

ARMED SERVICES BOARD OF CONTRACT APPEALS

Appeal of --)
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Martin Edwards & Associates, Inc.) ASBCA No. 57718
)
Under Contract No. W91247-11-D-0004)

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OPINION BY ADMINISTRATIVE JUDGE GRANT
ON THE GOVERNMENT'S MOTION TO DISMISS, OR
IN THE ALTERNATIVE, MOTION FOR SUMMARY JUDGMENT

The government moves to dismiss this appeal for failure to state a claim upon which relief can be granted, or in the alternative, for summary judgment. The government asserts that the breach of contract claim filed by Martin Edwards & Associates, Inc. (MEA) is precluded because MEA released its claim as part of a no-cost termination for convenience of its contract. MEA opposes the government's motion, arguing that the release is void because it was entered into pursuant to government misrepresentation of material facts, and that there are disputed material facts. We have jurisdiction under the Contract Disputes Act, 41 U.S.C. §§ 7101-7109. As both parties rely on matters outside the pleadings, we treat the government's motion as one for summary judgment, and hereby deny it.

STATEMENT OF FACTS (SOF) FOR PURPOSES OF THE MOTION

1. On 31 March 2011, the Army awarded MEA a contract for delivery and installation of washers and dryers at Ft. Bragg, Simmons Army Airfield, and Camp Mackall, NC (Contract No. W91247-11-D-0004) (Statement of Undisputed Material Facts (SUMF) ¶ 1; R4, tab 8 at 1, 8). The contract's performance work statement specified that the hours of operation for services to be performed would be Monday through Friday from 7:30 a.m. through 4:00 p.m. (except for federal holidays), unless otherwise authorized by the contracting officer (CO) or the CO's representative (R4, tab 7 at 3, ¶ 2.4).

2. Also on 31 March 2011, the Army issued Task Order No. W91247-11-D-0004-0001 to MEA to start the 45-day phase-in period required by the contract, running from 1 April 2011 through 15 May 2011 (SUMF ¶ 2; R4, tab 9). The 45 days for phase-in allowed for equipment installation and an orderly contract transition with the outgoing contractor (R4, tab 7 at 3, ¶ 2.6).

3. On 4 April 2011, a post-award briefing was held with representatives of MEA, the government, and the outgoing contractor Vortec Development, Inc. (Vortec). At the post-award briefing, MEA advised that it would be difficult, "if not impossible," to have the equipment installed by 15 May 2011, due to delays in getting the equipment from its supplier, and asked for an extension to the 45-day phase-in period until 1 July 2011. (App. opp'n, Affidavit of Rickie Day (Day aff.) ¶¶ 9, 10, 12; compl. ¶ 12) The government initially agreed to this request but then determined to retain the original phase-in period, ending 15 May 2011 (Day aff. ¶¶ 13, 19). The parties then discussed the issue of whether MEA could work Saturdays and Sundays to meet the 45-day phase-in date. MEA asserts that it asked for permission to work weekends but that the government denied the request on the basis that there was no money to pay a government representative overtime to monitor performance on-site (Day aff. ¶¶ 23-25). The government asserts that it offered MEA the option to work weekends but MEA refused (R4, tab 21; gov't reply br. at 3, n.1). The parties then discussed whether Vortec's contract could be extended, but that contract had expired 31 March 2011. When Vortec advised that its equipment would have to be removed due to Vortec's obligations to its lender, the government said it could enter into an agreement to pay Vortec for use of their equipment past the original contract expiration date. (Day aff. ¶¶ 14, 17, 20)

4. Later that same day, concerned about MEA's ability to meet the phase-in date given these issues, the CO asked for immediate assurances from MEA that MEA would complete the phase-in period as required by the contract (R4, tab 15). MEA responded that it intended to meet all terms and conditions of the contract (R4, tab 16). Finding that this response lacked specifics as to how the phase-in schedule could be met, in light of the problems raised at the post-award briefing, the CO terminated the contract for cause the next day, 5 April 2011 (R4, tab 17 at 1, 4; SUMF ¶ 4).

5. On 6 April 2011, MEA asked the CO to either reconsider the decision to terminate for cause or convert the termination to a no-cost termination for convenience (SUMF ¶ 5). On 7 April, government counsel notified MEA counsel that the government was willing to convert the termination for cause to a no-cost termination for convenience, on the condition that MEA help get Vortec to agree to extend its services until 20 May 2011 (compl. ¶ 19; Day aff. ¶ 40). MEA agreed to help get the Vortec extension, and the no-cost termination for convenience was finalized on 8 April 2011 via bilateral Modification No. P00002 (Mod. 2) (compl. ¶ 19, R4, tab 18). A separate purchase order was also issued that same day to Vortec for extended services through 20 May 2011 (Affidavit of Beverly Gurkin, ¶ 22).

6. The no-cost termination included the following release language on the part of MEA:

b. The Contractor agrees that any and all claims which the Contractor, and its assigns, officers, directors, employees, agents and subcontractors may have or acquire against the Government or its present and former agents, employees, or agencies, arising under or relating to this Contract, [sic] and are hereby fully and irrevocably releases and forever discharges the Government and anyone claiming by, through or under it, from any and all claims, actions, causes of action, obligations, costs, expenses, damages, losses and liabilities, of any kind or nature, whether known, unknown or unforeseen, vested or contingent, either encompassed by or which hereafter can arise out of or result from the performance or termination of the Contract.

(R4, tab 18 at 2) The termination also included comparable release language whereby the government released MEA from any further claims the government might have (*id.*).

7. On the same day that MEA asked for the termination for cause to be converted to a no-cost termination for convenience (6 April 2011), the government awarded a replacement contract for washers and dryers to Inventory Accounting Systems, Inc. (IAS), the offeror next in line for award after MEA (compl. and answer ¶ 17; Day aff. ¶ 30). IAS offered to work weekends, and the government allowed IAS to work Saturdays for the phase-in period (R4, tab 21; compl. and answer ¶ 22). MEA was not aware, at the time it signed the release, that IAS was allowed to work weekends (Day aff. ¶ 33). IAS did not complete the phase-in period within 45 days (Day aff. ¶ 36), although the record does not show whether a longer period was agreed to after award due to excusable delay or receipt of consideration.

8. On 4 May 2011, MEA filed a certified claim with the contracting officer for \$850,000 for breach of contract and unlawful termination for convenience. Specifically, MEA asserted that the government demonstrated bad faith and abuse of discretion in allowing IAS to work Saturdays but denying that option to MEA, and that the government awarded MEA's contract with no intention of fulfilling its promises. (R4, tab 20) The government denied this claim by final decision dated 29 June 2011 stating, among other things, that there was no bad faith underlying the government's termination for cause because MEA was offered the same option to work weekends as was later approved for IAS (R4, tab 21). On 27 July 2011, MEA appealed to this Board.

9. In an affidavit filed in opposition to the government's motion for summary judgment, MEA's president, Mr. Ricky Day, states that he signed the modification "solely because the Government represented to me that the Contract [phase-in period] had to be

completed within 45 days, MEA had to use the equipment specified in the Contract, the Contract had to be completed without working on Saturdays or Sundays, and that MEA's Contract was terminated by default because MEA failed to provide adequate assurances of Contract performance" (Day aff. ¶ 42).

DECISION

Summary judgment may be granted only where there is no genuine issue 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 (Fed. Cir. 1987). The movant has the burden to establish the absence of disputed material facts; once done, the non-moving party must set forth the specific facts, not conclusory statements or bare assertions, to defeat the motion. *Pure Gold Inc. v. Syntex (U.S.A.), Inc.*, 739 F.2d 624, 626-27 (Fed. Cir. 1984).

The government asserts that MEA released its breach of contract claim as part of the no-cost termination for convenience of its contract. MEA argues the release is void because MEA agreed to it as a result of government misrepresentation of material facts, and that there are disputed material facts as to whether the government offered MEA the chance to work weekends (app. opp'n at 1, 3, *passim*). In response, the government asserts that, for the purposes of the motion, even assuming it told MEA that MEA could not work weekends, the statement was not an "erroneous representation" nor material to the motion and the government is still entitled to a decision in its favor as a matter of law (gov't reply br. at 3-5). For the reasons discussed below, we deny the government's motion.

As an initial matter, MEA did in fact release its breach of contract claims by signing Mod. 2; the broad release language, including specific references to damages resulting from termination, makes this release comprehensive and unambiguous. *Holland v. United States*, 621 F.3d 1366, 1377-79 (Fed. Cir. 2010), *cert. denied*, 132 S. Ct. 365 (2011) (broad, unambiguous release language barred claims in question); *Bell BCI Co. v. United States*, 570 F.3d 1337, 1341-42 (Fed. Cir. 2009) (claim barred by unambiguous broad release language).¹

Indeed, MEA does not contest the scope of the release, but argues instead that Mod. 2 is voidable because MEA entered into the release as a result of government misrepresentation of fact (app. opp'n at 1, *passim*). Although a release is binding for the claims it encompasses, it can be voided if it was entered into because of a misrepresentation

¹ The government also argues that Mod. 2 bars the claim as an accord and satisfaction, which is a separate defense from release. *Holland*, 621 F.3d at 1377 (in an accord and satisfaction, a claim is discharged because performance other than what was due is accepted as full satisfaction of the claim). Here, we do not need to address the defense of accord and satisfaction because we conclude Mod. 2 constitutes a release barring MEA's claim.

of material fact. *Tzell Airtrak Travel Group Corp.*, ASBCA No. 57313, 11-2 BCA ¶ 34,845 at 171,409 (an agreement is voidable if a party's assent was induced by a material misrepresentation); *R&W Flammann GmbH*, ASBCA Nos. 53204, 53205, 02-2 BCA ¶ 32,044 at 158,368 (misrepresentation by a party can "vitiating" the binding nature of a release). A misrepresentation is an assertion that is not in accordance with the facts, and can include a misrepresentation as to one's state of mind, such as a statement as to one's intention to do something if that is not actually one's true intention. RESTATEMENT (SECOND) OF CONTRACTS § 159, cmt. d (1981).

The government's principal argument in opposition is that the alleged denial of weekend work was not a misrepresentation but was an accurate statement of the contract requirement, and that allowing IAS to work weekends was an exercise of discretion in a separate situation that does not constitute a misrepresentation of fact as to MEA's contract (gov't reply br. at 3-5). However, the issue is not whether the contract gave the government discretion, which it clearly did, or whether that discretion could reasonably be exercised differently, which it certainly could. Rather, the issue is whether the government potentially misrepresented how that discretion would be exercised for this requirement.

MEA has presented evidence that the government denied it the chance to work weekends, and that this was because of lack of money to pay overtime for a government representative to monitor performance on-site (SOF ¶ 3). The government admits that it allowed the replacement contractor to work weekends (SOF ¶ 7). If the government denied MEA the opportunity to work weekends knowing it would allow weekend work in a later contract, then this could constitute a material misrepresentation. As noted above, a misrepresentation of intent can be a misrepresentation of fact. RESTATEMENT (SECOND) OF CONTRACTS, §159 and cmt. d (1981) ("A person's state of mind is a fact, and an assertion as to one's opinion or intention...is a misrepresentation if the state of mind is other than as asserted."). Assuming for purposes of the motion that the government did in fact deny MEA the chance to work weekends, the government's underlying intent and the accuracy of its representation of that intent are questions of fact that cannot be resolved on summary judgment.

We recognize that the alleged misrepresentation here occurred in connection with contract performance, before the termination for cause and the later no-cost termination for convenience and release. This is in contrast to those situations where the misrepresentation was part of release negotiations. *See, e.g., Triple "A" South*, ASBCA No. 35824, 90-1 BCA ¶ 22,567 at 113,253 (government allegedly assured the contractor that certain claims would survive the "pro forma" release language when they would not); *cf. IMS Engineers-Architects, P.C. v. United States*, 92 Fed. Cl. 52, 71-73 (2010), *aff'd*, 418 Fed. Appx. 920 (Fed. Cir. 2011) (plaintiff's claim barred by release as there was no government misrepresentation as part of termination settlement and release negotiations). However, the key is whether the misrepresentation *induced* the party to sign the agreement. *See Tzell Airtrak Travel Group*, 11-2 BCA ¶ 34,845 at 171,409; RESTATEMENT (SECOND) OF

CONTRACTS, §164. We cannot automatically draw a barrier between the alleged misrepresentation and the later release just because of the separation of those events.

Here, MEA asserts the alleged misrepresentation induced it to sign the release (SOF ¶ 9). The government disagrees, arguing that MEA's position is contradicted by the fact that MEA itself was the one who asked for the no-cost termination (gov't reply br. at 5). As an aside, we note that at the time MEA asked for the no-cost termination, it did not know that the government allowed IAS to work weekends (SOF ¶ 7). Asking for a no-cost termination for convenience in this situation is different from asking for a no-cost termination knowing that weekend work was or will be allowed for the replacement contractor. See *J.G. Watts Construction Co. v. United States*, 161 Ct. Cl. 801, 809-10 (1963) (release binding as plaintiff "was in a position to know fully all the facts with respect thereto"); *Alliance Oil & Refining Co. v. United States*, 13 Cl. Ct. 496, 502 (1987), *aff'd*, 856 F.2d 201 (Fed. Cir. 1988) (table) (contractor barred by release "if it knows of the facts supporting a cause of action" even if it does not know that it actually has a cause of action). Ultimately, however, whether the alleged misrepresentation induced MEA's agreement to the release is a question of fact. RESTATEMENT (SECOND) OF CONTRACTS, §164, cmt. c (1981). MEA has presented sufficient evidence in this regard to raise a triable issue of fact and defeat the government's motion.

CONCLUSION

For the reasons stated above, we deny the government's motion for summary judgment.

Dated: 21 May 2012


ELIZABETH M. GRANT

Administrative Judge
Armed Services Board
of Contract Appeals

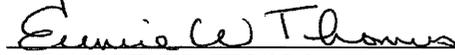
(Signatures continued)

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. 57718, Appeal of Martin Edwards & Associates, Inc., rendered in conformance with the Board's Charter.

Dated:

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