

ARMED SERVICES BOARD OF CONTRACT APPEALS

Appeals of –)
)
Basirat Construction Firm) ASBCA Nos. 56808, 56810
) 57085, 57150
Under Contract Nos. W917PM-07-C-0056)
W917PM-07-C-0062)

APPEARANCE FOR THE APPELLANT: Mr. Obaidur Rahman
President

APPEARANCES FOR THE GOVERNMENT: Thomas H. Gourlay, Jr., Esq.
Engineer Chief Trial Attorney
Daniel B. McConnell, Esq.
James A. Wallace, Esq.
Engineer Trial Attorneys
U.S. Army Engineer District, Middle East
Winchester, VA

OPINION BY ADMINISTRATIVE JUDGE YOUNGER
ON MOTION TO DISMISS APPEALS

In these four appeals regarding contracts to construct police stations in Afghanistan, respondent Corps of Engineers (Corps) has moved to dismiss on the ground that the parties entered into a binding settlement agreement that the Corps has fully performed. Appellant Basirat Construction Firm (Basirat) has opposed the motion, challenging the validity of the agreement on multiple grounds. We grant the motion and dismiss the appeals with prejudice.

STATEMENT OF FACTS FOR PURPOSES OF THE MOTION

By date of 12 July 2011, the Corps moved to dismiss the above-captioned appeals. With its motion, the Corps notified the Board that the parties had executed a settlement agreement, bilateral modifications, and release of claims in all four of the above-captioned appeals, as well as in a fifth appeal, ASBCA No. 56809, that the Board had previously dismissed. *See Basirat Construction Firm*, ASBCA No. 56809, 11-1 BCA ¶ 34,714 at 170,927.

The settlement agreement obligated the Corps to perform several acts. With respect to Contract No. W917PM-07-C-0056 (contract 0056), the Corps agreed to: (a) execute a new bilateral modification to replace Modification No. P00011, which

terminated the contract for default, with the new modification to reflect that the contract was terminated for the convenience of the government; (b) cancel Modification No. P00005 and replace it with a new modification providing for payment of the settlement amount of \$495,198.40 to Basirat; and (c) pay the settlement amount to Basirat within 90 days of execution of the agreement. (Bd. corr. ltr. dtd. 12 July 2011 at 5)

With respect to Contract No. W917PM-07-C-0062 (contract 0062), the Corps agreed to execute a new bilateral modification cancelling and replacing Modification No. P00005 and providing that the contract is terminated for the convenience of the government (*id.*).

The only obligation imposed upon Basirat under the settlement agreement was to request dismissal with prejudice of these appeals “[i]n exchange for the mutual promises and covenants” in the agreement (*id.*).

The record reflects that both parties executed the settlement agreement by date of 14 June 2011 (*id.* at 6). The record also contains a copy of the bilateral modification issued under contract 0056 cancelling and replacing Modifications Nos. P00011 and P00005, indicating that the contract is terminated for convenience, and increasing the contract price by \$495,198.40 (*id.* at 7-8). The record further contains a copy of the bilateral modification issued under contract 0062 cancelling and replacing the termination for default of that contract and replacing it with a termination for convenience of the government (*id.* at 9).

Finally, the record contains a release of claims. Under the terms of the release, Basirat “release[d] the Government...from any and all liability arising under [contracts 0056 and 0062] from any cause” (*id.* at 5-6). The record also contains evidence of payment of the full settlement amount by wire transfer on 22 June 2011 (*id.* at 11, 13).

By letter to the Board dated 13 July 2011 captioned “Notification of Settlement and Motion to Dismiss,” Basirat sought further relief. While acknowledging that the contracts were converted to convenience terminations, Basirat asserted that it agreed to settle “because we got scared that it will take 3 to 4 more years and also because we were in a very bad condition financially and...in need of money.” Basirat asked that, “if possible, our claims should be referred for review to [a] cost estimation engineer of the [Corps]...[to] find the facts.” Basirat asserted that its claims aggregated \$1,687,522.35. (Bd. corr. ltr. dtd. 13 July 2011)

On 13 July 2011, the Board held a conference call with the parties. Basirat was represented by its president. He reiterated the substance of Basirat’s 13 July 2011 letter. Counsel for the Corps insisted that the parties had reached a complete and final

settlement, as set forth in their agreement, and that, should Basirat seek to set aside that settlement, the Corps would seek the return of funds paid to Basirat and would revisit the conversion of the default terminations to terminations for the convenience of the government. Thereupon, Basirat's president stated that Basirat did not desire to go that route, and urged the Board to dismiss these appeals based on the settlement agreement, as sought in the Corps' motion. (Bd. corr. order dtd. 29 July 2011)

By order dated 29 July 2011, the Board notified both parties that it intended to grant the Corps' motion to dismiss these appeals with prejudice unless shown good cause to deny the motion by either party by or before 8 August 2011 (*id.*).

By date of 3 August 2011, an attorney retained to represent Basirat entered an appearance and filed a response to the Board's order. Basirat's arguments may be grouped under two principal rubrics. Basirat first raises issues relating to the performance and termination of the two contracts giving rise to the appeals, insisting that the Corps lacked factual and legal grounds to terminate for default and acted in bad faith in the terminations and in denying Basirat's claims. (Response to the Board's Order to Show Cause Why Appeals Should Not Be Dismissed Or, In the Alternative, Request for Extension of Time (response) at 2) Basirat's counsel secondly challenged the validity of the settlement agreement, asserting that it is the product of duress, fraud and misrepresentation, mistake, and lack of consideration (*id.* at 2-3). In the alternative, Basirat sought an extension of time to supplement its response with a more detailed showing of why the appeals should not be dismissed (*id.* at 4). The Corps generally opposed Basirat's contentions (Government's reply to Appellant's Response to the Board's Order to Show Cause Why Appeals Should Not Be Dismissed or, In the Alternative, Request for Extension of Time).

We thereafter granted Basirat to and including 7 October 2011, to supplement its response. Subsequently, Basirat sought more time. By order dated 19 October 2011, we gave Basirat to and including 18 November 2011 to supplement its response, specifying that "[n]o further extensions will be granted absent extraordinary cause shown." (Order on Appellant's Motion for Extension of Time to Serve and File Supplementation to Response to the Board's Order to Show Cause Why Appeals Should Not Be Dismissed at 2).

Instead of filing a supplemental response by 18 November 2011, however, Basirat's attorney filed a notice of withdrawal as counsel of record and specified that Basirat's president would be its representative. No further communication has been received from Basirat.

DECISION

We grant the Corps' motion to dismiss the appeals. Basirat having failed to supplement its response to the order to show cause despite being afforded two opportunities to do so we decide the matter on the record before us.

We first consider Basirat's arguments regarding the validity of the settlement agreement, inasmuch as we see those arguments as dispositive of Basirat's contentions concerning the Corps' terminations of the contracts. Taking Basirat's challenges to the settlement agreement in turn, Basirat first asserts that the settlement agreement is void due to duress. It is familiar that, to render a contract unenforceable for duress, a party must establish that: "(1) it involuntarily accepted [the other party's] terms, (2) circumstances permitted no other alternative, and (3) such circumstances were the result of [the other party's] coercive acts." *Rumsfeld v. Freedom NY, Inc.*, 329 F.3d 1320, 1329 (Fed. Cir. 2003), *cert. denied*, 541 U.S. 987 (2004) quoting *Dureiko v. United States*, 209 F.3d 1345, 1358 (Fed. Cir. 2000); *PNL Commercial Corp.*, ASBCA No. 53816, 04-1 BCA ¶ 32,414 at 160,457.

The record before us regarding duress consists of: (a) unsubstantiated assertions by Basirat's president that Basirat agreed to settle "because we got scared that it will take 3 to 4 more years and also because we were in a very bad condition financially and...in need of money" (ltr. dtd. 13 July 2011); (b) attorney argument that "certain representation[s] and threats were made by the Corps and/or its representatives which were used to obtain [Basirat's] consent," as well as "continuing duress and threats to [Basirat's president's] life by third parties" (response at 3). None of these "certain representation[s] and threats" is specified, and there is no indication of how the actions of unidentified "third parties" are traceable to the Corps. In any event, one "induced by the want of money, to which [the Corps] has not contributed, to accept a lesser sum than he claims is due is not under legally recognized economic coercion or duress." *La Crosse Garment Mfg. Co. v. United States*, 432 F.2d 1377, 1382 (Ct. Cl. 1970).

We also cannot disregard the settlement agreement for fraud or misrepresentation, which rests on the assertion that "[t]he Corps and its agents" falsely stated that, if Basirat did not settle, "it would take 3 to 4 more years for this dispute to be resolved" (response at 3). The record is devoid of substantiation for this assertion.

Basirat's position regarding mistake also does not justify setting aside the settlement agreement. Basirat urges that the mistake arose from its president's "deficiencies in knowing [Basirat's] rights under the contract and the U.S. laws," and, because Basirat was not then represented by counsel, "there were many facts which [Basirat]...was wrongly led to believe to be true," and upon which it relied (response at 3). None of these assertions is substantiated. Moreover, while Basirat does not

suggest that the releases should be set aside “by reason of a mutual mistake,” *J.G. Watts Construction Co. v. United States*, 161 Ct. Cl 801, 806 (1963), Basirat has not established any “obvious unilateral mistake,” *DMS*, ASBCA No. 45723, 95-1 BCA ¶ 27,367 at 136,367.

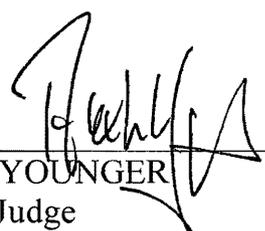
Finally, Basirat’s lack of consideration argument has no merit. While Basirat tells us that the Corps has not stated “any valid factual or legal grounds upon which it had denied payment of [Basirat’s] monetary claims” (response at 3), the record contains contracting officer’s final decisions for contract 0056 (ASBCA No. 57085, R4, tab 2) and contract 0062 (ASBCA No. 56810, R4, tab 1) elaborating on those grounds. Basirat also asserts that the Corps has failed to justify why it paid the lesser amount in the settlement agreement (response at 3-4), but it is Basirat that bears the burden of demonstrating why it should not be held to the amount to which it agreed. This it has failed to do.

Having concluded that Basirat has failed to justify setting aside the settlement agreement, we need not reach Basirat’s other arguments regarding the validity of the default terminations, the denial of Basirat’s claims, and the Corps’ alleged bad faith in contract administration, all of which have been resolved in the parties’ settlement.

CONCLUSION

No good cause appearing why these appeals should not be dismissed, ASBCA Nos. 56808, 56810, 57085 and 57150 are dismissed with prejudice.

Dated: 16 February 2012



ALEXANDER YOUNGER
Administrative Judge
Armed Services Board
of Contract Appeals

I concur



MARK N. STEMLER
Administrative Judge
Acting Chairman
Armed Services Board
of Contract Appeals

I concur



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 Nos. 56808, 56810, 57085, 57150, Appeals of Basirat Construction Firm, rendered in conformance with the Board's Charter.

Dated:

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