ARMED SERVICES BOARD OF CONTRACT APPEALS

Appeal of --	)	
	)	
Engility, LLC	)	ASBCA No. 61281
	)	
Under Contract Nos. DASC01-99-D-0001	)	
W911W4-04-D-0005	)	

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DECISION BY ADMINISTRATIVE JUDGE O'SULLIVAN
ON THE GOVERNMENT'S MOTION TO AMEND ITS ANSWER

In this appeal, which involves the government's disallowance of appellant Engility's legal proceeding and settlement costs, the government has filed a motion for leave to amend its answer to add one or more affirmative defenses, which Engility opposes.

Engility is the successor in interest to a company (Titan) that held and performed a contract for the provision of translation services at Abu Ghraib prison, Iraq. Subsequently, lawsuits were filed against Engility and/or its predecessor company by Iraqi plaintiffs alleging that appellant's employees participated in abuse of plaintiffs at Abu Ghraib. Only one lawsuit is at issue in this appeal. That lawsuit was defended and subsequently settled, and it is the costs of defending and settling that lawsuit that have been disallowed by the government and for which appellant seeks to recover.

Among the issues that have arisen in the course of discovery in this appeal is the proper application of the Federal Circuit's holding in *Geren v. Tecom, Inc.*,

566 F.3d 1037 (2009). Engility believes that it is entitled to recover the costs if it shows that the plaintiffs likely would not have prevailed in the litigation, whatever the reason. But the government has taken the position that Engility cannot prove it is entitled to the disallowed costs unless it proves that its employees did not engage in the conduct alleged by the Iraqi plaintiffs. Thus, both parties have had to undertake discovery into material provided by CENTCOM in March of 2018, pertaining to the government's investigations of detainee abuse at Abu Ghraib, approximately one-third of a terabyte of information that was neither organized nor labeled and which mixed unclassified with classified material. Review of that material has been slow and cumbersome, necessitating a lengthier and more costly period of document discovery than initially envisioned by either party. Issues regarding the applicable legal standard remain to be resolved in this appeal, but need not be addressed for purposes of resolving the instant motion for leave to amend.

On March 11, 2019, the government filed a motion for leave to amend its answer to include the affirmative defense of prior material breach. Engility opposed the government's motion on a number of grounds. Engility pointed out that the government's proposed affirmative defense would expand the scope of the litigation beyond an examination of the allegations of the 72 Iraqi plaintiffs to potentially encompass any conduct committed by an Engility employee with regard to any detainee, exponentially expanding the scope of discovery that would be necessary. Engility also presented several other arguments in opposition which we do not need to discuss for purposes of the instant motion, except to briefly note that Engility informed the Board that in connection with a settlement of another dispute under the same set of contracts, the government issued a broad release of all claims that it had or may have against Engility. According to Engility, this release would bar the government from bringing a claim against Engility for breach of contract.

After considering the parties' filings, the Board requested supplemental briefing. In the memorandum of conference call confirming the Board's request, the Board noted that the parties had agreed during the conference call that it was incorrect to refer to the government's proposed defense as one of prior material breach since Engility was not asserting a claim of breach against the government. The government did not seek to correct this observation. The Board then summarized the legal issue on which it had requested additional briefing:

> The government's proposed amended answer in this appeal would assert material contract breach as an affirmative defense to Engility's claim for the disallowed costs of defending and settling a lawsuit by 72 Iraqi plaintiffs alleging mistreatment by Engility's employees, who were under contract to act as interpreters at Abu Ghraib prison in Iraq. The issue not directly addressed in

> the parties' briefs is that the government proposes to prove the contract breach by offering proof that one or more Engility employees mistreated person(s) who are not one of the 72 plaintiffs in the lawsuit which caused Engility to incur the costs in question. In other words, the government proposes to defend against the allowability of the costs by proving a breach of contract not related to the incurrence of the costs. The Board is concerned that this legal theory may not be supported by either current Federal Circuit or ASBCA precedent....

(Bd. corres. mem. dtd. May 20, 2019)

In its supplemental brief filed June 14, 2019, the government explained that it seeks leave to amend its answer to add two affirmative defenses, not one. First, it seeks leave to add a defense ("second intended defense") that the claimed legal proceeding and settlement costs arise from a breach of contract (not necessarily a material breach), "based squarely on FAR 31.201-2(a)(4)" (i.e., the cost does not comply with the terms of the contract). In support of this proposed defense, the government stated that it proposed to introduce evidence of abuse of one or more of the 72 Iraqi plaintiffs, evidence which is "closely linked to the incurrence of the claimed costs." (Gov't supp. br. at 2-3)

The government also seeks leave to amend to add a defense of prior material breach ("third intended defense"). The government states that it will invoke this defense "should the Board conclude that any part of the claimed costs are allowable and hence properly payable to the appellant." The government further elaborates:

> If the Board concludes that the costs should have been paid but were not, then the Board would necessarily also conclude, either overtly or implicitly, that government failure to make payment of the costs breached the Allowable Cost and Payment clauses of the Contracts. The government would defend against this finding of breach by arguing that the appellant's prior material breach excuses any later government breach.

(Gov't supp. br. at 3) As to this defense, the government asserts that its evidence of prior material breach need not be related to the allegations of the Iraqi plaintiffs (*id.*).

Board Rule 6(d) provides that the Board may permit either party to amend its pleading upon conditions fair to both parties. In exercising our discretion under this rule, we have looked to Rule 15 of the FEDERAL RULES OF CIVIL PROCEDURE

(FED. R. CIV. P) and cases decided thereunder. *Public Warehousing Co. K.S.C.*, ASBCA No. 57510, 17 BCA ¶ 36,700 at 178,720. In *Foman v. Davis*, 371 U.S. 178, 182 (1962), the Supreme Court explained the standard in applying FED. R. CIV. P. 15:

> In the absence of any apparent or declared reason – such as 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 allowance of the amendment, futility of amendment, etc. – the leave sought should, as the rules require, be "freely given."

Our cases have found futility of amendment and denied leave to amend where the litigant cannot prove any set of facts in support of a claim or defense that would entitle it to relief. *Parsons Government Services, Inc.*, ASBCA No. 60663, 17-1 BCA ¶ 36,743 at 179,102; *Great Lakes Dredge and Dock Co.*, ASBCA Nos. 53929, 54266, 04-1 BCA ¶ 32,518 at 160,862.

The government contends that it may assert the affirmative defense of prior material breach because if the Board finds that the legal proceedings and settlement costs in question are allowable, it may defend against that finding (which it characterizes as a finding that the government has breached the contract's Allowable Cost and Payment clause) with evidence of a prior and not necessarily related material breach by appellant. The government cites no precedent in support of its position. The only case it cites, for the proposition that a party need not assert a claim of breach before the opposing party may assert the defense of prior material breach is the Board's decision in *Kellogg Brown & Root Services, Inc.*, ASBCA No. 56358, 17-1 BCA ¶ 36,779 (*KBRS*). In that appeal, the government argued that KBRS could not assert prior material breach as an affirmative defense because the contractor had submitted its own claim for withheld costs and had not appealed from a government claim. *Id.* at 179, 247-51. The Board, following the holding of *Placeway Construction Corp. v. United States*, 920 F.2d 903, 906-07 (Fed. Cir. 1990), held that the appeals involved government claims in the form of withholdings to recover allegedly unallowable costs and thus prior material breach could be asserted by the appellant as a defense to those claims. *KBRS*, 17-1 BCA ¶ 36,779 at 179,247, *aff'd, Sec'y of the Army v. Kellogg Brown & Root Services, Inc.,* No. 2018-1022 (Fed. Cir. July 9, 2019) (nonprecedential).

The government further argued in the *KBRS* appeal that the defense of prior material breach was inapplicable because it is a defense to a claim of breach and the government had not asserted a claim of breach against KBRS. The Board held that the government's claims that (1) KBRS violated the contract's prohibition against employing private security for its convoys in Iraq and (2) that KBRS violated the

contract's Allowable Cost and Payment clause by billing the government for unallowable private security costs were plainly claims of breach, even if not so labeled, against which KBRS could employ the defense of prior material breach. *KBRS*, 17-1 BCA ¶ 36,799 at 179,250-51.

As in *KBRS*, Engility is actually defending against a government claim of cost unallowability based on the government's position that Engility violated terms of the contract and thus committed a breach of contract. We note that the contracting officer's final decision finding Engility's legal proceedings costs unallowable specifically claimed that the abuse alleged in the Iraqi plaintiff's lawsuit was "out-of-scope" and "constitutes a breach of contract," if proven. (R4, tab 1914 at 2) Indeed, the government's supplemental brief on its motion to amend indicates that it will assert and prove a claim of breach arising from acts of abuse by Engility employees with respect to one or more of the Iraqi plaintiffs as part of making its case that Engility's legal proceedings costs are unallowable (gov't supp. br. at 6-7).

It is a legal impossibility for the government to raise the affirmative defense of prior material breach as a defense against what the government itself admits is essentially the possibility that its own claim may fail:

> If the Board concludes that the costs should have been paid but were not, then the Board would necessarily also conclude, either overtly or implicitly, that government failure to make payment of the costs breached the Allowable Cost and Payment clauses of the Contracts. The government would defend against this finding of breach by arguing that the appellant's prior material breach excuses any later government breach.

(Gov't supp. br. at 3)[1] The Board thus denies the government's motion for leave to amend its answer to add the affirmative defense of prior material breach, on grounds of the futility of the amendment.

There is also a case to be made that the government's motion to add the affirmative defense of prior material breach should be denied on the ground of undue prejudice to the appellant. While neither party has offered any specifics as to how

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[1] We note, moreover, that if the Board were to adopt the government's reasoning that any contracting officer deciding that costs are unallowable commits a breach of contract if the costs are found to be allowable, it would open up a whole new category of breach claims by contractors, with the attendant consequences for the government. We think the government's argument, therefore, is somewhat shortsighted as well as incorrect.

many detainees passed through Abu Ghraib prison during the period that appellant was performing its translation duties, Engility has characterized the number as "thousands." (App. opp. at 6) The number is thus vastly greater than the 72 plaintiffs involved in the litigation. Particularly since the government's proposed defense is insufficient as a matter of law and therefore futile, the burden of taking on additional discovery into incidents of detainee abuse unrelated to the litigation, as well as attendant delay in a final resolution of the issues, constitute undue prejudice.

CONCLUSION

The government's motion for leave to amend its answer is DENIED as to the affirmative defense of prior material breach (the government's "third intended defense") and GRANTED as to its "second intended defense," insofar as the government may present evidence of the abuse of any Iraqi plaintiff in the underlying litigation committed by Engility employees, to support either its claim of contract breach[2] or to demonstrate that the plaintiffs would likely prevail on the merits, either of which would support the government's claim that the legal proceedings costs are unallowable.

Dated: August 19, 2019

LYNDA T. O'SULLIVAN
Administrative Judge
Armed Services Board
of Contract Appeals

I concur

RICHARD SHACKLEFORD
Administrative Judge
Acting Chairman
Armed Services Board
of Contract Appeals

I concur

OWEN C. WILSON
Administrative Judge
Vice Chairman
Armed Services Board
of Contract Appeals

[2] We do not decide whether Engility is correct that the government's claim of breach arising from alleged abuse of one or more of the Iraqi plaintiffs is barred by the government's prior release of claims.

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. 61281, Appeal of Engility, LLC, rendered in conformance with the Board's Charter.

Dated:

PAULLA K. GATES-LEWIS
Recorder, Armed Services
Board of Contract Appeals