ARMED SERVICES BOARD OF CONTRACT APPEALS

Appeal of --	)	
	)	
Valenzuela Engineering, Inc.	)	ASBCA No. 54490
	)	
Under Contract No. DACA09-99-D-0018	)	

APPEARANCE FOR THE APPELLANT: Barbara A. Duncombe, Esq.
Sebaly Shillito + Dyer
Dayton, Ohio

APPEARANCES FOR THE GOVERNMENT: Thomas H. Gourlay, Jr., Esq.
Engineer Chief Trial Attorney
Lawrence N. Minch, Esq.
Engineer Trial Attorney
U.S. Army Engineer District, Los Angeles

OPINION BY ADMINISTRATIVE JUDGE DELMAN
ON MOTION FOR PARTIAL SUMMARY JUDGMENT

Valenzuela Engineering, Inc. (appellant or VEI) has filed a motion for partial summary judgment, contending that appellant is not barred as a matter of law from asserting its claims for various cost impacts arising from a suspension of work. The government opposes the motion, contending that appellant's execution of a contract modification related to the suspension bars the claims, or at the minimum raises disputes of material fact that preclude the grant of appellant's motion.

STATEMENT OF FACTS FOR PURPOSES OF THE MOTION

1. The government awarded appellant task order No. 0003 under the subject contract on 22 September 2000. Appellant was to construct two housing facilities and perform some adjacent site work at the Federal Correctional Institution (FCI) at Lompoc, California. The original contract performance period was 365 calendar days with a completion date of 15 October 2001. (R4, tab 3)

2. Effective 22 June 2001, the government suspended the contract work to allow for the completion of an environmental assessment. The government rescinded the suspension 92 days later, on 21 September 2001. (R4, tab 44 at 3661, tab 53 at 3882)

3. On 2 October 2001, VEI submitted a proposal to the government, requesting payment of $109,374.46 due to the suspension of the work. This amount included demobilization costs, remobilization costs and extended G&A expenses for 116 calendar days in the amount of $78,501.84. Insofar as pertinent, the proposal stated as follows:

> This proposal is based on the following parameters:
>
> 1. Valenzuela Engineering receives the formal modification and/or notice proceed on the contract by 15 October 2001.
>
> 2. **The impacts due to future adverse weather and/or site conditions are not considered in this proposal since these impacts may or may not be encountered. If and when these conditions occur, Valenzuela Engineering would expect a fair and reasonable compensation for any added costs.**
>
> 3. **This proposal does not address any additional costs that may be incurred by our subcontractors due to the imposed suspension of work.** These costs will be forwarded to our office once a firm notice to proceed date is received.
>
> 4. The costs associated with the additional G&A expenses are based on the use of the Eichleay Formula.

(Emphasis added) (R4, tab 59 at 3900)

4. By appellant's letter to the government dated 15 October 2001, Mr. I. J. Reyes, President, advised in pertinent part as follows:

> **It is already clear there will be a need to renegotiate some of the subcontracts. And it appears we can expect some delay costs and/or other requests for added compensation. We will need to let the dust settle a little before we can fully define these,** but would like to arrive at an executed contract modification on the issues we are able to define as soon as possible in order to begin generating project cash flow. . . .
>
> Mr. Ben Valenzuela [appellant] will be meeting on October 16th with Mr. Torres [government] to see if we can start the contract modification process by reviewing our

> submittal. Hopefully, this dialogue will continue to the point of a bilateral contract modification, reserving, if necessary, the issues such as project delay to another time.

(Emphasis added) (R4, tab 56 at 3887)

5. On 25 October 2001, VEI submitted a revised proposal of $99,818.59. The cover letter contained the same four caveats specified above (finding 3), and contained the same cost elements as the previous proposal. (R4, tab 59 at 3931)

6. Mr. Rogelio Torres, the government's resident engineer, and Mr. Carlos Rodriguez, VEI's project manager, negotiated the revised proposal. Mr. Torres requested that the administrative contracting officer (ACO), Mr. Harold Hartman, handle the *Eichleay* portion of the proposal since he was not familiar with calculating *Eichleay* damages.

7. Mr. Torres met with Mr. Rodriguez on 29 October 2001 and 2 November 2001. During the negotiations, the government questioned certain field overhead, demobilization and remobilization costs proposed by appellant. The ACO advised Mr. Torres that appellant's claimed *Eichleay* costs appeared to be fair and reasonable. (R4, tab 59 at 3937)

8. At the conclusion of the negotiations, the parties agreed to an increase in contract price, including Eichleay costs, in the amount of $98,736.16 and a time extension of 116 days. Mr. Torres prepared an internal price negotiation memorandum (PNM) dated 29 October 2001. Paragraph 9 stated in pertinent part as follows:

> It was agreed to by both parties that the total negotiated price of $98,736.16 increase with a 116 calendar day extension of time was fair and reasonable. The negotiated adjustment compensates the contractor in full for all costs and time associated with both the affected and unaffected contract work and includes direct costs, indirect costs, extended overhead costs and impacts.

(R4, tab 59 at 3938)

Notwithstanding the above reference to "impacts" in the PNM, it is undisputed that Mr. Rodriguez did not seek recovery for, nor did he discuss any of the potential impacts previously reserved by appellant in the October letters, nor did Mr. Torres discuss them with Mr. Rodriguez. The ACO also did not discuss them with appellant. In no conversations during the negotiations did Mr. Rodriguez, or any other authorized

representative of appellant, advise the government that appellant was withdrawing or waiving the potential claims it had reserved in its October letters.

9. The government prepared Modification R00307 for appellant's review and signature. Insofar as pertinent, the modification stated as follows:

> A. SCOPE OF WORK
>
> WC009 Suspension of Work Costs
> Reimburse Contractor for costs incurred due to suspension of work for county environmental office reasons.
>
> B. CHANGE IN CONTRACT PRICE
> Total contract price is increased by $98,736.16.
>
> . . . .
>
> C. CHANGE IN CONTRACT TIME
> The contract completion date shall be extended 116 calendar days by reason of this modification.
>
> D. CLOSING STATEMENT
> It is further understood and agreed that this adjustment constitutes compensation in full on behalf of the Contractor and its subcontractors and suppliers for all costs and markups directly or indirectly attributable to the change ordered, for all delays related thereto, and for performance of the change within the time frame stated.

(R4, tab 59 at 3896)

Both parties executed the modification on 14 December 2001 without qualification.

10. Roughly three weeks after it executed Modification R00307, appellant furnished the government on 7 January 2002 with an updated project schedule. Appellant claimed an additional 43 days of compensable delay arising, in part, from the government's suspension of work. (R4, tab 61 at 3955) By letter to appellant dated 25

January 2002, the government denied appellant's request, stating *inter alia*, that these issues were addressed in Modification R00307 (R4, tab 64).

11. In February 2003, appellant submitted a certified request for equitable adjustment (REA) in the amount of $495,553.71, including a request for additional time in the amount of 216 days for various compensable job delays. Included in this REA were a number of claimed delays related to the above suspension of work, as follows:

Delay – 02	Remobilization in October, 2001 (14 days)
Delay – 03	New HVAC & Plumbing Contracts (41 days)
Delay – 05	Adverse weather (10 days)
Delay – 06	Holidays - Christmas, New Year (9 days)
Delay – 07	New Epoxy Flooring Contract (26 days)

(R4, tab 2 at 0038-0071)

12. The government did not issue a contracting officer's decision, and appellant filed this appeal based upon the deemed denial of its claim.

DECISION

Summary judgment is appropriate when there is no genuine issue of material fact and the movant 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 that will make a difference in the outcome of the case. *Andersen v. Liberty Lobby, Inc.,* 477 U.S. 242 (1986). For reasons stated below, we conclude that there are no genuine issues of material fact pertaining to the appellant's motion, and that partial summary judgment is appropriate.

We believe the record is clear that appellant's letters of October, 2001, filed in anticipation of negotiating its proposal relating to the government's suspension order, reserved all potential claims related to additional subcontractor cost and performance delay, future adverse weather, and site conditions to the extent impacted by the government's suspension of work, and that appellant did not affirmatively waive, withdraw or modify these reservations throughout the negotiations.

An essential element of an accord and satisfaction is proof of a meeting of the minds of the parties as to the matter compromised. *Advanced Business Concepts, Inc.*, ASBCA No. 55002, 06-1 BCA ¶ 33,271 at 164,893. Clearly, there was no meeting of the minds as to the compromise or waiver of these potential claims. Appellant's reservations of rights in its October letters served as an exception to the general release-type language contained in Modification R00307.

Insofar as appellant's February, 2003 claim relates to these reserved matters, *i.e.*, DELAY - 03, DELAY - 05, and DELAY - 07, we conclude that they were not barred by appellant's execution of Modification R00307 as a matter of law. We grant appellant's motion for partial summary judgment to this extent.

We reach a different conclusion with respect to appellant's other suspension-related claims, DELAY - 02 and DELAY - 06. Under DELAY - 02, appellant seeks additional compensable time for general mobilization in October, 2001. Appellant did not reserve these costs prior to or during the negotiations. In fact, appellant was negotiating its remobilization costs during this very period and should have been aware of any additional remobilization costs. In addition, the government's suspension of work lasted 92 days, but appellant sought and was granted a time extension of 116 days, which allowed additional time for general remobilization.

As for DELAY - 06, appellant also did not reserve any impacts related to "holidays". Obviously, appellant was aware of the upcoming winter holidays during the negotiations in late October and early November 2001, and to the extent there was any possible impact, appellant could have reserved or reasonably projected the impact during the negotiations.

We believe that appellant released these two unreserved claims through its unqualified execution of Modification R00307, and the release-type language contained therein. Although the government did not file a cross-motion for summary judgment, its opposition memorandum contended that VEI's claims were barred as a matter of law based upon Modification R00307 (br. at 6). The government's second amended answer also asserted the affirmative defense of "accord and satisfaction."

Given the lack of any genuine issues of material fact related to this matter, we believe it is within our discretion to grant summary judgment to the government on these claims. *Standard Oil Company of California v. United States*, 685 F.2d 1337, 1346 (Ct. Cl. 1982); *Newport News Shipbuilding and Dry Dock Co.*, ASBCA Nos. 32289, 32290, 32567, 90-2 BCA ¶ 22,859 at 114,832; *The Boeing Co.*, ASBCA No. 28342, 85-3 BCA ¶ 18,435 at 92,608, *aff'd*, 802 F.2d 1390 (Fed. Cir. 1986).

CONCLUSION

Appellant and the government are granted partial summary judgment consistent with this opinion.[1]

Dated: 28 August 2006

JACK DELMAN
Administrative Judge
Armed Services Board
of Contract Appeals

I concur

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

I concur

ELIZABETH A. TUNKS
Administrative Judge
Acting Vice Chairman
Armed Services Board
of Contract Appeals

[1] Appellant seeks reimbursement of attorney's fees and expenses with respect to its motion pursuant to the Equal Access to Justice Act (EAJA) (mot. at 15). Under EAJA, an eligible party may recover fees and expenses as a prevailing party in an adversary adjudication, 5 U.S.C. § 504. While this decision allows appellant to take a number of its claims to trial, appellant has yet to prevail on them. Hence, assuming *arguendo*, that appellant is an eligible party, we must deny appellant's request as premature.

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. 54490, Appeal of Valenzuela Engineering. Inc., rendered in conformance with the Board's Charter.

Dated:

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