



UNITED STATES
CIVILIAN BOARD OF CONTRACT APPEALS

MOTION TO DISMISS DENIED: March 21, 2008

CBCA 978

THE BOEING COMPANY, SUCCESSOR-IN-INTEREST
OF ROCKWELL INTERNATIONAL CORPORATION,

Appellant,

v.

DEPARTMENT OF ENERGY,

Respondent.

Richard J. Ney and S. Jean Kim of Chadbourne & Parke LLP, Los Angeles, CA, counsel for Appellant.

Brady L. Jones, III and Kaniah Konkoly-Thege, Office of Legal Services, Environmental Management Consolidated Business Center, Department of Energy, Cincinnati, OH, counsel for Respondent.

Before Board Judges **GILMORE**, **BORWICK**, and **McCANN**.

McCANN, Board Judge.

The Department of Energy (DOE) has moved to dismiss the appeal of The Boeing Company (Boeing), successor-in-interest to Rockwell International Corporation (Rockwell) for lack of subject matter jurisdiction. The DOE alleges that Boeing's appeal is based upon a violation of a plea agreement entered into between Rockwell and the Government. The DOE alleges that the plea agreement is not a contract over which this Board has jurisdiction

under the Contract Disputes Act of 1978 (CDA), 41 U.S.C.A. §§ 601-613 (West Supp. 2007). We deny the motion.

Background

Boeing filed a complaint on November 20, 2007, alleging that it is entitled to \$10,318,571.16 in defense costs from the DOE. Boeing alleges that, in *United States of America, ex rel., and James S. Stone v. Rockwell International Corporation*, Civil Action No 89-C-1154 (D. Colo.) (*Stone*), the United States Department of Justice (DOJ), brought certain claims against Rockwell in violation of a prior plea agreement. Boeing alleges that the costs of defending against these claims are allowable costs under the contract.¹

The plea agreement is an agreement between Rockwell and the DOJ that was entered into on March 26, 1992. Appeal File, Exhibit 197. In the plea agreement Rockwell agreed to plead guilty to ten criminal charges involving violations of the Resource Conservation and Recovery Act (RCRA) and the Clean Water Act (CWA). The plea agreement states, in pertinent part:

1. . . . In return, the United States will not bring other environmental criminal charges (or environmentally-related conspiracy, fraud or false statement criminal charges) against Rockwell or its present or former officers, directors or employees, as to all such environmental and environmentally-related matters concerning Rocky Flats which are presently known to the Department of Justice on the date of this agreement.

. . . .

5. In connection with this disposition, the United States agrees that, as to all environmental matters at Rocky Flats which are presently known to the Department of Justice or the Environmental Protection Agency (“EPA”) on the date of this agreement, the United States covenants not to sue to take administrative action against Rockwell for civil damages, penalties or other monetary relief based upon alleged violation of RCRA, CWA, § 103 of the Comprehensive Environmental Response, Compensation and Liability Act (“CERCLA”), 42 U.S.C. § 9603, The Clean Air Act, 42 U.S.C. §§ 7401 et seq., or the Toxic Substances Control Act, 15 U.S.C. §§ 2206 et seq.

¹ This appeal, CBCA 978, has been consolidated with CBCA 337, 338, and 339. In CBCA 337, 338, and 339 Boeing claims that all *Stone* defense costs are allowable costs under the contract. In CBCA 978 Boeing asserts an additional argument for the allowability of some of the claims in *Stone*.

This covenant does not encompass (or preclude) . . . (c) the issues raised in United States of America, ex rel., and James S. Stone v. Rockwell International Corporation, Civil Action No 89-C-1154 (D. Colo.) (“Stone”). After an independent review, the Department of Justice-Civil Division has determined to file a notice in Stone declining to intervene.

In December 1996, after DOJ was granted leave to intervene in *Stone*, the Government and Mr. Stone filed an amended complaint. The amended complaint alleged, for the first time, additional common law claims, including breach of contract (count three), payment by mistake of fact (count four), and unjust enrichment (count five) (claims 3-5). Complaint ¶ 15; Answer ¶ 15.

Boeing alleges that claims 3-5 were based upon violations of the CWA and RCRA known to DOJ when the plea agreement was signed in March 1992, and that claims 3-5 did not involve issues that were raised in *Stone* as of March 1992. Accordingly, Boeing alleges that the Government breached the plea agreement when it asserted claims 3-5. Complaint ¶¶ 15-18.

Boeing alleges that as a result of the Government’s breach of the plea agreement, Rockwell incurred costs in defending claims 3-5, which it otherwise would not have incurred. Complaint ¶ 19. Boeing alleges that Rockwell prevailed on claims 3-5, but incurred significant expense in doing so. It also alleges that Rockwell’s *Stone* defense costs, which included defending claims 3-5, totaled \$10,318,571.16. Complaint ¶ 20.

Rockwell and DOE were parties to contract number DE-AC04-76DP03533, as amended (contract). Under the contract, Rockwell agreed to manage and operate the Government-owned Rocky Flats plant near Golden, Colorado. Under the contract, Rockwell is entitled to reimbursement by DOE for all of Rockwell’s allowable costs incurred in performing the contract. Complaint ¶¶ 4-5; Answer ¶¶ 4-5.

The contract provides that the following costs are allowable costs for which Rockwell is entitled to be reimbursed:

Consulting services (including legal and accounting), and related expenses, as approved by the Contracting Officer, except as made unallowable by paragraph (e)(16) and (25).

Appeal File, Exhibit 37 at 130 (clause 54(d)(3)).²

Litigation expenses, including payment of third-party claims, judgment and reasonable counsel fees, incurred in accordance with the clause of this contract entitled “Litigation and Claims.”

Id. (clause 54(d)(4)).

All costs incurred by the Contractor with respect to any and all liabilities, claims, demands, damage costs, or penalties (such as civil sanctions including fines), arising out of, or related to environmental, safety and health activities, including costs incurred with respect to investigation removal, remedial action, ground and surface water or other clean-up of hazardous, toxic or contaminated material(s), except for those costs that result from conduct identified in subparagraph (e)(17)(ii) of the clause entitled, “Allowable Costs, Base Fee and Award Fee.”

Id. at 138 (clause 54(d)(16)).

Fines and penalties, including assessed interest, resulting from violation of, or failure of, the Contractor to comply with Federal, state, or local laws or regulations . . . when incurred in accordance with the written approval of the Contracting Officer or as a result of compliance with the provisions of this contract.

Id. at 141 (clause 54(e)(12)).

The contract provides in what the parties refer to as the Defense of Fraud Proceedings clause that the following costs are unallowable costs for which Rockwell is not entitled to reimbursement:

Costs incurred in defense of any civil or criminal fraud proceeding or similar proceeding (including filing of any false certification) brought by the government where the Contractor, its agents or employees, is found liable or has plead nolo contendere to a charge of fraud or similar proceeding (including filing of a false certification).

² At some point the paragraphs were renumbered in the contract. In the version of the contract included in the appeal file, clause 54 appears as clause 62. The wording of the clauses was not changed.

Appeal File, Exhibit 37 at 145 (clause 54 (e)(32)).

In its complaint, Boeing states that the Board decided, in its decision dated July 9, 2007, which is *The Boeing Co., Successor-In-Interest of Rockwell International Corp. v. Department of Energy*, CBCA 337, et al., 07-2 BCA ¶ 33,622, (*The Boeing Co.*) that *Stone* defense costs are unallowable under the Defense of Fraud Proceedings clause. Complaint ¶ 27. This statement is incorrect. In *The Boeing Co.* the Board held only that the costs of defending against False Claims Act allegations in *Stone*, where Rockwell had been found liable, are unallowable under the Defense of Fraud Proceedings clause. This holding may or may not mean that all *Stone* defense costs are unallowable. The Board has not ruled on that issue. In any event, in this appeal Boeing is making an additional argument for the allowability of defense costs for some of the claims in *Stone*.

Discussion

For the purpose of ruling on this motion, the Board must treat the allegations set forth in Boeing's complaint as true. *Sadeghi v. United States*, 46 Fed. Cl. 660, 661 (2000) (citing *Scheuer v. Rhodes*, 416 U.S. 232, 236 (1974)). Accordingly, we must assume, *inter alia*, that the Government breached the plea agreement when it asserted claims 3-5 in the *Stone* case, and that the defense costs incurred were incurred within the scope of the contract.

The DOE alleges that this Board has no jurisdiction over this case because this case is founded upon a violation of the plea agreement, and the plea agreement is not a contract for the production of goods or services which is covered by the CDA. Boeing has not contested DOE's assertion that the plea agreement is not a contract covered by the CDA.

Boeing, on the other hand, alleges that the Board does have jurisdiction over this case because the costs incurred in defending claims 3-5 were incurred within the scope of the contract, and the Government's violation of the plea agreement makes these costs allowable under the applicable clauses of the contract.

The issue currently before the Board is the issue of jurisdiction over Boeing's appeal. This appeal alleges that certain defense costs are allowable under the contract. This Board has jurisdiction to determine the allowability of costs incurred under a contract covered by the CDA.

Decision

Respondent's motion to dismiss is **DENIED**.

R. ANTHONY McCANN
Board Judge

We concur:

BERYL S. GILMORE
Board Judge

ANTHONY S. BORWICK
Board Judge