

ARMED SERVICES BOARD OF CONTRACT APPEALS

Appeal of -- )  
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Cape Romain Contractors, Inc. ) ASBCA No. 54187  
 )  
Under Contract No. DACW21-98-C-0019 )

APPEARANCE FOR THE APPELLANT: Stan Barnett, Esq.  
Smith, Bundy, Bybee & Barnett, P.C.  
Mount Pleasant, SC

APPEARANCES FOR THE GOVERNMENT: Thomas H. Gourlay, Jr., Esq.  
Engineer Chief Trial Attorney  
Henry Richmond, Esq.  
Engineer Trial Attorney  
U.S. Army Engineer District,  
Savannah

OPINION BY ADMINISTRATIVE JUDGE TODD  
ON THE GOVERNMENT'S MOTION FOR PARTIAL SUMMARY JUDGMENT

The government has filed a motion for partial summary judgment on the ground that one of the issues presented was settled by an accord and satisfaction between the parties. Appellant has filed its opposition with supporting documents and an affidavit in response to the government's memorandum in support of its motion. The appeal arises from a contracting officer's decision denying appellant's claim for compensation in the amount of \$272,553.27 including 94 days in standby costs and a 40-day extension in the time for contract performance.

STATEMENT OF FACTS

On 30 December 1997, Contract No. DACW21-98-C-0019 was awarded to appellant Cape Romain Contractors, Inc., for repairs and related services to the Lock, New Savannah River Bluff Lock and Dam, Georgia (R4, tab 4). Phase I work for submittals, inspections and preparations called for the work to be completed in 15 calendar days. Phase II repair work and related services called for the work to be completed in 45 calendar days. Section 02000, paragraph 2.1 in the contract specifications required the contractor to remove 22 trestles from storage, inspect them, and wire brush clean the welds for inspection by an AWS-certified inspector.\* (R4, tab 5 at 01501-2, 01501-3, and 02000-1)

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\* AWS refers to the American Welding Society (R4, tab 5 at 05101-2).

On 26 January 1998, the government issued the Phase I notice to proceed requiring completion on 9 February 1998, as stated by appellant (compl. and answer ¶ 4; R4, tab 2 at 3, tab 3 at 8).

On 30 January 1998, appellant notified the government that in performing its inspections of the trestles, it had discovered the presence of lead based paint. The presence of lead paint was a condition not indicated in the contract that required abatement. On 12 March 1998, appellant completed the additional repair work that was required. (R4, tabs 2, 3)

The project was delayed for several reasons, including the abatement of lead paint, late submittals, unusually severe weather, and unanticipated repairs (R4, tabs 2, 3). On 4 February 1998, the government recorded delays due to high water and rain (app. opposition (opp.), tab 1).

During the 94-day period 13 March 1998 to 15 June 1998, there were high water levels at the worksite resulting from unusually heavy rainfall and the government's operation and maintenance of a hydroelectric dam and powerhouse upstream of the project site. The government required appellant to suspend work for an indefinite period of time due to the unsafe conditions at the worksite. (Compl. and answer ¶¶ 23-26)

On 7 April 1998, appellant submitted a cost proposal regarding abatement of the lead paint in the amount of \$27,611.38. Appellant did not request a time extension or delay costs in this cost proposal. (R4, tab 9) Appellant stated in the proposal that it covered "all lead abatement, weld inspection, and . . . trestle repair performed to date" (*id.* at 1).

Appellant did not include an amount for delay damages in requesting payment of its actual costs for abatement of the lead paint because Mr. Anthony T. DuPre, Sr., appellant's president, was engaged in discussions with Mr. Earl Hothem, the authorized representative of the contracting officer, over all the delays being experienced allegedly due to government actions (DuPre affid., ¶ 12). On 14 April 1998, appellant sent its statement of the disputed delay time cost incurred as a result of the lead paint condition, dated 26 February 1998, with an offer of settlement (app. opp., tab 2).

The parties negotiated a contract adjustment of \$27,611 and no time extension in response to appellant's cost proposal, dated 7 April 1998 (R4, tab 7). Bilateral Modification No. P00001, dated 5 May 1998, was issued to increase the contract price by the amount of \$27,611. The modification made no changes to the contract time. (R4, tab 8) The modification provided:

It is further understood and agreed that this adjustment constitutes compensation in full on behalf of the contractor and its subcontractors and suppliers for all costs and markups directly or indirectly attributable to the change ordered, for all delays related thereto, and for the performance of the change within the time frame stated.

(*Id.* at 2)

By letter dated 15 June 1998, the government advised appellant with reference to its 14 April 1998 letter that its request for additional compensation associated with the lead paint was not justified. The letter stated:

[I]f you wish to pursue this matter you may do so as described under the dispute [sic] clause.

(App. opp., tab 3) The parties continued to consider the request in discussions of all of appellant's possible claims (*id.*, tabs 8, 9, 11).

On 4 June 2001, appellant submitted a certified claim in the amount of \$272,553 to the contracting officer for impact costs during the 94-day standby period and for a 40-day compensable delay due to the removal of lead paint and unanticipated repairs that the government required (R4, tab 3). Appellant has acknowledged that it was concurrently responsible for 13 days of delay in Phase I and claimed compensable delay for the remaining 18 days of delay during the period 9 February 1998 to 12 March 1998 due to the removal of lead paint (*id.* at 9; gov't memo at 3-4).

The contracting officer's final decision, dated 14 February 2003, denied appellant's claim for compensable Phase I delay associated with issues of lead paint on the grounds that the parties' bilateral modification resulted in an accord and satisfaction on all costs associated with the lead paint abatement after the government agreed to a cost proposal which did not include delay costs.

Appellant filed this timely appeal.

### DECISION

The government maintains that the portion of appellant's claim seeking 18 days of delay damages associated with the lead paint abatement in Phase I of the project is precluded by accord and satisfaction. Appellant points to facts in the contemporaneous documentation and an affidavit to show that appellant did not intend to abandon a claim for delay damages by its agreement to Modification No. P00001.

Summary judgment is appropriate where no material facts are 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). The burden is upon the moving party, but when it has supported its motion with evidence that would establish its right to judgment, the non-moving party must proffer countering evidence sufficient to create a genuine factual dispute. *Sweats Fashions, Inc. v. Pannill Knitting Co., Inc.*, 833 F.2d 1560, 1562-63 (Fed. Cir. 1987). In deciding a motion for summary judgment, we are not to resolve factual disputes, but ascertain whether material disputes of fact are present. *DynCorp*, ASBCA No. 49714, 97-2 BCA ¶ 29,233.

The government has the burden of proof to establish that the parties' agreement constitutes an accord and satisfaction that operates to bar one of the contractor's claims. The essential elements of accord and satisfaction are proper subject matter, competent parties, meeting of the minds of the parties, and consideration. To reach an accord and satisfaction there must be mutual agreement between the parties with the intention clearly stated and known to the contractor. *Mil-Spec Contractors, Inc. v. United States*, 835 F.2d 865 (Fed. Cir. 1987); *Woerner Engineering, Inc.*, ASBCA No. 52248, 03-1 BCA ¶ 32,196 at 159,139. Where the parties continue to consider the claim, their conduct indicates an intent that the parties never understood the agreement as an accord and satisfaction or release of the contractor's claim. *Community Heating & Plumbing Company, Inc. v. Kelso*, 987 F.2d 1575 (Fed. Cir. 1993); *Woerner Engineering, Inc.*, *supra*.

Appellant has provided the affidavit of Mr. DuPre who asserts that appellant intended to be compensated for its delay damages due to the lead paint as part of its compensation for all government-caused delays. This intention was known to the government prior to execution of Modification No. P00001 in May 1998. The parties' subsequent discussions of alleged government-caused delays included this request for compensation due to lead paint. Appellant has thus established a genuine issue of material fact with respect to whether the parties had the meeting of the minds that would be required to bar the claim.

The government's motion for partial summary judgment is denied.

Dated: 19 May 2004

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LISA ANDERSON TODD  
Administrative Judge  
Armed Services Board  
of Contract Appeals

I concur

I concur

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

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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. 54187, Appeal of Cape Romain Contractors, Inc., rendered in conformance with the Board's Charter.

Dated:

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DAVID V. HOUBE  
Acting Recorder, Armed Services  
Board of Contract Appeals