ARMED SERVICES BOARD OF CONTRACT APPEALS

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| Appeals of -- | ) | |
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| Eaton Contract Services, Inc. | ) | ASBCA Nos. 52888, 54054, 54055 |
| | ) | |
| Under Contract Nos. DACW01-94-C-0185 | ) | |
| DACA21-95-C-0165 | ) | |
| DACA21-96-C-0009 | ) | |

APPEARANCE FOR THE APPELLANT: Mr. Glen L. Eaton
President

APPEARANCES FOR THE GOVERNMENT: Thomas H. Gourlay, Jr., Esq.
Engineer Chief Trial Attorney
Susan K. Weston, Esq.
Connie L. Baran, Esq.
Engineer Trial Attorneys
U.S. Army Corps of Engineers,
Savannah

OPINION BY ADMINISTRATIVE JUDGE PAGE
ON THE GOVERNMENT'S MOTIONS FOR PARTIAL SUMMARY JUDGMENT

Eaton Contract Services, Inc. (ECS or appellant) appealed the denial of claims in each of the subject contracts alleging, *inter alia*, material breach of contract.[1] Appellant

[1] Familiarity with the Board's previous decisions and rulings on these appeals is presumed. *See Eaton Contract Services, Inc.*, ASBCA Nos. 52686, 52796, 00-2 BCA ¶ 31,039; ASBCA Nos. 52888, 53069, 53070, 02-2 BCA ¶ 32,023, *recon. granted in part*, 03-1 BCA ¶ 32,239. The facts underlying ASBCA Nos. 52686 and 52796, and the facts in ASBCA Nos. 53069 and 53070 show these essentially are the same appeals as ASBCA Nos. 54055 and 54054, respectively, although damages differ. The Board dismissed ASBCA Nos. 52686, 52796, 53069 and 53070 for want of jurisdiction.

seeks a total of $1,380,993[2] for what it terms "special" or "expectancy" damages, which it allocates to two major categories: "total project & corporate damages & profit," and the "present value of destroyed business at date of destruction." The government filed motions for partial summary judgment on the issue of damages, contending the former category improperly includes losses from collateral undertakings and unallowable costs. It argues that the business destruction damages are too remote and speculative, and cannot be recovered as a matter of law. The motions are denied in part and granted in part.

## STATEMENT OF FACTS FOR PURPOSES OF THE MOTIONS

*The Contracts*

ASBCA No. 52888 arises from Contract No. DACW01-94-C-0185, CFC Removal and Fume Hood Vent Modifications, Athens, Georgia. The contract was awarded to ESC on 28 September 1994 by the U.S. Army Corps of Engineers, Mobile District in the initial amount of $408,936. The work was performed at the U.S. Environmental Protection Agency (USEPA) Laboratory, and administered by the Savannah District of the Corps. The contract contained standard clauses including FAR 52.233-0001 DISPUTES (DEC 1991) and FAR 52.243-0004 CHANGES (AUG 1987). (ASBCA 52888, R4, tab 3)

ECS also filed appeals under two fixed-price contracts performed for the Army at Ft. Bragg, NC and administered by the Savannah District. ASBCA No. 54054 arose under Contract No. DACA21-95-C-0165, "Construct Training Facility, SOTF Ft. Bragg, North Carolina." ESC was awarded that contract on 28 September 1995 in the amount of $213,241. Among the contract's standard clauses are FAR 52.233-1 DISPUTES (MAR 1994) and FAR 52.243-4 CHANGES (AUG 1987). (ASBCA 54054, R4, tab 3)

[2] Appellant states at p. 22 of the narrative portion of its 5 May 2003 Revision of Damages that it seeks a total of $1,380,994, comprised of $542,974 for the value of its business at the point of its destruction and $838,020 for "total project & corporate damages & profit." There appears to be a minor arithmetic error on ECS's part in computing this last figure. Correctly adding the sum as presented in appellant's Revision of Damages, tabbed § "Calculation of Expectancy Damages," table labeled "Consolidated Damages" (Consolidated Damages), the correct amount is $838,019. For purposes of these motions, we use the corrected overall amount sought of $1,380,993, and $838,019 for "total project & corporate damages & profit." The $542,974 in business destruction damages remains the same.

ASBCA No. 54055 was filed pursuant to the second Ft. Bragg contract, Contract No. DACA21-96-C-0009 "Construct Metal Building SOTF Facility." That contract was awarded to ECS on 29 December 1995 in the original amount of $253,901. Standard contract clauses incorporated by reference included FAR 52.233-1 DISPUTES (MAR 1994); FAR 52.243-4 CHANGES (AUG 1997); and FAR 52.252-2 CLAUSES INCORPORATED BY REFERENCE (JUN 1988). (ASBCA 54055, R4, tab 3)

*The Claims*

ESC asserts damages for material breach in each appeal alleging, *inter alia*, that the government breached its duty to cooperate, delay, and defective specifications. (ASBCA 52888, R4, tab 5; ASBCA 54054, claim dated 25 October 2002, Board corres. file; ASBCA 54055 claim dated 25 October 2002, Board corres. file) Appellant revised the damages portion of its claims in its 5 May 2003 Revision of Damages, and substituted "special" or "expectancy" damages for the earlier alleged "direct" and "consequential damages." (*Id.* at 3-4, 22) Appellant now seeks total damages of $1,380,993, allocating this amount among the three appeals as follows: $644,621 to ASBCA No. 52888, $336,140 to ASBCA No. 54054, and $400,233 to ASBCA No. 54055 (Consolidated Damages).

The $838,019 ECS attributes to losses suffered for "total project & corporate damages & profit" include $540,130 in "cumulative annual income (loss) per tax returns"; $63,570 in "unpaid Ft. Bragg [contract] balances"; $59,306 in "other income due or expenses incurred and not yet paid"; and "reasonable profit" of $175,013 on its total gross receipts for tax years 1993-2003 (Consolidated Damages). ESC declined to allocate these discrete costs among the underlying appeals. *See* app.'s 10 November 2003 "Response to Section 3 of Board's 27OCT03 Order Due 10NOV03."

The second major category of damages sought by ESC is the "present value of destroyed business at date of destruction" in the amount of $542,974 (Consolidated Damages). Appellant determined that amount using a mathematical model to project annual profits over the anticipated remaining life of the business, but for the material breaches it attributes to the government. The formula relies upon profits that allegedly would have been earned by businesses similar to ESC for the period following destruction of its business (Revision of Damages at 20). ECS furnished no evidence that the government knew of these damages at the time the contract was made.

## DISCUSSION

The parties extensively briefed the issues raised by the government's motions for partial summary judgment. Government objections to the $838,019 appellant seeks for "total project & corporate damages & profit" include ESC's allegedly claiming damages for periods prior to, and extending beyond, contract performance; appellant's inclusion of

costs attributable to its other work; and appellant's failure to allocate losses to specific subject contracts and events. (Gov't supp. at 3-6) The government acknowledges that if entitlement to this category of damages is proven, ECS may be able to show "some specific losses on each individual contract" during the time of performance. (*Id*. at 17)

The government contends that ESC cannot recover $542,974 for "business destruction damages," relying *inter alia* upon *Energy Capital Corp. v. United States,* 302 F.3d 1314 (Fed. Cir. 2002) and cases cited therein, for the proposition that summary judgment is appropriate and that ECS is not entitled to a hearing[3] on all damages asserted. The government distinguishes a permissible claim for lost profits under the instant contracts from an impermissible claim seeking lost profits from other independent and collateral undertakings, noting that the latter are as a matter of law too remote and speculative to be recovered. As a matter of evidence, the government asserts ECS failed to raise a triable issue of fact as to whether its damages reasonably were either actually foreseen, or were foreseeable. (Gov't br. of 22 August 2003 at 4-14) The government criticizes appellant's "use of profit statistics from other contractors" in its calculations seeking "lost profits from other contracts" as its business destruction damages. It argues that those statistics are flawed because there is no proof these businesses can be equated to appellant or that the model takes into account the many small businesses that fail. (Gov't 2nd supp. at 5)

Appellant resists the government's motions, and concludes it is entitled to trial on the issue of damages. ECS argues, but presents no proof, that the government knew or reasonably should have known prior to award of the contracts that the company could not withstand the government breaches of the magnitude and frequency it allegedly experienced. It contends that "appellant's damages were thus foreseeable at the time of contract award by reasonable government personnel in possession of the usual and common government training afforded pre-award review and contracting officer personnel." (Revision of Damages at 16) ESC states that the "forensic computation of a business' value at the time of its destruction may be virtually (but not actually) indistinguishable from the same for the determination of the business'[s] lost future profits." (*Id*. at 19) We understand appellant's argument to be that it should be allowed to use a formulaic approach as a yardstick to assess the value of a business that no longer exists and for which there is no actual data.

ESC contends that *Joseph Becks and Associates, Inc.*, ASBCA No. 31126, 86-3 BCA ¶ 19,299 prohibits dismissal by summary judgment of such central issues as

[3] On 10 November 2003, ESC elected to submit its case on the record in all three appeals pursuant to Board Rule 11, Submissions Without a Hearing. The government elected a hearing; *see* Order dated 3 December 2003. For purposes of the motions, we make no distinction between a party's submitting its case on the record or at a hearing.

whether breach damages were foreseeable because "[I]ssues such as foreseeability and causation are matters that are proper for trial and rarely susceptible of being disposed of by pre-trial motion." 86-3 BCA at 97,583. Appellant argues that summary judgment is inappropriate while discovery is incomplete, and denies that it seeks lost profits on other contracts or undertakings. ESC contends that the alleged business destruction damages properly were calculated using profit statistics from similarly sized businesses to project the value of its destroyed concern over time. Appellant urges that even if its business destruction damages were to be characterized as lost profits, factual matters remain in dispute which should not be decided on summary judgment, citing, *inter alia*, *California Federal Bank, FSB v. United States*, 245 F.3d 1342 (Fed. Cir. 2001), *cert. denied*, 534 U.S. 1113 (2002), and *Hansen Bancorp, Inc. v. United States*, 53 Fed. Cl. 92 (2002). (App. 7 October 2003 resp.)

Summary judgment is properly granted only where there are no genuine issues of material fact, and the movant is entitled to favorable judgment as a matter of law. The moving party bears the burden of establishing the absence of material fact, and all significant doubt over factual issues must be resolved in favor of the party opposing summary judgment. *Mingus Constructors, Inc. v. United States*, 812 F.2d 1387, 1390 (Fed. Cir. 1987); Fed. R. Civ. P. 56. A material fact is one that may affect the disposition of the case, and it is not our province in deciding such motions to serve as an arbiter of fact, nor will we weigh the evidence, or make determinations of credibility. *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 248 (1986). Properly employed, summary judgment is a salutary measure designed to "secure [a] just, speedy & inexpensive determination." *Celotex Corp. v. Catrett*, 477 U.S. 317, 322-27 (1986).

ESC's general arguments against summary judgment are rejected as incorrect interpretations of the law, or assertions unsupported by the facts at hand. Appellant is incorrect that summary judgment cannot be granted where discovery is incomplete. If sufficient opportunity for discovery has been provided before deciding the motion, summary judgment is not precluded on that basis. *Celotex Corp.*, 477 U.S. at 322-23; Fed. R. Civ. P. 56(c). Appellant failed to specify the additional evidence it requires to oppose the motion, or show that it was unable to obtain such evidence with reasonable efforts. The party opposing summary judgment by alleging that additional discovery is needed must justify that contention. *Lockheed Corp.*, ASBCA No. 39744, 97-1 BCA ¶ 28,757, and appellant did not do so. "It is not enough simply to assert, a la Wilkins Micawber, that 'something will turn up.'" *Id*. at 143,521 quoting *Simmons Oil Corp. v. Tesoro Petroleum Corp.*, 86 F.3d 1138, 1144 (Fed. Cir. 1996). The parties have been furnished an adequate time for discovery for purposes of the motions, and the fact that discovery has not closed does not avert a favorable ruling upon summary judgment.

ESC's reliance upon our decision in *Joseph Becks and Associates, Inc.*, ASBCA No. 31126, 86-3 BCA ¶ 19,299 to argue that summary judgment necessarily is precluded in the recovery of breach damages is misplaced. Appellant's interpretation impermissibly

would expand the scope of that decision, which focuses attention upon the nature of damages there alleged, not the nomenclature used as a description. The property damages sought in *Joseph Becks* differ significantly from those generally referred to in legal parlance as "consequential damages," and are unlike the losses sought by ESC. *Compare, e.g., Olin Jones Sand Co. v. United States,* 225 Ct. Cl. 741 (1980) and *Cox & Palmer,* ASBCA Nos. 37328 *et al*., 89-3 BCA ¶ 22,197. Our holding in *Joseph Becks* is factually distinguished from the instant appeals and does not require denial of summary judgment on the issue of breach damages.

*Joseph Becks* is, however, instructive in its admonition carefully to examine the specific nature of breach damages sought. Our precedent segregates business losses into those asserted under the contracts at bar, and those suffered from future or unrelated enterprises. Recovery of losses under these contracts is a matter of evidence, and summary judgment is inappropriate if there is a genuine issue of material fact. *Collette Contracting, Inc.*, ASBCA No. 53706, 03-1 BCA ¶ 32,056 at 158,459 citing *Energy Capital Corp. v. United States*, 302 F.3d 1314, 1328-29 (Fed. Cir. 2002). However, if the alleged breach damages are not derived from nor were they contemplated by the instant contracts but arise from "other independent and collateral undertakings," then they are "too uncertain and remote to be taken into consideration as a part of the damages occasioned by the breach of the contract in suit." *Energy Capital Corp.*, 302 F.3d 1314, 1328 citing *Wells Fargo Bank N.A. v. United States*, 88 F.3d 1012, 1022-23 (Fed. Cir. 1996), *cert. denied*, 520 U.S. 1116 (1997). *See also Myerle v. United States,* 33 Ct. Cl. 1, 27 (1987); *Olin Jones Sand Co. v. United States*, 225 Ct. Cl. 741, 743-44 (1980); *Ramsey v. United States*, 101 F.Supp. 353, 357-58 (Ct. Cl. 1951), *cert. denied*, 343 U.S. 977 (1952); *Northern Helex Co. v. United States*, 634 F.2d 557, 564 (Ct. Cl. 1980).

The $838,019 ESC seeks for "total project & corporate damages & profit" encompasses different types of alleged losses that must be evaluated separately. ESC cannot recover either the $540,130 it seeks as alleged general business losses or the $175,013 sought as "reasonable profit" on "total revenue" as appellant has not raised a triable issue as to whether these are related to the contracts, and they are too remote and speculative to be recovered. *Cox & Palmer,* ASBCA Nos. 37328 *et al*., 89-3 BCA at 111,665. The government's motions for partial summary judgment are granted with respect to these damages. We deny the government's motions regarding the "unpaid Ft. Bragg [contract] balances" of $63,570 and the $59,306 ESC asserts as "other income due or expenses incurred and not yet paid"; for purposes of the motions, appellant is entitled to a hearing (or record submission) on entitlement to these damages.

We agree with the government that the $542,974 sought by ECS for "present value of destroyed business at date of destruction" is unrelated to the contracts underlying these appeals and cannot be recovered as a matter of law. Appellant is not entitled to a hearing (or record submission) to prove these damages were foreseeable, as further evidence presented to the Board would have no material bearing on the ultimate disposition of the

claims. *Id.* at 111,666; *Worsham Construction Co., Inc.*, ASBCA No. 25907, 85-2 BCA ¶ 18,016 at 90,372. There is "'no recovery for general loss of business, the claimed loss of the entire [company's] net worth, and losses [on] the non-federal [contracts] . . . are all deemed too remote and consequential'" to be recovered. *Cox & Palmer*, 89-3 BCA at 111,665 quoting *William Green Construction Co. v. United States*, 477 F.2d 930, 936 (Ct. Cl. 1974), *cert. denied*, 417 U.S. 909 (1974).

## CONCLUSION

We deny the government's motions for partial summary judgment with respect to ESC's alleged damages in the amounts of $63,570 for "unpaid Ft. Bragg balances" and $59,306 for "other income due or expenses incurred and not yet paid." We grant the government's motions for partial summary judgment regarding the $542,974 asserted as the value of ESC's destroyed business; the $540,130 appellant contends as the general loss of income; and the $175,013 appellant seeks as "reasonable profits" on its "total revenue."

Dated: 14 January 2004

REBA PAGE
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 Nos. 52888, 54054 and 54055, Appeals of Eaton Contract Services, Inc., rendered in conformance with the Board's Charter.

Dated:

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