ARMED SERVICES BOARD OF CONTRACT APPEALS

Appeal of --	)	
	)	
Parsons-UXB Joint Venture	)	ASBCA No. 56481
	)	
Under Contract No. N62742-95-D-1369	)	

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OPINION BY ADMINISTRATIVE JUDGE MELNICK ON APPELLANT'S MOTION IN LIMINE TO STRIKE GOVERNMENT EXPERT REPORT AND PRECLUDE THE GOVERNMENT FROM ENTERING IMPROPER EXPERT TESTIMONY

On 9 November 2011, appellant, Parsons-UXB Joint Venture (Joint Venture), filed a motion in limine to strike the expert report of David G. Anderson and to preclude Mr. Anderson's testimony as an expert at the hearing of this appeal. Mr. Anderson's report was attached as an exhibit to the motion. We grant the motion.[1]

The nature of the appeal is comprehensively described in the Board's Opinion on the Government's Motion for Summary Judgment. *Parsons-UXB Joint Venture,* ASBCA No. 56481, 11-1 BCA ¶ 34,680. In summary, the Navy awarded the Joint Venture a cost plus award fee, indefinite-delivery, indefinite-quantity contract to remove unexploded ordnance. The Joint Venture seeks reimbursement from the government of additional general excise taxes (GET) imposed by the State of Hawaii upon the Joint Venture and its partners, and that they had disputed in litigation with the State. In its ruling upon summary judgment, the Board held that the Joint Venture's invoice for reimbursement of the GET assessment exceeded the total contract funding allotted for

[1] The government has not yet attempted to place Mr. Anderson's expert report into evidence. So to be more precise, rather than strike the report we exclude both it and Mr. Anderson's testimony from admission into evidence.

costs, constituting an overrun under the contract's Limitation of Funds clause. *Id.* at 170,829-31. However, among other things, the Board also ruled that genuine issues of material fact existed, requiring a trial, pertaining to "if and/or when appellant had reason to foresee it would be liable for GET beyond the existing funding...." *Id.* at 170,832.

Mr. Anderson's report states that he has earned a Bachelor of Science in Accounting, a Master of Arts in Business Management, a Doctor of Jurisprudence, and a Master of Laws in Government Procurement. It also reports that he is a Certified Public Accountant and a Certified Internal Auditor.

In summary, Mr. Anderson's report presents his opinion that the GET cost overruns were not unforeseeable, and that the record contains no evidence that the Joint Venture has reimbursed either of its partners for the GET costs at issue in the appeal.

I. Foreseeability of Cost Overruns

A. Mr. Anderson's Opinion

Mr. Anderson begins his analysis of foreseeability by asserting that the Joint Venture and its partners knew during contract performance that the State believed they had underpaid GET. He contends that the possibility of the State prevailing in litigation over the matter was "one of several foreseeable outcomes." Acknowledging that the Joint Venture and its partners could not have known their total GET liability until they settled with the State, Mr. Anderson suggests that "a cost is not unforeseeable in nature or amount merely because uncertainty exists." He also claims that "[f]oreseeability does not require certitude," that "[i]t is common for a cost to be uncertain," and that "it is uncommon for a cost to be 'unforeseeable.'" Mr. Anderson elaborates by arguing that the fact the outcome of a coin flip is uncertain does not make a particular result unforeseeable, and reiterates the point by maintaining that uncertainty about the number of hours a task will take does not mean the number of hours ultimately required for the task was unforeseeable. According to Mr. Anderson, the same logic dictates that it was not unforeseeable to the Joint Venture that Hawaii might prevail upon its GET claims.

Mr. Anderson declares the Joint Venture and its partners are sophisticated business entities that knew Hawaii's GET claims were not frivolous and therefore presented ample reason for concern that they would create a cost overrun. He then purports to repeat the views of the Joint Venture's tax attorney about the State's chances of prevailing. Finally, Mr. Anderson announces that the Joint Venture and its partners could have calculated their GET costs in the event the State prevailed, because they knew the dollar values at issue, which they could have applied to a formula for calculating GET that he provides. He also describes additional evidence that he contends shows that the Joint Venture could calculate its GET costs.

B. The Joint Venture's Motion and Government Response

The Joint Venture seeks the exclusion of Mr. Anderson's opinion about the foreseeability of the GET cost overruns on the ground that it is a legal conclusion, or because it discusses the legal implications of the evidence. Additionally, the Joint Venture objects on the ground that the opinion purports to advise the Board on what the outcome should be. Finally, the Joint Venture also contends that, even if Mr. Anderson's testimony is otherwise proper, it is unreliable because it is premised upon an incorrect legal standard.

The government responds that the Board often accepts the expert opinions of certified public accountants like Mr. Anderson upon the subjects of accounting and auditing. The government disputes the suggestion that Mr. Anderson's opinion addresses legal implications, and contends that Mr. Anderson's opinion is not objectionable merely because it addresses an ultimate issue in the case. According to the government, Mr. Anderson "is opining about the cost consequences of particular transactions," and "an accounting expert should be permitted to testify regarding the allowability of the costs of a transaction." Finally, the government contends that the motion is premature because it is unknown what appellant intends to present at the hearing.

C. Decision on Foreseeability

The purpose of a motion in limine is to prevent a party from encumbering the trial record with irrelevant, immaterial, or cumulative matters. *INSLAW, Inc. v. United States,* 35 Fed. Cl. 295, 302-03 (1996) (quoting *Baskett v. United States,* 2 Cl. Ct. 356, 367-68 (1983), *aff'd,* 790 F.2d 92 (Fed. Cir. 1986) (table)).

Rule 702 of the Federal Rules of Evidence provides governing standards for admitting expert testimony. *See Daubert v. Merrell Dow Pharmaceuticals, Inc.,* 509 U.S. 579, 586-87 (1993) (agreeing that the Federal Rules of Evidence supersede prior common law principles for the admission of evidence). As amended, effective 1 December 2011, Rule 702 provides the following:

> A witness who is qualified as an expert by knowledge, skill, experience, training, or education may testify in the form of an opinion or otherwise if:
>
> (a) the expert's scientific, technical, or other specialized knowledge will help the trier of fact to understand the evidence or to determine a fact in issue;
>
> (b) the testimony is based on sufficient facts or data;

(c) the testimony is the product of reliable principles and methods; and

(d) the expert has reliably applied the principles and methods to the facts of the case.[2]

In *Daubert*, the Supreme Court held that "the trial judge must ensure that any and all scientific testimony or evidence admitted is not only relevant, but reliable." *Id.* at 589. The Court has since expanded that obligation to all expert testimony, whether it is based upon "scientific," "technical," or "other specialized" knowledge. *Kumho Tire Co. v. Carmichael,* 526 U.S. 137, 147-49 (1999). Significantly, the use of the word "knowledge" in Rule 702 "connotes more than subjective belief or unsupported speculation." *Daubert*, 509 U.S. at 590. The rule permits admittance of opinion testimony based upon the "assumption that the expert's opinion will have a reliable basis in the knowledge and experience of his discipline." *Id.* at 592.

Rule 702 also limits the admission of expert testimony to that which will "help the trier of fact to understand the evidence or to determine a fact in issue." Expert testimony pertaining to issues of law is inadmissible.[3] *Mola Development Corp. v. United States,* 516 F.3d 1370, 1379 n.6 (Fed. Cir. 2008); *Rumsfeld v. United Technologies Corp.*, 315 F.3d 1361, 1369 (Fed. Cir. 2003); *Lockheed Corp.*, ASBCA No. 36420 *et al.,* 91-2 BCA ¶ 23,903. Similarly, expert testimony is not permitted to usurp the role of the judge in determining the law, or the trier of fact in applying the law to the facts. *United States v. Stewart,* 433 F.3d 273, 311 (2d Cir. 2006); *Stobie Creek Investments, LLC v. United*

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[2] The version effective prior to 1 December 2011 stated the following:

> If scientific, technical, or other specialized knowledge will assist the trier of fact to understand the evidence or to determine a fact in issue, a witness qualified as an expert by knowledge, skill, experience, training, or education, may testify thereto in the form of an opinion or otherwise, if (1) the testimony is based upon sufficient facts or data, (2) the testimony is the product of reliable principles and methods, and (3) the witness has applied the principles and methods reliably to the facts of the case.

The new version is part of a restyling to make the rules more easily understood. It is not intended to change the result of any prior rulings. FED. R. EVID. 702 advisory committee's note.

[3] The Court of Appeals recognizes an exception for determining foreign law. *Merck & Co. v. International Trade Commission*, 774 F.2d 483, 488 (Fed. Cir. 1985) (concluding that, "in the federal courts foreign law is a question of law to be determined by expert evidence or any other relevant source").

States, 81 Fed. Cl. 358, 363 (2008). Efforts by experts to apply the facts to specialized legal terminology to attempt to establish whether a particular legal standard has been satisfied should be excluded. *Burkhart v. Washington Metropolitan Area Transit Authority,* 112 F.3d 1207, 1212-13 (D.C. Cir. 1997). Finally, expert testimony that does not really rely upon any specialized knowledge, but simply opines about issues within the trier of fact's normal competence to determine, should also be excluded. *Andrews v. Metro North Commuter R.R. Co.,* 882 F.2d 705, 708-09 (2d Cir. 1989); *see also Getter v. Wal-Mart Stores, Inc.,* 66 F.3d 1119, 1124 (10th Cir. 1995); *Peters v. Five Star Marine Serv.,* 898 F.2d 448, 449-50 (5th Cir. 1990); *Brassette v. Burlington Northern Inc.,* 687 F.2d 153, 158 (8th Cir. 1982); *Sparton Corp. v. United States,* 77 Fed. Cl. 1, 7 (2007).

Applying these standards here, we first note our disagreement with the government's characterization of Mr. Anderson as an accounting expert opining about the cost consequences of particular transactions. At least with regard to whether Hawaii's GET assessment constituted a foreseeable cost overrun, Mr. Anderson does not perform that function. He does not analyze the Joint Venture's or its partners' accounting and financial records and provide any insights based upon his specialized knowledge, skill, experience, training, or education. An example of this might be the analysis of an accounting system and identification of costs affecting an overhead rate.

Instead, Mr. Anderson makes certain declarations about the events of this case, such as when the State notified the Joint Venture and its partners of its additional tax assessment, that the State explained its reasons, that the Joint Venture and its partners are sophisticated parties represented by counsel, that they knew the State's claims were non-frivolous and had reason to be concerned about them, and that the Joint Venture's counsel had made certain admissions about the State's chances of success. He also explains, without citation to support, how the GET taxes could be calculated. Mr. Anderson then applies this version of the facts to his opinion of the meaning of "foreseeable," or what is not "unforeseeable." He does not claim this opinion arises from any expert knowledge or experience, or from any other source. Nevertheless, given his belief that a cost is not unforeseeable because it is uncertain, he concludes that the facts demonstrate the GET costs were not unforeseeable.

We conclude that Mr. Anderson's opinion is not based upon any "scientific, technical, or other specialized knowledge" and does not "help the trier of fact." None of the facts described by Mr. Anderson require any expertise to decide them. All of them are within our competence to determine as the trier of fact. Accordingly, his opinion about them is of no help. Additionally, Mr. Anderson's opinion of the meaning of the word "foreseeable" relates to an issue of law, and in particular attempts to interpret specialized legal terminology. The Board addressed this issue in its ruling upon the government's motion for summary judgment. Quoting from *Moshman Associates, Inc.,* ASBCA No. 52868, 02-1 BCA ¶ 31,852 at 157,410, the Board noted that the issue is whether the overrun is reasonably foreseeable, and then declared the test to be whether, prior to the end of the contract, the contractor knew or should have known that there

would be a total cost overrun. *Parsons-UXB Joint Venture,* 11-1 BCA ¶ 34,680 at 170,831. To the extent the government wishes to present additional arguments about the meaning of "foreseeable," it must do so in its legal briefing. As a whole, Mr. Anderson's testimony that the overruns were not unforeseeable would apply an expert's opinion about generic facts to his opinion about the meaning of specialized legal terminology in an attempt to establish that a legal standard has been satisfied. That is not an appropriate use of expert testimony. *Burkhart,* 112 F.3d at 1212-13.

We also reject the government's contention that it is premature to rule upon this matter because we do not yet know what evidence the Joint Venture intends to proffer. Under these circumstances, the inadmissibility of Mr. Anderson's testimony and report are unrelated to the evidence the Joint Venture intends to present about foreseeability.

II. No Evidence of Reimbursement

A. Mr. Anderson's Opinion

Mr. Anderson begins his report about reimbursement with a description of his understanding of the requirements of the contract at issue. He also expresses his understanding that the Joint Venture registered as a partnership, and that Hawaii law dictates that a partnership is separate from its partners. He maintains that the agreement between the Joint Venture and its partners states that they will contract with each other, that the contract between the Joint Venture and partners is not in writing, that the partners submitted invoices to the Joint Venture, and that the partners had the same obligations to the Joint Venture that it had to the Navy. Mr. Anderson then reports that he has failed to find evidence in the record that the Joint Venture has paid its partners the two GET lump sums Hawaii claimed against them. He describes certain materials in the record purporting to support his conclusion.

B. The Joint Venture's Motion and Government Response

The Joint Venture contends that this portion of Mr. Anderson's report merely repeats facts contained in documents that require no specialized knowledge to understand. It also argues that an expert may not testify as to the meaning of contract terms. In its reply, the Joint Venture also claims that there is no dispute about whether the Joint Venture has paid its partners. The government responds that Mr. Anderson is a certified public accountant providing testimony related to accounting and auditing. It also contends that the report is not purporting to instruct the Board about the law, but simply giving Mr. Anderson's understanding of the circumstances pertinent to his opinion.

C. Decision on Reimbursement

As we understand Mr. Anderson's report, the ultimate opinion he is expressing in this section of it is that the Joint Venture has not paid its partners two specific lump sums related to increased GET liability assessed against them by Hawaii and that they allegedly invoiced to it.[4] Without deciding at this juncture whether that is relevant, the government has not explained why the determination of whether these two lump sums were or were not paid by the Joint Venture to the partners requires expert testimony reflecting scientific, technical, or other specialized knowledge. This relatively simple issue appears to be within the normal competence of the trier of fact to decide.[5] Also, the Joint Venture represents that the matter is not in dispute. Accordingly, Mr. Anderson's expert opinion on this matter would not be of help to the trier of fact.

CONCLUSION

Appellant's motion in limine is granted. Mr. Anderson's report and testimony are excluded from admission into evidence.

Dated: 12 January 2012

MARK A. MELNICK
Administrative Judge
Armed Services Board
of Contract Appeals

(Signatures continued)

[4] To the extent Mr. Anderson's understandings about the requirements of the contract, Hawaii law, whether registration took place, the terms of the agreement between the Joint Venture and its partners and whether it is in writing, as well as the legal obligations of the partners, are also advanced as part of his opinion they are all either legal conclusions or otherwise of no help to the trier of fact. Therefore, they too are not appropriate expert testimony.

[5] In contrast, a more complicated inquiry into whether a lengthy series of invoices were paid might require expert testimony.

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 No. 56481, Appeal of Parsons-UXB Joint Venture, rendered in conformance with the Board's Charter.

Dated:

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