ARMED SERVICES BOARD OF CONTRACT APPEALS

Appeal of --	)	
	)	
TRW, Inc.	)	ASBCA No. 51530
	)	
Under Contract No. F30602-88-C-0058	)	

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OPINION BY ADMINISTRATIVE JUDGE JAMES ON
GOVERNMENT MOTION FOR SUMMARY JUDGMENT

On 15 February 2001 respondent moved to "dismiss" the Odyssey project cost claim pertaining to TRW's fiscal year 1995 under the captioned contract, which claim was appealed by virtue of its deemed denial. Respondent moved to dismiss on the ground that in *United States ex rel. Richard D. Bagley v. TRW, Inc.*, No. CV 95-4153 AHM, 2000 U.S. Dist. LEXIS 21716 (C.D. Cal. Dec. 12, 2000), the District Court denied TRW's motion for summary judgment and granted partial summary judgment to the relator and the Government, holding that charging the Odyssey costs indirectly as bid and proposal costs violated FAR 31.205-18(a) because they were the "costs of effort sponsored by a grant or cooperative agreement or required in contract performance," namely, TRW's Memorandum of Agreement (MOA) with Teleglobe, Inc. Respondent asserts that that partial summary judgment collaterally estops TRW from re-litigating the identical Odyssey cost issues in ASBCA No. 51530. TRW replied to the motion.

STATEMENT OF FACTS (SOF) FOR PURPOSES OF THE MOTION

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 (ASBCA 51172, 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 1995 (ASBCA 51172, R4, tab 943).

5. On 21 June 1995 Mr. Richard Bagley, an ex-TRW employee, filed a complaint under the *qui tam* provisions of the False Claims Act (FCA), 31 U.S.C. §§ 3729 *et seq*., in the United States District Court for the Central District of California in *United States ex rel. Richard D. Bagley v. TRW, Inc.*, No. CV 95-4153 AHM ("*Bagley II*"), alleging, *inter alia*, that TRW had accounted improperly for the Odyssey project costs as "bid and proposal" (B&P) costs under FAR 31.205-18 (Gov' t ex. 1 at 1).

6. FAR 31.205-18(a) provided in 1990:

> "Bid and proposal (B&P) costs," as used in this subdivision, means the costs incurred in preparing, submitting, and supporting bids and proposals (whether or not solicited) on potential Government or non-Government contracts. The term does not include the costs of effort sponsored by a grant or cooperative agreement or required in contract performance.

FAR 31.205-18(a) in 1995 was substantively the same.

7. In its 5 November 1997 "Supplemental Certified Claim" submitted to the Divisional Administrative Contracting Officer (DACO), TRW alleged that it properly characterized Odyssey program costs incurred between January and May 1995 to prepare a proposal for submission to the "Odyssey Worldwide Services [OWS] Limited Partnership" which TRW and Teleglobe, Inc. had formed on 7 February 1995, as B&P costs in accordance with FAR 31.205-18 (R4, tab 18 at 1-2, 4-5). TRW alleged that such costs were allowable by virtue of FAR 31.205-18(e)(3), its interpretation allowed no double recovery of such costs because no entity ever paid TRW for such proposal preparation

costs, and its interpretation was supported by the legislative history of Pub. L. No. 102-190, § 802, 10 U.S.C. § 2372 (R4, tab 18 at 6-8). TRW's claim did not allege ratification, waiver or estoppel as defenses to disallowance of such costs (R4, tab 18).

8. On 15 May 1998 TRW filed an appeal from the "deemed denial" of its 5 November 1997 claim. The appeal was docketed as ASBCA No. 51530.

9. TRW's complaint in ASBCA No. 51530 alleged, *inter alia*, that it treated its Odyssey program costs, subject of its 5 November 1997 Supplemental Claim, as allowable B&P costs in accordance with FAR 31.205-18 (¶¶ 3-5); such costs were to prepare and submit a fixed-price proposal to the Limited Partnership for the Odyssey system by 1 May 1995 pursuant to ¶ 3.2 of the MOA (¶¶ 20, 28); TRW and Teleglobe, Inc., created the OWS Limited Partnership (¶ 29); "[t]he MOA between Teleglobe and TRW was a 'cooperative arrangement,' as that phrase is used at FAR 31.205-18" (¶ 56); and the Odyssey proposal preparation costs qualified as B&P costs under FAR 31.205-18 (¶ 57). The complaint alleged no defenses of ratification, waiver or estoppel.

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 Odyssey Claim; Denying Defendant's Motion for Summary Judgment on the Relator's Odyssey Claim" dated 12 December 2000 (Gov' t ex. 1 at 1-2, 18). The parties' cross-motions for summary judgment presented the sole issue of whether the costs TRW incurred in 1995 to prepare and submit a fixed-price Odyssey system proposal to the OWS "Limited Partnership" of TRW and Teleglobe, Inc. pursuant to ¶ 3.2 of their 8 November 1994 Memorandum of Agreement (MOA) were properly recorded as "bid and proposal" (B&P) costs in accordance with FAR 31.205-18(a) (Gov' t ex. 1 at 3-4, 6). The court held that such costs were costs "required in the performance of a contract," namely the MOA, or "costs of effort sponsored by a . . . cooperative agreement," and thus were excluded from the definition of B&P costs by the "plain language" of FAR 31.205-18(a) (Gov' t ex. 1 at 10-11). The court's 18-page opinion set forth undisputed and other facts material to the 1995 Odyssey project B&P cost issue (Gov' t ex. 1 at 2-4), and analyzed and rejected TRW's arguments that such costs were allowable by virtue of FAR 31.205-18(e)(3), and its interpretation did not allow double recovery of such costs and was supported by the legislative history of Pub. L. No. 102-190, § 802, 10 U.S.C. § 2372, and by agency intent expressed in the "Spector Memorandum" (Gov' t ex. 1 at 11-18).

11. Whether the 1995 costs of preparing and submitting an Odyssey project proposal to the OWS Limited Partnership were allowable B&P costs under FAR 31.205-18(a) was the exclusive issue in, and essential to, the 12 December 2000 partial summary judgment in *Bagley II* (Gov' t ex. 1 at 4).

12. In *Bagley II* TRW: (a) was represented by lawyers from Fried, Frank, Harris, Shriver & Jacobson (its attorneys in ASBCA No. 51530) 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. 2 at 1).

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 (11th Cir. 1993). Among the several claims in *Bagley II*, the court granted the plaintiffs' motion for partial summary judgment on the Odyssey proposal cost claim (SOF ¶ 10). Respondent's motion asserts the ground of "issue" preclusion (collateral estoppel) with respect to the Odyssey 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. 51530 addresses the contemporaneous interpretation of FAR 31.205-18 during performance of contract 58 and others, and involves TRW's affirmative defenses of ratification, waiver and estoppel. Movant argues that TRW's ratification, waiver and estoppel defenses are irrelevant to the Odyssey proposal costs, because such defenses deal with "contract terms and specifications," not with "regulatory provisions" such as FAR 31.205-18.

TRW did not allege in its 5 November 1997 Supplemental Claim, or in its complaint in ASBCA No. 51530, any ratification, waiver or estoppel, as a defense to disallowance of the disputed costs, with respect to whether the 1995 Odyssey costs were properly charged as B&P under FAR 31.205-18(a) (SOF ¶¶ 7, 9). Therefore, such defenses are not before us and do not alter the character of the issue in ASBCA No. 51530: the proper cost accounting treatment of such Odyssey proposal preparation costs. We conclude that the issue of the proper accounting of the Odyssey proposal preparation costs decided in *Bagley II* and alleged in ASBCA No. 51530 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 argues that the 12 December 2000 partial summary judgment in *Bagley II* addressed only the "falsity" element of the FCA with respect to the 1995 Odyssey project costs. Movant states that "the District Court still has to decide the issue of scienter with respect to the Odyssey False Claims Act allegations, an issue that is not before the Board." (Gov' t mot. at 5, n.15) We agree that "scienter" is not before us in ASBCA No. 51530. Moreover, the undecided "scienter" issue in *Bagley II* does not affect the District Court' s summary judgment on the issue it did decide: whether the 1995 Odyssey proposal preparation costs were within the FAR 31.205-18(a) definition of B&P.

With respect to the appealability of the December 2000 order in *Bagley II*, TRW argues that the *Bagley II* partial summary judgment was interlocutory and not appealable, the District Court declined to 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" rule 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. 1995), *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 for summary judgment, with respect to the 1995 Odyssey proposal preparation 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. 51530, Appeal of TRW, Inc., rendered in conformance with the Board's Charter.

Dated:

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