

ARMED SERVICES BOARD OF CONTRACT APPEALS

Appeal of --)
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M.E.S., Inc.) ASBCA No. 56454
)
Under Contract No. W912DS-05-C-0006)

APPEARANCE FOR THE APPELLANT: Michael H. Payne, Esq.
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& Furman PC
Philadelphia, PA

APPEARANCES FOR THE GOVERNMENT: Thomas H. Gourlay, Jr., Esq.
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U.S. Army Engineer District,
New York

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

This appeal involves a construction contract with M.E.S., Inc. (MES or appellant) and a contractor claim for a time extension and an equitable adjustment. The U. S. Army Corps of Engineers (government or Corps) has filed a motion to dismiss the appeal upon the grounds of release. We treat the motion as one for summary judgment. For the reasons set forth below, the motion is denied.

STATEMENT OF FACTS (SOF) FOR PURPOSES OF THE MOTION

1. On 11 February 2005, the government awarded Contract No. W912DS-05-C-0006 to MES for a total amount (inclusive of options) of \$8,253,975.00. Under the contract, appellant was to design and build an explosive research and development facility at Picatinny Arsenal, New Jersey. All work was to be completed within 730 calendar days from receipt of the notice to proceed. The contract included the following provision:

Section 00800 Special Contract Requirements

1.22 TIME EXTENSIONS FOR UNUSUALLY SEVERE WEATHER

a. This provision specifies the procedure for determination of time extension for usually [sic] severe weather in accordance with the contract clause entitled “Default: (Fixed Price Construction).” In order for the Contracting Officer to award a time extension under this clause, the following conditions must be satisfied:

1. The weather experienced at the project site during the contract period must be found to be unusually severe, that is, more severe than the adverse weather anticipated for the project location during any given month.
2. The unusually severe weather must actually cause a delay to the completion of the project. The delay must be beyond the control and without the fault or negligence of the Contractor.

(Supp. R4, tab 14 at 123-124)

2. After commencing work, appellant submitted a number of claims and requests for equitable adjustment (REAs) (gov’t mot. to dismiss ¶ 4; app. resp. at 1). The parties negotiated a settlement of the claims and REAs on 14 November 2007. Because of funding delays, the agreement memorializing the settlement was signed by appellant on 27 February 2008 and by the government on 7 March 2008. The settlement agreement included, in part, the following language:

WHEREAS, the Contractor submitted several claims in an amount exceeding \$520,000.00, along with several additional Requests for Equitable Adjustment (REAs), and miscellaneous contract correspondence during the period of contract performance to date; and

WHEREAS, the parties determined that it was in their mutual interest to compromise and settle all outstanding contract matters entirely, under the terms stated herein, without any further administrative, quasi-judicial, or judicial proceedings, without there being any adjudication of any issue of fact or law, and without constituting an admission of liability upon the part of either of the parties, and for no other purpose.

THEREFORE, the parties agree as follows:

1. The Government agrees to pay to the Contractor the amount of THREE HUNDRED THOUSAND AND 00/100 DOLLARS (\$300,000.00) (the “settlement amount”), and to grant the contractor a two hundred seventy nine (279) calendar days contract time extension, as full and complete settlement of all outstanding contractor issues under the captioned contract prior to the date of execution of this agreement.

....

6. In consideration for the Government’s payment of the settlement amount, less ONE HUNDRED DOLLARS (\$100.00), the contract time extension, and withdrawal of the interim rating, the Contractor fully releases the Government, as well as its agencies, officers, agents, employees, and former employees, ...from any claims, appeals, lawsuits, administrative actions, or other requests for compensation or other relief, either individually or in their official capacities, under the captioned contract or arising from the contractual relationship, facts, or circumstances, whatsoever, prior to the date of execution of this agreement.

....

The last day of acceptance by all representatives shall be the effective date of this Agreement.

(R4, tabs 5, 6 at 4-6; *see also* app. resp. at 2) The agreement provided that its terms would be implemented by contract modification.

3. The record reflects that performance continued and the parties held their usual bi-weekly site meetings after the 14 November 2007 settlement conference. During those meetings, critical weather delays were constantly on the agenda. (Supp. R4, tab 20) The parties had previously negotiated a 20-day time extension for weather delays and, through Modification No. A00010 executed by appellant on 15 December 2007, the contract was extended from 26 April 2008 to 16 May 2008. (R4, tab 6 at 10)

4. By letter dated 19 February 2008, appellant informed the government that since 1 November 2007 it had recorded a total of 66 calendar days (47 working days) as “Unusually Severe Weather Delays preventing any work from proceeding on the concrete roof of the Machining & Processing building...therefore delaying the estimated (Early Finish) project completion date.” Appellant added:

Although the latest Updated Progress Schedule of Baseline 2 dated 31 January 2008 suggests a project completion date of November 17, 2008, 69 working days (97 calendar days) ahead of the COE negotiated completion date of February 19, 2009, **MES reserves the right to request a Contract Time Extension** to the project schedule for all Unusually Severe Weather Delays if the total slack of the project has elapsed, since said weather delays on critical activities are due to previous delays caused by the Government shifting weather sensitive critical activities into the adverse weather season.

(App. surreply, ex. 14, emphasis added)

5. Modification No. P00005, which made funds available for the settlement and included a copy of the settlement agreement, had an effective date of 14 March 2008. The modification set out the money to be paid to MES and the time extension awarded and stated that all other terms and conditions remained unchanged in accordance with the settlement agreement. Accordingly, an additional \$300,000.00 was made available to MES and the contract was extended from 16 May 2008 to 19 February 2009. (R4, tab 6)

6. On 15 April 2008, MES submitted a claim for an 81-calendar day time extension and delay costs (REA No. 014) in the amount of \$66,275.75 for severe weather between 1 November 2007 and 14 March 2008. Appellant alleged that the weather delays anticipated under the contract were not applicable to the claimed days, due to “government actions forcing weather critical activities to be delayed and/or shifted to inclement weather seasons.” (R4, tab 11) All delay days claimed occurred prior to 7 March 2008. (*Id.*)

7. MES filed this deemed denial appeal from its 15 April 2008 submission on 10 July 2008. Shortly after the appeal was filed, the contracting officer denied the 81-day time extension request and REA No. 014 based upon the March 2008 settlement agreement (R4, tab 13).

8. The government moved to dismiss the appeal on the basis that the delay period and accompanying monetary claim were included in the March 2008 settlement. Appellant countered that the claim was not part of the settlement agreement because the release in the settlement agreement did not include time extensions for weather. The Board treated the motion as one for summary judgment. As such, the parties were allowed to supplement their responses with additional evidence and argument.

9. The government provided, *inter alia*, the affidavit of Daniel T. Lee, P.E., resident engineer and administrative contracting officer for the subject contract, in support of its motion. Mr. Lee states as follows:

5. In the fall of 2007, with many issues still outstanding, and in an effort to keep the project moving, the Government determined to try and settle all outstanding project issues with Appellant. Contemporaneous documentation internal to the Government...made clear that the settlement was intended to be a “global” settlement “in full and final settlement of all contract issues.”

6. I was given full authority by the Contracting Officer to negotiate a settlement for Respondent with respect to all MES issues. Negotiations were held on November 14, 2007. Mr. Kenneth Durr, P.E., Contracting Officer’s Representative, and I attended for the government. MES was represented at the meeting by Mr. George Makhoul, President. Agreement was reached (see letters from Ella D. Snell to George Michael Makhoul, dated November 14, 2007, subject: Explosive Research and Development Loading Facility, Contract No. W912DS-05-C-0006, Exhibit 3).

7. At the meeting, Mr. Makhoul and I discussed the scope of the settlement agreement, and we agreed that it would cover all issues, except for delays claimed by Appellant for alleged unusually severe weather during the period April 1, 2007 to October 31, 2007, and for time and money claimed by Appellant to design, install and operate a temporary storm water pumping system until a required wetlands permit was issued (Record of Negotiations, Exhibit 4).

(Gov’t surreply)

10. Appellant countered that the global settlement included all outstanding issues known to date under the subject contract and it never agreed to include any severe weather delays that occurred after 31 October 2007 (app. surreply at 2). In support of its contentions, appellant offered declarations from Mr. George Makhoul, president of M.E.S., Inc. and Mr. Bernard Khadra, project engineer and assistant project manager for appellant under the contract. Mr. Makhoul declared:

30. Neither on November 14, 2007, nor at any time thereafter, did I agree to include any weather delays after October 31, 2007 in the Agreement in Principle of 14 November 2007 or the Settlement Agreement of 7 March 2008.

(App. surreply) Further, Mr. Khadra stated:

19. For every agenda and minutes thereafter that I prepared for the project site meetings, I recorded the number of unusually severe weather days experienced each month on the project, and notified Mr. Durr at those site meetings of these weather delays.

20. On January 23, 2008, at the bi-weekly Site Meeting No. 30 held at the project site trailer, Mr. Durr stated that if MES was being delayed on critical activities because of weather delays, the weather delay should be recorded on the [contractor quality control] reports so that a time extension can be given to MES for those weather delays. See attached Minutes to the biweekly Site Meeting no. 30 (Exhibit No. 16).

(*Id.*)

DECISION

The government argues that the settlement agreement and release discharged any liability the government might have for the claim at issue in this appeal. It contends that the agreement unqualifiedly released any claims or requests for compensation arising before 7 March 2008. And because the delays asserted by appellant were all before that date, the instant claim based on such delays is barred. In response, MES points to Modification No. A00010, which granted time extensions for weather delays before 7 March 2008, and asserts it was led to believe and did believe that the March 2008 settlement did not cover weather delays which it thought “would be treated separately” (app. resp. at 3). Moreover, appellant contends that the cut-off date for outstanding issues and claims was at the latest 14 November 2007, the date of the settlement meeting and not the 7 March 2008 date that the government proffers. The government replied that the negotiations which resulted in the issuance of Modification No. A00010 started before the negotiations that led to the settlement agreement and that “the government and appellant absolutely considered any other time extensions for weather to be part of the pending REAs encompassed in the Settlement Agreement ...” (gov’t reply at 2).

Summary judgment is appropriate where there are no genuine issues of material fact and the movant is entitled to judgment as a matter of law. *Mingus Constructors, Inc. v. United States*, 812 F.2d 1387, 1390-91 (Fed. Cir. 1987); *Catel, Inc.*, ASBCA No. 52224, 01-2 BCA ¶ 31,432 at 155,227. A material fact is one which may affect the outcome of the case. *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 248 (1986).

The record shows that the parties routinely discussed additional project delays during the nearly four months between reaching the agreement and actual execution date of the settlement document. During the bi-weekly meetings, which occurred after the 14 November 2007 settlement meeting, the delay issue was a constant agenda item (SOF ¶ 3). Prior to the filing of the instant appeal, there is no evidence in the record that the parties explicitly agreed that weather delays encountered after 31 October 2007 were subject to the global settlement. Appellant, on the other hand, has clearly demonstrated that its 19 February 2008 letter to the contracting officer expressly reserved its right to subsequently request a time extension under the weather delays clause of the contract. Thus, the 19 February 2008 reservation and the declarations are sufficient to raise a triable issue of fact as to the scope of the release. Moreover, the government has provided us evidence that appellant did reserve matters from the release that are not recited in the so-called “Global Release” (SOF ¶ 9). Accordingly, because there are disputed material facts, summary judgment is not appropriate.

CONCLUSION

The government’s motion is denied.

Dated: 15 June 2009

OWEN C. WILSON
Administrative Judge
Armed Services Board
of Contract Appeals

(Signatures continued)

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. 56454, Appeal of M.E.S., Inc., rendered in conformance with the Board's Charter.

Dated: June 15, 2009

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