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Enclosure

ARMED SERVICES BOARD OF CONTRACT APPEALS

Appeals of --)
 Freedom, NY, Inc.) ASBCA Nos. 35671 and 43965
 Under Contract No. DLA13H-85-C-0591)

APPEARANCES FOR THE APPELLANT: Gilbert J. Ginsburg, Esq.
 Shlomo D. Katz, Esq.
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 Washington, DC

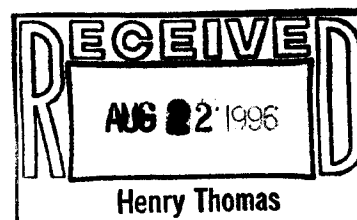
APPEARANCE FOR THE GOVERNMENT: Kathleen D. Hallam, Esq.
 Trial Attorney
 Defense Personnel Support
 Center (DLA)
 Philadelphia, PA

OPINION BY ADMINISTRATIVE JUDGE GROSSBAUM
ON APPELLANT'S MOTION TO VACATE DECISION IN PART

Pursuant to Rule 5(b), appellant moves for an order "to correct or vacate in part the May 7, 1996, decision in the above [captioned] appeals" and "to reinstate to the docket the appeal designated as ASBCA No. 43965." The Government opposes the motion.

The Board's 7 May 1996 decision sustained an appeal (ASBCA No. 35671) from the default termination of all undelivered supplies under the contract and also denied an appeal (ASBCA No. 43965) from the contracting officer's decision denying appellant's certified claim for approximately \$22 million in damages for various alleged contractual breaches Freedom, NY, Inc., ASBCA Nos. 35671, 43965, 96-2 BCA ¶ 28,328. Familiarity with the details of that decision is presumed.

Appellant's request is in the nature of a motion for relief from a judgment or order under Fed. R. Civ. P. 60(b)(1). Specifically, appellant seeks to vacate that part of the decision denying the appeal in ASBCA No. 43965 and restore that appeal to the Board's active docket. The motion is based mainly on appellant's understanding, reinforced by statements in a Board order granting its motion to consolidate the two appeals and in a later prehearing order, that the scope of the hearing and any decision in these appeals would be limited to issues concerning the propriety of the default termination. (Mot. exh. 1, 2) Appellant also alludes to an exchange between the Board and the parties at the opening of the hearing as confirming the parties' and the Board's apparent understanding that the scope of the decision in these appeals would be the "conversion issue"; i.e.,



the conversion of the default to a convenience termination.
(App. mot. at 4-5; tr. 1/13-14)

From the moment ASBCA No. 43965 was docketed there had been confusion as to the scope of the appeal. At the outset of proceedings, the Board advised the parties that consideration of the merits of appellant's nearly \$22 million monetary claim that appeared to be the exclusive subject of this appeal would be deferred until after determination of the propriety of the default termination. However, the prayer in appellant's amended complaint in ASBCA No. 43965 simply requested the Board to "invalidate . . . or alternatively, . . . convert the default termination to a termination for convenience and declare Freedom entitled to appropriate monetary relief."

To the extent that ASBCA No. 43965 contested the propriety of the default termination, the facts alleged and the issues raised therein were substantially identical to those presented in ASBCA No. 35671, except for an issue related to bilateral modification P00028.¹ The duplicative default termination matters raised in ASBCA No. 43965 properly should have been treated as having been merged into the pending appeal in ASBCA No. 35671, and further proceedings in ASBCA No. 43965 should have been suspended until ASBCA No. 35671 was resolved.² See Case, Inc. v. United States, No. 94-5140, 1996 U.S.App. LEXIS 15858, at *7 (Fed. Cir. June 28, 1996).

However, the Board gave credence to the default termination aspect of ASBCA No. 43965 and attempted unnecessarily to compartmentalize different termination issues between the two appeals. Thus, the Board confined the relevant time frame for ASBCA No. 35671 "to events occurring after 7 October 1986 when the parties entered into bilateral modification P00029" and assigned to ASBCA No. 43965 appellant's challenges to the enforceability of releases in certain bilateral modifications and other alleged Government breaches going back to the inception of the contract. (96-2 BCA at 141,473, 141,477).

During a further discussion on the second day of the hearing, appellant's then counsel characterized as "very helpful" the Board's observations that, among other things, appellant's more than \$21 million equitable adjustment or damages case involved "primarily bre[a]ches that occurred before Modification 25" and that the "linchpin of this [affirmative] claim" depended on establishing the invalidity of that bilateral modification (tr. 2/6-8). Encouraged by what it perceived to be appellant's apparent acquiescence, after determining the validity of modification P00025 and of the releases in two other challenged bilateral modifications, the Board proceeded to deny the entire appeal in ASBCA No. 43965 on the merits (96-2 BCA at 141,477).

In its motion appellant contends, inter alia, that it was surprised to its prejudice, within the meaning of reason (1) of Fed. R. Civ. P. 60(b), by that portion of the Board's decision purporting to decide the merits of ASBCA No. 43965 (app. mot. at 10). In support of this contention appellant introduced, without objection, a letter from its former counsel retained for the hearing describing his understanding of the scope of his representation as being limited to the specific "termination for default/termination for convenience issue" then "presently before the Board" and reserving for further discussion "whether [appellant] would want to employ us to pursue" the "potentially much broader series of claims and issues which relate to breach of contract damage matters . . ." (mot. exh. 3). This writing persuades us that the scope of appellant's former counsel's employment was limited to litigating default termination issues and did not extend to agreeing with Board observations concerning those issues that would determine the merits of appellant's affirmative claim "relat[ing] to breach of contract damage matters."

Opposing appellant's motion, the Government contends that during the hearing appellant had the opportunity to and did present evidence relevant to each element of its breach of contract/equitable adjustment claim and that the Board and the parties

understood that the various elements of Appellant's equitable adjustment claim under ASBCA No. 43965 were identical to its defenses to the Government's termination action . . . ASBCA No. 35671

(Gov't opp. at 3-4). For the most part, these contentions are accurate and point to the same considerations of economy of resources that influenced the Board's original decision.^{3/} Nevertheless, the fact

[t]hat both [ASBCA No. 35671] and [ASBCA No. 43965] arose out of the same underlying set of facts and involved [similar] allegations . . . does not alter the fact that the two cases involved different claims.

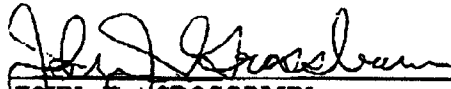
Case, Inc. v. United States, 1996 U.S.App. LEXIS 15858, at *21.

Appellant claims to have been "prejudiced by the Board's decision on the merits of the breach claim" and requests that "the decision . . . be corrected to reflect that the breach claim was not considered by the Board" and that its "breach claim (ASBCA No. 43965) should be reinstated to the Board's docket." We conclude that appellant's claim of prejudicial surprise is meritorious and we grant the requested relief as described below.


Appellant specifically requests the Board to "remove from its decision findings of fact and conclusions of law pertaining to those matters which were outside the scope of the hearing held . . . in these appeals." However, few of the Board's findings and conclusions of law in its 7 May 1996 decision dealt directly with appellant's "breach claim (ASBCA No. 43965)" or were outside the proper scope of the default termination appeal, ASBCA No. 35671. Nevertheless, in order to avoid any possible confusion that might be caused by the Board's unnecessary compartmentalization of different default termination issues between two separate docket numbers, we set forth appropriate corrections to our decision in an attached Appendix.

Appellant's motion is granted. We delete reference to docket number ASBCA No. 43965 from the caption of our 7 May 1996 opinion and in the "DECISION" section thereof; we vacate that portion of the decision denying ASBCA No. 43965; and we restore the appeal in ASBCA No. 43965 to our active docket. In addition, we correct the findings and conclusions of law in our 7 May 1996 decision with respect to ASBCA No. 35671 only to the extent specifically set forth in the Appendix attached hereto. In all other respects, we leave our decision in ASBCA No. 35671 unchanged.


Dated: 15 August 1996


JOHN J. GROSSBAUM
Administrative Judge
Armed Services Board
of Contract Appeals

I concur


ALAN M. SPECTOR
Administrative Judge
Acting Chairman
Armed Services Board
of Contract Appeals

I concur


MARK N. STEMPLER
Administrative Judge
Vice Chairman
Armed Services Board
of Contract Appeals

1. The validity of modification P00028 was challenged in ASBCA No. 43965 but had not been attacked in ASBCA No. 35671.
2. Pursuant to Rule 7, any later raised issues concerning the validity of modification P00028 could and should have been "treated in all respects as if they had been raised" in the pleadings in ASBCA No. 35671.
3. The Government requests, alternatively, "that the appeal should be dismissed on the basis of res judicata" (Gov't opp. at 7). This request is premature, and should be reserved for a proper motion that the parties can brief fully.

**CORRECTIONS TO BOARD'S 7 MAY 1996 DECISION IN
APPEAL OF FREEDOM, NY, INC., UNDER CONTRACT NO. DLA13H-85-C-0591**

1. at 141,457: Change caption to read:

ASBCA No. 35671, May 7, 1996. Contract No. DLA13H-85-C-0591.

GROSSBAUM, Administrative Judge: This appeal arises under a fixed price contract to supply a quantity of combat rations, referred to as "Meal[s], Ready-to-Eat" (MRE). The appeal was taken from a contracting officer's decision terminating the contract for default and, as supplemented, asserting a claim for repayment of unliquidated progress payments in the amount of approximately \$1.63 million. Only the propriety of the default termination and entitlement to repayment of unliquidated progress payments is before us.

3. at 141,472: Change finding 93 to read:

93. On 1 May 1991 appellant filed a certified claim for an adjustment or damages in the amount of \$21,959,311, based on various constructive changes and breaches by Government officials going back to the inception of the contract. According to the claim, Freedom had incurred total costs of \$21,727,850 performing the contract. (AR4, tab 1 at 39, exh. 36) Freedom's timely appeal from the contracting officer's 7 October 1991 decision denying this claim was docketed as ASBCA No. 43965, which appeal is not presently before us.

4. at 141,472-73: Delete first, second, and third full paragraphs of "DECISION" section, including the heading "ASBCA No. 43965," and substitute the following:

DECISION

This appeal deals only with the propriety of the 22 June 1987 termination of the then uncompleted portion of the contract (107,842 undelivered cases in the MRE-6 configuration) for default. If the default termination was proper, the Government will be entitled to recover unliquidated progress payments. If improper, the termination will be converted to one for convenience of the Government.

The focus of this appeal revolves around the questions of whether Freedom was actually in default or, if so, whether its default was excusable or, alternatively, whether its duty to continue performance had been discharged by a material breach by the Government?

Among other things, appellant contends that various Government acts and omissions from the beginning of the contract excused its subsequent performance delays and that none of these excusable causes of delay were extinguished by any bilateral delivery schedule extensions. In this regard, appellant argues that the releases in bilateral modifications P00025, P00028 and P00029 are unenforceable because they were extracted by means of duress, mistake or misrepresentation.

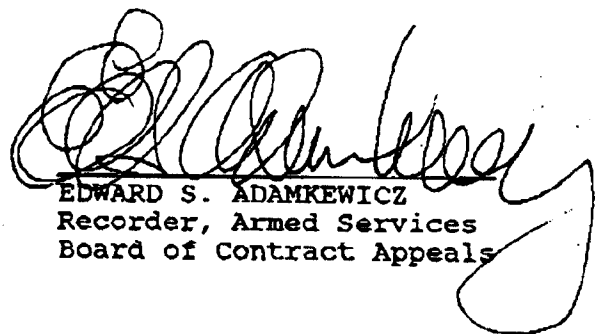
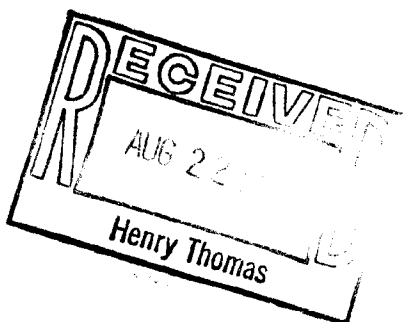
5. at 141,473: Change first and second sentence of second full paragraph (beginning with "We consider . . .") to read:

We consider first the alleged acts or omissions occurring before the challenged modifications that constituted excusable causes for delay. According to appellant, these acts or omissions revolve mainly around the allegedly improper manner in which the Government, especially the ACO, administered progress payments. . . .

6. at 141,473: Delete second sentence of Note 8.
7. at 141,476-77: Delete in entirety paragraph at bottom of 141,476 (beginning "One aspect . . .") through third full paragraph at 141,477 (ending "... 1986. (Finding 70)"), including the heading "ASBCA No. 35671."

I certify that the foregoing is a true copy of the Opinion and Decision of the Armed Services Board of Contract Appeals on appellant's motion to vacate decision in part in ASBCA Nos. 35671 and 43965, Appeals of Freedom, NY, Inc., rendered in conformance with the Board's Charter.

Dated: 19 AUG 1996



EDWARD S. ADAMKEWICZ
Recorder, Armed Services
Board of Contract Appeals