

ARMED SERVICES BOARD OF CONTRACT APPEALS

Appeal of -- )  
 )  
Thorington Electrical and Construction )  
Company ) ASBCA No. 56895  
 )  
Under Contract No. FA3300-06-C-0015 )

APPEARANCES FOR THE APPELLANT: Michael Guy Holton, Esq.  
Michael D. Boyle, Esq.  
Fuller, Taylor & Holton P.C.  
Montgomery, AL

APPEARANCES FOR THE GOVERNMENT: Richard L. Hanson, Esq.  
Air Force Chief Trial Attorney  
Lawrence M. Anderson, Esq.  
Trial Attorney

OPINION BY ADMINISTRATIVE JUDGE STEMPLER

This matter comes before us on the government’s Motion to Dismiss, or in the Alternative, for Summary Judgment. Appellant opposes the motion. Our jurisdiction flows from the Disputes clause of the contract, not the Contract Disputes Act.<sup>1</sup>

STATEMENT OF FACTS FOR PURPOSES OF THE MOTION

1. On 28 September 2006, the Air Force awarded Contract No. FA3300-06-C-0015 to Thorington Electrical and Construction Company (TECC) for the firm, fixed price of \$3,433,290. The contract was for a 10-lane bowling center at Maxwell, AFB. (R4, tab 1) The contract was awarded by the Air Force on behalf of the Air Force Services Agency, a non-enumerated, non-appropriated fund instrumentality (NAFI) (R4, tab 1 at 21 of 40, tab 9) (*see* 41 U.S.C. § 602(a)).

2. The contract contains a Disputes clause that grants this Board jurisdiction over appeals from contracting officers’ final decisions. The clause provides that appeals must be taken within 30 days of receipt of the final decision. (R4, tab 1 at 21 of 40) The contract also contains the FAR 52.243-1, CHANGES – FIXED-PRICE (AUG 1987) clause (R4, tab 1 at 27 of 40).

---

<sup>1</sup> We have previously denied appellant’s surety’s Motion to Intervene. *Thorington Electrical and Construction Company*, ASBCA No. 56895 *et al.*, 10-2 BCA ¶ 34,511.

3. The contract does not contain an Economic Price Adjustment clause.

4. On 14 February 2008, TECC submitted an invoice to the government for \$96,320.15, denominated a “final payment invoice.” The invoice was paid in full on 22 February 2008. Attached to the invoice was a release of claims signed by appellant’s owner on 14 February 2008. The release stated in part:

Pursuant to the terms of the above numbered contract [the instant contract], but subject to any claims as may be specifically excepted below, the Government of the United States, its Officers, Agents, and Employees are hereby released and discharged from all liabilities, demands, obligations, and claims arising under or by virtue of the said contract.

Excepted Claims: NONE

(R4, tab 13)

5. On 5 February 2009, TECC submitted a \$114,112.66 certified claim to the contracting officer citing the Disputes and FAR 52.216-4, ECONOMIC PRICE ADJUSTMENT – LABOR AND MATERIAL clauses. The claim was for:

The items that TECC is making a claim are the Kitchen Equipment & Furniture, Wall Mural, Silestone for counter tops and window seals, and the Quilted Steel on the walls of the Kitchen and Snack Bar area. The material cost for these items increased since submitting the original cost.

(R4, tab 15)

6. On 25 March 2009, the contracting officer issued a final decision denying the claim on the basis of the release and also that the contract did not contain an Economic Price Adjustment clause. The final decision gave appellant ninety days from receipt of the decision to appeal to this Board.<sup>2</sup> (R4, tab 16)

7. On 31 July 2009, TECC filed an appeal with this Board.<sup>3</sup>

---

<sup>2</sup> The final decision did not reach appellant until transmitted by e-mail on 8 May 2009 (R4, tab 17).

<sup>3</sup> The government has not challenged our jurisdiction based on timeliness of the notice of appeal. *See Maney Aircraft Parts, Inc. v. United States*, 479 F.2d 1350 (Ct. Cl. 1973); *Clyde P. Thomas*, ASBCA No. 28296, 86-3 BCA ¶ 19,246 at 97,330 n.1.

8. On 12 November 2009, the government filed the instant motion, seeking dismissal for failure to state a claim or in the alternative, summary judgment based on release or the lack of a clause or legal basis for recovery. We treat the motion as one for summary judgment.

9. On 28 December 2009, appellant responded to the government's motion, stating that it was entitled to recover on the theory of unjust enrichment stating:

The Government acquiesced to paying Appellant in previous instances under the same contract and Appellant avers that such acquiescence by the Government provides a basis for Appellant to reasonably rely that all increases would be paid.

(App. resp. at 2-3)

10. No evidence was submitted by appellant to support its argument. The totality of our knowledge concerning the "instances" referred to in the quote above, is the quote itself.

### DECISION

Summary judgment is properly granted 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 may affect the outcome of the decision. *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 248-49 (1986). The moving party bears the burden of establishing the absence of any genuine issue of material fact and all significant doubt over factual issues must be resolved in favor of the party opposing summary judgment. *Mingus*, 812 F.2d at 1390-91.

To counter a motion for summary judgment, more than mere assertions are necessary. *Pure Gold, Inc. v. Syntex (U.S.A.), Inc.*, 739 F.2d 624, 626-77 (Fed. Cir. 1984). Conclusory assertions do not raise a genuine issue of fact. The non-movant must submit, by affidavit or otherwise, specific evidence that could be offered at trial. Failing to do so may result in the motion being granted. *Id.*

There are no disputed material facts. The release is clear and operates to release the government from the instant claim.

CONCLUSION

The government is entitled to judgment as a matter of law. The government's motion for summary judgment is granted. The appeal is denied.

Dated: 22 September 2010

---

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

I concur

I concur

---

EUNICE W. THOMAS  
Vice Chairman  
Administrative Judge  
Armed Services Board  
of Contract Appeals

---

OWEN C. WILSON  
Administrative Judge  
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. 56895, Appeal of Thorington Electrical and Construction Company, rendered in conformance with the Board's Charter.

Dated:

---

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