

ARMED SERVICES BOARD OF CONTRACT APPEALS

Appeal of --)
)
New Iraq Ahd Company) ASBCA No. 59304
)
Under Contract No. W91GFB-10-C-5005)

APPEARANCE FOR THE APPELLANT: Mr. Abbas Abed Mohsin
Owner

APPEARANCES FOR THE GOVERNMENT: Raymond M. Saunders, Esq.
Army Chief Trial Attorney
CPT Vera A. Strebel, JA
Trial Attorney

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

The U.S. Army (government) has filed a motion to dismiss this appeal for failure to state a claim upon which relief can be granted, or in the alternative, a motion for summary judgment. Appellant, New Iraq Ahd Company (NIAC), has not responded to the government's motion. We have jurisdiction under the Contract Disputes Act (CDA) of 1978, 41 U.S.C. §§ 7101-7109.

STATEMENT OF FACTS FOR PURPOSES OF THE MOTION

1. On or about 30 May 2010, the government awarded the above-captioned contract to NIAC for the design and construction of a concrete slab on grade/concrete pads for a storage yard in Iraq for a total contract price of \$553,700 (R4, tab 1 at 2-4, 7). The contract incorporated by reference FAR 52.249-10, DEFAULT (FIXED-PRICE CONSTRUCTION) (APR 1984) (*id.* at 42). The period of performance called for was 90 days from date of notice to proceed (*id.* at 7), or from on or about 5 June 2010 to on or about 4 September 2010.

2. The government was not satisfied with the quality or the progress of appellant's work. On 18 August 2010, the contracting officer (CO) issued a Notice of Termination for Default under the Default clause effective 7 August 2010. The Notice indicated that the government had previously issued a cure notice but the contractor failed to justify or excuse the work delay. The Notice also stated as follows:

Due to the fact that you have failed to progress in this contract or provide the Government with any excusable

delay, this contract is Terminated for Default IAW FAR 52.249-10. The Government shall not be liable to the Contractor for any amount for supplies or services not accepted.

(R4, tab 5) The Notice also provided NIAC's appeal rights. As far as this record shows, it does not appear that NIAC filed an appeal of the default termination.

3. NIAC submitted to the government Invoice No. 01603, dated 18 August 2010, for the work performed in the total amount of \$45,667.50 (R4, tab 8 at 2).¹ This invoice did not mention any other amounts due under the contract, nor did it reserve NIAC's right to seek any additional amounts. The invoice was approved by the CO (*id.* at 1), and was processed for payment on 10 January 2011 (R4, tab 10).

4. On 13 April 2011, NIAC executed a "Release of Claims" citing the contract and containing the following language:

The undersigned contractor acknowledges payment in full for all supplies, services, and/or construction provided under the subject contract in the amount of **\$45,667.60** and hereby releases and discharges the United States Government of any further liabilities, demands, obligations, and claims arising under or by virtue of said contract.

I acknowledge payment in full for all supplies, services, and/or construction provided under the above contract and hereby releases [sic] and discharges [sic] the United States Government of any further liabilities, demands, obligations, and claims arising under or by virtue of said contract.

(R4, tab 11)

5. Over two years later NIAC contacted the CO by email, on 1 June 2013, requesting "please check this contract" (R4, tab 13). On 3 June 2013, the CO responded that the contract had been closed on 13 April 2011 (R4, tab 14). By email

¹ Contract line item numbers 0001 and 0002 on appellant's invoice added up to \$45,667.60. The CO approved a payment of \$45,667.50 (R4, tab 8). The government's "Payment Ledger" indicated a payment to appellant of \$45,667.60 (R4, tab 10 at 3). The voucher processed for payment indicated a payment of \$45,667.50 (*id.* at 1). Under the release, NIAC acknowledged receipt of \$45,667.60 (R4, tab 11). As far as this record shows, neither party has challenged this disparity of ten cents, and we find it immaterial to the disposition of this appeal.

dated 4 June 2013, the government provided additional information, in particular that the contract had been terminated for cause on 7 August 2010; that NIAC had been paid \$45,667.60 for work performed; and “On 13 April 2011 a representative of your company signed a release of claims stating that the \$45,667.60 was all the money expected to be received.” The government attached to the email the release, the termination modification and the termination notice. (R4, tab 14)

6. On 9 June 2013, NIAC sent the CO what it characterized as a “claim” for materials. Specifically, NIAC stated:

[Y]es I signed the notice for the amount of achieved work \$45,667.60. [T]his amount is for the work we did. [B]ut I bought the materials for this work. I have receipts prove that, I did not get a compensation for the losing, so please take my claim in your consideration and assist me as much as you can to get me paid my lost [sic].... I just demand for my right....

NIAC attached a list of receipts totaling \$166,014.00. (R4, tab 15)

7. The CO responded by email dated 10 June 2013, stating:

[A] release of claims means that you will not submit a claim against the government. Also, since this was a termination for cause, there are no grounds for any settlement agreement. There is no way the government is going to pay for your losses when you failed to perform the contract. I am sorry but in this case, there is nothing I can do to provide assistance.

(R4, tab 15)

8. NIAC filed a notice of appeal to this Board. The notice of appeal was docketed under ASBCA No. 58800.

9. Appellant’s claim was in excess of \$100,000 but was not certified under the CDA. The government moved to dismiss the appeal for lack of jurisdiction. The Board granted the motion, dismissing the appeal without prejudice for lack of jurisdiction. *New Iraq Ahd Co.*, ASBCA No. 58800, 14-1 BCA ¶ 35,479, *recon. denied as untimely*, 14-1 BCA ¶ 35,597.

10. On 1 March 2014, appellant submitted a certified claim to the CO for \$231,621.00 under the contract, itemized as follows:

I demand to get back my payment in amount \$166,014.00 which it in my receipts I have already provide you with plus %10 of work in amount (\$54,713.00) which was not accounted by the contracting officer also the mistake in account of %10 which accounted is (\$10,894.00) so the total amount which we request is (**\$231,621.00**)....

(R4, tab 17)

11. On 18 March 2014, the CO denied the claim, stating as follows:

As already discussed, prior to the submission of the certified claim, contractor submitted invoice 01603 for \$45,667.50. A release of claims was signed by contractor on 13[]Apr 2011. The release of claims indicates payment has been made in full for all supplies, services and/or construction provided under the contract and releases and discharges the United States Government of any further liabilities, demands, obligations and claims arising under or by virtue of said contract. In light of the paid invoice and release of claims it is my determination that the certified claim of \$231,621.00 NOT be paid.

(R4, tab 18)

12. Appellant timely appealed the CO's decision to the Board and the appeal was docketed as ASBCA No. 59304. Appellant filed a complaint, which did not reference the release. The government filed a Rule 4 file, which included the release. In lieu of filing an answer the government filed the subject motion.

DECISION

In support of its motion, the government relies upon appellant's signed release in the Rule 4 file, and asks us to construe the release and the undisputed surrounding circumstances to bar appellant's claim. Under these circumstances, we treat the government's motion not as a motion to dismiss, but rather as one seeking summary judgment.

The law of summary judgment is well settled. Summary judgment is properly granted when there are no genuine disputes of material fact on the record, and the moving party is entitled to judgment as a matter of law. To ward off summary judgment, the non-moving party must do more than make mere allegations; it must assert facts sufficient to show a dispute of material fact. *Mingus Constructors, Inc. v. United States*, 812 F.2d 1387, 1390-91 (Fed. Cir. 1987). Appellant has not done so here.

Therefore, applying the undisputed facts of record, we find that appellant executed this release after the events occurred for which it now seeks compensation. The release was clear, unequivocal and unconditional, and must be given its plain meaning and effect. *Bell BCI Co. v. United States*, 570 F.3d 1337 (Fed. Cir. 2009). Such a release bars any and all claims for additional compensation based upon events occurring prior to the execution of the release. *Todd Pacific Shipyards Corp.*, ASBCA No. 55126, 08-2 BCA ¶ 33,891 at 167,759. Accordingly, we conclude that appellant released this claim, and the government is entitled to summary judgment as a matter of law.

CONCLUSION

The government's motion for summary judgment is granted. The appeal is denied.

Dated: 22 December 2014



JACK DELMAN
Administrative Judge
Armed Services Board
of Contract Appeals

I concur

I concur



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



RICHARD SHACKLEFORD
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. 59304, Appeal of New Iraq Ahd Company, rendered in conformance with the Board's Charter.

Dated:

JEFFREY D. GARDIN
Recorder, Armed Services
Board of Contract Appeals