ARMED SERVICES BOARD OF CONTRACT APPEALS

Appeal of --	)	
	)	
TRW, Inc.	)	ASBCA No. 51172
	)	
Under Contract No. F30602-88-C-0058	)	

APPEARANCES FOR THE APPELLANT: John W. Chierichella, Esq.
Douglas E. Perry, Esq.
Anne B. Perry, Esq.
Fried, Frank, Harris, Shriver & Jacobson
Washington, DC

APPEARANCES FOR THE GOVERNMENT: Thomas B. Pender, Esq.
Chief Trial Attorney
Arthur M. Taylor, Esq.
Carol L. Matsunaga, Esq.
Trial Attorneys
Defense Contract Management Agency
Carson, CA

OPINION BY ADMINISTRATIVE JUDGE JAMES ON
GOVERNMENT MOTION FOR PARTIAL SUMMARY JUDGMENT

On 5 November 2001, the Government moved to "dismiss" the Solar Array Project costs claim in ASBCA No. 51172 on the ground that, in the False Claims Act (FCA) suit *United States ex rel. Richard D. Bagley v. TRW, Inc.*, No. CV 95-4153 AHM (C.D. Cal. Oct. 16, 2001) ("*Bagley II*" [*]), the U.S. District Court for the Central District of California: (i) denied TRW's motion for summary judgment that contended that TRW had properly charged the solar array costs as "capital" under FAR 31.205-25, and (ii) granted partial summary judgment to the Government, and held that such costs were required to be charged as independent research and development (IR&D) costs pursuant to FAR 31.205-18. Respondent contends that the judgment in *Bagley II* collaterally estops TRW from re-litigating the identical cost issue at the ASBCA.

STATEMENT OF FACTS (SOF) FOR PURPOSES OF THE MOTION

[*] Terminology used in *TRW, Inc.*, ASBCA Nos. 51172, 51530, 99-2 BCA ¶ 30,407 at 150,328 to distinguish it from another *qui tam* suit, *United States ex. rel. Richard D. Bagley v. TRW, Inc.*, No. CV 95-7755 AWT ("*Bagley I*"), in which the U.S. intervened on 13 February 1998, alleging that TRW made false claims with respect to the costs of fabrication, assembly, and testing of a prototype solar array wing.

1. On 8 July 1988, the Air Force awarded Contract No. F30602-88-C-0058 (contract 58) to TRW, Inc. Contract 58 included line items 1 and 2 for "Radiation-Hardened 32 Bit Processor" on a fixed-price basis, and option line items 3 and 4 for microcircuit development models on a cost-reimbursement basis, subject to the FAR 52.216-7 ALLOWABLE COST AND PAYMENT (APR 1984) clause. (R4, tab 1 at 2-4, 23)

2. On 23 January 1990, the contracting officer (CO) issued unilateral Modification No. P00006 to contract 58, exercising the Government's option for line items 3 and 4 (R4, tab 938).

3. The FAR 52.216-7 ALLOWABLE COST AND PAYMENT (APR 1984) clause provided that the Government was to reimburse the contractor in amounts the CO determined were allowable in accordance with the cost principles prescribed by FAR Subpart 31.2, final indirect cost rates and the appropriate bases were to be established by the procedures set forth in FAR Subpart 42.7, and failure of the parties to agree on a final annual indirect cost rate was a dispute within the meaning of the contract's Disputes clause (R4, tab 1).

4. TRW designated contract 58's line items 3 and 4 as "Subsales Number 56589" and recorded costs for Subsales No. 56589 in 1990, 1991 and 1992 (R4, tabs 939-942).

5. TRW submitted to the administrative contracting officer (ACO) its final indirect rate proposals for its 1990, 1991 and 1992 cost accounting periods, the Defense Contract Audit Agency (DCAA) audited those proposals, and the parties engaged in negotiations to establish final indirect rates for each of those periods (compl. & answer at ¶ 11).

6. On 21 June 1995, Mr. Richard Bagley, an ex-TRW employee, filed a complaint under the *qui tam* provisions of the FCA, 31 U.S.C. §§ 3729 *et seq*., in the United States District Court for the Central District of California in *Bagley II*, alleging, *inter alia*, that TRW had accounted improperly for the solar array project costs (Gov' t ex. 1 at 3).

7. In 1997 TRW and the Government entered into final indirect rate agreements for the 1990, 1991, and 1992 cost accounting periods. The parties attached to the final rate agreements a 31 March 1997 "Addendum to Final Rate Agreement for Years Ended 1990, 1991 and 1992" (Addendum). The Addendum acknowledged that the ACO had made no final determination of the allowability or allocability of certain costs subject of the *Bagley II* litigation, such costs were "provisionally allowed," but the Government reserved the right to make a final determination of their allowability and allocability. (Compl. & answer ¶¶ 15-16)

8. In its 18 September 1997 claim under contract 58, TRW alleged in Category III that it properly treated the costs of fabricating electrical and structural components for the "Solar Array Test Bed" as "capital" under FAR 31.205-25 for its 1990, 1991, and 1992 cost accounting periods, rather than charging such costs to IR&D under FAR 31.205-18. It

did not allege ratification, waiver or estoppel as defenses to disallowance of such costs. (R4, tab 14 at 37-43)

9. On 25 November 1997, TRW filed an appeal from the "deemed denial" of its 18 September 1997 claim. The appeal was docketed as ASBCA No. 51172. The complaint therein alleged at ¶¶ 46-49: (a) that in 1990 TRW began to define, develop, and construct capital test equipment or tools, including the Solar Array Test Bed, and it properly "treated the costs of fabricating the actual test bed components themselves as capital costs in accordance with . . . FAR 31.205-11, FAR 31.205-25(c)," and (b) no defenses of ratification, waiver and estoppel with respect to the solar array costs.

10. The District Court in *Bagley II* referred to Richard Bagley and the United States as the "plaintiffs" and issued an "Order Granting Plaintiffs' Motion for Partial Summary Judgment on the Solar Array Claims and Denying Defendant's Motion for Summary Judgment Dismissing the Solar Array Claims," dated 16 October 2001. The court's 23-page opinion set forth undisputed and other facts material to solar array costs, and extensively analyzed the parties' arguments with respect to the regulatory bases for charging such costs, TRW's program objectives, whether TRW notified the Government of its cost accounting treatment of solar array components, whether solar array costs should be apportioned between IR&D and capital, and whether the solar array was intended for sale. With respect to whether TRW's disclosures to the Government of capitalizing some solar array costs negated the FCA elements of materiality, falsity, and scienter, the court's ruling in *Bagley II* stated --

> . . . TRW argues that its "specific and widely broadcast disclosures negate any inference that TRW's Solar Array accounting was 'false' or material, that TRW ' knowingly' or 'recklessly' violated the FCA . . . ." The facts do not support TRW's contentions and the law would not entitle TRW to summary judgment in any event.
>
> . . . .
>
> Nor do TRW's disclosures negate the element of "scienter" under the FCA [citation omitted]. Although these "disclosures" may serve as evidence of TRW's "state of mind" that eventually might have negated proof of scienter at trial (assuming plaintiffs did not obtain summary judgment), they are not sufficient to find as a matter of law that TRW did not have the requisite mental state for liability under the FCA.

(Gov' t ex. 1 at 2, 20, 22)

11. Whether the solar array project costs were properly a depreciable capital overhead expense under FAR 31.205-25, as TRW contended, or were IR&D costs under FAR 31.205-18, as relator Bagley and the Government contended, was the principal if not exclusive issue in, and necessary to, the October 2001 judgment in *Bagley II* (Gov' t ex. 1 at 2-3, 10, 12-13).

12. In *Bagley II* TRW: (a) was represented by lawyers from Fried, Frank, Harris, Shriver & Jacobson (its attorneys in ASBCA No. 51172) and Jones, Day, Reavis & Pogue; and (b) conducted discovery, submitted declarations, stipulations, and briefs, and argued orally on cross-motions for summary judgment (Gov' t ex. 1 at 3-8, 15-16).

DECISION

I.

Like the related doctrine of *res judicata*, collateral estoppel (or "issue preclusion") is an affirmative defense within the ambit of FEDERAL RULES OF CIVIL PROCEDURE, Rule 8(c). *See North Georgia Electric Membership Corp. v. City of Calhoun, Georgia*, 989 F.2d 429, 431-32 (5th Cir. 1993). Among the several claims in *Bagley II*, the court granted the plaintiffs' motion for partial summary judgment on the solar array claims (SOF ¶ 10). Respondent's motion asserts the ground of "issue" preclusion (collateral estoppel) with respect to the solar array cost issue decided in *Bagley II*. Respondent bases its motion to dismiss exclusively on Rule 4 documents and various exhibits accompanying its motion. When a motion presents a non-jurisdictional, affirmative defense to a claim and relies on materials other than the pleadings, it is treated as a motion for summary judgment. *See Do-Well Machine Shop, Inc. v. United States*, 870 F.2d 637, 639-40 (Fed. Cir. 1989); *Bankruptcy Estate of Dr. William Barry*, ASBCA No. 50345, 99-2 BCA ¶ 30,469 at 150,520. We so treat respondent's motion.

Summary judgment is appropriate when there is no genuine issue as to any material fact and the moving party is entitled to judgment as a matter of law. *Mingus Constructors, Inc. v. United States*, 812 F.2d 1387, 1390 (Fed. Cir. 1987). There appears no genuine dispute about the foregoing statement of facts. Thus, this motion presents solely issues of law, which are appropriate for summary judgment. *See Konitz Contracting, Inc.*, ASBCA No. 52299, 01-2 BCA ¶ 31,572 at 155,901.

II.

Issue preclusion requires proof of four elements:

> (1) the issue to be decided is identical to one decided in the first action; (2) the issue was actually litigated in the first action; (3) resolution of the issue was essential to a final

> judgment in the first action; and (4) the parties had a full and fair opportunity to litigate the issue in the first action.

Arkla, Inc. v. United States, 37 F.3d 621, 624 (Fed. Cir. 1994), *cert. denied sub nom. NorAm Energy Corp. v. United States*, 514 U.S. 1035 (1995).

With respect to "identical" issue, TRW argues that *Bagley II* interpreted FAR 31.205-18 as a "stand alone regulation" considered in a "non-contractual context" in which the court struck TRW's "affirmative defenses" of ratification, waiver and estoppel as inapplicable to the FCA, whereas ASBCA No. 51172 addresses the contemporaneous interpretation of FAR 31.205-18 during performance of contract 58 and others, and hence involves TRW's affirmative defenses of ratification, waiver and estoppel. Movant argues that TRW's ratification, waiver and estoppel defenses are irrelevant to the solar array costs, because such defenses deal with "contract terms and specifications," not with "regulatory provisions" such as FAR 31.205-18, with respect to which, according to respondent, only the intent of the FAR Council, drafter of such regulations, is relevant to its interpretation.

TRW did not allege in its 18 September 1997 claim, or in its complaint in ASBCA No. 51172, any ratification, waiver or estoppel, as a defense to disallowance of the disputed costs, with respect to whether the costs of fabricating electrical and structural components for the Solar Array Test Bed in 1990, 1991, and 1992 were properly charged as capital under FAR 31.205-25, rather than as IR&D under FAR 31.205-18 (SOF ¶¶ 8-9). Therefore, such defenses are not before us and do not alter the character of the issue in ASBCA No. 51172: the proper cost accounting treatment of such solar array costs. We conclude that the issue of the proper accounting of the costs of fabricating electrical and structural components for the Solar Array Test Bed decided in *Bagley II* and alleged in ASBCA No. 51172 is identical. Furthermore, TRW does not seriously dispute that the third and fourth elements of issue preclusion, "essential to the judgment" and "party fully represented," were satisfied in *Bagley II* (SOF ¶¶ 11, 12). We turn, then, to the critical and hotly disputed second element, "actually litigated."

To determine whether an issue was "actually litigated and determined by a valid and final judgment," tribunals have considered whether the prior decision was "an appealable final decision" and, if it was not, whether it was "sufficiently firm." *See Lockheed Corp.*, ASBCA No. 39744, 97-1 BCA ¶ 28,757 at 143,518-19.

TRW first asserts that the 16 October 2001 order in *Bagley II* addressed only the "falsity" element of the FCA with respect to the solar array project costs. Respondent agrees, stating that "the District Court still has to decide the issue of scienter with respect to the Solar Array project False Claims Act allegations" (mot. at 3, n.6). However, even if scienter remains to be tried by the District Court, such "scienter" issue does not affect the District Court's summary judgment on the issue it did decide: that the solar array project costs were IR&D costs under FAR 31.205-18.

With respect to the appealability of the 16 October 2001 order in *Bagley II*, TRW argues that the *Bagley II* order was interlocutory and not appealable, the District Court did not certify the *Bagley II* ruling for an interlocutory appeal, and the lack of appealability requires denial of issue preclusion. TRW cites *Interconnect Planning Corp. v. Feil*, 774 F.2d 1132, 1135 (Fed. Cir. 1985) (no collateral estoppel when prior summary judgment decision was not final, not certified, not appealed, prior court was not asked to enter final judgment on the claim decided pursuant to FED. R. CIV. P., Rule 54(b), the prior court technically addressed a different issue than that presented in the second suit and prior decision was mooted by subsequent events); *Avondale Shipyards, Inc. v. Insured Lloyd's*, 786 F.2d 1265 (5th Cir. 1986) (no estoppel when insuror controlled ship owner's litigation position in prior suit, and claim was settled and dismissed with prejudice); and RESTATEMENT (SECOND) OF JUDGMENTS § 28(1) (1982) (party against whom preclusion is sought could not, as a matter of law, obtain review of the judgment in the initial action).

Movant cites *Lummus Co. v. Commonwealth Oil Refining Co.*, 297 F.2d 80, 89 (2d Cir. 1961), *cert. denied*, 368 U.S. 986 (1962), for the "practical finality" rationale that a judgment, while not "final" for appeal purposes under 28 U.S.C. § 1291, nonetheless can be considered "final" for purposes of issue preclusion. In *Lummus*, a 1960 First Circuit decision had vacated a district court's temporary injunction staying arbitration in order to determine whether the parties' contracts providing for arbitration were voidable for fraud in the inducement, holding that Commonwealth had not raised a substantial issue of the existence of such contracts. The Second Circuit in 1961 stated that an action with respect to a temporary injunction, whether by a trial court or an appellate court, ordinarily is interlocutory, not binding on the parties and discussed criteria for determining finality for purposes of issue preclusion:

> Whether a judgment, not "final" in the sense of 28 U.S.C. § 1291, ought nevertheless be considered "final" in the sense of precluding further litigation of the same issue, turns upon such factors as the nature of the decision (i.e., that it was not avowedly tentative), the adequacy of the hearing, and the opportunity for review. "Finality" in the context here relevant may mean little more than that the litigation of a particular issue has reached such a stage that a court sees no really good reason for permitting it to be litigated again.

Lummus, supra, 297 F.2d at 89.

Respondent also cites *Lockheed Corp.*, ASBCA No. 39744, 97-1 BCA ¶ 28,757. There we sustained the appeal on the ground of issue preclusion, holding that the identical issue had been decided on entitlement in a prior ASBCA appeal, "Lockheed I," which had been appealed to the Federal Circuit (though later dismissed by agreement of the parties), or, even if not an appealable final decision, Lockheed I was "sufficiently firm" by the criteria in Comment g, Illustration 3 (bifurcated proceedings) under § 13, RESTATEMENT

(SECOND) OF JUDGMENTS (1982), and the other criteria for issue preclusion had been satisfied. *Id*. at 143,519-20, -22.

No Federal Circuit decision cited by the parties is "on all fours" with the facts of this appeal and dispositive of the "actually litigated" element. There is some authority in the Third Circuit Court of Appeals for issue preclusion based upon a non-appealable, district court's denial of summary judgment. *See Burlington Northern R. R. Co. v. Hyundai Merchant Marine Co,. Ltd*., 63 F.3d 1227, 1229, 1233 n.8 (3d Cir. 1995). However, the Ninth Circuit Court of Appeals, where the District Court in *Bagley II* sits, has rejected issue preclusion based on non-appealable trial court partial summary judgments. *See St. Paul Fire & Marine Ins. Co. v. F.H.*, 55 F.3d 1420, 1425 (9th Cir.), *cert. denied*, 516 U.S. 1028 (1995) (no issue preclusion based on partial summary judgment that was not final, could not have been appealed when entered, and was subject to reconsideration under Alaska rules, and the parties settled before the litigation went to final judgment); *Luben Industries, Inc. v. United States*, 707 F.2d 1037, 1040 (9th Cir. 1983) (no issue preclusion based on non-appealable interlocutory memorandum).

Moreover, in *Danac, Inc.*, ASBCA Nos. 30227, 33394, 92-1 BCA ¶ 24,519 ("Danac I"), we held that the Government's affirmative defense of knowingly filing a false small business size certification was without merit, but we did not decide the merits of the contractor's equitable adjustment claim. In *Danac, Inc.*, ASBCA No. 30834, 92-2 BCA ¶ 24,981 at 124,509-10 ("Danac II"), we denied the Government's cross-motion for collateral estoppel on the issue of the same false small business size certification, holding that Danac I, although issued after a full hearing and certainly not tentative in nature, was not yet subject to appeal and thus was "not sufficiently final for purposes of collateral estoppel," citing *Block v. Int'l Trade Comm'n*, 777 F.2d 1568, 1571 (Fed. Cir. 1985) and *Interconnect*, 774 F.2d at 1135. Although the Danac I decision was not designated a "partial summary judgment," it was clearly akin to that.

For the foregoing reasons, we hold that the controlling precedents of the Federal Circuit and of this Board do not justify issue preclusion in the appeal *sub judice*.

CONCLUSION

We deny the Government's motion, which we treat as one for partial summary judgment, with respect to the Solar Array Project cost claim.

Dated: 17 May 2002

DAVID W. JAMES, JR.
Administrative Judge
Armed Services Board

of Contract Appeals

I concur

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

I concur

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. 51172, Appeal of TRW, Inc., rendered in conformance with the Board's Charter.

Dated:

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