

ARMED SERVICES BOARD OF CONTRACT APPEALS

Appeal of -- )  
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Tri-County Contractors, Inc. ) ASBCA No. 58167  
 )  
Under Contract No. N69450-10-C-3597 )

APPEARANCE FOR THE APPELLANT: Precious T. Martin, Sr., Esq.  
Precious Martin, Sr. & Associates, PLLC  
Jackson, MS

APPEARANCES FOR THE GOVERNMENT: Ronald J. Borro, Esq.  
Navy Chief Trial Attorney  
Pamela J. Nestell, Esq.  
Senior Trial Attorney

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

On 6 June 2012 Tri-County Contractors, Inc. (Tri-County) appealed from the contracting officer's (CO) 30 May 2012 letter denying all aspects of Tri-County's \$242,830 claim under the captioned contract. The Board's decision of 13 November 2012, *Tri-County Contractors, Inc.*, ASBCA No. 58167, 12-2 BCA ¶ 35,184, denied the government's motion to dismiss for lack of jurisdiction. The Board has jurisdiction of the appeal under the Contract Disputes Act of 1978 (CDA), 41 U.S.C. §§ 7101-7109. On 7 February 2013 respondent moved for summary judgment based on release and final payment. Tri-County responded to the motion on 12 March 2013. Respondent replied thereto on 29 March 2013.

STATEMENT OF FACTS (SOF) FOR PURPOSES OF THE MOTION

1. On 20 July 2010 NAVFAC (Naval Facilities Engineering Command), Southeast, Naval Construction Battalion Center (NCBC), Gulfport, Mississippi, and Tri-County entered into Contract No. N69450-10-C-3597 (the contract) to replace NCBC Building 400's oil and lubricating system for the firm fixed-price of \$618,304.00 (R4, tab 1 at 1-2, 4, 19<sup>1</sup>).

2. The contract's Standard Form 1442 SOLICITATION, OFFER, AND AWARD, Block 29, designated "the Government solicitation" (No. N69450-10-R-5093) as part of

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<sup>1</sup> All Rule 4 page number citations are to Bates numbers.

the contract.<sup>2</sup> That solicitation incorporated by reference the FAR 52.232-5, PAYMENTS UNDER FIXED-PRICE CONSTRUCTION CONTRACTS (SEP 2002) clause, which provided in pertinent part:

(h) *Final payment.* The Government shall pay the amount due the Contractor under this contract after—

- (1) Completion and acceptance of all work;
- (2) Presentation of a properly executed voucher; and
- (3) Presentation of release of all claims against the Government arising by virtue of this contract, other than claims, in stated amounts, that the Contractor has specifically excepted from the operation of the release.

The contract also incorporated by reference the DFARS 252.243-7002, REQUESTS FOR EQUITABLE ADJUSTMENT (MAR 1998) clause (R4, tab 1 at 20); it did not incorporate the FAR 52.243-4, CHANGES (JUN 2007) clause required by FAR 43.205(d)(2) for inclusion in construction contracts exceeding the \$100,000 simplified acquisition threshold.

3. On or about 25 February 2011 Tri-County sent a letter to NCBC titled “Equitable Adjustment: Request for Contracting Officer’s Final Decision” seeking \$156,150.80, including direct material cost and state taxes, and 49 days delay with respect to underground double wall piping, which included a DFARS 252.243-7002 certification that stated: “I certify that the request is made in good faith, and that the supporting data are accurate and complete to the best of my knowledge and belief,” but included no CDA certification (R4, tab 6 at 207-11).

4. The 27 June 2011 letter of Renee M. Comfort, NAVFAC Southeast Chief of Contracts, acknowledged receipt on 22 April 2011 of Tri-County’s \$156,150.80 “claim” (app. supp. R4, tab 1).

5. Ms. Comfort’s 24 October 2011 letter, Ser. ACQ/008, to NCBC forwarded Tri-County’s claim received 22 April 2011 about ambiguous double walled piping and stated that on her review, “the contractor’s position is found to have merit” (R4, tab 8). Her undated letter, Ser. ACQ/009, on or about 24 October 2011, advised Tri-County “that your claim has some merit” and that the claim was “remanded to PWD [Public Works Department] Gulfport to facilitate negotiations regarding the appropriate price adjustment associated with the specification ambiguity” (R4, tab 7).

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<sup>2</sup> Respondent sent Solicitation No. N69450-10-R-5093 to the Board on 17 April 2013.

6. Tri-County's 8 November 2011 email to Mr. Bennie Boren, PWD Gulfport, submitted a \$242,830.00 "cost for negotiation" for its underground piping claim, revised to include not only direct material costs, but also labor, equipment and overhead costs (R4, tab 9 at 233-34).

7. Respondent's 14 November 2011 email to Tri-County stated that the government considered the request for \$242,830 to be a new claim, but required the proper certification language in accordance with FAR 33.207(c) and required further supporting information (R4, tab 10).

8. On or about 12 December 2011 Tri-County's president John Hunter submitted to PWD Gulfport a "FINAL" invoice for the \$9,676.85 contract balance (R4, tab 11 at 236-37).

9. Mr. Boren's 15 December 2011 email to Tri-County stated:

I have received your final invoice, however the Final Release was not attached.... If you complete the attached and return we can process the invoice. If, however, you elect not to sign the attached, please advise and we will reject the invoice back to you. You can then resubmit leaving \$100.00 on the contract until you are ready to submit a final release.

(R4, tab 12 at 238) On the same day Tri-County forwarded Mr. Hunter's 15 December 2011 release stating:

Contractor's Release  
NAVFAC 4330/7 (6-72)  
S/N 0105-LF-0001-9100

CONTRACTOR'S RELEASE UNDER CONTRACT \_\_N69450-10-  
C-3597\_\_

KNOW ALL MEN BY THESE PRESENTS: In consideration of the premise and the sum of \_\_\$677,021\_\_\_\_ Dollars & \_15/100 (\$\_\_677,021\_.15) lawful money of the United States of America (hereinafter called the "Government") of \_\_\$667,344\_\_ Dollars & \_30\_/100 (\$\_667,344\_.30) of which has already been paid and of \_\_\$9,676\_\_ Dollars & \_85\_/100 (\$\_9,676\_.85) of which is to be paid by the Government under the above-mentioned contract, the 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.

IN WITNESS WHEREOF, this release has been executed this  
15 day of Dec., 2011

WITNESSES:

<u>Katum Evans</u> _____	_____ [signature]..... (Contractor) By: John Hunter Title: President
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CERTIFICATE

I, John Hunter, certify that I am the President of the corporation named as Contractor in the foregoing release; that John Hunter who signed said release on behalf of the Contractor was then President of said corporation; that said 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.

(Corporate Seal)

(R4, tab 13 at 240, 242) Tri-County excepted no claim against the government from the foregoing release.

10. On 17 January 2012, the government paid the \$9,676.85 balance to Tri-County (R4, tab 14).

11. Ms. Comfort's 15 March 2012 letter to Tri-County stated that she had reviewed its \$242,830 claim. She stated that the FAR 52.232-5(h)(3), PAYMENTS UNDER FIXED-PRICE CONSTRUCTION CONTRACTS clause and the FAR 52.243-4(f), CHANGES (JUN 2007), clause included<sup>3</sup> in the contract, do not allow payment of claims not specifically exempted from the operation of the contractor's final release; Tri-County had reserved no claim in, and respondent had made final payment to Tri-County based on, such release; and therefore "[a]s a result of this, no further adjustments may be made to this contract." (R4, tab 14 at 244-45)

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<sup>3</sup> See SOF ¶ 2.

12. The 23 May 2012 letter of Precious T. Martin, Sr., Esq., to NCBC's Mr. Boren stated:

Pursuant to §41 U.S.C. 605 (a) [sic] of the United States Code, this letter will serve as Tri-County Contractor's, Inc.'s (Tri-County) claim for payment of the NAVFAC Equitable Adjustment by the Navy.

In late 2011, Tri-County submitted the documents detailing a claim for an Equitable Adjustment in the amount of \$242,830.00. I am attaching the detailed Equitable Adjustment to this letter.

Please forward your written response to me.

The letter included a proper CDA certification signed by Mr. Hunter on 25 May 2012. (R4, tab 15 at 246-47)

13. The 30 May 2012 letter of Mr. Boren, over the title "Contracting Officer," to Mr. Martin attached Ms. Comfort's foregoing 15 March 2012 letter and repeated that "no further adjustments may be made to this contract" (R4, tab 16 at 249-51).

14. Mr. Hunter's 7 March 2013 affidavit stated in pertinent part:

2. My company, Tri-County...has been in business since 1997. We have been rewarded [sic] U.S. Government contracts for the past ten (10) years.

3. In that time, I have been accustomed to signing releases to obtain the small final payments due under the contract. When, in December 2011, I signed the release at the Government's request to obtain the final payment of \$9,676.85 on a contract for \$677,021.15, I in no way intended to release the two previously-made claims for adjustment, one for \$156,150.80 and the other for \$242,830.00 I had already presented to the contracting officer.

(App. resp., ex. C at 1-2)

## DECISION

A tribunal shall grant summary judgment if the movant shows that there is no genuine issue as to any material fact and the movant is entitled to judgment as a matter of law. FED. R. CIV. P. 56(a); *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 247 (1986). In considering a motion for summary judgment, the evidence of the non-moving party is to be believed, and all justifiable inferences are to be drawn in his favor. *Anderson*, 398 U.S. at 255 (citing *Adickes v. S. H. Kress & Co.*, 398 U.S. 144, 158-59 (1970)). The parties do not genuinely dispute any of the material facts set forth in our Statement of Facts, ¶¶ 1-14 (gov't mot. at 2-5; app. resp. at 1-2).

Movant bases its affirmative defenses of final release and final payment on the FAR 52.232-5, PAYMENTS UNDER FIXED-PRICE CONSTRUCTION CONTRACTS (SEP 2002) clause (gov't mot. at 2, 4). A final release followed by final payment to a contractor generally bars recovery of the contractor's claims under the contract except for those excepted on the release. *See Mingus Constructors, Inc. v. United States*, 812 F.2d 1387, 1394 (Fed. Cir. 1987). However, as recognized in *J.G. Watts Construction Co. v. United States*, 161 Ct. Cl. 801, 806 (1963): "There are...special and limited situations in which a claim may be prosecuted despite the execution of a general release. For instance, where it is shown that, by reason of mutual mistake, neither party intended that the release cover a certain claim, the court will reform the release."

The foregoing exception for reformation to correct a mutual mistake in contract formation has been extended "to include cases where the Government knew or should have known of a mistake in a bid costly to the bidder." *Burnett Electronics Lab., Inc. v. United States*, 479 F.2d 1329, 1333 (Ct. Cl. 1973) (holding there was no mutual mistake and CO did not learn of any pre-award mistake by the contractor). This rule for mistakes in contract formation also has been applied to alleged mistakes in final releases. *E.g.*, *TMS Envirocon, Inc.*, ASBCA No. 57285, 12-2 BCA ¶ 35,085 at 172,300 (citing *J.G. Watts*, 161 Ct. Cl. at 807) (TMS came 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 in September 2004, before a TMS representative who did not have authority to release claims signed a release in October 2006).

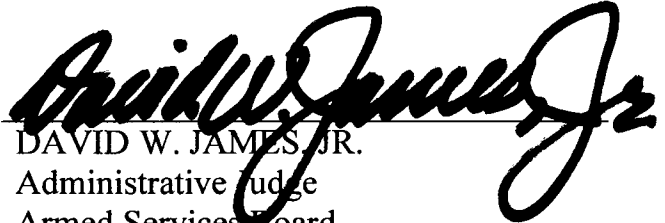
The unopposed affidavit of Mr. Hunter asserts that he was "accustomed to signing releases to obtain the small final payments due under the contract. When, in December 2011, I signed the release at the Government's request to obtain the final payment of \$9,676.85 on a contract for \$677,021.15, I in no way intended to release the two previously-made claims for adjustment, one for \$156,150.80 and the other for \$242,830.00 I had already presented to the [CO]." (SOF ¶ 14) Tri-County contends that since the CO knew of Tri-County's \$156,150 and \$242,830 claims, the CO knew that it had mistakenly executed the release, and therefore such release does not bar its claim.

The CO knew of Tri-County's February and November 2011 requests for equitable adjustment. She told Tri-County that she found the February claim to have merit and "remanded" the claim to PWD to negotiate a settlement. (SOF ¶¶ 4-7) In these circumstances, Tri-County has come forward with sufficient evidence, from which we must draw inferences in its favor, that establish issues of material fact relating to whether the CO knew, or should have known, that Tri-County's Mr. Hunter made a mistake in signing that release. We believe that an evidentiary hearing is needed to resolve these issues of material fact.<sup>4</sup>

CONCLUSION

We deny respondent's motion for summary judgment on the ground of release.

Dated: 6 May 2013



DAVID W. JAMES, JR.  
Administrative Judge  
Armed Services Board  
of Contract Appeals

I concur



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

I concur



PETER D. TING  
Administrative Judge  
Acting Vice Chairman  
Armed Services Board  
of Contract Appeals

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<sup>4</sup> Since the contract did not incorporate the FAR 52.243-4, CHANGES (JUN 2007) clause (SOF ¶ 2), the parties disagree whether such clause must be included in the contract by virtue of the Christian Doctrine. *G. L. Christian and Associates v. United States*, 312 F.2d 418 (Ct. Cl.), *cert. denied*, 375 U.S. 954 (1963). This issue has not been fully briefed. We therefore express no opinion at this juncture as to whether the Changes clause is properly considered as being in the contract, and if not, the effect such exclusion would have on the merits of this appeal.

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. 58167, Appeal of Tri-County Contractors, Inc., rendered in conformance with the Board's Charter.

Dated:

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JEFFREY D. GARDIN  
Recorder, Armed Services  
Board of Contract Appeals