UNITED STATES
CIVILIAN BOARD OF CONTRACT APPEALS

MOTION FOR SUMMARY RELIEF GRANTED: December 10, 2008

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, Environmental Management Consolidated Business Center, Department of Energy, Cincinnati, OH, counsel for Respondent.

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

McCANN, Board Judge.

The Boeing Company, successor in interest to 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 prevailed. Rockwell has filed a motion for summary relief. For the following reasons we grant that motion.

Uncontested Facts

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. 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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> (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.

> (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.[1]

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 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

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

(count 3), payment by mistake (count 4), and unjust enrichment (count 5). AUF 39.[2] 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.

Discussion

In this case, Rockwell argues that it is entitled to recover, as allowable costs, the costs of defending itself in the *Stone* case in those instances where it prevailed, i.e., on those claims and counts where it was found not to be liable. It does not dispute that it cannot recover defense costs in those claims of count 1 where it was found liable. DOE, on the other hand, contends that Rockwell is entitled to recover none of its defense costs incurred in the *Stone* case because contract clause (e)(32) clearly prohibits any such recovery in a proceeding where a contractor has been found liable for violating the FCA. Clause (e)(32) is DOE's sole argument for the non-allowability of *Stone* defense costs under the contract.[3]

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[2] 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.

[3] The issue in this case is the meaning of clause (e)(32). Other clauses in the contract may be applicable to the allowability of some or all of the claimed costs.

It is DOE's position that the word "proceeding" as used in clause (e)(32) should be interpreted broadly to mean anything included in that case or proceeding. As support for its position it refers the Board to the decision of the Court of Appeals for the Federal Circuit in *Rumsfeld v. General Dynamics Corp.*, 365 F.3d 1380 (Fed. Cir. 2004). In this case, the Federal Circuit found that, with respect to section 2324(k) of the Major Frauds Act (MFA), 10 U.S.C. § 2324 (2000), where there has been a settlement and compromise, the word "proceeding" should be interpreted broadly "such that it includes all claims, or causes of action within a particular case, action or proceeding." *Id*. at 1386. It is this interpretation of "proceeding" that DOE maintains should govern. In effect, DOE seems to be arguing that "proceeding" has been defined by the Federal Circuit in *General Dynamics* and that definition should apply here. DOE's position lacks merit.

To begin with, the Court in *General Dynamics* defined the word "proceeding" as it was used in 1988 in section 2324(k) of the MFA.[4] It did not define the term proceeding for all time and for all purposes. It did not even define "proceeding" as it is used in other sections of the MFA. It just defined the meaning of the term "proceeding" as it was used in one small section of the MFA. That section related only to the allowability of costs when the proceeding was resolved by consent or compromise, a situation not present here. Additionally, the *General Dynamics* Court stated that its decision on this issue was limited only to its facts. *Id.* at 1385. Accordingly, it is difficult to see how or why that meaning should apply to the word "proceeding" as used in section 1534(a)(3) of the DOD Authorization Act of 1986.

Furthermore, when the Court in *General Dynamics* defined the word "proceeding" as used in section 2324(k), it examined the statutory language in related sections of the MFA, specifically sections 2324(k)(2)(E) and 2324(k)(6), and also 18 U.S.C. § 293(c)(2). It found that those sections favored an expansive meaning of the word. Those sections, however, do not apply to section 1534(a)(3) of the DOD Authorization Act of 1986. Moreover, section 2324(k) of the MFA was enacted nearly two years after the DOD Appropriation Act of 1986. Just as an *ex post facto* law does not apply retroactively to make prior conduct criminal, the meaning of "proceeding" as used in section 2324(k) in 1988 cannot be used to define the meaning of "proceeding" as used in 1985 in the DOD Appropriation Act of 1986. The word "proceeding" as used in section 1534(a)(3) had a meaning long before the enactment of the MFA. Also, the circumstances present in *General Dynamics* (a settlement in a MFA case) are very different from those in the present case (a finding of liability and a finding of no liability under the FCA). There is nothing in the record that would lead us to conclude that an earlier and a different Congress intended to define the word "proceeding" as used in section

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[4] Section 2324(k) was enacted November 19, 1988. Pub. L. No. 100-700, 102 Stat. 4631; *see General Dynamics*, 365 F.3d at 1384-87.

1534(a)(3) of the DOD Authorization Act of 1986 in the same expansive way that a succeeding Congress did when considering section 2324(k) of the MFA. Accordingly, the meaning accorded to the word "proceeding" by the court in *General Dynamics* does not apply.

Regardless, DOE argues that, since the language used in clause (e)(32) is so similar to the language used in section 2324(k) of the MFA, the meaning of the word "proceeding" as used in section 2324(k) as found by the Federal Circuit in *General Dynamics* must be used in interpreting clause (e)(32). This argument also lacks merit.

Section 2324(k) states:

> (k) Proceeding costs not allowable. --(1) Except as othewise provided in this subsection, costs incurred by a contractor in connection with any criminal, civil, or administrative proceeding commenced by the United States or a State are not allowable as reimbursable costs under a covered contract if the proceeding (A) relates to a violation of, or failure to comply with, a Federal or State statute or regulation, and (B) results in a disposition described in paragraph (2).
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> (2) A disposition referred to in paragraph (1) (B) is any of the following:
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> . . . .
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> (B) In the case of a civil or administrative proceeding involving an allegation of fraud or similar misconduct, a determination of contractor liability on the basis of the violation or failure referred to in paragraph (1).

10 U.S.C. § 2324.

The language of section 2324(k) is simply not that similar to the language used in clause (e)(32) or in section 1534(a)(3) of the DOD Appropriations Act of 1986, where clause (e)(32) originated. *See* Uncontested Facts 1, 2. (The language in section 1534(a)(3) is virtually identical to the language used in clause (e)(32)).[5] In fact, the only real similarity is that both acts and the clause pertain to "fraud or a similar proceeding." That is really where the similarity ends.

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[5] When DOE put (e)(32) in the contract, it did modify 1534(a)(3) slightly. It substituted "Government" for "United States" and added the words "its agents or employees" after the word "contractor." The addition of these words did not change the meaning of clause (e)(32).

DOE may be arguing that the word "proceeding" means the same in both acts because both acts relate to the unallowability of defense costs in a proceeding involving fraud or a similar misconduct. However, the fact that both acts pertain to the unallowability of defense costs where some type of fraud proceeding or similar proceeding is involved, and where the contractor is found liable on an allegation of fraud or similar misconduct, does not mean necessarily that the word "proceeding" has the exact same meaning in both acts. As we have said, the facts, circumstances, time frames, language, and Congresses were all different.

In *General Dynamics*, the Federal Circuit also looked to the definition of the word "proceeding" as used in Black's Law Dictionary in coming to its conclusion on the meaning of the term. Black's defines "proceeding" as follows:

> [P]roceeding. 1. The regular and orderly progression of a lawsuit, including all acts and events between the time of commencement and the entry of judgment. 2. Any procedural means for seeking redress from a tribunal or agency. 3. An act or step that is part of a larger action. 4. The business conducted by a court or other official body; a hearing. 5. *Bankruptcy*. A particular dispute or matter arising within a pending case -- as opposed to the case as a whole.
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> > " 'Proceeding' is a word much used to express the business done in courts. A proceeding in court is an act done by the authority or direction of the court, express or implied. It is more comprehensive than the word 'action,' but it may include in its general sense all the steps taken or measures adopted in the prosecution or defense of an action, including the pleadings and judgment. As applied to actions the term 'proceeding' may include -- (1) the institution of the action, (2) the appearance of the defendant; (3) all ancillary or provisional steps, such as arrest, attachment of property, garnishment, injunction, writ of *ne exeat*; (4) the pleadings; (5) the taking of testimony before trial; (6) all motions made in the action; (7) the trial; (8) the judgment; (9) the execution; (10) proceedings supplementary to execution in code practice; (11) the taking of the appeal or writ of error; (12) the *remittitur*, or sending back of the record to the lower court from the appellate or reviewing court; (13) the enforcement of the judgment, or a new trial as may be directed by the court of last resort." *The Law of Pleading Under the Codes of Civil Procedure* 3-4 (2d ed. 1899).

Black's Law Dictionary 1221 (7th ed. 1999) (underlining added).

In its decision, the Federal Circuit indicated that Black's notes that "proceeding" is more comprehensive than the word "action." 365 F.3d at 1386. It then concluded that "Congress chose to employ the broader term 'proceeding' disallowing all such costs of the proceeding (except where the settlement provides otherwise)." *Id*. A close reading of *The Law of Pleading Under the Codes of Civil Procedure* as quoted in Black's and relied upon by the Court shows that the word "proceeding" should not be read as being more expansive or broader than the term "action." Indeed, it may well be less expansive and less broad. The word "proceeding" is a more comprehensive term than "action" only in the sense that it covers more situations. As the language makes clear, it is usually a part of an action, i.e. "(1) the institution of an action, . . . (3) all ancillary or provisional steps, such as arrest, attachment of property, garnishment, injunction, writ of *ne exeat*; . . . (6) all motions made in an action. . . ."

DOE also argues that in *General Dynamics*, the Federal Circuit indicated that "Congress could have drafted section 2324(k) such that legal costs of a 'proceeding' are unallowable on a claim-by-claim basis; it did not." *Id*. Accordingly, DOE concludes that, just as in *General Dynamics*, Congress did not intend for the apportionment of defense costs on a claim-by-claim basis because it did not so indicate in section 1534(a)(3) of the DOD Authorization Act of 1986. That argument, as it applies to the current situation, is not persuasive.

Notwithstanding *General Dynamics*, we have no reason to believe that Congress meant an expansive interpretation of the term "proceeding" simply because it could have indicated that costs would be apportioned on a claim-by-claim basis, but did not. Congress could just as easily have indicated that costs would not be apportioned on a claim-by-claim basis. Congress could have said that the term "proceeding" does not always include all claims, counts, parts, and allegations in a proceeding, just as easily as it could have said that the word "proceeding" always includes all claims, counts, parts, and allegations. Under such circumstances, no inference can be drawn as to Congress' intent in choosing to use the word "proceeding."

It seems clear that the word "proceeding" is subject to multiple definitions depending on the circumstances. Its precise meaning, or what that word encompasses, can be quite vague. That is why in *General Dynamics,* the Court found it necessary to look to the wording of the statute, the legislative history, and to Black's Law Dictionary to define "proceedings" as it is used in section 2324(k) of the MFA. Without such a definition, the Court could not determine whether certain costs were or were not allowable. We see no reason, however, to apply this definition to the instant case. For all of the above reasons, we find that the *General Dynamics* decision is of little assistance in determining the meaning of the word "proceeding" as it is used in the DOD Authorization Act of 1986.

Rockwell, on the other hand, argues that DOE, by drafting and signing the contract, intended to relieve Rockwell of all liability for performance of the contract to the maximum extent possible and to reimburse it for virtually all of its costs. It contends that this was necessary in order to get contractors to enter into such risky contracts. Rockwell points to the history of M&O contracting and to a number of contract clauses that do, in fact, relieve the contractor of much liability. The problem with Rockwell's argument here is that there is no evidence in the record that clause (e)(32) was drafted by DOE, let alone drafted with the same intent as the rest of the contract.

Clause (e)(32) is taken virtually word for word from the DOD Authorization Act of 1986 and placed into the contract.[6] Hence, it is the intent of Congress in enacting this law, not the intent of the drafters of the contract, that is pertinent. *Roeder v. Department of Energy*, 255 F.3d 1347, 1352 (Fed. Cir. 2001) ("For determination of contractual and beneficial intent when, as here, the contract implements a statutory enactment, it is appropriate to inquire into the governing statute and its purpose."); *Dalles Irrigation District v. United States*, 82 Fed. Cl. 346, 355 (2008) ("[W]here a contract implements or fulfills a statutory requirement, the interpretation of the contract will be guided by the underlying statute."). Unfortunately, we know of no legislative history on this part of the statute, and no other parts of the statute shed any light on this issue. Accordingly, we are left with the words themselves and the most reasonable interpretation of them as they apply to section 1534(a)(3) and clause (e)(32).

Section 1534(a)(3) and clause (e)(32) make unallowable the costs of defending against any fraud proceeding or similar proceeding for which the contractor has been found liable or has pled nolo contendere. The meaning of the word "proceeding," as it is defined in Black's Law Dictionary, is not particularly helpful. We cannot tell from the definition whether the "proceeding" does or does not encompass all claims, counts, and allegations in a law suit. It may or it may not. We are, thus, left to decide what we believe is the most reasonable interpretation of section 1534(a)(3) and clause (e)(32) under the circumstances.

It seems to this Board that the focus of clause (e)(32) is to disallow defense costs in a "fraud proceeding or similar proceeding" where the contractor has been found liable. We see no further intent in the wording. We see nothing that would make us believe that Congress intended, in addition, to disallow other defense costs in a proceeding where the contractor was not found liable for fraud or for similar misconduct, or where fraud or similar misconduct had not even been alleged. Accordingly, it seems to us that, in the absence of any other indication from Congress, that the more restrictive reading of the clause is the better one. Furthermore,

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[6] See footnote 5.

such a restrictive reading would be in accordance with the general rule that penal statutes should be strictly construed. *Ash Sheep Co. v. United States*, 252 U.S. 159, 170 (1920)

We realize that discerning the intention of Congress when it passed section 1534(a)(3) comes down to an interpretation of the word "proceeding." The word is vague and Congress has provided no clue. Congress could have defined it, but chose not to, and as we have said, we can draw no inference from that. Furthermore, we can think of no other word that Congress could have used that would have been more helpful to us in determining Congress' intent. Accordingly, we are left with what we perceive to be Congress' main thrust or purpose in passing this legislation. That thrust is to disallow certain defense costs where the contractor is found liable, but not to disallow certain defense costs where the contractor was not found liable, or where a claim did not pertain to "fraud or a similar proceeding."

Upon review of the language of section 1534(a)(3) and the case law cited by the parties, including *General Dynamics*, we perceive no general rule or even a predisposition against apportionment of defense costs. Indeed, the contrary seems more to be true. In *Abraham v. Rockwell International Corp*., 326 F.3d 1242 (Fed. Cir. 2003), the Federal Circuit indicated:

> Finally we consider the third category of costs (the database costs), which costs were attributable to the unsuccessful criminal environmental defense (a cost which may be unallowable) as well as successful criminal environmental defense and other non-criminal uses (which are allowable). Normally the costs of a database used for more than one purpose should have been apportioned in some manner to reflect both the allowable and unallowable uses. . . .

326 F.3d at 1255. We see nothing in clause (e)(32) or the DOD Authorization Act of 1986 that would lead us to a different conclusion. Indeed, in a non-fraud or similar proceeding, it is undisputed that costs for defending against breach of contract, payment by mistake, and unjust enrichment would be recoverable even if the contractor had been found liable. To disallow such costs simply because these claims had been brought in a fraud or similar proceeding seems to make little sense.[7]

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[7] Rockwell tries to draw a distinction between a fraud or similar proceeding and just a proceeding where there is an allegation of fraud or similar allegation. Rockwell seems to say that (e)(32) pertains to fraud or similar proceedings, but that the MFA applies only to proceedings where there is an allegation of fraud or a similar allegation. Thus, it contends that the wording of section 2324(k) of the MFA can not be used to interpret section 1534(a)(3) of the DOD Authorization Act of 1986. We see no validity to this distinction and

Moreover, on January 14, 1987, DOE issued a final rule implementing section 1534 of the DOD Authorization Act of 1986. In this rule, DOE indicated that defense costs in various proceedings were unallowable when the charges involve fraud or similar offenses and the result is a conviction. It also indicated, "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." *See* Uncontested Facts 3. This rule was promulgated after clause (e)(32) was included in the contract and is, therefore, not binding. However, since it does call for differentiation and separate accounting for defense costs, it does demonstrate that the DOE interpreted section 1543(a)(3) of the DOD Authorization Act of 1986 as not disallowing all defense costs, but only disallowing costs where (1) the charges involved fraud or similar offenses and (2) the contractor was convicted.

We discern nothing in the language of clause (e)(32) that indicates that Congress intended to make additional, unrelated defense costs unallowable or to make defense costs, where the contractor was found not liable, unallowable. We conclude, therefore, that clause (e)(32) does not disallow the defense costs that Rockwell incurred in *Stone*, except for those costs it incurred defending against the FCA claims in count 1 where it was found liable.

Decision

For the above stated reasons, appellant's motion for summary relief is **GRANTED** and respondent's cross-motion for summary relief is **DENIED**. Appellant may recover, as allowable costs, the costs of defending itself in *Stone* on those counts and claims where it prevailed. It may not recover, as allowable costs, the costs of defending against the FCA claims in count 1 where it was found liable.

R. ANTHONY McCANN
Board Judge

Rockwell has not explained the difference.

We concur:

BERYL S. GILMORE
Board Judge

ANTHONY S. BORWICK
Board Judge