ARMED SERVICES BOARD OF CONTRACT APPEALS

Appeal of --	)	
	)	
Precision Standard, Inc.	)	ASBCA No. 54027
	)	
Under Contract No. F41608-95-C-1176	)	

APPEARANCE FOR THE APPELLANT: Nancy M. Camardo, Esq.
Law Office of Joseph A. Camardo, Jr.
Auburn, NY

APPEARANCES FOR THE GOVERNMENT: COL Alexander W. Purdue, USAF
Chief Trial Attorney
CAPT Benjamin Morton, USAF
Trial Attorney

OPINION BY ADMINISTRATIVE JUDGE DICUS
ON RESPONDENT'S MOTION TO DISMISS FOR FAILURE
TO STATE A CLAIM UPON WHICH RELIEF CAN BE GRANTED
OR IN THE ALTERNATIVE FOR SUMMARY JUDGMENT

Respondent files this motion under Board Rule 5 and FED. R. CIV. P. 12(b)(6) and 56. The crux of the motion is that bilateral modifications bar relief and that the claim was untimely under the Changes clause. The appeal arises from a contracting officer's decision denying appellant's $30,854.32 equitable adjustment claim. The underlying contract is for purchase of fuselage panel slot doors. We deny the motion.

STATEMENT OF FACTS[1]

The following statement of facts is solely for resolution of the motion.

1. This appeal arises out of a supply contract awarded to Precision Standard, Inc. (PSI) on 25 August 1995, for the manufacture and delivery of one first article (Contract Line Item (CLIN) 0001AA) and nine production articles (CLIN 0001AB) of NSN 1560-00-295-1852LH, P/N 4F72605-117B, fuselage panel slot doors, as required by Kelly AFB, Texas (Statement of Undisputed Facts (SUF), ¶ 1).

2. During the period 5 September 1995 to 16 January 1996, PSI requested all mylars[2] and omitted specifications (SUF, ¶ 2).

3. On 23 February 1996, the Government shipped the stable base drawing to PSI and on 28 February 1996, PSI received the requested mylars (SUF, ¶ 3).

4. On 4 June 1996, PSI requested a no-cost modification of CLIN 0001AA to change the delivery date of 22 July 1996 to 22 January 1997. PSI requested this no-cost modification because the mylars were not received until 28 February 1996. (SUF, ¶ 4)

5. PSI's 22 July 1996 letter requested clarification of the aperture cards. Early in the following week, on 30 July 1996, the requested missing data to the adhesive specification was sent to PSI (SUF, ¶ 5).

6. Bilateral Modification No. P00001 (Mod. 1), dated 28 August 1996, modified the date for delivery of the first article, from 22 July 1996 to 22 January 1997, as had been requested by PSI (SUF, ¶ 6). Box 14(a) of Mod. 1 states that "The purpose of this modification is to extend delivery schedule of item 1AA 1 each at no cost to the contractor as due to Government delay in providing drawings to the contractor" (emphasis added). (R4, tab 1)

7. Page 3 of 27 of the Solicitation/Contract (R4, tab 1), delineated two shipping addresses for the first article (Item 0001AA). On 8 November 1996, PSI attempted to ship the first article to the Government, and on 20 December 1996, PSI sent a letter providing a Federal Express receipt indicating when shipment was made. However, PSI was told on 9 January 1997 that PSI had shipped the first article to the receiving facility rather than the testing facility. (SUF, ¶ 7)

8. Accordingly, PSI on 11 February 1997 offered to treat the prior shipment as a production unit and to supply a new first article to which the Government agreed (SUF, ¶ 8).

9. On 27 February 1997, PSI shipped another first article to the Government (SUF, ¶ 9).

10. A 22 April 1997 memorandum (R4, tab 22) and a 14 May 1997 memorandum (R4, tab 24) gave the authorization to modify the contract to adjust the line item pricing and modify the quantities associated with CLINs 0001AA and 0001AB.

11. On 15 May 1997, the parties agreed to the second bilateral modification, A00001 (Mod. A1), modifying the quantities associated with CLINs 0001AA and 0001AB to comport with the shipments made by PSI. This was further modified by bilateral agreement A00002 (Mod. A2) dated 22 May 1997. Modification No. P00002 (Mod. 2), another bilateral modification, amended the shipping instructions; it was signed by the contractor on 10 June 1997 and by the contracting officer on 16 June 1997. (SUF, ¶ 10) Box 13(c) of Mod. 2, which amended the first article delivery address, stated that "This supplemental agreement is entered into pursuant to authority of Changes Clause." (R4, tab 1)

12. All four of these modifications were bilateral supplemental agreements. None of them was a unilateral change order issued by the contracting officer under the authority of the Changes clause. To the extent relevant, however, the August 1987 FAR 52.243-1 Changes clause in this contract contains the following restriction (at subparagraph (c)):

> The Contractor must assert its right to an adjustment under this clause within 30 days from the date of receipt of the written order.

(SUF, ¶ 11)

13. Eighteen months after agreeing to Mod. 1 and nine months after signing Mod. A1, PSI on 16 February 1998 sent what PSI called a "Notice of REA/Claim For Equitable Adjustment" to Mr. James Sefzik, Contracting Office, Kelly AFB, Texas. The stated bases complained of in the one-page letter were (1) late receipt of mylars, (2) poor condition of aperture cards and drawings, and (3) misplacement of PSI's first article. The fifth numbered paragraph of PSI's letter said:

> Therefore, since it is PSI's specific intention to seek an equitable adjustment, and to file a REA/Claim for Equitable Adjustment. [sic] The final shipment and final payment will no way be deemed as a release of PSI's right to pursue its equitable adjustment and furthermore, will in no way be construed to be an accord and satisfaction.

(SUF, ¶ 12)

14. No such claim was filed prior to completion of work and final payment, which was made on 2 May 1998 (SUF, ¶ 13).

15. Four years thereafter, on 22 May 2002, PSI submitted to the Defense Contract Management Center, Detroit, Michigan, a request for equitable adjustment alleging entitlement to a price adjustment owing to the matters complained of in PSI's 16 February 1998 letter, all of which complaints predated the parties' bilateral Mods. 1 and A1. On 1 October 2002, PSI converted its request for equitable adjustment to a formal claim. The contracting officer issued a complete denial of PSI's claim on 17 October 2002. (SUF, ¶ 14)

16. Appellant's complaint (¶ 24) alleges entitlement based upon (a) failure to supply PSI at inception of the contract with a complete package of drawings and specifications, (b) failure to timely supply the missing information, and (c) failure to issue

a correct data package with a proper shipment address for the first article. All of these allegations relate to matters prior to the parties' bilateral Mods. 1 and A1. (SUF, ¶ 16)

17. Appellant has submitted the affidavit of Everett R. Casey, appellant's president, in which Mr. Casey states it was never appellant's intent to release respondent from liability for claims when it signed Mod. 1. He also states appellant never gave respondent other oral or written notification that it intended to release respondent from liability for relevant delays or disruption which appellant considered to be respondent's fault.

18. The complaint states "the Procuring Contracting Officer issued a Final Decision, denying the claim in its entirety" (Complaint, ¶ 24). The contracting officer's decision contains language placing in issue whether he addressed the merits of the claim (R4, tab 28).

DECISION

Respondent first moves for dismissal pursuant to FED. R. CIV. P. 12(b)(6) for failure to state a claim upon which relief can be granted. In resolving such motions, "the scope of our inquiry is limited to the complaint and the accompanying affidavits[3] and exhibits." *Schnell v. City of Chicago*, 407 F.2d 1084, 1085 (7th Cir. 1969). However, respondent's motion goes beyond the complaint and cites to Rule 4 documents. Respondent in so doing proceeded beyond the boundaries of a FED. R. CIV. P. 12(b) *facial* attack on the complaint and launched a *factual* attack. In a facial challenge, we must treat all well-pleaded facts as true and construe them in a light most favorable to the non-movant. *United States v. Ritchie*, 15 F.3d 592 (6th Cir. 1994), *cert. denied*, 513 U.S. 868 (1994). However, when the basis for the motion is factual and goes beyond the complaint, FED. R. CIV. P. 12(b)(6) instructs "[i]f . . . matters outside the pleading are presented to and not excluded by the court, the motion shall be treated as one for summary judgment . . . ." Appellant has responded to the motion by treating it as a motion for summary judgment, complete with affidavit to establish a genuine and material issue. We treat the motion as one for summary judgment.

Summary judgment is appropriate where no material facts are genuinely in dispute and the moving party is entitled to judgment as a matter of law. *Mingus Constructors, Inc. v. United States*, 812 F.2d 1387, 1390 (Fed. Cir. 1987). A material fact is one which may affect the outcome of the case. *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242 (1986). Inferences must be drawn in favor of the party opposing summary judgment. *Hughes Aircraft Co.*, ASBCA No. 30144, 90-2 BCA ¶ 22,847. In deciding a motion for summary judgment, we are not to resolve factual disputes, but to ascertain whether material disputes of fact are present. *General Dynamics Corp.*, ASBCA Nos. 32660, 32661, 89-2 BCA ¶ 21,851. Where the movant has the burden of proof his showing must be sufficient that no reasonable trier of fact could find other than for the movant. *Calderone v. United States*, 799 F.2d 254, 259 (6th Cir. 1986), citing W. Schwarzer, *Summary Judgment Under the*

Federal Rules: Defining Genuine Issues of Material Fact, 99 F.R.D. 465, 487-88 (1984).

Respondent argues that appellant's claim is barred by the doctrine of accord and satisfaction, an affirmative defense for which respondent bears the burden of proof. *Jimenez, Inc.*, ASBCA No. 52825, 01-1 BCA ¶ 31,294. "The essential elements of accord and satisfaction are proper subject matter, competent parties, meeting of the minds of the parties, and consideration. To reach an accord and satisfaction there must be mutual agreement between the parties with the intention clearly stated and known to the contractor." *Woerner Engineering, Inc.*, ASBCA No. 52248, 20 February 2003, slip. op. at 20.

Respondent has submitted no affidavits. Appellant has provided the affidavit of Mr. Casey, who asserts that appellant never intended to release its rights to file a claim, referencing for support the language in Mod. 1 that states the change is at no cost to it without specifically indicating Mod. 1 is at no cost to the Government. Thus, appellant has established a genuine issue of material fact with respect to whether the parties had a meeting of the minds. *Woerner Engineering, Inc.*, *supra.*

As to respondent's argument that notice of the claim was not timely under the Changes clause, respondent must establish prejudice to prevail. *Grumman Aerospace Corporation*, ASBCA Nos. 46834 *et al.*, 14 March 2003, slip. op. at 12-14; *Central Mechanical Construction*, ASBCA Nos. 29431 *et al.*, 85-2 BCA ¶ 18,061 at 90,657. Moreover, by considering the claim on the merits the contracting officer is deemed to have waived the notice requirement. *Id.* We have found that the content of the contracting officer's decision places whether he considered the merits of the claim at issue (finding 18). Respondent's motion is denied.

Dated: 12 May 2003

CARROLL C. DICUS, JR.
Administrative Judge
Armed Services Board
of Contract Appeals

(Signatures continued)

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

NOTES

[1] Respondent's statement of undisputed facts are admitted and cited to in our Statement of Facts. Appellant has added additional facts which are verifiable by reference to documents in the Rule 4 file submitted by respondent. In those instances, we have cited to the Rule 4 file.

[2] A mylar is a full-scale drawing, without dimensions, of an item. The contractor uses it to assist in the manufacturing of a part.

[3] There is not unanimity among the Federal Circuit Courts of Appeals as to the appropriateness of considering even an accompanying affidavit in resolving a 12(b)(6) motion to dismiss. *Rose v. Bartle,* 871 F.2d 331, 340 n.3 (3d Cir. 1989).

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. 54027, Appeal of Precision Standard, Inc., rendered in conformance with the Board's Charter.

Dated:

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