BE CAREFUL WHAT YOU SIGN

Now comes two cases decided on the same day by the Armed Services Board of Contract Appeals that demonstrate how important it is for a contractor to understand what he/she signs. *Arab Shah Const. Co.,* ASBCA No. 60813, September 7, 2017 and *Central Texas Expr. Metalwork LLC,* ASBCA No. 61109, September 7, 2017. In both cases, the contractors signed away rights to potential claims they could have reserved.

Case 1: In *Arab Shah,* the Air Force contract was for construction of two metal pole barns in Afghanistan. Before being built, one of the pole barns was no longer needed and the Contracting Officer ("CO") emailed Arab Shah stating that he wanted the barn built at another location, and would modify the contract, if the contractor could build it for the same price. Arab Shah responded by email that it would cost more money because it would have to move its team and materials to the new location. On the same day as these two emails, the Air Force and Arab Shah entered into (signed) a bilateral modification that stated:

- Change the location in which the work would be performed [from one location to another] because the original location no longer required the pole barn, but the second location required it
- All other terms and conditions remain unchanged

Arab Shah built both pole barns, and invoiced for the $62,000 contract amount, which the Air Force paid. But Arab Shah submitted a claim seeking $19,000 for the cost of moving the materials, and provided a "screenshot" of an email from the CO which said "Sir I will pay your transportation and escort cost. Send me your bill". No amount was stated. The Air Force provided a signed declaration from the CO, in which he stated that he never sent this email and giving compelling reasons why he could not have sent it. The Air Force denied the claim, and Arab Shah appealed to the Board.

First, the Board found the "screenshot" not credible without any other evidence, and gave it no weight. Then the Board considered the communications, noting that the parties had signed a modification that was consistent with the CO's statement of building two pole barns (with one at a different location) "for the same price." There simply was no reason for the Board not to enforce the modification. Although it appeared that Arab Shah made a mistake in signing the modification without negotiating a price increase, it was a *unilateral mistake* that was not known to the Air Force when it signed the modification. "The binding effect of [the modification] cannot be avoided since it arises from a unilateral mistake where the AF neither knew of the mistake nor had reason to know it." Finally, the Changes clause in the contract states that equitable adjustments will not be allowed after final payment, and the Board noted that this is true even if a release has not been signed. Arab Shah got nothing for its claim.

Case 2: In *Central Texas* both the prime (Central Texas) and its subcontractor (in a sponsored claim) submitted a request for equitable adjustment ("REA") for alleged delays and changes in a

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heating, ventilating and air conditioning contract. The total request was for $643,842, of which $345,691 was the subcontractor's sponsored claim.

The Air Force met with Central Texas to negotiate the REA. In that negotiation, the Air Force agreed to forego a credit that it sought, and Central Texas agreed to forego its pending REA. The parties agreed that the Air Force would make a final payment of $395,728, the outstanding contract balance, and Central Texas and its subcontractor agreed to provide a final invoice and release of claims. There was no evidence that Central Texas intended to except (hold back) the sponsored claim from the settlement and release, or that the Air Force knew of any such intent. There is nothing in the release language that excepted or reserved Central Texas's right to pursue the sponsored claim. Central Texas signed the release, as did the Air Force.

When the Defense Department attempted to pay the $395,728 to Central Texas, the company refused to accept the payment, by freezing its account. Central Texas then submitted a new certified claim for $643,842, including its sponsored subcontractor's claim.

The Board noted that Central Texas agreed to release its claim, and that a release followed by final payment to a contractor generally bars recovery of the contractor's claims under the contract except for those excepted in the release. The Board further noted that the contractor's refusal to accept payment by the Government does not excuse the contractor from meeting its obligations in the release—the contractor (and the government) has a duty of good faith and fair dealing, and the contractor must accept the agreed upon amount for its claims and release the remainder of the claims, per the release language.

TAKEAWAY No. 1: Be careful what you sign!! This is particularly true in the case of any release, or release language that might be included in a contract modification. The contractor has every right to "except" certain pending claims, by including language (e.g. "This release do not cover the subcontractor's claim of $345,691") that reserves some portion of the claim for a future discussion/settlement. But, when you sign a release concerning a specific set of facts and circumstances surrounding a claim, all of those facts and circumstances are included in the release unless you specifically exclude something. When you read these two cases, you must wonder if either of the contractors actually read the language of their release before they signed it.

TAKEAWAY No. 2: Don't be forced to sign a release to get the last dime of your payments. Many clauses commonly included in government contracts, including those for commercial items, require the execution of a release before final payment is made on the contract. Even FAR 52.212-4, "Contract Terms and Conditions - Commercial Items" includes the following:

> **(7)** ***Release of claim***s. The Contractor, and each assignee under an assignment entered into under this contract and in effect at the time of final payment under this contract, shall execute and deliver, at the time of and as a condition precedent to final payment under this contract, a release discharging the Government, its officers, agents, and employees of and from all liabilities, obligations, and claims arising out of or under this contract, subject only to the following exceptions.
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> > **(i)** Specified claims in stated amounts, or in estimated amounts if the amounts are not susceptible to exact statement by the Contractor.

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> **(ii)** Claims, together with reasonable incidental expenses, based upon the liabilities of the Contractor to third parties arising out of performing this contract, that are not known to the Contractor on the date of the execution of the release, and of which the Contractor gives notice in writing to the Contracting Officer not more than 6 years after the date of the release or the date of any notice to the Contractor that the Government is prepared to make final payment, whichever is earlier.
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> **(iii)** Claims for reimbursement of costs (other than expenses of the Contractor by reason of its indemnification of the Government against patent liability), including reasonable incidental expenses, incurred by the Contractor under the terms of this contract relating to patents.

FAR 52.212-4(i)(7). Similar requirements for execution of a release prior to and as a condition precedent to final payment are included in FAR 52.232-5, Payments under Fixed-Price Construction Contracts, FAR 52.232-7, Payments under Time and Materials and Labor Hour Contracts and FAR 52.232-10, Payments Under Fixed Price Architect Engineer Contracts.

Contractors should exercise extreme caution prior to signing final payment releases. Either include an exception for any expected claim, or do not invoice the last 1 percent of the amount due, in order to avoid signing a release.

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