

Board of Contract Appeals
General Services Administration
Washington, D.C. 20405

MOTION FOR SUMMARY RELIEF DENIED: May 31, 2002

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 Trataros Construction, Inc.'s motion that we grant summary relief regarding the General Services Administration's defense of accord and satisfaction. GSA opposes the motion. Because there are material facts genuinely at issue, we deny the motion.

Background¹

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

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

it had encountered a differing site condition during the performance of its work. Trataros 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

We previously considered GSA's motion for summary relief, in which GSA asserted that modification 82 amounted to an accord and satisfaction of the minipile claim. GSA said 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 countered 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. Both parties supported their positions with affidavits signed by people who participated in the negotiations leading up to modification 82. We denied GSA's motion because the conflicting evidence prevented GSA from establishing 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. Trataros Construction, Inc. v. General Services Administration, GSBCA 15344, 01-2 BCA ¶ 31,489.

Trataros now presents us with its motion for summary relief regarding the same issue that was presented in GSA's motion. Trataros says that it is entitled to summary relief as to GSA's accord and satisfaction defense because modification 82 does not memorialize an accord and satisfaction regarding the minipile claim. In order to establish that it is entitled to summary relief, Trataros 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). Trataros points to portions of three depositions to support its motion. GSA points to other portions of the same depositions to support its opposition to the motion.

We deny Trataros's motion for the same reason that we denied GSA's motion. That is, 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. In the modification, Trataros released "all claims . . . relating to . . . delay . . . and any other claims for time extensions and related costs . . . through December 31, 1999." The contracting officer explained in her deposition that the minipile claim was not discussed when modification 82 was negotiated and that when those negotiations occurred, she considered the minipile claim to be only a claim for a differing site condition, not a claim asking for a time extension. Later, she concluded that the minipile claim was one for a time extension and, as such, had been included in modification 82. Viewing the deposition testimony in a light favorable to GSA, the non-movant, we conclude that the deposition testimony does not establish 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, Trataros's motion for summary relief must be denied.

MARTHA H. DeGRAFF
Board Judge

We concur:

EDWIN B. NEILL
Board Judge

MARY ELLEN COSTER WILLIAMS
Board Judge