ARMED SERVICES BOARD OF CONTRACT APPEALS

Appeal of --	)	
	)	
The Swanson Group, Inc.	)	ASBCA No. 54862
	)	
Under Contract Nos. DAEA18-87-D-0022	)	
DABT63-92-D-0003	)	

APPEARANCE FOR THE APPELLANT: Mr. Johnny Swanson, III
President

APPEARANCES FOR THE GOVERNMENT: Craig Clarke, Esq.
Acting Chief Trial Attorney
CPT Scott N. Flesch, JA
Trial Attorney

OPINION BY ADMINISTRATIVE JUDGE PARK-CONROY
ON GOVERNMENT'S MOTIONS FOR
PARTIAL DISMISSAL AND SUMMARY JUDGMENT

At issue are the government's motions for partial dismissal for lack of subject matter jurisdiction and for summary judgment, both of which are opposed by appellant. We grant the government's motions as indicated below and deny the appeal.

FINDINGS OF FACT FOR PURPOSES OF THE MOTIONS

The Board has previously issued four separate opinions in two different appeals involving the above-captioned parties and contracts: *The Swanson Group, Inc.*, ASBCA No. 46856, 94-3 BCA ¶ 27,111, 96-2 BCA ¶ 28,500, and 97-1 BCA ¶ 28,664; and *The Swanson Group, Inc.*, ASBCA No. 53254, 02-1 BCA ¶ 31,838.

In ASBCA No. 46856, appellant asserted breach of contract claims under the price adjustment clauses of Contract Nos. DAEA18-87-D-0022 (Contract I) and DABT63-92-D-0003 (Contract II) with the Army at Fort Huachuca, AZ for costs related to increased wages and fringe benefits for security guard and other contractual services resulting from Department of Labor (DOL) Wage Determination No. 79-613 (Rev. 7). *Swanson*, 94-3 BCA ¶ 27,111. We found that appellant did not increase the wages and fringe benefits of its employees after the new wage determination was incorporated into Contract I because the government had not increased the contract price and that the unit

price labor rates in Contract II did not reflect the increases resulting from the new wage determination, although it was attached thereto. *Id.* at 135,122.

Following an investigation by DOL that disclosed violations of the Service Contract Act associated with Wage Determination No. 79-613 (Rev. 7) for both Fort Huachuca contracts, appellant, the Army and DOL executed an "Agreement on Payment of Wages and Fringe Benefits and Release of Withheld Contract Payments" in December 1992. Pursuant to that agreement, the Army paid $248,132.61 into a DOL escrow account for back wages and fringe benefits due appellant's employees at Fort Huachuca for the period 1 January 1991 through 31 July 1992. Appellant computed the total amount due in back wages and fringe benefits under the wage determination for the period 16 October 1990 through 31 July 1992 to be $444,154.05 and on 12 March 1993 submitted a claim for $196,021.44, representing the balance it alleged was due. *Id.* at 135,123. The government's answer to the complaint in the second appeal, ASBCA No. 53254, admitted that it had not reimbursed appellant $196,021.44 and denied that it was a valid debt (ASBCA No. 54862, compl., tab 1 at 8).

On 4 May 1993, a DOL Administrative Law Judge issued Consent Findings and Order of Dismissal that incorporated a settlement reached between appellant and DOL. The DOL Consent Order establishes that the total amount due appellant's employees under the Fort Huachuca contracts for the period 16 October 1990 through 31 July 1992 was $462,490.48, that DOL had withheld $461,230.02 (including the Army's $248,132.61 escrow) "from accrued payments due [appellant] under various contracts" awarded to it, that $19,444.00 had been released to appellant, reducing the DOL withholding to $441,786.02, and that appellant and DOL had settled the matter for $307,112.03, leaving a balance of $193,653.41. (Gov't mot., encl. 6 at 8-9)

The $307,112.03 settlement consisted of the $248,132.61 escrow payment made by the Army and a credit of $58,979.42 on Contract II. *See Swanson*, 96-2 BCA at 142,315-16. The DOL Consent Order authorized DOL to distribute $307,112.03 to the affected employees at Fort Huachuca and to release to appellant the remaining balance of $193,653.41 in accordance with specified provisions of the DOL Consent Order (gov't mot., encl. 6 at 14-15, 17).

Thereafter, appellant increased the amount of its claim to $218,148.24. *Swanson*, 96-2 BCA at 142,315. We found entitlement to the $58,979.42 credit from the DOL settlement, sustained the appeal in ASBCA No. 46856 to that extent, and otherwise denied it. *Id.* at 142,317, 142,319. We denied appellant's motion for reconsideration. *Swanson*, 97-1 BCA ¶ 28,664.

On 4 January 2001, appellant filed an appeal seeking $1,016,878.28, which was docketed as ASBCA No. 53254. The amount requested included $58,979.42, asserted to

be the final monthly invoice, and $196,021.44, asserted to be the amount due as the result of the new wage determination. *Swanson*, 02-1 BCA at 157,306. The complaint in ASBCA No. 53254 alleged, and the government's answer denied, that the DOL "took $196,021.44 of Appellants [sic] Contract Revenue from other sites to pay the back wages due to the Fort Huachuca operation" (ASBCA No. 54862, compl., tab 1 at 8). In a reply to the government's answer in ASBCA No. 53254, appellant further asserted that "DOL collected the amount of $231,097.41 by with-holding [sic] of contract Revenue of Appellant from other 'non-Fort Huachucha [sic] contract payments due appellant'" (gov't mot., encl. 5 at 2-3). $231,097.41 is the difference between the $461,230.02 DOL withheld from appellant's various contracts for the underpayment of wages and fringe benefits on the Fort Huachuca contracts and the $248,132.61 the Army had paid into the DOL escrow.

We concluded that the $58,979.42 was the credit we had found was due appellant in ASBCA No. 46856, but that appellant was entitled to recover interest under the Contract Disputes Act (CDA) on that amount from the date upon which the contracting officer received appellant's 12 March 1993 claim to 16 August 1996, the date of our entitlement decision, because no CDA interest had been paid for that time period. We further concluded that the $196,021.44 was the same adjustment appellant had requested in ASBCA No. 46856 and was barred by the doctrine of *res judicata*. *Swanson*, 02-1 at 157,307-08.

On 4 June 2004, appellant submitted a "LETTER INVOICE" to the Army for $430,908.21 for the Fort Huachuca contracts, consisting of a demand for $213,067.61 for "Withheld Revenue due Plaintiff Client," $127,840.60 in interest on the withholdings and $90,000.00 in legal fees. The following certification was included: "I hereby certify that the above amounts are true and correct to the Best [sic] on [sic] my knowledge and available records." (R4, tab 12) The contracting officer treated the letter as a CDA claim and issued a final decision denying the claim on 8 July 2004. She found that the matters asserted had been resolved in ASBCA Nos. 46856 and 53254 and pointed out that the Army had paid the additional CDA interest found due in ASBCA No. 53254 ($13,052.00) on 9 April 2004. (R4, tab 13) Appellant did not receive the contracting officer's final decision until 5 November 2004, after which a timely appeal was docketed as ASBCA No. 54862 (R4, tab 17).

The introductory portion of appellant's complaint in ASBCA No. 54862 characterizes the dispute as a CDA claim originating from the DOL audit findings of wages due appellant's employees on the two Fort Huachuca contracts resulting from the new wage determination (compl. at 1-2). It asserts the government "conducted sabotage efforts to destroy Appellants [sic] operations and business" and made "disturbing remarks regarding Appellant due to his race, skin color, and other attributes which clearly reflects [sic] a dislike or discrimination . . . because of the contractor's race or skin color"

(compl. at 3). Appellant moves to strike all information in the Rule 4 file concerning taxes, "and any other irrevelant [sic] or inflammatory matter, as well as discrimatory [sic] matter" and to allow appellant to amend the Rule 4 file with evidence that will prove the assertions made in the complaint (compl. at 6). Finally, appellant asks us to consider its allegations under FED. R. CIV. P. 60, which it asserts gives the Board authority to proceed where "[f]raud, errors, and miscalculations as well as intentional sabotage and discrimination exist" (compl. at 3, 6-7).

The complaint clarifies the basis for the 4 June 2004 claim. It alleges that DOL took $196,021.44 from appellant's "Contract Revenue from other sites to pay the back wages due to the Fort Huachucha [sic] operation" and that it has not been reimbursed either this amount or another "$96,000.00 plus" it paid in the early months of Wage Determination No. 79-613 (Rev. 7) (compl., § III at 11, ¶ 10). It further alleges that the government has engaged in intentional, deliberate and illegal actions to sabotage, interfere with and destroy appellant's business operations (compl., § IV at 12, ¶¶ 13-16). It seeks damages in the amount of $292,021.44 ($196,021.44 plus $96,000.00), interest and a "100 % penalty as damages" for the government's alleged "deliberate and intentional acts" of bad faith which caused interference and substantial losses to appellant, such other relief as appropriate, and leave to acquire proper DOL audit reports (compl. § V at 13, ¶¶ 1-7).

PRELIMINARY MATTERS

Appellant's Request for Legal Fees

Appellant's 4 June 2004 claim seeks $90,000.00 in legal fees. The complaint omits any such claim, and the government's motion to dismiss asserts that the claim is untimely (gov't mot. at 13-14). Appellant's reply confirms that it is not seeking recovery of legal fees and suggests that the government's motion should be denied as moot because it relates to a "non-existant [sic] claim" (app. reply at 1). Based upon appellant's representation that it does not seek legal fees, the government's motion to dismiss this claim is denied.

Apellant's Motion to Strike And Request for Leave to Supplement the Record

Under the ASBCA's Rule 4(e), the Board is obligated to remove from the Rule 4 file documents objected to by a party "for reasons stated," reasonably in advance of hearing or of settling the record. Appellant asks us to strike documents related to its taxes and other irrelevant, inflammatory and discriminatory matters, but has not identified the specific documents it wants us to remove from the record. Our review of the Rule 4 file indicates that tabs 3, 4, 5, and 9 are copies of Internal Revenue Service

(IRS) "Notice of Levy" forms and we strike these documents as related to appellant's taxes as requested. The remaining Rule 4 file documents do not appear to contain irrelevant, inflammatory or discriminatory matters. Appellant's request is granted to the extent indicated, and otherwise denied.

With respect to appellant's request for leave to supplement the record, ASBCA Rule 4(b) imposes a duty upon appellant to transmit to the Board within 30 days after receipt of the Rule 4 appeal file any documents not contained therein that the appellant considers relevant to the appeal. No request to supplement the file is required. Similarly, no request for leave to provide documentation to oppose a motion for summary judgment is required. *See* FED. R. CIV. P. 56. To the contrary, a motion for summary judgment puts the non-moving party on "notice that it [has] to come forward with all of its evidence." *Burnside-Ott Aviation Training Center, Inc. v. United States*, 985 F.2d 1574, 1582 (Fed. Cir. 1993). Appellant here has had ample opportunity to supplement the record, but has not complied with either ASBCA Rule 4(b) or FED. R. CIV. P. 56 and has not otherwise provided any additional documents in conjunction with its 4 June 2004 claim. Accordingly, we decide the government's motions on the record as it is presently constituted.

DISCUSSION

The government's motion to dismiss asserts that the Board has no jurisdiction over appellant's current appeal because it seeks reimbursement, under the Fort Huachuca contracts, for funds allegedly withheld by DOL from other government contracts awarded to appellant at other locations. The government's motion for summary judgment asserts that the appeal is otherwise barred by *res judicata* because the claims arise out of the same transactional facts that were the subject of the two prior appeals, ASBCA Nos. 46856 and 53254. Finally, it asserts that appellant has raised no new evidence and is time barred from relief under FED. R. CIV. P. 60.

Appellant contends that the Army never increased the price of the contract and never paid it the total amount of the price adjustment associated with Wage Determination No. 79-613 (Rev. 7), leaving a balance due of $196,021.44, which was collected by DOL from appellant's other contracts. It further contends that it paid "$96,000.00 plus" under the new wage determination from its line of credit before it was forced to reduce the wage rates for cash flow reasons. It seeks a review *de novo* under FED. R. CIV. P. 60, asserting that the government has perpetrated a fraud on the Board, causing errors and misunderstandings.

The amounts appellant now claims are due ($196,021.44 and "$96,000.000 plus") are based upon appellant's unsupported calculations of the total amount due as back

wages and fringe benefits on the two Fort Huachuca contracts. The additional amount withheld by the government as recited in the DOL Consent Order was $193,653.41.

Jurisdictional Issues

In ASBCA No. 46856, we found jurisdiction to consider appellant's breach of contract claims for costs related to increased wages and fringe benefits resulting from DOL Wage Determination No. 79-613 (Rev. 7) under the price adjustment clauses of the Fort Huachuca contracts. S*wanson*, 94-3 BCA at 135,121-24. Distribution to appellant of the additional amounts withheld at DOL's direction in excess of the $307,112.03 settlement was subject to specific provisions of the DOL Consent Order. Thus, to the extent that appellant is now seeking recovery of amounts DOL required be withheld for wage violations from other contracts and distributed in accordance with 29 C.F.R. § 4.187(a), we agree with the government that appellant's claims are beyond our jurisdiction. *See The Swanson Group, Inc.* ASBCA No. 53496, 04-1 BCA ¶ 32,535 at 160,914, *affirming* 04-1 BCA ¶ 32,417 *on reconsid. and citing Thomas & Sons Building Contractors, Inc.*, ASBCA No. 51577, 00-2 BCA ¶ 31,086 at 153,491, *aff'd on reconsid.*, 01-1 BCA ¶ 31,193.

We also lack jurisdiction over some or all of appellant's claim for "$96,000.00 plus." The CDA requires that a contractor's claim must first be submitted to the contracting officer for decision as a condition precedent to the Board's jurisdiction. 41 U.S.C. § 605(a). *See D.L. Braughler Co. v. West*, 127 F.3d 1476, 1480 (Fed. Cir. 1997). Appellant did not seek "$96,000.00 plus" for alleged payments under Wage Determination No. 79-613 (Rev. 7) in its 4 June 2004 claim.

Appellant's various allegations that the government engaged in racial discrimination are likewise beyond our jurisdiction. *See Bridget Allen*, ASBCA No. 54696, 05-1 BCA ¶ 32,871 at 162,904-05, *reconsid. denied*, 2005 ASBCA LEXIS 60, 8 July 2005. The same is true of its allegations of other activities on the part of the government intended to destroy its business that sound in tort. *See Pete Vicari General Contractor, Inc.*, ASBCA No. 54419, 04-2 BCA ¶ 32,665 at 161,684.

Summary Judgment

To the extent that appellant's present appeal alleges contractual violations over which we have CDA jurisdiction, we are satisfied that appellant is again attempting to re-litigate matters that we have previously addressed on the merits. Thus, we agree with the government that this appeal is barred by the doctrine of *res judicata* and that the government is entitled to judgment as a matter of law because there are no genuine issues of material fact in dispute. *See Mingus Constructors, Inc. v. United States*, 812 F.2d 1387, 1390-91 (Fed. Cir. 1987).

Under the doctrine of *res judicata* or claim preclusion, "a judgment on the merits in a prior suit bars a second suit involving the same parties or their privies based on the same cause of action." *Jet, Inc. v. Sewage Aeration Systems*, 223 F.3d 1360, 1362 (Fed. Cir. 2000) *quoting Parklane Hosiery Co. v. Shore*, 439 U.S. 322, 326 n.5 (1979). *See also Hitt Contracting, Inc.*, ASBCA Nos. 51594, 51878, 99-2 BCA ¶ 30,442 at 150,419-20, *reconsid. denied*, 99-2 BCA ¶ 30,558. The doctrine applies not only to matters that actually were raised in previous litigation, but also to matters that should have been raised in the prior proceedings. *See Case, Inc. v. United States*, 88 F.3d 1004, 1011 (Fed. Cir. 1996).

It is uncontested that the present appeal involves the same parties and the same cause of action that previously was adjudicated. Appellant is again seeking additional payments for wages and fringe benefits associated Wage Determination No. 79-613 (Rev. 7) for security guard and other services performed under Contracts I and II at Fort Huachuca which were addressed in the DOL Consent Order. This is the same cause of action that we decided on the merits in ASBCA No. 46856. *Swanson*, 96-2 BCA ¶ 28,500, *reconsid. denied*, 97-1 BCA ¶ 28,664. We addressed the same matters again in ASBCA No. 53254 and concluded that appellant's claims were barred by *res judicata*. *Swanson*, 02-1 BCA ¶ 31,838 at 157,307-08. Our conclusion here is the same.

We also note that the present complaint makes reference to "$96,000.00 plus" that appellant asserts represents amounts it paid to its employees in the early months of Wage Determination No. 79-613 (Rev. 7). To this extent, the claim is based upon the original cause of action, and should have been raised in the prior proceeding. It, too, is barred by *res judicata*. In any event, the allegation is without any record support and fails to raise a genuine issue of material fact. *See Matsushita Electric Industrial Co. v. Zenith Radio Corp.*, 475 U.S. 574, 586-87 (1986) and FED. R. CIV. P. 56(e) (nonmoving party must come forward with specific facts or evidence and cannot rest on mere pleading allegations). Moreover, we found in ASBCA No. 46856 that appellant did not increase the wages and fringe benefits after the new wage determination was incorporated in the Contract I. *Swanson*, 94-3 BCA at 135,122.

Federal Rule of Civil Procedure 60

Remaining is appellant's request for relief under FED. R. CIV. P. 60, RELIEF FROM JUDGMENT OR ORDER, on grounds the government has perpetrated a fraud on the Board that has caused errors and misunderstandings. Appellant made the same request without success in ASBCA No. 53254. *Swanson*, 02-1 BCA at 157,308.

Apart from the fact appellant has again failed to come forward with any proof of the alleged fraud, it is time barred from seeking redress inasmuch as Rule 60(b)(2)

requires that a motion based upon fraud be filed "not more than one year after" the decision was entered. The decisions on the merits and on reconsideration in ASBCA No. 46856 were entered on 16 August 1996 and 5 December 1996, respectively. *Swanson*, 96-2 BCA at 142,313, and 97-1 BCA at 143,175. Further, as we concluded in ASBCA No. 53254, there are no "extraordinary or exceptional circumstances" which would qualify as a reason for relief under Rule 60(b)(6). *Swanson*, 02-1 BCA at 157,308.

Any errors and misunderstandings remaining here rest with appellant. It is time for appellant to accept that the Board's decisions on these matters are final.

CONCLUSION

The government's motions for partial dismissal and summary judgment are granted as indicated. The appeal is denied.

Dated: 26 August 2005

CAROL N. PARK-CONROY
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

ROLLIN A. VAN BROEKHOVEN
Administrative Judge
Acting 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. 54862, Appeal of The Swanson Group, Inc., rendered in conformance with the Board's Charter.

Dated:

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