

ARMED SERVICES BOARD OF CONTRACT APPEALS

Appeals of --)
)
KiSKA Construction Corp.-USA and)
Kajima Engineering and Construction, Inc.,)
a Joint Venture) ASBCA Nos. 54613, 54614
)
Under Contract No. 1E0023)

APPEARANCES FOR THE APPELLANT: Jerome Reiss, Esq.
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Washington Metropolitan Area
Transit Authority

OPINION BY ADMINISTRATIVE JUDGE DELMAN ON MOTION FOR PARTIAL
SUMMARY JUDGMENT

KiSKA Construction Corp.-USA and Kajima Engineering and Construction, Inc., a Joint Venture (appellant), moves for partial summary judgment in these appeals¹, contending that -- except for the quantum for PCO 34 and PCO 56 -- there are no material disputes of fact and it is entitled to recover its contract retainage (ASBCA No. 54613) and an equitable adjustment for additional work under the Changes article of the contract (ASBCA No. 54614). The contract was awarded by the Washington Metropolitan Area Transit Authority (WMATA or the Authority) to construct twin, single track tunnels and related work in Washington, D.C., known as the "Greenbelt Route, 14th Street Tunnels". The Authority opposes the motion, contending, *inter alia*, that the record contains material disputes of fact and does not establish that appellant is entitled to recover the claimed amounts as a matter of law.

As background and in support of its motion, appellant cites findings from the Board's previous decisions under this contract that were issued to address the Authority's motions: (1) denying the Authority's motion to suspend Board proceedings, *KiSKA*

¹ Along with the motion for partial summary judgment, appellant filed a motion to waive hearing under the Board's rules. In response, WMATA chose not to waive its right to a hearing. We shall treat the two motions separately. The latter will be addressed by the Board in a prehearing conference in due course.

Construction Corp.-USA and Kajima Engineering and Construction, Inc., a Joint Venture, ASBCA Nos. 54613, 54614, 05-1 BCA ¶ 32,922; and (2) denying the Authority's motion to dismiss and/or for summary judgment, *KiSKA Construction Corp.-USA and Kajima Engineering and Construction, Inc., a Joint Venture*, ASBCA Nos. 54613, 54614, 06-1 BCA ¶ 33,244, *recon. denied*, 2006 WL 3347912 (6 November 2006). We see no need to repeat these findings; rather, we incorporate all prior findings herein. Familiarity with our prior decisions is presumed.

Appellant cites to attachments to its claim, dated 5 January 2004, to show that the claimed amounts are undisputed. With respect to the contract retainage, appellant relies upon a contract payment estimate dated 30 July 1998 under tab 1 of the claim, which shows a request for progress payment for \$380,380.92 (that was subsequently paid), and includes on the form a net contract retainage figure of \$650,000.00. This form appears to contain the signature of a WMATA engineer, who signed the following certification:

I CERTIFY [emphasis in original] that I checked the quantities covered by the estimate; that the work was actually performed; that the quantities are correct and consistent with all previous computations as actually checked; that the quantities and amounts are wholly consistent with the requirements of the contract or other instruments involved.

With respect to its request for equitable adjustment, appellant relies upon an uncaptioned, unsigned document at the back of tab 1 of the claim, listing certain modifications and PCOs as proof that WMATA owes the amounts claimed. (Mot. at 6-8)

The Authority contends that neither of these claim documents, nor the record as a whole, establishes that WMATA has agreed to pay, or that appellant is otherwise entitled to recover the claimed amounts. We agree with the Authority. It is unclear whether the WMATA engineer, by his signature on the request for progress payment, attested to appellant's entitlement to the retainage, and it is unclear whether he was authorized to make such a determination on behalf of the Authority. We also agree that the above unauthenticated listing of modifications is insufficient to establish liability.

We have considered all the other documentary evidence of record offered by appellant on the prior motions relevant to its claims. Based upon the state of the record in this early stage of the proceedings – WMATA has yet to file an answer to appellant's complaint -- and drawing all factual inferences in favor of the nonmoving party, we believe appellant has not shown, for purposes of partial summary judgment, that it is entitled to recover the claimed amounts under these appeals as a matter of law. Our prior decisions recognized that appellant had the right to proceed with these appeals, but the decisions did not dispense with appellant's burden, as claimant, to prove its claims in entitlement and quantum.

In view of our decision, we need not address the other grounds asserted by WMATA in support of its position. Appellant's motion for partial summary judgment is denied.

Dated: 28 November 2006

JACK DELMAN
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 Nos. 54613, 54614, Appeals of KiSKA Construction Corp.-USA and Kajima Engineering and Construction, Inc., a Joint Venture, rendered in conformance with the Board's Charter.

Dated:

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