's burden to establish that its default was excusable by a preponderance of the evidence. *Jet Flight Transp., Inc.*, ASBCA No. 38823 *et al.*, 93-1 BCA ¶ 25,336 at 126,232; *Dante A. Jones, Inc.*, ASBCA No. 32051, 88-3 BCA ¶ 21,106 at 106,551. Similarly, in this quantum appeal, ADT "must prove a causal connection between the damages alleged and the government by a preponderance of the evidence." *Mark O'Connor*, ASBCA No. 56863 *et al.*, 10-1 BCA ¶ 34,329 at 169,562. Contrary to appellant's assertions, the burden of persuasion on the causation issue does not differ between the two appeals.

Lastly, appellant argues that because this quantum appeal relates to the entitlement portion of ADT's preconstruction delay claim, ASBCA No. 55307, the default termination appeal, ASBCA No. 55358, is not a prior proceeding. ADT therefore maintains that collateral estoppel cannot apply. Appellant provides no citation for the proposition that a decision in a later filed action cannot be given preclusive effect in an earlier filed action. In *Corners & Edges*, 09-2 BCA ¶ 34,174 at 168,923-24, we applied

collateral estoppel to give preclusive effect to a decision of the Civilian Board of Contract Appeals even though the appeals before this Board were filed prior to the filing of the appeals before the Civilian Board. Appellant's suggestion that *ADT VI* cannot be given preclusive effect due to the timing of the appeals is without merit.

We emphasize that in *ADT VI* we focused solely on cost escalation as to ADT's trade subcontracts. Collateral estoppel bars ADT from relitigating the issue of causation with respect to its trade subcontract cost escalation in this quantum appeal because we decided that issue in *ADT VI*. However, we did not decide causation as to any other areas of cost escalation incurred by ADT. Appellant is therefore not precluded from litigating its remaining cost escalation damages.

## CONCLUSION

Our decision in *ADT VI* precludes appellant from relitigating the existence of a causal nexus between the government-caused preconstruction delays and its trade subcontract cost escalation damages. The government's motion for partial summary judgment is therefore granted in part. The government's motion is otherwise denied.

Dated: 12 February 2015

RICHARD SHACKLEFORD
Administrative Judge
Vice Chairman
Armed Services Board
of Contract Appeals

I concur

MARK N. STEMPLER
Administrative Judge
Acting Chairman
Armed Services Board
of Contract Appeals

I concur

MICHAEL N. O'CONNELL
Administrative Judge
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. 57322, Appeal of ADT Construction Group, Inc., by Timothy S. Cory, Chapter 7 Trustee, rendered in conformance with the Board's Charter.

Dated:

JEFFREY D. GARDIN
Recorder, Armed Services
Board of Contract Appeals