



UNITED STATES
CIVILIAN BOARD OF CONTRACT APPEALS

RESPONDENT'S MOTION FOR IMMEDIATE DISMISSAL AND TO
STRIKE AFFIRMATIVE DEFENSES DENIED; CASES CONSOLIDATED:
September 10, 2021

CBCA 6683, 6762, 6919, 6920, 6921, 7025, 7026

4K GLOBAL-ACC JOINT VENTURE, LLC,

Appellant,

v.

DEPARTMENT OF LABOR,

Respondent.

Karl Dix, Jr., Lochlin B. Samples, Jonathan R. Mayo, and Gesue A. Staltari of Smith, Currie & Hancock LLP, Atlanta, GA, counsel for Appellant.

Willow Eden Fort, Office of the Solicitor, Department of Labor, Nashville, TN; and José Otero, Joshua L. Caplan, Jonathan I. Pomerance, and C. Cleveland Fairchild, Office of the Solicitor, Department of Labor, Washington, DC, counsel for Respondent.

Before Board Judges **BEARDSLEY** (Chair), **LESTER**, and **KULLBERG**.

LESTER, Board Judge.

Appellant, 4K Global-ACC Joint Venture, LLC (4KG-ACC), has requested that, in accordance with the settlement of its monetary claims with respondent, the Department of Labor (DOL), the Board dismiss five of the seven appeals that remain pending before the Board. In their settlement agreement, the parties agreed that those five dismissals would not become effective until the day after the two other, remaining appeals – one a challenge to DOL's default termination decision, and the other a challenge to DOL's contractor performance assessment rating (CPAR) evaluation of 4KG-ACC's work on the contract –

are finally resolved. DOL now objects to the continued presence of the five settled appeals on the Board's docket and seeks their immediate dismissal. In response, 4KG-ACC says that, because the allegations in the claims underlying those five appeals constitute affirmative defenses to DOL's unresolved default termination challenge and the CPAR evaluation, 4KG-ACC would be prejudiced by their immediate dismissal, citing to the requirements for affirmative defenses that involve a contract adjustment, as the United States Court of Appeals for the Federal Circuit discussed in *M. Maropakis Carpentry, Inc. v. United States*, 609 F.3d 1323 (Fed. Cir. 2010).

For the reasons set forth below, we consolidate the seven appeals at issue here, deny DOL's request for an immediately effective dismissal of five of the appeals, and deny DOL's motion to strike, which seeks to preclude 4KG-ACC from relying upon any affirmative defenses in defending against DOL's default termination decision or in challenging the CPAR evaluation based upon an alleged lack of notice.

Background

Between December 16, 2019, and January 8, 2021, 4KG-ACC filed a total of twenty-three appeals with the Board involving disputes arising out of contract no. 1630DC-17-C-0024 (the contract) for the construction of a new Atlanta Job Corps Center. In the first-filed appeal, docketed as CBCA 6683, 4KG-ACC challenged a DOL contracting officer's final decision terminating the contract for default. In another appeal, CBCA 7025, 4KG-ACC challenged the agency's unsatisfactory CPAR evaluation of its performance on the contract. The other twenty-one appeals – two of which, CBCA 6832 and 6838, 4KG-ACC voluntarily withdrew in July 2020 – all involve monetary claims that 4KG-ACC had submitted to the contracting officer, seeking damages from DOL for increased costs totaling just over \$10 million, allegedly incurred under the contract for varying reasons. The Board consolidated some of the appeals, while others were not consolidated.

In February 2021, the parties jointly requested that the Chair of the Board assign a judge to serve as Board Neutral to provide mediation services for these appeals. Through the resulting mediation, the parties on May 24, 2021, entered into a settlement agreement resolving all of 4KG-ACC's monetary claims against DOL but leaving open for further litigation CBCA 6683 (the default termination appeal) and CBCA 7025 (the CPAR challenge) as well as any affirmative defenses associated with those two claims, as follows:

For its part, [4KG-ACC] reserves, does not waive, and may continue to pursue the Default Appeal and the CPAR Claim (CBCA 6683 and 7025, respectively), including affirmative defenses relevant to the Default Appeal and the CPAR Claim

Settlement Agreement ¶ 3.a. In the settlement agreement, the parties agreed to request that all but five of the appeals involving 4KG-ACC's monetary claims be dismissed immediately. With regard to those last five monetary claim appeals, docketed as CBCA 6762, 6919, 6920, 6921, and 7026 (collectively, the "affirmative defense appeals"), the parties agreed that those appeals should be dismissed but with a deferred effective date tied to the final resolution of CBCA 6683 (the default termination appeal) and 7025 (the CPAR appeal):

The effective date of the dismissal with prejudice of the Monetary Claims shall be the date of filing of [4KG-ACC's] aforementioned notice or motion to dismiss, with the exception of only CBCA Appeals 6762, 6919, 6920, 6921, and 7026 (the "Affirmative Defense Appeals"). . . . With regard to the Affirmative Defense Appeals the effective date of the dismissal with prejudice shall be the very next day after the resolution by the Board, or by an appellate body if there is an appeal, of the Default Appeal (CBCA 6683) and the CPAR Claim (CBCA 7025), or other such final and terminal resolution.

. . . The postponement of the effective date of dismissal of the Affirmative Defense Appeals is being agreed to by DOL only in order to alleviate [4KG-ACC's] concerns that the Board or an appellate body may question the jurisdiction of [4KG-ACC's] affirmative defenses to CBCA 6683 and/or CBCA 7025 if the dismissal of these Affirmative Defense Appeals is effective immediately. Neither Party concedes the jurisdiction of any appeal or any affirmative defense.

Settlement Agreement ¶ 7.a, .b. On June 14, 2021, 4KG-ACC filed a motion seeking immediate dismissal of all monetary claims other than the five affirmative defense appeals carved out in the settlement agreement, for which it sought a deferred dismissal effective date.

By order dated June 29, 2021, the Board granted 4KG-ACC's request to dismiss all of the appeals involving 4KG-ACC's monetary claims, other than the five affirmative defense appeals. The Board deferred dismissing the five affirmative defense appeals because the Board was uncertain how to issue a dismissal order that would not become final until after decisions in CBCA 6683 and 7025 became final (inclusive of any appeals of decisions by the Board in CBCA 6683 and 7025 to the Federal Circuit). The Board asked the parties to explain how the Board procedurally could issue such a dismissal order.

In response, on July 7, 2021, DOL filed a motion asking the Board to "strike" any affirmative defenses that 4KG-ACC might try to raise in CBCA 6683 or 7025 because "the affirmative defense appeals contain no properly pled affirmative defenses to preserve." Respondent's Motion to Strike (July 7, 2021) at 3. In accordance with Board Rule 6(a)

(48 CFR 6101.6(a) (2020)), 4KG-ACC, rather than DOL, originally filed the complaints in CBCA 6683 and 7025. DOL complained that 4KG-ACC did not label anything in its complaints as an affirmative defense and, therefore, waived its right to raise affirmative defenses in any challenge to the default termination or the CPAR evaluation. In a later-filed reply brief, DOL argued that, since there are no viable affirmative defenses, “the Board should give immediate effect to the [settlement] agreement and dismiss CBCA Nos. 6762, 6919, 6920, 6921, and 7026 in their entirety and with prejudice, as there is no basis for them to continue to exist following dismissal.” Respondent’s Reply Brief (Aug. 23, 2021) at 2.

In none of the briefing did either party explain how the Board could issue dismissals in the five affirmative defense appeals now that would not become effective until CBCA 6683 and 7025 are finally resolved. Currently, CBCA 6683, 7025, and 7026 are independent appeals while CBCA 6762, 6919, 6920, and 6921 are consolidated.

Discussion

In their settlement agreement, the parties agreed to request that the Board dismiss CBCA 6762, 6919, 6920, 6921, and 7026, but with a deferred effective date tied to the final resolution of the two remaining appeals, CBCA 6683 and 7025. The agreement identifies no procedure by which the Board is expected to implement that request.

Typically, orders that the Board issues dismissing appeals are effective upon issuance, subject to any appellate review deadlines. To the extent that there is any authority under the Contract Disputes Act (CDA), 41 U.S.C. §§ 7101–7109 (2018), for the Board to issue some type of “conditional” dismissal subject to the later finality of another appeal, the parties have not cited it. We need not evaluate whether any such authority exists because we can effectuate the intent behind the parties’ settlement by consolidating the seven related appeals that remain before the Board and allowing 4KG-ACC to litigate the affirmative defense aspects of the five affirmative defense appeals while any monetary aspects of those appeals remain dormant as settled.

Consolidation is appropriate if cases involve common issues of fact or law and if interests of judicial economy outweigh the potential for delay, confusion, and prejudice. *Harris IT Services Corp. v. Department of Veterans Affairs*, CBCA 5814, et al., 17-1 BCA ¶ 36,901. Plainly, those requirements are satisfied here. Once these seven cases are consolidated, we can tie any dismissal of the five affirmative defense appeals to the resolution of the two appeals still to be adjudicated. The disputes underlying the five affirmative defense appeals support 4KG-ACC’s affirmative defenses in the default termination and CPAR evaluation appeals. They remain relevant, and cannot be considered finally decided or resolved, until 4KG-ACC’s defenses in CBCA 6683 and 7025 are resolved. Although the mere fact of consolidation does not completely eliminate the separate

nature of distinct appeals, we cannot dismiss an appeal in which some part of the underlying dispute is still active. See *Hall v. Hall*, 138 S. Ct. 1118, 1131 (2018) (only “when one of several consolidated cases is finally decided,” through issuance of a decision resolving that one case, is “a disappointed litigant free to seek review of that decision in the court of appeals.”). Because the five affirmative defense appeals involve still-active disputes that support 4KG-ACC’s default termination and CPAR evaluation appeals, the Board consolidates CBCA 6683, 6762, 6919, 6920, 6921, 7025, and 7026 for all purposes and defers dismissal of the five affirmative defense appeals pending resolution of the default termination and CPAR evaluation appeals.

DOL argues that the five affirmative defense appeals are essentially moot because the monetary aspect of the claims underlying them has been resolved, eliminating the Board’s jurisdiction to entertain them and making consolidation unnecessary. “A matter becomes ‘moot when the issues presented are no longer “live” or the parties lack a legally cognizable interest in the outcome.’” *Sylvan B. Orr v. Department of Agriculture*, CBCA 5299, 16-1 BCA ¶ 36,522 (quoting *NEC Corp. v. United States*, 151 F.3d 1361, 1369 (Fed. Cir. 1998) (quoting *Powell v. McCormack*, 395 U.S. 486, 496 (1969))). In light of the Federal Circuit’s decision in *Maropakis*, 4KG-ACC has understandable concerns about its ability to maintain its affirmative defenses if the five affirmative defense appeals are dismissed immediately, even though the monetary aspects of those appeals are settled. In *Maropakis*, the contractor made factual allegations about delays, impacts, and disruptions for which the Government was allegedly responsible to establish excusable delay as a defense to the Government’s liquidated damages claim against the contractor. The Federal Circuit barred the contractor from pursuing that excusable delay defense, holding that a contractor, if “asserting [a] claim against the government . . . as a defense to a government action” that would require “an adjustment of contract terms,” has to “meet the jurisdictional requirements and procedural prerequisites of the CDA” before raising it. *Maropakis*, 609 F.3d at 1331. Because the contractor in *Maropakis* had not submitted a certified claim to the contracting officer for the alleged government-caused delays, impacts, and disruptions, all of which would have been considered changes to the contract at issue there, the contractor was not allowed to raise them as defenses to the Government’s liquidated damages claim.

Concerned that the dismissal of its five affirmative defense appeals might preclude it from raising its affirmative defenses in CBCA 6683 and 7025, 4KG-ACC negotiated a settlement with DOL that deferred the dismissal of the affirmative defense appeals until the default termination and CPAR evaluation appeals were finally resolved. Given the role that the five affirmative defense appeals play in 4KG-ACC’s ability to defend against DOL’s default termination action, those appeals are not moot simply because the parties have resolved the monetary portion of the claims underlying those appeals. The factual disputes in the five affirmative defense appeals remain live while 4KG-ACC is litigating CBCA 6683 and 7025.

DOL goes one step further in one of its motions and argues that the parties actually settled all of 4KG-ACC's affirmative defenses. *See* Respondent's Motion to Strike at 4 (asking the Board to order that "all . . . affirmative defenses in the Affirmative Defense Appeals have been settled and resolved"). Yet, in the settlement agreement, 4KG-ACC expressly reserved "affirmative defenses relevant to the Default Appeal and CPAR Claim." Settlement Agreement ¶ 3.a. 4KG-ACC agreed only "that all Monetary Claims, including but not limited to the *monetary* portions of the Affirmative Defense Appeals, . . . are fully satisfied and settled" and that it would "not attempt to revive any demand for *compensation* under any Monetary Claim." *Id.* ¶ 7.c (emphasis added). 4KG-ACC is using what remains of the five affirmative defense appeals to defend against DOL's default termination, which is clearly something that the settlement agreement contemplates, and not to seek additional compensation. DOL's argument that 4GK-ACC released its affirmative defenses ignores the plain language of the settlement agreement that it executed.

DOL also argues that we should "strike" 4KG-ACC's affirmative defenses because they were not properly labeled as "affirmative defenses" in the complaints that 4KG-ACC filed in CBCA 6683 and 7025 and that, since they were not properly preserved, immediate dismissal of the five affirmative defense appeals is warranted. Although a default termination is a Government claim, which the Government has the burden to prove, *Malone v. United States*, 849 F.2d 1441, 1443 (Fed. Cir. 1988), 4KG-ACC, rather than DOL, filed the notices of appeal, as well as (consistent with Board Rule 6(a)) the complaints, in CBCA 6683 and 7025. Although the Board sometimes orders the Government to file the complaint in an appeal involving a default termination, *see Ralph Muhammad v. Department of Justice*, CBCA 5188, 16-1 BCA ¶ 36,267; *Northrop Grumman Corp.*, DOT BCA 4041, 99-1 BCA ¶ 30,191 (1998), neither party requested a change from the regular Board Rule 6(a) practice, meaning that 4KG-ACC never filed answers in CBCA 6683 or 7025 in which it would have listed affirmative defenses.

Despite that fact, 4KG-ACC's complaints provided DOL with ample notice of 4KG-ACC's defenses to the default termination. In its complaint in CBCA 6683, which addresses the default termination, 4KG-ACC alleged in paragraphs 49, 50, 61, 62, 73, 76 through 79, and 86, among others, that DOL had improperly failed to pay outstanding pay applications and wrongfully withheld significant payments for completed work, which allegedly devastated 4KG-ACC, its subcontractors, and overall job progress. Those allegations are in line with four of the five affirmative defense appeals at issue here and the certified claims underlying them: CBCA 6762 involves allegations that DOL materially breached the contract by improperly withholding amounts undisputedly owed to 4KG-ACC, and CBCA 6919, 6920, and 6921 involve allegations that DOL materially breached the contract by improperly objecting to pay applications related to, and withholding amounts owed to, 4KG-ACC for stored materials and work-in-place. In addition, the complaint in CBCA 6683 is replete with additional allegations that DOL took unwarranted actions and

made constructive changes that caused delays to the project. Those allegations are consistent with the final affirmative defense appeal, CBCA 7026, which alleges that DOL constructively changed the contract in ways that excusably delayed 4KG-ACC's performance. In fact, two of the counts in 4KG-ACC's CBCA 6683 complaint are specifically titled "Failure to Pay" and "Cardinal Change." As for CBCA 7025, its complaint merges and overlaps its allegations with those of CBCA 7026. "The purpose of [pleading] affirmative defenses . . . 'is to give the opposing party notice of the affirmative defense and a chance to respond.'" *A-Son's Construction, Inc. v. United States*, CBCA 3491, 15-1 BCA ¶ 36,089 (quoting *Ultra-Precision Manufacturing, Ltd. v. Ford Motor Co.*, 411 F.3d 1369, 1376 (Fed. Cir. 2005) (quoting *Smith v. Sushka*, 117 F.3d 965, 969 (6th Cir. 1997))). 4KG-ACC's complaints in CBCA 6683 and 7025 provide such notice. The fact that 4KG-ACC did not label these allegations "affirmative defenses" in the complaints is of no consequence. By arguing to the contrary, DOL incorrectly places form over substance.

DOL finally argues that if the Board does not immediately dismiss the five affirmative defense appeals and instead consolidates them with CBCA 6683 and 7025, the Board's action "could be misconstrued and create confusion," Respondent's Motion to Strike at 4, with the result that 4KG-ACC might ultimately try to relitigate the monetary settlement to which the parties have already agreed. DOL's concern is unfounded. 4KG-ACC has settled the monetary aspects of these appeals. The only disputes that remain for the Board to resolve are the validity of DOL's default termination and 4KG-ACC's CPAR evaluation challenge, inclusive of any affirmative defenses associated with those issues. We encourage the parties to develop those issues expeditiously.

Decision

For the foregoing reasons, CBCA 6683, 6762, 6919, 6920, 6921, 7025, and 7026 are **CONSOLIDATED** for all purposes. DOL's motions to strike 4KG-ACC's affirmative defenses in CBCA 6683 and 7025 and immediately to dismiss the five affirmative defense appeals (CBCA 6762, 6919, 6920, 6921, and 7026) are **DENIED**. The Board will issue an order dismissing the five affirmative defense appeals as part of the final resolution of CBCA 6683 and 7025.

Harold D. Lester, Jr.
HAROLD D. LESTER, JR.
Board Judge

We concur:

Erica S. Beardsley
ERICA S. BEARDSLEY
Board Judge

H. Chuck Kullberg
H. CHUCK KULLBERG
Board Judge