ARMED SERVICES BOARD OF CONTRACT APPEALS

Appeals of --	)	
	)	
KiSKA Construction Corp.-USA and	)	
Kajima Engineering and Construction, Inc.,	)	
A Joint Venture	)	ASBCA Nos. 54613, 54614
	)	
Under Contract No. 1E0023	)	

APPEARANCE FOR THE APPELLANT: William J. Postner, Esq.
Postner & Rubin
New York, NY

APPEARANCES FOR THE AUTHORITY: Carol B. O'Keeffe, Esq.
General Counsel
Donald A. Laffert, Esq.
Associate General Counsel
Washington Metropolitan Area
Transit Authority

OPINION BY ADMINISTRATIVE JUDGE DELMAN

The Washington Metropolitan Area Transit Authority (WMATA or the Authority) moves to dismiss these appeals prior to filing its answer, or in the alternative seeks summary judgment on the grounds that the subject claims are barred, *inter alia*, by *res judicata* and/or collateral estoppel. Since WMATA offers evidence in support of its position, we treat its motion as one for summary judgment.

STATEMENT OF FACTS FOR
PURPOSES OF THE MOTION

1. By notice of award dated 25 February 1994, WMATA awarded this contract to KiSKA Construction Corp.-USA and Kajima Engineering and Construction, Inc., A Joint Venture (appellant) for the construction of twin, single-track earth tunnels, an access shaft, fan shaft and vent shaft in Washington, DC. The notice of award was issued by F.X. Watson, Contracting Officer, from the WMATA office, 600 Fifth Street, NW, Washington, DC. (R4, tab 9) According to WMATA, contract completion occurred on 22 May 1997 (R4, tab 1 at 2), but appellant's job cost reports show that it incurred significant monthly costs under the contract throughout 1997, with smaller amounts in 1998 through 2000 (R4, tab 6, Schedule A-1 at 12).

2. Disputes arose during performance of the contract. On 10 November 1997, appellant filed an action against the Authority in the United States District Court for the District of Columbia, *KiSKA Construction Corp.-U.S.A. and Kajima Engineering and Construction, Inc., partners in KiSKA-Kajima, A Joint Venture v. Washington Metropolitan Area Transit Authority*, Civil Action No. 97-2677 (the court action). Appellant sought damages from WMATA for fraudulent misrepresentation, negligent misrepresentation, quantum meruit, unilateral mistake and breach of contract. It is undisputed that the court dismissed the first two causes of action, granted summary judgment for WMATA on the third and held the latter two over for trial.

3. Paragraph 185 of appellant's complaint in the court action stated as follows:

> Despite repeated requests by KiSKA-Kajima throughout Contract performance for change orders and appropriate time extensions to compensate KiSKA-Kajima for the additional costs and delays to the Project schedule caused by WMATA, WMATA continuously refused to accept responsibility for its numerous acts and omissions.

(Auth. mot., ex. 1) Appellant did not identify the alleged change orders referenced above.

4. In Count IV of the complaint, "Material Breach of Contract," appellant alleged as follows:

> 248. WMATA materially breached the Contract, including express and implied warranties in at least the following ways:
>
> a. WMATA failed to disclose necessary and vital information to KiSKA-Kajima relating to the performance and safety of the work to be performed;
>
> b. The Contract plans and specifications and directed construction methods prepared by WMATA were defective, misleading, incomplete and unfit for their intended purpose;
>
> c. WMATA breached its duty to cooperate with KiSKA-Kajima and not hinder or interfere with KiSKA-Kajima's performance;

d. WMATA failed and refused to grant time extensions for excusable and/or compensable delays encountered by KiSKA-Kajima;

e. WMATA directed that extra work beyond the scope of the Contract be performed and has failed and/or refused to pay for such extra work;

f. WMATA failed and refused to administer the Contract in accordance with its terms and with good faith and fair dealing;

g. WMATA failed to coordinate the Project with the numerous Washington, D.C. utility companies and permit-granting agencies;

h. WMATA failed to coordinate the work of its other contractors, including Blake Construction;

i. WMATA failed to obtain necessary permits for construction in a timely manner;

j. WMATA failed and refused to review and approve shop drawings in a timely manner;

k. WMATA failed to provide timely and complete access to the jobsite;

l. WMATA directed the acceleration of the work without compensating KiSKA-Kajima;

m. WMATA arbitrarily and unreasonably directed pervasive changes to the Contract which constituted a cardinal change.

(Auth. mot., ex. 1) In this breach of contract count, appellant did not aver that WMATA wrongfully withheld contract retainage or that its failure to timely pay retainage was a breach of contract. With respect to paragraph 248(e), above, appellant did not identify the alleged extra work directed by the Authority.

5. Prior to the trial, the Authority filed a motion to dismiss the court action, contending that appellant's claims were disputes arising under the contract for which the

contract's Disputes article provided an administrative remedy. The court denied the Authority's motion and concluded, *inter alia*, that appellant had properly asserted a cause of action for breach of contract for which the court had jurisdiction. (Akyuz aff., ex. A)

6. At trial, appellant introduced into evidence an updated quantification of damages report prepared by Mr. Jeffrey E. Fuchs, P.E., CPA. The report claimed damages using the modified total cost approach, seeking all contract costs less adjustments not relevant here, plus overhead, profit, bond premium, interest and lost profit, for a subtotal of $46,955,313. Mr. Fuchs then added a claim for contract retainage in the amount of $650,000, for a total claim of $47,605,313. (R4, tab 6 at iv)

7. At trial, Mr. Fuchs testified about the claimed retainage, stating that it represented the portion of progress payments retained by WMATA for work undisputedly performed by appellant during the course of the contract (Auth. reply, revised ex. 6 at tr. 2609). On cross-examination, he stated as follows:

> I am claiming $650,000 because that relates to the work that was already earned, already performed. There is no dispute, no issue over that work. . . .
>
> So those moneys have been withheld from KiSKA-Kajima for work that it performed that has been acknowledged by WMATA that it performed, and so that simply is a return of that money, . . .
>
> It is completely different than now we have costs in excess, additional costs. . . .

(*Id*., at 2640-41) He further stated: "[T]he retainage is simply an accounting adjustment that occurs at the end of any job. And so that should simply be given back to KiSKA-Kajima. And it is not under dispute." (*Id*. at 2641) From the transcript excerpts of record, it is unclear what position, if any, WMATA took with respect to this retainage at the trial.

8. In appellant's closing argument to the jury, appellant's counsel sought recovery of its modified total cost damages, overhead, profit, bond premium, interest and the contract retainage (R4, tab 5 at 4669). The jury returned two general verdicts, finding in favor of the defendant WMATA on the claim of breach of contract, and finding in favor of the defendant WMATA on the claim for unilateral mistake. The jury provided no further particulars. (Auth. mot., ex. 8) The record is unclear whether the court provided the jury with any instructions regarding the claim of retainage.

9. On 23 March 2001, the court entered judgment on the verdicts for WMATA. (R4, tab 8) Appellant's motion for new trial was denied, and on appeal the judgment was affirmed. *KiSKA Construction Corp. v. Washington Metropolitan Area Transit Authority*, 321 F.3d 1151 (D.C. Cir. 2003), *cert. denied*, 540 U.S. 939 (2003).

10. By letter to the contracting officer dated 5 January 2004, appellant requested payment under the Disputes article of the contract for the following matters:

> RETAINAGE
> Pursuant to paragraph (d) of Article 7, "Payments to Contractor", there remains due and owing KiSKA for work performed under the contract, the retainage of $650,000 which has never been paid. (See, Exhibit 1, Pay Estimate No. 38, attached hereto).
>
> CHANGES
> Pursuant to paragraphs (a) and (b) of Article 3, "Changes", equitable adjustments are requested for the following:
>
> I. Approved Modifications:
>
> 1. Modification NO. 33. The parties agreed that KISKA was entitled to an increase of $6,042 of the contract price for test pitting to determine the extent of shallow utility ducts for restoration of the streets. . . .
> 2. Modification NO. 49. WMATA unilaterally issued this Modification in the sum of $6,994 for PCO 49 to cover the additional water connection performed by KiSKA. . . .
>
> II. Agreed Change Orders Pending Modifications:
>
> 1. PCO NO. 45 WMATA issued this PCO for the removal of the old street tracks on 14th Street. Following agreement on the final quantity, WMATA was to issue a Modification in the sum of $192,005.10. It has not done so. . . .
> 2. PCO NO. 60. The parties agreed upon the issuance of a change order in the sum of $5,920 for grouting weep holes in the tunnel, but no Modification was ever issued for this work.
> 3. PCO NO. [sic] WMATA directed the installation of additional railings at the intersection of Euclid and 14th Streets to prevent pedestrians from walking into the street

there. The parties agreed to add $5,839 to the contract price, but WMATA failed to issue a Modification.

III. Agreed Pending Change Orders:

1. PCO NO. 4. WMATA directed that the Access Shaft where the tunnel machines were launched be reduced in size. The reduction required that the high-tension power utilities affected by the reduction be relocated. The problem was substantial and KiSKA submitted a cost proposal in the sum of $208,399.91 for this change . . . .
2. PCO NO. 29. WMATA directed KiSKA, for safety reasons, to install steel posts in lieu of the wood wedges specified in the contract when the system was changed from two gap system to a one gap system in the precast concrete section of the tunnel. . . .
3. PCO NO[.] 34. WMATA directed a change by requiring KiSKA to install barriers in the Fan Shaft. KiSKA submitted a cost estimate of $131,825.64. The amount of the change Order remains open.
4. PCO NO[.] 56. WMATA directed that a safety walk handrail be installed in the tunnels which will be used by workers and visitors to walk in and out of the heading of the tunnel. KiSKA's proposal of $247,392 was negotiated by WMATA down to $77,000, but no Modification was issued. . . .

COMPENSABLE DELAYS
Pursuant to Article 22, "Suspension Of Work" and Article 3, "Changes", an adjustment in price is requested.
There are several changes and modifications that WMATA unilaterally decided and KiSKA reserved the time. Most of the changes resulted in schedule extension which caused an increase in the performance of the work. As per Article 22, equitable adjustments for the schedule extensions remain outstanding.

QUANTITY UNDERRUNS OR OVERRUNS
Pursuant to Article 53, "Variations in Estimated Quantities", equitable adjustment is requested for the following bid items where quantities varied by more than 15%: . . . .

(R4, tab 3)

11. By letter dated 15 April 2004, the Authority declined to issue a decision on appellant's request, contending that all claims were adjudicated in the court action (R4, tab 1). Appellant construed this letter as a deemed denial of its request and appealed to this Board. The appeal related to retainage under the Payments to Contractor article of the contract was docketed as ASBCA No. 54613, and the appeal related to the various requests for equitable adjustment under the Changes article of the contract was docketed as ASBCA No. 54614. The Board consolidated the appeals.

12. Appellant filed a complaint in accordance with the Board's rules.[1] Insofar as pertinent, appellant's complaint sought net retainage under the contract in the amount of $650,000, and the costs to perform work directed by WMATA under Modification No. 33 ($6,042) and Modification No. 49 ($6,994). The complaint further alleged as follows:

> 24. In the instant Contract, WMATA issued a number of PCOs for which the work was performed by KiSKA but no Modification was issued nor was any payment made.
>
> 25. Upon information and belief, the unpaid PCOs are as follows:
>
> a. PCO 45 for streetcar track quantity overruns in the sum of $192,005.10.
>
> b. PCO 60 for grouting weep holes in the tunnel in the sum of $5,920; and for additional pedestrian railings at Euclid Street in the sum of $5,839. Together, the two extra work items total the sum of $11,759.
>
> c. PCO 34 for barrier modifications at the fan shaft in the sum of $131,825.64.
>
> d. PCO 56 for a temporary tunnel safety walk in the sum of $247,392.

[1] In the complaint appellant chose to pursue only some of the claims it filed with the contracting officer in January, 2004. Accordingly, we consider only the claims specifically raised in the complaint and detailed herein to be properly before us.

> 26. The total amount due and owing by reason of the above PCOs is the sum of $582,981.74.
>
> 27. The total amount due by reason of the amount withheld as retainage, together with the Modifications and PCOs above described issued by WMATA for work acknowledged by WMATA to have been performed pursuant to the Contract provisions is the sum of $1,246,017.74, no part of which has been paid though duly demanded.

13. In lieu of filing an answer to appellant's complaint, the Authority filed a letter to the Board dated 19 July 2004, stating the Authority had initiated an action for declaratory judgment in the U.S. District Court for the District of Columbia seeking a judgment that the ASBCA claims were barred by *res judicata* and/or collateral estoppel. The Authority moved to suspend the Board appeals until the court addressed the declaratory judgment motion. The Board denied the Authority's motion. *KiSKA Construction Corp.-USA and Kajima Engineering and Construction, Inc., A Joint Venture,* ASBCA Nos. 54613, 54614, 05-1 BCA ¶ 32,922.

14. Thereafter, the Authority filed the subject motion. In support of its motion, the Authority offered, *inter alia*, the complaint in the 1997 court action, letters of counsel regarding discovery exchanges on pending change orders (PCOs), a number of pre-trial and post-trial opinions of the district court, excerpts from appellant's expert report and trial testimony to show that the matters under these appeals were litigated in the court action. In opposition, appellant offered affidavits from its vice president and its counsel in the court action and project records (*see* below) to show that the matters under these appeals were not litigated in the court action.

15. Appellant provided a memorandum memorializing a project closeout meeting dated 19 November 1997, that references, *inter alia*, a number of the parties' contract modifications and their ongoing negotiations on certain PCOs, a number of which are the subject of appellant's claim under ASBCA No. 54614. This project meeting was held after the court action was filed, which suggests that these changes may have been considered separate and apart from the matters under litigation. Insofar as pertinent, the memorandum states as follows:

> PCO-034; K&K [appellant] to submit revised proposal.
>
> . . . .
>
> PCO-056; WMATA action to review proposal and set up negotiations. PROC action.
>
> . . . .
>
> PCO-045; MOD-035 is being processed.

. . . .
MOD-31; 32; 33 ;34; 35; 36; 37; & 38 are currently in process and will be available for payment soon.

(App. response, ex. A) On or about 23 April 1998, WMATA issued Modification No. 49 to appellant, effective 18 February 1998, illustrating continued administration of the project after the court action was filed (Akyuz aff. at ¶ 11).

16. The project closeout meeting memorandum at paragraph 3 also indicated that the parties needed to reach certain "quantity agreements," presumably to reach agreement on additional payments for these quantities under the contract. The record contains the parties' executed agreement for final quantities for street car track removal dated 14 May 1998 (app. response, ex. A; Akyuz aff. at ¶ 10). This track removal issue is the subject matter of PCO-045, which is part of appellant's claim under ASBCA No. 54614. The record does not show whether the parties subsequently negotiated this matter, and what impact any such negotiations had on the court action.

17. In November, 1998, during discovery in the court action, the parties sought to exchange documents related to certain unidentified PCOs. In order to obtain this information without being subject to a protective order, appellant's counsel asserted to WMATA counsel by letter dated 10 November 1998 as follows:

> As KiSKA-Kajima seeks recovery of all costs incurred in the performance of the subject contract as a result of, among other things, WMATA's fraudulent and negligent misrepresentations and material breaches of contract, there are no outstanding claims which relate to the [subject] Contract. As you know, WMATA has also filed a counterclaim with respect to any potentially remaining claims in order to prevent piecemeal litigation and to ensure that this matter will be litigated in full before the United States District Court for the District of Columbia.
>
> Based on the foregoing, we accept WMATA's offer to produce responsive documents related to open PCOs on the [subject] Contract without the need for a protective order.

(R4, tab 7)

18. The record is not clear whether the PCOs referred to in counsel's letter are the PCOs that appellant has pleaded before the Board under ASBCA No. 54614. Assuming, *arguendo*, that this is the case, the record does not show the status of the PCOs at the

time counsel made this statement, that is, whether the PCOs were on an administrative negotiation track separate and apart from the court action per the parties' closeout memorandum above, or whether the parties had abandoned negotiations and the PCOs were considered part of the court action, or whether the PCOs were moving simultaneously on the contract administration and litigation tracks. Also, the record does not identify the documents WMATA provided to appellant in reliance upon counsel's representations, and does not indicate whether any of these documents were used by appellant to litigate the PCOs in the court action.

19. Insofar as pertinent, the contract at Article 6, Disputes, states as follows:

> 6. DISPUTES:
>
> a. Except as otherwise provided in this Contract, any dispute concerning a question of fact arising under this Contract which is not disposed of by agreement shall be decided by the Contracting Officer, who shall reduce his decision to writing and mail or otherwise furnish a copy thereof to the Contractor. The decision of the Contracting Officer shall be final and conclusive unless, within 30 days from the date of receipt of such copy, the Contractor mails or otherwise furnishes to the Contracting Officer a written appeal addressed to the Board of Directors. The decision of the Authority Board of Directors or its duly authorized representative for the determination of such appeals shall be final and conclusive unless in proceedings initiated by either party for review of such decision in a court of competent jurisdiction, the court determines the decision to have been fraudulent, or capricious, or arbitrary, or so grossly erroneous as necessarily to imply bad faith, or is not supported by substantial evidence.

(R4, tab 9) It is undisputed that pursuant to the parties' agreement, the ASBCA is the duly authorized representative of the Authority Board of Directors for purposes of decision-making under the Disputes article.

DECISION

In order to prevail on the subject motion, the Authority has the burden to show that there are no disputed material facts and it is entitled to judgment as a matter of law. *Mingus Constructors, Inc. v. United States*, 812 F.2d 1387, 1390 (Fed. Cir. 1987). In our evaluation of the motion, we must draw all inferences in favor of the nonmoving party.

United States v. Diebold, Inc., 369 U.S. 654, 655 (1962); *Lockheed Martin NESS-Akron*, ASBCA No. 54193, 04-2 BCA ¶ 32,728.

WMATA was established in the 1960s when the federal government gave its consent to an interstate compact signed by the State of Maryland, the Commonwealth of Virginia and the District of Columbia to develop a mass transit system for the Washington, DC metropolitan area. *See Beebe v. Washington Metropolitan Area Transit Authority*, 129 F.3d 1283, 1287 (D.C. Cir. 1997); *Rohr Industries*, ENGBCA No. 4306, 83-1 BCA ¶ 16,299 at 80,983, 80,998. WMATA's liability under this contract is to be determined by the law of the "applicable signatory" of the WMATA Compact.[2] As far as our record shows, this contract was awarded through the WMATA office in the District of Columbia, and the contract work was performed in the District of Columbia. We believe the District of Columbia is the "applicable signatory" under the circumstances, and we shall apply the law of the District of Columbia in addressing this motion.[3]

Our jurisdiction to hear these WMATA appeals is predicated upon the written agreement of the parties pursuant to the Disputes article of the contract and is not governed by the Contract Disputes Act (CDA), 41 U.S.C. §§ 601, *et seq*. *See KiSKA Construction Corp.-USA and Kajima Engineering and Construction, Inc., A Joint Venture*, 05-1 BCA at 163,081. In non-CDA cases, our jurisdiction is generally limited to the adjudication of disputes arising under the remedy-granting provisions of the contract pursuant to the Disputes clause. A contractor's action for breach of contract, however, may be brought directly in federal court. Under WMATA contracts, the Disputes article also provides that disputes of fact under the contract are to be adjudicated administratively and subject to judicial review (finding 19). Suits for breach of contract may be filed directly in the relevant federal district court, as appellant did in this case. *See KiSKA*, 05-1 BCA at 163,083, n.1. Generally, requests for equitable adjustment under contract clauses under WMATA contracts are not to be addressed in federal court in the first instance, but rather must be adjudicated under the administrative disputes procedures contained under the Disputes article. *See Rohr Industries, Inc. v. Washington Metropolitan Transit Authority*, 720 F.2d 1319, 1322-23 (D.C. Cir. 1983) (applying the pre-CDA jurisprudence regarding the standard Disputes clause under federal government contracts to the Disputes article under WMATA contracts); *Bethlehem Steel Corp. v.*

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[2] Paragraph 80, D.C. Code § 9-1107.01 (2001) states in pertinent part as follows:
"80. The Authority shall be liable for its contracts and for its torts ... in accordance with the law of the applicable signatory (including rules on conflict of laws), . . ."

[3] We need not explore here the conflict of law principles of the District of Columbia because the parties have not shown that this contract has a significant relationship to any other state so as to invoke conflict of law principles. *See generally*, RESTATEMENT (SECOND) OF CONFLICT OF LAWS §§ 1, 2 (1971).

Grace Line, Inc., 416 F.2d 1096, 1101 (D.C. Cir. 1969). *See generally United States v. Utah Construction and Mining Co.*, 384 U.S. 394 (1966), and cases cited therein.

We hear WMATA to argue that appellant is barred from litigating its equitable adjustment requests under these appeals on the grounds of *res judicata* because there was a final judgment against appellant on a breach of contract claim in the court action between identical parties on the same contract (Auth. mot. at 10-11). If the Authority was correct, a contractor would be forever barred from asserting an equitable adjustment under its contract if it had earlier lost a breach of contract claim in court. Such a result would render nugatory appellant's contract rights and remedies under the Disputes article. The Authority's position is inconsistent with the parties' contract and inconsistent with the unique disputes framework, above, mandated by law. The Authority has not persuaded us that *res judicata* applies to bar these appeals under the circumstances of this case.

In a related argument, the Authority contends that notwithstanding the availability of the Board as the parties' agreed-upon forum to dispose of factual disputes under the Disputes article, these appeals should be barred because appellant was nevertheless able to place all relevant factual matters before the court, which were all decided adversely to appellant. Accordingly, appellant should not get another proverbial "bite of the apple". In support of this position, the Authority invokes the principle of collateral estoppel, otherwise known as "issue preclusion".

The principle of issue preclusion is set forth at RESTATEMENT (SECOND) OF JUDGMENTS § 27 (1982) as follows:

> § 27. Issue Preclusion—General Rule
>
> When an issue of fact or law is actually litigated and determined by a valid and final judgment, and the determination is essential to the judgment, the determination is conclusive in a subsequent action between the parties, whether on the same or a different claim.

The District of Columbia Court of Appeals has applied this general rule in relevant contexts. *See Jonathan Woodner Co. v. Adams*, 534 A.2d 292, 295 (D.C. 1987). *See also United States v. TDC Management Corp.*, 288 F.3d 421, 424 (D.C. Cir. 2002).

With respect to ASBCA No. 54613 and appellant's claim for retainage under the Payments to Contractor article of the contract, the Authority contends that it has met the test for issue preclusion on this record, and should be granted judgment as a matter of law. We do not agree. In accordance with the Restatement, WMATA must establish that

the issue of retainage (1) was litigated in the court action; (2) was determined by the jury and the court's final judgment based thereon; and (3) that the determination was essential to the judgment. The Authority has only met the first prong of this test on this record.

The jury issued a general verdict in favor of WMATA on the claim of breach of contract. It is unclear on this record whether by this general verdict the jury addressed what Mr. Fuchs characterized as the undisputed, retained amounts by WMATA. It is possible that jury instructions could shed some light on this subject, but they are not of record.

The Court in *Woodner* stated the following in this context, at 296:

> Due to the lack of specificity in the jury verdicts, it is impossible to determine conclusively which of the lease provisions the tenant violated. *See Copening v. United States*, 353 A.2d 305, 309 (D.C.1976) (where the prior judgment relied upon is in form of general verdict, the prerequisites for collateral estoppel are even more difficult to establish). "Unless the record of the prior proceeding affirmatively demonstrates that an issue involved in the second trial was definitely determined in the former trial, the possibility that it may have been does not prevent the relitigation of that issue." (Citations omitted)

See also Major v. Inner City Property Management, Inc., 653 A.2d 379, 382 (D.C. 1995), where the District of Columbia Court of Appeals stated as follows:

> "The burden is on the party asserting preclusion to show actual decision of the specific issues involved." [Citation omitted]. In addition, it has long been the rule that when the record does not clearly disclose the grounds on which the first decision was based, that decision cannot be given collateral estoppel effect. . . ; *accord, e.g., Stebbins v. Keystone Insurance Co., supra* note 8, 156 U.S.App.D.C. at 332 n.13, 481 F.2d at 508 n.13 ("If the basis for the first judgment is uncertain, then no estoppel is created as to any of the issues, even though they were actually litigated" (citations omitted)); *Woodbury v. District of Columbia*, 67 App.D.C. 278, 280, 92 F.2d 202, 204 (1937). When "a prior judgment [does] not indicate clearly what issues were resolved . . . the result is that the opaque judgment fails to preclude relitigation." [Citation omitted]

Based upon the foregoing, and drawing all inferences in favor of appellant as the nonmoving party, we believe WMATA has failed to meet prong (2) of the issue preclusion test. Perforce, it has also failed to meet prong (3) of the test, requiring a showing that any determination was essential to the jury verdict and the court's judgment. We must conclude on this record that the Authority has failed to meet its burden to show its entitlement to judgment as a matter of law on the grounds of collateral estoppel under ASBCA No. 54613.

With respect to ASBCA No. 54614 and appellant's requests for equitable adjustment under the Changes article, the record is unclear whether WMATA has even met prong (1) of the test, that is, whether these matters were litigated in the court action. The specific PCOs and contract modifications in the Board complaint under ASBCA No. 54614 were not specified in the complaint in the court action, nor detailed in the quantification of damages report, nor in the excerpts of the trial testimony of record presented to us. Appellant's evidence indicates that the parties were negotiating a number of these matters after the court action commenced, which suggests the parties may have considered them separate and distinct from the litigation. While the Authority's evidence disputes this, we must draw all inferences in favor of appellant as the nonmoving party. We conclude on this record that the Authority has failed to meet its burden to show its entitlement to judgment as a matter of law on the grounds of collateral estoppel under ASBCA No. 54614.

The Authority also seeks to bar these appeals on the grounds of equitable estoppel. In support of its position, the Authority cites *Thoubboron v. Ford Motor Co*., 809 A.2d 1204, 1212 (D.C. 2002) for the following proposition: "The doctrine of equitable estoppel provides that 'a party with full knowledge of the facts, which accepts the benefits of a transaction, contract, statute, regulation, or order may not subsequently take an inconsistent position to avoid the corresponding obligations or effects' [citations omitted]." We do not question this legal principle, but believe that the Authority has yet to establish undisputed facts to which it may properly apply this principle. Given the unique disputes procedures at work here and the state of the record, WMATA has not persuaded us that the filing of a breach of contract claim in one forum, and the subsequent filing of a request for equitable adjustment under the same contract in a different forum are, without more, inconsistent, prejudicial acts in accordance with equitable estoppel principles.

Whether the Authority may be able to prove its affirmative defenses in these appeals after an opportunity to fully develop the record remains to be seen. However for present purposes we conclude that the record needs further development and contains material, disputed facts and the Authority has not shown entitlement to judgment as a

matter of law. We have duly considered WMATA's remaining contentions, but given the state of the record we do not believe that they compel a different conclusion.

CONCLUSION

WMATA's motion to dismiss and/or for summary judgment is denied. The Authority shall file its answer under these appeals no later than 30 days from receipt of this decision.

Dated: 30 March 2006

JACK DELMAN
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. 54613, 54614, Appeals of KiSKA Construction Corp.-USA and Kajima Engineering and Construction, Inc., A Joint Venture, rendered in conformance with the Board's Charter.

Dated:

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