ARMED SERVICES BOARD OF CONTRACT APPEALS

Appeal of -	)	
	)	
Targe Logistic Services Company	)	ASBCA No. 63282
	)	
Under Contract No. W91B4N-18-D-2005	)	

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Trial Attorneys

OPINION BY ADMINISTRATIVE JUDGE TAYLOR
ON THE GOVERNMENT'S MOTIONS TO AMEND THE ANSWER AND TO COMPEL APPELLANT TO PROVIDE RESPONSIVE INFORMATION

Pursuant to Board Rule 6(d), the United States Army (Army or government) moves to amend its previously filed answer to include affirmative defenses of material breach and assumption of risk. We first note that the government's original answer asserted the affirmative defense of assumption of risk (answer at 60). Appellant did not move to strike that defense. As such, the government does not need to amend its answer to present its legal theory that appellant should not recover any termination costs for the lost fuel and equipment since appellant assumed this risk of loss by choosing not to obtain the required insurance. The government's request to amend its answer to add this affirmative defense is moot.

The government also seeks to amend its answer to include the affirmative defense of material breach. The sole remaining issue before the Board in this appeal is appellant's entitlement to termination for convenience costs. Because the government elected to terminate the contract for convenience and not default, the Board denies the government's request to amend its answer to add an affirmative defense of material breach due to futility.

The government also filed a motion requesting the Board compel Targe Logistic Services Company (TLS or appellant) to provide information in response to certain government discovery requests. The Board grants, in-part, the government's

motion to compel and directs appellant to respond to the government's discovery requests pertaining to whether TLS obtained insurance to cover the potential loss of its fuel reserves and equipment since that issue is relevant to appellant's entitlement to termination for convenience costs under the second prong of the commercial termination clause.

STATEMENT OF FACTS FOR PURPOSES OF THE MOTIONS

TLS appealed the contracting officer's denial of its breach of contract and termination for convenience claims resulting from its loss of fuel and equipment seized by the Islamic Emirate of Afghanistan (known as the Taliban) in Afghanistan following the Army's withdrawal from that country. In a decision dated August 12, 2024, the Board granted the government's motion for summary judgment on appellant's breach of contract contentions while denying appellant's cross-motion for summary judgment on the termination for convenience costs. *See Targe Logistic Services Co*., ASBCA No. 63282, 24-1 BCA ¶ 38,653. Familiarity with that decision is presumed.

In our prior decision, we noted appellant's entitlement to additional termination costs, if any, would be addressed in further proceedings (*id*. at 187,899). We found TLS may be entitled to recover its lost fuel and equipment costs as costs reasonably incurred in preparing to perform the contract under the second prong of the commercial termination clause (*id*. at 187,898). We further noted the record was unclear as to whether TLS had obtained and recovered the lost fuel and equipment costs under any insurance policies that may offset some of its claimed termination costs (*id*.).

GOVERNMENT'S MOTION TO AMEND THE ANSWER

I. Parties' Contentions on Government's Motion to Amend the Answer

The government first seeks to amend its previously filed answer to add affirmative defenses of material breach and assumption of risk resulting from newly discovered evidence. The government contends appellant is not entitled to recover any costs for the lost fuel reserves and equipment under the termination for convenience clause since TLS breached the contract by failing to obtain the required insurance to cover those items (gov't mot. at 3). Furthermore, the government requests permission to add the affirmative defense of assumption of risk since TLS "knowingly and voluntarily" accepted the risk of loss if it failed to obtain that insurance (*id*.).

Appellant opposes the government's motion on several grounds. First, appellant contends the Board should deny this motion since the government's attempt to add these alleged affirmative defenses is futile (app. opp'n at 13-18). Appellant

asserts the government's motion is futile since the government waived these affirmative defenses when it decided to terminate the contract for convenience even though the government knew or should have known during contract performance that the contract required insurance policies, and whether TLS had acquired that insurance (app. opp'n at 13-16). Appellant further contends the government's motion is futile because the proposed defenses are government claims seeking affirmative relief that are time-barred since the government failed to raise them in a contracting officer's final decision within six years from their claim accrual date (*id*. at 17-18). In addition to contending the government's motion is futile, appellant asserts the Board should deny the government's motion since the government delayed asserting these defenses and that delay results in undue prejudice to TLS (*id*. at 19-21).

II. Motion to Amend the Answer to Add Affirmative Defense of Material Breach is Denied

Pursuant to ASBCA Rule 6(d), we may permit either party to amend its pleading upon conditions fair to both parties. Board Rule 6(d). Although not binding on the Board, we also look to Federal Rules of Civil Procedure (FED. R. CIV. P.) 15(a)(2) for guidance. *Chugach Fed. Sols., Inc*., ASBCA No. 61320, 18-1 BCA ¶ 37,111 at 180,620. Rule 15(a)(2) provides that a court should freely allow a party to amend its pleading "when justice so requires." *N.A.C.E. Inc*., ASBCA No. 63555, 23-1 BCA ¶ 38,444 at 186,851.

In certain situations, however, courts have denied parties the right to amend their pleadings. In *Foman v. Davis*, the Supreme Court identified several justifications for denying leave to amend a pleading including undue delay, bad faith or dilatory motive, repeated failure to cure deficiencies by amendments previously allowed, undue prejudice to the opposing party and futility of the amendment. *Foman v. Davis*, 371 U.S. 178, 182 (1962). "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." *Engility, LLC*, ASBCA No. 61281, 19-1 BCA ¶ 37,430 at 181,922 (denying leave to amend answer when the proposed defense was insufficient as a matter of law); *see also N.A.C.E.*, 23-1 BCA ¶ 38,444 at 186,851-52 (denying leave to amend answer where count alleging termination for cause was a "legal nullity" since it was not timely filed); *Relyant, LLC*, ASBCA No. 59809, 18-1 BCA ¶ 37,085 at 180,534 (denying leave to amend the complaint to assert promissory estoppel cause of action because the Board lacks jurisdiction over implied-in-law contracts). Here, the government's attempt to amend its pleading to add the affirmative defense of prior material breach mischaracterizes the nature of this defense because the government chose to terminate the contract for convenience and the sole remaining issue in the appeal is appellant's entitlement to termination settlement costs.

In its motion, the government contends appellant should receive nothing under the termination for its lost fuel reserves or equipment since its failure to obtain insurance was a prior material breach and/or assumption of risk (gov't mot. at 3). The government's breach argument is inappropriate. If the government wanted to hold the contractor responsible for prior breaches, it should have terminated the contract for default rather than convenience. Instead, the government's decision to terminate the contract for convenience precludes the government from treating the contractor's prior actions as material contract breaches. *See New York Shipbuilding Co*., *A Division of Merritt-Chapman & Scott Corp*., ASBCA No. 15443, 73-1 BCA ¶ 9852 at 46,020 (Following a convenience termination, the government is not "entitled to treat appellant as a defaulted contractor and recover by counterclaim the government's costs of correcting deficiencies."). The government waived its right to assert a prior material breach claim to avoid paying legitimate termination settlement costs when it chose to terminate the contract for convenience.

In our prior decision, we found TLS may be entitled to recover costs it incurred for prepositioned fuel and equipment as costs incurred in preparing to perform the contract under the second prong of the commercial termination clause. *Targe Logistics Serv.*, 24-1 BCA ¶ 38,653 at 187,898. We further noted the existing record was unclear as to whether TLS could have taken any actions to avoid the loss and mitigate the costs. (*Id*.). A contractor has a duty to avoid costs on a terminated contract. *Zahra Rose Construction*, ASBCA No. 62732, 22-1 BCA ¶ 38,111 at 185,111 (a terminated contractor has a duty to avoid additional costs under the second prong of FAR 52.212-4(l)); *Best Lumber Sales*, ASBCA No. 16737, 72-2 BCA ¶ 9661 at 45,098 (appellant responsible for taking reasonable means to protect and preserve the termination property).

The government's proposed affirmative defenses essentially address whether TLS is barred from recovering the costs for the lost fuel and equipment. As discussed in our previous decision, the contract placed the risk of loss for the undelivered fuel and equipment on the contractor. *Targe Logistics Serv.*, 24-1 BCA ¶ 38,111 at 187,893. Accordingly, TLS must demonstrate that the lost fuel and equipment are a type of cost for which it may recover under the contract.

Moreover, the contract placed the responsibility for obtaining adequate insurance to cover the risk of loss on the appellant. (*Id*.). TLS bears the burden of proof to support its claimed termination costs. *Green Dream Group*, ASBCA No. 57413 et al., 13-1 BCA ¶ 35,272 at 173,144. "A defense which demonstrates that [appellant] has not met its burden of proof is not an affirmative defense." *Zivkovic v. Southern California Edison, Co*., 302 F.3d 1080, 1088 (9th Cir. 2002). The government's contentions do not raise actual affirmative defenses but rather address whether appellant has met its burden of establishing an entitlement to its claimed termination costs including the costs for the lost fuel and equipment. We will not

preclude the government from raising these arguments and presenting evidence that TLS is not entitled to recover any costs for the lost fuel and equipment under the termination for convenience clause. The government's proposed amendment to its answer to add a material breach defense is thereby futile and not necessary.[1]

GOVERNMENT'S MOTION TO COMPEL

I. Parties' Contentions on Government's Motion to Compel

Pursuant to Board Rule 8 and FED. R. CIV. P. Rule 37(a), the government also filed a motion to compel discovery that appellant opposes.[2] In its motion, the government requests the Board order appellant to provide responsive information and documents to some of the government's discovery requests (gov't mot. at 1). Specifically, the government contends appellant has refused to provide information and documents concerning whether it had insurance coverage on its lost fuel reserves and equipment, and whether it received any payments from those policies. TLS originally asserted this information was irrelevant and immaterial (*id*.). The government argues whether TLS had insurance to cover the losses and/or previously received payment for the losses is a relevant and material issue with regards to TLS' entitlement to certain termination costs (*id*.).

TLS opposes the government's motion on several grounds. Appellant first contends the government failed to comply with the Board Rule 8 requirement that it in good faith attempt to resolve the discovery dispute without the Board's involvement before filing a motion to compel (app. opp'n at 8-10). Next, appellant asserts the government's motion is now moot since it has responded with supplemental responses to the government's discovery requests (*id*. at 11-12). Finally, TLS asserts its supplemental responses are in line with the Board's previous decision (*id.* at 12).

II. Good Faith Efforts to Resolve the Discovery Dispute

TLS first contends the government failed to meaningfully comply with the Board's requirement that the parties in good faith attempt to resolve the discovery dispute before filing a motion to compel with the Board. *See* Board Rule 8(a). TLS maintains the government filed its motion to compel even though TLS had informed

[1] Since we deny the government's motion to amend its pleading based upon futility, we need not address appellant's other arguments.

[2] The Board looks to the FED. R. CIV. P. for guidance in helping to resolve discovery disputes. *Lockheed Martin Aeronautics Co*., ASBCA Nos. 63149, 63150, 23-1 BCA ¶ 38,287 at 185,900 n.2 (citing Thai Hai, ASBCA No. 53375, 02-2 BCA ¶ 31,971 at 157,920).

the government that it reserved the right to revise and/or supplement its responses due to its continued investigation of the facts and circumstances (app. opp'n at 9). Moreover, TLS claims the government refused to withdraw its motion upon receipt of appellant's revised discovery responses (*id*. at 10).

In December 2022, the government first requested information and documents regarding TLS's insurance arrangements to cover the risk of claims stemming from the "loss or damage to product or equipment or personal injury or death of employees, agents, or subcontractors, or any member of the public" in accordance with the contract's risk of loss provision (gov't mot. at 5). In addition to stating its general objections, appellant responded to those discovery requests by objecting that the requested information was "irrelevant and immaterial" since the contract did not require it to obtain insurance for the risk of loss for the equipment and fuel since those risks did not arise from or relate to performance under the contract (*id*. at 6-8). On April 3, 2023, the government moved for summary judgment on appellant's breach of contract claims. TLS filed its response and a cross-motion for summary judgment on its termination costs. On August 12, 2024, the Board granted the government's motion for summary judgment and denied TLS's partial cross-motion. The Board then granted the parties' joint request to stay proceedings in the appeal pending settlement discussions. On April 24, 2025, following multiple extensions, the parties informed the Board that the settlement discussions were no longer productive and requested to resume the litigation.

On May 5, 2025, the government requested TLS review and revise its discovery responses regarding insurance for its fuel and equipment losses in light of the Board's decision. On June 5, 2026, appellant's counsel acknowledged receipt of the government's May 5, 2025, letter and indicated it would not be able to provide a response until after June 12, 2025. On June 13, 2025, appellant's counsel indicated he was working on TLS's response but would need until June 25, 2025, to provide a response. On June 26, 2025, appellant responded that it had no revisions to its discovery responses at this time. The government filed its motion to compel on July 8, 2025.

Almost three years have passed since the government first filed these discovery requests. TLS has had more than enough time to determine what if any insurance it had regarding the lost fuel and equipment, and whether it filed any claims against that insurance. The record indicates the government has given appellant ample opportunity to respond to these discovery requests. Appellant's final response before the government filed this motion to compel was that it did not intend to make any revisions to its initial responses. After the government filed this motion, appellant submitted a supplemental response to the discovery. As further discussed below, this supplement response, however, still does not adequately respond to all the government's discovery requests. We conclude that the government's efforts to get

appellant to respond to these discovery requests has met the good faith threshold requirement.

III. Government's Discovery Request Is Only Partially Moot

Appellant next asserts the Board should deny the government's motion since it has responded to the government's discovery requests in its supplemental discovery response included as an attachment to its opposition to the government's motion to compel (app. opp'n at 11-12). TLS is only partially correct.

In interrogatory number 14, the government requested appellant to:

> [D]escribe in detail TLS' insurance arrangement to cover the risks for claims stemming from loss or damage to product or equipment or personal injury or death of employees, agents or subcontractors, or any member of the public, as required in the Contracts' Statement of Work ("SOW"), Section 14.2.

(gov't mot. at 4-5). In its August 25, 2025, supplemental response, TLS again stated its objection based on relevancy and materiality and indicated it arranged for and obtained Defense Base Act Insurance (app. supp. disc. resp. at 1-2).[3] TLS's response does not respond to the interrogatory. TLS provided no information on whether it had any insurance arrangements pertaining to the risk of loss or damage to its products and equipment.

Similarly, TLS incorporated its response to interrogatory number 14 in its response to the government's document production request number six that sought documents in any way related to TLS's insurance arrangements covering the risk of loss or damage to its products and equipment (*id*. at 3).[4] Likewise, TLS responded to the government's request for admission numbers two and three by simply

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[3] Defense Base Act Insurance is worker's compensation insurance covering payment of disability compensation and medical benefits to covered employees and death benefits to their eligible survivors. *See* FAR 52.228-3, WORKERS COMPENSATION INSURANCE (DEFENSE BASE ACT) (JUL 2014).

[4] The government's production of document request number 6 requested TLS provide all "notes, documents, emails, and correspondences related in any way to TLS's insurance arrangement to cover the risks for claims stemming from loss or damage to product or equipment or personal injury or death of employees, agents or subcontractors, or any member of the public as required in the SOW Section 14.2" (gov't mot. at 5).

incorporating its response to interrogatory number 14 (*id*. at 4).[5] These responses do not adequately respond to the government's requests.

Appellant has, however, adequately responded to the government's interrogatory number 15. In that interrogatory, the government requested TLS:

> Identify any insurance claim made by TLS in connection with its performance of the Contracts and/or pursuant to the insurance required to be obtained under SOW Section 14.2, and explain in detail the status of any such insurance claims including the matters claimed, amounts in question and whether any insurance payments have been approved, paid and/or pending.

(gov't mot. at 5). In its August 25, 2025, supplemental response, TLS again restated its relevancy and materiality objections but also stated, "based on a reasonable search and inquiry, no insurance claim has been made by TLS under the DBA policy or any other policy concerning the Contracts at issue" (app. supp. disc. resp. at 2). Appellant's supplemental response to interrogatory number 15 provides an adequate response to the government's interrogatory and thereby moots the government's motion to compel an answer as to that interrogatory. Similarly, the government's production of documents request number seven seeks documents related to any TLS's insurance claims made by TLS in connection with its contract performance and/or pursuant to the insurance required to be obtained under SOW Section 14.2 (gov't mot. at 5). TLS responded to that request by incorporating its response to interrogatory number 15 thereby indicating no such documents exist (app. supp. disc. resp. at 3). TLS has also adequately responded to that document production request.

In summary, TLS has responded to the government's discovery requests by indicating it has made no insurance claims under any policy concerning this contract, but TLS has not indicated whether it had any such insurance policies.

IV. Whether TLS had Insurance to Cover Its Risk of Loss is Relevant

Finally, appellant contends the government's requests for information pertaining to any insurance policies covering the lost fuel and equipment are not relevant to the remaining issues in the appeal (app. opp'n at 12-13). Appellant is mistaken. "An interrogatory may relate to any matter that may be inquired into under

[5] The government's request for admission number two stated, "[A]dmit that TLS had an insurance policy as required by SOW Section 14.2" while its request for admission number three stated, "[A]dmit that TLS did not have an insurance policy as required by SOW Section 14.2" (gov't mot. at 6).

Rule 26(b)." FED. R. CIV. P. 33(a)(2). Rule 26 broadly construes relevancy; information sought need not be admissible at trial, but only reasonably calculated to lead to discovery of admissible evidence. *Afro-Lecon, Inc. v. United States*, 820 F.2d 1198, 1203 (Fed. Cir. 1987); *Corinthian-WBCM, J.V.*, ASBCA No. 62379, 21-1 BCA ¶ 37,864 at 183,862-63. Here, whether TLS had any insurance policies under which it may have recovered the costs for the lost fuel and equipment is directly relevant to its entitlement to termination settlement costs.[6]

CONCLUSION

The government's motion to amend its answer to add the affirmative defense of assumption of risk is moot. The government's motion to add the affirmative defense of material breach is denied. The government's motion to compel is granted in-part and denied in-part. Consistent with this decision, TLS shall provide responses to the government's interrogatory number 14, document production request number six, and request for admissions numbers two and three within 30 days from the date of this decision.

Dated: December 10, 2025

ARTHUR M. TAYLOR
Administrative Judge
Armed Services Board
of Contract Appeals

I concur

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

I concur

MICHAEL N. O'CONNELL
Administrative Judge
Vice Chairman
Armed Services Board
of Contract Appeals

[6] To be clear, we make no determination on TLS's entitlement to termination costs under FAR 52.212-4(l) in this decision regardless of whether TLS had any insurance to cover the risk of loss to fuels or equipment.

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. 63282, Appeal of Targe Logistic Services Company, rendered in conformance with the Board's Charter.

Dated: December 10, 2025

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