

ARMED SERVICES BOARD OF CONTRACT APPEALS

Appeals of --)
)
Contrack International, Inc.) ASBCA Nos. 56607, 56609
)
Under Contract Nos. W912ER-04-D-0003)
W917PM-04-C-0007)

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OPINION BY ADMINISTRATIVE JUDGE FREEMAN
ON THE GOVERNMENT’S MOTIONS TO DISMISS

Contrack International, Inc. (CII) appeals the deemed denial of its claims for full payment with interest of negotiated settlement amounts for equitable adjustments under the captioned contracts. The government alleges payment and waiver and moves separately to dismiss each appeal with prejudice. Since payment and waiver are affirmative defenses, the motions to dismiss are in the nature of motions for summary judgment. We find the government is not entitled in either appeal to judgment as a matter of law.

STATEMENT OF FACTS (SOF) FOR PURPOSES OF THE MOTIONS

1. On 30 September 2004, the government issued Task Order 0008 under Contract No. W912ER-04-D-0003 to CII. The task order required construction of an ammunition supply point at Bagram Airfield, Afghanistan. (Bd. corr. file 56607 (56607), compl. ¶ 13). At or about the same time, the government awarded Contract No. W917PM-04-C-0007 (hereinafter “Contract 0007”) to CII for design, construction and rehabilitation of the runway at the Kandahar Airfield, Afghanistan (Bd. corr. file 56609 (56609), compl. ¶ 11).

2. On 16 December 2006 and 10 February 2007, CII and the government reached claim settlement agreements, subject to the availability of funds, for price increases of \$1,750,000 for Task Order 0008 and \$7,300,000 for Contract 0007. Funds for payment of these claim settlement agreements were not available at the time the agreements were reached. (App. opp'n, ex. A at 4-5, 10-11)¹

3. By bilateral contract modifications dated 18 and 30 September 2007 the government made partial payments respectively of \$639,101.71 on the Task Order 0008 settlement agreement and \$896,409.71 on the Contract 0007 settlement agreement. The parties agreed at this time that interest would not start on the balances due on both agreements until 1 November 2007. (*Id.* at 4, 10; app. opp'n, ex. K at 1)

4. On or about 26 February 2008, CII submitted certified claims to the contracting officer under the Contract Disputes Act of 1978 (CDA), 41 U.S.C §§ 601-11, for the unpaid balances due on the settlement agreements plus accrued interest (app. opp'n, ex. K at 1). The unpaid principal balances were \$1,110,898.29 on the Task Order 0008 settlement agreement² and \$6,403,590.29 on the Contract 0007 settlement agreement.³ In letters to CII dated 16 and 17 June 2008, the contracting officer stated:

As of this date, the parties have not executed a follow-on modification for the balance of the [settlement] agreement because such funds are currently unavailable for this adjustment. When the appropriate funds become available, the parties intend to execute a follow-on modification obligating the available funds and permitting the submission of an invoice....

(App. opp'n, ex. A at 4, 10)

5. When no contracting officer's decisions on its claims were forthcoming, CII appealed the deemed denial of the claims to this Board on 31 October 2008. The appeal on the Task Order 0008 claim is docketed as ASBCA No. 56607. The appeal on the Contract 0007 claim is docketed as ASBCA No. 56609.

¹ The exhibits to appellant's oppositions to the motions in both appeals are the same.

² \$1,750,000 - \$639,101.71

³ \$7,300,000 - \$896,409.71

6. On 12 January 2009, government counsel sent to CII counsel the government's calculations of the total amount still due CII under the settlement agreements as follows:

ASBCA No. 56607
Settlement: \$1,110,898.29
Interest from 11/01/07 - 10-31-08 (1 yr max)
Interest: \$65,587.25 (@ 5.750% rate)
Total due: \$1,176,485.54

....

ASBCA No. 56609
Settlement: \$6,403,590.30
Interest from 11/01/07 – 10-31-08 (1 yr max)
Interest: \$378,066.89 (@ 5.750% rate)
Total due: \$6,781,657.19

(App. opp'n, ex. C at 1)

7. On 14 January 2009, government counsel asked CII counsel whether CII agreed with the government numbers. CII counsel replied: "Yes, Contrack has confirmed that they'll agree to those numbers and will execute releases." (App. opp'n, ex. D at 1-2) Funding for the agreed amounts, however, did not become available until eight months later in September 2009 (SOF ¶¶ 13-15).

8. On 16 July 2009, CII counsel notified government counsel that: "I have asked Contrack to update the interest calculations for both appeals [ASBCA Nos. 56607, 56609] through the end of July 2009. I want [to] make sure the Government has the correct figures, which are significantly higher given the accrual of interest." (App. opp'n, ex. K at 10)

9. On 3 September 2009, CII submitted its calculation in the total amount of \$759,532.20 for interest due on the unpaid settlement amounts for both Task Order 0008 and Contract 0007 for the period November 2007 through September 2009 (app. opp'n, ex. E at 1, 8-9). The government's 12 January 2009 total interest calculation was only \$443,654.14 and covered only the 12 months from 1 November 2007 to 31 October 2008 (SOF ¶ 6).⁴

⁴ For the 12 months included in the government calculation, the total interest due in CII's calculation was \$392,418.13 (app. opp'n, ex. E at 8).

10. On the same day, 3 September 2009, government counsel responded to CII's interest calculation as follows:

I think we are going to have to resolve the issue of the interest amounts separately from the payment of available funds....

I recommend that we work on the language in the SF-30 release clause to make it clear that your firm is reserving its rights with regard to the dispute over its entitlement to interest. That way, CII is free to proceed with its argument for these additional amounts, but we can get the funds obligated for the amounts not in dispute.

I do not want to jeopardize your client's receipt of payment of the amounts we have on hand, since these funds are from an FY 2004 appropriation which will close at the end of this fiscal year.

(App. opp'n, ex. F at 1)

11. Following their 3 September 2009 exchange of messages, CII and government counsel collaborated in drafting a clause for Contract 0007 and Task Order 0008 modifications that would allow payment of the unpaid settlement agreement amounts in accordance with the government's 12 January 2009 calculation, but reserving CII's right to claim additional interest (app. opp'n., ex. F at 1, ex. H at 1, 2).

12. On 16 September 2009, government counsel sent an e-mail to CII counsel indicating substantial agreement on language reserving CII's right to claim additional interest in a payment modification for Task Order 0008. This message concluded with the statement "Can we assume the same kind of language in the 56609 [Contract 0007] modification suits everyone? If so, I will make sure it is drafted and ready to be executed as soon as we can obligate the funds." (App. opp'n, ex. H at 1)

13. On 17 September 2009, the government sent CII a proposed modification increasing the Task Order 0008 price by \$1,176,485.54 (the total amount due in the government's January 2009 calculation). The message transmitting the modification stated "The lawyers have talked and agreed upon some language. Please sign this modification and return to me immediately." The modification included a "CLOSING STATEMENT" that read in relevant part:

It is further understood and agreed that this modification is in full and final settlement of all outstanding claims and demands of any nature whatsoever in regards to the items

listed above, provided however, that nothing in this modification releases the Government or otherwise waives the contractor's right to its claim for additional interest amounts it believes it is owed beyond the Prompt Payment Act interest amounts included in this modification.

(App. opp'n, ex. I at 1-3)

14. The CII corporate contracts manager, Mr. Frank McConnell, signed the 17 September 2009 payment modification for Task Order 0008 with the reservation of rights clause (app. opp'n, ex. J). The record on the motions does not contain a copy of this same modification signed by the contracting officer. However, the government has stipulated that the modification signed by Mr. McConnell "was later signed by the authorized Government Contracting Officer and was the basis for the payment of \$1,176,485.54 to Appellant for the Task Order 0008 claim" (56607, stip. received 2 July 2010).

15. CII did not receive any proposed contract modification for signature to implement the settlement of the Contract 0007 claim. However, on 29 September 2009, Mr. McConnell was informed by CII's finance department that the government had made an electronic funds transfer in the amount of \$6,781,659.19 directly to CII's account at the designated financial institution. No government documentation accompanied the payment. (56607, McConnell decl. at 4)

16. On 16 October 2009, government counsel sent CII counsel a document stating "The Government's position on the issue of CII's claim for additional interest amounts." The government's position on both Task Order 0008 and Contract 0007 stated in this document was that the government was liable to CII only for interest under the CDA from 26 February 2008 the date certified claims were submitted to the contracting officer. The position document did not allege that CII had waived all further claims to interest by accepting the final payments made in September 2009. (App. opp'n, ex. K at 1-2)

17. CII counsel requested government counsel to provide clarifications of certain points in the 16 October 2009 position document and calculation of the interest due under that analysis. On 19 October 2009, government counsel told CII counsel that he had prepared the calculations and was "running them through our PM folks before I provide to you." (App. opp'n, ex. K at 3-4)

18. On 4 December 2009, CII requested the "Final Payment Backup" for Contract 0007. The government did not respond to this request until on or about 16 March 2010. (56607, McConnell decl., ex. 1 at 1-2)

19. On 14 January 2010, government counsel informed CII counsel that the government's position on both the Task Order 0008 and Contract 0007 final payments was that CII had waived its rights to additional interest (app. opp'n at 6). The Government's motions to dismiss on this ground were submitted on 19 February 2010.

20. On or about 16 March 2010, the government provided to CII for the first time its back-up documentation for the 29 September 2009 final payment on Contract 0007. This documentation was a unilateral modification signed by a contracting officer on 30 December 2009, three months after the payment was made. The unilateral modification included a closing statement with an unconditional general release of claims by the contractor. (56607, McDonnell decl., ex. 1 at 1-2, 4-5)

DECISION

The government moves to dismiss the appeals with prejudice on the grounds that it has paid CII's claim and that CII has waived any right to further interest. The asserted grounds are non-jurisdictional affirmative defenses for which the motion to dismiss is in substance a motion for summary judgment. We grant such motions only if there are no genuine issues of material fact and the moving party is entitled to judgment as a matter of law. *Woodlawn Summit Group, Inc.*, ASBCA No. 54554, 05-2 BCA ¶ 33,113 at 164,102.

The government bases its motions on CII's 14 January 2009 acceptance of the government's 12 January 2009 calculations that included interest only through October 2008 and its alleged unconditional acceptance of those amounts in final payment of its claims in September 2009. With respect to the CII's acceptance in January 2009 of the government proposed amounts with interest running only to 31 October 2008, we find nothing in that acceptance that can be reasonably construed as agreeing to another eight months delay in payment without interest. Moreover, the record on the motions is clear that the parties reopened negotiations on 3 September 2009 and had agreed on a clause reserving CII's right to claim additional interest. That reservation was included in the bilateral modification for Task Order 0008, and the government acknowledged that the same reservation would be included in the modification for final payment on Contract 0007. (SOF ¶¶ 12-17)

On this record there is no genuine issue of material fact that CII expressly reserved its right to claim additional interest in the bilateral modification for Task Order 0008. There is also no genuine issue of material fact that while there was no bilateral modification for the 29 September 2009 payment on Contract 0007, the government's conduct in October 2009 after that payment was made was clearly consistent with the same reservation of rights by CII being applicable to the Contract 0007 payment. (SOF ¶¶ 16-17) *See Community Heating & Plumbing Co. v. Kelso*, 987 F.2d 1575, 1581 (Fed. Cir. 1993). The contracting officer's attempt three months after the payment was

made and accepted, to impose on that payment by unilateral modification an unconditional release that had not been agreed to by CII, is of no legal effect.

The government motions to dismiss are denied.

Dated: 5 August 2010

MONROE E. FREEMAN, JR.
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. 56607, 56609, Appeals of Contrack International, Inc., rendered in conformance with the Board's Charter.

Dated:

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