



UNITED STATES
CIVILIAN BOARD OF CONTRACT APPEALS

MOTION FOR SUMMARY RELIEF DENIED: March 29, 2007

CBCA 469

P.J. DICK, INCORPORATED,

Appellant,

v.

GENERAL SERVICES ADMINISTRATION,

Respondent.

John C. Person of Person & Craver LLP, Washington, DC, counsel for Appellant.

Timothy C. Tozer, Office of Regional Counsel, General Services Administration, Washington, DC, counsel for Respondent.

Before Board Judges **BORWICK**, **DeGRAFF**, and **GOODMAN**.

GOODMAN, Board Judge.

Appellant, P.J. Dick, Incorporated, was awarded a firm, fixed price contract by the General Services Administration (GSA or respondent) to construct a facility for the National Oceanic & Atmospheric Administration's National Environmental Satellite Data and Information Services in Suitland, Maryland. Appellant filed a claim alleging that it incurred additional costs in the amount of \$197,140 performing the structural concrete work on the project. Respondent's contracting officer issued a decision dated May 10, 2006, denying

the claim from which appellant appealed.¹ Respondent has filed a motion for summary relief. As there are issues of material fact in dispute, we deny appellant's request to defer ruling on the motion and deny respondent's motion.²

Background

Respondent acknowledges that appellant incurred additional costs as the result of GSA's late issuance of a notice to proceed (NTP) to appellant, which thereby resulted in appellant's concrete subcontractor pouring concrete three months later than planned, during the winter and summer months. Respondent's Memorandum in Support of Motion for Summary Relief (Respondent's Memorandum) at 1. Respondent further acknowledges that as the result of this shift in schedule, appellant incurred additional costs. *Id.* at 2. After this delay occurred, the parties entered into four bilateral contract modifications (the four modifications) -- PA03, PS07, PS10, and PS11. According to respondent, the four modifications compensated appellant for all costs that arose from the conditions encountered as the result of performing the concrete work three months later than planned - unusually wet weather,³ expanded plumbing work, repair to the mud mat caused by expanded plumbing work, dewatering of the elevated water table, and supersaturated silt above subgrade. *Id.*

¹ This case was docketed at the General Services Administration Board of Contract Appeals (GSBCA) as GSBCA 16941. On January 6, 2007, pursuant to section 847 of the National Defense Authorization Act for Fiscal Year 2006, Pub. L. No. 109-163, 119 Stat. 3391, the GSBCA was terminated and its cases, personnel, and other resources were transferred to the newly-established Civilian Board of Contract Appeals (CBCA). This case was docketed by the CBCA as CBCA 469. The holdings of the GSBCA and other predecessor boards of the CBCA are binding on this Board. *Business Management Research Associates, Inc. v. General Services Administration*, CBCA 464, 07-1 BCA ¶ 33,486. Until the rules of the CBCA are approved, the proceedings at this Board will be guided by the Federal Rules of Civil Procedure and specific orders of the Board.

² With its opposition to respondent's motion for summary relief, appellant requested that this Board defer ruling on the motion pending further discovery by appellant against respondent and third parties to obtain additional evidence to justify its opposition. Based on the information submitted with appellant's opposition, appellant has met its burden to demonstrate the existence of issues of material fact in dispute.

³ Respondent emphasizes that the basis of the modification for "unusually severe weather" is redundant of the subject matter of the claim at issue, appellant's "cold and hot weather concreting claim." Respondent's Memorandum at 8.

Modification PA03 contained the following language: “This change includes all direct costs, indirect and impact costs related to this change.” Appeal File, Exhibit 3. Modifications PS07, *id.*, Exhibit 6; PS10⁴; and PS 11, *id.*, Exhibit 8, contained the following language: “Settlement of this claim includes all costs, direct, indirect, impact and general conditions associated with this change order.” Respondent maintains that this language in the four modifications is clear and unambiguous and that the four modifications serve as accords and satisfactions of all costs incurred as the result of the delay in issuing the NTP. Respondent’s Memorandum at 3-9.

Discussion

Summary relief is appropriate 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). A fact is material if it will affect our decision, and an issue is genuine if enough evidence exists so the fact could reasonably be decided in favor of the non-movant at a hearing. *John A. Glasure v. General Services Administration*, GSBICA 16046, 03-2 BCA ¶ 32,284, at 159,746 (citing *Celotex Corp. v. Matsushita Electric Industrial Co. v. Zenith Radio Corp.*, 475 U.S. 574 (1986)).

Respondent moves for summary relief on the basis that all costs incurred as the result of the late issuance of the NTP, including those asserted by appellant in the claim which is the subject of this appeal, have been paid or settled by the four modifications. Appellant opposes the motion on several grounds. First, appellant contends that the subject matter of the claim at issue in this appeal, which it refers to as appellant’s “cold and hot weather concreting claim,” was never considered by the parties during the negotiations of the four modifications, was therefore not encompassed within the subject matter of the modifications, and the modifications therefore did not serve as accords and satisfactions of this claim. Appellant’s Opposition to Respondent’s Motion for Summary Relief (Appellant’s Opposition) at 2-5. To factually support this allegation, appellant notes that its “cold and hot weather concreting claim” was submitted to GSA on January 9, 2004, with a separate tracking number (RCO 15) which differed from the tracking number assigned to the other claims which ultimately became the subject of the four modifications.⁵ *Id.* at 6.

⁴ Respondent’s Memorandum, Exhibit 9. (Modification PS10 has not been submitted by the parties as an exhibit in the appeal file.)

⁵ Respondent does not dispute that the claim was assigned a tracking number which differed from those assigned to the claims that were the subject of the four modifications.

To support the factual allegation that the claim at issue was not the subject of the negotiations that led to the parties' agreeing to the four modifications, appellant submits with its opposition to respondent's motion a sworn declaration of Robert MacDaniels, president of Oncore, Construction L.L.C., appellant's concrete subcontractor. Mr. MacDaniels states, based upon his personal knowledge, that he was involved in all negotiations with GSA regarding the four modifications, and during those negotiations the claim which is the subject of this appeal was never "discussed or even mentioned, . . . or the factual bases underlying that claim." Declaration of Robert MacDaniels (Jan. 31, 2007) ¶ 3.

Appellant also opposes respondent's characterization of its claim as redundant of the basis for modification PA03 for unusually severe weather. Appellant notes that the modification was a non-compensable time extension of forty-two days and contends that the modification could not be considered an accord and satisfaction of a claim for a compensable delay as the result of Government-caused delay, and that GSA is "mixing and matching two entirely different weather-related concepts." Appellant's Opposition at 8.

Finally, appellant argues that the situation in the instant case is similar to that in *Dawson Construction Co.*, GSBCA 5611, et al., 83-1 BCA ¶ 16,160. Appellant's Opposition at 3. In *Dawson*, the Board held that a bilateral modification could not serve as an accord and satisfaction of a claim that had not been before the parties during the parties' negotiation.

Based upon the record in this appeal, we find that issues of material fact exist as to whether the claim which is the subject of this appeal was the subject of any of the four modifications. We reach this conclusion as to the existence of issues of material fact based upon 1) the fact that the claim which is the subject of this appeal was assigned a tracking number which differed from those that were assigned to the claims that were the subject of the four modifications and 2) the sworn declaration of appellant's subcontractor's president, based upon his personal knowledge and participation in the negotiations, that the claim which is the subject of this appeal and their factual bases were never "discussed or even mentioned" during the negotiations.⁶ See, e.g., *Parcel 49C Limited Partnership v. General Services Administration*, GSBCA 15932, 03-1 BCA ¶ 32,207 at 159,286 (the substance of the negotiations of a modification is material to the interpretation of the scope of that

⁶ This declaration, based upon personal knowledge and relevant to the subject matter, questions the credibility of the Government's position that the four modifications included the subject matter of the claim which is the subject of the appeal. As such, it is sufficient by itself to defeat the motion for summary relief. 10B Charles Alan Wright, Arthur R. Miller & Mary Kay Kane, *Federal Practice and Procedure* § 2738 (3d ed. 1998).

modification). We find this evidence sufficient to create genuine issues of material fact as to whether the subject matter of the four modifications included the claim at issue.

Decision

As genuine issues of material fact remain in dispute, respondent's **MOTION FOR SUMMARY RELIEF** is **DENIED**.

ALLAN H. GOODMAN
Board Judge

We concur:

ANTHONY S. BORWICK
Board Judge

MARTHA H. DEGRAFF
Board Judge