

ARMED SERVICES BOARD OF CONTRACT APPEALS

Appeal of --)
)
Ali Fawzi Gomme, Co-Owner, d/b/a)
Areebel Engineering & Logistics) ASBCA No. 56787
)
Under Contract No. W91GDW-07-D-2015)

APPEARANCES FOR THE APPELLANT: Ali Fawzi Gomme
Co-Owner
Ali F. Jowmah
General Manager

APPEARANCES FOR THE GOVERNMENT: Raymond M. Saunders, Esq.
Army Chief Trial Attorney
MAJ John C. Dohn, II, JA
Trial Attorney

OPINION BY ADMINISTRATIVE JUDGE FREEMAN ON THE
GOVERNMENT’S MOTION TO DISMISS

Ali Fawzi Gomme, Co-Owner, d/b/a Areebel Engineering & Logistics (hereinafter “Areebel”) appeals a contracting officer’s final decision denying most of a request for equitable adjustment (REA) on a delivery order under the captioned contract (hereinafter “Contract 2015”). The government moves to dismiss the appeal on the ground that the REA has been settled by a written agreement (hereinafter “the Settlement Agreement”).¹ Areebel opposes the motion on the ground that “the intention of the parties in executing the Settlement Agreement raises a material fact that is in dispute” (app. resp. at 5). We find no genuine issue of material fact as to whether the parties intended the present appeal to be within the scope of the Settlement Agreement. The Settlement Agreement amount has been paid. Accordingly, we dismiss the appeal.

STATEMENT OF FACTS (SOF) FOR PURPOSES OF THE MOTION

1. On 17 September 2007, the government awarded Contract 2015 to Areebel for design and construction projects as ordered (R4, tab 1). On 26 September 2007, the government issued Delivery Order No. 2 under the captioned contract for the design and construction of a water treatment facility at Camp Bucca, Iraq (R4, tab 2).

¹ The government originally styled its motion as one for summary judgment. Since the motion seeks enforcement of a settlement agreement to dismiss the appeal, we consider the motion to be a motion to dismiss.

2. On 3 November 2008, Areebel submitted to the contracting officer the REA that is the subject of this appeal. This REA (hereinafter "REA No. 1") was in the amount of \$662,392.50 for various alleged government-caused delays and increased costs incurred in performing Delivery Order No. 2. On 18 November 2008, Areebel certified REA No. 1 as a claim under the Contract Disputes Act of 1978, 41 U.S.C. § 7103 (R4, tab 10). On 24 December 2008, the contracting officer issued a final decision allowing \$59,730 of the claim (R4, tab 14). This appeal followed. In the complaint on appeal, Areebel increased the net amount of the claim to \$1,130,148.50.

3. On 12 December 2010, Areebel submitted a second REA under Delivery Order No. 2 and on 4 January 2011 it submitted a third REA. The second REA (hereinafter REA No. 2) was in the amount of \$519,376 and the third REA (hereinafter REA No. 3) was in the amount of \$504,088. Although they pertain to the same delivery order and construction project, REA Nos. 2 and 3 are not part of the present appeal.

4. At some time before 9:11 a.m. on 8 March 2011, the government represented by contracting officer Charlene Wilson and Areebel represented by Ali Fawzi Jowmah, General Manager, executed the Settlement Agreement under date of 8 March 2011 (gov't mot., ex. 1; gov't reply, encl. 4). The agreement states in pertinent part:

SETTLEMENT AGREEMENT

....

WHEREAS, the Parties have determined that it is in their best interests to settle all matters in dispute under ASBCA No. 56787, as well as any current or potential claims under Contract No. W91GDW-07-D-2015 and Delivery Order 00012.

NOW THEREFORE, in consideration of the promises set forth herein and other good and valuable consideration, the Parties mutually agree as follows:

1. The Parties mutually agree to end litigation by this Agreement

....

3. Upon execution of this Agreement, the Government will modify the contract to incorporate the terms of this Agreement.

4. Upon receipt of the final payment stated in paragraph 5, the Government will move, with the Contractor's concurrence, to dismiss with prejudice, the Appeal docketed as ASBCA No. 56787.

5. In full satisfaction of any and all claims arising under or related to Delivery Order No. 0002 and Contract No. W91GDW-07-D-2015, whether known or unknown, the Government agrees to pay the Contractor the amount of \$176,964.00 (hereinafter "the Settlement Amount"). This settlement does not constitute an acknowledgement of fault or concession by either Party.

6. The Government agrees to modify the contract in order to add the necessary settlement funds to the contract. The Contractor agrees to submit an invoice in the amount of \$176,964 to the contracting officer within fourteen (14) days of receiving notice of the contract modification. The Contractor agrees to annotate the invoice "full and final invoice." The contracting officer agrees to submit the Contractor's invoice for payment in accordance with the terms of the Prompt Payment Act.

7. This Agreement constitutes a full release and accord and satisfaction by the Contractor including its parents, partners, affiliates, successors in interest, and assignees, of any and all claims, demands, or causes of action, actual or perceived, known or unknown, arising under or related to Contract No. W91GDW-07-D-2015 and Delivery Order No. 0002, as of the date of execution of this agreement by the Parties and payment of the amount set forth in paragraph 5. The Contractor, including its parents, partners, affiliates, successors in interest, and assignees, remises, releases, and discharges the Government, its officers, agents, and employees of and from all civil liabilities, obligations, claims, appeals and demands which it now has or hereafter may have, whether known or unknown, administrative or judicial, legal or equitable to include attorneys fees, arising under or in any way related to Contract No. W91GDW-07-D-2015, and Delivery Order No. 0002

....

10. This Agreement constitutes the entire agreement and understanding between the Parties concerning the subject matter hereof, and supersedes and replaces all prior negotiations, proposed agreements and agreements, written and oral, relating thereto and the obligations set forth hereunder may not be altered, amended or modified in any respect unless in writing, and duly executed by the Parties. This Agreement exists independently of Contract No. W91GDW-07-D-2015 and Delivery Order No. 0002 and survives it. There are no collateral agreements, reservations, or understandings between the Government and the Contractor, express or implies, oral or written, except as specifically set forth herein. No modification to this Agreement shall be binding unless it is reduced to writing and signed by the Parties to this Agreement. This Agreement is the joint product of the Contractor and the Government, and it shall not be construed against either Party to the Agreement on the ground of sole authorship.

....

14. Each Party to this Agreement represents and warrants as follow:

(a) It does not rely and has not relied on any statement, representation, omission, or promise of the other Party (or any officer, agent, employee, representative, or attorney for the other Party) in executing this Agreement, or in making the settlement provided for herein, except as expressly stated in this Agreement; it has, however, relied on this Agreement and all of its terms and provisions;

(b) It has investigated the facts pertaining to this settlement and this Agreement, and all matters pertaining thereto, to the full extent it deems necessary;

(c) It has carefully read and knows and understands, the full contents of this Agreement and is voluntarily entering into this Agreement; and,

(d) It expressly understands that this Agreement represents the final agreement between the Parties and may

not be contradicted by the evidence of prior, contemporaneous, or subsequent oral agreements or understandings between the Parties.

(Gov't mot., ex. 1)

5. By e-mail date/time 8 March 2011, 9:11 a.m., government counsel sent to Areebel's counsel a copy of the Settlement Agreement and contract modification adding the settlement funds to the contract. The e-mail stated in pertinent part:

Attached is the executed [Settlement Agreement] and a modification to the contract. Looks to me like three things need to happen: 1) Areebel needs to sign and return the mod; 2) Areebel needs to provide a final invoice per the SA; and 3) Areebel needs to complete and return the EFT information for processing. Once these things are returned the payment will be submitted to DFAS for processing....

(Gov't reply, encl. 4)

6. The procedures for effecting payment of the amount due Areebel under the Settlement Agreement described in government counsel's e-mail of 8 March 2011, 9:11 a.m. are exactly the procedures for payment agreed to by the parties in paragraph 6 of that agreement (*see* SOF ¶ 4).

7. At 4:54 p.m. on 8 March 2011, Areebel's counsel sent an e-mail to government counsel that stated as follows:

I am writing to follow up on our conversation this afternoon as well as my later voice mail message to you. As we discussed, upon receipt of the fully executed settlement agreement this afternoon, Areebel inquired about the impact of the settlement agreement on two pending REAs that they have been discussing independently with the USAE's Resident Engineer, Mr. Thomas Lavean and Major Collins, the COR. As we discussed during the call, Arent Fox [Areebel counsel's law firm] just learned about these REAs

Areebel has informed us that it wishes to modify the settlement agreement to exclude these REAs from the scope of the agreement. Given that the Government principals apparently had full knowledge of these REAs, we hereby request that the settlement of the appeal be modified to

exclude these REAs. If this is not possible, we request that the agreement be deemed a nullity and that the parties negotiate an alternative solution.

(Gov't reply, encl. 5)

8. By e-mail date/time 10 March 2011, 3:50 p.m., Areebel counsel provided to government counsel copies of Areebel's REA Nos. 2 and 3. The e-mail included a brief description of the contents and the following comments:

[T]he facts of these REAs are entirely separate and distinct from the facts involved in ASBCA Appeal No. 56787. The later filed REAs relate to events occurring for the most part in 2010 and address O&M costs as well as other repair costs. The appeal relates to events occurring in 2008 and 2009, and relate to contract delays and costs associated with drilling the wells.

Additionally, as we have also discussed, Areebel did not understand that by executing the settlement agreement relating to ASBCA No. 56787 it would be waiving its rights relating to [REA Nos. 2 and 3]. This understanding is underscored by Areebel's recent, active discussions with the Resident Engineer and the Contracting Officer's Representative regarding final resolution of these REAs.

...[I]t is Areebel's position that [the] settlement agreement should not be read to extend to these two REAs. We therefore request that the settlement agreement be amended to exclude the REAs from the scope of the agreement.

(App. resp., dtd. 5 July 2011 at 10)

9. By letter dated 22 April 2011, government counsel advised Areebel that "the Government intends to enforce the terms of the settlement agreement as executed by the contracting officer and Mr. Jowmah." This letter further stated:

By its plain terms, the settlement agreement bars any future claims under Delivery Order No. 0002 to the contract. You have advised that Areebel did not understand that by executing the settlement agreement regarding the above appeal, it would waive its rights relating to the

12 December 2010 and 4 January 2011 REAs. The clear language of paragraphs 5 and 7 of the settlement agreement, however, apprised Areebel that by executing the settlement agreement it waived its rights to pursue those two REAs. Mister Jowmah, the signatory of the settlement agreement for Areebel, was uniquely positioned to raise the question of the applicability of the settlement agreement to Areebel's two pending REAs at any time prior to signing the settlement agreement. I have reviewed the copies of those REAs you provided to me and they are both signed by Mr. Jowmah. If, as you assert, he did not understand the scope of the release in the settlement agreement, he should not have executed the settlement agreement. He nonetheless did, and Areebel is thereby bound.

(App. resp. dtd. 5 July 2011 at 11)

10. On 27 April 2011, the government moved to enforce the Settlement Agreement as to this appeal. On 11 May 2011, Areebel submitted its response opposing the government motion. Mr. Ali F. Jowmah, Areebel's signatory on the Settlement Agreement, signed this response with a declaration under penalty of perjury that "the foregoing is true and correct to the best of my knowledge and belief." The substance of the response, pertinent to the present motion, is contained in the following statements:

Over the course of several months in 2010 and 2011, Areebel and the Government engaged in settlement negotiations of the Appeal...At no time during the settlement negotiations, did either the Government or Areebel discuss REA No. 2 or REA No. 3 or any issues relating to other Delivery Orders.

The parties executed a Settlement Agreement dated March 8, 2011. Areebel understood and intended that the scope of the Settlement Agreement related to REA No. 1, which were the facts and issues in dispute in the pending Appeal. Areebel did not understand and did not intend that the scope of the Settlement Agreement to include facts and issues raised in REA No. 2 or REA No. 3.

Immediately after executing the Settlement Agreement, Areebel informed the Government that it did not intend for the Settlement Agreement to include issues other than those in REA No. 1 and included in ASBCA No. 56787.

Specifically, Areebel informed the Government that it did not intend for the Settlement Agreement to extend to REA No. 2 or REA No. 3.

...The Government continued to discuss with Areebel the merits of REA No. 2 and REA No. 3 after the parties executed the Settlement Agreement.

(App. resp. dtd. 11 May 2011 at 3)

11. When Areebel failed to follow the payment procedures in paragraph 6 of the Settlement Agreement, the contracting officer persuaded the Finance Office to accept the Settlement Agreement as an invoice, and issued a unilateral modification increasing the contract price by the settlement amount. On 24 May 2011, the complete payment of the settlement amount of \$176,964 was electronically transferred to Areebel's bank account. (Gov't reply dtd. 7 June 2011, encl. 1) Areebel states that it received the funds in its account on 27 May 2011, but has segregated them and has not used them (app. resp. dtd. 5 July 2011 at 9).

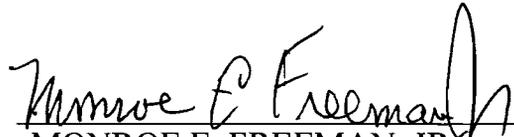
DECISION

The substantive issue on the motion is the applicability of the Settlement Agreement to REA No. 1 which is the subject of the appeal. REA Nos. 2 and 3 are not part of this appeal, and to our knowledge they have not been the subject of a contracting officer's decision or any appeal of such decision to this Board. Our decision herein does not decide the issue of the applicability of the Settlement Agreement to any REA or claim other than REA No. 1.

It is clear from the parties' correspondence, beginning with the first communication of Areebel's counsel on the afternoon of 8 March 2011 that the dispute between the parties is over the applicability of the Settlement Agreement to REA Nos. 2 and 3, and not to its applicability to REA No. 1 (*see* SOF ¶¶ 7-9). Moreover Areebel's 11 May 2011 response to the government motion, signed by Areebel's signatory on the Settlement Agreement, states that: "Areebel understood and intended that the scope of the Settlement Agreement related to REA No. 1, which were the facts and issues in dispute in the pending Appeal," and that: "Immediately after executing the Settlement Agreement, Areebel informed the Government that it did not intend for the Settlement Agreement to include issues other than those in REA No. 1 and included in ASBCA No. 56787" (*see* SOF ¶ 10).

On this record, there is no dispute as to the applicability of the Settlement Agreement to REA No. 1. Accordingly, the appeal is dismissed with prejudice.

Dated: 19 July 2011



MONROE E. FREEMAN, JR.

Administrative Judge
Armed Services Board
of Contract Appeals

I concur

I concur



MARK N. STEMPLER

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. 56787, Appeal of Ali Fawzi Gomme, Co-Owner, d/b/a Areebel Engineering & Logistics, rendered in conformance with the Board's Charter.

Dated:

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