

ARMED SERVICES BOARD OF CONTRACT APPEALS

Appeal of --)
)
Sundt Construction, Inc.) ASBCA No. 56293
)
Under Contract No. F41622-02-D-0001)

APPEARANCES FOR THE APPELLANT: Dorothy E. Terrell, Esq.
Kathryn T. Muldoon, Esq.
Smith Pachter McWhorter PLC
Vienna, VA

APPEARANCES FOR THE GOVERNMENT: Richard L. Hanson, Esq.
Air Force Chief Trial Attorney
Maj LaChandra C. Richardson, USAF
Trial Attorney

OPINION BY ADMINISTRATIVE JUDGE WILSON
ON THE GOVERNMENT'S MOTION TO DISMISS

This appeal involves a contract for design and construction services and the denial of a contractor claim. The government has moved to dismiss the appeal. For the reasons stated below, the motion is denied.

STATEMENT OF FACTS FOR PURPOSES OF THE MOTION

1. The government awarded Contract No. F41622-02-D-0001 to Sundt Construction, Inc. (Sundt or appellant) on 4 February 2002. Under the contract, appellant was to provide design and construction services for military family housing at various locations. (R4, tab 1)

2. On 30 September 2003, the government issued Task Order TG09 to appellant to perform construction services at McDill Air Force Base in Florida (R4, tab 2). Specifically, appellant was to construct and furnish new family housing units at McDill (R4, tab 4).

3. Appellant performed work under Task Order TG09 in 2004 and 2005 (am. compl. and answer ¶¶ 13, 14). The government accepted the final housing units for beneficial occupancy in October 2005 (*id.* ¶ 18).

4. The parties met in 2005 and 2006 to discuss appellant's potential requests for equitable adjustment to the contract price, as well as contract close-out issues, and

appellant's performance rating (*id.* ¶ 21). A subsequent meeting between the parties was held on 28 February 2006 to discuss actions required to close out the subject contract. A memorandum for the record (MFR) dated 28 February 2006 was prepared by the government to reflect what transpired at the meeting. The MFR stated in pertinent part:

a. Request for Equitable Adjustments/Liquidated Damages:

Request for equitable adjustment and liquidated damages were agree [sic] upon by Helen Bond from contracting and Ron Brown from Sundt to be dissolved [sic] based upon a satisfactory performance rating assessment.

....

d. Contractor Performance Rating: CE [Civil Engineering] is going to complete their assessment and have it to contracting by 3 Mar 06. Contracting will notify Sundt on 3 Mar 06 of what performance rating they should expect.

....

4. CONCLUSIONS/RESPONSIBILITIES:

The government is going to complete the remaining inspection by 10 Mar 06 and get the missing verification punch list to Sundts [sic]. CE will provide their input to Sundts [sic] performance rating by Friday 3 Mar 06 and contracting will in turn notify Sundt of what their final rating will be. Sundt will complete all punch lists [sic] items possible by 17 Mar 06 with the exception of items needing further clarification/resolution.

(R4, tab 20) The MFR was signed by the government's contract administrator and contracting officer (*id.*).

5. In mid-March 2006, the government replaced its contracting officer (am. compl. and answer ¶ 43). Based on the record, at least until 28 March 2006 the parties were working towards contract completion and close-out. In an e-mail to appellant, the government states: "we are making good progress on our way to close-out" (R4, tab 21). However, by letter dated 27 April 2006, the government advised appellant regarding its concern that appellant may not be able to successfully complete the requirements under the contract. Specifically, the government noted difficulties with "warranty support and the length of time it's taken to complete 'punch list' items." (R4, tab 22)

6. Appellant responded to the government's 27 April letter, expressing concern that the government "interpreted the contract requirements in a way that they cannot be complied with" (R4, tab 23). Appellant stated, *inter alia*:

In an effort to be supportive to the program and the client, Sundt decided to work through the issues rather than file a claim for contract violations. Now, after months of trying to satisfy the government inspectors and their on going punch list and reviews, we are being told that it is Sundt's fault? Sundt rejects that position and would point out that Sundt was prepared to submit a \$300,000 REA to cover this cost and change to the contract. This was not done in exchange for an agreed upon work out time for the final items and walk down of list, as well as a favorable final evaluation consideration and elimination of liquidated damages. This was confirmed in writing from the former Contracting Officer. Should Sundt now assume this position has changed by the Government and the new Contracting officer? If so, Sundt reserves its rights to reevaluate all agreements reached on February 28th of this year when the face-to-face meetings occurred.

(*Id.*)

7. By letter dated 22 May 2006, appellant informed the government:

All issues are closed or awaiting on reverification or as agreed in the February 28th meeting all issues that are not complete, Sundt agrees that these items are to become warranty issues, with the exception of the swale, the five items marked Dispute A and the sixteen items marked Dispute B.

(R4, tab 24)

8. The government advised appellant via letter dated 12 July 2006 that it had concluded that appellant was "unwilling to successfully complete certain requirements under [the] subject contract." As a result, the government was considering terminating the remaining portions of the contract for default. Appellant was provided the opportunity to present any additional facts or remedies germane to the government's assessment. Finally, the letter advised that appellant's "failure to satisfactorily address these issues may negatively effect [sic] your performance evaluation." (R4, tab 25)

9. Appellant responded by letter dated 14 July 2006, reiterating its position as follows:

Sundt believes that we have complied with the agreement reached between the government and Sundt's Senior Vice President, Mr. Ron Brown in the meeting held on February 28th, 2006 at your facilities at MacDill AFB. In summary, from that meeting, Sundt would complete all items identified to date and/or agree that some minor items would be listed as warranty issues and signed off as access to units was granted.

(R4, tab 26) Appellant requested a meeting with the parties be held to discuss the 28 February agreement and the current actions taken by the contracting officer (*id.*).

10. There is no evidence in the record that establishes whether a meeting was held, however by letter dated 21 December 2006, appellant filed eight monetary claims with the contracting officer (R4, tab 32). These claims were denied by the contracting officer on 2 April 2007 (*id.* at 32). Appellant appealed seven of these claims in July 2007 and the Board docketed these appeals as ASBCA Nos. 56087-56093. Proceedings in these appeals have been stayed pending resolution of the government's motion in the instant appeal.

11. The record also contains an unsigned "Determination and Finding (Sundt's Performance Rating)" dated 7 March 2007 which states:

1. INTRODUCTORY SUMMARY:

Previous memo dated 14 March 2006 addressed the proposed performance rating for Sundt construction. At that time the Contracting officer and administrator both agreed the performance rating should be Satisfactory. However, the Civil Engineering Squadron provided the attached DD2626 giving Sundt a Marginal performance rating...

(R4, tab 27) On 24 July 2007, the government issued, in draft form, a "Marginal" final rating for appellant's performance under the subject contract (R4, tab 28).¹

12. Appellant submitted a claim dated 12 November 2007, asking that the contracting officer recognize "the agreement between Sundt and the Government made on February 28, 2006." Appellant further requested "in recognition of that agreement,...a CO

¹ The record does not reflect appellant's final rating, however the government stated in its motion that the government has agreed not to finalize the rating until litigation regarding this matter was resolved (gov't mot. at 3).

Final Decision correcting Sundt's overall final performance rating to Satisfactory.”
(R4, tab 29)

13. The contracting officer denied the claim on 3 January 2008 using the rationale that the 28 February MFR did not constitute an agreement (R4, tab 31).

14. This appeal was timely filed with the Board on 17 January 2008. Following submission of the initial pleadings, the Board requested, *sua sponte*, the parties' views on whether we had jurisdiction in light of decisions such as *TLT Construction Corp.*, ASBCA No. 53769, 02-2 BCA ¶ 31,969, which held that we lacked jurisdiction to entertain appeals from a contractor's unsatisfactory performance rating. In response to the Board's request, the government moved to dismiss the instant appeal.

15. As part of its response to the Board's inquiry on jurisdiction, appellant filed an amended complaint and changed its prayer of relief so that it now requests that the Board “determine and declare that the Government's utilization of a performance rating other than satisfactory violates the terms of the February 28, 2006 Agreement” (am. compl. ¶ 54).²

16. After both parties filed briefs on the motion, on 27 October 2008, appellant supplemented its opposition by providing an affidavit from Helen J. Bond, the contracting officer at the time of the 26 February 2006 meeting. The affidavit states as follows:

5. I attended the February 28, 2006 meeting in my position as Contracting officer for the government.

6. During the meeting, Mr. Brown and I reached an agreement on behalf of our respective organizations. Mr. Brown and I agreed that Sundt would forgo its claims for equitable adjustment and, in exchange, the government would not assess [l]iquidated damages and Sundt would receive a satisfactory performance rating for the project after completion of punch list and warranty items upon timely completion.

² Paragraph 9 of the amended complaint, which refers to the Board's jurisdiction to hear this appeal, was denied by the government's amended answer. Appellant has moved to strike paragraph 9 of the amended answer arguing that it does not respond to the claims as set forth in the amended complaint and is not in compliance with Board Rule 6(b). We disagree with this assertion, however based on the decision in this matter, we conclude that the Board does have jurisdiction to hear the appeal. Accordingly, paragraph 9 of the government's amended answer is stricken.

The government responded, by letter dated 7 November 2008, contending that the official contract files do not contain any evidence of a prior agreement between the parties and questioned whether such an agreement was within Ms. Bond's authority and discretion. Finally, the government argues that Sundt did not satisfactorily complete the punch list and warranty items, and final project acceptance for all work did not occur until 4 August 2006, more than one year after the required contract completion date. Moreover, the government contends, the successor contracting officer experienced continuing ongoing issues with the punch list and warranty items, several of which were not closed until 2007. Ultimately, the government concludes, the decision to assign a marginal rating rested with the successor contracting officer, and not Ms. Bond. As such, the government proffers, it was not an abuse of discretion or violation of the terms of the alleged settlement agreement to give appellant a rating other than satisfactory.

DECISION

The Board has consistently ruled that we lack jurisdiction to decide appeals from unsatisfactory performance ratings where contract terms are not in issue. *See, e.g., TLT Construction Corp.*, ASBCA No. 53769, 02-2 BCA ¶ 31,969; *CardioMetrix*, ASBCA No. 50897, 97-2 BCA ¶ 29,319; *G. Bliudzius Contractors, Inc.*, ASBCA No. 42365, 92-1 BCA ¶ 24,605; *Konoike Construction Co.*, ASBCA No. 40910, 91-3 BCA ¶ 24,170; *cf. Todd Constructin, L.P. v. United States*, 85 Fed. Cl. 34 (2008) (court concluded it had CDA jurisdiction of a claim relating to a performance evaluation and requested further briefing on the nature and scope of the relief available). However, we have held that we have jurisdiction to determine the rights and obligations of the parties under disputed terms of a contract, which includes contract modifications and settlement agreements. *Coast Canvas Products II Co.*, ASBCA No. 31699, 87-1 BCA ¶ 19,678.

In the *Coast Canvas* decision, we held that the Board had jurisdiction to determine whether the terms of a settlement agreement barred a subsequently issued adverse performance evaluation by the contracting officer. The parties in that matter had reached a settlement agreement under a prior appeal that included very broad release language regarding performance delay. The government later rated appellant's performance as unsatisfactory because its delivery was 18 months late with only two months being caused by government delays. Appellant subsequently filed a claim for a *de minimus* amount of interest, due to a mistake in calculating the commencement and the termination dates, and amendment of its performance rating. The contracting officer denied the claim (although the government later conditionally awarded appellant \$150 in additional interest), and appellant appealed to the Board contending, *inter alia*, that the performance history rating was in violation of the settlement agreement reached in the prior appeal. The government contended that we lacked jurisdiction to provide injunctive relief by ordering the contracting officer to amend the performance rating. (*Id.* at 99,609) We held that the Board does have jurisdiction to determine the rights and obligations of the parties under the disputed terms of a contract, which includes modifications. (*Id.*)

In this case, which is similar to the facts in *Coast Canvas*, the government contends that because no settlement agreement ever came into existence, there are no terms of an agreement to be enforced (gov't mot. at 5-6). We disagree. The contracting officer affidavit provided by appellant is persuasive enough to establish that some type of agreement was reached. Appellant's claim asks for recognition of the agreement under the contract. Accordingly, we have jurisdiction to determine the rights and obligations of the parties under disputed terms of a contract. *Id.*, citing *McDonnell Douglas Corp.*, ASBCA No. 26747, 83-1 BCA ¶ 16,377, *aff'd in part and rev'd in part on other grounds*, 754 F.2d 365 (Fed. Cir. 1985).

CONCLUSION

For the reasons stated above, the government's motion is denied. Additionally, paragraph 9 of the government's amended answer is hereby stricken.

Dated: 23 February 2009

OWEN C. WILSON
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. 56293, Appeal of Sundt Construction, Inc., rendered in conformance with the Board's Charter.

Dated:

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