

ARMED SERVICES BOARD OF CONTRACT APPEALS

Appeal of --)
)
Jimenez, Inc.) ASBCA No. 52825
)
Under Contract No. F08651-96-C-0144)

APPEARANCE FOR THE APPELLANT: Terrance R. Ketchel, Esq.
Fort Walton Beach, FL

APPEARANCES FOR THE GOVERNMENT: COL Alexander W. Purdue, USAF
Chief Trial Attorney
Michael D. McGrath, Esq.
Trial Attorney

OPINION BY ADMINISTRATIVE JUDGE KIENLEN
UNDER RULES 11 AND 12.3

The appellant seeks additional time and money arising from the need for and the installation of zee flashing. The Government contends that the zee flashing was part of the original contract requirements, and pleads the affirmative defense of accord and satisfaction. The appellant elected accelerated procedures under Rule 12.3. Both parties agreed to a decision on the written record under Rule 11. They have submitted affidavits and briefs. We find that there was an accord and satisfaction.

FINDINGS OF FACT

On 19 August 1996, the Air Force issued an invitation for bids to renovate building 1208 at Eglin Air Force Base, Florida. The contract was awarded to Jimenez, Inc., on 27 September 1996 in the amount of \$936,245. (R4, tab 1) The appellant's material submittal reflected that its Carlisle wall panels met the 1½ inch thickness requirement of paragraph 5c of section 07413 of the specifications (R4, tab 5). This submittal included a drawing entitled "Closure Detail at Rake and Eave," which showed only a tight foam closure between the wall panels and the fascia. On 18 April 1997, the Government approved the submittal without comment. (R4, tab 6; Govt. supp. R4, tab G-2, ¶ 7)

By letter of 11 June 1997, Jimenez notified the Government that the design shown on the contract drawings with respect to the wall panel failed to show a difference of 2 inches between the thickness of the existing wall panels and the 1½ inch thick wall panels required and approved for the project. Because of this difference in wall thickness, the existing fascia would not reattach to the new wall panels without modification. (Fascia is the horizontal piece covering the joint between the top of a wall and the projecting eaves.)

Jimenez asked for direction on “how to correct this design problem concerning closure of the fascia to the new panels and [to] forward a request for proposal for same.” (R4, tab 7)

By letter of 11 July 1997, Jimenez notified the Government of a counter flashing problem, requested a detailed drawing of the counter flashing the Government wanted, and requested a modification for all costs incurred for this change. In the alternative, Jimenez suggested that the Government provide “all needed counter flashing and fasteners to complete this work and Jimenez will install this flashing instead of the flashing provided for this phase of work at no cost to the Government.” (R4, tab 9)

By letter dated 24 July 1997, the Government responded to the wall panel closure issue -- the space between the wall panels and the fascia noted in appellant’s 11 June 1997 letter -- as well as the counter flashing problem detailed in appellant’s 11 July 1997 letter. In regards to the wall panel closure issue, the Government stated in relevant part:

. . . . Contract Drawing A-12 eave detail shows a flashing detail to bridge and transition from the metal siding panel to the existing fascia panel. There are no dimensions shown and the system that the details are designed around is Smith Steelite. . . . Apparently, the Contractor did not verify the design conditions compared to his manufacturer’s product to ensure the proper size of the flashing requirement. . . . Based on your request, a detail is provided through Addendum No. 5 describing the acceptable requested design of this area. It is recommended that you field verify dimensions prior to fabrication of the flashing.

(R4, tab 11, ¶ 2) The Government’s design showed the use of zee flashing between the wall panels and the fascia. In regards to the counter flashing issue, the Government stated in relevant part:

. . . . Addendum No. 5 was developed with a detail describing an acceptable design. In addition, the Government has provided 50 LF of pre-formed metal flashing, as Government Furnished Material (GFM) in order to expedite resolution of this matter. Specification Section 07413-2, paragraph 2 cover[s] the extent of Contractor responsibility for this connection to the existing structure. However, in the spirit of cooperation and to resolve the issue, the Government has provided the GFM for the Contractor’s use. Warranty of Construction of workmanship provided by the Contractor in this area has not changed.

(R4, tab 11, ¶ 4) The letter closed with the following statement anticipating a no cost agreement to Addendum No. 5:

Hopefully, this letter, along with Addendum No. 5, resolves most of the outstanding issues which have arisen under this contract. If additional time is needed to incorporate the clarifications outlined in the Addendum, please advise this office. We anticipate a no cost change to the Contract to incorporate Addendum No. 5. Request your firm review this information provided and advise this office of your concurrence in writing, no later than 30 July 1997.

(R4, tab 11, ¶ 5) Addendum No. 5, attached to the Government's July 24th letter, states:

1. The contractor's submittal no. 21b shows a [counter] flashing detail which will not work with the existing built-up flat roof over the northeast corner of the building. The length of this flashing is approximately 50 feet. The reviewer's comment to submittal no. 21 was for the contractor to field verify the flat roof conditions at the roof and wall transition for the manufacturer so that the flashing could be made to fit the existing built-up roof condition.
2. In order to expedite the installation, the government will provide the contractor with approximately 50 LF of [counter] flashing which is constructed to fit the actual field conditions of the roof and wall panels. A detail showing the [counter] flashing and how it should be installed is attached.
3. A detail showing the required "Zee" flashing at the eaves and rakes is also attached. This detail applies to the portion of the building where the new metal siding panels meet the existing fascia panels.
4. This is a NO COST change to the contract. The contractor shall warrant his installation of the government-furnished materials.

(R4, tab 14) Two drawings were attached to Addendum No. 5. Page one was the "eave, rake similar" showing the "new zee flashing" connecting the existing fascia to the new wall panel. Page two showed the counter flashing detail. (R4, tabs 11, 14)

By letter of 29 July 1997, Jimenez replied to the Government's 24 July 1997 letter and stated that it "hereby agrees to the No Cost change for the subject addendum." This letter was signed by Joanie Massingill, Project Coordinator for Jimenez. (R4, tab 12) In a letter two days later, on 31 July 1997, Jimenez wrote to the Government concerning the "fascia closure." This letter contended that the drawings were defective in not showing the 2 inch gap between the new paneling and the fascia; and, requested the Government to issue a request for proposal concerning that issue. The letter read in relevant part:

This letter is in response to your letter dated 24 July 1997, paragraph #2, regarding closure flashing.

It is the determination of Jimenez, Inc. and our subcontractors involved in this phase of work that the contract drawing, page A-12, are defective and are not a true replication of the existing site conditions and are furthermore irrelevant to the project.

....

It is the opinion of Jimenez, that the Government is being unfair and unreasonable in their request that we provide the additional work and material without Equitable Adjustment, and as insinuated by the Government in Paragraph 4 of your 25 [sic] July letter, concerning the counter flashing over room E118. Providing this [counter] flashing is an admission by the Government that they know there is a differing site condition related to closures due to unrevealed siding thicknesses.

At this time, Jimenez, Inc. requests that the Government issue a request for proposal concerning eave and rake closures.

(R4, tab 13) This letter was also signed by Ms. Massingill. The Government never responded to the appellant's request for a proposal concerning the eave and rake closures. Instead, by letter also dated 31 July 1997, the contracting officer sent Jimenez Modification No. P00004, which incorporated Addendum No. 5.

The Government's transmittal letter of 31 July 1997 asked Jimenez to review Modification No. P00004. Jimenez was instructed that the proposed change required its signature; and, that if there was any disagreement "with the terms and conditions of the Modification, please submit a written reply to the Contract Administrator." The appellant did not respond to this letter. Modification No. P00004 stated in relevant part:

THE PURPOSE OF THIS MODIFICATION IS TO INCORPORATE ADDENDUM NO. 5 (CLARIFICATIONS BASED ON CONTRACTOR'S REQUEST).

A. ADD CONTRACT DRAWING, ENTITLED "ZEE CLOSURE DETAIL", TO DRAWINGS NO. 96EA; CLARIFICATION DRAWING IS DATED JULY 21, 1997, WHICH INCORPORATES SHEET 1 OF 2.

B. ADD CONTRACT DRAWING, ENTITLED "COUNTER FLASHING DETAIL", TO DRAWINGS NO. 96EA; CLARIFICATION DRAWING IS DATED JULY 21, 1997, WHICH INCORPORATES SHEET 2 OF 2 (TWO SHEETS).

B. [SIC] INCORPORATE ADDENDUM NO. 5 DATED 21 JULY 1997, CONSISTING OF ONE (1) PAGE, INTO AND PART OF THE CONTRACT SPECIFICATIONS NO. 96EA, DATED 12 JULY 1996.

C. THE TOTAL CONTRACT AMOUNT REMAINS UNCHANGED TO READ: \$965,410.74.

D. THE TOTAL CONTRACT PERFORMANCE TIME REMAINS UNCHANGED TO READ: COMPLETION NO LATER THAN 215 CALAENDAR DAYS AFTER THE NOTICE TO PROCEED. THE CONTRACT COMPLETION DATE IS: 07 AUGUST 1997.

E. C. [SIC] THE CONTRACTOR AGREES THAT ANY RIGHTS TO ANY EQUITABLE ADJUSTMENT IN ANY CONTRACT TERMS WHICH AROSE HERETOFORE UNDER ANY CLAUSE OF THIS CONTRACT AS A RESULT OF THE ADDITION AND OR CHANGE OF REQUIREMENTS DESCRIBED HEREIN, ARE FULLY SATISFIED BY THE TERMS OF THIS SUPPLEMENTAL AGREEMENT.

F. ALL OTHER TERMS AND CONDITIONS REMAIN UNCHANGED.

-END OF MODIFICATION-

(R4, tab 14)

On 6 August 1997, in a letter to the contracting officer's superior, Colonel Borchardt, the appellant wrote about its "serious concerns as to the health" of the contract. The letter recounted several issues, including:

Just as one example, the government is considering a cost proposal for various work items pertaining to Addendum #4 [apparently meaning Modification P00004] of the solicitation. It has been approximately a month since we have received any real direction on these issues. This extra work could have been performed within the original contract duration at no additional general condition expense. However, Contracting's unreasonable dissection of fair and reasonable pricing and untimely responses will push these issues outside of being able to complete within the original contract duration and will increase the cost of the modification request without an immediate response. A month to negotiate a change order would cause delay and extra general condition costs under any circumstances. I have enclosed a letter as of recent [sic] to show our complete opinion on this issue.

Jimenez, Inc. is interested in only one thing: to finish this project successfully and frugally. We can not achieve this, in my opinion, without a change in the attitude of your contracting division. Furthermore, Mr. Pedro I. Jimenez (Ike), president; Mr. Hal Callaway, claims consultant; Mr. Pat Sweeney, superintendent; and Mr. Kenneth Chambers, account manager, will be on site Monday, August 11, 1997, at approximately 10:30 a.m., if you should choose to come by and discuss any issues you feel would benefit our future relations. We shall be viewing the job-site and discussing the completion of the project. Whatever assistance, advice, or guidance you could offer would be greatly appreciated.

(ASR4, tab 3)

Thereafter, by date of 8 August 1997, Mr. Pedro Jimenez, signed on behalf of appellant Modification No. P00004 which incorporated Addendum No. 5 as a no cost change. No exceptions were noted and no reference made to appellant's 31 July 1997 letter. The contracting officer signed Modification No. P00004 on 11 August 1997. (R4, tab 14)

Subsequently, Jimenez sent letters, dated 27 August 1997 and 4 September 1997, which requested that the Government issue a change order for the additional work and

materials required by Modification No. P00004 for the zee metal flashing (R4, tabs 15, 16). The Government replied by letter dated 16 September 1997 stating that the issue already had been resolved by Modification No. P00004 which was signed by mutual agreement between the parties as a “no cost clarification change” (R4, tab 17).

By date of 23 March 1999, Jimenez submitted a revised certified request for an equitable adjustment in price and period of performance involving several claims, one of which was for the zee metal flashing (R4, tab 19). By letter dated 30 November 1999, the Government acknowledged receiving appellant’s claims on 11 June 1999, and, as regarding the zee metal flashing claim, stated that bilateral Modification No. P00004 addressed all of the outstanding issues (R4, tab 20).

Jimenez requested a contracting officer’s final decision by letter dated 18 February 2000. In this letter, which was signed by Mr. Pedro Jimenez, Jimenez makes the following statement:

Using 20/20 hindsight, the interest of Jimenez, Inc. would have been better served had it simply refused to execute Modification P00004. However, this was not the decision that was made. Mr. Pedro I. Jimenez signed Modification P00004 on August 8, 1997. Utilizing the four-corners of the document rule, the boilerplate release language contained within Modification P00004 would appear to bar this claim. However, as mentioned above, Jimenez’s letter dated July 31, 1997 made it clear that there was no satisfaction and accord on the issue involving the Government prepared sketch relating to the “Zee” flashing.

(R4, tab 21) By date of 24 April 2000, the contracting officer denied appellant’s zee metal flashing claim and this timely appeal followed (R4, tab 22).

In his affidavit, Mr. Jimenez stated that he believed the Government would issue a cost proposal to provide compensation and that he never told the Government that there was agreement to a no change “clarification” modification as now claimed by the Government. His statement, in relevant part, is as follows:

At no time between this 31 July 1997 [R4] (tab 13) letter requesting a compensated change order did I communicate to any Government official, nor to the best of my knowledge did any other employee or representative of Jimenez indicate to any Government official, that we were agreeing to a no change “clarification” modification as is now being represented by the Government. At the time I executed the modification P00004

and signed the releases I believed that the Government was going to provide a proposed cost proposal to compensate Jimenez for the Zee Flashing addition. This fact is further supported by Jimenez' 6 August 1997 letter to Colonel Borchardt [the contracting officer's superior] addressing a variety of issues, one of which was involving the Zee Flashing [R4] (tab A-3) and was further evidenced by the Government's response dated September 4, 1997 indicating that the Government received this August 6th correspondence [R4] (Tab GA-4). Neither of these letters were provided in the Government's Rule 4 File or Supplemental Rule 4 Filings and are today being submitted as Appellant's Supplemental Rule 4 documents.

(ASR4, tab 2, ¶ 11)

DECISION

The Government's assertion that the appellant's claim is barred by accord and satisfaction is an affirmative defense. ASBCA Rule 6(b) and FED. R. CIV. P. 8(c). The burden of proof is on the Government as the party asserting the affirmative defense. *See McGraw-Hill, Inc. v. United States*, 623 F.2d 700, 708 n.12 (Ct. Cl. 1980). For there to be an accord and satisfaction there must be mutual agreement between the parties with the intention clearly stated and known to both the contractor and the Government. *Mil-Spec Contractors, Inc. v. United States*, 835 F.2d 865, 867 (Fed. Cir. 1987); *Metric Constructors, Inc.*, ASBCA No. 46279, 94-1 BCA ¶ 26,532.

Addendum No. 5, as incorporated into Modification No. P00004, clearly expresses the intent that the changes made thereby are to be at no cost to either party and to have no effect on the contract price. The appellant acknowledged, in its 18 February 2000 letter, that this meaning was clear.*

However, we have held that even if a release is complete and unqualified on its face, a reading of the document is not determinative if the circumstances surrounding the signing of the release establish a different intent. *Hunt Building Corp.*, ASBCA No. 50083, 97-1

* The author of this opinion finds paragraph E of Modification No. P00004 to be unclear, for it appears to provide an accord and satisfaction only for claims which both (1) arose heretofore (that is, before the modification) and (2) resulted from (that is, were caused by) the modification. A claim cannot be caused by the modification and at the same time have existed before the modification. Nevertheless, Addendum No. 5 is clear. The two other participating judges believe paragraph E is clear.

BCA ¶ 28,807. The appellant maintains, as evidenced by its letters of 31 July and 6 August 1997, that it signed Modification No. P00004 with the belief that the Government would be issuing a proposal for the zee metal flashing. Those letters make it clear that the appellant wanted to be paid for the zee flashing. However, they do not show that the parties agreed that the appellant would submit a subsequent claim for zee flashing. Instead of discussing this issue with the Government, the appellant subsequently signed the modification which evidenced that the appellant had decided to agree to the no cost change.

Our cases, including those cited by the appellant, which grant relief from an accord and satisfaction involve situations where the Government gave written or oral assurances to the contractor that certain claims could be submitted after signing the release. *See Asbestos Transportation Services, Inc.*, ASBCA No. 46263, 98-1 BCA ¶ 29,502, 102 *Construction, Inc.*, ASBCA No. 45223, 93-3 BCA ¶ 26,067; *JDV Construction Inc.*, ASBCA No. 37937, 89-3 BCA ¶ 22,012, and *Able Products Company*, ASBCA No. 24221, 80-2 BCA ¶ 14,733. In this case, no such representations by the Government, oral or written, were made to Jimenez. Appellant's unqualified acceptance of Modification No. P00004, without written or oral assurances from the Government that it could later submit a claim for the zee flashing, precludes such a claim.

Because there was an accord and satisfaction, we do not address appellant's claims arising from the defect in the Government drawings. The appeal is denied.

Dated: 2 February 2001

RONALD A. KIENLEN
Administrative Judge
Armed Services Board
of Contract Appeals

I concur

I concur

MARK N. STEPLER
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. 52825, Appeal of Jimenez, Inc., rendered in conformance with the Board's Charter.

Dated:

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