ARMED SERVICES BOARD OF CONTRACT APPEALS

Appeal of --	)	
	)	
TMS Envirocon, Inc.	)	ASBCA No. 57286
	)	
Under Contract No. F44600-01-C-0029	)	

APPEARANCE FOR THE APPELLANT: Neil S. Lowenstein, Esq.
Vandeventer Black LLP
Norfolk, VA

APPEARANCES FOR THE GOVERNMENT: Alan R. Caramella, Esq.
Acting Air Force Chief Trial Attorney
Maj Sean Elameto, USAF
Jeffrey M. Lowry, Esq.
Trial Attorneys

OPINION BY ADMINISTRATIVE JUDGE PARK-CONROY
ON GOVERNMENT'S MOTION FOR SUMMARY JUDGMENT

At issue is the government's motion for summary judgment asserting that the above-captioned appeal is barred because appellant, TMS Envirocon, Inc. (TMS), executed a final release. TMS filed an opposition. For the reasons that follow, we deny the government's motion.

STATEMENT OF FACTS FOR PURPOSES OF THE MOTION

Contract No. F44600-01-C-0029 was awarded to TMS in the amount of $3,229,283 on 28 September 2001 for the replacement of all drinking water piping at specified locations on Langley Air Force Base (AFB), Virginia (R4, tab 1). TMS subcontracted the work to International Technology Corporation (ITC), but shortly thereafter, ITC filed for bankruptcy and the subcontract was assigned to Shaw Environmental, Inc. (Shaw) (decl. of Mehul S. Shah, TMS president, ¶¶ 1-2, 5-8).

There were numerous changes, differing site conditions, a work stoppage, delays and disruptions throughout contract performance (R4, tab 243 at 2474, 2476). A total of 18 modifications were issued to the contract, increasing the price to $4,262,938 and extending the completion date to 8 September 2004 (R4, tabs 2-18).

On 9 September 2004, TMS submitted to the contracting officer a request for equitable adjustment (REA) on behalf of Shaw seeking $2,403,325, to which it had added its markups, bringing the total amount requested to $3,197,210 (app. supp. R4, tab 561).

The REA was denied on 17 February 2005 for lack of the REA certification required by DFARS 252.243-7002(b) (app. supp. R4, tab 564). After TMS provided the DFARS certification on 14 March 2005, the REA was denied in its entirety on 15 November 2005 by a letter that stated it was a contracting officer's final decision (R4, tab 249 at 62).

On 22 November 2005, TMS submitted Invoice No. 2025-51 in the amount of $4,262.63 for the remaining contract balance, accompanied by a standard form payment affidavit signed by Ms. Anne S. Ray, controller, and notarized by Mr. Terry Penn (Ray decl. ¶¶ 4, 7). The invoice did not contain a release. (R4, tab 249 at 1075) Ms. Ray states that she signed a Contractor Release Form at that time, but there is no copy of any such release in the record (Ray decl. ¶ 7). Ms. Ray further states that, at the time, she was aware that TMS had submitted the Shaw REA to the contracting officer, that TMS intended to file claims on its own behalf and that she had neither the intent nor the authority to release any TMS claims (Ray decl. ¶¶ 5, 6, 10).

According to Ms. Ray, nearly a year later, in October 2006, she was contacted by Mr. Jim Doswell from Langley AFB who advised her that there was a ten cent error on Invoice No. 2025-51 and directed her to submit a new invoice and a Contractor Release Form (Ray decl. ¶¶ 13-16). Ms. Ray complied with this direction and on 6 October 2006, she signed a pre-printed standard "CONTRACTOR'S RELEASE FORM" for final payment of $4,262.73 as the TMS controller. The release form stated:

> [T]he undersigned Contractor does, and by the receipt of said sum shall for itself, its successors and assigns, remise, release and forever discharge the Government, its officers, agents, and employees of and from all liabilities, obligations and claims whatsoever in law and in equity under or arising out of said contract.

Mr. Penn, identified as the TMS business development manager, completed the "CERTIFICATE" required for corporations, certifying with his signature and the corporate seal that Ms. Ray was the corporate controller and that the release "was duly signed for and in behalf of said corporation by authority of its governing body and is within the scope of its corporate powers." (R4, tab 244)

Ms. Ray states that, in executing the "CONTRACTOR'S RELEASE FORM," it was her "intent to only revise the previously submitted invoice...and to only release TMS claims to the remaining $4,262.73 that was not disputed as due TMS in return for payment of that amount to TMS" (Ray decl. ¶ 18). She further states that she considered this invoice, like the November 2005 invoice, to be a routine request for payment (*id.* ¶ 20). At the time, she was aware that TMS was planning to submit claims for additional costs incurred on the contract and to file an action in the U.S. Court of Federal Claims.

She avers that she "had no intent and no authority to release TMS claims under the REA or any other future claims." (*Id.* ¶¶ 21, 22)

Mr. Shah similarly states that Ms. Ray did not have authority to waive or release the TMS claims (Shah decl. ¶¶ 39 and 39(g)). He also states that Mr. Penn was "not an officer or director of TMS, nor was he...authorized to make any representations about TMS's governing body or scopes [sic] of its corporate powers." According to Mr. Shah, Mr. Penn's position was essentially a marketing position. (*Id.* ¶ 40)

On 12 November 2006, TMS filed a protective law suit in the U.S. Court of Federal Claims based on the contracting officer's 15 November 2005 denial of the Shaw REA (app. supp. R4, tab 574).

Final contract payment was made on 10 January 2007 (app. supp. R4, tab 569). Thereafter, by a letter dated 2 August 2007, TMS advised the contracting officer that it was retracting the release, asserting that Ms. Ray "did not intend to release the pending adjustments or potential related claims arising under the contract," that she was not authorized to do so, and that the government had to be aware that the release had been inadvertently submitted by Ms. Ray because of the pending REA and protective law suit. TMS enclosed its check for $500 as a "REFUND OF MONIES PAID ON 2025." (R4, tab 245) On 6 August 2007, the contracting officer returned the check, advising TMS that it could not retract its final release of claims on the contract and that the government had rendered final payment more than seven months earlier (R4, tab 246).

A second protective lawsuit was filed in the U.S. Court of Federal Claims in August 2008 challenging the government's refusal to retract the contractor's release form and to rescind the final payment (app. supp. R4, tab 585; Shah decl. ¶ 38). Mr. Shah asserts that the government was aware that TMS intended to pursue adjustments on behalf of both Shaw and itself at the time it made final payment (*id.* ¶ 39(k)). The lawsuit was dismissed without prejudice on 16 July 2009 (app. supp. R4, tab 586).

On 8 March 2010, TMS submitted a revised REA to the contracting officer seeking $2,439,512 (R4, tab 249 at 1). The REA was converted into a Contract Disputes Act (CDA) claim by a letter dated 30 March 2010 (*id.* at 1073-74). The contracting officer denied the claim on 20 April 2010 (compl. ¶ 8), and this appeal was filed with the Board on 16 July 2010. In a decision issued 18 June 2012, except as to eight claim items valued at $23,987 that accrued between 19 April 2004 and 17 September 2004, we granted the government's motion to dismiss for lack of jurisdiction because the underlying claims accrued more than six years before TMS converted the 2010 REA into a CDA claim.

DISCUSSION

The government contends that it is entitled to summary judgment because TMS unambiguously released all claims under the contract. In order to prevail upon its motion, the government must demonstrate that there is no genuine issue of material fact relating to the validity of the release and that it is entitled to judgment as a matter of law. *Mingus Constructors, Inc. v. United States*, 812 F.2d 1387, 1390 (Fed. Cir. 1987). To survive the motion, TMS must come forward with specific facts showing there is a genuine issue for trial. *Matsushita Elec. Indus. Co. v. Zenith Radio Corp.*, 475 U.S. 547, 586-87 (1986). The substantive law identifies which facts are material and we are to draw all inferences in favor of TMS, the nonmoving party. *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 249-50, 255 (1986).

The government asserts that the language of the release here is unambiguous and that we should interpret it according to the plain meaning of its terms, without looking to extrinsic evidence. *Bell BCI Co. v. United States*, 570 F.3d 1337, 1341 (Fed. Cir. 2009).

TMS does not identify any ambiguity in the terms or provisions of the release; rather, it responds that there are circumstances which preclude the release from barring its claim. It first asserts that there is evidence that the contracting officer knew, or is properly chargeable with knowledge, that at the time of final payment it was asserting a right to additional compensation. It cites *JT Constr. Co.*, ASBCA No. 54352, 06-1 BCA ¶ 33,182. In that case, the contracting officer's knowledge of claims and the mutuality of intent regarding the final payment release were at issue. We denied the government's motion for partial summary judgment finding there were triable issues regarding the contracting officer's notice of certain of the contractor's claims and the mutuality of the final payment release executed by the contractor at the government's direction. *Id.* at 164,464-65.

In this case, TMS has come forward with sufficient evidence from which we draw inferences in its favor that establish issues of material fact relating to whether the contracting officer knew, or should have known, that TMS was asserting entitlement to additional compensation. The record shows that TMS submitted an REA to the contracting officer on 9 September 2004, and that it was denied twice. The first denial was for lack of a DFARS 252.243-7002(b) REA certification on 17 February 2005 and the second denied the REA in its entirety on 15 November 2005. The record does not establish conclusively whether Ms. Ray signed a Contractor Release Form in October 2005 when the REA was still before the contracting officer. The only Contractor Release Form in the record is dated 6 October 2006, which Ms. Ray states she signed after being contacted by the government and at the government's direction. On 12 November 2006, TMS filed suit in the U.S. Court of Federal Claims challenging the contracting officer's 15 November 2005 decision. We are satisfied that, having denied the REA twice, the contracting officer was aware that TMS was seeking additional compensation and should

have been aware that a law suit had been filed at the Court of Federal Claims when final payment was made two months later on 10 January 2007. *See J. G. Watts Construction Co. v. United States*, 161 Ct. Cl. 801, 807 (1963) (release will not be held to bar the prosecution of a claim, where it is obvious that the inclusion of a claim in a release is attributable to mistake or oversight).

Moreover, TMS came forward with uncontroverted evidence that Ms. Ray did not have authority to release the claims and that Mr. Penn was not authorized to make any representations on behalf of the company. *See Peter Bauwens Bauunternehmung GmbH & Co. KG*, ASBCA No. 44679, 98-1 BCA ¶ 29,551 at 146,497 (government did not provide evidence that contractor representative had apparent authority to resolve its claims).

CONCLUSION

For the reasons stated, the Government's motion for summary judgment is denied as to the eight remaining items.

Dated: 19 June 2012

Carol N Park-Conroy

CAROL N. PARK-CONROY
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

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. 57286, Appeal of TMS Envirocon, Inc., rendered in conformance with the Board's Charter.

Dated:

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