ARMED SERVICES BOARD OF CONTRACT APPEALS

Appeal of --	)	
	)	
JT Construction Company, Inc.	)	ASBCA No. 54352
	)	
Under Contract No. DACA63-96-C-0044	)	

APPEARANCES FOR THE APPELLANT: Theodore M. Bailey, Esq.
Johnathan M. Bailey, Esq.
Bailey & Bailey, P.C.
San Antonio, TX

APPEARANCES FOR THE GOVERNMENT: Thomas H. Gourlay, Jr., Esq.
Engineer Chief Trial Attorney
Lloyd R. Crosswhite, Esq.
Engineer Trial Attorney
U.S. Army Engineer District,
Fort Worth

OPINION BY ADMINISTRATIVE JUDGE YOUNGER
ON RESPONDENT'S MOTION FOR PARTIAL SUMMARY JUDGMENT

In this appeal under a construction contract, respondent has moved for partial summary judgment, contending that recovery is barred on three of the four sub-claims because of appellant's execution of a final payment release after project completion. Appellant chiefly argues that its claims are not barred because, although it did execute a release, it did not present a final payment voucher, which it asserts is a prerequisite to finality and because the contracting officer was on notice of the disputed claims in any event. We deny the motion.

FINDINGS OF FACT FOR PURPOSES OF THE MOTION

1. By date of 16 May 1996, respondent awarded Contract No. DACA63-96-C-0044 to appellant as a fixed price contract to construct a building at Kelly Air Force Base, Texas. (R4, tab 3 at 00010-2)

2. The contract contained various standard clauses found in fixed price construction contracts, including: FAR 52.232-5, PAYMENTS UNDER FIXED-PRICE CONSTRUCTION CONTRACTS (APR 1989); FAR 52.236-2, DIFFERING SITE CONDITIONS

(APR 1984); FAR 52.242-14, SUSPENSION OF WORK (OCT 1995); FAR 52.243-4, CHANGES (AUG1987). (R4, tab 3 at v, vi, 00700-7, 00700-17)

3. By date of 17 April 1998, appellant submitted to respondent a request for equitable adjustment for $202,866, representing "costs and impacts incurred resulting from defective plans and specifications requiring unobtainable tolerances for the exterior finish system" (R4, tab 22 at 1). Appellant stated in its letter that two of its subcontractors had advised it of their intent to file claims. Among them was Galvan Plastering Company (Galvan) which appellant asserted had incurred both direct and impact costs in performing "the infill required to achieve tolerances required by the specifications" for the exterior finish system (*id*. at 2).

4. With its 17 April 1998 request for equitable adjustment, appellant included multiple attachments, denominated as exhibits A through K. Exhibit G1, "Galvan Plastering Co. additional costs incurred as a result of interruption to flow of work," was one such attachment. Exhibit G1 memorialized a conversation between appellant's president and one of appellant's employees. It provided in part:

> Galvan advised that he had cost overruns amounting to $17,191 on this project in addition to the $32,809 overrun for in-fill of plaster. Galvan said these costs overruns are attributable to interruptions in the flow of work due to problems involving lack of a proper and complete design for this EFS system by the government. As an example, Galvan was required to pull off the job after durock was 40% installed as the government insisted that a water barrier was required behind the durock. . . . Days later the government determined that the water barrier was not required by the specifications. Also, Galvan had to pull off cement board application on the north side because his scaffolding was tied up with in-fill work on the building's south side. Galvan advised that additional scaffolding was required due to the in-fill requirements. This cost was not included in the $32,809 for in-fill.

(J T Construction Co., Inc.'s Response to Government Motion for Partial Summary Judgment (app. opp'n), ex. 3) We find insufficient evidence on the present record that appellant put the contracting officer on notice that appellant was asserting a claim with respect to extra work resulting from government direction to repair exterior finish bands by installing construction joints.

5. By letter to appellant dated 28 May 1998, respondent denied the request for equitable adjustment (R4, tab 24).

6. By letter to the contracting officer dated 2 November 1998, appellant challenged the denial, asserting that, if the parties could not resolve the matter, "we will be left with little alternative but to file a formal claim" for $211,825 (R4, tab 25 at 2-3). We find that, aside from the undertaking to file a claim, this letter was an amplification of factual arguments advanced in the request for equitable adjustment.

7. By date of 29 December 1999, appellant submitted to respondent its Payment Application No. 20, its last such application, showing the amount of $25.00 in Item No. 7, Retainage (Not Billed to the Government), and the same amount in Item No. 11 Balance to Finish, Plus Retainage. (App. opp'n, ex. 5) With respect to the entries in Item Nos. 7 and 11, appellant has tendered the uncontroverted affidavit of George Pace, its senior project manager, attesting that, upon direction from him, the project manager "specifically made this pay request for less than the full amount in order to leave the contract open with $25.00 still owed to [appellant]. It was not a final pay request." (App. opp'n, ex. 4 at 4)

8. On or about 12 January 2000, respondent disbursed a check to appellant for $13,400. (App. opp'n, ex. 7) It is undisputed that this amount was $75.00 less than appellant had requested on its Pay Application No. 20 and resulted in leaving a balance of $100.00 in the contract.

9. By date of 28 March 2000, appellant's operations manager executed a final payment release that provided in part that appellant:

> [h]ereby releases the United States, its officers, agents, and employees from any and all claims relating to or arising by virtue of said Contract, or any modification or change thereto, except with respect to those claims, if any, listed below:
>
> (Identify claims or if none write in the word "NONE".)
>
> Possible claim – veneer plaster/metal stud design issue (direct costs, delay and impact costs plus applicable markups)
>
> Final payment -- $100.00

(R4, tab 27)

10. It is undisputed that the reference in the release to the "veneer plaster/metal stud design issue" (*see* finding 9) designated appellant's claim regarding the allegedly defective design of cold formed structural steel in conjunction with the exterior finish system and resulting delays (*see* findings 3, 15). (Memorandum in Support of Respondent's Motion for Partial Summary Judgment (resp't mot.) at 12; app. opp'n at 50-51)

11. With respect to the execution of the release, Mr. Pace attests that:

> After paying us all but the $100.00, [respondent] sent two letters directing us to complete a Final Release. After the second letter I did as directed, but since I was not requesting final payment, I understood that the Final Release would not be effective until we did so. Our plan was to finish revising our claim and submit it before requesting final payment. . . . [W]e were not yet asking for the final billing on the job. We were buying some time to develop the claim to determine what the full amount was. . . . [W]e didn't intend to release them because we didn't bill for the $100.00.

(App. opp'n, ex. 4 at 4)

12. With respect to the entry on the release for "Final payment -- $100.00," Mr. Pace attests that he:

> included in the final release a reference to that $100.00 that was not yet billed to hold the contract open to emphasize that we were still not requesting final payment. I did not intend that filling out the release, as ordered by [respondent], was a pay request for the remaining $100.00 on the contract. We have a special format for pay requests that we used throughout this contract. If I had been requesting final payment, or any payment for that matter, I have to submit a signed formal Application for Payment on our letterhead and actually request a specific amount of money. I understood that the Final Pay Release would be effective upon [appellant] requesting payment of the $100.00.

(App. opp'n, ex. 4 at 5)

13. Respondent's records reflect that the project was 100% complete on 27 June 2000. (Resp't mot. ex. 1)

14. It is uncontroverted on the present record that, following completion of the work, appellant did not present a voucher for the $100.00 due under the contract. Mr. Pace attests that:

> we intentionally did not submit a final pay request for the $100.00. We understood that without our request, final payment would not be made. . . . Our plan was for the contract to remain open by leaving the $100.00 on the contract, until we submitted our claim and brought it to a final resolution.

(App. opp'n, ex. 4 at 5-6) It is uncontroverted that, by check dated 13 September 2000, respondent paid appellant the balance of $100.00 due under the contract. (Resp't mot., ex. 2 at 1) Mr. Pace attests that respondent "decided to do it on its own." (App. opp'n, ex. 4 at 6)

15. By date of 15 January 2003, appellant submitted a claim to the contracting officer. The claim included four sub-claims, as follows: (1) a restated claim in the amount of $211,825 for defective design of cold formed structural steel in conjunction with the exterior finish system and resulting delays (*see* finding 3); (2) costs for sixteen days of delay to Galvan related to the installation of an exterior vapor barrier; (3) $23,176.92 in extra scaffolding costs to Galvan resulting from government-directed changes; and (4) $7,500 in extra work resulting from government direction to repair exterior finish bands by installing construction joints. (R4, tab 28 at 1-13, 59-63, 63-79, 90-97) By date of 8 July 2003, the contracting officer rendered his final decision denying the claim in its entirety (R4, tab 2). Appellant thereafter brought this timely appeal.

DECISION

In its motion for partial summary judgment, respondent focuses on its affirmative defense of release. That is, respondent argues that three of appellant's four claims are precluded because they were not excepted from the final payment release (*see* finding 9). (Resp't mot. at 8) The three claims that are said to have been released are those relating to government-directed changes to the scaffolding; to government direction to install a vapor barrier; and to government direction to repair exterior finish system and install construction joints in the exterior finish system. Relying principally upon *Mingus Constructors, Inc. v. United States*, 812 F.2d 1387 (Fed. Cir. 1987) and the terms of several standard clauses in the contract (*see* finding 2), respondent insists that, by failing to reserve these three claims in the final payment release, appellant has waived them. (Resp't mot. at 8-13)

Appellant advances multiple arguments in its lengthy opposition. Appellant first asserts that it did not request final payment by a final payment invoice or voucher and respondent cannot unilaterally make payment to cut off claims. (App. opp'n at 44-46) Appellant further disputes the applicability of *Mingus Constructors*, upon which respondent relies. (App. opp'n at 46-50) Appellant also argues that its exception to the defective design claim prevented final payment. (App. opp'n at 50-51) Finally, appellant urges that the contract clauses cited by respondent do not support its argument. (App. opp'n at 51-55)

We evaluate the parties' respective contentions against the familiar formulation that "[s]ummary judgment is properly granted only where there is no genuine issue of material fact and the movant is entitled to judgment as a matter of law." *Mingus, supra*, 812 F.2d at 1390. "Our task is not to resolve factual disputes, but to ascertain whether material disputes of fact – triable issues – are present." *John C. Grimberg Co*., ASBCA No. 51693, 99-2 BCA ¶ 30,572 at 150,969. A material fact is one that may affect the outcome of the case. *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 248 (1986).

After considering the motion papers, the pleadings and other documents in the record, we deny the motion. Without intimating any view regarding our conclusions on a fuller record, we resolve all inferences in favor of appellant as the party against which the motion is directed, *e.g.*, *Matsushita Electric Industrial Co., Ltd., v. Zenith Radio Corp.*, 475 U.S. 574, 587 (1986) quoting *United States v. Diebold, Inc.*, 369 U.S. 654, 655 (1962), and conclude that the present record raises triable issues in at least two respects, which we outline below.

First, the present record presents a triable issue regarding the contracting officer's notice of the two sub-claims relating to Galvan. It is familiar that final payment does not bar a claim "[w]here a contracting officer knows, or is properly chargeable with knowledge, that at the time of final payment the contractor is asserting a right to additional compensation, even though formal claim therefor has not been filed." *Jo-Bar Mfg. Corp. v. United States*, 535 F.2d 62, 66 (Ct. Cl. 1976); *Navales Enterprises, Inc.*, ASBCA No. 52202, 99-2 BCA ¶ 30,528 at 150,757.

Viewing the present record in the light most favorable to appellant as the nonmoving party, *Matsushita*, *supra*, 465 U.S. at 587, it supports the conclusion that the contracting officer was on actual or constructive notice regarding appellant's second and third sub-claims, relating to Galvan (*see* finding 15). That is, appellant appears to have put the contracting officer on notice in its April 1998 request for equitable adjustment regarding the second sub-claim for additional costs attributable to the installation of a vapor barrier. In exhibit G1 to its request, appellant asserted that Galvan "was required to pull off the job after durock was 40% installed as the government insisted that a water barrier was required behind the durock" (finding 4). In addition, appellant appears to

have put the contracting officer on notice regarding the third sub-claim (*see* finding 15) for extra scaffolding costs. In exhibit G1, appellant stated that "Galvan advised that additional scaffolding was required due to the in-fill requirements. This cost was not included in the [cost] for in-fill" (finding 4). By contrast to these two sub-claims relating to Galvan, we have not found that the contracting officer was on notice regarding the fourth sub-claim, relating to extra work resulting from government direction to repair exterior finish bands by installing construction joints (*see id*.).

Second, apart from the foregoing considerations, there is a triable issue regarding the mutuality of the alleged final payment. Respondent insists that the release is dispositive because it "was properly executed and final payment was made." (Respondent's Reply to Appellant's Response to Respondent's Motion for Partial Summary Judgment (resp't reply) at 11) Nonetheless, appellant has supported its opposition with Mr. Pace's affidavit, which is uncontroverted (finding 7; *see also* findings 11, 12, 14). Viewing it, together with the other evidence of record, in the light most favorable to appellant, *Matsushita*, *supra*, 475 U.S. at 587, it supports the conclusion that appellant executed the release after respondent "sent two letters directing us to complete a Final Release" (finding 11). Appellant complied with the direction with the understanding that the release "would not be effective" until appellant requested final payment (*id*.). It is uncontroverted that appellant did not submit a voucher, invoice or other request for final payment, understanding that, "without our request, final payment would not be made" (finding 14). Respondent unilaterally decided to pay the outstanding contract balance.

While we have thus concluded above that there are triable issues regarding the two Galvan sub-claims but not the third sub-claim to which the motion is directed, our conclusion regarding the finality of the asserted final payment warrants denial of the motion in its entirety.

CONCLUSION

Respondent's motion for partial summary judgment is denied.

Dated: 26 January 2006

ALEXANDER YOUNGER
Administrative Judge
Armed Services Board
of Contract Appeals

(Signatures continued)

I concur

MARK N. STEMPLER
Administrative Judge
Acting Chairman
Armed Services Board
of Contract Appeals

I concur

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. 54352, Appeal of JT Construction Company, Inc., rendered in conformance with the Board's Charter.

Dated:

CATHERINE A. STANTON
Recorder, Armed Services
Board of Contract Appeals