

ARMED SERVICES BOARD OF CONTRACT APPEALS

Appeal of --)
)
Muhtesem Company) ASBCA No. 57538
)
Under Contract No. W91GFB-07-C-1011)

APPEARANCE FOR THE APPELLANT: Av. Süheyla Genç
Ankara, Turkey

APPEARANCES FOR THE GOVERNMENT: Raymond M. Saunders, Esq.
Army Chief Trial Attorney
MAJ Andrew J. Smith, JA
Trial Attorney

OPINION BY ADMINISTRATIVE JUDGE GRANT
ON THE GOVERNMENT’S MOTION FOR PARTIAL SUMMARY
JUDGMENT, OR, IN THE ALTERNATIVE, MOTION TO
PARTIALLY DISMISS FOR LACK OF JURISDICTION

In this appeal, Muhtesem Company (Muhtesem) claims \$149,000 in damages allegedly attributable to the government’s late final payment on Muhtesem’s contract to build a school in Iraq. The government has moved for partial summary judgment as to three counts of Muhtesem’s complaint: interest on borrowing (Count 1), loss of reputation damages (Count 2), and loss of anticipatory profits on other business opportunities (Count 3). In the alternative, the government moves to dismiss Count 2 for lack of jurisdiction as sounding in tort. For the reasons stated below, we grant the government’s motion as to all three counts.

STATEMENT OF FACTS (SOF) FOR PURPOSES OF THE MOTION

1. On 23 December 2006, the Joint Contracting Command-Iraq/Afghanistan awarded Muhtesem a firm fixed-priced contract (Contract No. W91GFB-07-C-1011) in the amount of \$696,858 to build a school in Iraq (Gov’t Proposed Findings of Fact 1; R4, tab 1).
2. Muhtesem billed for four progress payments of \$150,000 each, and was paid on 30 December 2006, 5 April 2007, 12 July 2007, and 8 October 2007 (compl. and answer ¶ 4). Muhtesem completed the contract and the government accepted the building on 23 August 2008 (R4, tab 2 at 1, tab 3 at 1; compl. and answer ¶ 3).

3. Muhtesem invoiced for the fifth and final installment of \$113,198 on 20 August 2008, which the government paid approximately nine months later on 15 May 2009 (R4, tab 2 at 1).¹ The invoice submitted was complete and correct; the delay in payment was due to “administrative errors on behalf of the Government” (R4, tab 3 at 3).

4. From late June 2007 through July 2008, before Muhtesem submitted its last invoice, Muhtesem obtained ten commercial loans, totalling approximately \$356,000 (R4, tab 2 at 2-3, tab 3 at 2-3).

5. Before these loans had been arranged, an unpaid subcontractor issued a criminal complaint against Muhtesem, and Muhtesem’s president was sentenced to jail for ten days for failure to pay the subcontractor. The jailing of Muhtesem’s president allegedly damaged the company’s business reputation and caused the company to lose its president’s services during this time. (R4, tab 2 at 1, 3)

6. Muhtesem was allegedly prevented from submitting offers on other projects by the Kurdish regional government for non-payment of debts, thereby losing profits on other business opportunities (R4, tab 2).

7. Sometime in September 2009, Muhtesem submitted a claim to the government for \$681,966 for damages allegedly attributable to the government’s delayed payment (R4, tab 2 at 4). The government denied most of this claim by contracting officer (CO) final decision dated 19 November 2010, granting Muhtesem only \$2,940.07 as a Prompt Payment Act interest penalty for the late payment. Muhtesem received this decision on 27 November 2010. (R4, tabs 3, 4)

8. On 24 February 2011, Muhtesem appealed the CO’s final decision, which was received at the Board on 25 February 2011 (R4, tab 5). In its complaint, Muhtesem revised the amount claimed to \$149,000, representing four separate counts (not individually quantified), the first three of which are at issue here. Count 1 is for interest on the commercial loans Muhtesem took out to pay its subcontractors, Count 2 is for “losses to business and personal reputation” due to the imprisonment of Muhtesem’s president, and Count 3 is for loss of anticipated profits on other business opportunities. (Compl. at 2-3; R4, tab 2; app. opp’n at 2) The fourth count concerning currency exchange rates is not before us on this motion.

DECISION

Summary judgment may be granted only where there is no genuine issue of material fact and the movant is entitled to judgment as a matter of law. *Mingus*

¹ The parties have not explained why this amount differs from what was apparently left due on the contract, but they do not dispute the accuracy of the figure.

Constructors, Inc. v. United States, 812 F.2d 1387, 1390 (Fed. Cir. 1987). The movant has the burden to establish the absence of disputed material facts; once done, the non-moving party must set forth specific facts, not conclusory statements or bare assertions, to defeat the motion. *Pure Gold, Inc. v. Syntex (U.S.A.), Inc.*, 739 F.2d 624, 626-27 (Fed. Cir. 1984).

In this appeal, there are no disputes of material fact to preclude a decision on summary judgment. Although Muhtesem states there are disputes of material fact (app. opp'n at 1, 3), none are presented, or even alleged. Rather, Muhtesem advances three legal arguments in opposition: that the Board has jurisdiction over the loss of reputation damages claim as it allegedly flows from the late payment, that the Board should not apply peacetime case law precedent in a wartime scenario, and that the Board should rule in Muhtesem's favor based on U.S. public policy considerations. Nothing in these arguments prevents us from assessing the merits of the claim on summary judgment, as they do not present disputes of material fact. We address the loss of reputation damages claim in our discussion of Count 2 below; with regard to Muhtesem's policy arguments, we are not persuaded, especially as they stand unsupported by legal precedent. Consequently, we grant the government's motion as to all three counts.

Interest on Commercial Loans (Count 1)

Count 1 of Muhtesem's breach claim is for interest on commercial loans for Muhtesem to pay its subcontractors, loans allegedly incurred due to the government's late payment. Actually, these loans were obtained before the invoice in question was submitted and were approximately three times the amount of that invoice, raising significant causation and nexus issues (SOF ¶ 4). However, regardless of such concerns, we agree with the government that, as explained below, interest on these loans is not recoverable.²

Interest claimed against the government cannot be recovered unless there is an express waiver of sovereign immunity allowing such recovery—a principle known as the “no interest” rule. This rule applies whether a party is seeking interest *on* its damages claim, or interest *as part of* its damages claim, as is the case here. *England v. Contel Advanced Systems, Inc.*, 384 F.3d 1372, 1379 (Fed. Cir. 2004) (the “no interest” rule bars both interest on the claim itself and interest as damages for money borrowed due to the

² This breach damage claim is distinct from a situation where a contractor requests interest on borrowings as part of an equitable adjustment. There, too, interest on borrowings is typically barred, but by virtue of contract clauses incorporating the FAR cost principles (including the prohibition on interest on borrowings at FAR 31.205-20) into the calculation of the equitable adjustment. *Tomahawk Construction Co.*, ASBCA No. 45071, 94-1 BCA ¶ 26,312 at 130,871.

government's late payment); *Ramsey v. United States*, 101 F. Supp. 353, 356 (Ct. Cl. 1951) (labeling the cost of borrowed money as "damages" or "loss" does not change its inherent nature as interest); *Energy Northwest v. United States*, 641 F.3d 1300, 1312-13 (Fed. Cir. 2011) (no waiver of sovereign immunity for interest on borrowings); *System Fuels, Inc. v. United States*, 2012 U.S. App. LEXIS 1039 (Fed. Cir. Jan. 19, 2012) (cost of borrowed funds barred by the "no-interest" rule). Consequently, as there is no waiver of sovereign immunity for interest on borrowed funds,³ Muhtesem is barred from recovering this portion of its claim, and the government's motion as to this count is granted.

Loss of Reputation (Count 2)

Count 2 restates the claim's assertion of damage to the company's reputation and loss of services of its president, allegedly caused by the government's late payment, and adds the statement that "[c]omplainant suffered "losses to ... personal reputation." (compl. ¶ 17). The business reputation and loss of services damages are barred, as explained below, and the government's motion for summary judgment is granted as to this count. To the extent that Muhtesem intended in Count 2 to expand its claim to include personal reputation damages to its president, we would lack jurisdiction as such damages would be to an individual in his personal capacity, not to the contractor pursuant to an express or implied contract. *See* 41 U.S.C. § 7102.

For Muhtesem to recover damages for loss of business reputation or loss of services of its president resulting from a breach of contract, those damages must have been caused by the late payment, and foreseeable at the time of contracting. *San Carlos Irrigation and Drainage District v. United States*, 111 F.3d 1557, 1563 (Fed. Cir. 1997) ("a plaintiff must show that but for the breach, the damages alleged would not have been suffered"); *Locke v. United States*, 283 F.2d 521, 526 (Ct. Cl. 1960) (harm must be traced to the breach with reasonable certainty); *Ramsey*, 101 F. Supp. at 357 (damages are limited to those that are the natural and probable consequences of the alleged breach); *Consolidated Defense Corp.*, ASBCA No. 52315, 03-1 BCA ¶ 32,099 at 158,668 / (damages must have been caused by the breach and been reasonably foreseeable at the time of contract award).

Here, there are problems with both causation and foreseeability, either one of which would defeat this part of Muhtesem's claim. First, the criminal charge filed by the subcontractor and the subsequent jailing occurred before the invoice was even submitted, so Muhtesem's alleged resulting loss of reputation or loss of the president's services was

³ The Contract Disputes Act of 1978 does, of course, waive sovereign immunity for interest on an amount found due on a claim, a matter not at issue here. 41 U.S.C. § 7109.

not caused by the late payment (SOF ¶¶ 3, 4, 5). Second, there is nothing to suggest that the government could have foreseen at time of contracting that a late payment after performance was complete would lead to a contractor's president being jailed and then to loss of the president's services and loss of business reputation damages. In *Ramsey*, the court found that the government's failure to pay the contract price did not "naturally and inevitably" produce bankruptcy. *Ramsey*, 101 F. Supp. at 357; *Tyrone Shanks*, ASBCA No. 54538, 06-1 BCA ¶ 33,137 at 164,215 (cost to restore credit standing was not reasonably foreseeable and hence not recoverable). In our view, jailing and resulting damages for loss of reputation or services is even less "naturally and inevitably" a result of late payment than bankruptcy, and such damages are thus not recoverable. Fundamentally, these damages relate to the loss of future business opportunities and, as discussed in connection with Count 3 below, are too remote to be recoverable. *Land Movers, Inc. and O.S. Johnson-Dirt Contractor (JV)*, ENG BCA No. 5656, 91-1 BCA ¶ 23,317 at 116,933 (loss of business reputation damages amount to losses of speculative future business opportunities and are not recoverable as a matter of law). Consequently, the government's motion as to this count is granted.


Loss of Anticipated Profits on Other Business (Count 3)

Count 3 is for loss of anticipated profits on contracts Muhtesem hoped to obtain but could not, since contractors with outstanding debts were allegedly not allowed by the Kurdish government to submit offers on other acquisitions (SOF ¶ 6). We agree with the government that, as a matter of law, lost profits that might have been realized on other business endeavors are too remote and speculative to be compensable. *CACI International, Inc.*, ASBCA Nos. 53058, 54110, 05-1 BCA ¶ 32,948 at 163,252, *aff'd*, 177 Fed. Appx. 83 (Fed. Cir. 2006) ("[l]ost profits from other contracts generally are viewed as consequential" and not recoverable); *Olin Jones Sand Co. v. United States*, 225 Ct. Cl. 741, 743-44 (1980) (lost business damages were too remote and speculative to be recovered as "there is no assurance that plaintiff would have received any additional contracts or work"); *Ramsey*, 101 F. Supp. at 357 ("lost profits of these collateral undertakings, which the corporation was unable to carry out, are too remote to be classified as the natural result of the Government's delay in payment"); *Godwin Equipment, Inc.*, ASBCA No. 51939, 01-1 BCA ¶ 31,221 at 154,109 (loss of other contracts and future profits on them are too remote and speculative to be recoverable). Consequently, the government's motion as to this count is granted.


CONCLUSION

For the reasons stated above, we grant the government's motion as to all three counts.

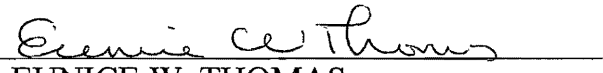
Dated: 7 February 2012


ELIZABETH M. GRANT
Administrative Judge
Armed Services Board
of Contract Appeals

I concur


MARK N. STEMLER
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. 57538, Appeal of Muhtesem Company, rendered in conformance with the Board's Charter.

Dated:

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