ARMED SERVICES BOARD OF CONTRACT APPEALS

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| Appeal of - | ) | |
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| Exceed Resources, Inc. | ) | ASBCA No. 61652 |
| | ) | |
| Under Contract No. NNJ15RA22B | ) | |

APPEARANCE FOR THE APPELLANT: Mr. Celsius Rebello
Director Government Services

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OPINION BY ADMINISTRATIVE JUDGE O'CONNELL ON THE GOVERNMENT'S MOTION FOR PARTIAL SUMARY JUDGMENT

Respondent, the National Aeronautics and Space Administration (NASA), moves for summary judgment on claims accruing on or before July 28, 2015, the date on which the parties signed a bilateral modification terminating the contract for the convenience of the government and in which appellant released its claims against NASA. We grant the motion.

STATEMENT OF FACTS FOR PURPOSES OF THE MOTION

This is a dispute that, at first blush, seems enormously complicated judging by the 82-page, single-spaced, complaint filed by appellant Exceed Resources, Inc. (Exceed). However, at its core, the dispute involves two issues: 1) whether Exceed can pursue a claim for about $2.5 million in breach of contract damages notwithstanding a bilateral contract modification terminating the contract in which the parties agreed that it would receive no money other than phase-in costs; and 2) whether Exceed can challenge the contracting officer's post-July 28, 2015, rating of its performance in the government's Contractor Performance Assessment Reporting System (CPARS). Only the former issue is before us in the pending motion.

The following facts are undisputed for purposes of the motion unless otherwise noted.

This appeal involves a five-year, indefinite-delivery, indefinite-quantity contract for secretarial and administrative support to NASA at hourly rates specified in the contract (R4, tab 1 at 1, 5, 7; app. opp'n at 1).

Exceed submitted a proposal and model contract to NASA on March 10, 2015. The proposal included three Standard Form (SF) 1449s (a form that serves as a solicitation, contract and order for Commercial Items) signed by Mr. Celsius Rebello for Exceed. The SF 1449s stated, among other things, that the contract included 193 pages. The model contract stated that the minimum contract value would be $750,000 and the maximum $73 million, and included NASA FAR Supp. Clause 1852.232-77, LIMITATION OF FUNDS (FIXED–PRICE CONTRACT) (MAR 1989). (App. supp. R4, tab 4 at 400,000-02, 400,023-24; app. opp'n at 16, 18-19) The model contract also contained FAR 52.212-4, CONTRACT TERMS AND CONDITIONS – COMMERCIAL ITEMS (SEPT 2013), which allows the government to terminate the contract at its convenience (app. supp. R4, tab 4 at 400,006).

The contracting officer (CO) signed the contract on June 2, 2015 and provided a copy of the first two pages (including SF 1449) to Exceed on June 22, 2015. When the contracting officer provided the SF 1449 she had signed to Exceed, she had made some changes to the form, including the insertion of a total award amount of $800,000 in box 26, and increasing the number of contract pages from 193 to 221 pages. (*Compare* R4, tab 1 at 1 and tab 4 at 1026, 1028)

In its filings, Exceed places a great deal of emphasis on the CO's changes to the SF 1449; but there is no evidence that Exceed expressed any objections to these changes and it apparently began performance upon the contract as executed by the CO.

The contract provided for a phase-in period for which Exceed would be paid $47,013.38 (R4, tab 1 at 5). During this period, a dispute arose between the parties involving the number of "productive hours" that the contract employees would work and the application of health and welfare benefits to those hours, as described in a letter from Mr. Rebello to NASA on July 26, 2015. He ended this letter by requesting relief under FAR 14.407-4. (R4, tab 4 at 1220-22; app. opp'n at 13) FAR 14.407-4 governs mistakes in bids that are discovered after award.

On July 27, 2015, the CO informed Mr. Rebello that she would not alter the contract terms and requested that Exceed confirm that it was willing and able to perform the contract (R4, tab 4 at 1223; app. opp'n at 13). Mr. Rebello wrote back

later that day as follows:

> 1. Exceed Resources, Inc. is willing and able to perform the contract in accordance with all applicable terms and conditions, including the Changes clause and Disputes clause. Exceed believes that it is entitled to an equitable adjustment, based upon certain mistakes, and the Government's actions and inactions to date. As such, Exceed will file the requisite Claim for bid mistake, equitable adjustment, and if necessary, rescission of the contract . . .
>
> 2. **Exceed would also be willing to entertain either a minimum amount for a termination for convenience or a no-cost termination for convenience.**

(*Id.* at 1224 (emphasis added)) Exceed does not challenge NASA's assertion that it sent this letter and, in fact, it referenced the letter in its claim (R4, tab 4 at 862).

The CO wrote back to Exceed on July 28, 2015, stating in relevant part, "NASA accepts your offer for a no-cost termination for convenience." She also stated that NASA would pay the full amount of the phase-in costs. (R4, tab 4 at 922; *see* Rebello decl. (Dec. 14, 2018) at ¶ 12)

Mr. Rebello provides a curious version of these facts in a declaration submitted to the Board. He does not mention that a no-cost termination for convenience had been his idea. But according to him, when the CO specified in her July 28 letter that NASA would pay the phase-in costs upon execution of the modification, this was actually a threat that NASA would not pay unless Exceed executed the modification. (Rebello decl. (Dec. 14, 2018) at ¶ 12)

Later that day, the parties signed a contract modification, terminating the contract for the government's convenience. The modification provided in relevant part: "[t]his supplemental agreement terminates the contract in its entirety, with the exception of Phase-In, and reflects a no-cost settlement agreement . . . ." (R4, tab 4 at 920-21)

The modification contained the following release language:

> The Contractor unconditionally waives any charges against the Government because of the termination of the contract and, except as set forth below, releases the Government from all obligations under the contract due to its

termination. The Government agrees that all obligations under the contract are concluded.

- Phase-In price will be paid in accordance with Section 1.5 of the contract

(R4, tab 4 at 921)

More than two years later, on September 6, 2017, Exceed submitted a 72-page, single-spaced, claim to the CO, seeking, among other things, $2,576,370 in breach of contract damages. The largest portion of this amount is $2,490,251 in lost profits over the five-year term of the contract, with the balance related to efforts by Exceed and its attorneys to contest the CPARS rating. Exceed admitted in the claim that NASA paid the full $47,013.38 for phase-in costs. (R4, tab 4 at 842, 869, 911-12)

The CO denied the claim on March 16, 2018 (R4, tab 5). Exceed filed a timely appeal on June 15, 2018.

## DECISION

Summary judgment is appropriate when there is no genuine issue of material fact and the moving party is entitled to judgment as a matter of law. *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 247-48 (1986). The party opposing summary judgment must show an evidentiary conflict on the record; mere denials or conclusory statements are not sufficient to avoid entry of judgment. *Mingus Constructors, Inc. v. United States*, 812 F.2d 1387, 1390-91 (Fed. Cir. 1987).

*Lost Profits after Termination for Convenience*

To begin, it is worth considering the steep hill Exceed would have to climb to obtain lost profits even if it had not signed a release. This is because termination for convenience clauses allow the government to end a contract without paying common law damages such as anticipatory profits. *Nexagen Networks, Inc.*, ASBCA No. 60641, 19-1 BCA ¶ 37,258 at 181,328 (citing *SWR, Inc.*, ASBCA No. 56708, 15-1 BCA ¶ 35,832 at 175,222; *William Green Constr. Co. v. United States*, 477 F.2d 930, 936 (Ct. Cl. 1973)). A termination for convenience "is conclusive unless the contractor can show a clear abuse of discretion or that the government acted in bad faith." *Id.* (citing *T&M Distributors, Inc. v. United States*, 185 F.3d 1279, 1283 (Fed. Cir. 1999). "To prove bad faith, there must be clear and convincing (or 'well-nigh irrefragable') evidence of some specific intent to harm the contractor." *Id.* (citing *Am-Pro Protective Agency, Inc. v. United States*, 281 F.3d 1234, 1239-40 (Fed. Cir. 2002)). "Due to the heavy burden of proof, contractors have rarely been successful in demonstrating the government's bad faith." *Id.* (citing *Krygoski Constr. Co. v. United States*, 94 F.3d

1537, 1541 (Fed. Cir. 1996)). One prominent commentator has described a bad faith termination for convenience as "almost impossible to prove." 33 Nash & Cibinic Rep. NL ¶ 32, *Contract Disputes Act Claims: Minimal Requirement*, (June 2019).

*The Release*

Exceed's burden only grows because it signed a release. A release is contractual in nature and is interpreted in the same manner as other contract terms. If the terms of the release are plain and unambiguous they must be given their plain and ordinary meaning. *Bell BCI Co. v. United States*, 570 F.3d 1337, 1341 (Fed. Cir. 2009); *J.C. Equipment Corp. v. England*, 360 F.3d 1311, 1316 (Fed. Cir. 2004). Claims may be considered after the execution of a release only in special and limited circumstances, such as where the release contains a specific exception for the claim or the release was entered under economic duress. *Mingus*, 812 F.2d at 1395 (citing *J.G. Watts Construction Co. v. United States*, 161 Ct. Cl. 801, 806-07 (1963)). Exceptions to releases are construed narrowly because the purpose of a release is to put an end to the matter in dispute. *Id.* at 1394.

We hold that the release in the bilateral modification is plain and unambiguous. It contains no exception that allows Exceed to pursue a claim for lost profits. Nor is there anything in the record indicating that Exceed proposed an exception for lost profits. Exceed "unconditionally waive[d] any charges against the Government" and "release[d] the Government from all obligations under the contract..." Exceed does not contend that the release states otherwise.

*Exceed's Arguments of Bad Faith and Duress Rest Upon a Misunderstanding of the Contract*

The Board has reviewed Exceed's complaint, its opposition to NASA's motion for summary judgment, motion to file a sur-reply, the sur-reply and multiple declarations of Celsius Rebello.[1] It is difficult to characterize the meandering arguments that Exceed makes, but they basically fall into three categories: 1) because of the changes that the contracting officer made to the SF 1449, there were multiple versions of the contract; 2) economic duress; and 3) Exceed's position concerning the disputes pending before the parties executed the termination modification were correct.

[1] The Rebello declarations reviewed by the Board are those dated May 26, 2017 and March 15, 2018 that are attached to the complaint, and those submitted after NASA moved for summary judgment, which include two declarations dated October 14, 2018, and one each on October 15, 2018, and December 14, 2018.

As described above, the SF 1449 signed by the CO was somewhat different than that signed by Exceed when it submitted the model contract. While we agree with Exceed that it would be problematic if the CO included new or different terms in the contract without its knowledge or agreement, Exceed has not identified any alteration that changed the nature of the bargain.[2] Exceed does not present the changes to the SF 1449 as facts that, when considered in connection with other facts, are meaningful as a matter of law. With one exception, Exceed presents these facts as meaningful in and of themselves. Thus, it seems to contend that changes, such as the increase in the number of contract pages (a fact Exceed clearly knew about before signing the termination), in and of themselves give Exceed the right to avoid the release in the termination agreement. However, without a showing that the contracting officer actually changed the terms of the bargain – and Exceed has not identified any substantive changes, with the exception of the (contractually necessary) completion of the Total Award Amount discussed immediately below – we do not see the point of Exceed's argument.

The one change for which Exceed presents any kind of argument is the contracting officer's insertion of $800,000 in the Total Award Amount box of the SF 1449, which had been blank in the ones it submitted with its bid. It does not pause to consider, however, that the CO had to insert some number here and that the amount is, on its face, proper because it falls within the $750,000 to $73 million range identified in the model contract. Exceed relies upon this difference to segue into a duress argument.

While difficult to understand, Exceed's argument seems to be that the CO's insertion of "$800,000" under the heading "Total Award Amount" on page 1 of the SF 1449, was a ploy that obligated Exceed to perform the maximum amount of work for an amount that was almost negligible. It contends that it would have incurred a loss of over $45 million and as a result it had no choice but to sign the modification[3] (app. opp'n at 24-29).

As described above, the model contract contained the Limitation of Funds (LOF) clause. This standard clause has blank spaces in which the CO can insert an

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[2] For example, the CO stated in her final decision that the reason for the increase in the number of pages was due to her inclusion of documents identified as attachments in the model contract (R4, tab 5 at 1697).

[3] The Board believes that there are reasons for doubting the sincerity of this argument. Beyond the inherent implausibility of the contention, the record contains an email from the CO to Exceed on June 22, 2015, in which she explained that the $800,000 simply represented the phase-in costs plus the first month of work (R4, tab 2 at 313). Nevertheless, we will consider Exceed's argument.

amount for incremental funding and the date through which the funding applies. NASA FAR Supp. 1852.232-77(a). In this case, the CO adapted it so that it stated: "Of the total price of items through August 29, 2015, the sum of $800,000.00 is presently available for payment and allotted to this contract." (R4, tab 1 at 30)

Despite Exceed's contentions, the clause does not allow a CO to force an unwitting contractor to perform 98% of the contract work for free by inserting a minimal number. While not a model of succinct wording, the clause states:

> The Contractor agrees to perform or have performed work on the items specified in paragraph (a) of this clause up to the point at which, if this contract is terminated pursuant to the Termination for Convenience of the Government clause of this contract, the total amount payable by the Government . . . would, in the exercise of reasonable judgment by the Contractor, approximate the total amount at the time allotted to the contract. The Contractor is not obligated to continue performance of the work beyond that point.

NASA FAR Supp. 1852.232-77(b).

Precedent from cases involving similar LOF clauses unsurprisingly confirm that contractors cannot be forced to work for free beyond the amount allotted to the contract. *Textron Defense Systems v. Widnall*, 143 F.3d 1465, 1469 (Fed. Cir. 1998) (the "LOF clause puts a duty on the contractor to contain its costs below the amount allotted to the contract . . ."); *American Electronic Laboratories, Inc. v. United States*, 774 F.2d 1110, 1111 (Fed. Cir. 1985) ("The contract included the LOF clause which provided that . . . (3) absent the CO's written notice, AEL was not obligated to continue performance under the contract or otherwise to incur costs in excess of the amount allotted to the contract.")

Exceed contends that it did not have the completed version of the LOF clause until after the termination (app. opp'n at 24). But, in addition to the email referenced in footnote 3 above, Exceed would have known from reading the LOF clause that it could not be forced to work beyond the amount allotted and, per the SF 1449 signed by the CO, that this amount was $800,000. Exceed has identified no other contract language that allowed the contracting officer to force it to perform the contract almost entirely for free.

*Exceed Has Not Shown That the Duress Issue Merits a Hearing*

"To render a contract unenforceable for duress, a party must establish (1) that it involuntarily accepted the other party's terms[;] (2) that circumstances permitted no other alternative[;] and (3) that such circumstances were the result of the other party's coercive acts." *N. Star Steel Co. v. United States*, 477 F.3d 1324, 1334 (Fed. Cir. 2007) (citation omitted). "Economic pressure and 'even the threat of considerable financial loss' are not duress." *Johnson, Drake & Piper, Inc. v. United States*, 531 F.2d 1037, 1042 (Ct. Cl. 1976) (quoting *International Tel. & Tel. Corp. v. United States*, 509 F.2d 541, 549, n. 11 (Ct. Cl. 1975)); *see J.C. Equipment*, 360 F.3d at 1316 (contractor's contention that it signed release under duress "rings hollow" where the modifications involved payment of additional money).

Under the test articulated in *North Star Steel*, Exceed must show that it involuntarily accepted NASA's terms. Exceed cannot meet this requirement because the undisputed facts show that it proposed the no cost termination, not NASA.

The Federal Circuit's decision in *Am-Pro Protective Agency* involved facts comparable to this appeal and is instructive. In that case, the contractor executed a release and then years later contended in an uncorroborated affidavit that the contracting officer used threats to force it to sign. The Federal Circuit affirmed the entry of summary judgment in favor of the government, despite an affidavit from the contractor stating that the CO had obtained the release through threats. While this would have been enough in an ordinary case to create a dispute of facts, the court held it was not in that situation due to the high standard of proof necessary to show that the CO acted in bad faith, the uncorroborated nature of an allegation made six years later, the inherent implausibility of the allegations, and the lack of contemporaneous documents recording the threat. *Am-Pro*, 281 F.3d at 1238-39, 1241-43.

Similar considerations are present here. While it is true that Mr. Rebello has submitted a declaration in which he testified that the contracting officer threatened to withhold the payment for phase-in costs unless he signed the termination, the various deficiencies in Exceed's presentation compel the conclusion that no rational fact finder could believe the representations it has made to the Board.

First, Mr. Rebello neglects to mention that he was the one who proposed a no cost termination. This leads to the rather obvious question as to why the contracting officer would have felt it necessary to make a threat. Moreover, because the undisputed facts show that the CO responded to Exceed's no cost termination proposal by stating, in essence, 'OK, but we'll pay you over $47,000', we do not believe that any rational business person would have construed this as a threat. *Am-Pro*, 281 F.3d at 1242 (rejecting as implausible contractor's perception of CO's explanation as a threat).

Second, the more than three year gap between the events in question and Mr. Rebello's declaration is also reason for doubting the allegation. While not as long as the six-year gap in *Am-Pro*, 281 F.3d at 1242, it is almost exactly the same as the gap found to be a "telling indication that no duress was practiced" in *Johnson, Drake & Piper*, 531 F.2d at 1043. Further, we also observe that in Exceed's 72-page September 2017 claim it failed to allege that the CO forced it to sign the termination by threatening to withhold payment of phase-in costs, nor did it raise this in either of the two affidavits Mr. Rebello submitted in support of the claim (R4, tab 4 at 842-915).

Third, as we have already explained, the CO's alleged effort to force Exceed to perform all of the contract work for $800,000 is refuted by the LOF clause and has no support in the language of the contract. No rational business person could have read the contract in this manner.

In summary, the Board finds that Exceed's contention that the contracting officer obtained Mr. Rebello's signature on the termination modification through duress to be inherently improbable. We find that it lacks support in contemporaneous documents, and is contradicted by the contract and the correspondence leading to the termination. Accordingly, Exceed has not created a genuine factual issue of duress for trial.

*Exceed is not Entitled to Relitigate its Pre-Release Position*

Exceed spends considerable effort going through all of the issues that were pending between the parties prior to the termination. We have no doubt that Exceed may have been under a great deal of financial pressure, but it is also undisputed that it asked for relief from the CO for a mistake in bid on July 26, 2015, and that it cited its own mistakes in the July 27, 2015, letter in which it proposed the termination for convenience. But as we have already explained, unless Exceed can avoid the effect of the release by proving duress or that the claim at issue was excepted from the release, the fact that there may also have been some validity to its position is irrelevant. As the Court of Claims explained in *Johnson, Drake & Piper*: "[i]t does not follow that because a claim is by hindsight seen to be even entirely meritorious, an agreement to compromise it was in any wise improper. A party who settles his claim may not avoid it by proof that his claim was just." *Johnson, Drake & Piper*, 531 F.2d at 1044 (Ct. Cl. 1976). Accordingly, Exceed is not entitled to a hearing on these issues.

## CONCLUSION

We grant NASA's motion for partial summary judgment and enter judgement against Exceed on the portion of its appeal related to its lost profits, both because there is an insufficient factual basis to find that termination of the contract was done in bad faith, which is a necessary predicate for such a cause of action, and because Exceed executed a valid release, which would preclude such a recovery in any event.[4]

Dated: June 11, 2020

MICHAEL N. O'CONNELL
Administrative Judge
Armed Services Board
of Contract Appeals

I concur

RICHAED SHACKLEFORD
Administrative Judge
Acting Chairman
Armed Services Board
of Contract Appeals

I concur

J. REID PROUTY
Administrative Judge
Vice Chairman
Armed Services Board
of Contract Appeals

I certify that the foregoing is a true copy of the Order of Dismissal of the Armed Services Board of Contract Appeals in ASBCA No. 61652, Appeal of Exceed Resources, Inc., rendered in conformance with the Board's Charter.

Dated: June 12, 2020

PAULLA K. GATES-LEWIS
Recorder, Armed Services
Board of Contract Appeals

[4] Exceed's motion to file a sur-reply is granted. Exceed's motion for sanctions on government counsel for including the contract at tab 1 of the Rule 4 file is denied.