



UNITED STATES
CIVILIAN BOARD OF CONTRACT APPEALS

MOTIONS TO DISMISS AND FOR SUMMARY
RELIEF DENIED: May 6, 2016

CBCA 4867

JOSÉ GUSTAVO ZENO,

Appellant.

v.

DEPARTMENT OF STATE,

Respondent.

José Gustavo Zeno, pro se, Manassas, VA.

John W. Cox, Office of the Legal Adviser, Buildings and Acquisitions, Department of State, Washington, DC, counsel for Respondent.

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

Opinion for the Board by Board Judge **HYATT**. Board Judge **VERGILIO** dissents.

HYATT, Board Judge.

Appellant, José Gustavo Zeno, has appealed a contracting officer's decision terminating for cause his personal services contract with respondent, the Department of State. The Department has moved to dismiss the appeal for lack of jurisdiction. In the alternative, the Department has filed a motion for summary relief urging the Board to deny the appeal on the merits as barred by the terms of a release. For the reasons stated below, we deny both motions.

Background

On May 4, 2014, Mr. Zeno entered into personal services contract SALMEC-14-P-0052 with the State Department to provide mechanical engineering services for the Department's Office of Overseas Building Operations. The contract duration was for an initial, one-year base period, with four one-year option periods.¹ Appeal File, Exhibit 3.²

Section E in Article 9 of the contract, in relevant part, provided: "A valid security clearance is required for the performance of services under this Contract. . . . Any action by the Contractor resulting in cancellation of the clearance shall be cause for immediate termination of the Contract regardless of any other contract provision." Exhibit 3 at 15.

Article 10 of the contract provided: "The Contractor shall be responsible for maintaining satisfactory standards of conduct and integrity. The Contractor's behavior should be above reproach." This section also incorporated by reference the Department's employee code of conduct set forth in the Foreign Affairs Manual. Exhibit 3 at 16.

The contract incorporated by reference the Federal Acquisition Regulation's (FAR's) Disputes clause, 48 CFR 52.233-01. Article 12 of the contract, in relevant part, provided:

The Government may terminate this contract for the convenience of the Government at any time upon at least 30 days written notice by the Contracting Officer to the Contractor. . . . The Department of State may terminate this Contract at any time for cause (failure of the Contractor to meet the requirements of the contract including failure by the Contractor to prosecute the work expeditiously) by a notice in writing from the Contracting Officer to the Contractor. ***If the Department of State terminates the contract for cause***

¹ The contract was authorized by the State Department Basic Authorities Act of 1956, 22 U.S.C. § 2669(c) (2012) (permitting the Department to hire personal service contractors for services abroad without regard to procurement statutes or regulations), and the Foreign Services Buildings Act of 1926, 22 U.S.C. § 296 ("[T]he Secretary of State is authorized . . . without regard to civil service and classification laws, to obtain architectural and other expert technical services as may be necessary[.]")

² All exhibits are found in the appeal file submitted by the State Department.

or failure to obtain and maintain the required Security Clearance, the requirement for the 30-day advance notice is not applicable.”

Exhibit 3 at 17.

On February 3, 2015, Mr. Zeno appeared in the Prince William County (Virginia) Court and pled guilty to a violation of the Virginia Code. By memorandum dated March 9, 2015, the Department’s Bureau of Diplomatic Security contract review panel advised Mr. Zeno that, based on this and other incidents, it had made a preliminary fitness determination that he was no longer eligible for employment on State Department contracts in light of State Department guidelines applicable to an employee’s personal and criminal conduct. The memorandum noted that the determination was not a denial of a security clearance and informed Mr. Zeno that he could request reconsideration of the decision in writing. Complaint, Attachment 8.

In an email message dated April 14, 2015, the contract review panel responded to appellant’s request for reconsideration, stating that the termination decision was being upheld and that Mr. Zeno was no longer eligible for employment with the State Department for a period of two years. This notice served as the Department’s final determination concerning Mr. Zeno’s fitness for employment. Exhibit 5.

In another email message dated April 14, 2015, State Department personnel were notified that the determination concerning Mr. Zeno’s fitness for employment was final and that, consequently, his security clearance had been administratively withdrawn. Exhibit 6.

In a letter dated April 15, 2015, the contracting officer notified Mr. Zeno that, effective April 16, 2015, his employment contract was terminated for cause, due to violations of Article 10’s standards of conduct. The letter stated, “The basis for the termination was made by Diplomatic Security [which] has revoked your security clearance and therefore, you are unable to perform the services required by the contract.” The letter also noted that this was the final decision of the contracting officer and apprised Mr. Zeno of his right to appeal. Exhibits 1, 2.

On April 20, 2015, during the closeout of his contract, Mr. Zeno executed a release whereby, in exchange for payment of services through April 20, 2015, and payment of any unused accrued annual leave, Mr. Zeno waived any further claims against the Government. Specifically, the release provided:

Pursuant to the terms of Contract SALMEC-14-P-0052 [in] consideration of the . . . [p]ayment of services through 4/20/2015 and payment for any unused annual leave accrued [as of] 4/20/15 which has been or is to be paid under the said contract[,] Jose Zeno . . . (hereinafter called the Contractor) or his assignees, if any, . . . upon payment of the said sum by the United States of America (hereinafter called the Government), does hereby remise, release, and discharge the Government, its officers, agents and employees of and from all liabilities, obligations, claims and demands whatsoever under or arising from the said contract, except: Specified claims in stated amounts or in estimated amounts where the amounts are not susceptible of exact statement by the Contractor, as follows: NONE. (Emphasis in original omitted.)

Exhibit 7 (emphasis omitted).

Mr. Zeno timely filed a notice of appeal with the Board and, in his complaint, requested reinstatement of his contract. Thereafter, prior to discovery or further development of the record, the Department filed its motion to dismiss the appeal for lack of jurisdiction or, in the alternative, to grant summary relief denying the appeal. Mr. Zeno has acknowledged that the contract cannot be reinstated by the Board, but still wishes to challenge the termination for cause.

Discussion

Motion to Dismiss for Lack of Jurisdiction

The State Department argues that the appeal should be dismissed for lack of jurisdiction on the basis that appellant seeks the reinstatement of his contract, a remedy that, respondent correctly points out, we have no authority to direct. *See Brent Packer v. Social Security Administration*, CBCA 5038, et al., 16-1 BCA ¶ 36,260, at 176,901; *cf. G2G, LLC v. Department of Commerce*, CBCA 4996, 16-1 BCA ¶ 36,266, at 176,917 (Board has no authority to direct an agency to place a requirement in a particular procurement program), *motion for reconsideration denied* (Apr. 20, 2016); *Eyak Technology, LLC v. Department of Homeland Security*, CBCA 1975, 10-2 BCA ¶ 34,538, at 170,340 (“The Board does not have jurisdiction to order specific performance or grant injunctive relief.”).³

³ In his response to the motion, Mr. Zeno acknowledged that he now understands that reinstatement is not an available remedy, but maintains that he still wishes to challenge the basis for the termination action.

The fact that reinstatement of the contract is not an available remedy, however, does not divest the Board of jurisdiction to entertain appellant's appeal. *Eyak Technology*, 10-2 BCA at 170,340 (incorrect articulation of the remedy available does not deprive the Board of jurisdiction to consider an appeal); *Amina Enterprise Group, LTD*, ASBCA 58547, et al., 13 BCA ¶ 35,376, at 173,580 ("gratuitous statements" requesting contract reinstatement do not nullify the notice of appeal). Mr. Zeno challenges the contracting officer's final decision terminating his contract for cause, which, under the CDA, is considered to be a Government claim. *Aurora, LLC v. Department of State*, CBCA 2872, 16-1 BCA ¶ 36,198, at 176,648 (2015) (citing *Malone v. United States*, 849 F.2d 1441, 1443 (Fed. Cir. 1988)). Should Mr. Zeno's appeal succeed, the termination for cause would be converted to one for the convenience of the Government. The Board has jurisdiction over appellant's timely appeal of the contracting officer's decision.

Motion for Summary Relief

In the alternative, the Government moves for summary relief in its favor, arguing that even if the Board has jurisdiction, Mr. Zeno is barred from pursuing the appeal. The State Department has not argued that the termination decision was justified as a matter of law,⁴ but rather contends that it is entitled to prevail because the release executed by Mr. Zeno exempted the Government "from all liabilities, obligations, claims and demands whatsoever under or arising from the said contract."

In general, summary relief is appropriately granted when, based upon undisputed material facts, the moving party is entitled to judgment as a matter of law. *E.g., Turner*

⁴ Although the standard default clause under the FAR is not applicable in this case, in resolving appeals of terminations for cause we have recognized that the basic legal principles developed with regard to challenges of terminations for default are applicable. *E.g., Paradise Pillow, Inc. v. General Services Administration*, CBCA 3562, 15-1 BCA ¶ 36,153, at 176,444; *ACM Construction & Marine Group, Inc. v. Department of Transportation*, CBCA 2245, et al., 14-1 BCA ¶ 35,537, at 174,150. To this end, a termination for default is "a drastic sanction which should be imposed (or sustained) only for good grounds and on solid evidence." *Lisbon Contractors, Inc. v. United States*, 828 F.2d 759, 765 (Fed. Cir. 1987) (quoting *J.D. Hedin Construction Co. v. United States*, 408 F.2d 424, 431 (Ct. Cl. 1969)). The Government bears the burden of proof that its action was justified. *Lisbon*, 828 F.2d at 764-65. If the Government presents a prima facie case that the termination was proper, the burden shifts to the contractor to rebut the prima facie case. *CDA, Inc. v. Social Security Administration*, CBCA 1558, 12-1 BCA ¶ 34,990, at 171,971.

Construction Co. v. Smithsonian Institution, CBCA 2862, et al., 15-1 BCA ¶ 36,139, at 176,394; *URS Energy & Construction, Inc. v. Department of Energy*, CBCA 3632, 15-1 BCA ¶ 35,949, at 175,683. The Government maintains that it should prevail as a matter of law because:

[T]here is no “genuine dispute about the underlying material facts: Mr. Zeno held a contract; he pled guilty to a crime; the Department conducted an investigation and found him unfit for contract employment; the Department terminated his contract for cause; he signed a release of all claims under or arising from his contract; he received payment of his accrued annual leave plus two business days’ pay . . . *beyond* the effective date of his termination in consideration for his release of all claims.

The Government’s motion is predicated on the terms of the release signed by Mr. Zeno, providing, without any reservation of claims, that he “does hereby remise, release, and discharge the Government, its officers, agents and employees of and from all liabilities, obligations, claims and demands whatsoever under or arising from the said contract.”

It is well settled that a release is contractual in nature and thus to be “interpreted in the same manner as any other contract term or provision.” *Bell BCI Co. v. United States*, 570 F.3d 1337, 1341 (Fed. Cir. 2009) (citing *Metric Constructors, Inc. v. United States*, 314 F.3d 578, 579 (Fed. Cir. 2002)). We have recognized that contract interpretation presents a question of law that is often amenable to summary disposition. *JAVIS Automation & Engineering, Inc. v. Department of the Interior*, CBCA 938, 09-2 BCA ¶ 34,309, at 169,478 (citing *Varilease Technology Group, Inc. v. United States*, 289 F.3d 795, 798 (Fed. Cir. 2002)); accord *A-Son’s Construction, Inc. v. Department of Housing & Urban Development*, CBCA 3491, et al., 15-1 BCA ¶ 36,089, at 176,207; *Fortis Networks, Inc. v. Department of the Interior*, CBCA 4176, 15-1 BCA ¶ 36,066, at 176,123.

It is also a longstanding tenet of law that in the absence of special, limited circumstances, the execution of an unconditional release by a contractor upon receipt of final payment serves to preclude the entertainment of any further claims for damages against the Government in connection with that contract. *E.g.*, *Mingus Constructors, Inc. v. United States*, 812 F.2d 1387, 1391 (Fed. Cir. 1987); *Adler Construction Co. v. United States*, 423 F.2d 1362, 1364 (Ct. Cl. 1970) (per curiam); *J. G. Watts Construction Co. v. United States*, 161 Ct. Cl. 801, 805 (1963). The philosophy underlying the enforcement of an unconditional release is to put an end to suits for additional damages and compensation arising from events that occurred prior to the execution of the release. *B. D. Click Co. v. United States*, 614 F.2d 748, 756 (Ct. Cl. 1980). “Consequently, except in narrow circumstances, a release bars further consideration of any claim not expressly exempted from its scope.” *P.I.O. GmbH*

Bau und Ingenieurplanung v. International Broadcasting Bureau, GSBCA 15934-IBB, 04-1 BCA ¶ 32,592, at 161,245 (citing *Trataros Construction, Inc. v. General Services Administration*, GSBCA 15344, 03-1 BCA ¶ 32,251).

Having said this, it is important to recognize that the decisions enunciating this venerable principle generally impose finality as to the releasing party's claims for additional compensation under a fully performed contract. In this appeal, the contractor is not asserting a claim for additional compensation. The claim in question is the Government's claim – Mr. Zeno seeks to defend against that claim, which, under the “unique procedural requirements” of the CDA, he is required to do by initiating an appeal. *JR Services, LLC v. Department of Veterans Affairs*, CBCA 4826, 16-1 BCA ¶ 36,238, at 176,808. We have found no decisions involving a release that are directly on point with respect to the circumstances presented in this case, involving solely a non-monetary challenge to a termination for cause or default.

Construed in context, the wording of the release executed by Mr. Zeno, signed within a few days of the termination of his personal services contract, is specific to his entitlement to compensation for wages and accrued leave under that contract. The proviso to list exceptions from the release, by its terms, refers only to monetary claims of the contractor. In order to find that Mr. Zeno relinquished his entitlement to pursue an appeal of the default termination action, or to defend against the Government claim in this case would require a “clear, manifest intent to waive” his right to do. *Au' Authum Ki, Inc. v. Department of Energy*, CBCA 2505, 14-1 BCA ¶ 35,727, at 174,891 (citing *Washington Development Group-JWB, LLC v. General Services Administration*, GSBCA 15137, et al., 03-2 BCA ¶ 32,319).

The State Department has not released any claims it has under the contract nor has it offered any evidence that it negotiated with Mr. Zeno to forgo his right to appeal the Government's claim, but asks us to find, before any development of the record has occurred, that the language in the release implicitly accomplished this result. Although the release as signed would no doubt operate to preclude a monetary claim should Mr. Zeno seek to press one, it does not plainly encompass an agreement by Mr. Zeno to waive his right to appeal the Government's decision to terminate his contract for cause, which, as noted above, is not his

claim, but rather is a Government claim.⁵ As such, the release does not compel the conclusion that the Government is entitled to prevail as a matter of law.

Decision

For the reasons stated, the Department's motions to dismiss for lack of jurisdiction and for summary relief are **DENIED**.

CATHERINE B. HYATT
Board Judge

I concur:

JERI KAYLENE SOMERS
Board Judge

VERGILIO, Board Judge, dissenting.

Because I conclude that the release language precludes the contractor from prevailing in this dispute, I dissent from the decision of the majority.

In April 2015, the contracting officer issued a notice of termination for cause, specifying April 16, 2015, as the effective date of the termination. The decision provides a notice of appeal rights. On April 20, following the conclusion of contract performance, the agency closed out the contract; the agency made a final payment to the contractor after obtaining a unilateral release. The agency's regulations provide guidance on contract

⁵ Moreover, even though a conversion of the termination for cause to one for the convenience of the Government could not give rise to any monetary relief, the challenge to the termination, if successful, would still result in the correction of any public records reflecting that Mr. Zeno's contract was terminated for cause, *see Brent Packer*, 16-1 BCA at 176,901, and restore Mr. Zeno's eligibility to compete for contracts.

closeout procedures. 48 CFR 604.804-70 (2015). As specified in the release, in consideration for the payment, the contractor did:

remise, release, and discharge the Government, its officers, agents and employees of and from all liabilities, obligations, claims and demands whatsoever under or arising from the said contract, except: Specified claims in stated amounts or in estimated amounts where the amounts are not susceptible of exact statement by the Contractor, as follows: NONE.

The contractor identified no claim as remaining in dispute: the contractor did not identify the agency claim (the termination for default) as being in dispute, or indicate that the contractor would seek a termination for convenience. Pursuant to the release, the contractor accepted payment from the agency.

The release language precludes this contractor from prevailing in a dispute over the Government claim of termination for default or in seeking to obtain a termination for convenience. The release identifies no claim as remaining in dispute which the contractor may pursue. Rather through the release, the contractor released and discharged the Government from all claims whatsoever under or arising from the contract. No exception from the release is carved out for the known agency claim. Even discounting the word “claim” in the release, the contractor now contends that the agency is liable and obligated to convert the termination for default to one for convenience. The contractor demands that the agency convert the default to one for convenience. To ignore each of the words following “all” (liabilities, obligations, claims, and demands) is inconsistent with the release language and concepts of contract close-out. Moreover, the contractor does not suggest that it understood it could accept the payment and thereafter challenge the default.

The agency is correct that the Board lacks the authority to reinstate the contract. While the Board has jurisdiction over this contract dispute, I conclude that the Board must grant the motion for summary relief and deny the appeal because the release language precludes the contractor from pursuing and prevailing in this dispute.

JOSEPH A. VERGILIO
Board Judge