



UNITED STATES
CIVILIAN BOARD OF CONTRACT APPEALS

RESPONDENT'S MOTION FOR SUMMARY RELIEF DENIED;
APPELLANT'S CROSS-MOTION FOR SUMMARY RELIEF GRANTED IN PART:
September 10, 2014

CBCA 2505

AU' AUTHUM KI, INC.,

Appellant,

v.

DEPARTMENT OF ENERGY,

Respondent.

Lawrence J. Sklute of Sklute & Associates, Potomac, MD, counsel for Appellant.

Michael W. Ling and Anh Nguyen, Office of the General Counsel, National Nuclear Security Administration, Department of Energy, Albuquerque, NM, counsel for Respondent.

Before Board Judges **SOMERS**, **HYATT**, and **GOODMAN**.

GOODMAN, Board Judge.

Au' Authum Ki, Inc. (AAK or appellant) has filed an appeal from the final decision of a Department of Energy (DOE or respondent) contracting officer denying a claim for differing site conditions. DOE has filed a motion for summary relief in part on the issue of accord and satisfaction and release, and a motion to dismiss in part for lack of jurisdiction. AAK has filed a cross-motion for summary relief and replied to DOE's motions. The parties' motions and responses only address these specific issues, and do not address the appeal on its merits.

Findings

The Contract, the Claim, and the Contracting Officer's Decision

DOE and AAK entered into a contract for construction of a new domestic water and fire protection system for the Tonopah Test Range in Nevada (the contract). After AAK commenced performance, it became apparent to the parties that the contract drawings did not identify all underground utilities.¹ AAK and DOE negotiated and entered into five bilateral modifications and DOE issued one unilateral modification (the modifications), which are the subject of their motions for summary relief. The modifications were A001 (effective May 17, 2005), A002 (effective August 2, 2005), A003 (effective August 22, 2005), A005 (effective September 22, 2005), A006 (effective November 8, 2005), and A008 (effective August 21, 2009). Appeal File, Exhibits 84, 114, 121, 132, 163, 193. For each modification, AAK submitted proposals to DOE to perform potholing services, an excavation technique which was used to expose and visually identify the utilities not shown on the contract drawings. AAK proposals included the use of a supersucker vacuum truck to perform the potholing services. *Id.*

Each of the six modifications stated: “The purpose of this modification is to compensate the contractor for design deficiencies and differing site conditions.” Modifications A001, A002, and A003 contain the following language:

The construction drawings used as as-built drawings do not reflect the existing conditions of the site. As a result, in several instances, AAK has uncovered utilities that were not represented in the drawings, and cannot locate utilities that the drawings say are in certain locations. As a result, AAK has needed to perform additional potholing. Because of the differing site conditions, the Government and the Contractor have agreed that an equitable adjustment to the contract in time [sic] shall be^[2]

¹ AAK alleges that DOE had superior knowledge that the contract drawings were defective. This argument is not addressed in the resolution of this motion.

² Each modification stated a time extension and/or a price adjustment.

Modifications A005, A006, and A008 contained similar language that described the need for additional potholing services. All the modifications incorporated AAK's proposals for performing potholing,³ and all the modifications contained the following provision:

CONTRACTOR'S STATEMENT OF RELEASE: The contractor hereby accepts the adjustments in the contract price and/or contract performance period set forth in this Supplemental Agreement No. A00 ___ to Contract No. DE-AC52-04NA25555, as the complete equitable and final adjustment for the changed requirements/conditions authorized herein and agrees that the Government has no further liability to the contractor whatsoever, directly or indirectly, in regard to any claims, known or unknown, including claims for delay and/or disruption, for any additional adjustments to the contract/task order by reason of these changed requirements/conditions or as a result of this supplemental agreement.

AAK performed work pursuant to the five bilateral modifications, DOE paid AAK the price included in the proposals submitted for the modifications, and AAK completed performance of the contract by the contract completion date of January 27, 2006. However, when modification A008 was sent to AAK in August 2009, AAK did not execute it, apparently because it intended to submit additional claims to the contracting officer. On August 21, 2009, modification A008 was issued unilaterally by DOE, accompanied by a letter of the same date from DOE to AAK's president that read in relevant part:

We have made numerous attempts both by letter and telephonically to resolve any outstanding issues in regards to your company's continual expression of intent to submit a request for equitable adjustment (REA) under subject contract. However, while you initially indicated such an intent by letter dated October 17, 2005, and have continued to make such declaration whenever we have requested you provide status on actually submitting such an REA, we have yet to receive it from you.

We are in the process of closing out your contract and an outstanding balance remains in the amount of \$59,455.03. This amount represents a request for equitable adjustment (REA) submitted by your firm for compensation for differing site conditions and design deficiencies encountered during construction for the period of October 24 through December 7, 2005. It is

³ Some of the modifications also contained AAK's proposals for other work not relevant to the resolution of the pending motions.

further noted that said amount represents in full your REA for this time period and the Government has always been in agreement that such an amount is due and owing to you under the contract. However, when the bilateral modification was provided to you for signature, your company refused and has continued to refuse to sign the modification on the assertion that you are in the process of preparing an additional REA. As stated above, while we have made repeated contact with you to resolve this issue, no REA has been forthcoming on your part.

Bilateral Modification A008 in the undisputed amount of \$59,455.03 was originally tendered to you for signature on March 24, 2006. We have made repeated attempts to obtain your signature on this modification so that you would be able to invoice for the outstanding balance due under your contract. As we are in the process of closing out your contract, I am providing you with a unilateral modification signed by me so that you can receive final payment under this contract. You are now directed to submit an invoice in this amount. . . . With this letter, I have also included a Contractor's Release statement for this contract to be signed by you and returned to me.

Appeal File, Exhibit 193 at 6-7.

On January 21, 2011, almost five years after completion of the contract, AAK submitted a certified claim (the claim) prepared on a modified total cost basis in the amount of \$1,578,533 for costs allegedly associated with differing site conditions. Appeal File, Exhibit 197. According to AAK, the costs included in the claim arose from work performed to rectify 531 differing site conditions identified during the potholing services performed pursuant to the modifications. The claim states:

AAK has prepared the instant REA on a total cost basis. This is so because there is no reasonable way to separate the actual added cost associated with each of the individual five-hundred and thirty-one (531) differing site conditions for individual pricing purposes to reflect the impact of separate occurrences given the sheer number of differing site conditions and the fact that the resulting impact is intertwined and overlapped among the differing site conditions and the original work required by the contract.

Id. at 42.

DOE's contracting officer issued a final decision dated May 2, 2011, Appeal File, Exhibit 199, denying the portion of AAK's claim arising prior to October 21, 2005, alleging

that the Contractor's Statement of Release in the modifications resulted in accord and satisfaction and the release of that portion of AAK's claim. The contracting officer did not issue a final decision with regard to the portion of AAK's claim arising on or after October 21, 2005, stating that AAK had not submitted sufficient cost information to support its claim. The contracting officer identified in the final decision a list of the types of information which must be submitted before the contracting officer could consider whether AAK would be entitled to additional costs arising after October 21, 2005.

The Appeal and the Parties' Motions

AAK timely appealed the contracting officer's decision to this Board. Early in the proceedings, DOE raised the question whether AAK's claim was barred by the Contractor's Statement of Release in the modifications that were executed by AAK. To deal with this potentially dispositive issue, the parties agreed to a period of discovery solely relating to that issue and thereafter filed the motions that are resolved herein.

DOE has filed a motion for summary relief which reiterates the decision of the contracting officer that the Contractor's Statement of Release in the modifications operated as an accord and satisfaction, a release for compensation for costs arising from differing site conditions and a release of future claims. DOE maintains it is therefore not liable for AAK's claim, which was submitted after the work encompassed by the modifications was performed and paid for.

DOE also has moved to dismiss the appeal of the portion of AAK's claim arising on or after October 21, 2005. DOE asserts that the Board lacks subject matter jurisdiction over that portion of the claim, as the contracting officer has not yet issued a final decision with regard to that portion.

AAK has filed a cross-motion for summary relief, asserting that its claim is not barred by the Contractor's Statement of Release in the modifications and also contesting the motion to dismiss the appeal in part.

The parties' motions do not address the merits of AAK's claim, but only whether the claim has been released and whether the Board has the jurisdiction to hear a portion of that claim.

The Parties' Positions

AAK asserts that during a meeting in early May 2005, DOE agreed to compensate AAK on a monthly basis for the costs incurred in performing supersucker vacuum potholing services. These services had become necessary to identify differing site conditions not indicated in the contract. AAK alleges that this meeting was attended by the contracting officer, the contracting officer's representative, and a representative of AAK. Additionally, AAK alleges that there was a verbal agreement between AAK and DOE that any differing site conditions identified during performance of the modifications would be rectified later by additional work outside the scope of the modifications.

AAK says that the Government-requested proposals submitted by AAK for costs to perform the potholing services contained only the costs incurred for performing those services, and not any subsequent costs for laying of pipe and other work necessary to resolve differing site conditions. AAK emphasizes that its proposals served as the basis for the modifications, the work contained in the proposals were the only changes authorized in the modifications, and the costs paid were exactly the amounts claimed for the work performed pursuant to its proposals and the modifications. Accordingly, AAK asserts that no work for rectifying differing site conditions was encompassed within the proposals or the modifications.

The additional work allegedly performed after the work pursuant to the modifications was completed is the subject of AAK's claim. AAK states that its claim is composed of costs incurred to contend with more than five hundred differing site conditions after the modification work was complete. Further, AAK reiterates that the work from which these costs arose was not within the scope of the modifications, and therefore the claim is not barred by the Contractor's Statement of Release in the modifications.

DOE tells a different story. DOE's position is that the purpose and scope of the modifications were both to identify *and* to rectify differing site conditions, and that the costs sought in AAK's claim were for work that was within the scope of the modifications, and therefore barred by the Contractor's Statement of Release in the modifications. DOE maintains that as AAK encountered differing site conditions while performing the work within the scope of the modifications, AAK had the choice to either resolve the differing site conditions or defer resolving them. Thus, DOE concludes that if AAK chose to defer resolving the differing site conditions until later, claims for such work had been released by the Contractor's Statement of Release, and DOE has no liability for future claims for differing site conditions. DOE therefore views AAK's claim as a repricing of work that had already been priced and included within the scope of the modifications, and for which releases for additional compensation had been agreed.

DOE further maintains that AAK's allegation of the existence of an oral agreement—that DOE would consider claims in the future for additional work to rectify differing site conditions after the completion of the work authorized in the modifications—even if true, is not relevant, as such agreement was not in writing. Thus, the modifications encompassed the differing site conditions encountered on the project, fully compensated AAK therefor, and waived future claims in relation to differing site conditions.

In support of its position, DOE cites an August 19, 2005, letter from a representative of AAK in which he states that having reviewed AAK's proposals incorporated into the modifications, he has concerns that AAK has "been missing some significant components." Appeal File, Exhibit 119. DOE interprets this as an indication that AAK failed to include costs in its proposals and the modifications. Thus, DOE believes that the claim is an attempt to recover costs that were incurred in the performance of the modifications.

Discussion

Standard for Summary Relief

Resolving a dispute on a motion for summary relief is appropriate when the moving party is entitled to judgment as a matter of law, based on undisputed material facts. The moving party bears the burden of demonstrating the absence of genuine issues of material fact. All justifiable inferences must be drawn in favor of the nonmovant. *Celotex Corp. v. Catrett*, 477 U.S. 317 (1986); *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242 (1986).

DOE's motion for summary relief involves the issue of interpretation of contract language in the modifications, including the Contractor's Statement of Release. As this Board stated in *Butte Timberlands, LLC v. Department of Agriculture*, CBCA 646, 08-1 BCA ¶ 33,730, at 166,993 (2007):

Pure contract interpretation is a question of law that may be resolved by summary judgment. *P.J. Maffei Building Wrecking Corp. v. United States*, 732 F.2d 913, 916 (Fed. Cir. 1984). However, the question of interpretation of language, the conduct, and the intent of the parties, i.e., the question of what is the meaning that should be given by a court or board to the words of a contract, may sometimes involve questions of material fact and not present a pure question of law. If there is a genuine dispute of material fact, summary judgment is inappropriate. *Beta Systems, Inc. v. United States*, 838 F.2d 1179, 1183 (Fed. Cir. 1988).

Additionally, this Board stated in *National Housing Group, Inc. v. Department of Housing and Urban Development*, CBCA 340, et al., 09-1 BCA ¶ 34,043, at 168,377 (citations omitted):

An “interpretation that gives a reasonable meaning to all parts of the contract will be preferred to one that leaves portions of the contract meaningless; nor should any provision be construed as being in conflict with another unless no other reasonable interpretation is possible.” . . . It has been long recognized that where a contract provision is clear, “[t]he rules of contract construction should not be permitted to create an ambiguity where none exists or change or twist the plain meaning of a simple agreement.”

DOE Has not Proven that the Modifications, Including the Contractor’s Statement of Release, Bar AAK’s Claim for Differing Site Conditions

When the modifications are read as a whole, together with the Contractor’s Statement of Release contained in the modifications, it is clear from the plain meaning that the release applies solely to the work authorized in each modification, and that work did not include the rectification of differing site conditions identified during the performance of the potholing services included within the scope of the modifications. While the modifications themselves state, “The purpose of this modification is to compensate the contractor for design deficiencies and differing site conditions,” it is clear from a plain reading of the modifications that the design deficiencies resulted in differing site conditions that could not be identified, which made the potholing work authorized in the modifications necessary.

DOE’s interpretation of the modifications’ use of the term “differing site conditions” to require AAK to rectify differing site conditions discovered during the course of the modification work is an unreasonable interpretation of the scope of the modifications. There is nothing in AAK’s proposals or the scope of the modifications that suggests that rectification of differing site conditions identified by the potholing was to be included.

DOE’s interpretation is also not supported by the plain meaning of the Contractor’s Statement of Release in the modifications. This release is comprised of one long sentence. The first part of the Contractor’s Statement of Release states:

The contractor hereby accepts the adjustments in the contract price and/or contract performance period set forth in this [modification] as the complete equitable and final adjustment for *the changed requirements/conditions authorized herein . . .*

(Emphasis added.) The remainder of the Contractor's Statement of Release applies solely to liability from claims arising from the work authorized in the modification. It reads as follows:

and [the contractor] agrees that the Government has no further liability to the contractor whatsoever, directly or indirectly, in regard to any claims, known or unknown, including claims for delay and/or disruption, for any additional adjustments to the contract/task order by reason of *these changed requirements/conditions or as a result of this supplemental agreement.*

(Emphasis added.) The reference in the last part of the sentence to "*these changed requirements/conditions*" is clearly a reference to "*the changed requirements/conditions authorized herein*" mentioned in the first part of the sentence, which refers to the work performed pursuant to the modification.

In order to find a release, clear, manifest intent to waive future claims is required. *Washington Development Group-JWB, LLC v. General Services Administration*, GSBCA 15137, et al. 03-2 BCA ¶ 32,319. A plain meaning of the Contractor's Statement of Release is that future claims are waived with regard to the work performed pursuant to the modifications. However, there is no clear release of all future claims for differing site conditions thereafter rectified. The Contractor Statement of Release neither specifically nor clearly refers to differing site conditions; it refers instead to "changed requirements/conditions." While "changed conditions" is a term that some may have used to refer to "differing site conditions" in other contexts, the term "changed conditions/requirements" in the Contractor's Statement of Release does not clearly refer to all differing site conditions thereafter rectified, as DOE asserts, but only to the work within the scope of the modifications.

We do not find clear, manifest intent by AAK to waive claims that arise from work not within the scope of the modifications performed. DOE has not proven that the modifications, including the Contractor's Statement of Release, and any additional undisputed facts, operate to bar AAK's claim for differing site conditions by accord and satisfaction or release. While the Contractor's Statement of Release applies to future claims for costs arising from the work encompassed by the modifications, the Government is not released from liability for future claims for costs arising from work not encompassed by the modifications.

DOE's motion to bar AAK's claim by operation of accord and satisfaction and release is denied, to the extent that the costs in the claim were not incurred for work performed pursuant to the modifications.

AAK's Cross-Motion for Summary Relief is Granted in Part

In order to resolve AAK's cross-motion for partial summary relief, there must be a determination as to whether the costs sought in AAK's claim arise from work encompassed by the modifications or not. If so, the claim is barred by the Contractor's Statement of Release. If not, the claim is not barred.

While AAK's briefing and affidavits allege the costs in the claim do not arise from work performed pursuant to the modifications, the Board cannot make this determination by a review of the documentary record. This determination cannot be made because AAK's claim is calculated on a modified total cost basis, submitted almost five years after the contract work was completed. The claim itself states that this pricing approach was used "given the sheer number of differing site conditions and the fact that the resulting impact is intertwined and overlapped among the differing site conditions and the original work required by the contract." There are substantial issues which must be resolved in order for a claimant to prevail using this cost approach. *See, eg., Moshe Safdie & Associates, Inc. v. General Services Administration*, CBCA 1849, *et al.*, 14-1 BCA ¶ 35,564.

Thus, there is an issue of material fact as to the origin of the costs claimed by AAK in its differing site conditions claim—whether the costs sought in the claim arise from work performed pursuant to the modifications or not.⁴ AAK asserts that the quantum of its claim arises from work not encompassed by the modifications. While the work in the modifications may be described differently from the work in the claim, this Board cannot determine on the existing record if the costs claimed in the modifications and the claim are separate and distinct, without detailed testimony by those with actual knowledge of the pricing of the modifications and the claim. That almost five years intervened between the completion of the work and the claim submission also raises issues as to accuracy and methodology of the claim's quantum calculation.

⁴ AAK cites decisions which state that the court or board must interpret contract provisions in light of what a prudent contractor might have done and further concludes that AAK, as a prudent contractor, would not have acted in the manner asserted by DOE, i.e., failing to include costs in the modifications which would have therefore been waived by the Contractor's Statement of Release. *P.J. Maffei Building Wrecking Corp. v. United States*, 732 F.2d 913, 917 (Fed. Cir. 1984); *AshBritt, Inc.*, ASBCA 55613, *et al.*, 09-1 BCA ¶ 34,086. This case law is not dispositive. Whether AAK acted prudently, as AAK's counsel suggests, or not, is an issue of material fact that remains in dispute.

AAK must present credible evidence by testimony from individuals who have personal knowledge of the pricing of the modifications and its claim, to prove that there is no duplication or overlap of quantum. As previously noted, DOE cites a statement by claimant's representative contemporaneous with the performance of the modifications as to whether the modifications were "missing significant components." Such statements raise issues of material fact and credibility as to whether the pricing of the modifications and the claim are separate and distinct or not.

Even though AAK states various reasons why its claim is not within the scope of the modifications, the resolution of that issue requires additional development of the record and an assessment of the testimony and credibility of those who prepared the claim. Credibility cannot be resolved by comparing the documentation of the modifications to a claim document and affidavits without further explanation by witnesses. A trial court cannot grant summary relief based upon an assessment of the credibility of the evidence presented. *Cebe Farms, Inc. v. United States*, 116 Fed. Cl. 179 (2014); *Principal Life Insurance Co. v. United States*, 116 Fed. Cl. 82 (2014); *Southern Oregon Ecological v. Department of the Interior*, CBCA 145, 08-1 BCA ¶ 33,806; *Butte Timberlands*.

Accordingly, AAK's cross-motion for summary relief, asserting that its claim is not barred by accord and satisfaction or release, is granted in part, to the extent AAK can prove that the costs claimed do not arise from work performed pursuant to the modifications. To the extent that costs may be proven to arise from work within the scope of the modifications, such costs have been released. The record therefore needs to be developed to determine if the claimed costs arose from work pursuant to the modifications, as alleged by DOE, or not, as alleged by AAK.

DOE's Motion for Partial Dismissal

DOE has filed a motion to dismiss the appeal with regard to the portion of the claim for costs that arose after October 21, 2005, as the contracting officer did not issue a decision on this portion of the claim but sought additional information.

AAK responds that such motion should be denied, as it is defective. AAK states in its response to the motion:

[T]he contracting officer clearly states that her final decision does not pertain to the portion of AAK's claim for costs that occurred after October 21, 2005. . . . AAK did not appeal that portion of the C[ontracting] O[fficer]'s letter, and the Government does not allege otherwise.

AAK Memorandum in Support of its Cross-Motion at 75.

The motion does not present an issue to be resolved by the Board, because there is no appeal to be dismissed or stayed with regard to that portion of AAK's claim.

Decision

DOE's motion for summary relief is **DENIED**. AAK's cross-motion on the issue of accord and satisfaction and release is **GRANTED IN PART**. The Board does not rule on DOE's motion for partial dismissal, for the reasons stated herein.

ALLAN H. GOODMAN
Board Judge

We concur:

JERI KAYLENE SOMERS
Board Judge

CATHERINE B. HYATT
Board Judge