

ARMED SERVICES BOARD OF CONTRACT APPEALS

Appeal of --)
)
Callejas & Ross, Inc.) ASBCA No. 53854
)
Under Contract No. DACA63-99-C-0040)

APPEARANCES FOR THE APPELLANT: W. Robert Vezina, III, Esq.
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APPEARANCES FOR THE GOVERNMENT: Thomas H. Gurlay, Jr., Esq.
Engineer Chief Trial Attorney
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U.S. Army Engineer District,
Fort Worth

OPINION BY ADMINISTRATIVE JUDGE JAMES
ON MOTION TO AMEND COMPLAINT

On 25 March 2003, appellant moved to amend its complaint in the captioned appeal to add allegations disputing the contracting officer's (CO) assessment of liquidated damages under the captioned contract. Appellant represents that respondent does not object to the amendment.

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

1. On 2 September 1999, the U.S. Army Corps of Engineers (COE) awarded Contract No. DACA63-99-C-0040 to Callejas & Ross, Inc. (CRI), to construct a new sewer line at Ft. Hood, Texas for the fixed price of \$1,360,000 (compl. & answer, ¶¶ 1-3).
2. The contract required completion of performance within 210 calendar days after CRI received notice to proceed (R4, tab 6 at 1). CRI received notice to proceed on 20 October 1999 (R4, tab 3), thus setting 17 May 2000 as the contract completion date.
3. Bilateral contract Modification Nos. P00001, P00002 and P00003, extended the contract completion date by 62 calendar days, to 18 July 2000 (R4, tabs 19-21).
4. The CO's 3 August 2001 letter to CRI stated that since the project was declared substantially complete on 3 November 2000, 108 calendar days after the extended 18 July

2000 completion date, he was “withholding potential liquidated damages at \$650 per day, for a total of \$70,200” and that “[i]f no official request for compensation or additional time is received by August 21, 2001, the Government will assess liquidated damages in the amount stated above” (R4, tab 29; compl. & answer, ¶ 6).

5. On 14 August 2001, CRI’s subcontractor, Anderson Columbia, Inc., aka ACE Constructors, Inc. (ACE), submitted a claim to CRI requesting additional time and compensation for: (1) unidentified utilities -- 4 calendar days and \$19,637; (2) differing site conditions -- 21 calendar days and \$135,458; (3) inspection delays -- 29 calendar days and \$4,467; and (4) changes after the completion date -- 70 calendar days, with no dollars (R4, tab 30 at 6). ACE’s claim (2) asserted, *inter alia*:

The official project completion date was July 18, 2000. It is impossible for ACE to have completed the project prior to that date when the project was still being redesigned at that time. The imposition of liquidated damages from July 18, 2000 is clearly unfair to a subcontractor waiting for the COE to complete design of the project.

ACE’s claim (4) asserted, *inter alia*, that “changes made after an established contract completion date nullify any liquidated damages.” (R4, tab 30 at 11, 71)

6. On 24 October 2001, ACE sent CRI a Contract Disputes Act (CDA) certification for its 14 August 2001 claim (R4, tab 30 at 8).

7. On 17 January 2002, CRI submitted a certified claim to the COE, incorporating ACE’s 14 August and 24 October 2001 claim documents, and adding a \$47,845 prime contractor mark-up, for a total claimed amount of \$207,407 (\$159,562 + \$47,845) (R4, tab 30 at 1). CRI did not explicitly request the CO to release the \$70,200 in “potential liquidated damages” (LDs) withheld since 3 August 2001 (finding 4).

8. On 2 July 2002, CRI submitted an appeal to the ASBCA from the CO’s “deemed denial” of its 17 January 2002 certified claim (R4, tab 1), which appeal the Board docketed as ASBCA No. 53854.

9. On 17 September 2002, the CO issued a final decision (COFD) which (a) denied CRI’s claim that the CO described as for “additional compensation and a reduction in the assessment of liquidated damages” for 124 days that CRI claimed were compensable or excusable, (b) found that of the 108 days by which CRI delayed completion of the contract after 18 July 2000, 8 days were excusable due to weather conditions, (c) assessed \$65,000 in LDs at \$650 per day for 100 days, and (d) advised CRI of its right to appeal to the ASBCA within 90 days, or to the Court of Federal Claims within 12 months, of the date CRI received such decision (R4, tab 2 at 1, 17-18).

10. CRI has taken no appeal from that 17 September 2002 COFD to this Board.

DECISION

The Contract Disputes Act of 1978, 41 U.S.C. § 606, provides that a contractor may appeal from a CO's final decision to an agency board of contract appeals within 90 days from the date of receipt of the decision. The Boards cannot waive that statutory appeal period. *See Cosmic Construction Co. v. United States*, 697 F.2d 1389, 1390 (Fed. Cir. 1982). CRI did not appeal to this Board within 90 days from its receipt of the CO's 17 September 2002 final decision assessing \$65,000 in liquidated damages.

The CO's 3 August 2001 letter advised CRI that the CO was withholding \$70,200 in "potential liquidated damages," and admonished that if he received no official request or claim for time extension, he would "assess liquidated damages in [that] amount" (SOF ¶ 4). The subcontractor's 14 August 2001 claim to CRI argued: "The imposition of liquidated damages from July 18, 2000 is clearly unfair to a subcontractor waiting for the COE to complete design of the project" and its claim for 70 uncompensated calendar days asserted that "changes made after an established contract completion date nullify any liquidated damages" (SOF ¶ 5). The CO's 17 September 2002 final decision described CRI's claim as seeking "additional compensation and a reduction in the assessment of liquidated damages" (SOF ¶ 9) CRI/ACE's claim for 124 days of delay was evidently intended to justify release of the withheld LDs.

The total context convinces us that the CDA claim of CRI and its subcontractor ACE explicitly challenged the imposition of LDs and implicitly sought the release of the contract balance withheld for such LDs, the CO knew of such contention and reasonably regarded such claim as seeking reduced LDs. *See Martin Marietta Corp.*, ASBCA No. 48223, 98-1 BCA ¶ 29,592 at 146,712, *aff'd on recon.*, 98-2 BCA ¶ 29,741 at 147,408 (antecedent context of communications on two defective pricing issues led us to hold that CO's generically expressed defective pricing claim addressed and gave the contractor notice of both issues). We hold that CRI's 17 January 2002 claim disputed the

Government's withholding of LDs, and, therefore, the LD issue is before the Board along with CRI's other claim items. We grant appellant's 25 March 2003 motion to amend its complaint.

Dated: 21 April 2003

DAVID W. JAMES, JR.
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 No. 53854, Appeal of Callejas & Ross, Inc., rendered in conformance with the Board's Charter.

Dated:

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