ARMED SERVICES BOARD OF CONTRACT APPEALS

Appeals of --	)	
	)	
Northrop Grumman Corporation	)	ASBCA Nos. 52785, 53699
	)	
Under Contract No. N00024-92-C-6300	)	

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OPINION BY ADMINISTRATIVE JUDGE DICUS ON
APPELLANT'S MOTION FOR SUMMARY JUDGMENT (ASBCA No. 52785)
and PARTIAL SUMMARY JUDGMENT (ASBCA No. 53699)

Northrop Grumman Corporation (Northrop) has moved for summary judgment and partial summary judgment,[1] asserting that, due to deficiencies in the pricing of the Navy's claim "the Navy cannot prove causation—an essential element of entitlement" (mot. at 1). Northrop contends, in effect, that the Navy's claim is on a total cost basis, which is strongly disfavored by the courts, and that the Navy cannot meet the threshold requirements imposed by case precedent. The appeals at issue are two of several arising from a contract between Northrop and the Navy for transducers. These appeals concern, *inter alia*, a $7,742,125 Navy claim under the warranty clause and Northrop's subsequent payment of that claim plus interest. We deny the motion.

STATEMENT OF FACTS FOR PURPOSES OF THE MOTION ONLY

On 11 September 1992 the Navy entered into Contract No. N00024-92-C-6300 with Westinghouse Electric Corporation, which was subsequently acquired by Northrop. The fixed price of the contract at award was $143,233,987. (R4, tab 1; complaint and

answer, ¶ 9, ASBCA No. 52785) The contract was for production of the AN/SQQ-89(V) system and associated equipment, which included production of TR-343 sonar transducer array assemblies ("transducers") (complaint and answer, ¶ 9, ASBCA No. 52785). Included in the contract were the following relevant clauses: FAR 52.233-1 DISPUTES (DEC 1991) - ALTERNATE I (DEC 1991); FAR 52.243-1 CHANGES--FIXED PRICE (AUG 1987); FAR 52.246-2 INSPECTION OF SUPPLIES - FIXED-PRICE (JUL 1985) ("the inspection clause"); FAR 52.246-18 WARRANTY OF SUPPLIES OF A COMPLEX NATURE (APR 1984) (NAVSEA VARIATION) (OCT 1990) (MODIFIED) (MAY 1992) ("the warranty clause"). (R4, tab 1, Bates No. (BN) 108-27, 133-36)

By letter of 24 February 1997 the contracting officer informed Northrop that, according to the Navy, a high failure rate of transducers, caused by leaks, had been observed and that the failures were Northrop's fault. Pursuant to the warranty and inspection clauses, the contracting officer directed Northrop to take certain corrective actions. (R4, tab 412) Thereafter, by letter of 2 July 1997 the Navy advised Northrop "it has become evident to the Navy that the paint on the [Northrop] produced TR-343 transducers was not properly adhering to the interior and exterior metal surfaces of the transducer housing (tube assembly)." The letter directed Northrop, under the warranty clause to "[r]emove all TR-343 transducer tube assemblies and arrange to have the paint stripped and reapplied . . . ." (R4, tab 593 at 1, 4) Both the Navy and Northrop stripped and repainted transducer tubes (app. Statement of Undisputed Facts (SUF), ¶ 3; Navy resp. at 17).

By letter of 28 October 1999 the Navy sent Northrop an expression of intent to file a claim against Northrop for a breach of the warranty clause (mot. ex. 2). Thereafter, a contracting officer's decision was issued seeking damages of $7,742,125 under the warranty clause. The decision alleges, among other things, that Northrop's workmanship was deficient and not in conformance with drawings and specifications. It asserts that various activities undertaken by the Navy in conjunction with the transducer failures resulted in costs to the Navy. (R4, tab 2342) It is not disputed that the Navy undertook tests and analyses to discover the cause of the alleged failures (*e.g.*, complaint and answer, ¶ 36) or that certain remanufacturing work on allegedly defective transducers was done by the Navy at a Navy facility (complaint and answer, ¶ 36).

Northrop has submitted various exhibits to support its position that it is entitled to judgment because the Navy cannot show causation with respect to the costs it has assessed against Northrop. Northrop cites to deposition testimony from Navy employee Lawrence Camillo,[2] who pulled together costs in the Navy's claim (mot. ex. 4 at 45). According to Northrop, Mr. Camillo's deposition testimony (*id*. at 108, 109, 111, 112, 141, 379, 380, 384, 397, 398, 443, 455), establishes that the Navy used a total cost approach to damages and summarily "rolled-up" all costs from all transducer related activities and then charged the costs to Northrop in the contracting officer's decision (app. SUF, ¶¶ 5-11, 16, 17). Northrop offers other deposition testimony of Mr. Camillo (mot. ex. 4 at 62, 108, 111, 112, 151, 173, 195, 227, 228, 231, 267, 270, 275, 298, 299) which Northrop interprets as

establishing that the Navy's cost accounting system does not operate with sufficient detail to segregate costs effectively, and that Mr. Camillo believes certain costs in the claim are neither proper nor reasonable (app. SUF, ¶¶ 18-19).

The Navy has also cited to the deposition testimony of Mr. Camillo presented in Northrop's exhibits, provided additional deposition pages (resp. ex. C) and provided a declaration from Mr. Camillo (resp. ex. B). According to the Navy, testimony on p. 380 of app. ex. 4, a page cited by Northrop, establishes that Mr. Camillo verified at least some of the relevant cost data independently of the Navy's accounting system, as follows:

> So what we did was we went out to Crane, went through all their [customer order numbers] relative to this, and all their cost centers to verify that yes indeed this was transducer work . . . directly attributable to this claim . . . .

According to Mr. Camillo's declaration, his 5 December 2002 report (R4, tab 2344) addresses eight areas of impact which he personally reviewed and found to be accurate. Under the "Shipyards" tab of the report, for example, there are extra costs listed as paid for removal and installation of the transducers at issue (resp. ex. B at 2). That tab includes contracts with other contractors which, in combination with Mr. Camillo's deposition testimony and the declaration, could, if believed, document and thus place in issue actual costs incurred by the Navy (resp. exs. B, C; R4, tab 2344).

DECISION

The Parties' Positions

Northrop argues that the Navy's record-keeping was so deficient that it cannot meet its burden of proof on causation. According to Northrop, summary judgment is therefore appropriate. The Navy counters that it has documented actual costs and that, in any event, Northrop has not met its burden of proof as the moving party. We deny the motion.

Summary Judgment Standards

Summary judgment is appropriate where no material facts are genuinely in dispute 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). A material fact is one which may affect the outcome of the case. *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242 (1986). The dispute about a material fact must be genuine - "that is, if the evidence is such that a reasonable [trier of fact] could return a verdict for the nonmoving party." *Id.* at 248. Inferences must be drawn in favor of the party opposing summary judgment. *Hughes Aircraft Co.*, ASBCA No. 30144, 90-2 BCA ¶ 22,847. In deciding a motion for summary judgment, we are not to resolve factual disputes, but to ascertain whether material disputes

of fact are present. *General Dynamics Corp.*, ASBCA Nos. 32660, 32661, 89-2 BCA ¶ 21,851. Summary judgment may be denied if "there is reason to believe that the better course would be to proceed to a full trial." *Anderson*, 477 U.S. at 255.

Resolution of the Parties' Positions

The proponent of a claim bears the burden of proof. *Sphinx International Inc.*, ASBCA No. 38784, 90-3 BCA ¶ 22,952. That burden requires proof of liability, causation, and resultant injury. *Electronic and Missile Facilities, Inc. v. United States*, 416 F.2d 1345, 1355 (Ct. Cl. 1969). Northrop correctly states that where a Government claim is involved, the Government is held to the same standards as contractors when it comes to proving its claim: "[T]he Navy must establish, in addition to establishing that Northrop Grumman is responsible for the problems associated with the allegedly defective transducers, 'the fundamental facts of causation and injury.' *Southeastern Services, Inc.*, ASBCA No. 21278, 78-2 BCA ¶ 13,239."[3] (App. mot. at 9) Only entitlement is at issue here. Nonetheless, where causation cannot be shown, it may be sufficient to defeat the claim. *Boyajian v. United States*, 423 F.2d 1231, 1235 (Ct. Cl. 1970) ("Recovery of damages for a breach of contract is not allowed unless acceptable evidence demonstrates that the damages claimed resulted from and were caused by the breach.").

Northrop cites *Doninger Metal Products Corp. v. United States*, 50 Fed. Cl. 110 (2001). In that case a Government motion for summary judgment was sustained where the contractor could not prevail on the version of the facts it presented:

> In cases such as this one, in which there is no indication that additional testimony or documentation would be available to the plaintiff at trial and in which the record before the court could not lead a rational trier of fact to find for the nonmoving party, award of summary judgment to the defendant at this time is appropriate.

Id. at 140. In *Doninger* deposition testimony established that neither of Doninger's proposed witnesses could explain how the amounts claimed were developed and summaries presented were not supported by source documents. It was, therefore, not possible for Doninger to prove actual costs and total costs were unverifiable. *Id.* at 138-39. The Court noted that the plaintiff had already been paid $104,372 by the contracting officer and the plaintiff admitted that the documents on which that award was based had been misplaced. The Court observed that to increase the award "a liability finding in this court would have to be based on even less primary documentary evidence than was available to the government auditors and the contracting officer." *Id.* at 139. Since use of the alternative jury verdict method required a clear finding of liability, that alternative was foreclosed. *Id.* The arguments advanced by Northrop include the contention that, similar to *Doninger*, the

damages flowing from the alleged breach cannot be validated from the Navy's total cost approach, with the result that causation cannot be established. We disagree.

Because we are solely deciding entitlement, the Navy need only place genuinely in issue the proposition that "liability is not academic, that some damage had been incurred." *Cosmo Construction Co. v. United States*, 451 F.2d 602, 606 (Ct. Cl. 1971). Where liability is clear and a fair and reasonable approximation is possible, it is "legal error for the board to fail to enter an award for damages in the nature of a jury verdict." *S. W. Electronics & Manufacturing Corp. v. United States*, 655 F.2d 1078, 1088 (Ct. Cl. 1981). In that case, a jury verdict award was granted even though the contractor failed to support either an actual cost or a total cost claim. Therefore, following this line of precedent, to grant Northrop's motion we must be persuaded that the Navy has not genuinely placed in issue Northrop's liability for any of the costs of the warranty work. As we interpret the basis of Northrop's arguments, we would have to be convinced, drawing all reasonable inferences for the Navy, that the Navy had failed to establish there is a genuine issue that it suffered some money damage as a result of Northrop's allegedly deficient performance.

The genesis of the Navy's claim is found in the allegation that transducers produced by Northrop under the contract failed while still covered by the warranty clause. Northrop's alleged failure to perform in accordance with contractual requirements, and thus liability, would be proved through evidence such as the results of testing, independent of cost data supporting damages. It is undisputed that there were tests and a reasonable trier of fact could find that performance deficiencies and resultant liability were clearly established by test evidence. There is, therefore, a genuine issue as to liability. As to causation, it must be established by a demonstration that some damages resulted from Northrop's allegedly deficient performance. *Cosmo Construction Co. v. United States, supra; Boyajian v. United States, supra.* In this regard, the Navy has provided a declaration and deposition testimony from Mr. Camillo, who was responsible for developing the costs at issue in the claim. That evidence and the tab 2344 report, with its supporting documentation, could lead a reasonable trier of fact to find that damages in the form of verifiable costs for removal and installation of transducers resulted from Northrop's allegedly deficient performance. Genuine and material issues are thereby presented, and that is all that the Navy needs to establish to defeat Northrop's motion. *Cosmo Construction Co. v. United States, supra.* Accordingly, Northrop's motion is denied.

Dated: 11 June 2003

CARROLL C. DICUS, 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] The motion, filed 18 March 2003, originally involved only ASBCA No. 53699. However, that appeal was filed as an "omnibus" appeal, incorporating issues raised in three pre-existing Northrop appeals - ASBCA Nos. 52178, 52784 and 52785. Therefore, if the Board granted the motion it would not have disposed of ASBCA No. 53699. It would, however, have disposed of ASBCA No. 52785. By Order of 28 April 2003 the Board reminded the parties of this and informed them that, unless objection was received within five days, the motion would be treated as for summary judgment in ASBCA No. 52785 and for partial summary judgment in ASBCA No. 53699. No objection was received.

[2] Both parties have cited to portions of Mr. Camillo's deposition. The complete deposition is not in the record.

[3] Liability was conceded in that case.

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. 52785, 53699, Appeals of Northrop Grumman Corporation, rendered in conformance with the Board's Charter.

Dated:

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