



UNITED STATES
CIVILIAN BOARD OF CONTRACT APPEALS

**THIS OPINION WAS INITIALLY ISSUED UNDER PROTECTIVE ORDER AND
IS BEING RELEASED TO THE PUBLIC IN ITS ENTIRETY ON
JANUARY 4, 2021**

MOTION FOR PARTIAL SUMMARY JUDGMENT DENIED: December 7, 2020

CBCA 6359

THE BOEING COMPANY,

Appellant,

v.

DEPARTMENT OF ENERGY,

Respondent.

Scott M. McCaleb, Jon W. Burd, and Gary S. Ward of Wiley Rein LLP, Washington, DC, counsel for Appellant.

Brady L. Jones, III, Rachna M. Talwar, and Sky W. Smith, Office of Chief Counsel, Environmental Management Consolidated Business Center, Department of Energy, Cincinnati, OH, counsel for Respondent.

Before Board Judges **HYATT**, **KULLBERG**, and **RUSSELL**.

KULLBERG, Board Judge.

Appellant, the Boeing Company (Boeing), has moved for partial summary judgment on the issue of entitlement in this appeal. Boeing appealed the contracting officer's (CO's) final decision (COFD) that denied its claim for indemnification for the costs incurred in connection with two lawsuits. The lawsuits alleged that the plaintiffs had suffered from illnesses caused by the release of radioactive materials from a facility owned by Boeing in

which it had performed various government contracts. Respondent, the Department of Energy (DOE), contends that the Board should deny the motion because there are material facts in dispute, and it has not had the opportunity to complete discovery. For the reasons stated below, the Board denies the motion.

Background

During a four-decade period that ended in 1988, the Government awarded contracts related to nuclear energy research at Boeing's 2850-acre Santa Susana Field Laboratory (SSFL) in Simi Hills, California. Appellant's Motion for Partial Summary Judgment, Exhibit A; Appeal File, Exhibits 3, 4, 5, 51 at DOE001320.¹ On December 15, 1998, DOE awarded to Boeing contract DE-AC03-99SF21530 (contract) for environmental restoration and remediation of the ninety-acre Energy Technology Engineering Center (ETEC), which DOE leased from Boeing within the SSFL.² Exhibits 2 at 11, 51 at 1320. The statement of work required that the contractor "operate and maintain facilities for the purpose of storing and/or treating hazardous and/or radioactive waste prior to disposal." Exhibit 2 at 76. The contract also stated that "small amounts of radioactive and/or hazardous contaminants present at the site that are not attributable to DOE activities . . . may be inextricably commingled with larger quantities of radioactive and/or hazardous substances attributable to DOE activities at the Site." *Id.* at 48-49. The contract performance period, which was to commence on December 31, 1998, consisted of five one-year base periods and three one-year option periods. *Id.* at 21-23.

The contract incorporated by reference DOE Acquisition Regulation (DEAR) 952.216-7 (48 CFR 952.216-7 (1998)), Allowable Cost and Payment, Alternate II (Nov. 1995), and Federal Acquisition Regulation (FAR) clause 52.228-7, Insurance—Liability to Third Persons (Mar. 1996). Exhibit 2 at 53-54. The contract included the full text of DEAR 952.250-70, Nuclear Hazards Indemnity Agreement (June 1996), which stated, in pertinent part, the following:

- (a) This clause is incorporated into this contract pursuant to the authority contained in subsection 170d. of the Atomic Energy Act of 1954, as amended, [42 U.S.C. §§ 2011 et seq. (1994 and Supp. IV)] (hereinafter called the Act).

¹ All exhibits are in the appeal file unless otherwise noted. Page numbering of exhibits hereinafter will omit "DOE" and extraneous zeros.

² The ETEC is located within area IV, which is a 290-acre section of the SSFL. Exhibit 51 at 1320.

- (b) The definitions set out in the Act shall apply to this clause.
- (c) Financial protection. Except as hereafter permitted or required in writing by DOE, the Contractor will not be required to provide or maintain, and will not provide or maintain at Government expense, any form of financial protection to cover public liability, as described in subparagraph (d)(2) below. DOE may, however, at any time require in writing that the contractor provide and maintain financial protection of such a type and in such amount as DOE shall determine to be appropriate to cover such public liability, provided that the costs of such financial protection are reimbursed to the Contractor by DOE.
- (d) Indemnification.
- (1) To the extent that the Contractor and other persons indemnified are not compensated by any financial protection permitted or required by DOE, DOE will indemnify the Contractor and other persons indemnified against (i) claims for public liability as described in subparagraph (d)(2) of this clause; and (ii) such legal costs of the Contractor and other persons indemnified as are approved by DOE, provided that DOE's liability, including such legal costs, shall not exceed the amount set forth in section 170e(1)(B) of the ACT or each nuclear incident or precautionary evacuation occurring within the United States or \$100 million in the aggregate for each nuclear incident occurring outside the United States, irrespective of the number of persons indemnified in connection with this contract.
- (2) The public liability referred to in subparagraph (d)(1) of this clause is public liability as defined in the Act which (i) arises out of or in connection with the activities under this contract, including transportation; and (ii) arise out of or results from a nuclear incident or precautionary evacuation, as those terms are defined in the Act.
-
- (f) Notification and litigation of claims. The Contractor shall give immediate written notice to DOE of any known action or claim filed or made against the Contractor or other person indemnified for public liability as defined in paragraph (d)(2). Except as otherwise directed by DOE, the Contractor shall furnish promptly to DOE, copies of all pertinent papers received by the Contractor or filed with respect to such actions or claims.

DOE shall have the right to, and may collaborate with, the Contractor and any other person indemnified in the settlement or defense of any action or claim and shall have the right to (1) require the prior approval of DOE for the payment of any claim that DOE may be required to indemnify hereunder; and (2) appear through the Attorney General on behalf of the Contractor or other person indemnified in any action brought upon any claim that DOE may be required to indemnify hereunder, take charge of such action, and settle or defend any such action. If the settlement or defense of any such action or claim is undertaken by DOE, the Contractor or other person indemnified shall furnish all reasonable assistance in effecting a settlement or asserting a defense.

(g) Continuity of DOE obligations. The obligations of DOE under this clause shall not be affected by any failure on the part of the Contractor to fulfill its obligation under this contract and shall be unaffected by the death, disability, or termination of existence of the Contractor, or by completion, termination or expiration of this contract.

Id. at 68-69, 71.

Boeing performed the contract until May 24, 2007. Exhibit 2 at 139. On December 13, 2012, the plaintiff, who will be referred to as DD,³ filed a lawsuit against Boeing in federal district court asserting “jurisdiction over this action pursuant to the Price-Anderson Act [(PAA)] 42 U.S.C. § 2210(n)(2).” Exhibit 12 at 583. The complaint alleged “personal injury, as well as other economic harm and losses, by virtue of the spill and releases of radioactive and other contaminants into the environment from . . . [the] SSFL.” *Id.* at 588. Additionally, the complaint alleged that those releases of radiation had occurred over a period in excess of the previous fifty years. *Id.* at 588-96. On May 28, 2013, a second plaintiff, JLH, filed a lawsuit in federal district court against Boeing that alleged “tortious illness due to exposure to hazardous materials and toxic substances.” Exhibit 18 at 753. JLH then filed an amended complaint on January 17, 2014, which cited the PAA, and alleged “personal injury . . . as a result of the release into the environment of radioactive and toxic contaminants generated by . . . [SSFL] following several nuclear incidents and a subsequent but negligent effort to clean up and dispose of the radioactive and toxic remains

³ The Board does not deem it necessary for purposes of rendering this decision to mention the plaintiff’s full name, and will use that person’s initials. The plaintiff’s spouse was also a plaintiff in that lawsuit.

thereof ('remediation effort')." Exhibit 51-5 at 1491. In its answers to both complaints,⁴ Boeing denied liability and any causal connection between its work at the SSFL and the plaintiffs' illnesses. Respondent's Response to Appellant's Motion for Partial Summary Judgment, Exhibits E, F.

By letter dated January 7, 2013, Boeing forwarded DD's complaint to DOE and requested that "DOE acknowledge its obligation to defend and indemnify this matter." Exhibit 12. Boeing noted that the complaint "encompass[ed] decades of nuclear activities at the SSFL." *Id.* Additionally, Boeing advised DOE that it had retained counsel and informed its nuclear liability insurance carrier about the lawsuit. *Id.* On July 24, 2013, Boeing forwarded JLH's complaint to DOE and requested that it defend and indemnify it in that lawsuit. Exhibit 18.

On August 26, 2013, DOE informed Boeing that it "would not assume the defense of the [lawsuits]." Exhibit 19. Additionally, DOE stated that it would "evaluate the reimbursement of Boeing's litigation expenses under FAR 52.228-7, Liability to Third Parties." *Id.* "However, DOE will not agree to indemnify Boeing." *Id.* In a subsequent letter, which was dated October 15, 2013, DOE rejected Boeing's contention that the nuclear hazards indemnity agreement clause applied to the two lawsuits. Exhibit 23. DOE noted that "[w]hile both [of] the . . . plaintiffs allege [that] nuclear incidents occurred at [SSFL] . . . DOE has no information verifying that any formal determination has been issued consistent with the Price Anderson Act that justifies any nuclear incident took place at SSFL." *Id.*

By letter dated March 20, 2014, Boeing sought DOE's permission to settle DD's lawsuit. Exhibit 29. In an email dated March 26, 2014, DOE advised Boeing that "the decision to settle the . . . lawsuit and the settlement amount is within Boeing's business judgment and discretion." Exhibit 33. On April 9, 2014, Boeing executed a settlement agreement with DD. Exhibit 37 at 835. The agreement stated that Boeing made no admission of liability. *Id.* at 829. By letter dated April 21, 2014, Boeing forwarded a copy of the settlement agreement to DOE. *Id.* at 826. On February 18, 2015, the court granted JLH's request to dismiss the lawsuit with prejudice. Appellant's Motion for Partial Summary Judgment, Exhibit B at 9. By letter dated August 29, 2016, Boeing's insurer declined to reimburse Boeing for any of its costs related to the two lawsuits. Exhibit 43.

⁴ In both lawsuits, the plaintiffs filed amended complaints, and Boeing's answers in both lawsuits responded to amended complaints.

On November 30, 2017, Boeing submitted to the CO its claim in the amount of \$2,014,313.41 for the costs incurred defending DD's and JLH's lawsuits and the settlement of DD's lawsuit. Exhibit 51 at 1319. In its claim, Boeing contended that DOE was required to indemnify it for those costs because the plaintiffs asserted public liability for a nuclear incident. *Id.* at 1331. The COFD, which was dated October 23, 2018, denied Boeing's claim. Exhibit 1 at 2. In denying the claim, the COFD noted that the manager of health and safety at SSFL had conducted an extensive study of "radiological components, including the history of major spills." *Id.* at 4. With regard to that report, the COFD stated that, "despite detailing numerous potential sources for the radiological contamination at ETEC, [it] never stated that any of the sources resulted from a 'nuclear incident' such that [the PAA] would apply." *Id.* at 5. Boeing timely appealed the COFD and filed its motion for partial summary judgment. DOE filed its opposition to the motion, and Boeing filed a reply.

Discussion

The issue before the Board is whether summary judgment may be granted as to Boeing's claim for entitlement to indemnification under the contract for its costs related to the two lawsuits, which were resolved without any finding or admission of public liability. The Board's authority is pursuant to the Contract Disputes Act (CDA), 41 U.S.C. §§ 7101–7109 (2018). In ruling upon a motion for summary judgment, the Board recognizes the following:

Summary judgment is only appropriate where there is no genuine issue of material fact. *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 248 (1986). "Only disputes over facts that might affect the outcome of the suit under the governing law will properly preclude the entry of summary judgment." *Id.* It is not the judge's function "to weigh the evidence and determine the truth of the matter." *Id.* at 249. All justifiable inferences and presumptions are to be resolved in favor of the nonmoving party. *Id.* at 255.

The moving party has the initial responsibility of stating the basis for its motion and "identifying those portions of 'the pleadings, depositions, answers to interrogatories, and admissions on file, together with affidavits, if any,' which it believes demonstrate the absence of a genuine issue of material fact." *Celotex Corp. v. Catrett*, 477 U.S. 317, 323 (1986). "[A]llegations without support are not evidence." *McAllen Hospitals LP v. Department of Veterans Affairs*, CBCA 2774, et al., 14-1 BCA ¶ 35,758, at 174,970 (quoting *Max Castle*, AGBCA 97-128-1, 97-1 BCA ¶ 28,833, at 143,845).

Optimum Services, Inc. v. Department of Interior, CBCA 4968, 19-1 BCA ¶ 37,383, *aff'd*, *Optimum Services, Inc. v. Secretary of the Interior*, 829 Fed. App'x. 527 (Fed. Cir. 2020) (table).

Boeing contends that it is entitled to indemnification under the PAA and the contract's nuclear hazards indemnification agreement, DEAR 952.250-70, which referenced section 170d of the Atomic Energy Act of 1954 (AEA), as amended. The Supreme Court has summarized the history of the AEA and PAA as follows:

When Congress passed the Atomic Energy Act of 1946, it contemplated that the development of nuclear power would be a Government monopoly. See Act of Aug. 1, 1946, ch. 724, 60 Stat. 755. Within a decade, however, Congress concluded that the national interest would be best served if the Government encouraged the private sector to become involved in the development of atomic energy for peaceful purposes under a program of federal regulation and licensing. See H.R. Rep. No. 2181, 83rd Cong., 2d Sess., 1-11 (1954). The Atomic Energy Act of 1954, Act of Aug. 30, 1954, ch. 1073, 68 Stat. 919, as amended 42 U.S.C. §§ 2011-2281 (1970 ed. and Supp. V), implemented this policy decision, providing for licensing of private construction, ownership, and operation of commercial nuclear power reactors for energy production under strict supervision by the Atomic Energy Commission (AEC).

....

Thus while repeatedly stressing that the risk of a major nuclear accident was extremely remote, spokesmen for the private sector informed Congress that they would be forced to withdraw from the field if their liability were not limited by appropriate legislation.

Congress responded in 1957 by passing the Price-Anderson Act, 71 Stat. 576, 42 U.S.C. § 2210 (1970 ed. and Supp. V). The Act had the dual purpose of “protect[ing] the public and . . . encourag[ing] the development of the atomic energy industry.” 42 U.S.C. § 2210(i).

Duke Power Co. v. Carolina Environmental Study Group, Inc., 438 U.S. 59, 63-64 (1978). Accordingly, the reference in DEAR 952.250-70 to section 170d of the AEA, as amended, is also a reference to the PAA, which amended the AEA by adding section 170 in 1957. Pub. L. 85-256, 71 Stat. 576, 577 (1957).

The PAA provides that DOE's Secretary "shall . . . enter into agreements of indemnification . . . with any person who may conduct activities under a contract with [DOE] that involve the risk of public liability and that are not subject to financial protection requirements." 42 U.S.C. §2210(d)(1)(A). In the contract, DEAR 952.250-70 defines public liability according to the definitions set forth in the AEA. The AEA states that "[t]he term 'public liability' means any legal liability arising out of or resulting from a nuclear incident or a precautionary evacuation." *Id.* § 2014(w). "The term 'nuclear incident' means any occurrence, including an extraordinary nuclear occurrence, within the United States causing within or outside the United States, bodily injury, sickness, disease, or death, or loss of or damage to property, or loss of use of property arising out of or resulting from the radioactive, toxic, explosive, or other hazardous properties of sources, special nuclear, or byproduct material." *Id.* § 2014(q). Additionally, the PAA provides that "[w]ith respect to any public liability action arising out of or resulting from a nuclear incident, the United States district court in the district where the nuclear incident takes place . . . shall have original jurisdiction." *Id.* § 2210(n)(2).

The Board's discussion turns to whether the contract's nuclear hazards indemnity agreement, DEAR 952.250-70, which is subject to the PAA and the AEA, allows for indemnification of Boeing for costs incurred defending two lawsuits that alleged nuclear incidents but were resolved with no finding by the court that the alleged nuclear incidents had occurred. The Court of Federal Claims has noted that the word occurrence as it is used in connection with a nuclear incident "simply means an 'event.'" *Sweet v. United States*, 53 Fed. Cl. 208, 221 (2002). The record does not show the occurrence of a nuclear incident as an undisputed fact, and the Board does not find that DEAR 952.250-70 provides for indemnification for only an allegation of public liability. Not only did Boeing deny liability in both lawsuits for causing any of the alleged illnesses from the release of radiation, but also, DOE has asserted that it has made no findings as to the occurrence of a nuclear incident at the SSFL. Accordingly, Boeing has failed to show the occurrence of a nuclear incident as an undisputed fact that proves its claim for indemnification under DEAR 952.250-70.

Boeing argues that the PAA only requires that DOE make a determination of an extraordinary nuclear occurrence, and neither the nuclear hazards indemnity agreement "[n]or . . . the PAA impose[s] any other condition or requirement that there be any 'formal determination' of a nuclear incident to trigger DOE's indemnity obligation." Appellant's Motion for Partial Summary Judgment at 33. The AEA defines an extraordinary nuclear occurrence, which is a subset of all nuclear incidents, as "any event causing a discharge or dispersal of source, special nuclear, or byproduct material from its intended place of confinement in amounts offsite, or causing radiation levels offsite, which the Nuclear Regulatory Commission [NRC] or the Secretary of Energy, as appropriate, determines to be substantial." 42 U.S.C. § 2014(j). "Any determination by the [NRC] or the Secretary of

Energy, as appropriate, that such an event has, or has not, occurred shall be final and conclusive, and no other official or any court shall have power or jurisdiction to review any such determination.” *Id.*

Boeing draws an incorrect conclusion from the AEA’s distinction between a nuclear incident and an extraordinary nuclear occurrence as it relates to indemnification in this case. The Federal District Court for the Eastern District of Missouri noted that “it is significant that the definition of nuclear incident employs ‘occurrence’ in concert with the clause ‘including an extraordinary nuclear occurrence,’ so as to read, ‘[t]he term “nuclear incident” means any occurrence, including an extraordinary nuclear occurrence.’” *Strong v. Republic Services, Inc.*, 283 F. Supp. 3d 759, 767 (E.D. Mo. 2017) (citing 42 U.S.C. § 2014(q)). Boeing has only shown that an extraordinary nuclear occurrence requires a finding, depending on the circumstances, within either the NRC or DOE. The absence of such a requirement for an agency-level determination with regard to all other nuclear incidents does not lead to the conclusion that this Board can assume the occurrence of a nuclear incident in order to find that Boeing is entitled to indemnification.

In the alternative, Boeing seeks indemnification under FAR 52.228-7, insurance–liability to third persons. That clause, in pertinent part, states the following:

(c) The contractor shall be reimbursed–

....

(2) For certain liabilities (and expenses incidental to such liabilities) to third persons not compensated by insurance or otherwise without regard to and as an exception to the limitation of cost or the limitation of funds clause of this contract. These liabilities must arise out of the performance of this contract, whether or not caused by the negligence of the Contractor or of the Contractor’s agents, servants, or employees, and must be represented by final judgements or settlements approved in writing by the Government. These liabilities are for–

....

(ii) Death or bodily injury.

FAR 52.228-7(c). That clause, however, relates to liability that is not at issue in this appeal. The two lawsuits against Boeing concerned public liability for a nuclear incident, and DEAR 952.250-70 is the only contract provision that relates to public liability. Boeing has

not explained how FAR 52.228-7 is applicable to its claim as that clause involves other forms of liability. Additionally, FAR 52.228-7 only allows for indemnification in the event of a judgment or settlement approved by DOE, and neither of those conditions apply to the two lawsuits against Boeing.

Finally, Boeing contends that it is entitled to indemnification under DEAR 952.216-7, allowable cost and payment (alternate II), which incorporates by reference FAR 52.216-7, allowable cost and payment. That FAR clause provides that “[t]he Government shall make payments to the Contractor . . . in amounts determined to be allowable by the Contracting Officer in accordance with subpart 31.2 of the . . . [FAR] in effect on the date of this contract and the terms of this contract. FAR 52.216-7(a). The relevant section of the FAR under that subpart provides the following:

- (a) The factors to be considered in determining whether a cost is allowable include the following:
 - (1) Reasonableness.
 - (2) Allocability.
 - (3) Standards promulgated by the [cost accounting standards (CAS)] Board, if applicable; otherwise, generally accepted accounting principles and practices appropriate to particular circumstances.
 - (4) Terms of the contract.
 - (5) Any limitations set forth in this subpart.

FAR 31.201-2.

The Board’s discussion, accordingly, turns to whether Boeing can recover its legal costs under FAR 31.201-2. Although no court has directly addressed allowable costs in connection with the settlement of a lawsuit that alleged public liability under the PAA, the Court of Appeals for the Federal Circuit has recognized that a government contractor’s legal costs related to the defense and settlement of a third party lawsuit were allowed where the plaintiffs’ allegations had very little likelihood of success on the merits. *See Bechtel National, Inc. v. United States*, 929 F.3d 1375, 1381 (Fed. Cir. 2019) (employment discrimination suit); *Geren v. Tecom, Inc.*, 566 F.3d 1037, 1045-46 (Fed. Cir. 2009) (sexual harassment suit); *Boeing North American, Inc. v. Roche*, 298 F.3d 1274, 1298 (Fed. Cir. 2002) (shareholder derivative suit). The question of whether Boeing’s legal costs are

allowable, accordingly, is a factual issue as to whether the plaintiffs were likely to prevail in their lawsuits against Boeing, and the Board cannot resolve that factual issue in deciding Boeing's motion.⁵

Decision

Appellant's motion for partial summary judgment is **DENIED**.

H. Chuck Kullberg
H. CHUCK KULLBERG
Board Judge

We concur:

Catherine B. Hyatt
CATHERINE B. HYATT
Board Judge

Beverly M. Russell
BEVERLY M. RUSSELL
Board Judge

⁵ DOE has filed a motion to compel discovery. The Board will issue an order regarding that motion in light of its decision on Boeing's motion for summary judgment.