

ARMED SERVICES BOARD OF CONTRACT APPEALS

Appeal of --)
)
Laguna Construction Company, Inc.) ASBCA No. 58324
)
Under Contract No. FA8903-04-D-8690)

APPEARANCE FOR THE APPELLANT: Carolyn Callaway, Esq.
Carolyn Callaway, P.C.
Albuquerque, NM

APPEARANCES FOR THE GOVERNMENT: E. Michael Chiapas, Esq.
DCMA Chief Trial Attorney
Gregory T. Allen, Esq.
Trial Attorney
Defense Contract Management Agency
Manassas, VA

OPINION BY ADMINISTRATIVE JUDGE DELMAN
ON GOVERNMENT'S MOTION TO AMEND ANSWER

The government has filed a motion for leave to file an amended answer in this appeal to include the affirmative defense of fraud. Appellant opposes the motion. We have jurisdiction under the Contract Disputes Act (CDA), 41 U.S.C. §§ 7101-7109.

STATEMENT OF FACTS (SOF) FOR PURPOSES OF THE MOTION

1. In November 2003, the Air Force Center for Environmental Excellence (government) awarded Contract No. FA8903-04-D-8690, a contract for Worldwide Environmental Remediation and Construction Services (WERC), to Laguna Construction Company, Inc. (appellant or Laguna). Under this contract, Laguna received 16 cost-reimbursable task orders (TOs) to perform construction and/or environmental remediation work in Iraq. (Compl. ¶¶ 6, 12, 14) While Laguna was performing these TOs the United States was engaged in a contingency operation in Iraq as defined by FAR 2.101 (compl. ¶ 15).

2. Insofar as pertinent, the WERC contract contained the following clauses: FAR 52.215-2, AUDIT AND RECORDS-NEGOTIATION (JUN 1999); FAR 52.216-7, ALLOWABLE COST AND PAYMENT (DEC 2002) - ALTERNATE 1 (FEB 1997); FAR 52.233-1, DISPUTES (JUL 2002); FAR 52.244-2, SUBCONTRACTS (AUG 1988); and FAR 52.244-5, COMPETITION IN SUBCONTRACTING (DEC 1996) (R4, tab 1 at 25-29).

3. In February 2009, the Defense Contract Audit Agency (DCAA) began an audit of Laguna's incurred costs for its fiscal year (FY) 2006 (compl. ¶ 32). Insofar as pertinent here, on 17 March 2011, DCAA issued four Notices of Contract Costs Suspended and/or Disapproved (hereafter "Forms 1"), designated by numbers 2011-002 through 2011-005, totaling \$17,459,674 of disapproved costs (compl. ¶ 41; R4, tabs 26-29). On 4 August 2011, DCAA revised the four Forms 1, changing the designations to 2011-002a through 2011-005a and increasing disapproved costs to \$17,823,506 (compl. ¶ 43; R4, tabs 32-35).

4. On or about 6 April 2012, DCAA, seeking to recover some of the disapproved costs, rejected 14 Laguna vouchers under a number of TOs under the contract totaling \$3,031,925 (compl. ¶ 47). On or about 21 May 2012, Laguna submitted a certified claim to the contracting officer, requesting a decision, *inter alia*, "authorizing payment to Laguna of the improperly withheld sum certain of \$2,874,081" (supp. R4, tab 40 at 283-84).

5. On 18 September 2012, Laguna submitted a notice of appeal to this Board based upon the deemed denial of this claim. The Board docketed the appeal as ASBCA No. 58324.

6. Appellant's complaint was filed on or about 26 October 2012. The government's answer was filed on or about 2 January 2013. The government did not assert an affirmative defense of fraud at this time.

Indictment of Laguna Manager

7. On 10 October 2010, a Laguna manager pled guilty to a criminal information for conspiring to receive kickbacks from subcontractors on a number of Iraq projects, including certain TOs under this contract. As part of the plea agreement, he acknowledged as follows:

From April 2005 until March 2008, I agreed with others to accept kickbacks from [Laguna] subcontractors, specifically: money payments for the purpose of improperly facilitating the award of [Laguna] subcontracts and favorably rating the performance of subcontractors.... In order to make contract funds available for kickbacks, I would cause subcontractors to submit inflated invoices to [Laguna] for presentment to the government, but to agree to accept lesser amounts than those specified in their subcontractor invoices so that contract funds were available to pay me kickbacks. Through this practice, I caused the subcontracts paid by the

United States Government to be inflated by the amounts I would receive as kickbacks.

(Appx., mot. at 84-85)

Indictment of Laguna's Officers and Subcontractors

8. On 28 February 2012, a federal grand jury in the United States District Court for the District of New Mexico issued a criminal indictment against three principal officers of Laguna and four owners of subcontractors with subcontracts with Laguna under the TOs under this contract. The Laguna officers indicted were: (1) the president of Laguna; (2) the executive vice president and chief operating officer of Laguna; and (3) Laguna's contract compliance manager. The indicted subcontractor owners/principals were two owners of a Jordanian construction company known as "Snobar"; an owner of Mercury Development Company (MDC); and an owner of Tigris River Company. (Appx., mot. at 97-99) Generally, the indictment alleged that the subcontractors paid and Laguna's officers received kickbacks for awarding construction subcontracts to the subcontractors on TOs issued under the WERC contract. It alleged 1 count of wire fraud conspiracy, 74 counts of wire fraud, 1 count of illegal kickbacks, 1 count of money laundering conspiracy, 11 counts of money laundering, and 3 counts of income tax evasion. (Appx., mot. at 97)¹

9. On or about 2 July 2013, the United States Attorney for the District of New Mexico filed a criminal information against Laguna's executive vice president. The information generally alleged that from in or about December 2004 through on or about February 2009, said individual and others knowingly conspired to defraud the United States by providing, soliciting, and accepting kickbacks in connection with Laguna's reconstruction projects in Iraq. It specifically identified numerous kickback payments to said individual from Snobar and MDC. (Appx., mot. at 132-39)²

10. On 2 July 2013, Laguna's executive vice president pled guilty to solicitation and receipt of subcontractor kickbacks, in violation of 41 U.S.C. § 53 (2008), attempt to

¹ By letter to the Board dated 30 October 2013, appellant brought to our attention that the government filed a superseding indictment on 27 August 2013. Among other changes, it appears that Laguna's executive vice president was withdrawn from the original indictment after he pled guilty to a criminal information on 2 July 2013, *infra* (findings 9, 10). Neither party suggests that the changes made in the superseding indictment have any material impact on the government's motion before us, and we so find.

² The transcript of the criminal information and the plea agreement were initially placed under seal by the court, but the court unsealed these documents by order dated 8 July 2013.

evade and defeat tax in violation of 26 U.S.C. § 7201; and conspiracy to provide, solicit, and accept kickbacks in violation of 18 U.S.C. § 371 (appx., mot. at 140-62, 163-64). In his plea agreement he admitted that:

[D]uring and in conjunction with the administration of the LCC Iraqi reconstruction prime contracts and subcontracts, I accepted numerous kickbacks from [Snobar and MDC], and others, in return for giving them favorable treatment in connection with the awards of subcontracts under the WERC and HERC.... These subcontractors were willing to pay us kickbacks because we circumvented the fair, open, and competitive bidding process required by the FAR and LCC's policies and procedures, and instead directed subcontracts to these favored subcontractors.

(Appx., mot. at 150) It is undisputed that Snobar and MDC received a number of subcontracts under the TOs under this contract, e.g., TOs 12, 18, 20. Appellant's rejected vouchers also relate to these TOs.

11. On 2 August 2013, the government moved to amend its answer to include the affirmative defense of fraud. After alleging a series of factual contentions, including those above, the government's proposed amended answer avers as follows:

The Fraud By LCC Officers and Employees

....

The Government is not liable for LCC's claim...because of LCC's breach of Contract No. FA8903-04-D-8690 when its principal officers and employees solicited and accepted kickbacks for awarding subcontracts under task orders issued under that contract, which constituted fraud against the United States.

(Proposed amended answer at 103, 110)

DECISION

Board Rule 7 provides that the Board has the discretion within the proper scope of the appeal to permit amendments of pleadings "upon conditions fair to both parties." In the exercise of this discretion, we have been guided by FED. R. CIV. P. 15(a) and the cases that have construed it. *Space Age Engineering, Inc.*, ASBCA No. 25761 *et al.*, 83-2 BCA ¶ 16,789. FED. R. CIV. P. 15(a)(2) states in pertinent part as follows: "[A] party may

amend its pleadings only with the opposing party's written consent *or the court's leave. The court should freely give leave when justice so requires.*" (Emphasis added)

In *Space Age Engineering* we quoted with approval the following guidance from the federal courts:

Leave to amend pleadings out of time under Rule 15(a) of the Federal Rules of Civil Procedure is generally at the discretion of the trial court, *Foman v. Davis*, 371 U.S. 178, 182, 83 S.Ct. 227, 230 9 L.Ed.2d 222 (1962), *Zenith Radio Corporation v. Hazeltine Research, Inc.*, 401 U.S. 321, 330, 91 S.Ct. 745, 802, 28 L.Ed.2d 77 (1971), and "[c]ourts have shown a strong liberality...in allowing amendments under Rule 15(a)," 3 Moore's Federal Practice ¶ 15.08(2) at 15-59 (2d ed. 1980), (footnote omitted)....

In *Foman v. Davis* the Supreme Court observed:

Rule 15(a) declares that leave to amend "shall be freely given when justice so requires"; this mandate is to be heeded.... In the absence of any apparent or declared reason—such an [sic] undue delay, bad faith or dilatory motive on the part of the movant, repeated failure to cure deficiencies by amendments previously allowed, undue prejudice to the opposing party by virtue of amendment, etc.—the leave sought should, as the rules require, be "freely given."

Space Age Engineering, 83-2 BCA ¶ 16,789 at 83,439-40.

Although the government's answer dated 2 January 2013 did not contain the affirmative defense of fraud, the government sought to add this affirmative defense roughly four weeks after the guilty plea of Laguna's executive vice president. We find this timely. Appellant has not shown that the government's motion to amend was filed in bad faith, nor has appellant shown a dilatory motive or repeated government failures to cure deficiencies by previously allowed amendments.

Appellant does assert undue prejudice in the filing of this amended pleading. It is self-evident that the government's affirmative defense of fraud, if established, may prejudice appellant (*see infra*). But the relevant factor is not prejudice but "undue" prejudice. We believe appellant has not shown any undue prejudice here. Appellant cannot legitimately claim "surprise;" the government filed an affirmative defense of fraud in an earlier, related appeal before the Board in *Laguna Construction Company*, ASBCA No. 58292, 13 BCA ¶ 35,315 at 173,364. Currently, there is no pretrial order pending in

the subject appeal; trial dates and trial preparation deadlines have been canceled. While the parties have already conducted substantial discovery, the Board will consider a reasonable discovery extension, at appellant's request, to allow appellant to meet this fraud defense. We believe these conditions are fair to both parties, as required by Board Rule 7.

Next, appellant contends that the government's amendment would be futile because it provides no legal basis to excuse the government's payment of appellant's invoices here. Appellant is incorrect. Fraud in the performance of a contract may be deemed a breach of contract sufficient to deny payment of appellant's invoices on grounds of public policy. *AAA Engineering & Drafting, Inc.*, ASBCA No. 47940 *et al.*, 01-1 BCA ¶ 31,256. The government's amended pleading provides sufficient notice of the government's affirmative defense consistent with Board Rule (6)(b). The proposed amended pleading also avers sufficient facts to support the government's defense.

Appellant contends that the disputes process under the CDA does not provide for the recovery of alleged kickbacks or other fraudulent conduct in violation of federal law. While this contention is true, it has no application here. The government's proposed affirmative defense seeks denial of appellant's claim and the appeal, not a finding of a violation of federal law.

CONCLUSION

We have considered appellant's remaining arguments but are not persuaded by them. Having considered the relevant guiding factors under the case law, we exercise our discretion to permit the government to amend its answer in this appeal to include the affirmative defense of fraud. The government's motion seeking leave to file its amended pleading is granted, and the amended answer is accepted consistent with this opinion.

Dated: 22 November 2013



JACK DELMAN
Administrative Judge
Armed Services Board
of Contract Appeals

(Signatures continued)

I concur



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

I concur



ELIZABETH A. TUNKS
Administrative Judge
Acting 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. 58324, Appeal of Laguna Construction Company, Inc., rendered in conformance with the Board's Charter.

Dated:

JEFFREY D. GARDIN
Recorder, Armed Services
Board of Contract Appeals