ARMED SERVICES BOARD OF CONTRACT APPEALS

Appeals of --	)	
	)	
National Gypsum Company	)	ASBCA Nos. 53259, 53568
	)	
Under Contract No. W-ORD-607	)	

APPEARANCE FOR THE APPELLANT: R. Steven DeGeorge, Esq.
Robinson, Bradshaw & Hinson, PA
Charlotte, NC

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

OPINION BY ADMINISTRATIVE JUDGE FREEMAN

National Gypsum Company (NGC) appeals the denial of its claims under an indemnity provision in a World War II contract. The parties have submitted the appeals for decision under Rule 11 without oral hearing. Since the indemnity provision was unlimited in amount, and not otherwise authorized by law, it violated the Anti-Deficiency Act and the Executive Order under which the contract was entered into. The claims were properly denied, and we deny these appeals.

FINDINGS OF FACT

1. On 9 February 1942, NGC and the War Department entered into a negotiated cost plus fixed fee contract (W-ORD-607) for procurement of production equipment and other services for an ordnance munitions plant. The contract included an option for operation of the plant by NGC which was subsequently exercised. (R4, tab 1 at 1, 4)

2. The cover page of the W-ORD-607 contract stated that it was authorized by Public Law No. 77-354 and by Executive Order No. 9001. It also stated that "the equipment, services and supplies to be obtained by this instrument" were chargeable to three Ordnance Department procurement authorities, "the available balances of which are sufficient to cover the cost of the same." (R4, tab 1 at 1)

3. A recital at page 4 of the contract stated that "the accomplishment of the above-described work under a cost-plus-a-fixed-fee contract, entered into after negotiations approved by the Secretary of War, and without advertising for proposals, is authorized by law" (R4, tab 1 at 4).

4. Title IV of the contract contained the cost-reimbursement provisions of the contract (R4, tab 1 at 15). Title VI-A(a) of the contract included the following indemnity provision:

> . . . the Government shall indemnify and hold the Contractor harmless against any loss, expense (including expense of litigation) or damage (including personal injuries and deaths of persons and damage to property) of any kind whatsoever arising out of or connected with the performance of the work, unless such loss . . . should be shown by the Government to have been caused directly by bad faith or willful misconduct on the part of some officer or officers of the Contractor acting within the scope of his or their authority and employment.

(R4, tab 1 at 25)

5. At the time Contract No. W-ORD-607 was entered into, and at all relevant times thereafter, the Anti-Deficiency Act stated in relevant part:

> No Executive Department or other Government establishment of the United States shall expend, in any one fiscal year, any sum in excess of appropriations made by Congress for that fiscal year, or involve the Government in any contract or other obligation for the future payment of money in excess of such appropriations unless such contract or obligation is authorized by law. (Emphasis added)

Act of July 12, 1870, 16 Stat. 251, amended, Act of March 3, 1905, 33 Stat. 1257, as amended, Act of Feb. 27, 1906, 34 Stat. 49 (1906) (previously codified at Revised Statutes, § 3679 and 31 U.S.C. § 665). *See* 22 Comp. Gen. 774.

6. Public Law No. 77-354, the First War Powers Act, was enacted on 18 December 1941. Section 201 of that Act stated in relevant part: "The President may authorize any department . . . in accordance with regulations prescribed by the President . . . to enter into contracts [for prosecution of the war effort] . . . without regard to the provisions of law relating to the making, performance, amendment, or modification of contracts . . . ." Act of December 18, 1941, Pub. L. No. 77-354, § 201, 55 Stat. 838, 839 (1941).

7. By Executive Order No. 9001, President Roosevelt acting under the authority of Section 201 of the First War Powers Act ordered that the War Department and other named agencies "be and they hereby respectively are authorized within the limits of the amounts appropriated therefor to enter into contracts . . . without regard to the provisions of law relating to the making . . . of contracts" (emphasis added). 6 Fed. Reg. 6787 (Dec. 27, 1941). (R4, tab 66)

8. The Ordnance Department appropriations for the fiscal years from the award of Contract No. W-ORD-607 in FY 1942 through its termination and termination settlement agreement in FY 1946 (*see* Finding 11 below) were all for sums certain, and there is no evidence that the indemnity provision in the contract was otherwise authorized by law. *See* Act of June 30, 1941, Pub. L. No. 77-139, 55 Stat. 381 (1941); Act of January 30, 1942, Pub. L. No. 77-422, 56 Stat. 38 (1942); Act of April 28, 1942, Pub. L. No. 77-528, 56 Stat. 228 (1942); Act of July 2, 1942, Pub. L. No. 77-649, 56 Stat. 623 (1942); Act of July 1, 1943, Pub. L. No. 78-108, 57 Stat. 360 (1943); Act of June 28, 1944, Pub. L. No. 78-374, 58 Stat. 586 (1944); Act of December 22, 1944, Pub. L. No. 78-529, 58 Stat. 885 (1944); Act of July 3, 1945, Pub. L. No. 79-126, 59 Stat. 396-97 (1945).

9. On 1 July 1944, Congress enacted the Contract Settlement Act of 1944 (CSA). Section 20(a) of the CSA stated in relevant part:

> Each contracting agency shall have authority, notwithstanding any provisions of law other than contained in this Act, . . . (2) to amend by agreement any existing contract, either before or after notice of its termination, on such terms and to such extent as it deems necessary and appropriate to carry out the provisions of this Act; and (3) in settling any termination claim, to agree to assume, or indemnify the war contractor against, any claims by any person in connection with such termination claims or settlement. This subsection shall not limit or affect in any way any authority of any contracting agency under the First War Powers Act of 1941, or under any other statute.

Act of July 1, 1944, Pub. L. No. 78-395, § 20(a), 58 Stat. 668, now codified at 41 U.S.C. § 120(a).

10. On 13 December 1944, the parties entered into "Supplemental Contract" No. 10 to the W-ORD-607 contract. Supplemental Contract No. 10 extended the performance period to 18 December 1945, provided for various changes in the terms of performance, and otherwise reaffirmed the original terms of the contract. No change was made to the indemnity provision in Title VI-A(a). Supplemental Contract No. 10 stated that it was entered into under the authority of Public Law No. 76-703,[1] Public Law No. 77-354 (the

First War Powers Act) and Executive Order No. 9001. It made no reference to the CSA, and was not a termination settlement agreement for the contract. (Supp. R4, tab 13 at 1-3, 9)

11. On 15 August 1945, Contract No. W-ORD-607 was terminated for convenience. On 10 May 1946, the Government and NGC entered into a termination settlement agreement pursuant to the CSA. *See National Gypsum Co. v. Army*, No. 337, decided 19 January 1950, Vol. 5, page 43, Decisions of the Appeal Board, Office of Contract Settlement (OCS), GPO, 1953. Since the OCS Appeal Board decision quoted only those provisions of the agreement relevant to that decision, we requested the parties to search their records for a complete copy of the agreement. Both parties reported that they were unable to find it.

12. The quoted provisions in the OCS Appeal Board decision indicate that the settlement agreement followed the sample termination settlement agreement form at paragraph 983.1 of the Joint Termination Regulations (JTR). The only reference to indemnity provisions in that sample agreement was in the "suggested language" for an exception to the general release. That exception was for: "All rights and liabilities of the parties under the articles, if any, in the Contract applicable to . . . covenants of indemnity, . . ." JTR, paragraph 983.1, Article 4(c) and 4(c)(7).

13. In 1952, the plant was reactivated and was operated by other contractors as a munitions plant under Air Force and later under Navy contracts until it was closed in 1995 (R4, tab 2 at 101-10). On 17 September 1998, NGC was joined as a defendant in a suit filed by Mr. David Bubert in Texas state court against a local jurisdiction and prior operators of the plant. NGC and the other operators were alleged to have contaminated Mr. Bubert's property by negligent operation of the plant. (Supp. R4, tab 20 at 1, 8-9)

14. By letters dated 8 December 1998, 13 January and 10 February 1999, NGC notified the Government of the *Bubert* claim, requested "some level of settlement authority," and stated its intent to seek indemnity from the Government for any loss incurred (supp. R4, tabs 23, 24, 26). The Government did not respond until one week after the *Bubert* claim was settled on 24 May 1999 (supp. R4, tabs 27, 28, 30). On 2 June 1999, NGC submitted an indemnity claim to the Government in the amount of $21,586 for its costs of defending and settling the *Bubert* claim (supp. R4, tab 29).

15. By letter dated 27 October 2000, NGC notified the Government that it had been joined as a defendant in a second suit (the *Hollan* claim) for property damage allegedly arising from its negligent operation of the plant, and asserted a right of indemnity for any costs incurred on account of that claim (supp. R4, tab 42). By letter dated 3 November 2000, the contracting officer denied any indemnity obligation on either the *Bubert* or the *Hollan* claims (supp. R4, tab 43).

16. NGC appealed the 3 November 2000 letter as a final decision. On receipt of the appeal, we docketed the *Bubert* indemnity claim as ASBCA No. 53259 and dismissed the *Hollan* indemnity claim for lack of jurisdiction. *National Gypsum Company*, ASBCA No. 53259, 01-1 BCA ¶ 31,532. After submission to and denial by the contracting officer (app. 2d supp. R4, tab 6), the *Hollan* indemnity claim in the amount of $46,472.01, was again appealed and is now docketed as ASBCA No. 53568.

DECISION

The Government argues for the first time, that these appeals must be dismissed because "the Board lacks authority to hear First War Powers Act claims," citing *inter alia* *Apemco, Inc.*, ASBCA No. 9942, 65-2 BCA ¶ 5131 at 24,156-57, and because the claims are time barred under the rule in *Fogarty v. United States*, 340 U.S. 8 (1950) (Gov't 2nd Rule 11 br. at 7, 11). The claims in *Apemco* and *Fogarty*, however, were claims to the contracting agency to exercise its discretionary powers under section 201 of the First War Powers Act, and its successor Public Law No. 85-804, to modify the contracts at issue in the claimant's favor without regard to other provisions of law. NGC's claims are not claims for discretionary modifications, but claims of legal right based on the existing terms of the contract. As such, and having been properly submitted to the contracting officer for decision and properly appealed, they are within our subject matter jurisdiction under section 8, 41 U.S.C. § 607, and section 16 of the Contract Disputes Act of 1978, and are not subject to the time-bar in *Fogarty*. *See* Pub. L. No. 95-563, §§ 8 and 16, 92 Stat. 2385, 2391; *Federal Electric Corp.*, ASBCA No. 9476, 65-1 BCA ¶ 4747 at 22,573, n. 5.

The indemnity provision in Title VI of NGC's contract purported to impose on the Government a contingent obligation to pay money in the future in an unlimited amount. This open-ended indemnity provision was in violation of an express limitation on the contracting agency's authority in the Anti-Deficiency Act and in Executive Order No. 9001, and NGC has no legal right to indemnification under that provision. *California-Pacific Utilities Company v. United States*, 194 Ct. Cl. 703, 715, 719 (1971); *Union Pacific Railroad Corp. v. United States*, 52 Fed. Cl. 730 (2002), 62 Comp. Gen. 361 (1983).

The Anti-Deficiency Act in effect at the time that purported obligation was entered into and when it was subsequently renewed in Supplemental Contract No. 10, expressly prohibited an obligation in any fiscal year for the future payment of money in excess of the appropriations made by Congress for that fiscal year unless otherwise authorized by law. *See* Finding 5 above. The Ordnance Department appropriations for the fiscal years from the award of the contract to its termination and termination settlement agreement were all for sums certain, and there is no evidence that the indemnity provision in the contract was otherwise authorized by law. *See* Finding 8 above. To the extent the First War Powers Act gave the President the discretionary authority to waive the Anti-Deficiency Act with respect to war contracts, he elected not to do so in Executive Order No. 9001. *See* Findings 6 and 7 above.

Cadillac Fairview/California, Inc. v. Dow Chemical Co., 299 F.3d 1019 (9th Cir. 2002), cited by appellant, is inapposite. The indemnity agreement in *Cadillac* was entered into pursuant to Executive Order No. 9246 which did not include the "within the limits of the amounts appropriated therefor" term that was included in Executive Order No. 9001. Moreover, Executive Order No. 9246 expressly provided that it superseded any conflicting provision in any other Executive Order to the extent of such conflict. 7 Fed. Reg. 7379 (Sept. 19, 1942).

NGC argues that the Anti-Deficiency Act defense is an affirmative defense which the Government waived in these appeals when it failed to plead it in its answers. Under Board Rule 7, we have discretion to permit amendment of the pleadings upon conditions fair to both parties. After the Government raised the Anti-Deficiency Act defense for the first time in its main brief, and appellant responded in its reply brief, we requested and the parties submitted supplementary main and reply briefs specifically addressed to that issue. We consider that the parties have had fair opportunity to be heard on the defense, and consider the pleadings amended accordingly.

NGC alleges that the Government explicitly represented on the face of the contract that its "obligations" were chargeable to procurement authorities, "the available balances of which are sufficient to cover the cost of the same" (app. supp. reply br. at 3). We disagree. The statement to which NGC refers does not state that the Government's "obligations" were chargeable to the cited authorities. It states that "the equipment, services and supplies to be obtained by this instrument" were chargeable to those authorities. *See* Finding 2 above.

NGC refers to the statement on the cover page of the contract that the contract was authorized by Public Law No. 77-354 and Executive Order No. 9001, and to the recital at page 4 that the contract was "authorized by law." NGC argues that "[t]hese assurances, within the contract, in and of themselves, override the [Act's] prohibition against contracts in excess of appropriated funds" (app. supp. reply br. at 4). We disagree. Assuming *arguendo* that the cited statements could have been reasonably understood as applicable to the indemnity provision, the Government is not estopped by the representations or assurances of its agents, whether intentional or unintentional, that have the effect of nullifying a statutory requirement or are contrary to an express authority limitation affecting payment of money from the Treasury. This rule is applicable in cases of alleged contractual entitlement as well as in cases of alleged statutory entitlement. *See OPM v. Richmond*, 496 U.S. 414 (1990); *Johnson Management Group CFC, Inc. v. Martinez*, No. 01-1145, 2002 U.S. App. LEXIS 21657 (Fed. Cir. Oct. 17, 2002); *Harbert/Lummus Agrifuels Projects v. United States*, 142 F.3d 1429, 1433 (Fed. Cir. 1998), *cert. denied*, 525 U.S. 1177 (1999); *Total Medical Management, Inc. v. United States*, 104 F.3d 1314, 1321 (Fed. Cir. 1997), *cert. denied*, 522 U.S. 857 (1997); *CACI, Inc. v. Stone*, 990 F.2d 1233, 1236 (Fed. Cir. 1993); *City of Alexandria v. United States*, 737 F.2d 1022, 1027-28 (Fed. Cir. 1984); *Prestex, Inc. v. United States*, 320 F.2d 367, 371 (Ct. Cl. 1963).

NGC argues that, if the assurances of authority in the contract were incorrect, as applied to the indemnity provision, "the Government would still be liable under the principle of fraudulent inducement" (app. supp. reply br. at 4, n. 2). From its cited support for this proposition, *Shaboon v. Duncan*, 252 F.3d 722, 735 (5th Cir. 2001), NGC appears to be asserting a tort claim. We have no jurisdiction over tort claims,[2] and decline NGC's request to "fully present, including briefing, the Government's fraudulent inducement" (app. supp. reply br. at 4, n. 2).

We also have considered whether the 10 May 1946 termination settlement agreement contained a promise of indemnity enforceable under the CSA. The CSA gave the contracting agency authority, "notwithstanding any provisions of law other than contained in this Act," to "indemnify the war contractor against, any claims by any person in connection with such termination claims or settlement." *See* Finding 9 above. There is no evidence, however, that the settlement agreement contained a new or renewed promise of indemnity. Assuming that it included the sample exception to the general release for "All rights and liabilities of the parties under the articles, if any, in the Contract applicable to . . . covenants of indemnity," that exception did not constitute a new or renewed promise of indemnity independent of the indemnity provision in the terminated contract. *See* Finding 12 above.

The appeals are denied.

Dated: 25 October 2002

MONROE E. FREEMAN, 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

NOTES

[1] Public law 76-703, Act of July 2, 1940, 54 Stat. 712, authorized various expenditures "out of the moneys appropriated for the War Department." It contained no authority for an indemnity provision in an unlimited amount.

[2] The Federal Tort Claims Act excludes claims against the Government for "misrepresentation" and "deceit." *See* 28 U.S.C. § 2680(h). This exclusion was noted by the Supreme Court in *OPM v. Richmond, supra*, with the comment that it would "be most hesitant to create a judicial doctrine of estoppel that would nullify a congressional decision against authorization of the same class of claims." 496 U.S. at 430.

I certify that the foregoing is a true copy of the Opinion and Decision of the Armed Services Board of Contract Appeals in ASBCA Nos. 53259, 53568, Appeals of National Gypsum Company, rendered in conformance with the Board's Charter.

Dated:

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