

ARMED SERVICES BOARD OF CONTRACT APPEALS

Appeal of --)
)
Catel, Inc.) ASBCA No. 52224
)
Under Contract No. DACA51-98-C-0061)

APPEARANCES FOR THE APPELLANT: Jason P. Pedalino, Esq.
Robert T. Lawless, Esq.
Hedinger & Lawless, LLC
Florham Park, NJ

APPEARANCES FOR THE GOVERNMENT: Frank Carr, Esq.
Engineer Chief Trial Attorney
Donald M. Harris, Esq.
Engineer Trial Attorney
U.S. Army Engineer District
New York

OPINION BY ADMINISTRATIVE JUDGE DICUS ON RESPONDENT'S MOTION FOR
SUMMARY JUDGMENT

This appeal was taken from the deemed denial of a claim for \$75,857.56¹ submitted to the contracting officer on or about 21 April 1999. The underlying contract is for maintenance enhancement to drainage at McGuire Air Force Base (McGuire), Wrightstown, New Jersey. Respondent's motion² alleges that appellant's claim is barred by execution of a 6 October 2000 release and a 4 January 2001 final payment voucher containing a release. Appellant has countered with an affidavit asserting, *inter alia*, that appellant understood the 6 October 2000 release pertained to the undisputed contract balance and not to the claim. We deny the motion.

FINDINGS OF FACT

The following findings are solely for the purpose of resolving the motion.

1. Contract No. DACA51-98-C-0061 was awarded to appellant on 30 September 1998 for the firm fixed-price of \$302,000. The contract called for enhancements to drainage at McGuire. Relevant contract clauses included FAR 52.233-1 DISPUTES (OCT 1995) — ALTERNATE I (DEC 1991) and FAR 52.232-5 PAYMENTS UNDER FIXED-PRICE CONSTRUCTION CONTRACTS (MAY 1997). This last clause contained the following:

(h) *Final Payments*. The Government shall pay the amount due the Contractor under this contract after —

- (1) Completion and acceptance of all work;
- (2) Presentation of a properly executed voucher; and
- (3) Presentation of release of all claims against the Government arising by virtue of this contract, other than claims, in stated amounts, that the Contractor has specifically excepted from the operation of the release. . . .

(R4, tab B)

2. Appellant filed a request for equitable adjustment (REA) on 9 February 1999 seeking \$57,121 for site work (R4, tab Q). The REA was denied in a letter of 30 March 1999 in which the contracting officer's representative asked appellant to withdraw its claim (R4, tab R). By letter of 21 April 1999 appellant sought a contracting officer's decision on a claim in the amount of \$75,857.56 (\$57,121.00 for site work and \$18,736.56 arising from encountering a sinkhole) (R4, tab S). When a contracting officer's decision was not forthcoming, an appeal from a deemed denial was filed by letter of 7 June 1999 (R4, tab A).³

3. On 6 October 2000 appellant executed a release stating:

The work under [the contract] . . . having been completed and finally accepted, the United States, its officers and agents, are hereby released from all claims and demands whatsoever arising under or by virtue of said contract, except as follows:
(If none, so state.) None

(Attachment to 16 February 2001 motion)

4. Payment of the contract balance of \$17,598, was made in January 2001 (affidavit of Telmo Pires) (Pires aff.).

5. On 4 January 2001 a Payment Estimate - Contract Performance form (hereinafter "final voucher") was executed by appellant. Telmo Pires, president of appellant, signed the final voucher in Block 12. The amount due the contractor is shown as \$100 in Block 14L. The following release is contained in the "Remarks" box:

EXECUTION BY OR FOR THE CONTRACTOR IN THE SPACE
PROVIDED UNDER BLOCK 12 HEREOF SHALL, UPON RECEIPT OF

THE PAYMENT INDICATED IN BLOCK 14L HEREOF CONSTITUTE A FULL COMPLETE & UNCONDITIONAL RELEASE OF THE GOVERNMENT FROM FURTHER LIABILITY OF ANY NATURE OR KIND ARISING FROM THIS CONTRACT, EXCEPT FOR THOSE ITEMS, IF ANY WHICH ARE SPECIFICALLY RESERVED & IDENTIFIED BY THE CONTRACTOR ON THE REVERSE SIDE HEREOF. BY EXECUTION IN BLOCK 13 HEREOF, IT IS CERTIFIED THAT THE CONTRACT WAS COMPLETE AND THE WORK ACCEPTED AS SATISFACTORY ON BEHALF OF THE GOVERNMENT AS OF 7/15/00.

There are no items reserved. (Attachment to 12 March 2001 letter)

6. Appellant was given the opportunity to respond and informed that failure to submit evidence in rebuttal of the final payment voucher would result in the Board drawing the inference that the final voucher was paid (Board Order of 16 March 2001). Appellant did not submit rebuttal evidence, so we draw the inference that payment of the final voucher was made.

7. Appellant has submitted the affidavit of its president, Telmo Pires. Mr. Pires asserts that, despite numerous attempts, the contract balance had not been paid by October 2000. He further asserts that the contracting officer advised him that the contract balance would only be paid if he signed the release. He signed the 6 October 2000 release “under the belief that the Release pertained to the undisputed contract balance.” The affidavit does not mention the 4 January 2001 release. (Pires aff.) The contracting officer denies having the conversation recounted in Mr. Pires’ affidavit (Snell aff.).

DECISION

Summary judgment is appropriate where no material facts are genuinely in dispute and the moving party is entitled to judgment as a matter of law. *Mingus Constructors, Inc. v. United States*, 812 F.2d 1387, 1390 (Fed. Cir. 1987). Here, material facts as to the dates and content of the vouchers, the contract provisions respecting final payment, and the date of the claim and appeal are undisputed (findings 1-6). A dispute exists as to whether a conversation was held between Mr. Pires and the contracting officer regarding what the release covered (finding 7). The claim at issue is an appeal that predates the release. In similar circumstances, where the parties’ intent was in dispute and respondent’s evidence of the parties’ intent was an unconditional release executed in conjunction with contract payment (as opposed to settlement of the appeal), we have denied similar motions. *Petroleum Contractors, Inc.*, ASBCA No. 21985, 78-2 BCA ¶ 13,340; *Gene Fuller, Inc.*, ASBCA No. 19813, 76-1 BCA ¶ 11,898. Although not articulated in those opinions, a release is an affirmative defense for which respondent bears the burden of proof. *Atlantic Dry Dock Corporation*, ASBCA No. 42679, 99-1 BCA ¶ 30,208. In a summary judgment

motion where, as here, the burden of proof is on the movant, its showing must be sufficient to support a holding that no reasonable trier of fact could find for the nonmovant. *Calderone v. United States*, 799 F.2d 254 (6th Cir. 1986). We are not persuaded that respondent has met that standard. Respondent is not, therefore, entitled to judgment as a matter of law and respondent's motion is denied.

Dated: 21 May 2001

CARROLL C. DICUS, JR.
Administrative Judge
Armed Services Board
of Contract Appeals

I concur

I concur

MARK N. STEMLER
Administrative Judge
Acting Chairman
Armed Services Board
of Contract Appeals

EUNICE W. THOMAS
Administrative Judge
Vice Chairman
Armed Services Board
of Contract Appeals

NOTES

¹ The complaint only seeks \$57,121. Appellant has apparently dropped its claim of \$18,736.56 for work associated with a sinkhole.

² The 16 February 2001 motion was styled “Letter Motion to Dismiss.” We have treated it as a summary judgment motion because it seeks a decision on the merits. *See* Board letter of 19 March 2001.

³ While the appeal was premature, we see no reason to send it back for a contracting officer’s decision at this point.

I certify that the foregoing is a true copy of the Opinion and Decision of the Armed Services Board of Contract Appeals in ASBCA No. 52224, Appeal of Catel, Inc., rendered in conformance with the Board's Charter.

Dated:

EDWARD S. ADAMKEWICZ
Recorder, Armed Services
Board of Contract Appeals