

ARMED SERVICES BOARD OF CONTRACT APPEALS

Appeal of -- )  
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Free & Ben, Inc. ) ASBCA No. 56129  
 )  
Under Contract No. W91GY0-07-C-0056 )

APPEARANCE FOR THE APPELLANT: Mr. Ben Emosivbe  
President

APPEARANCES FOR THE GOVERNMENT: Craig S. Clarke, Esq.  
Army Chief Trial Attorney  
Robert T. Wu, Esq.  
Trial Attorney

OPINION BY ADMINISTRATIVE JUDGE TING  
ON APPELLANT'S SECOND MOTION FOR RECONSIDERATION

On 14 April 2009, we denied appellant's cross-motion for summary judgment. *Free & Ben, Inc.*, ASBCA No. 56129, 09-1 BCA ¶ 34,129. Thereafter, appellant moved for reconsideration. On 22 December 2009, we denied appellant's motion for reconsideration (slip op.). Appellant now moves for reconsideration of our reconsidered decision. The government has elected not to respond to appellant's latest motion.

The Board's Rules do not provide for a second motion for reconsideration. Absent extraordinary circumstances, which are not present here, we would summarily deny such a motion, and we do so here.

Accordingly, appellant's second motion for reconsideration is denied.

ADDITIONAL SEPARATE OPINION BY ADMINISTRATIVE JUDGE TING

Having joined my colleagues in denying appellant's second motion for reconsideration on the basis stated above, I believe it would be useful to amplify the critical issues the parties should focus upon in the interest of proceeding orderly and efficiently at the hearing.

From the numerous facts appellant proffered in support of its cross-motion for summary judgment, we have identified at least two broad themes or legal theories which could arguably support summary judgment as a matter of law: (1) the issue of failure to cooperate, and (2) the issue of nondisclosure.

On the issue of failure to cooperate, appellant alleges that Captain Robert S. Lady (Capt Lady)<sup>1</sup> was slow to respond when it sought advice on the issuance of an End Use Certificate (EUC) by the Iraqi government directly. The government disputes Capt Lady was slow in responding. In denying appellant's motion for reconsideration, we said "there are material disputed facts relating to whether 1LT Lady's conduct during contract performance was reasonable" (slip op. at 1-2). In this regard, we have said that issues that require the determination of the reasonableness of the conduct of the parties under the facts and circumstances of the case cannot ordinarily be disposed of by summary judgment. *Coastal Government Services, Inc.*, ASBCA No. 50283, 99-1 BCA ¶ 30,348 at 150,088; *McDonnell Douglas Corp.*, ASBCA No. 48432, 99-2 BCA ¶ 30,517 at 150,692.

As a part of its cross-motion for summary judgment, appellant asserted that the government's decision to terminate its contract for cause was made in bad faith (cross-mot. papers No. 1 at 35-43). Opposing appellant's cross-motion, the government disputed this assertion and contended that the CCIR<sup>2</sup> was used to inform the contracting officer's (CO) chain of command of the impending termination and did not trigger the termination, that the CO independently determined the propriety of the termination, and that the termination occurred because appellant "expressed its inability to perform in conformance with the terms of the contract" (cross-mot. papers No. 2 at 3, ¶ 7). In its second motion for reconsideration, appellant asserted that Capt Lady drafted a CCIR "known to be tainted by bad faith" (second mot. for recon. at 3). We have said that the crucial elements of bad faith tend to be "very fact-intensive, revolving round...subjective intentions and motives," and do not lend themselves readily to disposition by summary judgment. *J.A. Jones Construction Co.*, ASBCA No. 43344, 96-2 BCA ¶ 28,517 at 142,422; *Lockheed Martin Aircraft Center*, ASBCA No. 55164, 08-1 BCA ¶ 33,832 at 167,447.

Based on the record submitted, we found under the broad category of nondisclosure there are "at least material issues with respect to: (1) whether appellant knew prior to execution of Contract 0056 that an EUC could be required; and (2) whether appellant, knowing what it knew, could have offered to provide trucks from a source other than its Japanese supplier" (slip op. at 2). These two issues are material to the question of whether appellant detrimentally relied on Capt Lady's alleged representation

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<sup>1</sup> 1LT Lady has since been promoted to the rank of Captain in the United States Air Force (gov't opp'n at 3, n.2). We refer to him as Capt Lady except where his rank is used in quotes.

<sup>2</sup> As the government previously explained, a Commander's Critical Information Requirements or CCIR is "a situation report used by the Contracting Officer...to inform the Commanding General, JCC-I/A, of the impending termination for cause" (mot. papers No. 3 at 10, n.3).

in proceeding with execution of Contract 0056, which in turn, could affect the propriety of the termination for cause.

Appellant has said that it had “prior knowledge” about an EUC, and that was what prompted him “to approach 1LT Robert Lady on June 21, 2007 concerning the issuance of an EUC” (mot. for recon. at 3). Appellant has also alleged that “[p]rior to signing the contract on 21 June, 2007, Appellant called on Respondent, raising the issue of EUC, to which 1LT Robert Lady, responded ‘that would be taken care of’” (mot. papers No. 4 at 11, ¶ 1). In opposing appellant’s motion for reconsideration, the government furnished a declaration from Capt Lady which states “I am certain that an EUC was not discussed on 21 June 2007 or prior to signing the contract... I certainly did not tell Mr. Emosivbe that an EUC ‘would be taken care of.’” (Gov’t opp’n, ex. 1) Appellant’s 15 July 2009 response challenged this statement as “inaccurate” (app. resp. at 1). This conflict presents a credibility issue. As courts have long recognized, summary judgment is singularly inappropriate where credibility is at issue. Only after an evidentiary hearing can credibility issues be appropriately resolved. *SEC v. Karacorp Industries, Inc.*, 575 F.2d 692, 699 (9<sup>th</sup> Cir. 1978) *citing Poller v. Columbia Broadcasting System, Inc.*, 368 U.S. 464, 473 (1962) (“It is only when witnesses are present and subject to cross-examination that their credibility and the weight to be given their testimony can be appraised”); *George Hyman Construction Co.*, ASBCA No. 44362, 93-3 BCA ¶ 26,030 at 129,389.

Dated: 22 January 2010

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PETER D. TING  
Administrative Judge  
Armed Services Board  
of Contract Appeals

I concur

I concur

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

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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. 56129, Appeal of Free & Ben, Inc., rendered in conformance with the Board's Charter.

Dated:

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