ARMED SERVICES BOARD OF CONTRACT APPEALS

Appeal of --	)	
	)	
The Swanson Group, Inc.	)	ASBCA No. 53254
	)	
Under Contract Nos. DAEA18-87-D-0022	)	
DABT63-92-D-0003	)	

APPEARANCE FOR THE APPELLANT: Mr. Johnny Swanson, III
President

APPEARANCES FOR THE GOVERNMENT: COL Michael R. Neds, JA
Chief Trial Attorney
MAJ John B. Alumbaugh, JA
Trial Attorney

OPINION BY ADMINISTRATIVE JUDGE PARK-CONROY

At issue in this appeal is the Government's Motion to Dismiss for r*es judicata* based upon the Board's decision in *The Swanson Group, Inc.*, ASBCA No. 46856, 96-2 BCA ¶ 28,500, *reconsid. denied*, 97-1 BCA ¶ 28,664, and appellant's Opposition and Motion for Relief which seeks to have that decision set aside under FED. R. CIV. P. 60(b).[*] We restate and supplement the facts in our earlier *Swanson* decisions as necessary to a full understanding of the issues presently before us.

FINDINGS OF FACT FOR PURPOSES OF THE MOTIONS

ASBCA No. 46856

In ASBCA No. 46856, appellant sought increased costs it alleged were associated with security guards and other services it provided at Fort Huachuca, Arizona under Contract No. DAEA18-87-D-0022 and its follow-on, Contract No. DABT63-92-D-0003, with the Department of the Army (Army) after the new Department of Labor (DOL) Wage Determination No. 79-613 (Rev. 7) was implemented. *Swanson*, 96-2 BCA at 142,314.

We found that a DOL labor investigation had revealed that appellant had underpaid its Fort Huachuca employees by as much as $461,230.02. Pursuant to an agreement between appellant, DOL and the Army, the contracting officer placed $248,132.61 in accrued payments due appellant on the Fort Huachuca contracts into a DOL escrow account. In the

[*] Judge Spector who participated in ASBCA No. 46856 has since retired.

settlement of the DOL investigative proceedings, which was memorialized in the DOL Consent Findings and Order of Dismissal, appellant and DOL agreed that the amount due appellant's employees under the Fort Huachuca contracts was $307,112.03. *Id.*, 96-2 BCA at 142,315.

On 12 March 1993, prior to the settlement, appellant submitted a claim under the Contract Disputes Act (CDA) seeking increased wages and benefits resulting from implementation of the new wage determination. It sought $196,021.44, which was the difference between the $444,154.05 it had computed was due under the two contracts and the Army's escrow payment of $248,132.61. After entry of the DOL Consent Findings and Order of Dismissal, appellant revised both the quantum of its claim and the method by which it was computed. *Id.*

A Government audit determined that $58,979.42 should be credited to appellant on the Fort Huachuca contracts as part of the DOL settlement, but that appellant had not paid its employees $79,202.24 in health and pension fund benefits it had received from the Army under the wage rates in effect prior to implementation of the new wage determination and that the $79,202.24 should be set-off against the $58,979.42 due appellant. *Id.*, 96-2 BCA at 142,316. Absent any record evidence reflecting what action, if any, had been taken by the contracting officer regarding the set-off, we concluded that appellant was entitled to a credit of $58,979.42 in connection with the DOL settlement as reflected by the audit report, and otherwise denied the appeal. *Id.*, 96-2 BCA at 142,317. Our decision in ASBCA No. 46856 is dated 16 August 1996.

ASBCA No. 53254

In the present appeal, appellant "adopts and incorporates by reference all filings, pleadings, exhibits, notes, charts, and briefs as pertaining to . . . ASBCA No. 46856" (compl. ¶ 5). Additionally, it alleges that the Government approved a new hourly rate of $14.92 in "an amendment to a work order to one of it' s [sic] sub-offices," but then refused to pay appellant that rate (compl. ¶ 12). There is no record evidence reflecting how the new hourly rate was computed, or for which contract and classification of worker it was computed.

Appellant's request for relief seeks: (1) payment of $58,979.42, which it alleges represents the final monthly invoice amount for Contract No. DABT63-92-D-0003; (2) a review of the amounts due as a result of the new wage determination, alleged to be $196,021.44, under "case law applicable to errors and fraudulent persuasion;" (3) bank interest at 14 percent per annum on $58,979.42; (4) Internal Revenue Service (IRS) interest and penalties resulting from the Army's alleged interference with payment of the contract amounts it asserts are due ($58,979.42 plus $196,021.44), estimated to be $490,362.24; and (5) a 100% penalty as punitive damages based upon the Army's bad faith in

administering the two contracts in the amount of $255,000.86 (the sum of $58,979.42 and $196,021.44) (compl. ¶ V).

The only claim in the record is the original 12 March 1993 claim that was the subject of ASBCA No. 46856 (R4, tab 7). The record reflects that the final amount due on Contract No. DABT63-92-D-0003 was $55,986.73 and that this amount was transferred to DOL pursuant to a DOL Order (R4, tabs 47 through 53, 56).

On 19 July 2000, appellant submitted a letter invoice to the Army requesting payment of the credit found due, $58,979.42, in ASBCA No. 46856 (R4, tab 23). In response, the Army advised appellant that, "[d]ue to the passage of time and the turnover of personnel," it was necessary to research the events leading to the decision in ASBCA No. 46856, and it proceeded to communicate with DOL (R4, tabs 25, 28).

On 4 January 2001, appellant submitted a "Letter Complaint in Regards" to its Fort Huachuca contracts to the ASBCA's Recorder. The letter explained that "[t]his run-on complaint stems from ASBCA Appeal No. 46856, where the Swanson Group, Inc. made wholesale complaints in it's [sic] appeal in regards to monies due for a wage increase in the captioned contracts that [sic] the U.S. Army at Fort Huachucha [sic], Arizona." It went on to complain that, "[a]fter years of attempting to collect the monies awarded," the Army had "failed and still refuses to pay" the $58,979.42 found due. (R4, tab 29) The letter was treated as an appeal in the nature of quantum enforcement and docketed as ASBCA 53254 because our prior decision in ASBCA No. 46856 had decided both entitlement and quantum.

Effective 31 August 2001, the contracting officer issued Modification No. P00012 to Contract No. DAEA18-87-D-0022 in the amount of $77,737.00. It stated:

> a. This Modification makes complete payment of a claim that resulted in a decision under ASBCA 46856, effective 16 August 1996, in the amount of $58,979.42. The claim stems from labor issues that arose during the Contractor's performance under the contract cited . . . , and follow-on contract DABT63-92-D-0003.
>
> b. Interest accrued against the judgment amount is calculated from 16 August 1996 through 31 August 2001. The amount of accrued interest is $18,758, and the total amount of money the Army has made available is $77,737.00 ($58,979.00 plus $18,758.00). . . .

(Attach. 3 to Gov' t Motion to Dismiss) Modification No. P00012 explained that interest was based upon the attached Department of the Treasury Rates Table and that payment had been made to the Department of the Treasury in compliance with IRS Notices of Levy, copies of which were also attached. The Treasury rates used to pay interest are the rates applicable to CDA claims. (*Id.*)

DISCUSSION

In its Motion to Dismiss, the Government asserts that the present appeal is barred by the doctrine of *res judicata* or claim preclusion because: "(1) there is identity of the parties . . . ; (2) there has been an earlier final judgment on the merits of a claim; and (3) the second claim is based upon the same set of transactional facts as the first." *Jet, Inc. v. Sewage Aeration Systems*, 223 F.3d 1360, 1362-63 (Fed. Cir. 2000). *Accord AAA Engineering & Drafting, Inc.*, ASBCA Nos. 47940, 48575, 48729, 01-1 BCA ¶ 31,256.

Although styled as a motion to dismiss, we treat the Government's motion as one for summary judgment to the extent it relies upon matters outside the pleadings and apply the familiar rules which require us to draw the requisite inferences and apply the applicable evidentiary standards to determine whether a reasonable fact finder could decide the issues raised by the Government in favor of appellant. *Anderson v. Liberty Lobby Inc.*, 477 U.S. 242, 255 (1986).

There is no dispute here about whether the parties in ASBCA Nos. 46856 and 53254 are the same or that we have issued a final decision upon the claim in ASBCA No. 46856. Likewise, the same set of transactional facts is present in both appeals; specifically, both involve claims for payment of increased wages and benefits resulting from implementation of DOL Wage Determination No. 79-613 (Rev. 7). Indeed, appellant's opposition to the Government's motion concedes that it is "bring[ing] back to this board a series of ongoing complaints that the Board had previously ruled upon" (app. opp. at 2). Thus, we are satisfied that the $196,021.44 contract adjustment now requested is the same adjustment requested in appellant's 12 March 1993 claim and that the $58,979.42 now claimed was the credit we found due in ASBCA No. 46856.

Further, assuming the new $14.92 hourly rate referred to in appellant's complaint relates to the Fort Huachuca contracts, it was subsumed within appellant's original claim. *See Young Engineers, Inc. v. United States International Trade Commission*, 721 F.2d 1305, 1314 (Fed. Cir. 1983) (parties are precluded from re-litigating claims that were or could have been raised in the prior action). If it relates to other contracts or involves a new claim, we lack jurisdiction to consider it. *See* 41 U.S.C. § 605(a); *H.L. Smith, Inc. v. Dalton*, 49 F.3d 1563, 1564 (Fed. Cir. 1995) (ASBCA's jurisdiction over a contractor's claim is predicated upon the prior submission of that claim to a contracting officer for decision).

However, appellant also alleged that the Government failed to credit it with $58,979.42 we found was due in ASBCA No. 46856. Thus, we treated appellant's 4 January 2001 letter to the Recorder as an appeal relating to our decision in ASBCA No. 46856. After the new appeal was docketed as ASBCA No. 53254, the Army looked into the matter and eventually issued Modification No. P00012 to Contract No. DAEA18-87-D-0022 awarding appellant $58,979.42, plus interest from 16 August 1996.

There are three remaining issues associated with the $58,979.42 credit. First, contrary to appellant's contentions at page 2 of its opposition, both our decision in ASBCA No. 46856 and the record in this appeal establish that the credit does not represent the balance due on Contract No. DABT63-92-D-0003. As we found above, the balance on that contract was $55,986.73 and was transferred to DOL pursuant to a DOL Order.

Second, our decision in ASBCA 46856 was based upon the 12 March 1993 claim appellant submitted to the contracting officer under the CDA. Thus, interest on the credit due appellant is set by section 12 of the CDA, 41 U.S.C. § 611, and cannot be computed at bank interest rates, irrespective of whether they are the 14 percent per annum requested by appellant.

Finally, 41 U.S.C. § 611 provides:

> Interest on amounts found due contractors on claims shall be paid to the contractor from the date the contracting officer receives the claim pursuant to section 605(a) of this title from the contractor until payment thereof. The interest provided for in this section shall be paid at the rate established by the Secretary of the Treasury . . . .

Modification No. P00012 awarded CDA interest on $58,979.42 at the rates established by the Secretary of the Treasury from 16 August 1996, the date of our decision on entitlement in ASBCA No. 46856, to 31 August 2001. This was incorrect. Under the CDA, interest on a contractor's claim is to be computed from the date upon which the contracting officer received appellant's 12 March 1993 claim.

Appellant's response to the Government's motion seeks to avoid the *res judicata* effect of our decision in ASBCA No. 46856, asserting that it is entitled to relief from our decision under FED. R. CIV. P. 60(b)(2) for fraud, (b)(3) for newly discovered evidence, and (b)(4) because the judgment is void. We generally apply FED. R. CIV. P. 60 as a guide when deciding whether to re-open a decision. *Electronics & Space Corp.*, ASBCA No. 37352, 95-1 BCA ¶ 27,306. The decision which appellant now seeks to open was issued on 16

August 1996, well over five years ago. Rule 60(b) requires that a motion shall be made "within a reasonable period of time," and that a motion filed under 60(b)(2) or (b)(3) be filed "not more than one year after" the decision was entered. As is apparent, appellant's motion was not timely. *See Triad Microsystems, Inc.*, ASBCA No. 48763, 00-1 BCA ¶ 30,876. Nor do we find any "extraordinary or exceptional circumstances" which would qualify as a reason for justifying relief under Rule 60(b)(6). *See Ordnance Devices, Inc.*, ASBCA No. 42709, 99-1 BCA ¶ 30,304.

In any event, appellant's arguments are insufficient to overcome the Government's motion. Appellant alleges that the Government "misled this Board and took advantage of Appellant's inability to respond to this matter due to incarceration," that it used "confusing and misleading pleadings and affidavits or statements" (app. resp. at 2), and "misrepresentation[s] . . . to meet it's [sic] ends means to destroy the business of Appellant" (app. resp. at 4), that it "interfere[d] in the operations of [its] business" and engaged in "improper conduct" rising to the level of bad faith (*id*.). We agree with the Government that these allegations are completely lacking in record support. *See Mingus Constructors, Inc. v. United States*, 812 F.2d 1387, 1390-91 (Fed. Cir. 1987) ("[T]he party opposing summary judgment must show an evidentiary conflict on the record; mere denials or conclusory statements are not sufficient.") Finally, as we understand it, appellant's argument that the judgment is void asserts only that the DOL Consent Findings and Order of Dismissal has been satisfied because DOL has distributed the amounts found due its employees, a fact which is not disputed in the context of this appeal.

CONCLUSION

Based upon the foregoing, the Government's motion is denied in so far as it has not paid CDA interest due under 41 U.S.C. § 611 running from the date upon which the contracting officer received appellant's 12 March 1993 claim to 16 August 1996 (the period for which interest has not been paid) upon the principal sum of $58,979.42. The motion is otherwise granted. Appellant's motion for relief is denied. The appeal is sustained only with respect to the CDA interest we found due and otherwise is denied.

Dated: 9 April 2002

CAROL N. PARK-CONROY
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. 53254, Appeal of The Swanson Group, Inc., rendered in conformance with the Board's Charter.

Dated:

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