

# Board of Contract Appeals

General Services Administration  
Washington, D.C. 20405

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MOTION FOR SUMMARY RELIEF DENIED: June 26, 2001

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GSBCA 15344

TRATAROS CONSTRUCTION, INC.,

Appellant,

v.

GENERAL SERVICES ADMINISTRATION,

Respondent.

Joel S. Rubinstein of Bell, Boyd & Lloyd, Washington, DC, counsel for Appellant.

Jeremy Becker-Welts, Office of General Counsel, General Services Administration, Washington, DC, counsel for Respondent.

Before Board Judges **NEILL, WILLIAMS, and DeGRAFF.**

**DeGRAFF**, Board Judge.

Pending before the Board is the General Services Administration's motion that we grant summary relief and deny the appeal. Trataros Construction, Inc. opposes the motion. Because there are material facts genuinely at issue, we deny the motion.

## Background<sup>1</sup>

On September 26, 1996, the parties entered into contract GS-02P-DTC-0033(N) for renovations and alterations to the United States Post Office and Courthouse in San Juan, Puerto Rico. Exhibit 1. Part of the contract work included drilling for and placing minipiles, and Trataros subcontracted this work to Structural Preservation Systems, Inc. (SPS). Exhibits 1, 6. On February 13, 1998, SPS submitted a claim to Trataros, stating that it had encountered a differing site condition during the performance of its work. Trataros

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<sup>1</sup> The facts set out in this section are undisputed. All cited exhibits are included in the appeal file.

forwarded the claim to GSA's project manager on March 19, 1998. Exhibit 6. On August 30, 1999, Trataros sent GSA's project manager a revision to the claim. Exhibit 18.

In November 1999, Trataros and GSA signed contract modification 82, which was the product of negotiations between the parties. The modification reads as follows:

This Modification will revise the contract completion date by 318 calendar days from February 16, 1999 to December 31, 1999.

The Government agrees that no liquidated damages will be assessed against Trataros Construction for the period beginning February 17, 1999 through December 31, 1999. The Government reserves its right to assess and withhold liquidated damages pursuant to the contract beginning on January 1, 2000 and continuing until substantial completion of the entire Project is achieved.

In consideration for the release of all claims known and unknown by Trataros Construction and its subcontractors and suppliers relating to: impact; delay; extended or unabsorbed overhead (both direct and indirect); and any other claims for time extensions and related costs for the period beginning with the Contract Award Date and ending December 31, 1999, the contract value will be increased in the amount of \$200,000.00, such amount to be invoiced on the first payment application following the completion of the Project. Trataros Construction and the GSA do hereby mutually agree that the \$200,000.00 increase in the Contract amount provides full, fair and just compensation for any and all costs which may have been incurred as a result of any delay which has occurred to the Project schedule since Contract Award Date through December 31, 1999 and further compensates Trataros Construction and its subcontractors and suppliers completely for any and all extended or unabsorbed overhead costs through the period ending December 31, 1999.

Trataros Construction and the GSA pledge to cooperate with one another at all levels.

Exhibit 16.

The parties met to discuss the minipile claim in January 2000. Exhibit 17. On February 7, 2000, Trataros sent GSA's contracting officer a revised version of the claim. Exhibit 18. The contracting officer denied the claim on March 29, 2000, explaining that GSA did not agree that SPS had encountered a differing site condition. Exhibit 19. This appeal followed.

### Discussion

In order to establish that it is entitled to summary relief, GSA must show that there is no genuine issue as to any material fact and that it is entitled to relief as a matter of law. A fact is material if it will affect our decision. An issue is genuine if enough evidence exists such that the fact could reasonably be decided in favor of the non-movant at a hearing.

Celotex Corp. v. Catrett, 477 U.S. 317 (1986); Matsushita Electric Industrial Co. v. Zenith Radio Corp., 475 U.S. 574 (1986). GSA says that it is entitled to relief as a matter of law because modification 82 memorializes an accord and satisfaction regarding the minipile claim. In order to establish the existence of an accord and satisfaction, GSA must show " 'proper subject matter, competent parties, meeting of the minds of the parties, and consideration.' " Brock & Blevins Co. v. United States, 343 F.2d 951, 955 (Ct. Cl. 1965) (quoting Nevada Half Moon Mining Co. v. Combined Metals Reduction Co., 176 F.2d 73, 76 (10<sup>th</sup> Cir. 1949), cert. denied, 338 U.S. 943 (1950)).

We deny GSA's motion because there is a genuine issue concerning whether there was in fact a meeting of the minds regarding the disposition of the minipile claim by modification 82. The modification says that GSA would increase the contract price by \$200,000 and, in return, Trataros would release "all claims . . . relating to . . . delay . . . and any other claims for time extensions and related costs" through December 31, 1999. The modification also says that the \$200,000 increase in the contract price compensated Trataros for "all costs . . . incurred as a result of any delay" through December 31, 1999. GSA says that it considered the minipile claim to be a claim for a compensable time extension and that it intended for modification 82 to settle all such claims. Trataros counters that it did not consider the minipile claim to be a claim for a compensable time extension and that it did not intend for modification 82 to settle the claim. Trataros also says that GSA evaluated the merits of the minipile claim after modification 82 was executed, and notes that GSA did not raise accord and satisfaction as a defense when it denied the claim. Both parties support their positions with affidavits signed by people who participated in the negotiations leading up to modification 82. This conflicting evidence prevents GSA from establishing at this stage of the proceedings that there was a meeting of the minds regarding the nature of the minipile claim and whether the scope of modification 82 included that claim. Accordingly, GSA's motion for summary relief must be denied.

Within fourteen days from the date of this order, the parties will file a proposed schedule for further proceedings in this appeal.

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MARTHA H. DeGRAFF  
Board Judge

We concur:

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EDWIN B. NEILL  
Board Judge

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MARY ELLEN COSTER WILLIAMS  
Board Judge