UNITED STATES
CIVILIAN BOARD OF CONTRACT APPEALS

SUMMARY JUDGMENT GRANTED: May 20, 2019

CBCA 6147

CH2M-WG IDAHO, LLC,

Appellant,

v.

DEPARTMENT OF ENERGY,

Respondent.

Mark J. Meagher, Phillip R. Seckman, and K. Tyler Thomas of Dentons US LLP, Denver, CO, counsel for Appellant.

William C. Harvey, Margaret B. Hinman, and Eva M. Aumen, Office of Chief Counsel, Idaho Operations Office, Department of Energy, Idaho Falls, ID, counsel for Respondent.

Before Board Judges **SOMERS** (Chair), **SHERIDAN**, and **ZISCHKAU**.

SHERIDAN, Board Judge.

At issue in this appeal are certain sums that the Department of Energy (DOE) seeks to withhold from CH2M-WG IDAHO (CWI). These sums, $27,359,380 in incentive fees and $5,985,811 for safe units provided under an employee incentive plan, were awarded by this Board in *CH2M-WG IDAHO, LLC v. Department of Energy*, CBCA 3876, 17-1 BCA

¶ 36,849.[1] We note that DOE neither requested Board reconsideration nor appealed our decision in CBCA 3876 to the United States Court of Appeals for the Federal Circuit (Federal Circuit). Consequently, the Board's decision became final. Rule 31(c) (48 CFR 6101.31(c) (2008); 41 U.S.C. § 7107(b) (2012).

On March 22, 2018, a DOE contracting officer issued a final decision (March 2018 final decision) pursuant to the Contract Disputes Act (CDA), 41 U.S.C. §§ 7101-7109 (2012), informing CWI that DOE would only be paying a portion of the amounts the Board had awarded in CBCA 3876. The contracting officer determined that DOE was entitled to withhold payment of $4,790,066 of the $27,359,380 awarded by the Board to avoid what she referred to as a "double fee payment."[2] The final decision also claimed a right to withhold all of the $5,985,811 the Board awarded to CWI for safe units, positing that prior to paying the awarded safe unit funds, DOE was entitled to receive a plan for disbursement to former employees who held safe unit shares as of September 30, 2012. DOE informed CWI that it intended to perform an audit to ensure that all disbursements were followed in accordance with the approved employee incentive compensation plan and that upon a successful audit, DOE would reimburse CWI its share of safe units, together with appropriate interest.

CWI appealed the March 2018 final decision, seeking payment of the full award in CBCA 3876, and the matter was docketed as CBCA 6147. CWI now moves for summary judgment arguing that DOE's alleged double fee payment claim in the new appeal is barred by res judicata because it is based on the same transactional facts that formed the bases of the CBCA 3876 decision. Appellant also seeks summary judgment on DOE's attempt to withhold payment of the safe units award addressed in the CBCA 3876 decision, asserting that res judicata and collateral estoppel apply barring relitigation of that issue.

DOE argues that res judicata does not apply to the instant appeal because the $4,790,066 at issue was specifically excluded from CWI's claim litigated in CBCA 3876, and CWI's claim for payment of safe units in CBCA 3876 did not include or address the non-monetary contract interpretation that DOE currently asserts in its March 2018 final decision.

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[1] Familiarity with the decision in CBCA 3876 is assumed and necessary for full understanding of our decision here.

[2] Throughout the contract and subsequent litigation, the parties have referred to this issue in various ways, including, "the G& A allocation issue," "the double fee payment issue," "the double payment issue," "the B.5 G&A allocation issue," and "the G&A issue." In CBCA 3876 we generally referred to the issue as "the B.5 allocation issue." In this decision we refer to the issue as "the double fee payment" issue, because that is how the DOE contracting officer referred to it in her final decision.

DOE also posits that the affirmative claim currently before the Board in CBCA 6147 arises out of additional and distinct facts not previously litigated.

We grant appellant's motion for summary judgment for the reasons set forth below.

Background

The contract giving rise to this matter is referred to as the ICP [Idaho Cleanup Project] contract, and involved the clean-up of nuclear sites located in and around Idaho. The ICP contract was structured two ways and contained: 1) target work which was specified in the contract and paid on a cost plus incentive fee (CPIF) basis under clause B.4 - Incentive Fee, and 2) non-target work which was added to the contract by negotiated modifications and paid for on a cost plus fixed fee (CPFF) basis pursuant to clause B.5 - Items not included in target cost.

Early in the contract, CWI, in agreement with DOE, reallocated some general and administrative (G&A) costs earned under the CPIF contract into the CPFF portion of the contract. This, and CWI's continued allocation of G&A costs into the CPFF contract, allowed it to earn greater fees in the CPIF portion of the contract than DOE anticipated. The issues giving rise to this appeal, as well as the issues litigated and decided in CBCA 3876 have percolated between CWI and DOE for many years. DOE and CWI began talking about what they referred to as the double fee payment issue, and DOE's contention that G&A was being double counted in fee calculations by at least the year 2007, but the parties were unable to reach a mutually amicable resolution.

Attempting to close out the ICP contract, DOE issued unilateral contract modification 260 on October 31, 2013, containing DOE's final fee determination. Modification 260 unilaterally reduced CWI's target cost and fee based on certain G&A costs that had been allocated to non-target work. The final fee determination provided: "In addition to the appropriate target cost and fee adjustments, DOE recognizes that CWI is entitled to an increase to the fixed fee for the G&A costs estimated to non-target work. Having already paid a portion of this fee, DOE in its final fee determination included the fixed-fee balance of $4,790,066." As for the safe units, the final fee determination stated: "The employee safe unit (SU) calculation is a component of the final fee calculation, based on the amount owed by DOE on the final fee calculation." Based on her calculations, including the deduction for the double fee payments, the contracting officer calculated DOE owed CWI $17,495,136 for the safe units. The contracting officer did not provide CWI the right to appeal the final fee determination so CWI filed a certified claim on March 6, 2014, seeking among other things, $27,359,380 for DOE's reduction to the target cost and fee based on G&A cost allocations and a $5,985,811 payment for safe units.

As is noted in our CBCA 3876 decision, significant evidence offered in CBCA 3876 addressed the respective positions of the parties on the double fee payment issue. Extensive testimony about the issue was elicited at hearing from both DOE and CWI, and both parties discussed the issue in their pre- and post-hearing briefs. In its post-hearing brief, DOE argued an alternative basis to support awarding nothing to CWI and pointed to, among other things, DOE's budget director's report and testimony as proof that CWI had double counted the target fee related to the G&A costs, and DOE's reduction in modification 260 was appropriate and equitable.

We discussed DOE's double fee payment theory, including the budget director's opinions on that topic at various points in our decision. 17-1 BCA at 179,554, 557, 562-33. We did not explicitly address the double fee payment arguments in the discussion. However, after fully considering all the evidence presented, we disposed of the double fee payment argument as well as various other arguments made by DOE as to why it should be allowed to make a reduction via modification 260 by stating:

> DOE, while presenting equitable arguments, has provided no compelling legal basis to support its unilateral actions. To the extent that various other arguments were made by the parties in relation to the B.5 allocation issue[3] including, but not limited to the impact of the LCB [life cycle baseline] and severability, we did not find them to be sufficiently compelling to merit detailed discussion. CWI is entitled to recover $27,359,380 in incentive fees for the target work it performed.

17-1 BCA at 179,570.

Regarding its argument that it should not be required to pay the $5,985,811 that the Board ordered in CBCA 3876, DOE's complaint in the instant appeal asserts that CWI did not comply with the employee incentive agreement, that CWI is not entitled to the safe units until it proves compliance with the employee incentive agreement, and that CWI does not plan to properly distribute the safe units. *See* Complaint ¶¶ 28-38. Contentions that CWI was not in compliance with the employee incentive agreement were raised in DOE's May 5, 2015, final decision giving rise to CBCA 3876, in which the contracting officer voiced concerns she had with safe unit payments, and noted "it is unclear whether CWI paid its

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[3] As noted earlier in this decision, "the B.5 allocation issue" refers to the same issue that DOE now calls the "double fee payment issue."

employees the full $17,495,136" that DOE had determined was owed to CWI for safe units in its final fee determination."[4]

In the May 2015 final decision the contracting officer concluded that "DOE's portion of the safe units is based upon a predetermined formula related to CWI's final fee earned under the contract." 17-1 at 179,563. The contracting officer went on to state:

> As CWI stated in its claim, the employee SU [safe units] calculation is a component of the final fee calculation. DOE does not dispute CWI's methodology in calculating the value of the safe units. CWI's claim of $4,382,504 in additional safe units is based solely on CWI's final fee request of $288,418,320.12. The DOE final fee calculation of $252,672,59413 equates to a final safe unit payment of $17,495,136. The DOE position has not changed.

During the litigation of CBCA 3678, DOE had ample opportunity to develop its theories as to the payment of safe units. DOE made several arguments as to why it should not be required to pay for safe units at all or should only be required to pay the safe units at a reduced percentage. While DOE briefed its position that it "should only be required to pay CWI for safe units actually distributed to the beneficiaries of the [safe unit] program," it failed to provide convincing evidence supporting its conjecture that CWI had failed to properly distribute safe unit payments to its employees.

Our decision in CBCA 3876 fully considered the evidence presented and determined CWI's entitlement to safe units in the amount of $5,985,811. Now, DOE attempts to place caveats on our decision, stating that it will pay this portion of the award only if CWI first provides DOE a plan for disbursement of all safe unit funds to employees, DOE approves the plan, CWI independently pays another $11,432,899 in safe units to employees, and CWI successfully passes a DOE audit of the disbursement of all the safe unit funds.

We review our decision in CBCA 3876 in the context of the allegations set forth in motion before us to determine whether the allegations set forth in this appeal are precluded by res judicata and/or collateral estoppel.

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[4] The contracting officer's final decision of May 5, 2015, is part of the record in CBCA 3876.

Discussion

I. Standard for Summary Relief

The summary relief stage requires that the Board determine whether the moving party has demonstrated the absence of a genuine issue of material fact, and thus is entitled to judgment as a matter of law. *Celotex Corp. v. Catrett*, 477 U.S. 317, 323 (1986). The non-moving party may successfully defeat a motion for summary relief by showing that a disputed material fact exists; however, the non-moving party cannot simply rely on the parties' pleadings but must support its argument with evidence such as affidavits, depositions, answers to interrogatories, admissions, and other admissible documents under Rule 8 (48 CFR 6101.8 (2016)). *See id.*; *see also Crown Operations International, Ltd. v. Solutia, Inc.*, 289 F.3d 1367, 1375 (Fed. Cir. 2002) (opposing party cannot rest on mere allegations to establish a genuine issue of material fact but must present actual evidence); Rule 8(g)(3). When both parties have moved for summary relief, as here, each party's motion will be evaluated on its own merits and all justifiable inferences will be resolved against the party whose motion is under consideration. *Turner Construction Co. v. Smithsonian Institution*, CBCA 2862, et al., 15-1 BCA ¶ 36,139, at 176,392.

II. Issue before the Board

CWI has moved for summary relief, which DOE opposes. The issue in this matter is whether the Board's decision in CBCA 3876 precludes DOE from attempting another withholding, as set forth in the contracting officer's March 2018 final decision, on the grounds of res judicata and/or collateral estoppel. CWI argues that res judicata and collateral estoppel bar DOE from claiming a $4.7 million offset from the Board's incentive fee award to avoid a double fee payment, and that the double fee payment claim is barred by res judicata because it is based on the same transactional facts which were the basis of the Board's decision in CBCA 3876 granting the incentive fee award. CWI argues that if res judicata does not apply, DOE's double fee payment claim is barred by collateral estoppel because the same issue was litigated and necessary to the Board's CBCA 3876 decision. As for DOE's safe units claim, CWI argues that DOE's attempt to withhold CWI's recovery of the safe units award, based on its alleged noncompliance with the employee incentive plan, is barred by res judicata and collateral estoppel.

The principles of res judicata (also known as claim preclusion) and collateral estoppel (also known as issue preclusion) are well established at the Board. *SBBI, Inc., v. International Boundary and Water Commission*, CBCA 4994, 17-1 BCA ¶ 36,722; *Optimum Services, Inc. v. Department of the Interior*, CBCA 4968, 16-1 BCA ¶ 36,357. Under res judicata, a final judgment on the merits precludes the parties from re-litigating claims that

were or could have been raised in the prior action. *Federated Department Stores, Inc. v. Moitie*, 452 U.S. 394, 398 (1981). Res judicata applies when the following factors are met:

> (1) the parties are identical or in privity;
> (2) the first suit proceeded to a final judgment on the merits; and
> (3) the second claim is based on the same set of transactional facts as the first.

Phillips/May Corp. v. United States, 524 F.3d 1264, 1268 (Fed. Cir. 2008) (citations omitted).

The doctrine of collateral estoppel bars a party from raising issues that have been litigated and decided in a prior proceeding. Unlike claim preclusion, there is no requirement that the claim or cause of action in the two suits be identical, the rationale being that a party who has litigated an issue and lost should not be allowed to relitigate it. *In re Freeman*, 30 F.3d 1459, 1465 (Fed. Cir. 1994); *Mother's Restaurant, Inc. v. Mama's Pizza, Inc.*, 723 F.2d 1566, 1569 (Fed. Cir. 1983). For collateral estoppel to apply, the moving party must establish the following:

> (1) identity of the issues in a prior proceeding;
> (2) the issues were actually litigated;
> (3) the determination of the issues was necessary to the resulting judgment; and,
> (4) the party defending against preclusion had a full and fair opportunity to litigate the issues.

Jet, Inc. v. Sewage Aeration Systems, 223 F.3d 1360, 1366 (Fed. Cir. 2000); *see Freeman*, 30 F.3d at 1465 (citations omitted).

For the reasons stated below, we conclude that DOE's claims are barred by res judicata because they arise from the same transactional facts as the prior appeal. Further, the claims involve the same parties, the same contract, and the same issues of CWI's entitlement to payment under the contract.

The claim presented by DOE for the alleged double fee payment was clearly addressed in the litigation of CBCA 3876 and in that decision. The Board did not find the double fee payment rationale compelling in CBCA 3876. The appeal in CBCA 6147 involves a mirror claim of that in CBCA 3876, this time applied to the G&A associated with the non-target work. Apparently, because it did not prevail in its argument that it had double paid on the target work, DOE has elected to apply the same argument to the non-target work. DOE, by

seeking to apply the double fee payment rationale to another type of costs, simply seeks an opportunity to relitigate the issue. The principle of res judicata precludes such action.

DOE incorrectly postures that the decision in CBCA 3876 "undid" modification 260. Our decision addressed only the portion of modification 260 where DOE unilaterally attempted to "correct" the inequities it perceived were associated with the G&A allocation issue by a downward adjustment of fee. We stated:

> We conclude that DOE, at its own peril, waited too long to resolve the G&A allocation issue with CWI, both because it was not an issue DOE was contractually allowed to address unilaterally, and because, by the time DOE decided to address the issue, CWI's position on an equitable adjustment for the G&A allocation issue had changed. We find more compelling a line of cases which holds that the Changes clause does not provide an agency an unfettered right to change any and every clause in a contract. Longstanding case law establishes that an agency is not entitled to unilaterally change the terms and conditions of a contract, including the payment terms.

17-1 BCA at 179,567 (citations omitted). This holding puts to rest any further machinations on the part of DOE as far as its double fee payment arguments go. DOE's current attempt to adjust payments associated with non-target work downward using the double fee payment argument it used in CBCA 3876 cannot be sustained.

As for the safe units, by finding the contracting officer's conclusions in the final decision compelling, the Board implicitly rejected other arguments made by DOE during the litigation. Most, if not all, of DOE's arguments are the same as those used to defend against payment of safe units in CBCA 3876. DOE was given a full and fair opportunity to present any evidence it had relating to the payment of safe units. For the safe units dispute, DOE litigated all the contentions in CBCA 3876 that it now seeks to relitigate in CBCA 6147. Specifically, its position that CWI was obligated to show compliance with the incentive fee plan before DOE was obligated to pay was addressed at hearing. DOE offered no compelling evidence to convince the Board in CBCA 3876 that it should not have to pay safe units (or only pay a reduced amount). DOE has shown no sound bases that would permit it to get another chance in CBCA 6147 to relitigate positions taken in CBCA 3876 which the Board implicitly rejected.[5]

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[5] As noted earlier, the decision in CBCA 3876 became final when DOE failed to appeal it to the Federal Circuit.

To the extent that DOE makes various other arguments positing that its claim is not barred by res judicata, we did not find those arguments compelling.

Decision

In essence, in CBCA 3876, CWI filed a claim to seek payments of monies that were contractually due and owing. Protracted litigation ensued, and at the end of that litigation the Board awarded CWI $27,359,380 for incentive fees and $5,985,811 for safe units, along with applicable CDA interest. In the appeal now before us, CBCA 6147, DOE's claims are premised on precisely the same issues litigated and decided by the Board in CBCA 3876. The principles of res judicata therefore bar proceeding on CBCA 6147. CWI's motion for summary relief is **GRANTED** and CBCA 6147 is **DISMISSED WITH PREJUDICE**.

Patricia J. Sheridan
PATRICIA J. SHERIDAN
Board Judge

We concur:

Jeri Kaylene Somers
JERI KAYLENE SOMERS
Board Judge

Jonathan D. Zischkau
JONATHAN D. ZISCHKAU
Board Judge