ARMED SERVICES BOARD OF CONTRACT APPEALS

Appeal of --	)	
	)	
Inca Contracting Co., Inc.	)	ASBCA No. 52697
	)	
Under Contract No. DABT63-94-D-0021	)	

APPEARANCE FOR THE APPELLANT: Mr. Lynn M. Pate
Vice President

APPEARANCES FOR THE GOVERNMENT: COL Michael R. Neds, JA
Chief Trial Attorney
LTC Richard B. O'Keeffe, Jr., JA
Trial Attorney

OPINION BY ADMINISTRATIVE JUDGE JAMES ON
RESPONDENT'S MOTIONS FOR SUMMARY JUDGMENT AND
FOR PARTIAL DISMISSAL FOR LACK OF JURISDICTION

Respondent moves for summary judgment on the grounds that under the captioned small business "§ 8(a)" contract, Inca Contracting Co., Inc. (Inca) released its November 1999 claim, and two of the elements of the claim seek anticipatory profits that are not recoverable under the contract's convenience termination clause (MOSUJ at 3). Respondent also moves to dismiss Inca's "equipment losses" claim element for lack of jurisdiction under the Contract Disputes Act (CDA), 41 U.S.C. §§ 603-613, on the grounds that Inca did not submit a properly quantified and supported claim for equipment losses to the Contracting Officer (CO) for decision (MODJUR at 1).

STATEMENT OF FACTS (SOF) FOR PURPOSES OF THE MOTIONS

1. In April 1994, the U.S. Small Business Administration (SBA) accepted the U.S. Army Intelligence Center and Ft. Huachuca's offer to contract for building demolition at Ft. Huachuca, Arizona, pursuant to § 8(a) of the Small Business Act, 15 U.S.C. § 637(a), and authorized respondent to negotiate directly with Inca (R4, tab 5).

2. Respondent solicited a proposal for a firm fixed-price requirements contract for Ft. Huachuca building demolition with a one-year base period and four one-year option periods (R4, tab 1). Inca submitted a proposal on or about 6 September 1994 in response thereto (R4, tabs 9, 10).

3. On 30 September 1994, the CO awarded Contract No. DABT63-94-D-0021 (the contract) to the SBA. By the contract's FAR 52.219-17 SECTION 8(A) AWARD (FEB 1990)

clause, the SBA subcontracted complete performance to Inca, and delegated to the Army contracting agency--

> the responsibility for administering the contract with complete authority to take any action on behalf of the Government under the terms and conditions of the contract; provided, however that the contracting agency shall give advance notice to the SBA before it issues a final notice terminating the right of the subcontractor to proceed with further performance.

(R4, tab 1 at 1, 2, A-2) The contract provided that Delivery Orders (DO) were to be issued for all work required under the contract, and included the FAR 52.216-19 DELIVERY-ORDER LIMITATIONS (APR 1984) clause, whose ¶ (b) limited the "maximum order" to the quantity or quantities estimated for each line item and whose ¶ (d) required the contractor to honor any order exceeding the maximum limitations unless it returned the order to the ordering office within two days after its issuance stating the reason for the contractor's intent not to ship the item(s) ordered (R4, tab 1 at C-3, I-7).

4. The contract's FAR 52.217-9 OPTION TO EXTEND THE TERM OF THE CONTRACT (MAR 1989) clause required a preliminary written notice of intent to extend at least 60 days before the contract expires (R4, tab 1 at I-9). On 9 July 1996, the CO gave preliminary notice to Inca of intent to exercise the second year option (R4, tab 98).

5. On 23 September 1996, the CO issued unilateral Modification No. P00006 to the contract, exercising "Option Year 2," with item Nos. 2001-2001F (R4, tab 43).

6. Inca's 25 September 1996 letter to the CO submitted a "Request for Equitable Adjustment to correct error and omissions," alleging that it had inadvertently omitted disposal costs, such as truck hauling costs and landfill dumping fees, from its original proposal (R4, tab 44).

7. The CO issued DO No. 0104 (DO 104), dated 28 September 1996, for 31,986 square feet of item No. 1001E and 170,643 square feet of item No. 1001F (whose estimated quantities in the contract were 15,000 and 20,000 square feet, respectively) at first option year unit prices. Inca received DO 104 on 3 October 1996. (R4, tab 45) Inca did not return DO 104 to the ordering office, stating its intent not to ship the items ordered and reasons therefor within two days of its issuance, as required by ¶ (d) of the FAR 52.216-19 DELIVERY-ORDER LIMITATIONS (APR 1984) clause.

8. Inca's 30 October 1996 letter to the CO rejected DO 104, alleging: (a) "Our records indicate the 'mail' date of [DO 104] by the Government was Tuesday, October 1, 1996," so the second option year's unit prices applied. (b) DO 104's quantities exceeded the specified maximum order. (c) Inca received no Government preliminary notice of

intent to exercise the second option year. Inca stated: "We will . . . not proceed with any work [on DO 104] pending your decision to negotiate" the 25 September 1996 request for equitable adjustment. (R4, tab 47)

9. Inca's 27 November 1996 letter to respondent quantified its 25 September 1996 request for equitable adjustment at $3.65 per square foot for DOs 101-103 (R4, tab 50).

10. On 28 January 1997, the CO wrote to SBA: "Notice is hereby given that the subcontractor, Inca . . . has breached the terms and conditions of assigned [sic] contract DATB63-94-D-0021." The CO's letter noted Inca's 25 September 1996 request for equitable adjustment for omitted disposal costs, and stated:

> The contractor has refused to perform unless a price adjustment is made.
>
> Request that you take immediate action to resolve this issue with Inca. Default action . . . may be initiated. Request your reply within ten (10) days from receipt of this letter.

(R4, tab 55)

11. The CO's 24 February 1997 letter to SBA stated:

> There are no additional funds available to provide a contract price adjustment resulting from an error.
>
> The Government is willing to relieve Inca . . . from their [sic] contract, providing that a successor contractor under the 8A program is available and willing to perform the contract under the same terms, conditions, and prices stipulated in the contract. If Inca . . . does not withdraw, the Government will be forced to terminate the contract pursuant to the Default Provision [FAR 52.249-10].

(R4, tab 58)

12. Inca's 26 February 1997 letter to SBA stated that it could not negotiate with the CO to correct errors in its original proposal, and, therefore, it had –

> no other alternative, but to withdraw from the Contract as mutually agreed to by the three parties involved: S.B.A., the Prime Contractor, Sophie Moore, the Contracting Officer, and Inca . . . the Subcontractor.

Inca did not mention any threat to terminate the contract for default or "duress." Inca proposed several conditions for its withdrawal, including: the contract would not be terminated for default; no Government action would be brought against Inca for damages, additional cost, or cost to complete; the Government would release Inca's performance and payment bonds; "Inca . . . will release any rights of Claim against the government on the contract . . . [and] any rights on the original proposal submitted in 1994 to the government"; and the Government would "not hold ill will towards [Inca] nor provide negative recommendations/evaluations of [Inca] to outside parties." (R4, tab 59)

13. On 28 February 1997, the SBA forwarded Inca's 26 February 1997 letter to the CO. The SBA letter requested that, if the CO agreed with Inca's conditions, she sign it and return it to the SBA. The CO wrote her signature and date "5 Mar 97," and stated: "I concur with the above conditions" on the second page of Inca's letter. (R4, tabs 59, 60)

14. On 6 and 7 March 1997, Inca and SBA signed modifications "SBA 001" and "SBA 002," respectively, citing "0009-94-206062/DABT63-94-D-0021." SBA 001 provided:

> The Small Business Administration pursuant to FAR 52.249.3 [sic] plans to Terminate for Convenience its contract with Inca . . . effective March 6, 1997. The government releases the contractor of any and all present and future liabilities under this contract. Likewise the contractor releases any rights of Claims agai[nst the] government on this contract.

SBA 002 named Miller and Associates, Inc., to complete the DOs. On 12 March 1997, the Army CO signed unilateral Modification No. P00007, citing both contract DABT63-94-D-0021 and SBA's subcontract No. 0009-94-206062 with Inca, and providing:

> This modification recognizes the results of Modification SBA 001, issued by . . . (SBA) to Inca . . . and Modification SBA 002.

(R4, tab 64)

15. On 23 November 1998, Inca submitted to the CO a certified claim, stating that it was reasserting its 27 November 1996 request for an equitable adjustment. Inca alleged that $242,355.72 was the difference between the original "value" of DOs 101-103 and their re-computed cost at $3.65 per square foot, and DO 104 "should have been issued in the amount of $739,595.85." (R4, tab 73)

16. The CO's 25 January 1999 final decision denied Inca's 23 November 1998 claim in its entirety (R4, tab 78). On 3 May 1999, appellant filed a notice of appeal to this Board, which was docketed as ASBCA No. 52171 (R4, tab 79). We dismissed that appeal for lack of jurisdiction due to its untimely filing. *Inca Contracting Co., Inc.*, ASBCA No. 52171, 00-1 BCA ¶ 30,672. (R4, tab 92)

17. Inca's 30 November 1999 certified claim to the CO alleged that the CO had refused to discuss Inca's 1996 request for equitable adjustment for proposal error and forced Inca to withdraw from the contract by threatening default termination if Inca did not withdraw, and sought $304,453.59, comprised of: (a) $73,959.59 in lost profits on DO 104; (b) $100,000 estimated for "equipment losses," whose exact amount Inca would provide after review of all its equipment records; and (c) $130,494 in lost profits on the remaining years of the contract performed under Contract No. "DABT63-97-D-0016" (R4, tab 93).

18. On 25 January 2000, the CO denied Inca's 30 November 1999 claim in its entirety, citing Inca's 6 March 1997 release of claims, the non-recoverability of anticipatory profits under the convenience termination clause, and Inca's failure to provide any supporting data and to state a sum certain for alleged "equipment losses" (R4, tab 94). On 28 March 2000, Inca timely appealed the CO's 25 January 2000 final decision, which the Board docketed as ASBCA No. 52697 (R4, tab 95).

DECISION

I.

Respondent moves to dismiss the "equipment losses" element of Inca's November 1999 claim on the basis that it was not properly quantified and supported, so the Board lacks jurisdiction to entertain it. Inca's claim alleged duress – threatened default termination – as the cause for its withdrawal from the 8(a) subcontract, and damages totaling $304,453.59, of which the $100,000 estimated equipment loss was one element (SOF ¶ 17). Thus, Inca gave sufficient notice of the basis of its claim and stated a sum certain therefor. The circumstance that one element was estimated did not invalidate Inca's CDA claim. *See Manhattan Const. Co.,* ASBCA No. 52432, 00-2 BCA ¶ 31,091 at 153,521. We deny the motion to dismiss for lack of jurisdiction.

II.

Summary judgment is appropriate when there are no material facts genuinely at issue, and the moving party is entitled to judgment as a matter of law. *See Mingus Constructors, Inc., v. United States*, 812 F.2d 1387, 1390 (Fed. Cir. 1987). Respondent argues that it is entitled to judgment because (i) by modification SBA 001 the parties mutually released each other's claims, so Inca's claim is barred by accord and satisfaction,

and (ii) the contract's FAR 52.249-3 convenience termination clause disallows anticipatory profit as sought in Inca's first and third claim elements.

Inca contends that there are 13 "disputed material facts," but did not support such disputed facts by any affidavit, deposition, answer to interrogatories, or admission. *Cf*. Fed. R. Civ. P., Rules 56(c), (e). Inca's "disputed material facts" Nos. 1, 2 and 4 concerning its mistake claim were decided conclusively by Inca's untimely appeal of the CO's 25 January 1999 final decision. *See JWA Emadel Enterprises, Inc.*, ASBCA No. 51016, 98-2 BCA ¶ 29,765 at 147,503, *recon. den*., 98-2 BCA ¶ 29,960 (a contractor cannot validly renew a claim, whose denial it did not timely appeal, by merging it into other claims which are the subject of a later CO's decision). Inca's "disputed material facts" No. 3 is immaterial to MOSUJ issues, and Nos. 5-13 are actually legal arguments regarding undisputed facts. We conclude that there are no disputed material facts.

Inca further argues that: (1) Inca was not in default or in noncompliance with the contract at the time it rejected DO 104 and so Inca's withdrawal from the contract was under duress due to respondent's threat to terminate the contract for default; and (2) the CO did not issue Inca any termination notice, and there was no signed modification between Inca and the Army providing a convenience termination and contractor release; and thus Inca's claim is not barred by accord and satisfaction.

III.

To establish duress, Inca must show that one side involuntarily accepted the terms of another, circumstances permitted no other alternative, and the circumstances were the result of coercive acts of the opposite party. *See Systems Technology Associates, Inc. v. United States*, 699 F.2d 1383, 1387 (Fed. Cir. 1983). The record does not establish those three elements of proof.

Inca voluntarily proposed the conditions of withdrawal from the contract on 26 February 1997, including that the contract would not be terminated for default (SOF ¶ 12). Inca could have performed DO 104 pending resolution of any dispute concerning its issuance date, unit prices, and quantities. A contractor risks termination by failing to proceed even if his belief concerning the dispute is correct. *See Triax Co., Inc.*, ASBCA No. 33899, 88-3 BCA ¶ 20,830 at 105,344.

Inca refused to perform DO 104, based on the unsubstantiated allegation that DO 104's unit prices were erroneous, and did not return DO 104 to the delivering office within two days after its issuance and state Inca's intent not to ship the items ordered and the reasons therefor, as required by the contract's FAR 52.216-19 DELIVERY-ORDER LIMITATIONS clause (SOF ¶¶ 7-8). Support for the contention that Inca was not in default or was in compliance with the contract is not evident. Thus, the CO's 28 January and 24 February 1997 statements to SBA regarding initiating a default action, and default

termination if Inca failed to withdraw (SOF ¶ 10-11), followed by her 5 March 1997 agreement not to terminate the contract for default (SOF ¶ 13), were not coercive under the circumstances.

Finally, Inca waived the alleged "duress" by waiting from February 1997 to November 1999 before protesting the CO's default termination "threat" (SOF ¶¶ 11, 12, 14, 17). Such 33-month lapse was not "reasonable promptness," especially when the alleged cause of duress – the threat of default -- had been resolved by the CO's agreement not to terminate for default prior to the execution of the release (SOF ¶¶ 13, 14). *See Tacoma Boatbuilding Co.*, ASBCA No. 50238, 00-1 BCA ¶ 30,590 at 151,069-70.

IV.

The argument that the Army CO did not issue any written notice of termination to Inca is irrelevant. The Army had no need or duty to terminate the SBA prime contract, since SBA substituted another 8(a) subcontractor. All that was needed to terminate Inca's subcontract was written notice of termination from SBA. SBA gave notice of termination for convenience to Inca effective 6 March 1997 (SOF ¶ 14).

Inca's argument that there was no signed modification between Inca and the Army containing any release of claims is unpersuasive. On 5 March 1997, the Army CO signed and accepted Inca's proposed release of claims against the Government on the contract (SOF ¶ 13). Furthermore, Inca and the SBA executed bilateral Modification No. SBA 001 on 6 and 7 March 1997, which released all claims against the Government on the contract. The "government" in modification SBA 001 is a more inclusive term than "SBA" or the "Army." Modification SBA 001 cited both subcontract No. 0009-94-206062 and contract No. DABT63-94-D-0021. (SOF ¶ 14)

Inca's release in Modification SBA 001 was general, *i.e.*, it was not limited to a specific claim, it was without reservation, and it was supported by consideration by the Government's release of Inca from all present and future liabilities under the contract (SOF ¶ 14). A general release bars all unreserved claims based on events that occurred before the execution of the release. *See Inland Empire Builders, Inc. v. United States*, 424 F.2d 1370, 1376, 191 Ct. Cl. 742, 752 (1970). The causative events on which Inca's November 1999 claim was based occurred in January-February 1997 before execution of the release (SOF ¶¶ 10-12, 17). We hold that such release bars Inca's November 1999 claim. Accordingly, we need not decide the other issue concerning anticipatory profits.

We grant respondent's motion for summary judgment.

Dated: 19 January 2001

DAVID W. JAMES, 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. 52697, Appeal of Inca Contracting Company, rendered in conformance with the Board's Charter.

Dated:

EDWARD S. ADAMKEWICZ
Recorder, Armed Services
Board of Contract Appeals