

ARMED SERVICES BOARD OF CONTRACT APPEALS

Appeal of --)
)
Red Sea Engineers & Constructors) ASBCA No. 57448
)
Under Contract No. W91B4M-09-C-7340)

APPEARANCES FOR THE APPELLANT: R. Dale Holmes, Esq.
Louisville, KY

Terence J. Kelley, Esq.
New Bern, NC

APPEARANCES FOR THE GOVERNMENT: Raymond M. Saunders, Esq.
Army Chief Trial Attorney
CPT Joon K. Hong, JA
Trial Attorney

OPINION BY ADMINISTRATIVE JUDGE FREEMAN
ON APPELLANT'S MOTION FOR RECONSIDERATION

Red Sea Engineers & Constructors (Red Sea) moves for reconsideration of our decision of 9 November 2011 denying its motion for summary judgment. *Red Sea Engineers & Constructors*, ASBCA No. 57448, 11-2 BCA ¶ 34,880. The grounds for the motion are that:

The Board's original conclusion that Johnson v. All-State supports a common law right to offset of the improper nonpayment of the May 2010 Invoice for \$619,406.01, due to an earlier erroneous duplicate payment, is not legally supportable, due to the 2008 change in FAR Supart [sic] 32.6. As the Federal Circuit noted in Johnson v. All-State, if there is a specific provision of law preventing an offset, as we assert is the prohibition in FAR 32.602(a), common law offset is not available to the Government. For this reason, the Government's improper nonpayment of the May 2010 invoice of \$619,406.01 supports a finding of a breach of the Government's payment obligations, requiring the default to be overturned due to this breach.

(Mot. at 9)

Red Sea's argument ignores the fact that when the contracting officer withheld certification of Invoice No. 8 on or about 19 June 2010, Red Sea was itself in breach of the payment provisions of the contract. Paragraph (1) of the Prompt Payment clause of the contract stated:

(1) Overpayments. If the Contractor becomes aware of a duplicate contract financing or invoice payment or that the Government has otherwise overpaid on a contract financing or invoice payment, the Contractor shall –

(1) Remit the overpayment amount to the payment office cited in the contract along with a description of the overpayment including the –

(i) Circumstances of the overpayment (e.g., duplicate payment, erroneous payment, liquidation errors, date(s) of overpayment);

(ii) Affected contract number and delivery order number if applicable;

(iii) Affected contract line item or subline item, if applicable; and

(iv) Contractor point of contact.

(2) Provide a copy of the remittance and supporting documentation to the Contracting Officer.

FAR 52.232-27(1).

Red Sea became aware of the duplicate payment of Invoice No. 7 on 5 June 2010 (*see* Red Sea letter dated 24 July 2010 attached to its 19 October 2011 Response to Board Letter of October 11, 2011, Bd. corr.). Red Sea did not at that time, and has not to date, remitted that duplicate payment to the payment office as required by paragraph (1) of the Prompt Payment clause of the contract. For as long as Red Sea was delinquent on its own contractual obligation to remit the duplicate payment of Invoice No. 7, and drawing all reasonable inferences in favor of the government as the non-moving party, Red Sea suffered no damage from the government's failure to pay Invoice No. 8 in the lesser amount. In these circumstances, the materiality of the alleged government breach is not proven and remains a genuine issue of material fact to be determined after a full evidentiary hearing on the merits.

We take this opportunity to clarify our decision of 9 November 2011. We did not intend to hold that the contracting officer had asserted a set-off. Accordingly, FAR 32.602(a) was not discussed by our decision. We point out that the government (through the proper officer) appeared to be eligible to assert a set-off and that consequently, we could not hold as a matter of law that the government was in breach of contract.

On reconsideration, we affirm our denial of the motion for summary judgment.

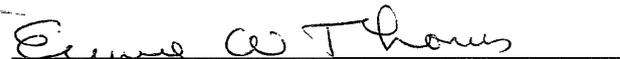
Dated: 3 February 2012


MONROE E. FREEMAN, JR.
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 No. 57448, Appeal of Red Sea Engineers & Constructors, rendered in conformance with the Board's Charter.

Dated:

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