



UNITED STATES  
CIVILIAN BOARD OF CONTRACT APPEALS

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MOTION FOR PARTIAL SUMMARY JUDGMENT DENIED:  
March 8, 2024

CBCA 7147

WILLIAMS BUILDING COMPANY, INC.,

Appellant,

v.

DEPARTMENT OF STATE,

Respondent.

Kevin M. Cox of Camardo Law Firm, P.C., Auburn, NY, counsel for Appellant.

Randal W. Wax, Office of the Legal Adviser, Buildings and Acquisitions, Department of State, Washington, DC, counsel for Respondent.

Before Board Judges **LESTER**, **VERGILIO**, and **O'ROURKE**.

Opinion for the Board by Board Judge **LESTER**. Board Judge **VERGILIO** concurs.

**LESTER**, Board Judge.

This appeal involves a dispute over the amount of money that Williams Building Company (WBC) is owed under its termination settlement proposal (TSP), which it submitted after the Department of State's Office of Overseas Building Operations (OBO) terminated its construction contract for convenience. Pending before us is WBC's motion for partial summary judgment on one of the affirmative defenses that OBO raised more than two years ago in its answer to WBC's complaint. In that affirmative defense, OBO alleged that, during contract performance, WBC "falsely certified" that it had paid certain amounts of money to certain subcontractors; that, based on that certification, OBO had reimbursed

WBC for that money, even though WBC never actually paid those subcontractors; and that WBC's actions amounted to a prior material breach of contract for which WBC should be held accountable. WBC argues that OBO is essentially alleging that WBC committed fraud, which the Board lacks jurisdiction to address, and that any allegations regarding false certifications and associated past overpayments should be dismissed from this appeal.

Reading the parties' briefs, it seems that both parties have strayed far from issues that are actually relevant to the resolution of this appeal. Because a termination for convenience essentially turns a fixed-price construction contract into a cost-reimbursement contract, allowing the contractor to recover its incurred performance costs, the resolution of this appeal will involve identifying the total costs that WBC incurred in performing this contract before OBO terminated it for convenience. Since OBO terminated the contract for convenience rather than for default, it no longer matters whether, in the past, WBC acted intentionally in overstating the amount of its incurred costs or committed a contract breach. Ultimately, as permitted in response to a termination for convenience, WBC will recover those allowable costs that WBC establishes it incurred in performing the contract. Nevertheless, although OBO couches its affirmative defense as a contract breach, it is essentially challenging whether WBC actually incurred certain costs that it is claiming. Because the issue of fraudulent intent is irrelevant to a determination of whether WBC incurred those costs, we have no basis to preclude OBO from arguing that the claimed costs are overstated. Accordingly, as explained below, we deny WBC's motion for partial summary judgment.

### Background

#### WBC's Statement of Undisputed Material Facts

WBC bases its motion on the following statement of undisputed material facts, which OBO, although believing some to be irrelevant to the motion, does not contest:

1. On January 23, 2015, OBO issued solicitation no. SAQMMA-15-R-0145 (solicitation) for construction services at the United States Consulate lease-fit-out in Wuhan, China.
2. The solicitation provided that "[c]onstruction shall be performed within the period of performance of 488 (four hundred eighty eight) calendar days from the issuance of the Limited Notice to Proceed."
3. On June 15, 2016, OBO awarded contract no. SAQMMA-16-C-0155 (contract), a firm-fixed-price contract, to WBC in the amount of \$14,714,824.

4. By letter dated February 28, 2020, in response to issues in the Wuhan area relating to what would soon become known as COVID-19, the OBO contracting officer advised WBC that, effective immediately, the contract was being terminated for the Government's convenience pursuant to Federal Acquisition Regulation (FAR) 52.249-2 (Apr 2012) and 52.249-2 Alt 1 (Sep 1996) (48 CFR 52.249-2, .249-2 Alt 1 (2016)).

5. On or about July 9, 2020, WBC submitted its total-cost TSP in the amount of \$8,754,863.48 in accordance with FAR part 49, with supporting documentation.

6. WBC converted its TSA to a claim by letter dated August 21, 2020, and demanded a contracting officer's final decision.

7. On June 15, 2021, WBC filed with the Board a notice of appeal of the contracting officer's "deemed denial" of its claim.

8. The Board docketed WBC's appeal as CBCA 7147.

9. WBC filed its complaint with the Board on July 20, 2021.

10. OBO filed its answer on September 13, 2021. In its answer, OBO asserted three affirmative defenses, the third of which, titled "Prior Breach of Contract," reads as follows:

Prior to termination for convenience, WBC falsely certified on pay applications submitted to the Government for progress payments that it had paid its subcontractors and suppliers from amounts previously received [from] the Government. WBC billed the Government and received payment for labor and materials furnished to the project by Wuhan Jindeyuan Construction and Decorating Co. (JDY), Total Millwork, LLC, and HWS Group (Shanghai) Limited (Haworth) but WBC did not pay these firms. WBC's non-payment of its subcontractors resulted in ongoing disruption and damage to the Government in connection with the procurement and completion of the work. WBC's prior breach of contract bars its recovery of amounts sought in this appeal.

Answer at 3.

#### WBC's Motion for Partial Summary Judgment

On October 31, 2023, WBC filed a motion for partial summary judgment on OBO's third affirmative defense. It interpreted OBO's allegations that WBC "falsely certified" pay

applications in the past as an allegation of fraud and argued that “an affirmative defense that would turn on a Board’s finding of fraudulent conduct by appellant is not within the Board’s jurisdiction.” Appellant’s Motion for Partial Summary Judgment at 4. OBO responded by representing that it has not alleged fraud and instead was seeking to challenge WBC’s entitlement to claimed costs that it had not actually incurred. Nevertheless, in briefing that OBO filed earlier in this appeal discussing the effect of its prior material breach argument on WBC’s TSP recovery, OBO asserted that its “affirmative defense of prior material breach, if successful, could defeat” WBC’s appeal. Respondent’s Supplemental Briefing (May 23, 2022) at 6. OBO alleged that it had to pay one of WBC’s subcontractors directly, even though OBO had previously sent WBC money to pay that subcontractor, because the subcontractor was refusing to continue work absent immediate payment. *Id.* Despite this allegation of duplicate payments, OBO has not explained how its prior material breach argument would eliminate WBC’s recovery of all termination costs.

### Discussion

#### OBO’s Right to Allege WBC’s Nonincurrence of Costs

“The effect of [a] termination for convenience [is] to convert [a] contract from a fixed-price type, as awarded, into a cost-reimbursable type permitting [the contractor] to recover its allowable costs incurred in performance of the contract.” *Anlagen-und Sanierungstechnik GmbH*, ASBCA 37878, 91-3 BCA ¶ 24,128, at 120,753 (citing *Seven Science Industries*, ASBCA 23337, 80-2 BCA ¶ 14,518, at 71,555); see *CTA I, LLC v. Department of Veterans Affairs*, CBCA 5826, et al., 22-1 BCA ¶ 38,083, at 184,947. Accordingly, “[a] contractor whose fixed-price contract is terminated for the convenience of the Government is entitled to recover (a) allowable costs incurred in the performance of the work, (b) a reasonable profit for work performed, (c) reasonable settlement expenses, and (d) certain ‘continuing’ (post-termination) costs,” Paul J. Seidman & Robert D. Banfield, *Maximizing Termination for Convenience Settlements*, 95-5 Briefing Papers 2 (Apr. 1995), with performance cost recovery being “limited to the total contract price.” *CTA I*, 22-1 BCA at 184,947 (citation and italics omitted). In considering a termination for convenience settlement proposal, “it is necessary to ascertain the extent to which appellant incurred costs in the performance of the terminated contract but it is not relevant to assign such costs to changes, delays, or ‘damages’ which might be recoverable absent a Termination for Convenience clause.” *Seven Science*, 80-2 BCA at 71,555; see *Worsham Construction Co.*, ASBCA 25907, 85-2 BCA ¶ 18,016, at 90,369 (“Even assuming that the delayed performance of the contract was caused in part by appellant, . . . the contractor is entitled to recover all allowable costs.”).

To the extent that, in its third affirmative defense, OBO asserts that WBC’s failure to pay its three subcontractors amounts to a “prior breach of contract [that] bars [WBC’s]

recovery” of any termination settlement costs, that assertion is, on its face, incorrect. OBO terminated this contract for convenience, not for default. Once OBO terminated the contract for convenience, WBC became entitled to recover the allowable costs that it can show it incurred in performing the contract. *Seven Science*, 80-2 BCA at 71,555. If OBO had wanted to hold WBC responsible for prior breaches of that contract, it should have terminated the contract for default. OBO’s decision to terminate for convenience, rather than default, effectively precludes OBO from treating past contractor improprieties as material breaches of contract for which it can obtain relief. *See, e.g., Best Foam Fabricators, Inc. v. United States*, 38 Fed. Cl. 627, 640 (1997) (“[A] contrary rule would, in effect, convert a convenience termination into a termination for default, even though a convenience termination is ‘not based upon any fault or negligence on the part of the contractor.’” (quoting *New York Shipbuilding Co.*, ASBCA 15443, 73-1 BCA ¶ 9852, at 46,020)); *New York Shipbuilding*, 73-1 BCA 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.”). OBO’s categorization of WBC’s alleged past nonpayment of its subcontractors as a “breach” of contract adds nothing to this litigation.<sup>1</sup>

That does not mean that the factual allegations contained in OBO’s third affirmative defense are irrelevant to this appeal. In supporting its TSP, WBC bears the burden of establishing the costs that it incurred in performing its contract. *See Trinity Installers, Inc.*, AGBCA 2004-139-1, 05-1 BCA ¶ 32,868, at 162,890 n.2 (“The general burden of proof on a termination for convenience settlement is the contractor’s.”); *Hospital Healthcare Systems, Inc. v. Department of the Treasury*, GSBCA 14442-TD, 98-2 BCA ¶ 29,986, at 148,312 (“Appellant has the burden of establishing its entitlement to disputed items of quantum in termination for convenience settlement appeals.”); *James Greer*, ENG BCA 6283, 97-2 BCA ¶ 29,013, at 144,547 (In supporting a termination settlement proposal, “the contractor has the burden of reasonably establishing the amount of incurred cost.”). In its third affirmative defense, OBO has essentially alleged that it previously reimbursed WBC for costs that WBC effectively avoided. OBO asserts that, when WBC presents the list of allowable costs that it allegedly incurred in performing work under this contract, the Board should exclude costs incurred by Wuhan Jindeyuan Construction and Decorating Co. (JDY), Total Millwork, LLC, and HWS Group (Shanghai) Limited (Haworth) from WBC’s cost calculation because “WBC did not pay these firms.” The Board will not preclude OBO from presenting evidence

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<sup>1</sup> To the extent that, in past supplemental briefing, OBO alleged that it previously paid one subcontractor’s costs twice (making one payment to WBC and a later duplicative payment to the subcontractor), the OBO contracting officer never issued a decision demanding reimbursement for that second payment, meaning that it is not properly before us.

or arguing that WBC never paid these three subcontractors, that WBC is no longer responsible for the costs, and that, as a result, WBC did not and will not “incur” any of these subcontractor costs.

We note that the allegations in OBO’s third affirmative defense, absent the “prior material breach” nomenclature, do not actually raise an “affirmative defense.” A true affirmative defense is typically one for which the responding party bears the burden of proof. *Ironburg Inventions Ltd. v. Valve Corp.*, 64 F.4th 1274, 1299 (Fed. Cir. 2023); *Sundstrand Corp. v. Standard Kollsman Industries, Inc.*, 488 F.2d 807, 813 (7th Cir. 1973). To the extent that there are exceptions to that rule, they do not involve a responding party’s allegations that the appellant cannot satisfy its burden of proof. *See Brunswick Leasing Corp. v. Wisconsin Central, Ltd.*, 136 F.3d 521, 530-31 (7th Cir. 1998) (discussing possible varying ways of defining affirmative defenses).<sup>2</sup> “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), but is instead is a “negative” defense—that is, one that “simply assert[s] that the [appellant] cannot prove [its] case.” *Ear v. Empire Collection Authorities, Inc.*, No. 12-1695-SC, 2012 WL 3249514, at \*2 (N.D. Cal. Aug. 7, 2012). “Unlike affirmative defenses, negative defenses typically do not have to be pled [in an answer] to avoid waiver.” *Nyberg v. Portfolio Recovery Associates, LLC*, No. 3:15-CV-01175-PK, 2016 WL 3176585, at \*3 (D. Or. June 2, 2016); *see Hunt Valley Baptist Church, Inc. v. Baltimore County, Maryland*, No. ELH-17-804, 2019 WL 3238950, at \*8 (D. Md. July 17, 2019). Nevertheless, WBC has suffered no prejudice from OBO’s inclusion of this defense in its answer—to the contrary, the allegations in OBO’s 2021 answer provided WBC with early notice as to one of the arguments that OBO intends to raise in challenging WBC’s claimed costs—and we see no reason to strike the allegations at this point in the litigation. *See, e.g., Verdandi VII, Inc. v. Accelerant Specialty Insurance Co.*, No. 3:23-CV-00635-H-WVG, 2023 WL 6812553, at \*4 (S.D. Cal. Oct. 16, 2023) (“[A]rguments that an affirmative defense is better characterized as a challenge to or a denial of an element of a plaintiff’s claim ‘provide[ ] insufficient grounds for striking the defenses.’” (quoting *Smith v. Wal-Mart Stores*, No. C 06-2069-SBA, 2006 WL 2711468, at \*10 (N.D. Cal. Sept. 20, 2006)); *Arthur v. Constellation Brands, Inc.*, No. 16-CV-04680-RS, 2016 WL 6248905, at \*6 (N.D. Cal. Oct. 26, 2016) (“[P]arsing negative from affirmative defenses is unnecessary here because [plaintiff] has made no showing that he will suffer prejudice if these defenses are not stricken or that striking them will avoid litigation of spurious issues”).

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<sup>2</sup> In addition, Rule 8(c) of the Federal Rules of Civil Procedure, which lists “affirmative defenses” that a responding party must plead in an answer, does not include allegations that an appellant has failed to incur or prove its claimed costs.

### WBC's Description of OBO's Defense as Involving Fraud

The main focus of WBC's motion is its contention that, because OBO's allegation of a "false certification" associated with subcontractor non-payment could be viewed as an allegation of fraud, the Board lacks jurisdiction to address whether WBC paid its subcontractors. In support, it cites to section 7103(c)(1) of the Contract Disputes Act (CDA), 41 U.S.C. §§ 7101–7109 (2018),<sup>3</sup> which provides that agency heads are not authorized "to settle, compromise, pay, or otherwise adjust any claim involving fraud," and past board precedent holding that "Congress did not wish the contract appeals boards to exercise any jurisdiction over the issue of the existence of fraud in any form." Appellant's Motion for Partial Summary Judgment at 4 (quoting *Warren Beaves*, DOT BCA 1324, 83-1 BCA ¶ 16,232, at 80,648). WBC then asserts that "an affirmative defense that would turn on a Board's finding of fraudulent conduct by appellant is not within the Board's jurisdiction." *Id.* (citing *Laguna Construction Co. v. Carter*, 828 F.3d 1364, 1368-69 (Fed. Cir. 2016); *Turner Construction Co. v. General Services Administration*, GSBCA 15502, et al., 05-2 BCA ¶ 33,118, at 164,122; and *Environmental Systems, Inc.*, ASBCA 53283, 03-1 BCA ¶ 32,167).

As previously discussed, the only relevant issues in this termination for convenience matter are tied to WBC's ability to establish what costs it incurred in performing the contract. We do not need to evaluate WBC's subjective intent in resolving those issues. As a result, there will be no need for the Board to make findings about fraud. Accordingly, there is no basis for precluding the Board from evaluating OBO's allegations of past overpayment. *See Nexus Construction Co.*, ASBCA 51004, 98-1 BCA ¶ 29,375, at 146,017 (1997) (finding that, despite the Government's allegations that the contractor's TSP was fraudulent, "[w]e clearly have jurisdiction under the [CDA] to decide the dispute concerning appellant's entitlement to termination costs under the Termination for the Convenience of the Government clause"); *Anlagen-und Sanierungstechnik GmbH*, 91-3 BCA at 120,753 ("That fraud may have been practiced in the course of negotiations for settlement of those costs . . . does not deprive us of jurisdiction under the CDA" to "decide the dispute concerning appellant's entitlement to [convenience] termination costs under the contract clause."); *see also Environmental Systems*, 03-1 BCA at 159,053 (finding jurisdiction "to determine whether appellant submitted falsified progress payment requests, in violation of the standard payment clauses," without regard to whether those falsifications, if intentional, might also violate the False Claims Act, 31 U.S.C. § 3729 (2000)). The premise of WBC's motion is unfounded.

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<sup>3</sup> WBC actually quoted language from 41 U.S.C. § 605(d) (2000), but that section was revised and recodified at 41 U.S.C. § 7103(c)(1) on January 4, 2011. Any differences between the two are not significant for purposes of resolving WBC's motion.

Decision

For the foregoing reasons, WBC's motion for summary judgment on OBO's third affirmative defense is **DENIED**.

*Harold D. Lester, Jr.*

HAROLD D. LESTER, JR.  
Board Judge

I concur:

*Kathleen J. O'Rourke*

KATHLEEN J. O'ROURKE  
Board Judge

**VERGILIO**, Board Judge, concurring.

I concur in the conclusion of the majority to deny the motion of the contractor but would not reach other determinations in the majority opinion. In its third affirmative defense, the agency asserts that the contractor breached its contract prior to the termination, thereby reflecting a breach which bars recovery of the termination for convenience costs sought. Underlying this defense is the notion that the contractor falsely certified that it had made payment to subcontractors. The defense does not contain an assertion of fraud as an element. In seeking summary relief on this issue, the contractor alleges that the agency is basically alleging that the contractor committed fraud and that the Board lacks jurisdiction to resolve matters involving fraud. The contractor is misguided, because the agency need not demonstrate fraud to show a false certification. Because fraud is not at issue, the contractor's motion fails. The Board resolves these disputes with a de novo review of the record. The contractor has not substantiated a basis to reject the agency's affirmative defense.

*Joseph A. Vergilio*

JOSEPH A. VERGILIO  
Board Judge