

ARMED SERVICES BOARD OF CONTRACT APPEALS

Appeals of --)
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R&W Flammann GmbH) ASBCA Nos. 53204, 53205
)
Under Contract Nos. F61521-96-DR001)
F61521-96-DR003)
F61521-98-DR001)

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OPINION BY ADMINISTRATIVE JUDGE KETCHEN
ON THE GOVERNMENT'S MOTION FOR SUMMARY JUDGMENT

R&W Flammann GmbH (Flammann, appellant or nonmovant) appeals the denial of its claims under the captioned contracts maintaining that the Air Force (Air Force or Government) improperly failed to order all of its actual requirements for services from Flammann, but secretly backlogged them for performance by another contractor after its contracts expired. The Air Force moves for summary judgment, contending it ordered all of its requirements only from Flammann during the terms of the Flammann contracts. The Air Force also asserts affirmative defenses of release and accord and satisfaction. We deny the Air Force motion.

STATEMENT OF FACTS FOR PURPOSES OF THE MOTION

1. The Air Force awarded Contract No. F61521-96-DR001 (96-DR001) and Contract No. F61521-96-DR003 (96-DR003) to Flammann on 30 September 1996 for Flammann to provide the Air Force requirements for repair and maintenance of floors in U.S. Air Force family housing units located in the Kaiserslautern Military Community, Kaiserslautern, Germany. The initial year of performance began on 1 October 1996, fiscal year (FY) 1997. These two contracts provided options for two additional years of performance through FY 1999, ending on 30 September 1999. (ASBCA 53205, R4, tabs 1-2)

2. The Air Force awarded Contract No. F61521-98-DR001 (98-DR001) to Flammann on 27 March 1997, for its requirements for interior painting of Air Force housing units located in the Military Community, Kaiserslautern, Germany. Contract No. 98-DR001 provided options for two additional years of performance. The initial year of performance of this contract was FY 1998, commencing on 1 October 1997. (ASBCA 53204, R4, tab 1)

3. The Air Force exercised options under all three contracts extending their terms of performance through 30 September 1999. (ASBCA 53205, R4, tabs 1, 2, CNA ¶ 4; ASBCA 53204, R4, tab 1, CNA ¶ 4)

4. Each contract incorporated by reference standard FAR clauses, including FAR 52.216-18 ORDERING (OCT 1995); FAR 52.216-19 ORDER LIMITATIONS (OCT 1995); FAR 52.216-21 REQUIREMENTS (OCT 1995); FAR 52.233-1 DISPUTES (OCT 1995) and FAR 52.243-4 CHANGES (AUG 1987) (ASBCA 53204, R4, tab 1; ASBCA 53205, R4, tabs 1, 2).

5. On 21 April 1999, the Air Force issued invitation for bids (IFB) No. F61521-97-R-3022 for military housing maintenance services, including services similar to the services provided by Flammann under its contracts, with performance of the follow-on contract to begin on 1 October 1999 (FY 2000) after the Flammann contracts expired (R4, tab 10, filed with Gov't mot.). As amended, the IFB included CLINs (contract line item numbers) which had SUBCLINs soliciting offers on a single lot basis for "backlog" items, similar to the interior painting and floor repair and maintenance requirements provided by Flammann under its contracts, as follows:

0004AL [Major Interior Painting:] Backlog only - est 80 MFH units, any mix [sic]

0005AE [Major floor repair/replacement] Backlog only - refinish of hardwood (parquet and strip) est 6,000 SQM [sic]

(R4, tab 10 (filed with Gov't mot.))

6. The Air Force awarded a contract to "Firm WSA" (WSA) for performance of the work to begin 1 October 1999, including performance of the interior painting backlog and floor repair and maintenance backlog (app. resp., Flammann Statement ¶ 6).

7. The Air Force acknowledges by an unsworn "affidavit" (Air Force Statement), dated 28 January 2002 and executed jointly by Captain Jennifer A. Black, contracting officer (CO), and Resat Aydoslu, contract specialist, that the April 1999 IFB requested pricing for the estimated backlog of requirements identified in the IFB's SUBCLINs. No

one submitted a signed affidavit for the Government. The Air Force also acknowledges that at the time the Flammann contracts expired a backlog of requirements existed for performance by the successful follow-on contractor, WSA, beginning on 1 October 1999 (FY 2000). The estimated backlog referenced in the April 1999 IFB bid schedule resulted in part because of the Air Force's uncertainty concerning whether Flammann would have had time to complete orders placed in September 1999 prior to the expiration of its contracts and the availability of FY 1999 funds to order its requirements immediately prior to the expiration of the Flammann contracts. The Air Force estimate of the backlog does not distinguish between that due to its determination that Flammann would not be able to complete the requirements ordered and that due to the Air Force's concern about a lack of funds. (Gov't mot., Air Force Statement at 1-2)

8. The Air Force indicates that the IFB for the contract awarded to WSA estimated the backlog of interior painting at 80 housing units, but WSA actually only performed interior painting for 37 backlogged units. It states that the IFB estimated 6000.00 square meters (sqm) of backlogged floor repair work, but WSA only performed 2,016.5 sqm of backlogged floor repair. (Gov't mot., Air Force Statement at 1)

9. The documents submitted by Flammann in response to the Air Force motion indicate that, in October 1999 alone, WSA performed backlogged painting and floor repair work on a per lot basis in accordance with the criteria announced in the April 1999 IFB having a total value of 200,000 deutsche marks (DM) (approximately \$100,000 using the average exchange rate current at the time of performance of 2.06 DM/\$). (App. resp., Flammann Statement ¶ 4, attachs. 1, 2, 5; see Gov't mot., Air Force Statement, attach. 1 at 1)

10. In response to Flammann's request for information by letter dated 7 March 2001, the Air Force provided a complete list of 26 military family housing units where WSA performed backlogged floor repair and maintenance. The Air Force also provided Flammann with a complete list of 37 military family housing units where WSA performed backlogged interior painting. (App. resp., Flammann Statement, attach. 1 at 1, 2; Gov't mot., Air Force Statement at 1)

11. Flammann does not dispute that during the terms of performance of its contracts all the requirements for services the Air Force actually ordered it ordered from Flammann and no other contractor (Gov't mot., attach., Interrog. ¶ 5; Interrog. Answer ¶ 5).

12. On 15 May 2000, Mr. Peter Flammann, managing director of appellant, executed identical final, general releases, without exceptions, of all claims pertaining to Contract Nos. 96-DR001, 96-DR003, and 98-DR001. The general releases discharged the Government from all liabilities and claims whatsoever under the contracts, and the Air Force made final payment. On the same date Mr. Flammann executed releases in connection with bilateral modifications to Contract Nos. 96-DR003 and 98-DR001.

(ASBCA 53205, R4, tabs 1B, 2A; ASBCA 53204, R4, tabs 1B, 11 (furnished with Gov't mot.)).

13. On 14 July 2000, Flammann submitted to the CO certified claims maintaining that the Air Force did not order all its actual requirements from Flammann during the terms of its three contracts (ASBCA 53204, R4, tab 2; ASBCA 53205, R4, tab 3).

14. The CO issued a final CO decision on 14 September 2000 denying Flammann's claim under Contract No. 98-DR001 stating, in part, as a basis Flammann's releases, and Flammann filed a timely appeal (ASBCA 53204, R4, tab 3; corres. file). The CO issued a final CO decision on 14 September 2000 denying Flammann's claims under Contract No. 96-DR001 and under Contract No. 96-DR003 stating, in part, as a basis Flammann's releases, and Flammann filed a timely appeal (ASBCA 53205, R4, tab 4; corres. file).

15. On 6 April 2001, the Air force filed its answer in each appeal. It did not plead any affirmative defenses. On 28 January 2002, the Air Force filed a motion for summary judgment alleging that it purchased all its requirements from Flammann during the terms of the Flammann contracts and that Flammann executed releases discharging the Government from all liability under the contracts. As stated above, the Air Force supports its motion with an unsworn affidavit by the contracting officer and the contract specialist (SOF 7).

16. Appellant's response opposing the Air Force motion is supported by the declaration of Mr. Flammann pursuant to 28 U.S.C. § 1746, *i.e.*, the Flammann Statement. Mr. Flammann declares that when Flammann inquired of the Air Force during the pre-bid period for the follow-on contract about the estimate of a backlog set forth in the IFB the Air Force informed him that the Air Force "was not aware of any actual backlog" (Flammann Statement, at 1). Mr. Flammann states that since Flammann was not aware of any backlog based on its work under its contracts, it believed the Air Force when the Air Force told it that no "work requirement [was] being backlogged or held off from us under our contracts." *Id.* Mr. Flammann also declares that if he had known that the Air Force had awarded work to WSA which fell under Flammann's contracts he would have complained at that time. However, he declares the Air Force led him to believe that this was not the case. *Id.* at 2.

17. Mr. Flammann further declares that the same is true concerning his execution of the releases. He was completely unaware of the backlog work withheld from Flammann and performed by WSA. He states that he only learned later in June 2000 after he had executed the releases in May 2000 that the Air Force had misled him concerning the backlog work awarded to WSA. He would not have signed the releases had he known "what I shortly thereafter [sic] began to find out concerning the Air Force's secret accumulation of backlogged work, the withholding of requirements work from my firm, and that the related earlier statements to us by the Air Force were not true. . . ." *Id.* at 2-3.

DECISION

The Air Force maintains it met its obligations under the contract because it purchased all its requirements for services from Flammann during the lives of the three contracts and from no other contractor. The Air Force also contends that Flammann's claims are barred by the releases and the accord and satisfaction effect of final payment of all the contracts (Govt. mot. at 9). The Air Force does not support its motion with an affidavit or declaration.

Flammann contends that the releases are not binding, and hence there could be no accord and satisfaction, because of misrepresentation and duress. Flammann also argues that the Government has waived its affirmative defenses by failing to so plead in its answers. We deem the Air Force assertion of the affirmative defenses in effect an amendment of its answers. In view of our denial of the motion, we need not address whether Flammann would be entitled to additional discovery in any event because the Government first raised its affirmative defenses in the motion for summary judgment.

Summary judgment is appropriate where the moving party establishes the absence of genuine issues of material fact and that it is entitled to judgment as a matter of law. FRCP 56(c); *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 247-48 (1986); *Celotex Corp. v. Catrett*, 477 U.S. 317, 323-24, 327 (1986); *Mingus Constructors, Inc. v. United States*, 812 F.2d 1387, 1390 (Fed. Cir. 1987). “[A]ll of the nonmovant’s evidence is to be credited, and all justifiable inferences are to be drawn in the nonmovant’s favor.” *Hercules Inc. v. United States*, 292 F.3d 1378, 1380 (Fed. Cir. 2002).

We focus on the defense of general release since there is no showing that appellant’s claims relate to the subject matter of the modifications to Contract Nos. 96-DR003 and 98-DR001. Tribunals will enforce a general release so as to bar further consideration of a contractor’s claims which are not excepted. *Mingus, supra* at 1394-95. *See also United States v. William Cramp & Sons Ship & Engine Building Co.*, 206 U.S. 118, 127-28 (1907); *Environmental Devices, Inc.*, ASBCA Nos. 37430 *et al.*, 93-3 BCA ¶ 26,138 at 129,940. The rare circumstance of misrepresentation on the part of a party may, however, vitiate the binding effect of a release. *See J.G. Watts Contr. Co. v. United States*, 161 Ct. Cl. 801, 806-07 (1963); *Triple “A” South*, ASBCA No. 35824, 90-1 BCA ¶ 22,567 at 113,253.

In his declaration, Mr. Flammann states that the Air Force misrepresented the existence of an actual backlog of work during the terms of the Flammann contracts when he inquired during the pre-bid period for the follow-on contract and at the time he negotiated the general releases closing out the Flammann contracts. Mr. Flammann also declares that Flammann did not discover the Air Force misrepresentation concerning the existence of the secret backlog until June 2000. Nowhere does the Air Force in its motion or supporting documents refute Flammann’s declaration that the Air Force created a secret backlog of

work during Flammann's contracts and misrepresented the existence of the backlog to Mr. Flammann.

Drawing all inferences in the light most favorable to Flammann as the nonmovant concerning the Air Force's affirmative defenses, we determine that the described facts raise a genuine issue of material fact concerning whether the Air Force misrepresented to Mr. Flammann the existence of an actual backlog when he inquired about the estimated backlog during the pre-bid period and when he inquired at the time he executed the final releases. If the statements of Mr. Flammann concerning misrepresentations are proved true at trial, the releases may be voidable. See *J.G. Watts, supra* at 806-07 (instances in which a claim may be prosecuted despite execution of a general release); *Triple "A" South, supra*.

We also deny the Air Force motion based on its allegation that it purchased all of its requirements for services from Flammann during the terms of the Flammann contracts. Again drawing all inferences in Flammann's favor as the nonmovant, the Air Force had requirements to purchase services during the terms of the contracts but elected to postpone those purchases until after the terms of the contracts. A material issue of fact thus arises concerning whether the Air Force failed to order all its requirements from Flammann as it was obligated to do. The Government is liable under a requirements contract if its requirements do not change but its method of fulfilling them does. *Pacific Technical Enterprises, Ltd.*, ASBCA No. 17087, 74-2 BCA ¶ 10,679 at 50,757; see *T&M Distributors, Inc.*, ASBCA No. 51279, 01-2 BCA ¶ 31,442 at 155,281.

In sum, the Air force has failed to establish that there are no genuine issues of material fact and that it is entitled to judgment as a matter of law.

Dated: 15 October 2002

EDWARD G. KETCHEN
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

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. 53204 and 53205, Appeals of R&W Flammann GmbH, rendered in conformance with the Board's Charter.

Dated:

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