

ARMED SERVICES BOARD OF CONTRACT APPEALS

Appeal of --)
)
Wescorp, Inc.) ASBCA No. 54256
)
Under Contract No. NAFF21-02-C-0001)

APPEARANCE FOR THE APPELLANT: Larry W. Buquoi, Esq.
Prairieville, LA

APPEARANCES FOR THE GOVERNMENT: Thomas H. Gourlay, Jr., Esq.
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OPINION BY ADMINISTRATIVE JUDGE PARK-CONROY ON THE
GOVERNMENT’S MOTION FOR SUMMARY JUDGMENT

The government moves for summary judgment on appellant’s delay claim seeking \$140,971 and a contract time extension of 112 days, asserting that the claim was resolved by bilateral modification and, therefore, is barred by accord and satisfaction. Appellant has filed an opposition. We grant the government’s motion, in part.

FINDINGS OF FACT FOR PURPOSES OF THE MOTION

Contract No. NAFF21-02-C-0001 in the amount of \$1,938,880.00 for the construction of a golf course clubhouse and upgrades to an equipment storage facility at Pope Air Force Base, NC, was awarded to appellant Wescorp, Inc. (Wescorp) on 19 November 2001. It was a non-appropriated fund (NAF) project. (R4, tab 4) Wescorp acknowledged receipt of the government’s notice to proceed (NTP) on 16 January 2002 (R4, tab 6). Wescorp was to commence work within 5 calendar days of receipt of the NTP and complete performance not later than 270 calendar days after receipt of the NTP, or by 14 October 2002 (R4, tab 4, § H-1(a)).

The specifications provided that the government was to remove existing trees on the project site “prior to Contractor[’s] commencement of work” (R4, tab 4, § 01500, ¶ 1.15.3.2). The government did not remove trees from the project site until 16 February 2002, 31 days late (gov’t mot. at 2, n.1).

The government did not provide to appellant updated contract plans as required by the contract specifications until 18 March 2002, 61 days late (R4, tab 2 at 2, ¶ 6, tab 4, § 01780, ¶ 1.3.1.1). Wescorp delayed the start of work until it received the updated documents (compl., ¶ 1.c.). The parties agree that the delay resulting from the government's failure to timely remove the trees was concurrent with the delay resulting from the government's untimely delivery of the updated contract documents (compl., answer, ¶ 1.b.).

The affidavit of Ms. Jeanette Crowe, a Wescorp employee who is aware of its daily business transactions and was involved with this construction project, states in part:

To the best of my knowledge, Wescorp, Inc. never received the final compact disc containing the construction documents and specifications and were [sic] told that the compact disc delivered to Wescorp, Inc. on March 18, 2002 was not to be used and that a new final compact disc would be deliver [sic] o [sic] us, but one was never was [sic] provided.

(App. br., Crowe aff., ¶ 4)

In a letter to the government dated 13 March 2002, Mr. Robert J. Stein, Wescorp's project superintendent, submitted a request for information (RFI-001) regarding the structural steel drawings. Mr. Stein requested that the questions "be answered as soon as possible." The date stamp on this letter indicates it was received by the government on 15 March 2002. (R4, tab 9) By letter dated 11 April 2002, Mr. Stein submitted another RFI, with questions almost identical to the 13 March 2002 RFI (R4, tab 10). On 2 May 2002, the government responded to Wescorp's 11 April 2002 RFI (R4, tab 12). By letter dated 10 May 2002, Wescorp complained that it had been delayed due to the failure of the government to timely provide updated drawings and to timely respond to its RFI (R4, tab 14). Wescorp submitted another RFI, labeled RFI No. C01050-001-A, on 17 May 2002 (R4, tab 15). On 7 June 2002, the government provided documentation to appellant and noted that all of its RFIs had been answered (R4, tab 17).

By letter dated 20 June 2002, Wescorp submitted a request for a 53-calendar day adjustment to the contract duration and \$28,618 for delay due to the alleged untimely response to its RFI. The claim states in part:

Discrepancies in drawings prompted us to submit RFI number 1 for clarification on 3/13/02 Numerous notices were issued advising the CORPS that if the RFI was not answered in a timely manner delays in the structural steel fabrication were to be experienced An acceptable response was not

received from the CORPS until 6/7/02 which exceeded the contractual obligation for such by 53 calendar days. Claim is hereby made for cost reimbursement and additional contract days as a result of the extended technical time required to answer the RFI.

(R4, tabs 18-A, -B)

On 16 July 2002, the contracting officer denied Wescorp's request, finding that Wescorp was fully responsible for the delay (R4, tab 19). Thereafter, the government reevaluated its position and, on 13 August 2002, Mr. Daniel H. Davis, the resident engineer, prepared a prenegotiation objectives memorandum. The government's position was that the claimed delay was the product of multiple concurrent actions by both the government and Wescorp, and that only a time extension to the contract was warranted. The memorandum cites delays due to the government's response to RFI-001 and late provision of contract documents. (R4, tab 21) Negotiations between the government and Wescorp were held the same day at Pope Air Force Base. Mr. Davis and Mr. Larry Ford, a construction representative, participated on behalf of the government and Mr. Stein and Mr. Alan Crowe, Wescorp's president, represented Wescorp. The parties agreed to a no-cost contract modification that extended the contract performance period 35 days. The price negotiation memorandum states in pertinent part:

The Contractor experienced delays in his critical path activities due to excessive response time by the Government on Request for Information (RFI) # 001; and delays in the delivery of additional copies of contract documents. These delays negatively impacted the contractor's schedule and the ability to meet the contractual time requirements.

(R4, tab 22-A, ¶ 1.b.) There is no evidence the parties agreed that further claims would be precluded during the negotiations. Nor is there any evidence that the parties discussed the government's untimely removal of trees or resultant delays to subcontractor site work.

Wescorp acknowledged the agreement and the 35-day time extension in two letters to Mr. Davis. In a 13 August 2002 letter, Mr. Crowe stated: "Wescorp accepts your time extension of 35 days . . . due to the late delivery of contract documents" (R4, tab 22-B). Following a telephone conversation with Mr. Davis, Wescorp provided another letter, dated 14 August 2002, stating: "Wescorp accepts your time extension of 35 days . . . to be added at the end of the contract period, . . . due to the late delivery of contract documents, and delay in reply to RFI-001. This time extension is at no additional cost to the government." (R4, tab 22-C)

On 27 August 2002, the parties executed bilateral contract Modification No. P00003, citing FAR 52.243-4, CHANGES (AUG 1987) and extending the contract performance period by 35 days (R4, tab 22-D). The designation as Modification No. P00003 was in error and was corrected to Modification No. P00001 (R4, tab 4). The Changes clause set forth in the contract, I-4, CHANGES CONSTRUCTION (APRIL 1987), is identical to the FAR Changes clause cited in the modification, except that it refers to “NAFI,” instead of the “Government” (R4, tab 4). Mr. Stein signed the modification on behalf of Wescorp as “ATTORNEY IN FACT.” The modification’s “SCOPE OF WORK” section states that it is to “[p]rovide an equitable adjustment in the contract time by increasing the contract time 35 days in compensation for delays associated with the Government’s response to Request for Information #1 dated 11 April 2002.” The “CLOSING STATEMENT” provides:

It is understood and agreed that pursuant to the above, the contract time is extended the number of calendar days stated, and the contract price is unchanged by this Modification, which reflects all credits due the Government and all debits due the Contractor. 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 for the change ordered, for all delays related thereto, for all extended overhead costs, and for performance of the change within the time frame stated.

(R4, tabs 4, 22-D)

By letter dated 23 January 2003, Wescorp submitted a certified claim for 112 days and \$140,971. It alleged a 62-day delay for a constructive suspension of work due to the government’s failure to provide a revised set of drawings reflecting all bid amendments until 18 March 2002. The claim also requested 31 days of concurrent delay for the government’s failure to remove trees from the project site until 31 days after the issuance of the NTP. Additionally, Wescorp claimed the 62 days of government delay affected critical activities because it forced the site work subcontractor to schedule other work ahead of this project, resulting in manpower shortages that made it impossible for Wescorp to complete the site work in the scheduled amount of time. It alleged that it took 80 days for the subcontractor to complete work that had been scheduled to take 30 days, resulting in a 50-day delay. (R4, tab 3)

By final decision dated 30 May 2003, the government denied Wescorp’s claim in its entirety on the basis of bilateral Modification No. P00001, which the contracting

officer determined resolved all delays asserted in appellant's claim (R4, tab 2). Wescorp timely appealed to this Board (R4, tab 1).

DISCUSSION

Summary judgment is appropriate when there is no genuine issue of material fact and the movant is entitled to judgment as a matter of law. *Mingus Constructors, Inc. v. United States*, 812 F.2d 1387, 1390 (Fed. Cir. 1987). A material fact is one which may affect the outcome of the case. *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 248 (1986). We must draw all inferences in favor of the party opposing summary judgment. *Hughes Aircraft Co.*, ASBCA No. 30144, 90-2 BCA ¶ 22,847 at 114,759. However, the opposing party must demonstrate that there is an evidentiary conflict on the record; mere denials are not sufficient. *Mingus*, 812 F.2d at 1390.

The government's motion for summary judgment asserts that appellant's claims are barred by Modification No. P00001, which constitutes an accord and satisfaction. The government has the burden of proof. "An accord and satisfaction requires a meeting of the minds of the parties, or mutual agreement in satisfaction of a claim which is a *bona fide* dispute." *Wright Associates, Inc.*, ASBCA No. 33721, 87-3 BCA ¶ 20,056 at 101,535. "To reach an accord and satisfaction there must be mutual agreement between the parties with the intention clearly stated and known to the contractor." *Metric Constructors, Inc.*, ASBCA No. 46279, 94-1 BCA ¶ 26,532 at 132,058.

The government contends that, even though Modification No. P00001 only cites delays associated with its late response to Wescorp's RFI, both parties understood that the modification released all existing delay claims. The motion is not supported by affidavits. The government interprets Modification No. P00001 as resolving any liability for delays related to its failure to timely respond to the RFI, provide contract documents, and remove trees. In further support of its argument, the government points to contemporaneous documents relating to the 13 August 2002 negotiation meeting and appellant's follow-up letters as evidence of the parties' understanding as to the full scope of the modification. As the government asserts, parole evidence may be considered where the language of a modification is not a clear indicator of the parties' agreement. It is settled that "we are not precluded from considering evidence of prior or contemporaneous agreements and negotiations or other relevant evidence concerning dealings and understandings between the parties" to determine the full scope of a bilateral modification. *Triple "A" South*, ASBCA No. 35824, 90-1 BCA ¶ 22,567 at 113,253, *citing* RESTATEMENT (SECOND) OF CONTRACTS § 214(a) (1981).

We first consider that part of appellant's delay claim that relates to the government's failure to timely provide a revised set of contract documents. While Modification No. P00001 does not specifically identify this delay, the contemporaneous

documents, including the government's price negotiation memorandum and appellant's 13 and 14 August 2002 follow-up letters, make clear that the time extension was due to the late delivery of the contract documents. Appellant, in its opposition to the government's motion for summary judgment and, based upon the attached affidavit from Ms. Crowe, argues that the contract documents received by appellant on 18 March 2002 were defective and that it never received the final compact disc containing the final specifications and plans. According to appellant, this somehow changed the mutual agreement reflected in bilateral Modification No. P00001 dated 27 August 2002. Ms. Crowe's statement, however, does not raise a genuine issue of material fact. The 18 March 2002 compact disc was received by appellant long before Modification No. P00001 was executed and there is no evidence of prior objections relating to its contents.

We are satisfied that the delay in delivery of the contract documents was fully considered by the parties during negotiations and that appellant understood that the 35-day time extension was granted, at least in part, because of this delay. Accordingly, the portion of appellant's 23 January 2003 claim related to late delivery of contract documents is barred by accord and satisfaction.

We next consider whether appellant's delay claim for the government's late removal of trees is barred by Modification No. P00001. Although the parties did not raise the issue of delay related to late tree removal during negotiations, they agree that this delay was concurrent with the delay resulting from the government's late delivery of revised contract documents. It is, therefore, subsumed within and resolved by the 35-day adjustment granted by the modification. While perhaps not barred by accord and satisfaction, the government is entitled to judgment as a matter of law on this element of the claim. *See Insulation Specialties, Inc.*, ASBCA No. 52090, 03-2 BCA ¶ 32,361 at 160,102, 105.

Finally, appellant's claim also includes a request for 50 days and costs for delays to subcontractor work resulting from the delayed start of the project. The government has the burden of proof to establish that the parties' agreement constitutes an accord and satisfaction barring this portion of appellant's claim. *Cape Romain Contractors, Inc.*, ASBCA No. 54187, 04-2 BCA ¶ 32,645 at 161,521. Nevertheless, the government's motion does not assert that this aspect of appellant's claim is barred by Modification No. P00001. Furthermore, apart from the general language contained in the CLOSING STATEMENT, the record presently before us does not indicate whether this delay was considered by the parties and we are unable to discern whether the subcontractor delays were "directly or indirectly attributable for the change ordered." *See, e.g., Chantilly Construction Corp.*, ASBCA No. 24138, 81-1 BCA ¶ 14,863 at 73,392. In addition, it is not clear whether the delay to the subcontractor's work was a concurrent delay such as the delay caused by late tree removal and was therefore subsumed and resolved by the

modification. Accordingly, this segment of appellant's claim is not amenable to summary disposition. See *Hercules Construction Corporation*, ASBCA No. 51296, 99-2 BCA ¶ 30,406 at 150,326.

CONCLUSION

The government's motion for summary judgment as to appellant's claim for compensation related to delays in receiving contract documents and late tree removal is granted. The motion is denied as to the claimed delay to subcontractor work.

Dated: 17 December 2004

CAROL N. PARK-CONROY
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

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. 54256, Appeal of Wescorp, Inc., rendered in conformance with the Board's Charter.

Dated:

CATHERINE A. STANTON
Recorder, Armed Services
Board of Contract Appeals