

ARMED SERVICES BOARD OF CONTRACT APPEALS

Appeal of --)
)
Andreas Boehm Malergrossbetrieb) ASBCA No. 44017
)
Under Contract No. DAJA04-89-C-0402)

APPEARANCE FOR THE APPELLANT: Reed L. von Maur, Esq.
Frankfurt, Germany

APPEARANCES FOR THE GOVERNMENT: COL Michael R. Neds, JA
Chief Trial Attorney
MAJ Michael J. O'Farrell, Jr., JA
CPT Gregg M. Schwind, JA
Trial Attorneys

OPINION BY ADMINISTRATIVE JUDGE GRUGGEL
ON THE GOVERNMENT'S MOTION TO DISMISS FOR LACK OF JURISDICTION

This appeal is from a constructive denial of certified claims for payment of invoices for work appellant performed, Prompt Payment Act interest, additional work and remission of liquidated damages. The Government moved for dismissal based on lack of jurisdiction contending that the subject contract was tainted by bribery in the inducement and therefore void *ab initio*. Appellant's opposition thereto denied, *inter alia*, that the contract was either void *ab initio* or obtained through bribery and invoked its rights to a hearing, pursuant to Board Rule 5(a) with respect to the facts it contended were relevant to the Government's motion. The hearing thereon was subsequently held in Heidelberg, Germany (tr. 28-29). Both parties have supplemented the record with multiple document filings pursuant to Board Rule 4 together with trial exhibits (*id.*).

FINDINGS OF FACT FOR PURPOSES OF THE MOTION

1. Solicitation No. DAJA04-89-B-0088, a Standard Form 1442, sealed bid, firm fixed price, lump sum procurement for the construction of two U-Coft Platforms including utilities, at Warner Barracks I in Bamberg, Germany, was issued by the Army's Regional Contracting Office (RCO), Fuerth, Germany on 7 August 1989 (R4, tab 1). Block 9 of the solicitation identified Mr. Goesl, a RCO Fuerth contract specialist, as the point of contact to call for information pertaining to the solicitation. Appellant's bid in response to the solicitation was signed and submitted by its manager, Mr. Peter Boehm, on 30 August 1989 (*id.*; tr. 33). The construction project was awarded to appellant as Contract No. DAJA04-89-C-0402 (contract 0402) on 27 September 1989 in the amount of DM 198,796.00. The award was signed by Brigitte Stenzel, a contracting officer for RCO, Fuerth (*id.*).

2. The contract contains the following relevant clauses: FAR 52.202-1 DEFINITIONS-ALTERNATE 1 (APR 1984); FAR 52.203-1 OFFICIALS NOT TO BENEFIT (APR 1984); FAR 52.203-3 GRATUITIES (APR 1984) (“the Gratuities clause”); FAR 52.203-5 COVENANT AGAINST CONTINGENT FEES (APR 1984); USEUCOM SUPP. 52.225-9901 LAW GOVERNING CONTRACTS (JAN 1986-E); FAR 52.203-7 ANTI-KICKBACK PROCEDURES (OCT 1988); FAR 52.233-1 DISPUTES (APR 1984); FAR 52.249-10 DEFAULT (FIXED-PRICE CONSTRUCTION) (APR 1984); FAR 52.209-5 CERTIFICATION REGARDING DEBARMENT, SUSPENSION, PROPOSED DEBARMENT AND OTHER RESPONSIBILITY MATTERS (MAY 1989) (R4, tab 1).

3. Bilateral Modification No. P00001, dated 12 July 1990, substituted a masonry building to be constructed by appellant for the prefabricated building that originally was to be installed by appellant (R4, tabs 2-3, 6-7). Modification No. P00001 increased the contract amount from DM 198,796.00 to DM 202,146.00 and extended the completion date thereof to 14 September 1990 (*id.*).

4.(a) On 16 November 1990, Mr. Goesl was interviewed by the Nuernberg Criminal Police Directorate (SR4, tab 14; ex. G-4 at 8). Mr. Goesl stated that he received “bribe payments” from at least 15 German construction firms, including appellant (*id.*). Said bribe payments were received in exchange:

[t]o some extent for nothing at all and partly through the release of the firms that were also submitting bids, to the respective contractor. With list I mean the source list. To 90% the contractor already knew the estimate for the project. I assume that the contractor had already received the estimate from the assigned engineer (designer) who had prepared the estimate. I would even go as far as saying that the respective estimate was known to the contractor to 99%.

(*Id.*). At his 29 February 2000 evidentiary deposition, Mr. Goesl acknowledged that he had given the above-quoted statement adding that it was “made under stress” since said statement was made while he was being held by the German authorities in “pretrial confinement” (ex. G-4 at 8-10).

(b) On 20 November 1990, while still held in pretrial confinement, Mr. Goesl stated that he “probably received about DM 6,000.00 from Firm BOEHM, Mr. BOEHM in person. I believe it was Mr. BOEHM Junior” in answer to a question seeking detailed information regarding “various construction companies from whom [Mr. Goesl] had received bribes” (SR4, tab 15; ex. G-4 at 8-9).

(c) On 21 December 1990, Mr. Goesl provided a statement, through his attorney, Mr. Link, to the Nuernberg Criminal Police Directorate regarding bribe payments he received from German contractors during the 1989-1990 time period (SR4, tab 1; exs. G-3, -4 at 10-11). Mr. Goesl's 21 December 1990 statement was prepared after he had been released from pretrial confinement (ex. G-3; SR4, tab 1). Specifically, Mr. Goesl stated that he was bribed by the payment of DM 4000.00 sometime during October, 1989 from Mr. Boehm for the award of contract 0402 (SR4, tabs 1, 14-15). The statement was based upon "a handwritten list of names, contract numbers, dates and bribe amounts" prepared by Mr. Goesl and which Mr. Goesl discussed with Mr. Link prior to the submission of Mr. Goesl's statement (ex. G-3). Mr. Link "wrote down additional information below the information written by Mr. Goesl and made check marks and question marks next to several of the entries made by Mr. Goesl" (*id.*). Mr. Goesl's statement that "I however want to stress that I do not totally remember the past years" refers to his activities during "1987 and 1988" since Mr. Goesl did not then have with him the lists containing contract procurements for which he was responsible during those years (SR4, tab 1). Mr. Link wrote down a question mark (*i.e.*, "?") in the space located immediately to the right of and corresponding to the above described entry regarding the bribe paid for the award of contract 0402 (ex. G-3). With respect to his actions, *vel non*, rendered in return for the payment of the bribe money, Mr. Goesl "mentioned the other bidders to the stated firms. After the opening of the bids the contract was awarded to the cheapest bidder" (SR4, tab 1).

(d) On 27 December 1990, Mr. Goesl made:

[a]n additional statement to the letter dated 21 Dec 90, received by the Nuernberg criminal police from my lawyer Mr. LINK.

Passing on the information on the mentioned firms concerning a specific project to the so-called person concerned happened in writing so that the individual person received a handwritten note with about 10 to 15 names of other bidders. By that I mean those firms that we wanted to ask for a bid.

Q: When mailing out solicitations were other equal, potential bidders left out on the list?

A: No, they were not. I assume that the addressed firms dealt with it among themselves.

(SR4, tab 16; ex. G-4 at 11-12)

(e) Mr. Goesl's statements dated 16 November, 20 November and 27 December 1990 were freely made after he had coordinated with his attorney and signed only after he

had verified the accuracy of the transcript of his statements (SR4, tabs 1, 14-16; exs. G-3, -4 at 8-12).

5. Appellant represented that the work was 99 percent complete by invoice dated 6 May 1991 (R4, tab 26). Appellant completed work on contract 0402 on 28 May 1991 (R4, tab 31).

6. Appellant submitted its final payment invoice and an equitable adjustment claim stemming from alleged performance of additional work by letter dated 10 June 1991. Said letter contained reservation language stating, “[w]e reserve herewith furthermore the right to claim the costs of our delay of the contract imposed by the late Government decision making on modifications . . . and claim for the remission of so much in liquidated damages” (R4, tab 33).

7. By letter dated 16 September 1991, appellant asserted its claim for payment of its final invoice, reiterated its claim for additional work and disputed the Government’s right to assess liquidated damages (R4, tab 36).

8. On 17 September 1991, appellant was suspended from contracting with the U. S. Government (R4, tab 37).

9. By letter dated 24 September 1991, the contracting officer informed appellant that the Government would be withholding payments under the contract based on preliminary findings by the U. S. Government that the “contract was awarded under circumstances which could be viewed as fraudulent or criminal in nature” (R4, tab 38).

10. On 14 January 1992, appellant appealed the contracting officer’s constructive denial of its claims asserted under the contract to the Armed Services Board of Contract Appeals. The Board docketed the appeal as ASBCA No. 44017. The claims included the final invoice of DM 38,407.74, Prompt Payment Act entitlement on the unpaid invoice, additional work in the amount of DM 33,834.70 and remission of liquidated damages “in an amount not yet determined” (tr. 63; R4, tab 39).

11.(a) During the course of performance of the contract, appellant’s manager, Mr. Peter Boehm, was investigated by the Nuernberg Criminal Police Directorate in connection with the payment of bribes to RCO, Fuerth contracting personnel. On 4 April 1991, Mr. Boehm admitted that he had paid “bribe money to the employees of the RCO in Fuerth,” as follows: “[t]o Mrs. Stenzel about 15,000.00 since 1985, as far as I remember. To Mr. Goesl may be DM 20,000.00, also since 1985. To Mrs. Flannery-Bateman also about DM 20,000.00 since 1985” (SR4, tabs 2-3; tr. 58, 64). Mr. Boehm did not identify the specific contracts for which he paid bribe money in order to obtain the award thereof (*id.*). In January 1991, Mrs. Stenzel’s husband went to Mr. Boehm’s house to talk about the bribery case. He asked Mr. Boehm if the German Criminal Police had already contacted

Mr. Boehm. Mr. Boehm indicated that, “[d]uring the conversation we tried to establish how much bribe money was paid during the years to his wife and we arrived at the sum of about DM 15,000.00.” (*Id.*) During the course of Mr. Boehm’s testimony at the hearing he stated, “[t]he money simply was paid, and let me put this in very simple words, simply to stay in business, in order to get contracts and in order to actually get solicitations and requests for submitting offers on contracts.” (tr. 42). Mr. Boehm signed a Certificate of Procurement Integrity which certified that he would comply with contract rules and would accept the contract as is. (Tr. 48-49; R4, tab 1) Mr. Boehm did not see paying money to U. S. Government employees as a violation, but as a way to show “good will” (tr. 49). When asked whether he knew that it was against the U. S. Government laws and regulations to give such monetary gifts or gifts of value, he replied by saying, “Maybe” (tr. 49).

(b) On 7 May 1991, Mr. Boehm’s attorney provided a statement on Mr. Boehm’s behalf to the Criminal Police Directorate. Mr. Boehm stated he gave Mrs. Stenzel--DM 15,000.00, Mr. Goesl -- DM 20,000.00, Mrs. Pierce--presents in the form of property with a value of about DM 10,000.00 and Mrs. Flannery-Bateman--about DM 20,000.00 consisting of cash and presents. Mr. Boehm’s rationale for making these payments was explained, as follows:

In a relatively lonely decision, without his father’s knowledge, the owner of the firm, Mr. Peter BOEHM decided to calculate very carefully to set free money, and not by raising the prices, and then use that money to pay the agents. At first he attempted to get the attention by giving small presents, in that he did not want to get into the illegal game and to avoid paying bribes. The presents were accepted by almost all persons who had something to do with the contracts the firm Boehm received, however the business did not increase. . . . Also, Mr. BOEHM has to state at this point that this type of business (bribery) was not initiated by him, but a lot later when some of his competitors already knew about it. It was a question of existence of the firm BOEHM, if he would participate in this game (howl with the wolves) or get completely out of it.

(SR4, tab 3) Mr. Boehm, again, was “unable to come up with a list of contracts for which he paid money” (SR4, tabs 2-3). Mr. Boehm only received a couple of “solicitations that [had] not been published properly in terms of being posted on a bulletin board or advertised” (tr. 56). Further, he stated during the hearing that “[b]ecause it has shown former times that if you haven’t give any gifts or gratuities to that guys, you won’t get no solicitations” (tr. 51). The solicitations were comprised of the specifications and offer sheets (tr. 51).

(c) Appellant was awarded eight to ten contracts per year by RCO, Fuerth during the 1985-1990 period (SR4, tab 2). At the hearing, Mr. Boehm, for the first time, denied that

he had paid any sums whatsoever to Mr. Goesl in connection with the award of contract 0402 (tr. 40-42; findings 11(a)-(b)). He also testified that his payments to RCO, Fuerth employees during the 1985-1990 time period were not “bribes” but, rather, were expressions of “good will” (tr. 46-52). Neither appellant nor Mr. Boehm was prosecuted by German authorities in connection with either contract 0402 or other U. S. Government contracts. Mr. Boehm presently faces a suit for “civil fraud” in the form of bribery in connection with, *inter alia*, the award of contract 0402 in an action brought by the United States in Nuernberg-Fuerth Regional Court, Germany on 5 November 1993 (ex. G-1).

12. Mr. Goesl was indicted on 8 January 1992 by the District Attorney’s Office at the District Court, Nuernberg, Germany for receiving bribes and tax evasion for not declaring the bribe money as income on unspecified dates between 1984 and 1990 in a total amount of at least DM 1,106,103.00 from construction firms, including appellant, “in return for supporting these firms in the award of construction contracts by manipulations contrary to duty before and during the solicitation process.” (SR4, tab 4; ex. G-4 at 12-13) The money was allegedly given to him in cash either in his apartment in Nuernberg or in his office in Fuerth (*id.*). Regarding the acceptance of bribes, Mr. Goesl “was acting from the beginning on the basis of a uniform determination of his will directed at a repeated commission of the offence” (*id.*). Said indictment does not specifically identify contract 0402 as a contract which Mr. Goesl obtained for appellant in return for appellant’s payment of bribe money (*id.*; SR4, tab 1).

13. On 31 August 1992, Mr. Goesl was sentenced to imprisonment of one year and seven months because of tax evasion associated with the bribe payments he received during the 1985-1988 period but which he had not declared as taxable income (tr. 7-8; SR4, tab 4; ex. G-4 at 13). Mr. Goesl was not convicted of either bribery or tax evasion associated with any contracts, including contract 0402, that were solicited and awarded during 1989 (*id.*; R4, tab 1).

14. On 10 February 1992, the Criminal Police Directorate interviewed Karl-Heinz Maennling, manager of appellant from 1 September 1979 to 30 September 1984 (SR4, tab 5). Mr. Maennling indicated that firms, including appellant, were price rigging regarding different projects at least through 1984 (*id.*). He described bribery schemes involving appellant, as well as other German construction contractors, and identified RCO, Fuerth personnel who received bribe money in connection with the award of U. S. Government contracts (*id.*). He identified Mr. Goesl as one of the RCO, Fuerth employees who was “specially liked” by appellant for purposes of bribery, at least through 1984 (*id.*).

15. By letter dated 2 October 1992, Mr. Peter Boehm was debarred by the U. S. Army from contracting with the U. S. Government through 16 September 1995 (SR4, tab 6).

16. On 15 April 1996, the Deputy Commander of the U. S. Contracting Command Europe sent a memorandum to the Suspension and Debarment Office concerning a suspected violation of the Gratuities clause (FAR 52.203-3) by appellant (SR4, tab 7).

17. On 8 May 1996, the Government notified appellant of the Gratuities clause violation proceedings to be held pursuant to FAR 52.203-3, which had been incorporated into the contract. Appellant was afforded the opportunity to either file written matters in opposition or advise the Government whether appellant wanted an in-person hearing. (SR4, tab 8)

18. By letter dated 28 June 1996 appellant's attorney notified the Government of its opposition to appellant's suspected violations of the Gratuities clause (SR4, tab 9).

19. On 29 August 1996 Gratuities clause proceedings were held by James F. Gravelle, Colonel, U. S. Army, Hearing Officer. It was concluded that in October 1990 (sic), Mr. Peter Boehm gave DM 4,000.00 in cash to Warner Goesl in consideration of Mr. Goesl's assistance in ensuring award of contract 0402 (SR4, tabs 1, 10). The acts or failures to act that may have comprised Mr. Goesl's "assistance" with respect to "ensuring" the award of contract 0402 to appellant are not identified. It was concluded that Mr. Boehm's payment of DM 4,000.00 violated the Gratuities clause incorporated by reference into the contract. Based on these findings, it was recommended that appellant's right to proceed under the contract be terminated and that exemplary damages be assessed in the amount of six times the amount paid; DM 4,000.000 or DM 24,000.00. (SR4, tab 10)

20. By letter dated 3 December 1996, Mr. Kenneth J. Oscar, Deputy Assistant Secretary of the Army (Procurement), found that respondent's payment of DM 4,000.00 to Mr. Goesl violated the Gratuities clause. The letter then directed the contracting officer to terminate the respondent's right to proceed under the contract and assessed exemplary damages six times the amount of the gratuity paid equaling DM 24,000.00. (SR4, tab 11)

21. The contracting officer, by letter dated 20 December 1996, notified appellant that its right to proceed under the subject contract was terminated in accordance with the Gratuities clause and the order of the Deputy Assistant Secretary of the Army (Procurement) dated 3 December 1996. The contracting officer also advised appellant that exemplary damages would be assessed in the amount of DM 24,000.00. However, since the United States had already withheld this amount, no collection action, on the part of the U. S. Government, was initiated (SR4, tab 12).

22.(a) Neither Mr. Goesl nor his attorney, Mr. Link, testified at the 9 February 2000 hearing on the Government's jurisdictional motion (tr. 80-83). The presiding administrative judge granted permission for their testimonies to be presented either by evidentiary deposition or by affidavit (*id.*). The Government timely submitted

Mr. Goesl's testimony in the form of an evidentiary, videotaped deposition dated 29 February 2000 (ex. G-4; tr. 88-91) and Mr. Link's testimony in the form of an affidavit, dated 29 February 2000, acknowledged by Mr. Link to be "true and correct to the best of his knowledge and belief" (*id.* at 2-3; ex. G-3). Mr. Link was present and available for deposition at Mr. Goesl's evidentiary deposition (*id.*). Counsel for the Government has represented that Mr. Link's 29 February 2000 affidavit "was indeed sworn" (Gov't br. at 4-5).

(b) Appellant's counsel did not attend the 29 February 2000 deposition, *supra*, despite having apparently been afforded adequate notice thereof by the Government (tr. 80-83, 88-91; exs. G-2, -4 at 1-3; app. br. dated 23 June 2000 at 7-8; Gov' br. dated 10 August 2000 at 4). Appellant's counsel requested that the evidentiary record remain open through 15 October 2000 due to his "recent hospitalization" for the purpose of filing a reply brief (Bd. corres. file). No such reply brief has been filed on appellant's behalf. The adequacy of the Government's "notice" with respect to the above-described evidentiary proceedings has thus not been rebutted. Moreover, this Board has not been requested by appellant's counsel to reopen the record for the purpose of obtaining and submitting additional evidentiary affidavits and/or affidavits with respect either to the adequacy of said "notice" or the substance of the testimonies of Messrs. Goesl and Link (tr. 89; Bd. corres. file).

(c) During his evidentiary deposition, Mr. Goesl, *inter alia*, affirmed that he had given the statement as set forth by his attorney, Mr. Link, in Mr. Link's letter to the Nuernberg Criminal Police Directorate, dated 21 December 1990 (ex. G-4 at 10-11; finding 4 (c)). He also stated that he had the "written list, yeah, of contracts awarded at that time. But it was not a complete set of contracts. There were some of them were in it, some were not available. It was not very accurate stuff" (*id.*; finding 4 (c)). He then testified that he "looked into the information and those money amounts, and I added whatever" to the "information that went into the letter" (*id.*).

(d) Exhibits G-3 and G-4 (Mr. Goesl's deposition and Mr. Link's affidavit) have been received in evidence over the objection of appellant's counsel.

DECISION

We agree with the Government that contract 0402 was tainted by bribery from its inception. The operative facts herein clearly and convincingly establish that Mr. Boehm, appellant's manager, bribed Mr. Goesl, the Government's contract specialist assigned to the procurement action that resulted in the award of contract 0402 to appellant, for the purpose of compromising the bidding process with respect to subject contract (findings 1, 4(a)-(e), 11(a)-(c), 12-14, 16-20, 22(a)-(d)). The amount of the bribe paid for the award of subject contract was DM 4000.00 (*id.*). Mr. Boehm also paid additional moneys to Mr. Goesl before, during and after the award of subject contract for the admitted purpose of "getting contracts," acts which he later disingenuously characterized as "good will" and which he

denied were “bribes” (findings 11(a)-(c)). We recognize that Mr. Goesl’s 21 December 1990 statement, submitted by and through his attorney, that he was bribed by Mr. Boehm for the award of contract 0402, is contrary to Mr. Boehm’s statement at the hearing wherein Mr. Boehm denied making any payments whatsoever to Mr. Goesl in connection with the award of contract 0402 (finding 11(c)). We are also cognizant of the absence of any mention of contract 0402 (including the procurement that led to the award thereof) in the indictment of Mr. Goesl for bribery and tax evasion and the absence in his conviction for tax evasion of any mention of the alleged payment by Mr. Goesl of DM 4000.00 for the award of contract 0402 (findings 12-13). The fact remains, however, that Mr. Goesl contemporaneously admitted receiving the specific bribe of DM 4000.00 for contract 0402 (finding 4(c)) and, except for his self-serving testimony at the 9 February 2000 hearing, Mr. Boehm has otherwise consistently maintained that he could not remember the contracts for which he paid bribes (findings 11(a)-(b)). Moreover, the operative facts herein persuasively establish that Mr. Goesl sought to enable appellant’s manipulation or management of the competitive bidding process in furtherance of a corrupt scheme specifically related to the award of contract 0402 by “[p]assing on the information on [the] . . . other bidders [so that appellant and] . . . the addressed firms [could deal] with it among themselves” (findings 4(d), see also 4(a)-(c), 4(e), 11(a)-(c), 12-14, 17-20). Under these circumstances, we agree with the Government that the contract was tainted by bribery from its inception. *See Schuepferling GmbH & Co., KG*, ASBCA No. 45564, 98-1 BCA ¶ 26,659 and cases cited therein; *Schuepferling GmbH & Co., KG*, ASBCA No. 45565, 98-2 BCA ¶ 29,739; *Schuepferling GmbH & Co., KG*, ASBCA No. 45567, 98-2 BCA ¶ 29,828; and *Schneider Haustechnik GmbH*, ASBCA Nos. 43969, 45568, slip op. dated 30 January 2001. The primacy of the public interest in preserving the integrity of the Federal procurement process as well as the overriding concern for insulating the public from corruption compel our holding that this contract is *void ab initio* and cannot be ratified (*id.*). Consequently, appellant is not entitled to equitable remedies for work actually performed (*id.*).

We have considered appellant’s other arguments and have determined that they are devoid of merit.

The Government’s motion to dismiss this appeal because the contract is *void ab initio* is granted. The appeal is dismissed with prejudice.

Dated: 15 March 2001

J. STUART GRUGGEL, JR.
Administrative Judge
Armed Services Board
of Contract Appeals

I concur

I concur

MARK N. STEMLER
Administrative Judge
Acting Chairman
Armed Services Board
of Contract Appeals

EUNICE W. THOMAS
Administrative Judge
Vice Chairman
Armed Services Board
of Contract Appeals

I certify that the foregoing is a true copy of the Opinion and Decision of the Armed Services Board of Contract Appeals in ASBCA No. 44017, Appeal of Andreas Boehm Malergrossbetrieb, rendered in conformance with the Board's Charter.

Dated:

EDWARD S. ADAMKEWICZ
Recorder, Armed Services
Board of Contract Appeals