UNITED STATES
CIVILIAN BOARD OF CONTRACT APPEALS

MOTION TO STRIKE DENIED;
MOTION FOR SUMMARY JUDGMENT DENIED: October 1, 2020

CBCA 6449

REGIMENT CONSTRUCTION CORP.,

Appellant,

v.

DEPARTMENT OF VETERANS AFFAIRS,

Respondent.

Timothy A. Furin of Ward & Berry PLLC, Washington, DC, counsel for Appellant.

Harold W. Askins, III, Office of General Counsel, Department of Veterans Affairs, Charleston, SC; and David G. Fagan, Office of General Counsel, Department of Veterans Affairs, Portland, OR, counsel for Respondent.

Before Board Judges **BEARDSLEY**, **GOODMAN**, and **O'ROURKE**.

GOODMAN, Board Judge.

Respondent, the Department of Veterans Affairs (VA), has filed a motion for summary judgment, and appellant, Regiment Construction Corp., has filed a motion to strike respondent's motion. We deny both motions.

Background

On March 28, 2011, respondent awarded appellant a service-disabled veteran-owned small business (SDVOSB) set-aside contract (the contract). The contract was for condensate

piping replacement at a VA healthcare facility in New York state. In November 2014, appellant substantially completed the contract. In February 2019, appellant submitted to respondent a certified claim and request for equitable adjustment. When respondent's contracting officer did not issue a decision on the claim, appellant considered its claim deemed denied and filed this appeal on April 23, 2019. Respondent filed an answer in this appeal on June 21, 2019. The parties then requested a suspension of proceedings to engage in settlement discussions.

The suspension of proceedings was extended several times at the parties' requests. During a status conference with the Board on July 16, 2019, counsel requested a continued stay, informing the Board that a settlement was near. However, on November 4, 2019, during a status conference with the Board, the parties requested that the Board continue to stay all further proceedings until the resolution of a dispositive motion to be filed by respondent.

On November 29, 2019, respondent filed a motion for summary judgment, asking the Board to find as a matter of law that appellant committed fraud, and therefore the contract was void ab initio. The motion was supported by a settlement agreement between appellant, an individual, and the Department of Justice (DOJ) executed on July 30, 2019, as well as a VA Office of Inspector General (OIG) referral of appellant for suspension and debarment dated November 21, 2019, which refers to the DOJ settlement agreement.

Concurrently with the filing of its response to the motion for summary judgment, appellant filed a motion to strike respondent's motion for summary judgment, asserting that respondent cannot now raise the issue of fraud, since it did not raise fraud as an affirmative defense in its answer, or otherwise assert the contract was void ab initio, and further asserts that allowing the defense now would be unduly prejudicial.

Discussion

Appellant's Motion to Strike Respondent's Motion for Summary Judgment

In its motion to strike respondent's motion for summary judgment, appellant asserts that in 2009 the Government began an investigation into allegations that appellant had committed SDVOSB fraud against the VA, at which time appellant had not applied to be a SDVOSB nor to bid on contracts set-aside for SDVOSB contractors. Appellant further describes the settlement negotiations that were conducted between counsel for appellant and respondent during the stay of proceedings in this appeal, and the July 16, 2019, conference with the Board advising that the settlement was near. Appellant states that at no point during that call did respondent's counsel raise the affirmative defense of fraud, or otherwise indicate that the VA considered the contract void ab initio. Appellant alleges further that on or about

July 17, 2019, counsel for respondent and appellant conducted further settlement discussions and verbally agreed in principle to settle the appeal. Respondent's counsel indicated that he did not have final settlement authority but would schedule a meeting with the appropriate approval authority within the VA.

On July 30, 2019, appellant and an individual entered into the DOJ settlement agreement, pursuant to which the United States was to be paid a sum of money as "restitution." On August 1, 2019, respondent's counsel sent an email to appellant's counsel requesting a call to discuss the DOJ settlement agreement, stating, "This may have an impact on my ability to settle this case." Appellant states that this was the first time that the Government had raised the issue of fraud despite knowing about the investigation for a period of over ten years.

Appellant asks the Board to strike the motion for summary judgment, as it has been injured and prejudiced by respondent's failure to raise the affirmative defenses of fraud and contract voidness until after extended settlement negotiations and appellant's incurrence of substantial legal fees, as appellant would have employed a different legal strategy had the defenses been raised earlier. Respondent replies that respondent only became aware of the DOJ settlement agreement and the VA OIG "finding of fraud" from a DOJ press release dated July 30, 2019.[1]

Failing to state an affirmative defense in an initial answer is not a complete bar to ever asserting that defense. This Board has allowed initial pleading of an affirmative defense in a motion for summary judgment absent prejudice to the opposing party. In *A-Sons Construction, Inc. v. Department of Housing & Urban Development*, CBCA 3491, et al., 15-1 BCA ¶ 36,089, the Board stated:

> The purpose of putting the affirmative defenses in the answer "is to give the opposing party notice of the affirmative defense and a chance to respond." . . . Failure to plead an affirmative defense in a timely manner can result in the defense's waiver. . . . Nonetheless, even though the Government acts "at its own peril" in failing to plead its affirmative defenses in its answer, "tribunals generally are liberal . . . in allowing the late assertion of [affirmative] defenses, absent prejudice to the opposing party." *Ball, Ball & Brosamer, Inc.*, IBCA 2841, 97-1 BCA ¶ 28,897, at 144,084; *see First Annapolis Bancorp, Inc. v. United States*, 75 Fed. Cl. 280, 288 (2007) ("An affirmative defense may be

[1] A link to the press release was included in respondent's response to the motion. While the press release refers to a VA OIG investigation, the VA OIG fraud referral was dated November 21, 2019.

> waived if not pled as prescribed, but the waiver is not effective absent unfair surprise or prejudice.") . . . While we encourage timely pleading of affirmative defenses, we, like other tribunals, will not typically reject an affirmative defense raised for the first time in a motion for summary relief, absent articulable prejudice to the opposing party, particularly where the motion, as here, is filed well before any trial or hearing has been scheduled. *See, e.g.*, *Ultra-Precision* [*Manufacturing, Ltd. v. Ford Motor Co.*], 411 F.3d [1369,] at 1376 [(Fed. Cir. 2005)] (affirming trial court's consideration of affirmative defense first raised in second set of summary judgment motions); *National Gypsum Co.*, ASBCA 53259, et al., 03-1 BCA ¶ 32,054, at 158,454-55 (2002) (affirmative defense considered although first raised in brief); *Holland v. United States*, 74 Fed. Cl. 225, 256 (2006) (same), *rev'd on other grounds*, 621 F.3d 1366 (Fed. Cir. 2010).

While we realize that appellant expended resources for settlement negotiations which resulted in an expectation that a settlement had been reached, before respondent asserted its affirmative defense, appellant has had the opportunity to respond fully to the affirmative defense in its opposition to the motion for summary judgment. We cannot find that appellant has been prejudiced.

Appellant's motion to strike respondent's motion for summary judgment is denied.

Respondent's Motion for Summary Judgment

Summary judgment is appropriate when there are no genuine disputes of material fact and the movant demonstrates it is entitled to judgment as a matter of law. *See Carmazzi Global Solutions, Inc. v. Social Security Administration*, CBCA 6264, 19-1 BCA ¶ 37,439 (citing *Walker Development & Trading Group Inc. v. Department of Veterans Affairs*, CBCA 5907, 19-1 BCA ¶ 37,376). Genuine disputes of material fact exist when a rational finder of fact could resolve an issue in favor of either party and the resolution of that issue would impact the outcome of the case under governing law. *See Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 248 (1986). We must view all inferences in a light most favorable to the non-movant. *See Walker Development & Trading* (citing *Matsushita Electric Industrial Co. v. Zenith Radio Corp.*, 475 U.S. 574, 599 (1986)).

Respondent contends that appellant has committed fraud and therefore the contract is void ab initio. Respondent's motion presents an extensive recitation of alleged undisputed facts, many of which are disputed with supporting documentation in appellant's response to the motion, leaving issues of material fact in dispute. We will not burden this decision with a recitation of these issues. However, the basis of the motion for summary relief is stated by respondent as follows:

> [R]espondent is not asking the Board to making [sic] a factual finding of fraud because the DVA OIG has already determined that the fraud was committed. There are no facts in the record which rebut this determination. Since the question of fraud is resolved and not currently before the Board, the issue is whether the established fraud renders this contract void ab initio which is within the Board's jurisdiction.

In denying the motion for summary judgment, we find that respondent's motion and three specific documents upon which it relies – the DOJ settlement, the VA OIG fraud referral, and the DOJ press release – do not, as respondent alleges, evidence a previous determination that appellant committed fraud.

Respondent states in its motion:

> Respondent's Statement of Uncontested Facts demonstrates that [appellant], through its representatives, knowingly misrepresented its status as an eligible SDVOSB in order to receive awards under VA's SDVOSB set-aside program, and that the Government relied on that misrepresentation in making its award decision. This fact is evidenced by the July 30, 2019 settlement agreement with the Government as well as the substantiated VA OIG findings and referral to the Suspension and Debarment Committee. These findings reflect the lack of control by the service-disabled veteran as required for award of an SDVOSB set aside contract. These facts alone are sufficient for the Board to make a ruling in this case.

Respondent's argument is devoid of merit. The DOJ settlement agreement does not contain findings or admissions of fraud, and reads in relevant part:

> The United States contends that it has certain civil claims against Regiment and Hernandez arising from false claims made in conjunction with contracts awarded to Regiment by the United States. . . . [The] United States asserts that between the years 2008 and 2015, Regiment and [an individual] procured government contracts set aside for SDVOSBs by improperly representing that Regiment was an SDVOSB. That conduct is referred to below as the Covered Conduct.
>
> This Settlement Agreement is neither to be construed as an admission of liability by Regiment or [the individual], who dispute the merits of the allegations, nor a concession by the United States that its claims are not well founded.

> The United States releases Regiment and [an individual] from any civil or administrative monetary claim the United States has for the Covered Conduct under . . . the common law theories of breach of contract, payment by mistake, unjust enrichment and fraud.
>
> Nothing in this Paragraph . . . shall be construed as releasing Regiment and/or [an individual]'s claims against any federal agency in connection with the work performed by Regiment.

When we read the document as a whole, and the statements quoted above, we cannot interpret the document as a "finding of fraud," as alleged by respondent. Likewise, the VA OIG referral of appellant for suspension and debarment cannot be so construed, as it merely references the DOJ settlement as a basis. While the VA OIG referral states: "investigation substantiated allegations of SDVOSB providing grounds for debarment under 38 U.S.C. 8127(c)," no grounds for debarment were stated, nor does this statement support a finding of fraud.

Finally, the DOJ press release from which respondent states it learned of the VA OIG "finding of fraud" states only that it "credited [a] Special Agent . . . of the United States Department of Veteran's Affair's Office of Inspector General, and [a] Special Agent . . . of the U.S. Small Business Administration's Office of Inspector General, with the investigation." The press release does not state that there was a finding of fraud by the VA OIG, but only implies that the VA OIG's investigation aided the DOJ in reaching the settlement.

Respondent's motion for summary judgment lacks factual support. While it contains a plethora of allegations, there is no evidence of a previous finding of fraud, nor can we make such a finding based upon the record. Issues of material fact remain in dispute, and respondent does not prevail in its motion for summary judgment.

Decision

Appellant's motion to strike respondent's motion for summary judgment is **DENIED**. Respondent's motion for summary judgment is **DENIED**.

Allan H. Goodman
ALLAN H. GOODMAN
Board Judge

We concur:

Erica S. Beardsley
ERICA S. BEARDSLEY
Board Judge

Kathleen J. O'Rourke
KATHLEEN J. O'ROURKE
Board Judge