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

MOTION FOR SUMMARY RELIEF DENIED: August 26, 2003

GSBCA 16127-TD

CORNING CONSTRUCTION CORPORATION,

Appellant,

v.

DEPARTMENT OF THE TREASURY,

Respondent.

Joseph H. Kasimer of Kasimer & Annino, PC, Falls Church, VA, counsel for Appellant.

Marvin Kent Gibbs and Diane Mullaney, Office of Chief Counsel, Bureau of Engraving and Printing, Department of the Treasury, Washington, DC, counsel for Respondent.

Before Board Judges **DANIELS** (Chairman) and **HYATT**.

HYATT, Board Judge.

Respondent, the Bureau of Engraving and Printing (BEP), Department of the Treasury, contracted with appellant, Corning Construction Corporation (Corning), for the replacement of the roof on its main building in Washington, D.C. This appeal is brought by Corning on behalf of its subcontractor, Prospect Waterproofing Company (Prospect). Corning seeks an equitable adjustment for extra work it says it was required to perform in connection with repair of the concrete roof deck. Corning has elected to have this case processed in accordance with the accelerated procedure provided in Board Rule 203.

Respondent has filed a motion for summary relief, asserting that appellant's claim is barred by a bilateral modification to the contract which operated as an accord and satisfaction with respect to the work in question. Corning opposes the motion. For the reasons stated, we deny the motion.

Background

1. On July 7, 1999, BEP and Corning entered into contract TEP-97-28, task order #4, for the replacement of the roof on respondent's main building, located at Fourteenth and C Streets, S.W., in Washington, D.C. The notice to proceed was issued on July 20, 1999. The contract required Corning to remove the existing roof and replace it with a stainless steel roof system, including gutters, drains, lightning protection, and safety restraints. Appeal File, Exhibits A, B; Complaint ¶¶ 1-2.

2. The roof has four wings -- A, B, C, and D. In December 1999, Corning's subcontractor, Prospect, was performing work on the south side of the D wing of the roof. At a construction project meeting held on December 23, 1999, Prospect noted that the existing concrete roof deck had undulations in all directions and that shims and longer screws would be necessary to overcome problems this posed to installation of a replacement roof. Affidavit of John T. Menocal (Menocal Affidavit) (Aug. 4, 2003) ¶¶ 3-4.

3. By letter dated January 19, 2000, Prospect furnished a proposal to Corning for the performance of the extra work occasioned by the conditions encountered on the D wing roof. Prospect's itemized cost proposal, in the amount of $131,033, was accompanied by the following statement:

> As per the discussion at previous progress meetings, the area of the roof currently exposed has excessive deflection and will require the use of 1-1/2" by 2" "U" shaped high impact plastic shims to level the framing members. This is as recommended by the Architect in previous progress meetings. We assume the concrete deck for the entire project will be similar to the south side of wing "D".

Corning forwarded this proposal to the contracting officer under cover of a letter dated January 21, 2000. After itemizing and adding its own costs attributable to the roof deflection issues, Corning requested a change order for $174,242 and a time extension of forty-two days. Appeal File, Exhibit N.

4. Modification 004 to the contract extended the contract completion date by forty-two days and added $174,242 to the contract price "[p]ursuant to the attached Statement of Work dated February 10, 2000, and contractor's proposal dated January 21, 2000." The attached statement of work called for the contractor to "shim between the new Z perlins and the existing concrete roof deck as required to achieve an even plane, using 'U'-shaped high impact plastic shims and the approved concrete fasteners of appropriate length." Modification 004 also stated that this was a "complete equitable adjustment for all additional costs associated" with this additional work and further provided that:

> The contractor hereby releases the Government from any and all liability under this contract for further equitable adjustment due to this modification, including but not limited to labor, materials, equipment, overhead, profit, bonds, insurance and indirect costs such as impact and delay.

Appeal File, Exhibit O. Corning's president signed the modification on February 21, 2000; the contracting officer signed the modification on March 7, 2000.

5. As Prospect continued with the demolition work on the north side and east end of the D wing, it encountered conditions different from those encountered on the south side of the D wing. In a letter to Corning dated May 10, 2000, Prospect repeated that its prior estimate had been predicated on the assumption that "the substrate for the entire project would be similar to the South side of 'D'." Prospect added:

> Now that we are nearing completion of the purlin installation at "D" wing we can more accurately provide a cost estimate for the purlin installation at areas where the batten roofs were installed. These areas have much worse deflection in the deck and require modifications in the purlin spacing to account for the removed battens. Below is an itemization of our additional costs associated with reduced labor production and increased fasteners/shims at all the existing batten roof areas (South and East of Wing "A" and West Side of Head House). Again this assumes that the remainder of the batten seam areas will be similar to the areas at Wing "D".

Prospect's proposal sought an equitable adjustment in the amount of $65,223. By letter dated June 20, 2000, Corning submitted another change order request for the amount of $94,877, which included Corning's added costs associated with the additional work to be performed by Prospect. Prospect's proposal was attached to the change order request. Appeal File, Exhibit P.

6. By letter dated September 7, 2001, the contract specialist responded to Corning's June 20, 2000, change order request:

> This letter is to follow up several meetings and discussions held between yourself and Bureau representatives concerning [the subject change order request]. Per your change order you are requesting $94,877.00 for additional work due to roof deck irregularities in addition to monies and time already provided to Corning under Modification No. 004. . . .
>
> Prospect's proposal dated January 19, 2000 under which [the prior change order] was issued is based on the conditions actually found on the south side of D Wing and the assumption that these conditions would be constant throughout the entire project, i.e., D Wing, A Wing and the Headhouse.
>
> Prospect's proposal under [the subject change order request] states that now they are nearing completion of the purlin installation at D Wing, that the roofing irregularities are much worse than anticipated and provides for additional costs for D Wing, A Wing and the Headhouse. Prospect's proposal under

> [the subject change order request] is dated May 10, 2000, however work had not occurred on A Wing or the Headhouse at the time the proposal was submitted. Per the Government's records, work did not occur on A Wing or the Headhouse until July 10, 2000.
>
> The Government has provided compensation to Corning under Modification No. 004 for roof irregularities for D Wing, A Wing and the Headhouse. It is unclear to the Government how Prospect can submit a proposal on January 19, 2000 for roof irregularities on A Wing and the Headhouse when work had not occurred in these areas. Furthermore, the original proposal of Prospect states that shimming is between 1 ½" to 2." It has been shown that 2" has been the worst case scenario throughout the project and that the shimming on A Wing nor [sic] the Headhouse has [not] exceeded 2" .
>
> Based on the above, your request for additional costs and time due to the [subject change order request] is denied unless further information can be provided to support your position.

Appeal File, Exhibit Q.

7. In a letter dated September 25, 2001, addressed to Corning and forwarded by Corning to the Government, Prospect stated its understanding that the contract specialist had acknowledged that the conditions on the roof had varied from those that were anticipated in the estimate and that the contractor had reserved its right to seek an equitable adjustment for additional work. Appeal File, Exhibit R.

8. By letter dated February 6, 2003, the contracting officer formally denied Corning's claim for a second equitable adjustment based on irregularities in the roof deck. Appeal File, Exhibit T. Corning's appeal followed.

9. In support of its opposition to the motion for summary relief, Corning has submitted the affidavit of its president, John T. Menocal. Mr. Menocal states that, in executing modification 004 to the contract, he understood it to include Prospect's proposal which qualified the price quoted with a statement that it was based upon conditions in other areas of the roof being the same as those on the south side of wing D. Corning did not intend to release any claims based on conditions that differed from those encountered on the south side of wing D. As work progressed under the contract, it became evident that conditions on much of the roof were significantly worse than those initially discovered on the south side of wing D, giving rise to Prospect's submission of a proposal to Corning and Corning's request for a second equitable adjustment based on the condition of the roof. Mr. Menocal explains that although Prospect had not started to work on wing A or the Head House, it had by that time completed enough work on all of wing D to "forward price" an estimate for the remainder of the work. Menocal Affidavit ¶¶ 8-11.

Discussion

BEP has moved for summary relief, contending that Corning's claim is barred by modification 004 and must be denied. Summary relief is properly granted when there is no genuine issue of material fact and the moving party is clearly entitled to judgment as a matter of law. Anderson v. Liberty Lobby Inc., 477 U.S. 242, 247 (1986); Celotex Corp. v. Catrett, 477 U.S. 317, 322 (1986); US Ecology, Inc. v. United States, 245 F.3d 1352, 1355 (Fed. Cir. 2001); Olympus Corp. v. United States, 98 F.3d 1314, 1316 (Fed. Cir. 1996). As the moving party, BEP bears the burden of establishing the absence of any genuine issue of material fact. Mingus Constructors, Inc. v. United States, 812 F.2d 1387, 1390 (Fed. Cir. 1987); Armco, Inc. v. Cyclops Corp., 791 F.2d 147, 149 (Fed. Cir. 1986); Washington Development Group-JWB, LLP v. General Services Administration, GSBCA 15137, et al. (July 9, 2003). All reasonable inferences are drawn in favor of the non-moving party. Parcel 49C Limited Partnership v. General Services Administration, GSBCA 15222, 00-2 BCA ¶ 31,073; Executive Construction, Inc. v. General Services Administration, GSBCA 15224, 00-2 BCA ¶ 30,977.

BEP argues that, as a matter of law, appellant's claim for an equitable adjustment is barred by an accord and satisfaction as evidenced by bilateral modification 004 to the contract. Specifically, BEP asserts that the release language in the modification bars Corning and its subcontractor from pursuing additional compensation for work attributable to the deflection in the roof.

The Board has recently delineated the legal standard applicable to showing that a modification of a contract operates as an accord and satisfaction sufficient to discharge a claim:

> Generally, when a bilateral contract modification does not contain any reservation of claims, the modification constitutes an accord and satisfaction as to the subject matter of the modification and the contractor cannot later narrow the scope of the modification. . . . An accord and satisfaction has the effect of discharging an existing right. The accord occurs when one party to a contract agrees to give or to perform something other than what the second party claims the contract requires, and the second party agrees to accept the alternate thing or performance in satisfaction of the claim. The satisfaction occurs when the parties perform their agreement. . . . The essential elements of an accord and satisfaction are competent parties, proper subject matter, consideration, and a meeting of the minds.

Trataros Construction, Inc. v. General Services Administration, GSBCA 15344, 03-1 BCA ¶ 32,251, at 159,471 (citations omitted); accord Washington Development Group; 2160 Partners v. General Services Administration, GSBCA 15973, 03-2 BCA ¶ 32,269; see also Precision Standard, Inc., ASBCA 54027, 03-2 BCA ¶ 32,265 (accord and satisfaction requires mutual agreement between the parties with the intention clearly stated and known to the contractor); Trataros Construction, Inc. v. General Services Administration, GSBCA 15344, 02-2 BCA ¶ 31,910; Roxco, Ltd. v. Department of the Treasury, GSBCA 14430-TD, 01-2 BCA ¶ 31,465, aff'd, 36 Fed. Appx. 453 (Fed. Cir. 2002) (table).

Corning argues that the release language must be read in the context of the entire modification, which incorporated by reference both the Corning proposal and a statement of work. According to Corning, its proposal incorporated Prospect's proposal, which specifically qualified the estimate, noting that it was predicated on the assumption that conditions elsewhere on the roof would be comparable to those on the south side of wing D. Corning thus maintains that neither it nor Prospect intended to release the right to seek further compensation should conditions elsewhere be worse than those encountered initially.

On the record before the Board at present, BEP cannot prevail as a matter of law. To do so it would have to show that there is no genuine issue as to any material fact. As we noted in Trataros:

> 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).

02-2 BCA at 157,638. Here there is a genuine issue as to whether the release in modification 004 included the work for which Corning now seeks additional payment. Corning has submitted an affidavit, executed by its president, stating that appellant did not intend to release any claims based on conditions that differed from those encountered on the south side of wing D. This, together with the language of the Prospect proposal which was attached to Corning's equitable adjustment request, suffices to establish a genuine issue of material fact as to whether the meeting of the minds that BEP posits occurred.

Decision

Respondent's motion for summary relief is **DENIED**.

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CATHERINE B. HYATT
Board Judge

I concur:

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STEPHEN M. DANIELS
Board Judge