

McDONALD'S EXCAVATING,

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AGBCA No. 98-193-1

Appellant

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Representing the Appellant:

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RULING ON GOVERNMENT'S MOTION FOR SUMMARY JUDGMENT

March 1, 1999

OPINION BY ADMINISTRATIVE JUDGE ANNE W. WESTBROOK

This appeal is before the Board on the Government's Motion for Summary Judgment. It arises out of Contract No. 50-04M3-7-0021 between the Forest Service, U. S. Department of Agriculture (Government) and McDonald's Excavating of Nampa, Idaho (Appellant). The contract required trail reconstruction in the Hells Canyon National Recreation Area, Wallowa-Whitman National Forest in Oregon. The Forest Service awarded the contract June 6, 1997, in the amount of \$148,684. Final contract amount after modifications was \$163,882.26.

Appellant claims \$49,687.19 for additional costs to conform to Davis-Bacon Act requirements and additional costs to perform the work in a manner other than anticipated. Because it was submitted after execution of a release of claims, the Contracting Officer (CO) denied the claim without considering its merits.

The Government moves for Summary Judgment relying on the release of claims containing no reservations. The Appellant defends based on its own concern that prior submission of claims would delay final payment.

The Board has jurisdiction under the Contract Disputes Act (CDA) of 1978 (41 U.S.C. §§ 601- 613).

FINDINGS OF FACT

1. The Forest Service awarded Contract No. 50-04M3-7-0021 in the amount of \$148,684, to Appellant on June 6, 1997. Final contract amount was \$163,882.26. This fixed-price construction contract required trail reconstruction in Hells Canyon National Recreation Area, Wallowa-Whitman National Forest, Oregon.

2. The contract incorporated by reference Federal Acquisition Regulation (FAR) clause 52.232-5, Payments Under Fixed Price-Construction Contracts (MAY 1997). In pertinent part, the clause reads as follows:

(a) *Payment of price.* The Government shall pay the Contractor the contract price as provided in this contract.

. . . .

(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. . . .

3. Appellant submitted its final Construction Contract Payment Estimate and Invoice in the amount of \$24,789.11 on April 16, 1998. The reverse side of that invoice contains the Release of Claims. The release is entitled “FOR FINAL PAYMENT INVOICES ONLY” and contains the following language: “The undersigned do/does hereby release the Government of all claims arising by virtue of this contract, other than claims in stated amounts that the undersigned has specifically excepted from this release. Reservations: [blank space provided].” Appellant signed the quoted release on April 22, 1998, and left the space for “reservations” blank.

4. Thereafter on April 24, 1998, the CO accepted the project so indicating by her signature on the front side of the final invoice.

5. By letter dated June 1, 1998, Appellant submitted its claim in the total amount of \$49,687.19. In its claim, Appellant states: "I am submitting this claim after final acceptance of the contract by the USFS (as notified by Max Mallory, and receipt of final pay voucher) because I had no confidence that the remaining portion of the contract, or submittal of final pay, would've been handled fairly by the Contracting Officer. As the contract has been finalized [sic], and final pay has been processed, I am requesting the Contracts Board of Appeals [sic] to handle the claim."

6. The CO denied the claim in a decision dated June 12, 1998. She decided that the execution of the release of claims barred the contractor from thereafter asserting claims. She did not consider or decide the merits of Appellant's claims. The decision informed Appellant of its appeal rights; Appellant made a timely appeal to this Board.

7. The Board accepted Appellant's appeal letter as a complaint. Therein, Appellant described its interpretation of the meaning of the "Payments Under Fixed-Price Construction Contracts" clause (Payments clause) and its fear that submission of reserved claims in stated amounts as required by the clause would delay final payment. Appellant asserted its disagreement with the language of the FAR clause, but failed to allege Government conduct or knowledge limiting the applicability of the release of claims.

8. The Government's Motion for Summary Judgment was filed October 16, 1998. Appellant responded on November 14, 1998, asserting that the claim was prepared well in advance of final payment, but intentionally withheld due to its interpretation of the Payments clause as failing to provide protection for the contractor.

DISCUSSION

This matter comes before the Board on the Government's Motion for Summary Judgment. The Government asks the Board to rule that Appellant's execution of the April 16, 1998 release without reservation bars Appellant from recovering for claims presented thereafter. Summary judgment is appropriate where there are no material facts in dispute, so that the moving party is entitled to judgment as a matter of law. Santee Modular Homes, Inc., AGBCA No. 95-220-1, 96-2 BCA ¶ 28,432; Cannon Structures, Inc., AGBCA No. 90-207-1, 93-3 BCA ¶ 26,059; Lindsay Logging/Brush Piling, AGBCA Nos. 90-144-1, 90-215-1, 91-2 BCA ¶ 23,671. Any doubts as to whether there is a genuine issue of material fact must be resolved in favor of the non-moving party. Santee Modular Homes, Inc., and Peter J. Brandon, AGBCA No. 91-186-1, 92-1 BCA ¶ 24,648. Once the party moving for summary judgment has met its initial burden of demonstrating the absence of disputed material facts, the non-moving party must present more than "some" evidence to the contrary. Miguelina Grant dba Hermanos Del Bosque, AGBCA No. 93-176-1, 94-2 BCA ¶ 26,736. Here, Appellant has alleged no Government action or knowledge to limit the applicability of the general rule. He admits intentionally delaying submission of claims until after execution of the final pay estimate and release of claims. He presents no evidence of prior knowledge of the claims by the CO. In fact, he states that he worked on the claims for months before completion while deliberately omitting to present them to the CO.

In Santee Modular Homes, Inc., this Board discussed the flow of consideration between the parties where the Government agrees to pay the amount stated in a release and the contractor agrees to press only specifically reserved claims. There the Government's slight reduction in the amount paid was held to be a failure of consideration making the contractor's release unenforceable. Here, Appellant wishes to disavow the release it signed with the specific intention of inducing payment it feared might not be forthcoming otherwise. Allowing Appellant's claim in this situation would be to deny the Government the benefit of its consideration. As this Board held in Santee, the proper and better course is to hold the parties to the precise terms of the release. Here, the result is to grant the Government's motion.

RULING

The Government's Motion for Summary Judgment is granted.

ANNE W. WESTBROOK

Administrative Judge

Concurring:

EDWARD HOURY

Administrative Judge

HOWARD A. POLLACK

Administrative Judge

Issued at Washington, D.C.

March 1, 1999