

ARMED SERVICES BOARD OF CONTRACT APPEALS

Appeal of --)
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Hanley Industries, Inc.) ASBCA No. 54315
)
Under Contract No. N00104-01-C-K109)

APPEARANCES FOR THE APPELLANT: Linda L. Shapiro, Esq.
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St. Louis, MO

APPEARANCES FOR THE GOVERNMENT: Susan Raps, Esq.
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Naval Inventory Control Point
Mechanicsburg, PA

OPINION BY ADMINISTRATIVE JUDGE FREEMAN

Hanley Industries, Inc. (Hanley) appeals the denial of its claim for the increased costs of delay allegedly caused by a defective government technical data package (TDP). The government moves for summary judgment on the entire claim, and in the alternative on a portion of the claim, on the basis of “releases” in three bilateral contract modifications.* The government accepts the allegations in appellant’s complaint for purposes of the motion. We find a genuine issue of material fact as to the intent of the parties in those releases and deny both motions.

STATEMENT OF FACTS

1. On 8 June 2001, the government awarded Hanley the captioned contract for impulse cartridges to be manufactured in conformance with the government’s TDP. First Article Test (FAT) samples were due 5 December 2001, and production deliveries were to begin on 3 June 2002 and end on 5 March 2003. (R4, tab 1 at 21, 22, 24) The contract

* The cited terms in the modifications do not include the word “release” and might be better described as terms of accord and satisfaction. Nevertheless both parties have used the term “release.” Since nothing in this case turns on the descriptive term used, we will follow the parties’ usage.

included, among other provisions, the FAR 52.242-17 GOVERNMENT DELAY OF WORK (APR 1984) clause (R4, tab 1 at 54).

2. On or about 24 January 2002, Hanley's first articles failed the FAT primarily for exceeding the specified maximum ignition delay (R4, tab 18). According to Hanley, a failure analysis indicated that, although the powder used in the first articles conformed to the military specification, it did not consistently ignite fast enough. Hanley further alleges that, on the advice of a government engineer, it changed its powder source and then achieved ignition delays within the specified limit. (Compl. ¶¶ 18-22)

3. On 6 March 2002, Hanley requested a second FAT (R4, tab 25). This was allowed in bilateral Modification No. P00002, effective 13 March 2002. Modification No. P00002 required delivery of the second set of first articles, due to the failure of the first set, by 29 March 2002 with a contract price reduction of \$5,430 as consideration to the government for the delivery extension and other costs. Modification No. P00002 also stated that all other terms and conditions remained unchanged and included the following release:

This supplemental agreement to the contract, modification P00002, shall be full, complete and final settlement of any or all claims which the contractor or its successor may now have or which may arise in the future as a result of the issuance of this modification.

Appellant's president, T. Gaynor Blake signed the modification for it. (R4, tab 1 at 7)

4. On 17 June 2002, the government approved Hanley's second FAT. The approval letter, however, noted that some of the ignition delay times were "higher than normal" and stated "[y]ou are advised to closely monitor your manufacturing processes to assure the ignition delay time for the production lots does not advance beyond the specification upper limit of 10 milliseconds." (R4, tab 28) Although the second FAT was approved, Hanley "thought it best" to perform further firing circuit tests on its igniters before proceeding with production (compl. ¶ 28).

5. To that end, on 24 July 2002 it requested a copy of the government's firing circuit schematic. Hanley explained this request on the basis that "we are at great risk if we can not take a measure of our igniters before they are uploaded into the end item." (R4, tab 30) Also on 24 July 2002, the parties entered into bilateral Modification No. P00003. Modification No. P00003 revised the production delivery schedule to begin on 15 November 2002 and end on 12 August 2003 at no change in contract price or other terms of the contract. It concluded with a release by Hanley that was substantially

identical to the release in Modification No. P00002. Appellant's vice-president, Raymond H. Steimel, signed Modification No. P00003 for appellant. (R4, tab 1 at 5)

6. The government provided Hanley with the firing circuit schematic and answered Hanley's questions on the schematic between 17 October and 4 November 2002 (R4, tabs 36, 37; compl. ¶ 30; gov't mot. at 7 n.1.). On 12 November 2002, Hanley notified the government that the first production lot (due 15 November 2002) would be late because it did not have all of the firing circuit components needed to test the igniters (R4, tab 38). On 11 December 2002, Hanley proposed delivering the first production lot on 30 January 2003 with monthly deliveries of 20,000 units thereafter, resulting in a final delivery on 30 October 2003 (R4, tab 40).

7. On 18 December 2002, the contracting officer sent Hanley a proposed contract modification extending the production unit delivery schedule based on the schedule proposed by Hanley with a price reduction of \$9,586.50 as consideration to the government (R4, tab 41). By letter dated 26 December 2002, Hanley told the government that consideration to the government for the schedule change was "unacceptable" because the schedule change was caused by the government delay in providing the firing circuit schematic (R4, tab 43). In a letter dated 27 January 2003, Hanley asserted that a further cause of the contract delay was the zirconium specification in the TDP that "would not function within the specified upper limit of 10ms" (R4, tab 48). The government's proposed modification extending the production delivery schedule with consideration to the government was not executed by the parties. Contractual modification of the delivery schedule was not considered again until Modification No. P00005 in May 2003. (R4, tab 1 at 1)

8. On 9 April 2003, Hanley submitted an uncertified claim for unabsorbed overhead in the amount of \$235,480 for 238 days of delay in performance of the contract caused by the allegedly defective zirconium specification in the TDP (R4, tab 54). On 8 May 2003, the contracting officer acknowledged receipt of the claim and noted the absence of certification (R4, tab 58). Hanley's president certified the claim on 15 May 2003 (R4, tab 61). Extending the original delivery period, 3 June 2002 to 5 March 2003, by 238 days resulted in a new delivery period of 27 January 2003 to 29 October 2003.

9. On 19 May 2003, the contracting officer sent a proposed Modification No. P00005 to Hanley extending the production unit delivery schedule as previously proposed by Hanley on 11 December 2002, but without monetary consideration to either party. The proposed modification concluded with a release by Hanley that was substantially identical to the releases in Modifications Nos. P00002 and P00003. Neither the government's forwarding e-mail nor the proposed modification made any explicit reference to the claim submitted by Hanley on 9 April 2003 and certified on 15 May 2003 (app. opp'n, Jones aff. ¶ 7; R4, tab 1 at 1).

10. Modification No. P00005 as proposed by the government was signed for Hanley on 19 May 2003 by Mr. Steimel and for the government by the contracting officer on 22 May 2003 (R4, tab 1). On 11 June 2003, the contracting officer denied Hanley's 9 April 2003 claim on the ground that it was barred by the release in Modification No. P00005 (R4, tab 64).

11. By letter to the contracting officer dated 13 June 2003, Mr. Steimel contested the release of the claim as follows:

Modification P00005 was to update the delivery schedule, which was months out of date. It was not meant to settle our claim submitted on 15 May. I consider that a standalone issue outside the delivery schedule matter.

Hanley had been shipping for several months and the government QAR was questioning the contract not reflecting a current status. My interpretation of the "release from liability statement" you cited applied only to the \$14,129.75 assessed Hanley as a penalty for the need to modify the delivery schedule. If you recall, the \$14,129.75 had been a matter of dispute under 2 previous versions of the modification.

This is to advise that I, in the name of Hanley Industries, Inc., rescind and contest my signature on modification P00005 is a release to the government of the claim submitted for government delay on 15 May 2003.

(R4, tab 66)

12. Mr. Ron Jones, Hanley's marketing manager, was the initial point of contact for Hanley between the government and Hanley for contract administration. Mr. Jones has stated by affidavit:

7. I, nor anyone else from Hanley, ever had a conversation with anyone from the Navy indicating that by signing this release [in Modification No. P00005], Hanley was waiving its claim that it had just certified four days earlier

. . . .

9. We did not consider the release clause to even apply to our certified claim. As we read the modification, the release was limited to the scope of the modification. The modification did nothing more than bring the contract current by extending the delivery dates. It certainly did not have anything to do with the Government's defective technical data package or the increased costs we incurred as a result.

10. We never intended to release our certified claim by signing any of the modifications. And we never had any conversations with anyone from the Navy where they stated or even implied that signing the modifications would serve as a release to our certified claim.

(App. opp'n, Jones aff.)

13. On 8 September 2003, Hanley appealed the contracting officer's decision to the Board. The appeal was docketed as ASBCA No. 54315.

DECISION

The government moves for summary judgment on the ground that Hanley's entire claim is barred by the releases in Modifications Nos. P00003 and P00005. In the alternative, it moves for partial summary judgment on the ground that the portion of the claim relating to the second FAT is barred by the release in Modification No. P00002.

Summary judgment may be granted only if there are no genuine issues of material fact 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). In Hanley's case there is a genuine issue of material fact as to the intent of the parties with respect to the scope of the releases in all three modifications. *See Maintenance Engineers*, ASBCA No. 23131, 81-2 BCA ¶ 15,168 at 75,073 ("Release or waiver of claims is basically a matter of intention."). The operative words defining the scope of the release in each modification are ambiguous as to applicability to Hanley's claim. The operative words are: "any or all claims which the contractor or its successor may now have or which may arise in the future as a result of the issuance of this modification" (emphasis added). Hanley's claim is for the additional costs of the production delay allegedly caused by a defect in the TDP and by government delay in providing the firing circuit information. The operative words are ambiguous because the alleged defect in the TDP was a circumstance leading up to, and not a result of, the issuance of all three modifications. The alleged government delay in providing the firing circuit information was a

circumstance leading up to, and not a result of, the issuance of the last modification (P00005).

Apart from the ambiguous words in all three modifications, Mr. Steimel's letter of 13 June 2003 and Mr. Jones' affidavit specifically state that it was not Hanley's intent in signing Modification No. P00005 to release its \$235,480 claim that had been submitted a little more than one month earlier and had been certified only four days before that modification was signed. Also, the Jones affidavit states that there was no discussion between the parties regarding the claim in connection with Modification No. P00005. On the record before us on the motion, the Jones affidavit is not contradicted as to the absence of discussion of the claim in connection with Modification No. P00005. Moreover, there is no affidavit or declaration of the contracting officer that she understood and intended at the time she signed Modification No. P00005 that it would bar further consideration of Hanley's recently submitted claim.

There being a genuine issue of material fact as to the intended scope of the releases in bilateral Modifications Nos. P00002, P00003 and P00005, the government's motion, and alternative motion for summary judgment are denied.

Dated: 26 July 2005

MONROE E. FREEMAN, 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

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. 54315, Appeal of Hanley Industries, Inc., rendered in conformance with the Board's Charter.

Dated:

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