ARMED SERVICES BOARD OF CONTRACT APPEALS

Appeal of --	)	
	)	
Advanced Business Concepts, Inc.	)	ASBCA No. 55002
	)	
Under Contract No. FA4814-05-P-0069	)	

APPEARANCE FOR THE APPELLANT: Mr. Ray Farhadi
President

APPEARANCES FOR THE GOVERNMENT: COL Anthony P. Dattilo, USAF
Chief Trial Attorney
Matthew H. Beutel, Esq.
Trial Attorney

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

This appeal involves appellant's claim to recover the cost of specialty commercial items that respondent incorrectly identified in the contract. The government has moved for summary judgment regarding its affirmative defense of accord and satisfaction. We deny the motion.

FINDINGS OF FACT FOR PURPOSES OF THE MOTION

1. Effective 6 December 2004, the government awarded appellant Advanced Business Concepts, Inc. (ABC) contract No. FA4814-05-P-0069. The contract contained various standard clauses. Under the contract, the government agreed to purchase
20 AVIO MP 50 Projector Replacement Lamps, MPLU-50, at a total price of $9,518.00. (R4, tab 14 at 1, 3, 6-15) We find from the present record that the lamps were a specially-ordered part.

2. It is undisputed that, in early January 2005, the government's contracting specialist, Senior Airman Carlos Mayorga, advised appellant that the government had mistakenly ordered the wrong part (compl., ¶ 5; answer, ¶ 5).

3. We find from the present record that appellant communicated to respondent its position that it would accept the lamps back if it could return them to the manufacturer. By e-mail to Airman Mayorga dated 20 January 2005, an ABC representative, Victor Kompany, advised that, although appellant had provided what the government ordered,

he would do his best to obtain a return authorization which, he said, would require a contract modification. He also stated that "in the case of rejection, we will be obligated not to accept the order back." (R4, tab 17 at 3) By e-mail dated 25 January 2005, Mr. Kompany informed Airman Mayorga that there would be a "25% restocking fee in the case of return plus involved shipping costs" (*id*. at 2). By e-mail dated 28 January 2005, Mr. Kompany advised Airman Mayorga that 31 January 2005 "will be our dead line [sic] with manufacturer. After that there will not be any return; accordingly we will be required to have either the receiving report or modification to contract for returning the goods under manufacturer conditions." (*Id*. at 1) By e-mail dated 31 January 2005, Mr. Kompany advised Airman Mayorga that:

> Today is our deadline and I have to send them an email that we are going to sent [sic] the product back based on their policy. At this moment, they are not available and I can not get in touch with the manufacturer. . . .
> I will pay 5% of restocking fee and shipping charges to the manufacturer out of my pocket. . . .
> Please, go ahead and issue a modification that you are going to send QTY 20 un-opened lamp part number MPLU-50 WITH the 20% amount of restocking fee equal to $1903.60

(R4, tab 18 at 1)

4. By e-mail dated 1 February 2005, Airman Mayorga was advised that approval had been given to let ABC "take the restocking fee of $1,903.60 from [the] contract . . . sending the remaining portion of $7,614.40 back" to the government (R4, tab 18 at 1). Mr. Kompany inquired about the contract modification twice on 1 February 2005 and twice on 2 February 2005, stating once that "[w]e have to process the return ASAP" (R4, tab 20 at 1-2). We find no evidence in the present record that, during this time period, ABC changed its previously-expressed position that, "in the case of rejection [by the manufacturer], we will be obligated not to accept the order back" (*see* finding 3).

5. By date of 3 February 2005, effective 1 February 2005, the parties entered into bilateral Modification No. P00001. The modification stated the following: its purpose was "to cancel the order and return the items;" a restocking fee of $1,903.60 would be assessed against the delivery order; and, the remainder of $7,814.40 would be deobligated. (R4, tab 19 at 1) The modification did not contain a release. It also did not mention appellant's condition regarding the manufacturer's agreement to accept return of the lamps (*see* finding 3).

6. On the same day that the parties executed the modification, Mr. Kompany asked Airman Mayorga to assure that the end user would have the lamp boxes ready for return. We find from the present record that respondent delayed return until at least 9 February 2005 (R4, tabs 21-24).

7. By letter dated 21 February 2005, appellant's domestic supplier advised appellant that, on specially-ordered and custom made items:

> we simply do not accept any returns but because of your particular erroneous circumstance we tried to make an exception providing the manufacturer . . . accepts these items back for credit.
> After we shipped these items back, [the manufacturer] decided . . . that due to an extended process of modification of contract & shipment they were simply unable to accept & receive them back. . . .
> We regret to inform you that we have tried all channels, on your behalf, to have these Lamps returned but unfortunately we must obey by [sic] the returns rules & regulations of the manufacturer and will be sending you back these lamps.

(R4, tab 25)

8. The present record reflects continued government consideration of compensating appellant for the cost of the lamps through into March 2005. By e-mail dated 2 March 2005, Airman Mayorga reported "bad news," which was that "the Contracting Officer has decided to take back the bulbs and pay the contractor the full amount of the order. . . . It is an unfortunate situation, but we are going to have to bite the bullet on this one. . . [T]he Government does not want to put small businesses out." (R4, tab 27 at 2) Internally, the government considered administrative steps to reverse the previous de-obligation by the modification of $7,614.40 (*id*. at 1-2). (*See* finding 5) However, by e-mail dated 24 March 2005, Airman Mayorga informed Mr. Kompany that respondent "will not take back the lamps," and that appellant could submit a claim to the contracting officer (R4, tab 30 at 1).

9. By date of 25 March 2005, appellant submitted a "claim on the cancelled order" to Airman Mayorga, who forwarded it to the contracting officer, stating that appellant would "seek collections through legal channels" unless the government accepted reshipment of the lamps or agreed to purchase them at appellant's "raw cost" of $8,416.88 (R4, tab 31 at 1). By decision dated 21 April 2005, the contracting officer treated appellant's 25 March 2005 submission as a claim and, as such, denied it (R4, tab 32). Appellant thereafter filed this timely appeal.

DISCUSSION

The government's motion for summary judgment rests upon the straightforward proposition that Modification No. P00001 bars the present claim because it satisfies the classic elements of an accord and satisfaction, *viz*., "proper subject matter, competent parties, meeting of the minds, and consideration." *Precision Standard, Inc.*, ASBCA No. 54027, 03-2 BCA ¶ 32,265 at 159,600. Hence, the government tells us that the modification bars the present claim for appellant's cost of purchasing the lamps.

Under familiar principles, summary judgment is properly granted where no material facts are genuinely in dispute and the moving party is entitled to judgment as a matter of law. *E.g.*, *Mingus Constructors, Inc. v. United States*, 812 F.2d 1387, 1390 (Fed. Cir. 1987); *Precision Standard*, *supra*, 03-2 BCA at 159,600. "Our task is not to resolve factual disputes, but to ascertain whether material disputes of fact – triable issues – are present." *John C. Grimberg Co., Inc.*, ASBCA No. 51693, 99-2 BCA ¶ 30,572 at 150,969. We resolve all inferences in favor of appellant, as the party against which the motion is directed. *E.g., JT Construction Co., Inc.*, ASBCA No. 54352, 06-1 BCA ¶ 33,182 at 164,464.

Applying these procedural standards, we conclude that the motion must be denied. The modification did not contain a release (finding 5). Where there is a question "whether claimed costs were considered when [an] adjustment was negotiated, absent clear release language, price adjustment amendments are narrowly construed." *Danac, Inc.*, ASBCA No. 33394, 97-2 BCA ¶ 29,184 at 145,149 (internal quotations omitted), *aff'd on recon.*, 98-1 BCA ¶ 29,454.

Even with a release, however, we would be reluctant to grant summary judgment because of the evidence of continued consideration of full payment after execution of the modification. It has long been established that "where the conduct of the parties in continuing to consider a claim after execution makes plain that they never construed the release as constituting an abandonment of the claim, . . . the release will not be held to bar the prosecution of the claim." *J. G. Watts Construction Co. v. United States*, 161 Ct. Cl. 801, 807 (1963) (citation omitted). While the parties executed the modification on 3 February 2005 (finding 5), the present record reveals that payment for the cost of the lamps remained alive after 21 February 2005, when the manufacturer refused to accept them back (finding 7), and on 2 March 2005, when the contracting officer "decided to take back the bulbs and pay the contractor the full amount of the order" (finding 8). This evidence of continued consideration gives a hollow ring to the government's assurances in the motion that the modification conclusively fixed the rights of the parties.

Another consideration warrants denial of the motion. While "[m]eeting of the minds is an essential element of an effective accord and satisfaction," *Danac, Inc.*, *supra*, 97-2 BCA at 145,149, the sparse record before us presents a triable issue regarding whether the parties agreed that the modification finally resolved appellant's "raw cost" for the lamps (*see* finding 9). The record reveals appellant's persistent position, before and through the time the modification was signed, was that it would attempt to return the items but that "in the case of rejection [by the manufacturer], we will be obligated not to accept the order back" (findings 3, 4). It is not evident whether both parties understood that the modification's stated purpose "to cancel the order and return the items" (finding 5) meant returning the lamps to the original manufacturer, or simply to appellant. Appellant tells us that it set forth "on the back of every packing slip and invoice" its condition that returns must be accepted by the original manufacturer (Appellant's Proposed Finding of Fact Response at 1), and Mr. Kompany's 28 January 2005 e-mail seeking "either the receiving report or modification" to accomplish the return "under manufacturer conditions" (finding 3) suggests that appellant equated the modification terms with its own. Drawing all inferences in favor of appellant, *JT Construction Co.*, *supra*, 06-1 BCA at 164,464, we cannot say at this juncture that the element of meeting of the minds is satisfied on this record.

CONCLUSION

The government's motion for summary judgment is denied.

Dated: 20 April 2006

ALEXANDER YOUNGER
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

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. 55002, Appeal of Advanced Business Concepts, Inc., rendered in conformance with the Board's Charter.

Dated:

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