ARMED SERVICES BOARD OF CONTRACT APPEALS

Appeal of --	)	
	)	
Freedom NY, Inc.	)	ASBCA No. 43965
	)	
Under Contract No. DLA13H-85-C-0591	)	

APPEARANCE FOR THE APPELLANT: Bruce M. Luchansky, Esq.
Bruce M. Luchansky, P.A.
Baltimore, MD

APPEARANCE FOR THE GOVERNMENT: Kathleen D. Hallam, Esq.
Chief Trial Attorney
Defense Supply Center Philadelphia (DLA)

OPINION BY ADMINISTRATIVE JUDGE JAMES ON
APPELLANT'S MOTION FOR RECONSIDERATION AND TO CORRECT

The Board's 14 October 2004 decision in *Freedom NY, Inc.*, ASBCA No. 43965, 04-2 BCA ¶ 32,775 (*Freedom III*), decided the Modification No. 25 (Mod. 25) issues of consideration, duress, fraud and unconscionability remanded to the Board by the United States Court of Appeals for the Federal Circuit (hereinafter Federal Circuit) in *Rumsfeld v. Freedom NY, Inc.*, 329 F.3d 1320, *reh'g denied*, 346 F.3d 1359 (Fed. Cir. 2003), *cert. denied*, 541 U.S. 987 (2004), *aff'g in part, rev'g in part and remanding Freedom NY, Inc.*, ASBCA No. 43965, 01-2 BCA ¶ 31,585, *recon. denied*, 01-2 BCA ¶ 31,676 (*Freedom II*). Appellant moved on 17 November 2004 that the ASBCA "(1) reconsider and vacate the decision issued in its Opinion dated October 15 [sic], 2004 . . . and (2) recuse itself from any further proceedings in the Appeal of Freedom NY, Inc. and transfer jurisdiction, instead, to the United States Court of [Federal] Claims" (mot. at 1). On 30 December 2004, appellant filed a memorandum in support of its motion (hereinafter app. memo.). Respondent filed a response to the motion (hereinafter gov't resp.) and each party has filed a reply.

I.

We address first the motion to recuse the Board and transfer this appeal to the United States Court of Federal Claims. Appellant contends that the Federal Circuit's decision in *Rumsfeld v. Freedom NY, Inc.* improperly changed the Board's finding 93 in *Freedom II*. According to appellant, the Board found that "Mr. Thomas had attached the

'side agreement' to Mod 25 *before* Mr. Bankoff signed the fastened documents," but the Federal Circuit characterized that finding "as though Mr. Thomas attached *his copy* of the 'side agreement' to Mod 25 *after* Mr. Bankoff signed Mod 25" (mot. at 2-3, italics in original). Appellant's 20 October 2003 letter sought the Board to clarify finding 93, but the Board did not do so, which resulted in a "miscarriage of justice to Appellant" and caused it "to lose confidence in the Board's ability to render a fair and just decision in this case" (mot. at 3). Appellant "does not know with certainty" why the Board refused "to stand by its original findings" (mot. at 3), but is concerned that the possibility of appellant recovering approximately $150 million in lost profits pursuant to the side agreement has caused a conflict of interest because the Board "may be unwilling to justify [such amount] to its superiors at the Department of Defense" (mot. at 3-4). Appellant avers that *Freedom III* "is at inexplicable odds with the Board's prior analysis and conclusions in this case, and the Board should recuse itself from further consideration of this matter" (app. memo at 11) and our "recent actions appear to be race-based and economic in nature, suggesting an irreconcilable conflict of interest with its superiors at the Department of Defense" (mot. at 11). Appellant "requests that the Board vacate its decision in Freedom III and transfer jurisdiction of this case to the United States Court of [Federal] Claims" (mot. at 11-12). Appellant cites no legal authority to support such action.

Respondent opposes the motion. It points out appellant has not provided any facts or case law supporting it. It states, "Appellant's frivolous request for transfer based upon judicial conflict of interest should be denied." (Gov't resp. at 2) It concludes that "Appellant has failed to cite any evidence to support its inflammatory remarks" (*id*. at 13).

Although not directly applicable to members of boards of contract appeals, we look to 28 U.S.C. § 455 for guidance on recusal issues. *AEI Pacific, Inc.*, ASBCA No. 53806, 04-2 BCA ¶ 32,635 at 161,483. Appellant's motion does not identify what provisions in 28 U.S.C. § 455 constitute its grounds for recusal, but says that the Board has a "conflict of interest" and our "recent actions appear to be race-based and economic" (mot. at 3, 11). 28 U.S.C. § 455 provides in pertinent part:

> (a) Any justice, judge, or magistrate judge of the United States shall disqualify himself in any proceeding in which his impartiality might reasonably be questioned.
>
> (b) He shall also disqualify himself in the following circumstances:
>
> (1) Where he has a personal bias or prejudice concerning a party . . . ;

. . . .

> (4) He knows that he . . . has a financial interest in the subject matter of the controversy or in a party to the proceeding, or any other interest that could be substantially affected by the outcome of the proceeding;
>
> (5) He or his spouse, or a person within the third degree of relationship to either of them, . . .
>
> . . . .
>
> (iii) Is known by the judge to have an interest that could be substantially affected by the outcome of the proceeding; . . . .

Appellant speculates that the ASBCA may be unwilling to justify a possible recovery of approximately $150 million to its "superiors at the Department of Defense." However, appellant has presented no facts to support its allegation of a conflict of interest, admits that its allegation is speculation ("does not know with certainty") and the appeal record contains no evidence whatever that any Department of Defense "superior" has attempted to direct or to control the outcome of this appeal or to interfere with the independence of the Board's decision-making. The Federal Circuit, not the Department of Defense, reviews Board decisions (41 U.S.C. § 607(g)). Under 28 U.S.C. § 455, "[a] judge should not recuse himself on unsupported, irrational, or highly tenuous speculation. . . . *Davis v. Commissioner*, 734 F.2d 1302, 1303 (8th Cir. 1984) (affidavits based on conclusions, opinions, and rumors are insufficient for recusal)," *Hinman v. Rogers*, 831 F.2d 937, 939-40 (10th Cir. 1987).

Moreover, before the Contract Disputes Act of 1978 (CDA), 41 U.S.C. §§ 601-613, the ASBCA viewed itself as functioning "as an independent, quasi-judicial tribunal in essentially the same manner as the courts." *Ingalls Shipbuilding Division, Litton Systems, Inc.*, ASBCA No. 17717, 73-2 BCA ¶ 10,205 at 48,098. The legislative history of the CDA shows that the Congress intended in enacting Pub. L. No. 95-563 to continue and strengthen the independence of the boards of contract appeals:

> Key elements of this [contract disputes-resolving] system would be agency boards of contract appeals, acting as quasi-judicial forums and strengthened by adding additional safeguards to assure objectivity and independence. . . .

. . . .

> . . . The principal purpose of having agency board members selected and appointed to serve in the same manner as hearing examiners appointed pursuant to section 3105 of title 5 is to insure the independence of contract appeals board members as quasi-judicial officers. In other words, the method of appointment . . . is intended to guarantee that contract appeals board members, like hearing examiners (administrative law judges), be appointed strictly on the basis of merit, and that in conducting proceedings and deciding cases they would not be subject to direction or control by procuring agency management authorities. . . .
>
> . . . .
>
> . . . The agency boards of contract appeals as they exist today, and as they would be strengthened by this bill, function as quasi-judicial bodies. Their members serve as administrative judges in an adversary-type proceeding, make findings of fact, and interpret the law. Their decisions set the bulk of legal precedents in Government contract law, and often involve substantial sums of money. In performing this function they do not act as a representative of the agency, since the agency is contesting the contractor's entitlement to relief.

S. REP. NO. 95-1118, at 13, 24, 26 (1978), *reprinted in* 1978 U.S.C.C.A.N. 5247, 5258, 5260.

Numerous decisions after enactment of the CDA have recognized the independence of the boards of contract appeals. *See Boeing Petroleum Services, Inc. v. Watkins*, 935 F.2d 1260, 1261 (Fed. Cir. 1991) (quoting part of legislative history excerpted above); *PX Engineering Co.*, ASBCA No. 40714, 91-2 BCA ¶ 23,921 at 119,831-32 (in CDA appeals ASBCA does not act as the representative of an agency head, but rather as an independent, quasi-judicial forum); *Dry Roof Corp.*, ASBCA No. 29061, 88-3 BCA ¶ 21,096 at 106,504 (ASBCA "is 'neither an agent nor the alter ego of agency contracting officers' . . . and cannot be equated with such officials," quoting *Martin Marietta, infra*. Agency contract appeal boards established pursuant to the CDA were intended to be independent, quasi-judicial forums.); *Four-Phase Systems, Inc.*, ASBCA No. 26794, 84-2 BCA ¶ 17,416 at 86,746 (quoting part of legislative history excerpted above); *Martin Marietta Corp.*, ASBCA No. 25828, 84-1 BCA ¶ 17,119 at

85,258 ("Agency contract appeal boards, such as the ASBCA, established pursuant to [the] CDA . . . were intended to be independent, quasi-judicial forums, not subject to direction or control by procuring agency management authorities."). Based upon all the foregoing, we conclude that appellant has not shown that *Freedom III* was tainted by any conflict of interest.

With respect to appellant's allegation that *Freedom III* was "race-based and economic in nature" (mot. at 11), the general rule interpreting 28 U.S.C. § 455(a), is that bias sufficient to disqualify a judge must stem from extrajudicial sources, except when a judge's remarks in a judicial context demonstrate such pervasive bias and prejudice that it constitutes bias against a party and requires his recusal. *Thomas v. Tenneco Packaging Co.*, 293 F.3d 1306, 1329 (11th Cir. 2002). Applying those criteria to this appeal, appellant identifies no statements of the assigned administrative judge or any member of the ASBCA that expressed or implied racial or economic bias. Moreover, the Board accepted the testimony of appellant's president and rejected the contradictory testimony of the government's contracting officer (*Freedom II*, finding 94). Accordingly, we conclude that appellant's allegation of racial or economic bias is contrary to the record of these proceedings and not a basis to recuse the assigned administrative judge or the ASBCA.

Appellant's assertion that *Freedom III* "is at inexplicable odds with the Board's prior analysis and conclusions in this case" (mot. at 11) is legally unsound. In *Freedom II*, we made no findings or holding on appellant's grounds of no consideration, duress, fraud, and unconscionability to void the release in Mod. 25. This is precisely why the Federal Circuit remanded the appeal to this Board for such additional determinations. Therefore, our holdings in *Freedom II* that the government repeatedly breached Freedom's contract and delayed its performance, 01-2 BCA at 156,061-65, are immaterial to, and not inconsistent with, *Freedom III*'s holding that appellant's grounds for voiding Mod. 25's release were not valid. 04-2 BCA at 162,072.

We did not "clarify" finding 93 in *Freedom II* for several reasons. In denying appellant's petitions for panel and *en banc* rehearings, the Federal Circuit rejected appellant's contentions about the effect of finding 93 prior to appellant's 20 October 2003 letter. *See* 346 F.3d at 1359-61. Nothing in the court's statements in *Rumsfeld v. Freedom NY, Inc.*, 346 F.3d at 1361 (quoted in the motion at 3) suggests that when the side agreement was attached to Mod. 25 was material to its holding. Rather, it held that the side agreement was not integrated with Mod. 25 in part because Mr. Thomas attached the side agreement to Mod. 25 (consistent with our finding 93), not Mr. Bankoff, "the party to be charged" pursuant to RESTATEMENT (SECOND) CONTRACTS § 132, comment c. *Id*.

Moreover, clarification of finding 93 and re-opening of the side agreement argument are not issues remanded by the Federal Circuit to this Board for determination. *See* 329 F.3d at 1326, 1329. Those issues were decided by the Federal Circuit in *Rumsfeld v. Freedom NY*, and, as the law of the case, are foreclosed from further review on remand. *Insurance Group Committee v. Denver & Rio Grande Western Railroad Co.*, 329 U.S. 607, 612 (1947) ("when matters are decided by an appellate court, its rulings, unless reversed by it or a superior court, bind the lower court"); *In re Sanford Fork & Tool Co.*, 160 U.S. 247, 255 (1895) ("The Circuit Court is bound by the decree [of the Supreme Court] as the law of the case; and must carry it into execution, according to the mandate. That court cannot vary it, or examine it for any other purpose than execution; or give any other or further relief; or review it, even for apparent error, upon any matter decided on appeal; or intermeddle with it, further than to settle so much as has been remanded."); *Jamesbury Corp. v. Litton Industrial Products, Inc.*, 839 F.2d 1544, 1550 (Fed. Cir.), *cert. denied*, 488 U.S. 828 (1988), *overruled on other grounds*, *A. C. Aukerman Co. v. R. L. Chaides Construction Co*., 960 F.2d 1020 (Fed. Cir. 1992) (*en banc*) ("When a judgment of a trial court has been appealed, the decision of the appellate court determines the law of the case, and the trial court cannot depart from it on remand. . . . Orderly and efficient case administration suggests that questions once decided not be subject to continued argument . . . ."); *King Instrument Corp. v. Otari Corp.*, 814 F.2d 1560, 1563 (Fed. Cir. 1987) (Appellate court affirmed that portion of the trial court's determination as to machine damages, and remanded the issue of damages pertaining to spare parts. "Under the law of the case doctrine, that court was absolutely bound by our affirmance as to the machine damages. [Citation omitted.] It was therefore not incorrect or an abuse of discretion for the trial judge to order execution on that portion of the judgment which was final, while reserving the issue of spare parts.")

The remedy for the Board's failure to "clarify" finding 93, if any, is not recusal of the Board, but appeal from the Board's decision to the Federal Circuit. *See Liteky v. United States*, 510 U.S. 540, 555 (1994) (judicial rulings are proper grounds for appeal, not for recusal).

Movant identifies no legal authority that authorizes the ASBCA to transfer an appeal to the United States Court of Federal Claims. This Board has no such authority.

II.

We next address the timeliness of appellant's motion for reconsideration. Pursuant to appellant's request in its 27 May 2004 letter from Mr. Thomas, appellant's president, a copy of our 14 October 2004 decision was sent by certified mail on 15 October 2004 to Gilbert J. Ginsburg, Esq., 1250 24th Street, NW, Suite 350, Washington, DC 20037. The certified mail receipt accompanying that letter addressed to Mr. Ginsburg was signed by Yetta Bungie and dated "10/17/04." The Board takes

official notice that 17 October 2004 was a Sunday. The 30th day thereafter was 16 November 2004.

Appellant's current counsel's letter postmarked and dated 17 November 2004 filed a notice of appearance, moved for "Reconsideration and To Correct" our 14 October 2004 decision, and asserted that such motion was "filed within thirty (30) days of Gilbert Ginsburg's receipt of the Decision on behalf of Freedom on October 18, 2004."

In a 16 December 2004 conference call with the parties regarding the 17 October date on the certified mail receipt and the 18 October date asserted in appellant's 17 November 2004 letter, the Board suggested that an affidavit from Yetta Bungie could help to resolve the discrepancy.

Appellant's 30 December 2004 brief on its motion included a 24 December 2004 affidavit of Yetta Bungie. Ms. Bungie's affidavit states that she is employed by Advantage Business Centers, 1215 24th Street NW, Suite 350, Washington, DC 20037. One of her duties is to receive mail for subtenants of the "350 side" of 1215 24th Street NW. One such subtenant is Gilbert Ginsburg, Esq. She is the only person who receives and signs for mail directed to Mr. Ginsburg. She recognizes the signature on the certified mail receipt as hers. She has never worked for Advantage on a Sunday from 18 August 2003 to 24 December 2004. Advantage's building is locked on weekends and it did not provide its building or third floor elevator keys to mail carriers. She states: "I am absolutely certain that I signed the return receipt on Monday, October 18, 2004, and that I did not sign it on Sunday, October 17, 2004." We accept Ms. Bungie's conclusion for the purposes of this motion. We deem appellant's motion for reconsideration was timely.

III.

Appellant's motion also summarized its grounds for reconsideration of the Board's ruling on the four alleged reasons for invalidating Mod. 25, *viz.*, lack of consideration, duress, fraud and unconscionability (mot. at 4). Appellant presents no newly discovered evidence on those remanded issues.

With respect to new consideration for Mod. 25, our decision of 14 October 2004 at findings 141 and 142 found, at a minimum, two elements of new consideration for Mod. 25. First, appellant's receipt of capital equipment payments of $399,111 in an accelerated fashion, and second, the reinstatement of the terminated 114,758 MRE cases at a price of over three million dollars.

Appellant argues that the two items of "new" consideration in Mod. 25 were not suggested in the government's brief, but were raised *sua sponte* by the Board (app. memo at 6-7). Appellant is mistaken. Respondent argued that reinstatement of the terminated

114,758 cases with an accompanying price increase, and the $399,111 capital equipment payment were consideration for Mod 25's release (gov't br. on *Freedom II* at 116-17, gov't remand br. at 3). Thus, the government plainly did not waive those arguments about consideration.

Appellant argues that the Board's "conclusion incorrectly substitutes an analysis of contract damage remedies for an analysis of the sufficiency of consideration" and the "issue is whether the consideration . . . in Mod 25 is 'new consideration' in contrast to the original consideration provided for [in] the Contract" (app. memo at 7-8). The November 1984 contract price was $17,197,928 (finding 22), as was the price as revised by Mod. 25, *viz*., $13,816,262.86 in Mod. 20 + $3,181,665.55 reinstated MREs + $200,000 (SR4, tab 119 at 1-3). Such price comparison is immaterial. The material facts are that prior to executing Mod. 25, Mod. 20 had set the contract price at $13,816.262.86, and had provided for reinstatement of the terminated 114,758 MREs "at the sole discretion of the Government" (SR4, tab 104 at 2; finding 138), and the contract's Default clause did not require the government to reinstate supplies terminated for default should the termination be held to be for the convenience of the government, as occurred with respect to the later termination for default of 107,842 MREs, ASBCA No. 35671, 96-2 BCA ¶ 28,328 at 141,472 (finding 92), 141,479 (*Freedom I*). Appellant cites no authority for its contention that the Board incorrectly substituted an analysis of contract damage remedies for an analysis of the sufficiency of consideration.

Appellant argues that in the determination and findings (D&F) for Mod. 20, the PCO "agreed to the reinstatement of the Terminated Cases" without additional consideration "(above a $100 administrative charge)," and thus their reinstatement in Mod. 25 did not constitute consideration for the release (app. memo at 8-9). This argument is unsound because the cited D&F did not state that the CO "agreed" to reinstate the terminated MREs, as opposed to reinstatement at the sole discretion of the government, and the CO's analysis of the $100 consideration pertained to the delivery schedule extension, not to reinstatement of the terminated MREs (ex. FT239 at 1637).

Appellant argues that the government "failed to actually deliver [the] consideration" for the 114,758 reinstated MREs because it "never actually procured sufficient GFM to enable Freedom to assemble the promised 114,758 cases," citing *Freedom I*, 96-2 BCA at 141,477 ("The record indicates that Freedom's scheduled delivery of 114,758 assembled MRE-6 cases by 5 December 1986 had never been an urgent Government requirement. DPSC had never purchased enough MRE-6 configured components to permit assembly of that entire quantity. . . .") (app. memo at 9-10). The foregoing statements addressed our decision on the validity of the government's June 1987 default termination of 107,842 MREs (*Freedom I*, finding 92). The government provided sufficient GFM for delivery of 6,916 MREs. In *Freedom II*, we rejected appellant's argument that the government's post-Mod. 25 delays in providing GFM to

appellant "materially breached the contract and specifically Modification 25" (app. br. at 10), held instead that those GFM delays were compensable under the contract's Government Property clause, and granted a $2,970,947 equitable adjustment of therefor, 01-2 BCA at 156,077. There was no failure of consideration. The Federal Circuit affirmed that holding in *Rumsfeld v. Freedom NY, Inc.*, 329 F.3d 1320, 1332-33. Accordingly, that holding is the law of the case. See authorities cited above in I.

Appellant finally argues that since the government insisted that the $399,111 capital equipment costs recognized by Mod. 25 must be paid under the contract's Payments clause at 100% of the amount, not under the contract's Progress Payments clause at 95% of the amount, payment of the 5% differential "was not made as 'new' consideration, but rather as satisfaction of the original consideration" (app. memo at 11). The fallacy of this argument is that, notwithstanding ACO Liebman's cited testimony (tr. 1562-64, app. memo at 11), the contract contained no Payments clause as such (R4, tab 1 at 81-94, tabs 2-35; SR4, tab 3), and pursuant to the contract's Progress Payments clause, appellant was entitled only to payment of 95% of its costs incurred (as distinguished from 100% of its invoiced price for MREs delivered and accepted).

Therefore, we reaffirm our holding that Mod. 25 was supported by new consideration.

To show duress, movant states: "During their meeting on May 29, 1986, both Mr. Bankoff and Mr. Thomas knew that if a Contract modification was not signed, Freedom would be defaulted the next day" (app. memo at 13). Appellant made the same argument in its 10 February 2004 remand brief (app. br. at 12-13, citing tr. 1347-49). CO Bankoff stated that on 29 May 1986 "Freedom is in for the most part, a default position" but did not say that he and Mr. Thomas knew that appellant would be defaulted the next day if Freedom did not sign Mod. 25 (tr. 1347-49). The record does not support a finding of imminent default termination on 29 May 1986. Not long thereafter the parties agreed to further delivery extensions in Mods. 28 and 29 (findings 100, 107). Movant's further contentions repeat its earlier arguments and do not show that our ruling of absence of duress was not correct.

Movant's arguments with respect to fraud repeat its former arguments, and do not merit further analysis.

Movant's argument on unconscionability reiterates its views on lack of consideration in respondent's reinstatement of the terminated 114,578 MREs, which we rejected above. Movant also argues that the Board interpreted the phrase "modification as written" in Mr. Lambert's testimony to exclude the side agreement, whereas he could have meant that the modification included the side agreement. Movant's interpretation conflicts with the context of Mr. Lambert's testimony. Mr. Lambert first testified about

appellant's 1986 cost overrun position, its April 1986 draft claim, its desire for a follow-on MRE contract, and a proposed contract modification (tr. 831-34), which led to the following colloquy:

> Q. Was it your understanding with respect to this modification that if signed it would grant them the relief they needed to do what you just said?
>
> A. That was my understanding, yes.
>
> Q. The modification itself?
>
> A. Yes.
>
> Q. The modification document?
>
> A. Yes.
>
> . . . .
>
> Q. And you still believe that the modification as written would have allowed them with it's [sic] waved [sic] claim to complete the contract?
>
> A. Yes. That was my understanding. . . .

(Tr. 834-35) Only after that colloquy did Mr. Lambert testify about the terms of the side agreement, the V-Loan and negotiating a follow-on contract, which he described as "basically administrative actions outside the contract" (tr. 836-40). We find no reason to modify our interpretation of Mr. Lambert's testimony or to alter our conclusion of no proof of unconscionability.

CONCLUSION

We deny appellant's motion in all respects.

Dated: 11 April 2005

DAVID W. JAMES, 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

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. 43965, Appeal of Freedom NY, Inc., rendered in conformance with the Board's Charter.

Dated:

CATHERINE A. STANTON
Recorder, Armed Services
Board of Contract Appeals