

ARMED SERVICES BOARD OF CONTRACT APPEALS

Appeal of --)
)
Fireman's Fund Insurance Company) ASBCA No. 50657
)
Under Contract No. N62472-90-D-0037)

APPEARANCE FOR THE APPELLANT: Vincent J. Zichello, Esq.
Zichello & McIntyre, L.L.P.
New York, NY

APPEARANCES FOR THE GOVERNMENT: Arthur H. Hildebrandt, Esq.
Navy Chief Trial Attorney
Chuck Kullberg, Esq.
Senior Trial Attorney

OPINION BY ADMINISTRATIVE JUDGE JAMES
ON APPELLANT'S MOTION FOR RECONSIDERATION

On 22 March 2000 appellant timely moved for reconsideration of the Board's 28 February 2000 decision granting respondent's motion to dismiss certain portions of the claim for lack of jurisdiction and denying appellant's motion to strike. Appellant argues that it seeks remission of \$151,600 in liquidated damages assessed in Modification No. P00008* on the ground that the delays – some of which occurred before the takeover agreement – upon which liquidated damages were assessed “were at least excusable,” which proposition the contracting officer (CO) understood in his final decision. Fireman's disagrees with the following sentence in the penultimate paragraph of our 28 February 2000 decision:

Fireman's claims an equitable adjustment in excess of the contract price for additional costs allegedly incurred by Summit under the defaulted contract.

According to Fireman's, it seeks no “additional costs allegedly incurred by Summit,” but rather recovery of so much of the original contract balance as corresponds to claims I-A (Government delays in reviewing Summit's submittals 1-15) and III (pile driving delay).

* Mr. Zichello states that the Rule 4 file lacks page 2 of Modification No. P00008, which page it submitted with its motion. Mr. Zichello is mistaken. Page two of modification No. P00008 is in the Rule 4 file. From that page the Board identified the dates for which liquidated damages were assessed. See SOF ¶ 6, last sentence.

The Government's 7 April 2000 response to the motion contends that Fireman's claim was silent with respect to, and the CO's final decision did not address, remission of \$151,600 in liquidated damages; a surety's right to appeal an assessment of liquidated damages on behalf of a defaulted contractor exists only when the takeover agreement so provides; Fireman's takeover agreement did not so provide; and so the Board lacks jurisdiction over liquidated damages for Summit's delays prior to the 17 April 1990 takeover agreement.

Appellant's 13 April 2000 reply argues that Fireman's claim explicitly requested "remission" of liquidated damages; the CO's final decision denied such claim; Modification No. P00008 assessed liquidated damages against Fireman's, not Summit; and so only Fireman's has standing to seek remission of those liquidated damages.

The defaulted contract, N62472-88-C-0026 (Contract 26), was between Summit General Contracting Corp. (Summit) and respondent. The 17 April 1990 takeover agreement between Fireman's and respondent, designated Contract No. N62472-90-C-0037 (Contract 37), provided in pertinent part:

1. The Surety will perform . . . all work and other obligations of the defaulted contract not presently completed or fulfilled, including the correction and repair of all defective workmanship. The provisions and clauses of the defaulted contract . . . are incorporated into this Agreement.

. . . .

3. The Surety agrees to . . . complete the work by August 15, 1990 in accordance with the terms and conditions of the defaulted contract This shall not affect any liability of defaulted contractor or of the Surety for liquidated damages computed from the completion date of the defaulted contract.

(R4, tab 15)

Unilateral Modification No. P00008 assessed liquidated damages against Fireman's under Contract No. N62472-90-C-0037 for the periods of 9 December 1989 to 15 August 1990 and 3 November 1990 to 13 March 1991 (R4, tab 2). Fireman's 9 October 1995 claim based the monetary amounts for the delays alleged in claims I-III "upon the contractually stipulated liquidated damages assessment rate of \$400.00/day," but did not expressly seek "remission" of liquidated damages (R4, tab 31 at 10, 14, 18). The CO's 17 December 1996 final decision denied the first three of Fireman's 9 October 1995 claims, commenting that they corresponded to "release of liquidated damages assessed at the rate of \$400/day" (R4, tab 32).

The first 128 days for which the CO assessed liquidated damages were from 9 December 1989 to 16 April 1990 due to Summit's alleged delays under contract 26. Of the 15 Government reviews of Summit submittals in claim I-A, the first 13 were from May to November 1989, *before* the period of assessed liquidated damages. Only the 29 alleged delay days in February-March 1990 for the 14th and 15th Summit submittal reviews coincided with the period of assessed liquidated damages. (R4, tab 31 at 5-6) The claim III alleged pile driving delays were from 17 April to 16 May 1989 (R4, tab 31 at 18), all *before* the period for which liquidated damages were assessed.

We are not persuaded that Fireman's choice of the \$400/day liquidated damages rate to quantify Claims I and III, and the coincidence of 29 of the alleged delay days in its claim I with the period for which the CO assessed liquidated damages, made Fireman's claims I and III "claims for release or remission of liquidated damages" under contract 37, rather than delay claims of Summit under contract 26. The CO's statement in the final decision that Fireman's claims corresponded to "release of liquidated damages assessed at the rate of \$400/day" and his liquidated damages assessment against Fireman's in unilateral Modification P00008 are entitled to no deference or presumption of correctness by the ASBCA. *See Wilner v. United States*, 24 F.3d 1397, 1401 (Fed. Cir. 1994).

Nor are we persuaded that Fireman's seeks to recover that portion of the unexpended contract balance as corresponds to 29 days of assessed liquidated damages. The term "unexpended contract balance" means all contract funds retained by the Government "*less liquidated damages*" (emphasis added). *See Home Insurance Co.*, ASBCA No. 22898, 81-1 BCA ¶ 14,884 at 73,637-38.

We deny the motion for reconsideration.

Dated: 2 May 2000

DAVID W. JAMES, 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

CARROLL C. DICUS, JR.
Administrative Judge
Acting 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. 50657, Appeal of Fireman's Fund Insurance Company, rendered in conformance with the Board's Charter.

Dated:

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