ARMED SERVICES BOARD OF CONTRACT APPEALS

Appeals of --	)	
	)	
Fru-Con Construction Corporation	)	ASBCA Nos. 53544, 53794
	)	
Under Contract No. DACW69-93-C-0022	)	

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OPINION BY ADMINISTRATIVE JUDGE PARK-CONROY

At issue are appellant's motions to strike the Government's affirmative defenses raised in ASBCA No. 53544 and for summary judgment in ASBCA No. 53794, both of which have been opposed by the Government. The motions address the Government's claim that it is due "credits and savings" of 1,510 days and $9,891,149.40 for permitting the use of a second set of bulkheads and 174 days and $1,139,775.80 for deleting the installation of poiree dams and related changes. We deny both motions.

FINDINGS OF FACT FOR PURPOSES OF THE MOTIONS

On 18 June 1993, the Government awarded appellant Contract No. DACW69-93-C-0022 in the amount of $35,582,600.20 to rehabilitate the locks and refurbish the roller gates of the Robert C. Byrd Locks and Dam (the Byrd Dam) on the Ohio River, near Hogsett, West Virginia (R4, tab D-1). The Byrd Dam consists of eight separate roller gates extending across the Ohio River. Each of the gates is bracketed between pier houses which raise and lower the gates. (ASBCA No. 53544, compl., answer, ¶ 12) The contract provided 1,850 days for contract work. The completion date was to be 12 August 1998. (Mot. to strike, ex. 2) The completion date was extended a number of times, the last, via bilateral Modification No. P00137, to 8 June 2000 (mot. to strike, ex. 5).

Appellant subcontracted work involving the installation of the eight roller gates and painting to Noell, Inc. (Noell) for a lump-sum price of $8,700,000.00 (ASBCA No. 53544, compl., answer, ¶ 5).

The contract contained the standard FAR 52.243-4 CHANGES (AUG 1987) clause and a special clause, H.9 52.212-0005 LIQUIDATED DAMAGES – CONSTRUCTION (APR 1984), which specified liquidated damages in the amount of $3,500.00 per day if appellant failed to complete the contract work within the time specified or any extension, if the Government terminated appellant's right to proceed until such reasonable time as required to complete the work, or, if the Government did not terminate the contractor's right to proceed, until the work was completed or accepted (R4, tab D-1).

Paragraph 1, SCOPE, of DIVISION 16 - ELECTRICAL, SECTION 16D - MOTORS, BRAKES AND LOCAL CONTROL EQUIPMENT, of the specifications provided:

> . . . Only one gate bay at a time will be released for construction activities. Each gate bay must be totally complete and operational before a successive gate bay will be released to the Contractor.

(R4, tab D-1) Appellant alleges that it planned to proceed with the work sequentially from Gate 1 to Gate 8, completing all of the activities for one gate before proceeding to the next (ASBCA No. 53544, compl. ¶ 14). Beginning 7 October 1997, however, the Government permitted appellant to use a second set of bulkheads, allowing it to work on two gates at the same time, with certain restrictions (mot. to strike, ex. 1 at 33).

The specifications required that each gate bay was to be dewatered by means of an upstream bulkhead and a downstream poiree dam prior to performance of specified work activities (ASBCA No. 53544, compl., answer, ¶ 20). By a letter dated 12 August 1994, however, the Government advised appellant that installation of the poiree dams would be deleted from the contract due to safety concerns that developed during testing of the poiree anchorages in gate bay number one (R4, tab F-9).

Despite numerous attempts to negotiate the cost and schedule impacts associated with the bulkhead and poiree dam changes to the contract work, the parties were unable to reach agreement on contract modifications (opp. to mot. to strike, exs. 6 through 11).

On 28 December 2000, appellant submitted a Request for Equitable Adjustment (REA) seeking a contract extension of 733 days and $5,987,069. As is relevant to the pending motions, the REA asserted that the deletion of the poiree dams required Noell to perform extra and re-sequenced work and delayed Noell by forcing it to perform work in the "wet" which it had planned to perform in a "dry" dewatered condition. The REA also

provided a credit of 116 days and $598,326.00 to the Government for the reduction in the contract schedule resulting from the Government's authorization to use the second set of bulkheads. (R4, tab C-1)

The contracting officer did not respond to the REA and appellant, by a letter dated 24 May 2001, converted the REA into a claim and requested a contracting officer's final decision (R4, tab G-25). When no final decision was issued, appellant filed an appeal from a deemed denial of its claim. The appeal was docket as ASBCA No. 53544 on 26 September 2001.

Paragraphs 64 and 65 of the Government's answer to the complaint in ASBCA No. 53544 refer to a contracting officer's final decision issued on 11 February 2002, which denies appellant's claim and demands payment of $11,030,924 in "credits and savings." The decision is lengthy and detailed and analyzes the findings of appellant's delay expert and explains the basis of the Government's claims and demand. It asserts that the deletion of the poiree dams and associated changes resulted in a 174-day net credit to the Government and a savings of $1,139,775.80. It also asserts that permitting appellant to use the second set of bulkheads resulted in a 1,510-day credit to the Government and a savings of $9,891,149.40. Paragraphs 64 and 65 of the Government's answer characterized these "credits and savings" as "COUNTERCLAIMS." (Mot. to strike, ex. 1)

On 6 March 2002, the Board ordered the Government to show cause why the Board should not strike the counterclaims from the Government's answer (opp. to mot. to strike, ex. 2). The Government responded on 10 April 2002, with a motion to amend the answer by "changing the label 'COUNTERCLAIMS' to read 'Affirmative Defenses and Defenses.'" The motion explained that paragraphs 64 and 65 of the answer were statements of the Government's "expected defenses and affirmative defenses" and that, once appellant had appealed the "Government's affirmative claims" and the two appeals were consolidated, the issue would be moot. (Opp. to mot. to strike, ex. 1 at 1, 4) Appellant did not oppose the Government's motion to amend and it was granted on 23 April 2002 (*id*., ex. 3).

Thereafter, appellant filed a timely appeal from the contracting officer's 11 February 2002 final decision and demand. The appeal was docketed as ASBCA No. 53794 and consolidated with ASBCA No. 53544. Appellant's motion to strike the Government's affirmative defenses in ASBCA No. 53544 was filed on 5 November 2002; its motion for summary judgment in ASBCA No. 53794 was filed on 4 April 2003.

The record contains a copy of the narrative portion of the report of the Government's delay expert dated 14 March 2003. The report analyzes the extended duration of the contract performance by means of ten adjusted schedules that purport to illustrate the impact of controlling delays on achieving contract completion. (Mot. for summ. j., ex. 1) A single page excerpt from the deposition of Government employee, Mr. Michael A. Presley, placed in the record by appellant suggests that the Government's

claim for deletion of the poiree dams should only be approximately $100,000.00 (mot. for summ. j., ex. 2). Other evidence reflects that the same employee projected savings of 792 days and over $9 million from use of the second set of bulkheads (opp. to mot. to strike, ex. 9 at 3, 4).

According to the declaration of Noell's site and, later, project manager, Mr. George Pagnotta, if Noell had known that the Government would assert "an illogical and grossly disproportional penalty (exceeding by almost half again the original amount of Noell's *entire* $8.7 million contract with Fru-Con), Noell would not have accepted the second set of bulkheads and would have pursued other less costly alternatives" (mot. for summ. j., ex. 4 at ¶ 10). He goes on to state that Noell relied upon statements made by the Government that any credit associated with use of the bulkheads would be fair and reasonable and was so interrelated with the deletion of the poiree dams "that a separate settlement of either issue would be incomplete" (*id*. at ¶ 12).

Excerpts of Mr. Pagnotta's deposition, however, also establish that he did not make the decision to use the second set of bulkheads and that he does not know what his superiors relied upon in deciding to use them (opp. to mot. for summ. j., ex. 12 at 131-32). The declaration of Mr. Ronald H. Kaye, Noell's Chief Executive Officer and Director, also does not explain who made the decision to use the second set of bulkheads and what facts were relied upon (mot. for summ. j., ex. 5. at ¶¶ 1, 5).

Noell settled a claim asserted by its painting subcontractor, W.R. Mollohan (Mollohan), in December 1998, which Mr. Kaye declares was based upon the "reasonable belief that since the Government had not asserted any claims against Noell in connection with Noell's performance of the contract, the Government would not do so long after Noell's performance was completed" (mot. for summ. j., ex. 5 at ¶ 6, attach. 1). No details of the dispute between Noell and Mollohan are provided by appellant, however, the Government came forward with evidence that Fru-Con considered Noell to be in default and, on 10 November 1996, began withholding payments to it (opp. to mot. for summ. j., exs. 6, 8).

Mr. Donald Larson, who was either Fru-Con's project manager or its construction manager, from 1993 to 1998, died on 1 February 1999 (mot. for summ. j., ex. 5 at ¶ 7; opp. to mot. for summ. j., ex. 13). The Rule 4 files contain voluminous records of contract performance, photographs, deficiency reports, daily quality assurance reports, quality control reports, and correspondence.

DISCUSSION

Appellant's motions in both ASBCA Nos. 53544 and 53974 assert that the Government's affirmative defenses seek actual damages, liquidated damages and/or completion costs which are not recoverable under the contract, and that the affirmative

defenses are untimely and have been waived. In ASBCA No. 53974, it further asserts that it has been prejudiced by the Government's failure to assert its claims within a reasonable period of time and that the claims have no merit.

The Government's oppositions to the motions contend that it is "not asserting a claim, affirmative claim, or counterclaim" or "monetary consideration" in ASBCA No. 53544, and that its affirmative claims are asserted in ASBCA No. 53974. It argues that appellant's motion to strike is untimely, that the Government is not required to give appellant notice of either a Government claim or its defenses, that, in any event, appellant was aware of the Government's claims and refused to reestablish negotiations, and that appellant has not established prejudice. Finally, it asserts that there are material facts in dispute relating to the merits of its claims which preclude summary judgment in ASBCA No. 53794.

The Board's rules of practice do not specifically address motions to strike, and we are guided by the Federal Rules of Civil Procedure. *Nero and Associates, Inc.*, ASBCA No. 30369, 86-1 BCA ¶ 18,579. Paragraphs 64 and 65 of the Government's answer in ASBCA No. 53544 do not raise the kind of affirmative defenses addressed by FED. R. CIV. P. 8(c). They do, however, raise defenses to appellant's claims. Thus, we agree with the Government that, as in *Danac, Inc.*, ASBCA Nos. 30227, 33394, 88-3 BCA ¶ 20,993, the motion to strike should be viewed as one to strike an insufficient defense under FED. R. CIV. P. 12(f). Such a motion is to be filed within 20 days after service of the pleading. Under FED. R. CIV. P. 12(f), appellant's motion to strike is untimely.

In any event, the standards applicable to striking a defense and those applicable to summary judgment are stringent. Motions to strike a defense must be denied unless we are satisfied that "there are no questions of fact, that any questions of law are clear and not in dispute, and that under no set of circumstances could the defense succeed." *Danac*, 88-3 BCA at 106,071-72, *quoting Carter-Wallace, Inc. v. Riverton Laboratories, Inc.*, 47 F.R.D. 366, 368 (S.D.N.Y. 1969). "These narrow standards are designed to provide a party the opportunity to *prove* his allegations if there is the possibility that his defense or defenses may succeed after a full hearing on the merits." *Id.* at 106,071, *quoting id*.

Motions for summary judgment must be denied unless there are no material facts in dispute and we are satisfied that 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). Inferences must be drawn in favor of the opposing party. *Hughes Aircraft Co*., ASBCA No. 30144, 90-2 BCA ¶ 22,847.

The contracting officer's 11 February 2002 final decision asserts Government claims for "credits and savings." Appellant characterizes them as claims for actual costs, liquidated damages and/or completion costs, arguing that they are not recoverable under the liquidated damages provision of the contract. The argument on this point is not only

convoluted, it also ignores both the Changes clause of the contract, which authorizes deductive changes, and the Government's right to assert claims against contractors and its common law right to setoff. 41 U.S.C. § 605(a); *see Applied Companies v. United States*, 144 F.3d 1470, 1476 (Fed. Cir. 1998).

Both appellant's and the Government's claims concern the impact to the construction work resulting from the Government's decisions to delete the requirement for poiree dams and to permit the contractor to use two sets of bulkheads. As is obvious, there are factual issues as to whether the duration of the project was increased or decreased, and by how many days, as the result of the Government's changes which preclude granting either of appellant's motions. We cannot say on this record that the Government's defenses could not succeed under any set of circumstances or that appellant is entitled to judgment as a matter of law on the Government's claims.

We are also not persuaded that the Government's defenses and claims are untimely or that appellant has been prejudiced. First, there is no prerequisite for the Government to give prior notice before asserting a claim in a contracting officer's decision. *Reflectone, Inc. v. Dalton*, 60 F.3d 1572 (Fed. Cir. 1995) (*en banc*); *Eurasia Heavy Industries, Inc.*, ASBCA No. 52878, 01-2 BCA ¶ 31,574. Whether there was a sufficiently unreasonable delay on the part of the Government in asserting its defenses and claims under this contract such that the doctrine of estoppel by waiver can be established involves questions of fact which are unique to the circumstances of this case and which have not been satisfactorily addressed by appellant.

Appellant relies upon two early Board cases, *Lindwall Construction Co.*, ASBCA No. 23148, 79-1 BCA ¶ 13,822 and *A. E. Gibson Company & Amulco Asphalt Company, Joint Venture*, ASBCA No. 13307, 70-1 BCA ¶ 8289, and a Court of Claims decision, *Joseph H. Roberts v. United States*, 357 F.2d 938, 946 (Ct. Cl. 1966), to support its contentions of waiver and estoppel. While these cases do stand generally for the proposition that there may be circumstances in which the Government has unreasonably delayed in asserting a claim, appellant has not persuaded us that these cases are applicable to the facts of this case, as presented in its motions. Moreover, appellant made no attempt to show that the traditional elements of equitable estoppel against the Government are present. *See Burnside-Ott Aviation Training Ctr., Inc. v. United States*, 985 F.2d 1574, 1581 (Fed. Cir. 1993).

Further, the evidence appellant relies upon in response to the Government's contention that it must show prejudice under our decision in *World Wide Tankers, Inc.*, ASBCA No. 20903, 87-1 BCA ¶ 19,397, was wanting. The support offered for the contention that Noell would not have agreed to use the second set of bulkheads consists of the declarations of individuals who did not make the decision to use the bulkheads. Further, the declarations do not provide any real details about the facts and circumstances leading up to the agreement. Similarly, there are no evidentiary details supporting the broad statement

that Noell would not have settled Mollohan's claim if it had known of the Government's claims. Moreover, the Government's evidence that Fru-Con considered Noell to be in default and began withholding payments raises questions not only about the reasons for the settlement, but also as to whether there is any causal connection with the Government's claims. And, finally, any prejudice associated with the fact that Mr. Larson cannot testify at the trial is diminished by the availability of voluminous Rule 4 files recording the events that occurred.

Appellant's final contention is that the Government's claims have no merit. Appellant asserts that there is no merit to the bulkhead claim because the Government's expert did not address the impact of using the second set of bulkheads and, also, that the Government's expert's report is flawed. It further asserts that the Government's expert's estimate does not support the Government's claim. The Government offers excerpts of deposition testimony and other documentary evidence that it argues demonstrates the merits of its claims and further asserts that, contrary to appellant's contentions, its expert report does address the bulkhead claim, finding a schedule savings of 2,140 days.

Relying upon the deposition testimony of the Government's resident engineer, appellant further asserts that the quantum of the Government's poiree dam claim is only approximately $100,000.00. The Government responds that the deponent in question is not the resident engineer, but rather is a civil engineer whose testimony has been taken out of context and offers other arguments and evidence about the merits of appellant's poiree dam claim.

In our view, the nature of the claims asserted by both appellant and the Government make ASBCA No. 53794 a particularly unlikely candidate for summary judgment. When we draw all inferences in favor of the Government, the only possible conclusion we can reach is that there are genuine issues of material fact associated with the merits of the Government's claims and that the Government should be permitted to present its supporting evidence, including that of its expert witness, at a full hearing. We will not conclude on the basis of the present record that the report of the Government's delay expert is flawed. Nor will we conclude that the bulkhead claim should only be valued at about $100,000.00 from a single page of the deposition transcript of a single witnesses, irrespective of whether the testimony is taken out of context as the Government asserts.

CONCLUSION

Appellant's motion to strike the defenses raised in paragraphs 64 and 65 of ASBCA No. 53544 is denied. Appellant's motion for summary judgment in ASBCA No. 53794 is likewise denied.

Dated: 6 June 2003

CAROL N. PARK-CONROY
Administrative Judge
Armed Services Board
of Contract Appeals

I concur

I concur

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

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 Nos. 53544 and 53794, Appeals of Fru-Con Construction Corporation, rendered in conformance with the Board's Charter.

Dated:

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