



UNITED STATES  
CIVILIAN BOARD OF CONTRACT APPEALS

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MOTION TO STRIKE AFFIRMATIVE DEFENSE DENIED:  
November 4, 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 Judges **BEARDSLEY** (Chair), **LESTER**, and **KULLBERG**.

**LESTER**, Board Judge.

Respondent, the Department of Labor (DOL), has filed an untimely and factually underdeveloped motion to strike a defense to the default termination decision at issue in CBCA 6683. We deny the motion.

Background

CBCA 6683, which the Board docketed on December 19, 2019, is the first of numerous appeals that appellant, 4K Global-ACC Joint Venture, LLC (4KG-ACC), filed with the Board relating to a contract for the construction of the Atlanta Job Corps' Center in

Atlanta, Georgia. In CBCA 6683, 4KG-ACC challenges DOL's termination of that contract for default. Although a default termination is a government claim, the burden of which is upon the Government to prove, *JR Services, LLC v. Department of Veterans Affairs*, CBCA 4826, 16-1 BCA ¶ 36,238, the Board directed 4KG-ACC to file the complaint in that appeal, consistent with the requirements of Board Rule 6(a) (48 CFR 6101.6(a) (2020)). In its complaint, filed January 16, 2020, 4KG-ACC alleged, among other things, that DOL's default termination was improper because DOL had terminated the contract "for failure to make progress after the contract completion date and without establishing a new contract completion date derived from a reasonable analysis of the time needed to perform." Complaint ¶ 149(b). DOL filed its answer on February 19, 2020, denying 4KG-ACC's allegations.

All but one of 4KG-ACC's subsequently filed appeals involved affirmative monetary claims against DOL. Most of those appeals were consolidated with CBCA 6683. After the parties engaged in extensive and contentious discovery, the parties in May 2021 settled the monetary aspects of 4KG-ACC's appeals, leaving the following non-monetary matters as the only issues remaining before the Board: (1) the validity of DOL's default termination (CBCA 6683), inclusive of affirmative defenses that are supported by the claims at issue in CBCA 6762, 6919, 6920, 6921, and 7026; and (2) 4KG-ACC's challenge to DOL's negative Contractor Performance Assessment Rating of 4KG-ACC (CBCA 7025).

During a status conference with the parties on September 1, 2021, DOL expressed confusion over 4KG-ACC's defenses to the default termination, asserting that, because 4KG-ACC (as the appellant in CBCA 6683) did not list "affirmative defenses" to that default termination in the complaint that it filed on January 16, 2020, DOL did not have proper notice of those defenses. To eliminate any possibility of confusion, 4KG-ACC agreed to articulate in a single, written document all of the defenses upon which it currently expects to rely in challenging the default termination in CBCA 6683.

On September 17, 2021, 4KG-ACC provided to DOL and filed with the Board a list of five "affirmative defenses" to the default termination, including the following listed as its fifth affirmative defense:

DOL's asserted grounds for failure to make progress should be rejected because there was no schedule in place at the time of the default termination. Because there was no schedule in place, there was nothing against which to measure 4KG's progress. There was also no schedule establishing a construction completion date or even a contract completion date following agreement and execution of [a memorandum of understanding that the parties executed during contract performance].

On October 28, 2021, DOL filed a motion to strike that fifth affirmative defense. Citing as support the Board's prior decision in *Global Construction, Inc. v. Department of Veterans Affairs*, CBCA 1198, 10-1 BCA ¶ 34,363, and the United States Court of Appeals for the Federal Circuit's decision in *Lisbon Contractors, Inc. v. United States*, 828 F.2d 759, 765 (Fed. Cir. 1987), DOL argued that the absence of a specific binding completion date is irrelevant to the validity of its default termination and that default can be justified by other contractor failures, including the contractor's failure to meet its own representations concerning the progress of work.

### Discussion

"[M]otions to strike, as a general rule, are disfavored." *Stabilisierungsfonds Fur Wein v. Kaiser Stuhl Wine Distributors Pty. Ltd.*, 647 F.2d 200, 201 (D.C. Cir. 1981). The Board's rules, although not expressly addressing motions to strike, provide that the Board "may apply principles of the Federal Rules of Civil Procedure to resolve issues not covered by [the Board's] rules." Rule 1(c). Pursuant to Rule 12(f) of the Federal Rules of Civil Procedure, a tribunal "may strike from a pleading an insufficient defense," either on its own or "on motion made by a party either before responding to the pleading or, if a response is not allowed, within 21 days after being served with the pleading." Fed. R. Civ. P. 12(f); see *Knight's Construction v. Department of Agriculture*, CBCA 6658, 21-1 BCA ¶ 37,889 (applying Fed. R. Civ. P. 12(f) when considering a motion to strike).

Because no response is allowed to an answer identifying affirmative defenses but not asserting a counterclaim, 5 Charles Alan Wright & Arthur R. Miller, *Federal Practice & Procedure* § 1183 (2d ed. 1990), any motion to strike was due, at the latest, within twenty-one days after 4KG-ACC filed and served the list of affirmative defenses<sup>1</sup> that it had voluntarily agreed to submit to assist in moving this litigation forward. DOL's motion to strike was filed forty-one days after service of the list. On its face, DOL's motion is untimely, given the twenty-one-day deadline in Fed. R. Civ. P. 12(f).

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<sup>1</sup> Given that 4KG-ACC's fifth defense challenges the merits of DOL's default termination, we question whether it is truly an affirmative defense under Fed. R. Civ. P. 8(c), rather than a negative factual defense that "is merely rebuttal against the evidence presented by the plaintiff." *Barnes v. AT&T Pension Benefit Plan – Nonbargained Program*, 718 F. Supp. 2d 1167, 1173 (N.D. Calif. 2010); see *Zivkovic v. Southern California Edison Co.*, 302 F.3d 1080, 1088 (9th Cir. 2002) ("A defense which demonstrates that plaintiff has not met its burden of proof is not an affirmative defense."). For purposes of DOL's motion to strike, we need not resolve that matter.

Beyond that, DOL has been aware of 4KG-ACC's fifth "affirmative defense" since at least January 16, 2020, when 4KG-ACC alleged the factual elements of that defense in its complaint in CBCA 6683. DOL has no basis for taking 4KG-ACC's voluntary agreement to supplement its complaint with a concise listing of its default termination defenses and twisting it into an opportunity to invoke the provisions of Fed. R. Civ. P. 12(f) allowing for motions to strike. Although the Board retains discretion to consider an untimely motion to strike, *Williams v. Jader Fuel Co.*, 944 F.2d 1388, 1399-1400 (7th Cir. 1991), we decline to do so here.

To the extent that DOL wants to file a summary judgment motion on the merits of its challenge to 4KG-ACC's defense, the Board's most recent scheduling order adopted the parties' requested deadline of September 7, 2022, for the submission of dispositive motions. Any motion for summary judgment needs to be supported by a statement of undisputed material facts, citing appeal file exhibits, admissions in pleadings, and/or evidence filed with the motion. Rule 8(f)(1). The vagaries of the undeveloped record that DOL presented to the Board with its motion to strike, which provides no context for its assertion that it was entitled to terminate 4KG-ACC's contract for default for failure to make progress even though the previously established contract completion deadline apparently had been waived, provides no basis for the Board to dismiss 4KG-ACC's defense or grant summary judgment to DOL on that defense at this time.

### Decision

For the foregoing reasons, DOL's motion to strike the fifth defense from 4KG-ACC's September 17, 2021, list of affirmative defenses to the default termination at issue in CBCA 6683 is **DENIED**.

*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