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DECISION



**THE COMPTROLLER GENERAL
OF THE UNITED STATES
WASHINGTON, D. C. 20548**

FILE: B-191140

DATE: April 5, 1978

MATTER OF: DNH Development Corporation

DIGEST:

Contractor, having mistakenly failed to reserve claims against the Government in general release, may nevertheless have claims considered on merits since contracting officer knew of contractor's active interest in larger claims and prior to payment was informed of error by contractor.

The United States Coast Guard, on January 30, 1978, requested an advance decision regarding the validity of a release executed by DNH Development Corporation (DNH), under contract No. SB0228(a)-76-C-090 (Contract 090). By letter dated February 8, 1978, DNH elected to submit the matter to our Office for decision in lieu of pursuing an appeal to the board of contract appeals under the disputes procedure. The material facts are not disputed.

The Small Business Administration (SBA) entered into Contract No. DDT-CG17-2249 with the Coast Guard on March 19, 1976, under the provisions of section 8(a) of the Small Business Act, 15 U.S.C. § 637(a) (1970). DNH was awarded Contract 090 by the SBA on April 1, 1976, pursuant to the "8(a) subcontracting program," a program designed to assist small business concerns owned and controlled by socially or economically disadvantaged persons. The contract was for the construction of one duplex family house and one fourplex family house at Tok, Alaska, for a total contract price of \$522,065. Construction was to begin within 60 days of receipt of a notice to proceed and work was to be completed

by September 30, 1976. The contract was modified on September 2, 1976 to include the construction of Bachelor Enlisted Quarters at an amended total price of \$724,475.

On September 13, 1977, DNH filed a claim for \$560,125 against the SBA and the Coast Guard. The basis of the claim was that the SBA failed to advise and assist the contractor in meeting production schedules and overcoming construction problems during performance, contrary to the nature and purpose of the "8(a) program." DNH's claim was also based on additional work necessitated by changes and defective specifications, as well as the alleged failure of the Coast Guard to have sufficient field inspectors available during construction. Included with the claim was a detailed cost breakdown of the various portions of the claim.

The contracting agency retained \$3,749, or .005 percent of the \$724,475 contract price, pending the completion by the contractor of several minor repairs to the family houses. On October 10, 1977, DNH wrote the following letter to the contracting officer:

"Please be advised that the necessary repairs have been completed to correct the water seepage problem at the duplex in Tok.

"At this time we respectfully request the Coast Guard to remit the remainder of funds being retained."

The reason for this request was that the president of DNH believed that the \$3,749 would "give DNH a little more money." By letter dated October 31, 1977, the contracting officer, who was fully aware of the extensive claim filed by DNH, replied as follows:

"Reference is made to letter dated 10 October 1977.

"The letter's second paragraph requests the release of the remaining funds left

in the contract. In order that the remaining funds can be released I am forwarding a Contractor's Release form for your signature. Please execute as indicated and return.

"In the event that the release is not returned I will have to retain funds in order to keep the contract open on the Government books."

On November 17, 1977, DNH's president executed the release accompanying the contracting officer's letter. The release provided as follows:

"In consideration of the sum stated above, which has been paid or is to be paid to the Contractor, upon payment of the said sum by the UNITED STATES OF AMERICA (hereinafter called the Government), does remise, release, and discharge the Government, its officers, agents, and employees, of and from all liabilities, obligations, claims, and demands whatsoever under or arising from the said contract, except:"

According to DNH's president, he mistakenly and inadvertently failed to except or reserve the pending claims of DNH from the general terms of the release. On November 22, 1977, upon being informed of the mistake, DNH immediately sent a telegram to the contracting officer to "give notice that DNH does not waive rights to claims against this project." A United States Treasury check in the amount of \$3,749 was issued and mailed to the contractor on December 1, 1977. The check has not been negotiated.

In 46 Comp. Gen. 414 (1966), we held, consistent with court decisions, that a general release executed without reserving claims against the Government was a valid defense to a contractor's claim for unliquidated damages. See, e.g., United States v. Wm. Cramp & Sons Co., 206 U.S. 118 (1907); J. G. Watt's Construction Company v. United States, 161 Ct. Cl. 801 (1963). However, we also found in that case that the attendant circumstances did not place the contracting officer on notice of possible error. We reach a different conclusion here.

The contracting officer know of the recently filed claim of DNH for \$560,125 and that it was pending and under active consideration. The contracting officer sent the letter with the release at the request of DNH solely for the purpose of allowing payment of the retained amount of \$3,749 to be made after the necessary minor repairs had been completed. Additionally, in this instance, unlike the situation in 46 Comp. Gen. 414, supra, the contracting officer was aware of DNH's active interest in its larger claim when the erroneous release was received. Therefore, the contracting officer had no reasonable basis for reliance upon the mistakenly signed release since, in view of the attendant circumstances, he was on notice of the mistake. See, e.g., Colonial Navigation Company v. United States, 149 Ct. Cl. 242 (1960). Further, by its very terms, the release was not to become effective until payment by the Government of the amounts withheld. Prior to such payment, DNH had expressly notified the contracting officer by telegram of its error. We believe that where the contracting officer has been actually notified of a mistake in the execution of a release before final payment effectuating the release has been made, subsequent payment with such knowledge by the contracting officer does not extinguish the Government's liability under the contract.

Accordingly, the release does not preclude consideration of DNH's claim on the merits. However, since the execution of a valid and binding release without claims excepted on the face of the release was the consideration for the issuance of the December 1, 1977 check, DNH should return that check to the Government. This decision does not preclude the negotiation of a new release by the parties.

R. F. Keller
Deputy Comptroller General
of the United States