

ARMED SERVICES BOARD OF CONTRACT APPEALS

Appeal of --)
)
Packard Construction Corp.) ASBCA No. 55383
)
Under Contract No. DACA21-02-C-0012)

APPEARANCE FOR THE APPELLANT: Mr. Richard C. Forrester, III
Vice President, Operations

APPEARANCES FOR THE GOVERNMENT: Thomas H. Gourlay, Jr., Esq.
Engineer Chief Trial Attorney
Colin R. Ozanne, Esq.
Engineer Trial Attorney
U.S. Army Engineer District, Savannah

OPINION BY ADMINISTRATIVE JUDGE JAMES
ON RESPONDENT'S MOTION TO DISMISS AND
FOR PARTIAL SUMMARY JUDGMENT

Respondent moved on 15 June 2006 to dismiss appellant's claim for Eichley damages for failure to plead facts sufficient to state a claim upon which relief can be granted, or, in the alternative, if the Board should find that appellant has pleaded sufficient facts to support its Eichley claim, for summary judgment as to 19 of the 75 days claimed for Eichley damages pursuant to the doctrine of issue preclusion. Appellant opposed the motion on 31 August 2006. We deny the motion.

STATEMENT OF FACTS (SOF) FOR THE PURPOSES OF THE MOTION

1. The government awarded Contract No. DACA21-02-C-0012 (the contract) to Packard Construction Corp. on 28 March 2002 for the fixed price of \$3,181,476. The contract required Packard to construct a Photographic, Imagery and Analysis Facility at Ft. Bragg, NC, to be completed within 450 days after receipt of notice to proceed. (R4, tab 3 at 1)

2. Packard submitted a number of claims under the contract that have resulted in ASBCA appeals. This appeal relates to its water main location and supply tap claim ("Water Main" claim), certified on 21 October 2005, which sought \$34,278 in direct costs and \$111,062 in "Eichley" damages for 75 days of delay, totaling \$145,340. The contracting officer denied this claim in part on 23 December 2005. (R4, tab 12; Bd. corr. file, letter dated 24 October 2005)

3. Packard's previous appeals include ASBCA No. 55238, relating to the "underground debris" claim, and ASBCA No. 55239, relating to the "sewer line" claim. Each of these appeals also sought Eichleay damages, for a total of 19 days of delay. Packard elected the expedited procedure of Board Rule 12.2 for the processing of these two appeals. On 21 February 2006, the Board issued an unpublished opinion denying Packard's claim for Eichleay damages in those appeals except for two days.

4. On 14 April 2006, appellant filed its complaint in this appeal. The complaint includes 22 exhibits and a narrative statement of the delays allegedly associated with the water main and their effect on the work. The complaint alleges *inter alia* that:

[D]elays associated with the water main tie-in meet all of the requirements established for Eichleay recovery: (19)

- There were no concurrent delays caused by Packard;
- Packard was required to remain mobilized at the site, ready to resume work immediately upon receipt of direction from the Government;
- Packard could not reasonably have been expected to secure other work to replace the work being delayed: and
- Even though Packard's work had not been suspended in writing, we fully meet the requirements established by the Court under *Interstate*, regarding the availability of other contract work during the delay.

(Compl. at 5) The government denied this allegation in its answer (answer, ¶ 22).

DECISION

Respondent's motion presents two issues. First, according to movant, appellant's complaint does not allege sufficient material facts to support its Eichleay claim, particularly the requirement that it be on standby, under the criteria applied in *P. J. Dick, Inc. v. Principi*, 324 F.3d 1364, 1371 (Fed. Cir. 2003). Movant argues that Packard's "general allegation that it was required to remain mobilized at the site and ready to resume work immediately upon receipt of direction from the Government is insufficient" to establish that it was on standby in view of other allegations that, in movant's view, show Packard was performing work at the time. (Gov't mot. at 8)

In our opinion, the motion, although phrased as one to dismiss, in fact asks us to consider the evidence underlying appellant's various allegations. Accordingly, we decide

the motion under the standards applicable to one for summary judgment.¹ Viewed in that light, movant has not established that there are no genuine issues of material fact and that it is entitled to judgment as a matter of law on the standby issue. Accordingly, we deny the motion as it relates to the first issue.

Second, movant contends that in ASBCA Nos. 55238 and 55239, “Packard has already litigated entitlement to ‘Eichleay’ damages for 19 of the 75 days alleged and is therefore precluded from litigating entitlement to these 19 days by the doctrine of issue preclusion” (gov’t mot. at 10). As we found above, the Board decided these appeals pursuant to Board Rule 12.2, implementing 41 U.S.C. § 608. There is no right to appeal an ASBCA decision under Rule 12.2. Because of the lack of the right of appeal, Rule 12.2 decisions do not have preclusive effect except as to the claim they decide (here, the underground debris and sewer claims). *Hitt Contracting, Inc.*, ASBCA Nos. 51594, 51878, 99-2 BCA ¶ 30,442 at 150,421, *recons. denied*, 99-2 BCA ¶ 30,558; *Fossitt Groundwork, Inc.*, ASBCA No. 45358, 96-2 BCA ¶ 28,527 at 142,458.²

In summary, we deny respondent’s motion to dismiss or for partial summary judgment in its entirety.

Dated: 6 December 2006

DAVID W. JAMES, JR.
Administrative Judge
Armed Services Board
of Contract Appeals

I concur

I concur

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

EUNICE W. THOMAS
Administrative Judge
Vice Chairman
Armed Services Board
of Contract Appeals

¹ The result would be the same if we regarded the motion as one for failure to state a claim upon which relief can be granted.

² Packard may not, of course, recover again for the two days as to which it was granted recovery in ASBCA No. 55239.

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. 55383, Appeal of Packard Construction Corp., rendered in conformance with the Board's Charter.

Dated:

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