

ARMED SERVICES BOARD OF CONTRACT APPEALS

Appeal of --)
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Tilley Constructors & Engineers, Inc.) ASBCA No. 54485
)
Under Contract No. NAS13-98069)

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OPINION BY ADMINISTRATIVE JUDGE FREEMAN ON
MOTIONS TO DISMISS AND FOR SUMMARY JUDGMENT

This appeal involves the claim of a subcontractor (Boes Iron Works, Inc.) sponsored by the prime (Tilley Constructors & Engineers, Inc.). The government moves to dismiss for lack of jurisdiction. Tilley moves for summary judgment. The government responds with a cross motion for summary judgment. We deny the government's motion to dismiss and Tilley's motion for summary judgment. We dismiss the government's cross motion for summary judgment as moot. We find the facts stated hereafter for purposes of resolving the motions.

Tilley submitted and certified the Boes claim to the government on 1 and 9 July 2003. The claim was in the amounts of (i) \$145,987.92 for alleged government delay in approving shop drawings, and (ii) \$9,944.00 for alleged government changes to the penthouse and rooftop handrails (compl., ex. 10 at 5). The contract included the FAR 52.242-17 GOVERNMENT DELAY OF WORK (APR 1984) clause and the FAR 52.243-4 CHANGES (AUG 1987) clause (R4, tab 67 at 6). These clauses respectively required that claims for government delay be asserted "not later than the day of final payment," and

that no claim for changes would be allowed “if asserted after final payment.”* On 30 October 2003, the contracting officer denied the Boes claim on the ground that it was barred by Tilley’s alleged acceptance of final payment in April 2002 without reservation of that claim (R4, tab 3 at 2). Tilley timely appealed

The government moves to dismiss the appeal on the ground that a release in a civil suit settlement agreement completely exonerated Tilley of any liability to Boes on the claim. *See Severin v. United States*, 99 Ct. Cl. 435 (1943), *cert. denied*, 322 U.S. 733 (1944). The cited settlement agreement among other things required Tilley to certify and submit the Boes claim to the government and to cooperate with Boes in prosecuting that claim. The release in the agreement was titled “Limited Release” and included express exceptions if (i) the Boes claim was denied due to “misconduct” on the part of Tilley, or (ii) if the Boes claim was denied by the government “without comment.” The release broadly defined “misconduct” as “any act, omission or failure to act by Tilley that causes the Government to reject the [Boes claim] in whole or in part, whether or not on the merits of the claim.” (R4, tab 1 at 5, 7, 8)

On these facts, the government’s motion to dismiss is without merit. To prevail on its *Severin* defense, the government must prove that Boes granted Tilley a full release and completely exonerated it from any liability on the claim. With its express exception for “misconduct” and with its broad definition of misconduct, the “Limited Release” in the settlement agreement was not a full release. *See Metric Constructors, Inc. v. United States*, 314 F.3d 578, 582-84 (Fed. Cir. 2002). Nor did the settlement agreement, with its requirement that Tilley certify and submit the Boes claim and cooperate thereafter with Boes in the prosecution of the claim, otherwise completely exonerate Tilley from liability. *See Jordan-DeLaurenti, Inc.*, ASBCA No. 45467, 94-3 BCA ¶ 27,031 at 134,726.

Tilley’s motion for summary judgment on the Boes claim is also without merit. The Rule 4 file, which was incorporated by reference in the government’s response, includes a 24 April 2000 analysis by the contracting officer’s technical representative (COTR) disputing the factual basis for Boes’ allegation that its claimed costs were caused by government delay in approving shop drawings (gov’t resp. at 1; R4, tab 40). That allegation was similarly disputed in a Tilley letter to Boes, dated 21 May 1999, that was

* The FAR 52.242-17 Government Delay of Work clause is specified by the FAR for use in supply and service contracts, and appears to have been incorporated into Tilley’s construction contract by mistake. The FAR 52.242-14 Suspension of Work clause is the FAR required clause for use in fixed price construction contracts. Both clauses, however, include the same requirement that claims for delay be asserted not later than the date or day of final payment under the contract.

included by Tilley in the exhibits to the complaint (compl., ex. 10, tab C at 50). These documents raise genuine issues of material fact as to the merits of the delay claim item.

We further find that the single conclusory sentence in the Boes' affidavit supporting the handrail changes claim item is insufficient to establish a prima facie case for that item (compl., ex. 10, tab E at 4). And, with respect to the government's defense of final payment, the record on the motion shows genuine issues of material fact as to (i) whether Tilley authorized a request for and acceptance of final payment by its payment bond surety; (ii) whether a final payment application was in fact submitted by Tilley; and (iii) whether Tilley or its surety advised the government at the time the alleged final payment was requested and made that the Boes claim was still outstanding.

The government's response to Tilley's motion for summary judgment includes a cross motion for summary judgment "to the extent that there is no genuine issue of fact" (gov't resp. at 13). Since we have found genuine issues of material fact on Tilley's motion, the government's cross motion is moot.

The government's motion to dismiss for lack of jurisdiction is denied. Tilley's motion for summary judgment is denied. The government's cross motion for summary judgment is dismissed.

Dated: 10 January 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. 54485, Appeal of Tilley Constructors & Engineers, Inc., rendered in conformance with the Board's Charter.

Dated:

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