AGENCY CANNOT RE-LITIGATE ISSUES PREVIOUSLY DECIDED IN AN APPEAL ON A CLAIM

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The Department of Energy ("DOE") sought to pay only a portion of amounts that the Civilian Board of Contract Appeals ("CBCA") had awarded to a contractor in a previous appeal (CBCA 3876). The CBCA had previously awarded CH2M $27.4 in incentive fees and $6 million for safe units provided under an employee incentive plan. After the CBCA decision, the DOE contracting officer issued a final decision stating that it would withhold payment of $4.8 million of the $27.4 million awarded by the CBCA, and would also withhold all of the $6 million for the safe unit funds. CH2M filed a claim for monies contractually due and owing, which was denied and appealed. The CBCA found that the Department of Energy's claims were "premised on precisely the same issues [previously] litigated and decided by the CBCA, the principles of res judicata barred proceedings in the DOE claim, and CH2M's motion for summary relief was granted in full. *CH2M-WG Idaho, Inc. v. Department of Energy,* CBCA 6147, May 20, 2019.

In 2017, the CBCA issued its decision in CBCA 3876, and neither DOE nor CH2M had requested reconsideration nor appealed to the Court of Appeals for the Federal Circuit. Consequently, the CBCA decision became final. 41 USC § 7107(b). After becoming final, the DOE contracting officer issued a final decision asserting that he would withhold funds--$4.8 million was a "double fee payment" and that the contractor had to provide both a plan for disbursement and undergo a DOE audit before it would pay the $6 million for the safe unit funds.

The simple issue before the board, which considered CH2M's motion for summary judgment on its appeal of DOE's withholding claim, was whether res judicata and/or collateral estoppel barred DOE from claiming any offsets or withholding.

Under res judicata (also known as claim preclusion), a final judgment on the merits precludes the parties from re-litigating claims that were or could have been raised in the prior action. Res Judicata applies when: (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. Collateral estopped (also known as issue preclusion) bars a party from raising issues that have been litigated and decided in a prior proceeding. There is no requirement that the claim or cause of action in the two suits be identical.

The Board concluded that both of DOE's claims for offsets were barred by res judicata. It noted that the Board had rejected the DOE's double fee payment rationale in CBCA 3876, and this appeal involved a mirror claim of that claim. "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 (seeking to relitigate the issue)." As for the safe units, the Board, in CBCA 3876, had implicitly rejected all of the DOE arguments, and all DOE was doing was religitating the same dispute once again.

The CBCA granted summary relief, thereby requiring DOE to comply with the order in CBCA 3876 to make full payment of these amounts to CH2M.

Takeaway. Any attempt to relitigate claims previously decided on the merits in a final board or court decision will be barred by either collateral estoppel or res judicata.

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