THE GEILER COMPANY

CONTRACT NO. V539C-654 VABCA-5137R

VA MEDICAL CENTER
CINCINNATI, OHIO

William G. Geisen, ***Esq***., Graydon, Head & Ritchey, Florence, Kentucky, for the Appellant.

Patrick J. LaMoure, Esq., Trial Attorney; ***Charlma O. Jones, Esq.,*** Deputy Assistant General Counsel; and ***Phillipa L. Anderson, Esq.,*** Assistant General Counsel, Washington, D.C., for the Department of Veterans Affairs.

OPINION BY ADMINISTRATIVE JUDGE THOMAS

Appellant has filed a timely Motion for Reconsideration of only that portion of our decision finding that the Release of Claims barred Appellant from recovering costs of $10,233 for repairing Failure Number 1. The decision is reported at 98-1 BCA ¶ 29,279 and familiarity with the Board's findings is presumed. The VA has filed a brief in opposition to the Appellant's motion.

Appellant points out that Failure Number 1 occurred in May 1994 and that, at the VA's request, Appellant quickly performed the necessary repairs, for which it did not then seek compensation. By August 1994, the contract work was completed by Appellant, and accepted by the VA. Appellant executed a release containing no reservation of claims and final payment was made. There, it appears, the matter might have ended. However, subsequently, during the contract's warranty period, Failure Number 2 occurred, which the Appellant repaired under protest. In January 1995, Appellant submitted an invoice to the Government requesting payment for the cost of repairs for both Failure Number 1 and 2. Eventually, Failure Number 3 occurred during the warranty period, for which repairs were made by the Appellant and a claim filed with the VA.

The parties treated all three failures as having occurred during the warranty period. Indeed, the thrust of the VA's blanket defense to payment for any repairs was that the Contractor was liable for making the repairs under its warranty obligation. The release was never raised by the VA as a separate defense to the Appellant's claim in connection with Failure Number 1.

In our decision in this matter, we were unable to determine conclusively whether the failures were caused by the Appellant's installation or by the VA's design or operation of the system. Nevertheless, responsibility for the cost of repairs under the warranty was assigned by us to the VA because it had the burden of proof in the matter and had not met that burden. However, such burden extended only to Failure Numbers 2 and 3 because only those failures occurred during the warranty period. Failure No. 1 occurred earlier, during performance of the contract, and prior to acceptance, release and final payment. Thus, while we awarded Appellant compensation in connection with Failure Numbers 2

and 3, we denied compensation for Failure No. 1 as being barred by the release. It is that portion of our decision that Appellant asks us to reconsider.

Appellant asserts first that the release does not bar the claim in the instant case because the claim post-dated the release. Second, Appellant asserts that the bar of release is an affirmative defense that must be pleaded or is waived by the Government. Because the Government never raised the release as a defense, such defense was waived it argues and that the Board erred in relying on the release to bar the claim in connection with Failure Number 1.

Appellant seems to suggest that the release bars only CDA claims established prior to the execution of the release. Thus, Appellant would have us find that it is not the date the events occurred that gives rise to the claim but the date the actual claim is filed that determines what is released. Under this novel argument, Appellant could have filed an unlimited number of claims after signing the release and receiving final payment as long as it had not filed the claims prior to signing the release. We must reject such suggestion.

The rule for releases is that absent special vitiating circumstances, a general release bars claims based upon events occurring prior to the date of the release. ***H.L.C. & Associates Constr. Co. v. United States,*** 367 F.2d 586, 590 (Ct. Cl. 1966) and cases cited. No exception to this rule should be implied for a claim whose facts were well enough known for the maker of the release to frame a general description of it and request an explicit reservation. ***Adler Construction Co. v. United States,*** 423 F.2d 1362, 1364 (Ct. Cl. 1970), *cert. denied*, 400 U.S. 993, (1971); ***United States Rubber Co. v. United States,*** 160 F.Supp. 492, 495-96 (Ct. Cl. 1958); ***Inland Empire Builders, Inc. v. United States***, 424 F.2d 1370, 1375 (Ct. Cl. 1970).

Geiler knew the facts underlying Failure No. 1 when it signed the Release but argues that they did not realize their full impact or that they would become claims until 8 months later when their claim was filed. In ***Adler Construction Co***., *supra*, a contractor was permitted to list 13 exceptions to a general release. His later claims were held barred. His contention that he obtained sufficient information to frame the additional claim only in discovery proceedings was held not to excuse his failure to state his exceptions covering his present claims in general.

In ***United States Rubber Co.*, supra**, the court stated that if facts were available but not properly assimilated by plaintiff at the time of the termination agreement, plaintiff's failure to comprehend their significance in terms of recoverable expense does not of itself except them from the force of the release. The test is not the state of plaintiff's knowledge, but the availability of information which, properly digested, could reasonably be expected to acquaint plaintiff with the existence of a reimbursable cost. Geiler offers no excuse for its failure to seek to reserve the present claims from the release. Most prominent among the circumstances is that with knowledge of the facts constituting the present claims, Geiler nevertheless expressed full agreement to giving the Government a slate clean of all claims.

We find Geiler's first argument that Failure No 1 was not subject to the release to be without merit.

Appellant also argues that the Government never raised the Release as an affirmative defense and thus waived its right to do so. Appellant cites Rule 8(c) of the Federal Rules of Civil Procedure for the proposition that "release" is an affirmative defense that must be asserted by a party. While Appellant's position has considerable merit, were we to assume that the Appellant is correct and the Government did waive its right to assert the release and we were precluded from using it to deny Appellant compensation for Failure No. 1, Appellant will still not prevail.

Both Geiler and the VA tried and briefed this appeal as if all failures were covered by the warranty clause. However, Failure No. 1 occurred prior to final payment and acceptance. The contract contained the clause at FAR 52. 236- 7, Permits And Responsibilities**.** **(**NOV 1991) which states in pertinent part: "The Contractor shall also be responsible for all materials delivered and work performed until completion and acceptance of the entire work, except for any completed unit of work which may have been accepted under the contract." We recognize that the Government never raised the Permits and Responsibilities clause as a defense to Failure No. 1. Unlike its failure to raise the release as an affirmative defense however, the failure of the Government to raise the Permits And Responsibilities clause in defense presents no issue of waiver.

The law is clear and well-established that, when a contract includes the standard Permits And Responsibilities clause, the contractor assumes strict liability for its work and materials until accepted by the Government. ***Beach Building Corp***., ASBCA No. 30969, 88-1 BCA ¶ 20,490, at 103,646. In seeking to escape the consequences of its assumpti