ARMED SERVICES BOARD OF CONTRACT APPEALS

Appeal of --	)	
	)	
Konitz Contracting, Inc.	)	ASBCA No. 53433
	)	
Under Contract No. F48608-96-D0007	)	

APPEARANCE FOR THE APPELLANT: Shane D. Colton, Esq.
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Billings, MT

APPEARANCES FOR THE GOVERNMENT: COL Alexander W. Purdue, USAF
Chief Trial Attorney
Robert P. Balcerek, Esq.
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OPINION BY ADMINISTRATIVE JUDGE JAMES
ON RESPONDENT'S MOTION FOR SUMMARY JUDGMENT

ASBCA No. 53433 arises from the contracting officer's (CO) 29 March 2001 final decision denying appellant's 26 January 2001 claim for adjustment in the prices of delivery orders (DO) 5003, 5004 and 5005 based upon the captioned contract's FAR 52.211-18 VARIATION IN ESTIMATED QUANTITY (VEQ) clause.

Respondent submitted a "Motion to Dismiss" this appeal on the grounds that for each of those three delivery orders the contractor signed a release of claims with reservations that did not include the subject of this appeal. A "release" is an affirmative defense. FED. R. CIV. P. 8(c). Respondent bases its motion almost exclusively on Rule 4 documents and three "exhibits." When a motion presents a non-jurisdictional, affirmative defense to a claim and relies on materials other than the pleadings, it is treated as a motion for summary judgment. *See Do-Well Machine Shop, Inc. v. United States*, 870 F.2d 637, 639-40 (Fed. Cir. 1989); *Bankruptcy Estate of Dr. William Barry*, ASBCA No. 50345, 99-2 BCA ¶ 30,469 at 150,520. We so treat this motion.

STATEMENT OF FACTS (SOF) FOR THE PURPOSES OF THE MOTION

1. On 12 April 1996, respondent awarded Contract No. F48608-96-D0007 (contract 7) to Konitz Contracting, Inc. (appellant) for launch facility contours restoration and fence repairs at F. E. Warren Air Force Base, Wyoming. Contract 7 included a base year and one option year. (R4, tab 1; compl. & answer, ¶ 1)

2. Contract 7 incorporated the following relevant FAR clauses: 52.211-18 VARIATION IN ESTIMATED QUANTITY (APR 1984), which provided in pertinent part:

> If the quantity of a unit-priced item in this contract is an estimated quantity and the actual quantity of the unit-priced item varies more than 15 percent above or below the estimated quantity, an equitable adjustment in the contract price shall be made upon demand by either party. The equitable adjustment shall be based upon an increase or decrease in costs due solely to the variation above 115 percent or below 85 percent of the estimated quantity.

52.216-18 ORDERING (OCT 1995), which provided in pertinent part:

> (a) Any supplies and services to be furnished under this contract shall be ordered by issuance of delivery orders or task orders . . . .
>
> (b) All delivery orders or task orders are subject to the terms and conditions of this contract. . . .

and 52.232-5 PAYMENTS UNDER FIXED-PRICE CONSTRUCTION CONTRACTS (APR 1989), whose ¶ (h) provided:

> The Government shall pay the amount due the Contractor under this contract after --
>
> (1) Completion and acceptance of all work;
>
> (2) Presentation of a properly executed voucher; and
>
> (3) Presentation of a release of all claims against the Government arising by virtue of this contract, other than claims, in stated amounts, that the Contractor has specifically excepted from the operation of the release.

(R4, tab 1 at 15, 16, 18 of 43; compl. & answer, ¶ 3) The record contains no evidence that contract 7 prescribed FAR 52.232-5 releases in connection with final DO payments.

3. Section B of contract 7 set forth an estimated quantity for each of unit-priced, line items 55 through 108, and a $2,798,099.12 estimated total amount, for the option year (R4, tabs 1 at 5-8 of 43, tab 3 at 2).

4. On 20 March 1997 the CO issued unilateral Modification No. P00003, exercising the option year (R4, tab 4).

5. During the option year, on 21 November 1997 respondent issued DO 5003 for $612,861.25 of work (R4, tab 11).

6. Appellant's 7 January and 17 February 1998 letters to the CO asserted that it "is entitled to at least 85% of the amount that was bid and contracted for" pursuant to the VEQ clause, and sought the "additional contract funds" for the difference between the amount of the orders issued and 85% of the contract's estimated amount (R4, tabs 17, 18).

7. The CO's 27 February 1998 letter to appellant stated that the FAR 52.211-18 clause "does not guarantee a minimum of 85% of the estimated contract amount," but rather referred to the "quantity of unit-priced items" in the contract (R4, tab 19).

8. Appellant's 16 March 1998 letter to the CO stated that "[i]n accordance with clause 52.211-18 Konitz . . . will request a price adjustment . . . due to increased costs if the minimum quantity of 85% is not used" (R4, tab 20).

9. The CO's 30 March, 16 April, 14 May 1998 letters to appellant extended the times to reply to appellant's 16 March "claim" for price adjustment, whose decision "must go through the same review process of a claim" (R4, tabs 21, 22, 24). The CO's 19 May 1998 letter to appellant stated that under FAR 52.211-18 only unit-priced line items can be adjusted, and --

> If you feel your actual costs on individual line items increased as a result of the variation in quantities ordered, you will need to submit a list of those line items effected [sic], proposed re-pricing of the effected [sic] line items, and documentation to support the proposed increase.

(R4, tab 26)

10. Appellant's 29 May 1998 response to the CO's 19 May 1998 letter did not list the line items affected by variations in quantities ordered, specific revised prices for such line items, and documentation to support the proposed increase, but stated:

> During the . . . period of December 1, 1996 to April 1, 1997 Contracting changed the acceptance requirements for various line items. They also changed the material quantities. For example, base course was changed from installed thickness to compacted thickness.

> Konitz . . . made it very clear that the only way we could accomplish these changes was if we received all the funding for the Option year. We made it very clear that if we were not funded we would not only renegotiate the line item prices in accordance with FAR 52.211-18, but we would also have to submit a claim for the cost of these changes due to adding a Crusher and trucks to accomplish compacted thickness . . . .
>
> You unilaterally extended the contract, thereby obligating the equipment for the 1998 construction season. If we do not receive additional funding we will . . . send a claim for the cost of this equipment. It will also be easy to show increased costs in the line items due to changed acceptance criteria, changed material quantities and changed security procedures.

(R4, tab 27)

11. Appellant's General Manager, Harrison David Blair, stated that:

> 8. In August of 1998 I was instructed by officials at F.E. Warren to have Tom Konitz execute a Release of Claims and that until the Release of Claims was executed, no payment would be made on Delivery Order 5003.
>
> 9. At that time, I stated we would not be releasing any claims since we were still in the process of discussing the Variation in Estimated Quantities claim. I was assured that they were fully aware of our claim and that the release would not act as a bar to that claim since the issue had been raised and discussed at length.

(Ex. A-6, Blair affidavit of 14 February 2002)

12. On 4 August 1998, in connection with final payment for DO 5003, appellant signed a release of claims, reserving "Security Delay Claims caused by a change of conditions of the contract" (which claim became the subject of ASBCA No. 51819) and "Any governmental contractural [sic] requirements of the entire contract" (ex. G-1).

13. Pursuant to the FAR 52.217-8 OPTION TO EXTEND SERVICES clause in contract 7, by unilateral Modification No. P00007, dated 15 September 1998, the CO last extended the contract ordering period to 10 October 1998 (R4, tab 9).

14. On 23 September 1998, respondent issued DO 5004, which ordered $235,624.03 of work, and on 30 September 1998 respondent issued DO 5005, which ordered $188,196.41 of work (R4, tabs 13, 16). DOs 5003-5005 were the only DOs issued for option line items. DO 5004 was modified twice after 10 October 1998 (R4, tabs 14, 15).

15. Appellant's 9 October 1998 letter to respondent stated, "We reserve . . . our rights under the FAR clauses, particularly FAR 52.211-18 Variantion [sic] in Estimated Quantity, and also any potential claims arising from our contract . . . ." (R4, tab 30).

16. Appellant's 8 December 1998 letter to the CO submitted a claim pursuant to the VEQ clause for failure to receive "minimum funding" during the option year. Appellant calculated the $1,341,702.65 claim by subtracting 15% from the original option year estimate of $2,798,099.12, yielding $2,378,384.25, from which it deducted the $1,036,681.60 "funded amount for the Option Year Period." Appellant's letter also included other alleged changes. (R4, tabs 3, 32) On 24 March 1999, appellant appealed to this Board on the basis of a deemed denial of its claim. The appeal was docketed as ASBCA No. 52113.

17. On 1 September 1999, in connection with final payments for DOs 5004 and 5005, appellant signed releases of claims, each reserving "Claims filed with ASBCA including, but not limited to, ASBCA No. 51819 and ASBCA No. 52113" and "Any governmental contractural [sic] requirements of the entire contract" (exs. G-2, -3). The record contains no evidence of when Konitz completed performance of DOs 5003, 5004 and 5005.

18. The Board granted summary judgment to the Government on appellant's 8 December 1998 "minimum funding" claim in *Konitz Contracting, Inc.*, ASBCA No. 52113, 00-2 BCA ¶ 31,121, *recon. den.*, 01-1 BCA ¶ 31,232 (*Konitz I*), wherein we observed: "To the extent Konitz seeks equitable price adjustments of any of the 54 line items in the option year, no such claim was submitted to the contracting officer" in appellant's 8 December 1998 claim. 01-1 BCA at 154,148. The parties settled ASBCA Nos. 51819 and 52113, which the Board dismissed on 23 March 2001.

19. On 26 January 2001, appellant submitted to the CO a certified claim, which was received on 30 January 2001, citing the FAR 52.211-18 VEQ clause and alleging: (a) that of the 54 option year line items, "47 were under 85% of the estimated quantities. 14 of these line items had no quantities used and 32 line items were under 50% of the estimated quantities"; (b) specific dollar amounts based upon revised unit prices for 19 line items (Nos. 55, 59, 64, 65, 70, 71, 72, 73, 74, 76, 77, 78, 79, 80, 81, 82, 83, 88 and 96) totaling $1,267,338.16, without identifying to which DOs (5003, 5004, 5005) those line item amounts pertained; and (c) the "Total amount of Certified Claim $1,267,338.16" (R4, tabs 38, 39).

20. The CO's 29 March 2001 final decision did not assert that Konitz's claim was barred by release, but denied that claim on other grounds (R4, tab 39). On 26 June 2001, the Board docketed appellant's timely appeal from that final decision as ASBCA No. 53433.

Positions of the Parties

Respondent moves to dismiss, which we treat as for summary judgment, on the basis that appellant executed releases with respect to DOs 5003-5005; the exceptions in those releases did not include the claim in ASBCA No. 53433; and therefore such claim is barred by those releases. Respondent argues that appellant's excepted "Security Delay Claims" was the subject of ASBCA No. 51819, which the parties settled and which the Board dismissed on 23 March 2001. Appellant's reservation of "Claims filed with ASBCA including . . . ASBCA No. 52113" is ineffective as a bar because that appeal also has been settled and dismissed. (SOF ¶¶ 12, 17, 18) Finally, appellant's exception of "Any governmental contractural requirements of the entire contract" did not explicitly state a claim based on the operation of the VEQ clause, and is too vague and non-specific to constitute a reservation of a claim, citing *Mingus Constructors, Inc. v. United States*, 812 F.2d 1387, 1394 (Fed. Cir. 1987) ("blunderbuss exception" to release did not inform the Government of the source, substance, or scope of the contractor's specific contentions, and was insufficient as a matter of law to constitute "claims" excluded from the release).

Appellant argues that *Mingus* is distinguishable because the DO releases did not relate to final contract payment under contract 7, the type of release in *Mingus*; the CO knew of appellant's VEQ claim before it signed the DO releases; the CO accepted appellant's 8 December 1998 VEQ claim without contending that it was barred by the DO releases; the parties understood that the DO 5003 release did not bar appellant's January 2001 claim that is the subject of this appeal; and appellant's exception to the DO releases – "Any governmental contractural requirements of the entire contract" – did not constitute a "naked intention" to file a future claim.

DECISION

Summary judgment is appropriate when there are no genuine issues of material fact and the moving party is entitled to judgment as a matter of law. *See Mingus*, 812 F.2d at 1390-91. There appears no genuine dispute about the foregoing Statement of Facts. Thus, this motion presents solely issues of law, which are appropriate for summary judgment. *See Konitz Contracting, Inc.*, ASBCA No. 52299, 01-2 BCA ¶ 31,572 at 155,901.

Contract 7 provided for ordering of supplies and services by issuance of DOs. The VEQ clause entitles a contractor to an equitable adjustment in the unit price of a line item if the actual quantity of a unit priced item varies more than 15% above or below the estimated

quantity for such item. (SOF ¶ 2) Respondent issued three DOs during the option year as extended, DOs 5003, 5004 and 5005. The record contains no evidence of when Konitz completed performance of DOs 5003, 5004 and 5005. (SOF ¶ 17). Konitz's January 2001 VEQ clause claim cited unit-priced line items 55 through 108 under the contract's option year (SOF ¶ 19). Since respondent modified DO 5004 twice after the expiration of the DO ordering period on 10 October 1998 (SOF ¶ 14), Konitz could not know whether the actual quantities of line items 55 through 108 would vary by more than 15% from their estimated quantities until the DOs in the option year were completely performed.

Konitz's 1 September 1999 releases by their terms released only claims under DO 5004 and DO 5005 individually (SOF ¶ 17). No one of the individual DO 5003, 5004 and 5005 releases encompassed Konitz's January 2001 VEQ clause claim whose basis was, and had to be, all DOs issued under the option year for line items 55 through 108. Therefore, no one of those DO releases, nor all three DO releases conjunctively, encompassed or released Konitz's VEQ clause claim.

Moreover, the CO's final decision did not assert that Konitz's January 2001 VEQ clause claim was barred by release, but denied that claim on other stated grounds (SOF ¶ 20). When the conduct of the parties in continuing to consider a claim after the execution of a release makes plain that they never construed the release as constituting an abandonment of the claim, the release will not be held to bar the prosecution of the claim. *See Winn-Senter Const. Co. v. United States*, 110 Ct. Cl. 34, 65-66 (1948), cited in *J. G. Watts Const. Co. v. United States*, 161 Ct. Cl. 801, 807 (1963).

For the foregoing reasons, respondent is not entitled to judgment on Konitz's VEQ clause claim as a matter of law. We deny respondent's motion for summary judgment.

Dated: 18 April 2002

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. 53433, Appeal of Konitz Contracting, Inc., rendered in conformance with the Board's Charter.

Dated:

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