

ARMED SERVICES BOARD OF CONTRACT APPEALS

Appeal of --)
)
Trawick Contractors, Inc.) ASBCA No. 55097
)
Under Contract No. N62467-01-C-0295)

APPEARANCE FOR THE APPELLANT: John T. Flynn, Esq.
Weinberg, Wheeler, Hudgins, Gunn &
Dial, LLC
Atlanta, GA

APPEARANCES FOR THE GOVERNMENT: Thomas N. Ledvina, Esq.
Navy Chief Trial Attorney
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Trial Attorney
Naval Facilities Engineering Command
Litigation Headquarters
Washington, DC

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

This timely appeal arises out of the contracting officer's (CO) decision denying the contractor's claim for remission of \$68,394 in liquidated damages, which the contractor contends was agreed to in an oral settlement agreement. The government moves for summary judgment. Trawick opposes the motion. There are no relevant material facts in dispute and the government prevails as a matter of law. We grant the motion.

STATEMENT OF FACTS (SOF) FOR PURPOSES OF THE MOTION

1. The Naval Facilities Engineering Command, Southern Division, Charleston, SC, awarded Trawick Contractors, Inc. (appellant) firm fixed-price Contract No. N62467-01-C-0295 (the contract) on 6 February 2002. The contract called for Capehart Whole House Revitalization at NSA MidSouth, Millington, Tennessee. The total contract price was \$9,463,492 with a completion date of 6 February 2004. (R4, tab 6)
2. The contract, *inter alia*, contained the following clauses: FAR 52.233-1, DISPUTES (DEC 1998); 52.211-12, LIQUIDATED DAMAGES--CONSTRUCTION (SEP 2000); and Navy clauses FAC 5252.201-9300, CONTRACTING OFFICER AUTHORITY (JUNE 1994), and

FAC 5252.242-9300, GOVERNMENT REPRESENTATIVES (OCT 1996) (R4, tab 4 at 39, 40, 51, 54 of 59).

3. The Liquidated Damages clause provided that:

(a) If the Contractor fails to complete the work within the time specified in the contract, the Contractor shall pay liquidated damages to the Government in the amount of \$4,351.00 for Item 0001, \$200.00 for Item 0002, \$691.00 for Item 0003 and \$200.00 for Item 0004 for each calendar day of delay until the work is completed or accepted.

(R4, tab 4 at 40 of 59)

4. The Contracting Officer Authority clause provided that:

In no event shall any understanding or agreement between the Contractor and any Government employee other than the Contracting Officer on any contract, modification, change order, letter or verbal direction to the Contractor be effective or binding upon the Government. All such actions must be formalized by a proper contractual document executed by an appointed Contracting Officer. The Contractor is hereby put on notice that in the event [of] a change in work to be performed or increases in the scope of the work to be performed, it is the Contractor's responsibility to make inquiry of the Contracting Officer before making the deviation. Payments will not be made without being authorized by an appointed Contracting Officer with the legal authority to bind the Government.

(R4, tab 4 at 51 of 59)

5. The Government Representatives clause provided that:

The contract will be administered by an authorized representative of the Contracting Officer. In no event, however, will any understanding or agreement, modification, change order, or other matter deviating from the terms of the contract between the Contractor and any person other than the Contracting Officer be effective or binding upon the Government, unless formalized by proper contractual documents

executed by the Contracting Officer prior to completion of this contract.

(R4, tab 4 at 54 of 59)

6. In the course of contract performance, an issue arose regarding the daily rate for liquidated damages. Following discussions, the parties executed bilateral Modification No. A00017 on 16 December 2003, changing the daily rate for liquidated damages for Item 0001 from \$4,351 per day to \$23 per day per unit not completed. (R4, tab 7 at 34; gov't mot., ex. A, ¶ 10, ex. B, ¶ 6, ex. C, ¶ 5)

7. There were delays during contract performance, and on 31 October 2002 Mr. Mark Wilson, the Assistant Resident Engineer in Charge of Construction, informed Trawick that continued slippage would result in retainage from progress payments for possible liquidated damages (gov't mot., ex. A, tab 2).

8. Malcolm Griffin, who held a contracting officer's warrant and was administrative contracting officer (ACO) for the contract, retained funds from the contractor's monthly invoices when Trawick fell behind schedule, at one point retaining \$263,306.46 (gov't mot., ex. C, ¶¶ 3-4, 7). When Trawick's schedule improved, \$163,306.66 of the retained funds were released, with the Navy continuing to retain \$99,999.80 (gov't mot., ex. C, tab 2). An additional \$25,000 was retained from invoice number 26 for slow progress, resulting in \$124,999.80 retained for possible liquidated damages. \$26,072.00 of that retainage was later paid to appellant, resulting in retainage of \$98,927.80. (Gov't mot., ex. C, ¶ 16, tab 4)

9. The final contract completion date, agreed to in Modification No. A00023, was 1 July 2004 (R4, tab 7 at 46).

10. The project was substantially completed on 19 November 2004 (R4, tab 8), 141 days past the contract completion date.

11. By letter dated 10 January 2005, Mr. Leo Eddings, appellant's project manager, wrote to Mr. Wilson, asking for a list of costs incurred as a basis for determining liquidated damages (R4, tab 9).

12. Mr. Wilson responded by letter dated 2 February 2005, explaining the government's policy that liquidated damages are used to compensate the government for "probable" damages and it is not necessary or reasonable for the government to provide actual costs incurred (R4, tab 10).

13. Trawick submitted Invoice No. 32, dated 4 April 2005, for 100% of the contract work (R4, tab 11).

14. In early May 2005, Mr. Eddings telephoned ACO Griffin to discuss the status of Invoice No. 32 and the money retained by the Navy for possible liquidated damages (gov't mot., ¶ 20, ex. C, ¶¶ 10-11; R4, tabs 12-13).

15. In a letter dated 17 May 2005, Mr. Eddings wrote to ACO Griffin as follows:

Per our telephone conversations the week of May 2, 2005, Trawick made a verbal offer to settle the liquidated damages being presently held on the above contract to \$25,000. Your office then countered our offer with a settlement of \$30,000 which was accepted by Trawick. Since that time, we understand your office has a problem with your counter offer of \$30,000. Trawick feels the verbal counter offer of \$30,000 to be binding.

(R4, tab 12)

16. By letter dated 25 May 2005, Mr. Eddings wrote to ACO Griffin:

Earlier this year, the ROICC Memphis reduced Trawick's retainage from \$125,000 to \$98,928. Trawick understood that the \$98,928 represented any possible liquidated damages which the Navy might assess against it. On April 4, 2005, Trawick invoiced for all the retainage in excess of \$98,928. During the week of May 2, 2005, I called you to inquire about the status of the April 4 invoice. During our conversation, I told you that Trawick would like to resolve the issue of the remaining \$98,928 being held for liquidated damages. I offered, on behalf of Trawick, to settle the question of liquidated damages by allowing the Navy to keep \$25,000 of the \$98,928, with the rest being paid to Trawick. You indicated that you would discuss the offer with your supervisor and that we would speak again.

During a subsequent conversation, you advised me that the Navy could not settle for \$25,000. I asked you what it would take to settle and you replied, "Thirty Thousand Dollars." I then confirmed your statement that the Navy would keep \$30,000 of the \$98,928 and the remainder would be paid to Trawick. You said, "Yes," and I advised you that Trawick accepted the settlement and asked you to forward all necessary close-out documents.

We subsequently spoke again on May 16, 2005 and you advised me that the agreed settlement was now being rejected by the Navy. I dealt with you in good faith and in reliance on your authority to negotiate a settlement. You have previously executed 22 of the 27 modifications on this project as Contracting Officer for the Navy. It was my understanding at the time of our agreement, and it is my understanding now, that you have complete authority to bind the Navy, and I believe your actions did so.

Please forward the appropriate paperwork to allow Trawick to close out this contract in accordance with our agreement.

(R4, tab 13)

17. In a letter dated 29 June 2005, appellant filed a claim for \$68,394.00 held by the government as liquidated damages. The sole basis for the claim was the foregoing alleged settlement agreement. Appellant asserted no excusable delay or other defense against the assessment of liquidated damages. (R4, tab 15)

18. ACO Griffin, in a letter dated 7 July 2005, denied Trawick's claim and stated that liquidated damages of \$98,394 would be charged (R4, tab 16).

19. On 8 July 2005, ACO Griffin executed unilateral Modification No. A00027 assessing liquidated damages of \$98,394 and decreased the contract price by that amount (R4, tab 7 at 54-57).

20. Trawick appealed that final decision to the Board on 21 July 2005 and the appeal was docketed at that time.

21. The parties did not execute a written modification to settle the government's liquidated damages claim for \$30,000, and hence to decrease the contract price by that amount rather than \$98,394.

PARTIES' AFFIDAVITS AND DECLARATIONS

22. In Mr. Eddings' recollection of the conversation he had in early May 2005 with ACO Griffin, he offered to settle the liquidated damages with the Navy keeping \$25,000 of the \$98,394 retained, and the remainder being paid to appellant. According to

Mr. Eddings, ACO Griffin indicated he would discuss the offer with his supervisor. (App. opp'n, Eddings aff., ¶ 3)

23. According to Mr. Eddings, ACO Griffin's supervisor said they would have to have \$30,000.00, "in essence making an oral counter-offer to settle the liquidated damages issue for \$30,000.00," and he (Mr. Eddings) "accepted Mr. Griffin's counter-offer by saying 'You have a deal'" (app. opp'n, Eddings aff., ¶ 4).

24. ACO Griffin recalled that he had only one telephone conversation with Mr. Eddings during which Eddings said he wanted to settle the damages issue and offered that the Navy keep \$25,000 and return the remainder of the retainage to appellant. ACO Griffin said he remarked to Mr. Eddings that \$25,000 was "under \$30,000, less than one-third of the amount being held." He did not tell Mr. Eddings his offer was accepted. (Gov't mot., Griffin decl., ¶ 11).

25. ACO Griffin told his supervisor that Trawick wanted to settled the liquidated damages issue and also sent an email to his legal counsel on 17 May 2005 asking for advice regarding the liquidated damages, noting Trawick's desire to settle the issue (gov't mot., Griffin decl., ¶ 13). ACO Griffin said he "did not expect my phone conversation with Mr. Eddings to be the final word on LDs, which is why I went to my supervisor and to counsel about the issue." (Gov't mot., Griffin decl., ¶ 12)

26. Respondent's legal counsel advised ACO Griffin on or about 19 May 2005 that liquidated damages "should be imposed against the contract as written" (gov't mot., ex. C, tab 3).

PARTIES' CONTENTIONS

The government contends that it rightfully assessed liquidated damages, there was no oral agreement to return a portion of the liquidated damages and even if there had been, the agreement was not binding on the parties until a written modification was executed (gov't mot. at 8-15).

Trawick's opposition to the motion argues that the parties reached an oral settlement agreement on remission of \$68,394 of the liquidated damages, it did not change any terms of the contract and it did not have to be in writing (app. opp'n at 1-3). Appellant, in its response to the motion, does not otherwise question the propriety of the assessment or the calculation of the amount of liquidated damages.

DECISION

Summary judgment is properly granted only where 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).

The alleged oral agreement here in issue necessarily would change the contract price, as established pursuant to the contract's Liquidated Damages clause (SOF, ¶ 3). The parties do not dispute the material fact that they did not execute a written modification to settle the government's liquidated damages claim for \$30,000, and hence to change the contract price by that amount (SOF, ¶ 21). Rather, the ACO issued unilateral Modification No. A00027 reducing the contract price by \$98,394, the full amount of liquidated damages he assessed (SOF, ¶ 19).

In *Kato Corp.*, ASBCA No. 51462, 06-2 BCA ¶ 33,293, *appeal docketed*, No. 2006-1623 (Fed. Cir. Sept. 14, 2006), an alleged oral agreement to settle the contractor's claims for \$85,000 was held unenforceable because such agreement would change the contract price and there was no written contract modification to change the contract price, as required by the applicable FAR regulations. 06-2 BCA at 165,085-86. Similarly, an oral settlement agreement that would change the contract price by \$30,000 is unenforceable without a written contract modification to decrease the contract price in such amount.

We hold that there are no material facts in dispute on this controlling issue, and respondent is entitled to judgment as a matter of law. We grant respondent's motion and deny the appeal.

Dated: 23 February 2007

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

(Signatures continued)

I concur

I concur

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

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. 55097, Appeal of Trawick Contractors, Inc., rendered in conformance with the Board's Charter.

Dated:

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