ARMED SERVICES BOARD OF CONTRACT APPEALS

Appeals of --	)	
	)	
Corners and Edges, Inc.	)	ASBCA Nos. 55611, 55619
	)	
Under Contract No. 263-MO-608091	)	

APPEARANCE FOR THE APPELLANT: Mr. John E. Larson
Secretary

APPEARANCE FOR THE GOVERNMENT: Mogbeyi E. Omatete, Esq.
Trial Attorney
Department of Health and Human Services
Washington, DC

OPINION BY ADMINISTRATIVE JUDGE DELMAN

Under ASBCA No. 55611, Corners and Edges, Inc. (CEI or appellant) disputes the government's deduction of $569.09 from its invoice to reimburse the government for the repair of a government furnished minivan that was damaged by appellant while performing this contract at the Rocky Mountain Laboratories (RML), National Institutes of Health (NIH) in Hamilton, Montana. Under ASBCA No. 55619, appellant challenges the denial of its claim, as amended, in the amount of approximately $99,000, for the risk of bodily harm to perform the contract work after the government limited appellant's access to this vehicle. We have jurisdiction under the Contract Disputes Act (CDA), 41 U.S.C. §§ 601-613.

Appellant also filed appeals with the Civilian Board of Contract Appeals (CBCA) under this contract, challenging contracting officer (CO) decisions denying claims with certain facts in common with the ASBCA appeals.[1] During a prehearing conference on 3 October 2008 on the ASBCA appeals, the parties advised the Board that the CBCA had issued a decision on the merits denying its appeals. The Board ordered the parties to address whether the CBCA's findings and conclusions were binding on this Board based upon the principles of *res judicata* and/or *collateral estoppel.*

The parties briefed the matter. The government contended that the CBCA decision constituted a bar on the relevant issues based upon *res judicata* and/or *collateral estoppel*.

[1] The CDA, as amended effective 6 January 2007, gave effect to the establishment of the CBCA, 41 U.S.C. § 438. Effective this date, CBCA jurisdiction extended to appeals from CO decisions of NIH and its contracting components.

Appellant opposed the application of these principles. For reasons stated below, we grant the government's motion and conclude that the CBCA's decision and its findings and conclusions are binding on this Board based upon *res judicata* and/or *collateral estoppe*l.[2]

FINDINGS OF FACT

1. On or about 19 May 2006, the government awarded appellant a purchase order to provide courier delivery services and mail handling services on the RML campus in Hamilton, Montana. The Statement of Work provided the following pertinent provisions:

> **Duties**
>
> Courier Delivery Services:
>
> - Load government-provided carts and vehicles with incoming freight for delivery to appropriate locations within the RML campus;
> - Deliver to the Bldg. 22 stockroom or directly to laboratories, offices, libraries, and storage facilities, as indicated, within one day of receipt, all commodities except perishables (see below);
> - Perishable items with different temperature requirements have delivery priority. Refrigerated and frozen items are to be delivered to and received by the proper owner not later than 4:15 pm the same business day. If items(s) cannot be delivered within that timeframe, the item(s) must be returned to the Supply Specialist or Supply Technician to be appropriately stored no later than 4:30 pm that day in order to preclude damage; and

[2] While the government identified its filing as a "position paper," we deem its filing to constitute a "motion" insofar as it seeks relief from the Board with respect to the matters indicated, and we shall treat it accordingly for purposes of this opinion. We also note that it was impossible for the government to assert the doctrine of *res judicata* or *collateral estoppel* as an affirmative defense in its answers to the complaints in these appeals since the CBCA decision was issued many months after the government answers were filed. Based upon the unique circumstances of this case we find that the government's motion, which was filed shortly after the CBCA decision was issued, in effect incorporated these affirmative defenses in its answers. To require the government to otherwise file an additional pleading to incorporate these defenses at this late date would be a mere formality and would serve no useful purpose.

- Obtain a signed receipt for all commodities as proof of proper and correct delivery.
- Mail Handling Services:
- Accurately sort and distribute incoming mail twice daily to all designated mail stops; and
- Pick up outgoing mail from designated mail stops and transport to Bldg. 29 for pickup by the USPS, Federal Express, UPS, and/or DHL contract carriers. All outgoing shipments must be deposited at Bldg. 29 no later than 2:00 pm each business day.

. . . .

Government Furnished Property:

The Government will supply the following equipment to the contractor for official use only:

- *Government-owned vehicles and carts, including van, forklift, 4wd ATV, pallet jacks.*

(App. supp. R4, tab 20)(Emphasis added)

2. Pursuant to the Government Furnished Property clause, the government provided appellant with a Dodge Caravan minivan to perform its duties under the contract. On 10 August 2006, Mr. John E. Larson, an employee and officer of the contractor, was driving this vehicle on the RML campus in the course of performing the contractor's duties under the contract. While backing up the vehicle, Mr. Larson collided with a chain-link guard gate and fence and damaged the vehicle. According to Mr. Larson's signed statement dated 10 August 2006, "I didn't see it when I was turning" (R4, tab 5(e)).

3. By letter to Mr. Larson dated 17 August 2006, the CO referenced a NIH police investigation report indicating that the accident was due to "the driver's inattentiveness." The CO advised that appellant would be held responsible for repair costs to the damaged government vehicle. The CO further provided as follows:

> As a direct result of this accident a decision has been made that from this date forward you, Corner's and Edges Inc. [sic] employee John Larson, will only be allowed to use the government van in the event of inclement weather. Specifically this means if it is raining and/or snowing. In the event that it is raining or snowing, you will need to get verbal

> approval from either Kristine Schmitt or Chris Rausch before each use.
>
> You will be required to use the [government furnished] hand dolly to make deliveries in clear weather. During the winter months if there is more than ¼" of snow on the campus roadways, or the roadways are deemed unsafe by the RML Occupational Health and Safety Manager due to a buildup of ice and/or snow, you will be allowed to use the Shipping & Receiving department's ATV to make deliveries upon verbal approval of one of the above-mentioned Government employees.

(R4, tab 3(g)). The restriction on the use of the minivan was to apply to Mr. Larson only. Mrs. Larson, who also performed work under the contract, was permitted to drive the van.

4. By letter to the CO dated 21 August 2006, appellant disputed the CO's conclusions about the accident, and stated that the government was responsible for the property damage to the vehicle "for neglecting to provide industry-standard safe conditions within which to operate the Government owned vehicles…" (R4, tab 5(i)(2)). Appellant requested reconsideration of the government's position.

5. The CO convened a meeting on 29 August 2006 to address this matter. Insofar as pertinent, Mr. and Mrs. Larson, the CO, and the person that conducted the accident investigation attended the meeting. The meeting was recorded and the minutes were transcribed with the knowledge and consent of the parties. With respect to the accident in question, the CO reaffirmed her position that appellant was responsible for the damage to the government van, and gave appellant the option of how to pay for the repairs. Appellant chose to have the repair costs taken out of money due and owing under the contract (R4, tab 4 at 3-5). The CO also reaffirmed her earlier determination that Mr. Larson would be forbidden to drive the van in the future, with certain weather-related exceptions, and instead he would be provided a government cart (also known as a "dolly") to make deliveries when the weather was clear (*id*.).

6. By CO decision dated 29 September 2006, the CO advised appellant that the government had repaired the vehicle at a cost of $569.09, which the CO represented to be the lowest price received from three body shops. The CO advised that the government intended to deduct $569.09 from appellant's invoice #004 as reimbursement for these repair costs. (R4, tab 1(b)) As far as we can tell, the government took this deduction (R4, tab 3(d)).

7. Appellant appealed the CO decision to this Board on 4 October 2006, contending that the accident occurred "from the Government's negligence in not providing safe conditions" for the operation of the vehicle, and that the CO's deduction was a violation of the government furnished property clause (R4, tab 3(c)). The appeal was docketed as ASBCA No. 55611.

8. On 27 September 2006, appellant filed a monetary claim with the CO, contending that the CO's direction restricting Mr. Larson's use of the van was a "Constructive Change Order/Unilateral Contract Modification" for which appellant was entitled to recover damages. Appellant claimed $15,500, which reflected appellant's assessment of the increased risk of bodily injury to Mr. Larson for each day he worked using the cart rather than the van ($500.00 x 31 days). (R4, tab 3(e)) The CO denied the claim by decision dated 29 September 2006 (R4, tab 1(a)), and appellant appealed to this Board on 4 October 2006. This appeal was docketed as ASBCA No. 55619. The appeals were consolidated.

The Claims Before The CBCA[3]

9. On 10 January 2007, appellant submitted a certified claim to the CO seeking $9,980,490, or $255,910 per day for the thirty-nine days of contract performance between August 10 and 6 October 2006. Appellant claimed that the CO's restriction of Mr. Larson's use of the government van (due to the same accident that is the subject of the ASBCA appeals) caused "the risk of catastrophic accident harming people other than [appellant's] employees increased to an amount insupportable by the then existing contract price," *CEI*, 08-2 BCA ¶ 33,961 at 168,020. Appellant stated that the risk was:

> based on the increased danger that a biological, chemical and radiological (BCR) accident could occur from a vehicular accident (collision) involving a motorized vehicle and the transport dolly utilized by [appellant's] employee John Larson during the transport of hazardous agents that could harm the local residential community and the workforce community at RML.

(*Id*.) On 23 February 2007, the CO denied this claim. Appellant filed an appeal with the CBCA.

10. On 11 January 2007, appellant submitted another claim to the CO, seeking an additional payment of $15,578.49, contending that the government had breached the

[3] The findings of fact in this section are taken from *Corners and Edges, Inc. v. Department of Health and Human Services (CEI)*, CBCA Nos. 693, 762, 08-2 BCA ¶ 33,961 at 168,019-020.

contract by issuing a modification reducing the hours of courier service to be provided under the contract. The CO denied this claim on 23 February 2007, and appellant filed an appeal with the CBCA. The CBCA appeals were consolidated.

The CBCA Decision

11. The CBCA conducted an evidentiary hearing. Appellant attended the hearing and presented evidence. On 23 September 2008, the CBCA issued a decision on the merits denying the appeals. *CEI*, CBCA Nos. 693, 762, 08-2 BCA ¶ 33,961. Appellant did not seek reconsideration nor did it appeal this decision, and we find the decision to be a final, binding judgment.

12. The CBCA made the following findings and conclusions, insofar as pertinent, which we summarize below:

> 1. Appellant did not show that the government failed to comply with the government-furnished property clause.
>
> 2. The government acted reasonably to restrict Mr. Larson's use of the van because based on his prior use of the van the government could not trust him to operate it in ways that did not pose a danger to others.
>
> 3. Appellant did not show that the restrictions placed on Mr. Larson's use of the vehicle adversely affected the costs of performance or the time specified for performance.
>
> 4. Appellant did not show that Mr. Larson's use of the dolly [cart] in lieu of the van resulted in any release of hazardous material during contract performance, or in any physical or financial damage or injury.

CEI, 08-2 BCA ¶ 33,961 at 168,021-022.

DECISION

The principles of *res judicata* (also known as "claim preclusion") and *collateral estoppel* (also known as "issue preclusion") are familiar. Under *res judicata*, a final judgment on the merits precludes the parties from re-litigating claims that were or could have been raised in the prior action. *Federated Department Stores, Inc. v. Moitie*, 452 U.S. 394, 398 (1981). *Res judicata* applies when the following factors are met:

> (1) the parties are identical or in privity; (2) the first suit proceeded to a final judgment on the merits; and (3) the second claim is based on the same set of transactional facts as the first [citation omitted].

Phillips/May Corp. v. United States, 524 F.3d 1264, 1268 (Fed. Cir. 2008).

The doctrine of *collateral estoppel* bars a party from raising issues that have been litigated and decided in a prior proceeding. Unlike claim preclusion, there is no requirement that the claim or cause of action in the two suits be identical, the rationale being that a party who has litigated an issue and lost should not be allowed to re-litigate it. *In re Freeman*, 30 F.3d 1459, 1465 (Fed. Cir. 1994); *Mother's Restaurant, Inc. v. Mama's Pizza, Inc.*, 723 F.2d 1566, 1569 (Fed. Cir. 1983). The moving party must establish the following:

> (1) identity of the issues in a prior proceeding;
> (2) the issues were actually litigated;
> (3) the determination of the issues was necessary to the resulting judgment; and,
> (4) the party defending against preclusion had a full and fair opportunity to litigate the issues [citations omitted].

Jet, Inc. v. Sewage Aeration Systems, 223 F.3d 1360, 1366 (Fed. Cir. 2000); *Freeman*, 30 F.3d at 1465.

For reasons stated below, we conclude that the principles of *collateral estoppel* and/or *res judicata* apply here so as to bar appellant from re-litigating before the ASBCA the responsibility for the van accident, the reasonableness of the CO's determination to limit Mr. Larson's use of the van resulting from the accident and whether appellant's use of the cart/dolly caused the release of hazardous material or any other damage.

ASBCA No. 55611

Under ASBCA No. 55611, appellant claims the amount the government has withheld from its invoice for damages to the government van related to the accident, which claim was not before the CBCA. Hence, we cannot state that both actions share the same set of transactional facts, and we believe that the doctrine of *res judicata* does not apply.

On the other hand, we believe that the doctrine of *collateral estoppel* is applicable. There is an identity of issue in the two proceedings, that is, the issue of appellant's responsibility for the van accident. This issue is squarely before us in ASBCA No.

55611, and it was raised, litigated and decided at the CBCA. As stated in the CBCA opinion, the government contended at the trial that "the restriction of Mr. Larson's use of the van was reasonable in view of Mr. Larson's negligent use of the van..." *CEI*, 08-2 BCA ¶ 33,961 at 168,020. The CBCA decided this issue adversely to appellant: "Respondent acted reasonably in restricting Mr. Larson's use of the van, because based on Mr. Larson's prior use of the van, it could not trust Mr. Larson to use the van in ways that did not pose a danger or inconvenience to those around him." *CEI*, 08-2 BCA ¶ 33,961 at 168,021.

With respect to element (3) of the *collateral estoppel* test, the Federal Circuit has stated that "[t]he purpose of this requirement is to prevent the incidental or collateral determination of a nonessential issue from precluding reconsideration of that issue in later litigation." *Freeman*, 30 F.3d at 1466. The CBCA's determination of this issue was not an incidental or collateral determination of a nonessential issue in the CBCA proceedings, and we believe that element (3) of the test has been met. Finally, appellant attended and presented evidence at the CBCA hearing, and as far as this record shows it had a full and fair opportunity to litigate this issue at the CBCA.

All four elements of the *collateral estoppel* doctrine have been met. We conclude that appellant is barred from re-litigating the responsibility of the van accident under ASBCA No. 55611 based upon the doctrine of *collateral estoppel*.[4]

[4] There still remains the issue under ASBCA No. 55611 of whether the government's deduction of $569.09 from the CEI invoice for the damage to the vehicle was reasonably supported and justified.

ASBCA No. 55619

In ASBCA No. 55619, appellant contends that the CO's decision to limit Mr. Larsen's use of the government van and to substitute the government furnished cart/dolly for deliveries was wrongful and caused a quantifiable risk of injury to Mr. Larson by dint of the dangerous matter delivered. In CBCA No. 762, appellant contended that this same CO decision was wrongful and caused a quantifiable risk of injury to the general public by dint of the dangerous matter delivered. The transactional facts in the two actions are identical; only the claimed damage amount is different. The parties before the boards are identical. These claims were adjudicated adversely to appellant in a binding, final judgment on the merits at the CBCA. The CBCA held that the CO's decision to limit Mr. Larson's use of the van after the accident was not wrongful, and no damages were shown by appellant resulting from the use of the cart/dolly. We believe the doctrine of *res judicata* applies to bar the re-litigation of these claims under ASBCA No. 55619.

In support of its argument disputing the applicability of *res judicata*, appellant offers a distinction between matters before the CBCA and ASBCA, contending that in ASBCA No. 55619, it claims that the CO's direction limiting Mr. Larson's use of the van after the accident and providing him with the government furnished cart/dolly was a "change" to the contract and constituted an improper "addition of a new requirement" (br. at 2), which legal issue was not specifically raised and addressed by the CBCA. However, this is a distinction without a material difference. The issue of whether the CO's direction was wrongful was before the CBCA, and appellant was free to make the above legal argument at the CBCA if it so chose. It chose not to do so. *Res judicata* bars the re-litigation of factual and legal matters that could have been raised in a prior proceeding. *Federated Department Stores,* 452 U.S. at 398.

Accordingly, we conclude that the CBCA decision bars the re-litigation of the above issues under ASBCA No. 55619 on the grounds of *res judicata.* Alternatively, based upon *collateral estoppel,* we are bound by the factual and legal issues litigated and decided adversely to appellant at the CBCA, *i.e.,* that the CO's decision to restrict Mr. Larson's use of the van after the accident was not wrongful and that appellant failed to show that Mr. Larson's use of the cart/dolly in lieu of the van caused the release of hazardous material or any other damage. These issues in the CBCA and ASBCA proceedings are identical; they were actually litigated and decided by the CBCA; the CBCA's determination was necessary to its judgment, and appellant had a full and fair opportunity to litigate the matter.

CONCLUSION

For reasons stated, we grant the government's motion and conclude that the subject CBCA opinion bars the re-litigation of the claims and/or issues stated herein under ASBCA Nos. 55611 and 55619 on the grounds of *res judicata* and/or *collateral estoppel*. The Board shall convene a conference call to address the need for further proceedings consistent with this opinion.

Dated: 12 June 2009

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. 55611, 55619, Appeals of Corners and Edges, Inc., rendered in conformance with the Board's Charter.

Dated:

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