

ARMED SERVICES BOARD OF CONTRACT APPEALS

Appeal of -- )  
 )  
The Ryan Company, Inc. ) ASBCA No. 53230  
 )  
Under Contract No. F34612-93-C-0006 )

APPEARANCE FOR THE APPELLANT: Leo S. McNamara, Esq.  
McNamara & Flynn, P.A.  
Boston, MA

APPEARANCES FOR THE GOVERNMENT: COL Alexander W. Purdue, USAF  
Chief Trial Attorney  
Brady L. Jones, III, Esq.  
Trial Attorney

OPINION BY ADMINISTRATIVE JUDGE FREEMAN  
ON MOTION FOR SUMMARY JUDGMENT

The Ryan Company, Inc. (Ryan) appeals a contracting officer's decision which substantially reduced the price adjustment allowed in a prior decision. The second decision was issued while the first decision was on appeal. Ryan moves for summary judgment. There are no genuine issues of material fact, but Ryan is not entitled to judgment as a matter of law. Therefore, the motion is denied.

STATEMENT OF FACTS

1. On 27 May 1993, Ryan was awarded a contract to replace an electrical power distribution system at Altus Air Force Base, Oklahoma. The contract included the usual provisions providing price adjustments for changes, differing site conditions and suspensions of work. (R4, tab 3) Notice to proceed was issued on 22 June 1993. Contract completion was required within 365 days. (Gov't supp. R4, tab 149-1 at 1)

2. On 30 September 1994, Ryan submitted a request for price adjustment in the amount of \$444,934 for alleged changed conditions, changes and extended performance time (Gov't supp. R4, tab 145). This request was certified as a claim on 6 January 1995 (R4, tab 98). It was revised for a total amount of \$426,405 on 18 August 1995 with additional support provided on 11 December 1995. (Gov't supp. R4, tab 146; app. supp. R4, Vol. IV)

3. On 8 August 1996, the contracting officer issued a final decision allowing a price adjustment of \$203,942 on the revised claim (R4, tab 142). On 13 August 1996, Ryan

requested payment of the allowed amount while reserving its right to appeal the denial of the balance (R4, tab 143). After attempting unsuccessfully to get Ryan to agree to a release of the balance of its claim, the contracting officer agreed to pay the allowed amount with Ryan reserving its rights (Gov't opp'n, Attach. 5 at ¶¶ 20-21, Attach. 12 at ¶¶ 6-7).

4. On 28 October 1996, Ryan appealed the 8 August 1996 decision (R4, tab 144). That appeal is docketed as ASBCA No. 50315. On 19 December 1996, Ryan and the Government entered into bilateral Modification No. P00006 which incorporated into the contract the agreement to pay Ryan the allowed amount of the claim. Modification No. P00006 stated:

1. This modification is issued to pay an equitable adjustment for delay costs incurred during performance of this contract.
2. This increase will result in a new contract price of \$2,153,951.95.
3. The Ryan Company acknowledges the contract increase of two hundred three thousand nine hundred forty one dollars and ninety five cents (\$203,941.95) as payment of the request for equitable adjustment for four hundred twenty-six thousand four hundred dollars and ninety-nine cents (\$426,400.99).
4. The Ryan Company reserves the right to claim the remaining balance under the request for equitable adjustment in the amount of two hundred twenty-two thousand four hundred sixty-three dollars and four cents (\$222,463.04) under the appeal of the Ryan Company currently pending before the ASBCA as appeal No. 50315.

(R4, tab 9)

5. On 16 October 2000, with ASBCA No. 50315 still pending before the Board, a successor contracting officer issued a "revised" final decision on Ryan's claim. The revised decision allowed a price increase of \$48,860.81, and demanded repayment of \$155,081.14 of the amount paid under Modification No. P00006. The decision stated that the "overpayment" on Modification No. P00006 was the result of a "miscalculation" by the Government. (Gov't supp. R4, tab 380) That decision is the subject of this appeal (ASBCA No. 53230) on which Ryan now moves for summary judgment.

## DECISION

Ryan alleges that, as a matter of law, the 16 October 2000 decision could not overrule either the 8 August 1996 decision or the payment of the allowed amount in Modification No. P00006.<sup>1</sup> We disagree. The 8 August 1996 decision was appealed by Ryan on 28 October 1996. That appeal was still pending before the Board when the 16 October 2000 decision was issued. A contracting officer's decision that is on appeal is not binding on the parties. *Wilner v. United States*, 24 F.3d 1397, 1401 (Fed. Cir. 1994) (*en banc*). Therefore, the 16 October 2000 decision legally superseded the 8 August 1996 decision.

Modification No. P00006 was not a settlement of Ryan's claim in whole or in any part. Ryan reserved its rights to claim the entire unpaid amount of its claim in the pending appeal (ASBCA No. 50315). Under FAR 33.211(h) in effect when Modification No. P00006 was executed, the contracting officer was authorized in these circumstances to pay the allowed amount in a decision that was subject to appeal, but only with a reservation of the Government's rights.<sup>2</sup> Modification No. P00006 does not contain the reservation required by a published regulation, and is not enforceable without it. *See Ordnance Devices, Inc.*, ASBCA No. 42709, 96-2 BCA ¶ 28,437 at 142,058, *vacatur denied*, 99-1 BCA ¶ 30,304.

Therefore, neither the 8 August 1996 decision nor Modification No. P00006 bar the Government as a matter of law from recovering any overpayment on Ryan's claim that may be determined in proceedings on the merits of the claim.

The motion for summary judgment is denied.

Dated: 19 April 2002

---

MONROE E. FREEMAN, JR.  
Administrative Judge  
Armed Services Board  
of Contract Appeals

(Signatures continued)

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

NOTES

<sup>1</sup> Ryan also alleges that the 16 October 2000 decision could not overrule a 1994 decision extending the contract completion date by 71 days and Contract Modification No. P00003 which incorporated that decision into the contract (app. motion at 6). We find nothing in the 16 October 2000 decision which overrules the 1994 decision or Modification No. P00003.

<sup>2</sup> FAR 33.211(h) states in relevant part: “The amount determined payable under the [contracting officer’s] decision . . . should be paid . . . without awaiting contractor action concerning an appeal. Such payment shall be without prejudice to the rights of either party.” The word “shall” in the FAR “denotes the imperative.” FAR 2.101 (1996)

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. 53230, Appeal of The Ryan Company, Inc., rendered in conformance with the Board's Charter.

Dated:

---

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