UNITED STATES
CIVILIAN BOARD OF CONTRACT APPEALS

MOTION FOR SUMMARY RELIEF DENIED: December 14, 2010

CBCA 337, 338, 339, 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, Department of Energy, Cincinnati, OH, counsel for Respondent.

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

McCANN, Board Judge.

The Boeing Company, successor-in-interest of Rockwell International Corporation (Rockwell) seeks to recover, as allowable costs under the contract, the costs of defending itself in *United States ex rel. Stone v. Rockwell International Corp.*, No. 89 C-1154 (D. Colo. 1989) (*Stone*) on those counts and claims where it was found both liable and not liable (common costs). In *The Boeing Co. v. Department of Energy*, CBCA 337, et al., 09-BCA ¶ 34,026 (2008) (*Boeing*), we found that Rockwell was entitled to its defense costs in *Stone* where those costs were expended entirely on those counts and claims where it was found not liable. We also found that it was not entitled to its defense costs where those costs were

expended entirely on those counts and claims where it was found liable. Rockwell has filed a motion for summary relief on common costs. For the following reasons, we deny that motion.

Uncontested Facts[1]

1. Rockwell and the Department of Energy (DOE) were parties to management and operating (M&O) contract DE-AC04-76DP03533, as amended, for the operation and maintenance of the Rocky Flats Nuclear Weapons Plant. Appellant's Uncontested Facts (AUF) 1.[2] Modification M087 covered performance of the contract from January 1, 1986, through December 31, 1988. AUF 2. Modification M097 added clause 54(e)(32), hereinafter referred to as clause (e)(32), to the contract effective January 1, 1987. AUF 4. This clause provides that the following costs are not allowable:

> (32) 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 pleaded nolo contendere to a charge of fraud or similar proceeding (including filing of a false certification).

AUF 3.

2. The Department of Defense (DOD) Authorization Act of 1986, Pub. L. No. 99-145, 1985 Stat. 1160, was enacted by Congress on November 8, 1985. Respondent's Supplemental Statement of Uncontested Facts (RUF) 5. Section 1534 of the DOD Authorization Act of 1986 reads as follows:

COSTS NOT ALLOWED UNDER COVERED CONTRACTS

> (a) IN GENERAL. -- The following costs are not allowable under a covered contract:
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> . . . .

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[1] These facts are taken verbatim from our earlier decision in *Boeing*. With regard to footnote 4, the Board is unaware of the current status of the proceeding involving count 6. That status is not relevant to this decision.

[2] AUF refers to the uncontested facts submitted in *Boeing*.

> (3) Costs incurred in defense of any civil or criminal fraud proceeding or similar proceeding (including filing of any false certification) brought by the United States where the contractor is found liable or has pleaded nolo contendere to a charge of fraud or similar proceeding (including filing of a false certification).
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> . . . .
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> (c) DEFINITION. -- In this section, "covered contract" means a contract for an amount more than $100,000 entered into by the Secretary of Energy obligating funds appropriated for national security programs of the Department of Energy.
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> (d) EFFECTIVE DATE. -- Subsection (a) shall apply with respect to costs incurred under a covered contract on or after 30 days after the regulations required by subsection (b) are issued.[3]

42 U.S.C. § 7256a (2000).

3. On January 14, 1987, DOE issued a final rule implementing section 1534 of the DOD Authorization Act of 1986. 52 Fed. Reg. 1602 (Jan. 14, 1987). This rule also added section 970.3102-20 to the Department of Energy Acquisition Regulations (DEAR), which implemented section 1534(a) of the DOD Authorization Act of 1986. It states:

> (b) Costs incurred in connection with defense of any (1) criminal or civil investigation, grand jury proceeding, or prosecution, (2) civil litigation, or (3) administrative proceedings . . . are unallowable when the charges which are the subject of the investigation, proceedings, or prosecution, involve fraud or similar offenses (including filing of a false certification) on the part of the contractor, its agents or employees, and result in conviction . . . .
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> . . . .
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> (d) Costs which may be unallowable under this subsection, including directly associated costs, shall be differentiated and accounted for by the contractor so as to be separately identifiable. During the pendency of any proceeding or

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[3] The parties agree that the subject contract is a covered contract.

> investigation covered by paragraph (b) of this section, the Contracting Officer should generally withhold payment of such costs.

52 Fed. Reg. 1609-10.

4. In July 1989, James Stone brought an action under the False Claims Act (FCA) in the United States District Court for the District of Colorado, alleging that Rockwell had misrepresented or failed to disclose certain environmental matters at Rocky Flats. AUF 36. The Department of Justice initially declined to intervene in *Stone*, but sought leave to intervene on November 14, 1995. AUF 37, *see* Declaration of Richard J. Ney (Dec. 13, 2006), Exhibit 3. This request was granted on November 19, 1996. AUF 38.

5. In December 1996, the Government and Mr. Stone filed an amended complaint alleging violations of the FCA (count 1), common law fraud (count 2), breach of contract (count 3), payment by mistake (count 4), and unjust enrichment (count 5). AUF 39.[4] After a jury trial, the district court entered judgment in May 1999, and amended it in June 1999 to correct ministerial errors. AUF 40. The jury found Rockwell liable on three of the ten alleged FCA claims in count 1. These three claims related to Rockwell's performance in connection with three award fee periods. AUF 45. Rockwell was found not to be liable in connection with the other seven award fee periods in count 1. *Id*. Rockwell prevailed entirely on counts 2, 3, 4, and 5. AUF 41. The Court of Appeals for the Tenth Circuit affirmed the district court's decision. AUF 42, 43.

6. DOE reimbursed Rockwell for all *Stone* defense costs ($4,060,669.03) that Rockwell had incurred up to the date the Government filed its motion for leave to intervene in *Stone* (November 14, 1995). AUF 46. All defense costs incurred after November 13, 1995, were deemed to be unallowable. AUF 47.

7. In May 2005, Boeing, Rockwell's successor in interest, requested a contracting officer's final decision on its claim in the amount of $11,344,081.14 for unreimbursed costs that Rockwell had incurred in defending itself in *Stone* from November 14, 1995, to December 31, 2004. AUF 50; Complaint ¶ 6. On September 30, 2005, the contracting officer denied Rockwell's claim in its entirety and demanded, in addition, that Rockwell pay the Government $4,060,669.03 of previously reimbursed *Stone* defense costs plus interest of $2,522,746.50 as of March 15, 2005. AUF 51.

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[4] The amended complaint also included a separate count 6 for alleged FCA violations asserted by Mr. Stone alone. Count 6 has been severed and has not yet been tried.

Discussion

Summary relief is appropriate where there is no genuine issue of material fact and the moving party is entitled to judgment as a matter of law. *Anderson v. Liberty Lobby*, *Inc*., 477 U.S. 242, 247 (1986). "Only disputes over facts that might affect the outcome of the suit under governing law will properly preclude the entry of summary judgment." *Id*. at 248. Any doubt on whether summary relief is appropriate is to be resolved against the moving party. *Celotex Corp. v. Catrett*, 477 U.S. 317, 325 (1986).

In *Boeing*, 09-BCA ¶ 34,026 (2008), this Board held that Rockwell was entitled under the contract to its costs of defending itself in the *Stone* case where those costs were expended solely in defense of those counts and claims where Rockwell was found not liable. We found that clause (e)(32) did not bar such recovery. We also found that Rockwell was not entitled under the contract (clause (e)(32)) to its defense costs where it could be shown that those costs were expended solely in defense of those claims and counts where it was found liable. The Board made no ruling on "common costs," those costs Rockwell incurred in defending itself where the result was that it was held to be both liable and not liable. The Board did not rule on this issue because parties had not submitted briefs on that issue.[5]

Respondent appealed the Board's decision to the Court of Appeals for the Federal Circuit. The Federal Circuit returned the case to the Board without a decision, indicating that the case was not yet final because the issue of the allowability of common costs had not been decided. Subsequently, Rockwell filed a motion for summary relief claiming entitlement to common costs of defense in the *Stone* case. The parties have briefed the issue and we herein issue our decision. We hold that Rockwell is not entitled to recover as allowable costs any of its defense costs incurred in the *Stone* case that are common costs.

The issue here again, as in our previous decision, is the proper interpretation and effect of clause (e)(32) of the contract. The parties do not dispute that Rockwell is entitled to all its defense costs except those that are specifically disallowed by this clause, if any.

DOE takes the position that this clause disallows all defense costs in the *Stone* case because Rockwell was found liable under the False Claims Act (FCA). It claims that, because of this finding of liability, clause (e)(32) makes all costs in *Stone*, common or not, unallowable. DOE disagrees with the Board's decision in *Boeing*, and has set forth essentially the same arguments that it had previously set forth in Boeing.

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[5] The issue of what particular *Stone* defense costs fall into which of these three categories is not in issue in this decision.

Rockwell, on the other hand, contends that it prevailed overwhelmingly in the *Stone* case, and, therefore, it is entitled to recover all of its defense costs. In the alternative, Rockwell contends that its common defense costs should, at the very least, be apportioned, allowing it to recover somewhere between eighty and ninety-nine percent of the costs. Rockwell points to a number of instances, many under the Equal Access to Justice Act (EAJA), 5 U.S.C. § 504 (2006), where attorney fees and costs have been apportioned between parties, where the outcome of a litigation demonstrates split results, not entirely in favor of one party or the other. Rockwell contends that this is such a case, where the contract specifically allows some of the defense costs and specifically disallows others. Specifically, Rockwell points to *Hensley v. Eckerhart*, 461 U.S. 424 (1983), where the Court indicated that, in determining the proper amount of attorney fees in a case, a court must consider the degree of success obtained. 424 U.S. at 436. Thus, Rockwell argues that it should recover all of its defense costs, or at least an amount in proportion to its success.[6]

Unfortunately, the argument that this case is similar to EAJA cases and other cases in which attorney fees can be awarded is not well taken. The issue here is not the extent to which Rockwell prevailed. The issue here is what is the effect of clause (e)(32) on the costs Rockwell expended in defending itself in the *Stone* case where it both prevailed and was found liable. While it is true that the contract does cover most defense costs, clause (e)(32) is a specific exception to that coverage. We see nothing in clause (e)(32), or the DOD Authorization Act of 1986 from whence it came, indicating that the Government must prevail entirely, or even to a substantial degree, in order for all defense costs to be disallowed. All that is required is a finding of liability. Defense costs are simply not allowable when contractors are found liable.

As we have stated, clause (e)(32) is taken virtually word for word from the DOD Authorization Act of 1986, and codified at 42 U.S.C. § 7256a (2000). There is nothing in the statute or the legislative history that indicates that there is any leeway here for the relative success of the parties. We do not believe that it is reasonable to interpret this clause or the underlying statute as intending to set up a situation where some of the defense costs could be recovered even though a contractor is ultimately found liable. Such an interpretation could lead to unintended litigation over the allowability of defense costs in many cases dealing with contractor fraud and FCA violations. The simple fact that the Government did

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[6] A persuasive argument can be made that Rockwell prevailed overwhelmingly in the *Stone* case. The jury awarded damages of $1,390,775.80 on the three FCA claims in count 1, where Rockwell was found liable. The Government had sought damages in excess of $187 million.

not prevail on all of the counts and claims brought against a contractor does not entitle a contractor to defense costs on the counts and claims where it was successful in its defense.

As in this case, and presumably others, a core set of facts can constitute any number of different alleged violations of law. Here, Counts 1 through 5 all involved issues relating to pondcrete and saltcrete.[7] Rockwell's Uncontested Facts (RUF) 27 and 28.[8] Those core facts all supported to some degree alleged claims for FCA violations, common law fraud, breach of contract, payment by mistake, and unjust enrichment. When the Government brings a case, it cannot know in advance just how successful it will be. The Government should not have the incentive not to bring a charge or claim because it would have to pay attorney fees if it does not prevail on that charge or claim. There should be no incentive to bring lesser and easier to prove charges, rather than more serious and harder to prove charges. We do not believe that Congress, in passing the DOD Authorization Act of 1986, which led to clause (e)(32), intended such a result.

Contrary to Rockwell's assertions, we are not dealing here with a situation that is analogous to a situation involving a fee shifting statute, such as the EAJA. Simply because DOE, under the contract, agreed to treat most defense costs as allowable costs but certain other defense costs as not allowable, does not make this situation analogous, as Rockwell seems to contend. The clause and the statute are clear. If the contractor is found liable, the defense costs are not recoverable as allowable costs.

Our holding here is not inconsistent with our previous decision in *Boeing*. In our previous decision we found that Rockwell was entitled to its defense costs expended where those costs related solely to claims and counts where it had prevailed. We found that the term "proceeding," as used in clause (e)(32), did not necessarily apply to the entire *Stone* case, but could apply only to separate parts of *Stone*. Specifically, we found that where Rockwell could show that its defense costs pertained only to claims and counts where it prevailed, that that was in essence a separate "proceeding." This holding is consistent with *Hensley v. Eckerhart*, where the Court held in a suit claiming attorney fees that "[t]he congressional intent to limit [attorney fee] awards to prevailing parties requires that . . . unrelated claims be treated as if they had been raised in separate lawsuits. . . ." 461 U.S. at 435. Accordingly, to the extent that Rockwell could show that its efforts pertained only to counts and claims

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[7] Pondcrete is mixture of sludge from solar ponds and cement. Saltcrete is a mixture of cement, salts, and brine from liquid waste treatment processes.

[8] RUF refers to Rockwell's uncontested facts submitted in support of its motion for summary relief on common costs.

where it had prevailed, those efforts could be considered to have been expended in a different and separate suit or proceeding.

Decision

Appellant's motion for summary relief is **DENIED**. Appellant may not recover, as allowable costs, its defense costs in *Stone* which are "common" costs, specifically, those costs expended in defense of counts and claims where Rockwell was found to be both liable and not liable.

R. ANTHONY McCANN
Board Judge

We concur:

BERYL S. GILMORE
Board Judge

ANTHONY S. BORWICK
Board Judge