

ARMED SERVICES BOARD OF CONTRACT APPEALS

Appeal of --)
)
The Tyree Organization, Ltd.) ASBCA No. 53167
)
Under Contract No. N62474-96-C-6021)

APPEARANCE FOR THE APPELLANT: Timothy J. Tyree, Esq.
Glens Falls, NY

APPEARANCES FOR THE GOVERNMENT: Fred A. Phelps, Esq.
Navy Chief Trial Attorney
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Senior Trial Attorney
Naval Facilities Engineering
Command
San Bruno, CA

OPINION BY ADMINISTRATIVE JUDGE YOUNGER
PURSUANT TO RULE 12.3

In this appeal under a construction contract, appellant seeks the remission of liquidated damages retained because of untimely completion. Appellant principally challenges enforcement of the contract's liquidated damages clause. Respondent argues that appellant's execution of an unqualified final payment release bars recovery. Appellant has elected the accelerated procedure pursuant to Board Rule 12.3. We deny the appeal.

FINDINGS OF FACT

1. By date of 13 February 1997, respondent awarded appellant contract No. N62474-96-C-6021 for the removal and construction of a fuel filling station at the Naval Weapons Station at Concord, CA. (R4, tab 1 at 1, 2)
2. The contract contained various standard clauses, including FAR 52.211-12 LIQUIDATED DAMAGES - CONSTRUCTION (APR 1984), in which the amount of \$600.00 was inserted for each day of delay; FAR 52.232-5 PAYMENTS UNDER FIXED-PRICE CONSTRUCTION CONTRACTS (APR 1989); and FAR 52.243-4 CHANGES (AUG 1987). (ASBCA No. 53000 Complaint, exh. A at T 04552, T 04572, T 04573)
3. The contract work included the installation of five 10,000 gallon underground fuel storage tanks that were contained in pre-cast concrete vaults (tr. 18). It is undisputed that, during performance, the vaults installed by appellant's subcontractor were found to be

cracking and leaking, and that respondent directed appellant to replace the vaults, delaying contract completion (tr. 36-37, 48).

4. The original contract completion date was in December 1997, but the project was not substantially completed until 30 October 1998 (R4, tab 16 at 1; tr. 61). Thereafter, by bilateral modification P00010 dated 2 July 1999, the parties agreed to adjust:

the final amount due and payable . . . to reflect assessment and collection of liquidated damages for failure to complete the work with [sic] the timeframe specified for completion.

The specified date for completion including all authorized extensions is 18 June 1998. Actual date of completion . . . has been calculated as 30 October 1998, which is 134 calendar days after the specified date for completion.

Late completion has been determined to have been within the control of the contractor. Therefore, under the authority of FAR 52.212-5 [sic], Liquidated Damage[s]-Construction, the Government hereby exercises entitlement to assess and collect liquidated damages as follows.

134 calendar days at the prescribed rate of \$600.00 per calendar day for delay damages totalling \$80,400.00.

As a result of this modification, the final amount due and payable . . . is downwardly adjusted by the sum of \$80,400.00 from \$1,169,862.98 to \$1,089,462.98.

(R4, tab 11 at 1-2) Eric Spink, the project manager, signed the modification for appellant (*id.* at 2; tr. 68, 73-74, 78, 161-62). It is undisputed that Mr. Spink had the authority to bind appellant (tr. 10).

5. By date of 13 September 1999, appellant submitted its final payment invoice for \$44,363.10 to the ROICC. (R4, tab 17 at 1) On the same date, Mr. Spink executed a standard release on behalf of appellant reciting that, in consideration of \$1,045,099.98 already paid, and of \$44,363.10 to be paid:

the undersigned Contractor does, and by receipt of said sum shall, for itself, its successors and assigns, remise, release and forever discharge the Government, its officers, agents, and employees, of and from all liabilities, obligations and claims whatsoever in law and in equity under or arising out of said contract.

(R4, tab 17 at 2) We find that neither party excepted any claim in any amount from the operation of the release (*id.*; tr. 70). Stephen Tyree, appellant's chief operating officer, executed the certificate attesting to Mr. Spink's authority to sign on behalf of appellant (R4, tab 17 at 2; tr. 82, 97-98).

6. Mr. Spink testified, and we find, that he did not sign either modification P00010 or the final payment release under mistake, or as the result of any false statement (tr. 74). When asked about duress, he denied that he was coerced or pressured by respondent (tr. 74-75). Mr. Spink was appellant's sole representative in the negotiations to close out the contract (tr. 62-63,96). Eric Nesbit, his counterpart representing respondent in those negotiations, testified that he knew of no mistake, false statements, duress or post-release consideration relating to either document (tr. 163-64).

7. Following execution of the final payment release, respondent made the final payment under the contract (R4, tabs 17 at 1, 18; *see* tr. 95).

8. By letter to the contracting officer dated 20 September 2000, appellant demanded release of the \$80,400 in liquidated damages. (Notice of appeal, exh. B) Subsequently, by letter to appellant's counsel dated 5 December 2000, the contracting officer declined to pay the withheld liquidated damages, stating that appellant's final "invoice has been paid and the contract is closed." The contracting officer added that "[t]his is not a final decision of the Contracting Officer because there is no longer a contract in place." (R4, tab 19 at 2) Thereafter, appellant brought this appeal, invoking our "deemed denied" jurisdiction under 41 U.S.C. § 605(c)(5).

DECISION

In seeking the remission of liquidated damages, appellant advances two broad arguments. First, appellant challenges enforcement of the LIQUIDATED DAMAGES clause (*see* finding 2). Appellant asserts that it "is disputing the validity, legality and punitive nature of the liquidated damages assessed," contending chiefly that respondent suffered no loss and that respondent contributed to the delay. (Appellant's Closing Brief at 5) Second, appellant urges that the final payment release is not a bar because appellant objected to the liquidated damages during closeout, was assured by Mr. Nesbit "of an avenue of relief (the instant appeal)," and executed the release under duress. (*Id.* at 6-7) By contrast, respondent stresses that appellant made no reference to any claim in the release, received final payment, and executed modification P00010 agreeing to the liquidated damages that it now seeks to recover. (Respondent's Brief at 8)

On the record before us, we cannot sustain the appeal. The threshold issue relates to the final payment release. As to this issue, the PAYMENTS clause in the contract (*see* finding 2) provided, in paragraph (h) that:

[t]he 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. . . .

FAR 52.232-5. Of similar import, the CHANGES clause (*see* finding 2) also provided that “[n]o proposal by the Contractor for an equitable adjustment shall be allowed if asserted after final payment is made under this contract.” FAR 52.243-4.

In *Mingus Constructors, Inc. v. United States*, 812 F.2d 1387, 1391 (Fed. Cir. 1987), our court of appeals construed a comparable Payments clause and reaffirmed that “final payment to the contractor by the government bars consideration of any claims for damages under the contract which are submitted subsequent to final payment except those specifically excepted.” The court recognized that, “[i]f there are no claims excepted on the release . . . , then the final payment will act as a bar to their subsequent submittal on the basis of the release signed by the contractor.” *Id.* We have held to the same effect. *E.g.*, *Pan-Alaska Construction, Inc.*, ASBCA No. 38525, 90-3 BCA ¶ 23,050.

Here, the work was completed and accepted and appellant presented its invoice (findings 4, 5). However, appellant failed to except any claim in any amount from the final payment release (finding 5). Respondent thereafter made final payment (finding 7). We have not found duress, fraud or mistake (finding 6) so as to bring the case within the “special and limited circumstances under which a claim can be considered despite the execution of a release.” *Mingus, supra*, 812 F.2d at 1395. And indeed, the release was preceded by a bilateral modification in which the parties agreed that the \$80,400 presently in dispute would be deducted from the final amount due to appellant (finding 4).

In view of our disposition of the release issue, we need not decide whether appellant has met its burden of proving the LIQUIDATED DAMAGES clause unenforceable under *DJ Manufacturing Corporation v. United States*, 86 F.3d 1130, 1133-34 (Fed. Cir. 1996).

CONCLUSION

The appeal is denied.

Dated: 22 June 2001

ALEXANDER YOUNGER
Administrative Judge
Armed Services Board
of Contract Appeals

I concur

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

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. 53167, Appeal of The Tyree Organization, Ltd., rendered in conformance with the Board's Charter.

Dated:

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