Board of Contract Appeals

General Services Administration
Washington, D.C. 20405

MOTION TO DISMISS FOR FAILURE TO STATE A CLAIM
UPON WHICH RELIEF MAY BE GRANTED DENIED: September 7, 2000

GSBCA 15217

ROWE, INC.,

Appellant,

v.

GENERAL SERVICES ADMINISTRATION,

Respondent.

O. Kevin Vincent of Baker Botts L.L.P.,Washington, DC, counsel for Appellant.

Robert T. Hoff, Office of General Counsel, General Services Administration, Washington, DC, counsel for Respondent.

Before Board Judges **DANIELS** (Chairman), **NEILL**, and **WILLIAMS**.

WILLIAMS, Board Judge.

In this appeal, Rowe, Inc. (Rowe) contends that the General Services Administration (GSA) breached a requirements contract. Specifically, Rowe alleges that GSA contracted to procure all requirements for certain vans during the contract term from Rowe, but diverted those requirements by awarding contracts for the same type vans to Chrysler Corporation and Carter Chevrolet. Rowe seeks its lost profits in the amount of $1,775,514.

This matter comes before the Board on respondent's motion to dismiss for failure to state a claim upon which relief may be granted. As grounds for that motion, respondent contends that absent bad faith, appellant's entire quantum claim for lost profits is barred because the contract contains a termination for convenience clause.

Respondent relies upon John Reiner & Co. v. United States, 325 F.2d 438 (Ct. Cl. 1963), cert. denied, 377 U.S. 931 (1964), which respondent reads as holding that any breach of contract is to be converted to a termination for the convenience of the Government if the contract had a termination for convenience clause. Respondent also relies upon Kalvar

Corp. v. United States, 543 F.2d 1298 (Ct. Cl. 1976), wherein the United States Court of Claims stated:

> In the absence of bad faith or clear abuse of discretion, the effect of the constructive termination for convenience is to moot all breach claims and to limit recovery to costs which would have been allowed had the contracting officer actually invoked the clause . . . . Any award of damages must be limited to items specifically allowed by the termination clause.

Id. at 1304-05.

Respondent recognizes in making this argument that, subsequent to the decisions in John Reiner and Kalvar, this Board expressly permitted precisely the type of damages which appellant is claiming here -- lost profits for breach of contract due to diversion. Respondent argues on the one hand that the Board in issuing S&W Tire Services, Inc., GSBCA 6376, 82-2 BCA ¶ 16,048, which has since been followed, was not aware of Kalvar, or alternatively that S&W Tire can be harmonized with Kalvar by reading into the Board's decision in S&W Tire a finding of bad faith.

Appellant contends that there is ample precedent at the Board and in the decisions of the United States Court of Appeals for the Federal Circuit for awarding lost profits in the absence of any showing of bad faith when the Government diverts orders from a requirements contract. Appellant contends further that respondent "entered into the Rowe contract with no intention of fulfilling its promise to order all of its requirements" from Rowe. Appellant's Reply to Respondent's Motion to Dismiss for Failure to State a Claim upon Which Relief May Be Granted (Appellant's Reply) at 4.

With respect to respondent's legal contentions, appellant states that the Board in S&W Tire was well aware of Kalvar, but instead of following that precedent followed later cases, such as Torncello v. United States, 681 F.2d 756 (Ct. Cl. 1982); see also Krygoski Construction Co. v. United States, 94 F.3d 1537 (Fed. Cir. 1996). According to appellant, Torncello governs because the court in its plurality opinions allowed the contractor to recover its lost profits for the agency's diversion although there was no finding that the agency had "any specific intent to harm the contractor." 681 F.2d at 771. Appellant also points out that the Federal Circuit has not permitted the Government to make a retroactive use of a termination for convenience clause to avoid liability for lost profits in a case involving diversion of work from a requirements contract.

Although appellant vigorously contends that it does not need to prove bad faith in order to recover lost profits in this case, it "intends to prove bad faith" if necessary as the case proceeds. Appellant’s Reply at 19.

Discussion

A board of contract appeals may dismiss a case for failure to state a claim upon which relief may be granted only when it is beyond doubt that the appellant can prove no set of facts in support of its claim that would entitle it to relief. Southfork Systems, Inc. v. United States, 141 F.3d 1124, 1132 (Fed. Cir. 1998). A dismissal for failure to state a claim is a decision

on the merits which focuses on whether the complaint contains allegations that, if proven, are sufficient to entitle a party to relief. Gould, Inc. v. United States, 67 F.3d 925 (Fed. Cir. 1995).

In considering such a motion, we view all the facts in the light most favorable to the nonmovant, accept the facts alleged by the nonmovant as true, and require the movant to show that the nonmovant can prove no set of facts in support of his claim which would entitle it to relief. Carroll Automotive, ASBCA 50993, 98-2 BCA ¶ 29,864. Applying these clear legal principles, we conclude that respondent's motion must fail. Even if we were to accept respondent's assertion that appellant is not entitled to lost profits unless it alleges bad faith, appellant has in its motion papers alleged bad faith and asserted that it can prove its entitlement. Thus, we cannot conclude at this juncture that Rowe can prove no set of facts which would entitle it to relief.

Decision

Respondent's motion to dismiss for failure to state a claim upon which relief can be granted is **DENIED**.

MARY ELLEN COSTER WILLIAMS
Board Judge

We concur:

STEPHEN M. DANIELS
Board Judge

EDWIN B. NEILL
Board Judge