

ARMED SERVICES BOARD OF CONTRACT APPEALS

Appeals of --)
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Schneider Haustechnik GmbH) ASBCA Nos. 43969 and 45568
)
Under Contract No. DAJA04-90-C-0101)

APPEARANCE FOR THE APPELLANT: Mr. Hans Schneider
Owner

APPEARANCES FOR THE GOVERNMENT: COL Michael R. Neds, JA
Chief Trial Attorney
CPT Gregg M. Schwind, JA
CPT Charmine Betty-Singleton, JA
Trial Attorneys

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

These appeals are from the default termination of subject contract (ASBCA No. 43969) and a deemed denial of certified claims for contract retention funds and for extra work appellant performed but for which appellant was not paid by the Government (ASBCA No. 45568). The Government moved for dismissal of said appeals based on lack of jurisdiction contending that the contract was tainted by bribery in the inducement and therefore void *ab initio*. The Government also asserts that the Board lacks jurisdiction regarding the default termination since the contract was subsequently terminated pursuant to Title 10 U.S.C. § 2207 and FAR 52.203-3 GRATUITIES (APR 1984). The Government has asserted that the 22 March 1996 decision of the Deputy Assistant Secretary (Procurement), Office of the Assistant Secretary of the Army (Research, Development, and Acquisition) (SARDA), supersedes the contracting officer's 15 October 1991 termination for default, thus making the contracting officer's 15 October 1991 termination a nullity, and its status moot. Appellant's opposition to the Government's motions denied, *inter alia*, that subject contract was either void *ab initio* or obtained through bribery and invoked its right to a full hearing thereon. During the course of the appeals, the Government filed a motion to stay the proceedings, at the request of the Department of Justice, pending completion of parallel civil and criminal fraud proceedings which appellant opposed. On 27 February 1995, the Board issued an order dismissing ASBCA Nos. 43969 and 45568 without prejudice at appellant's request. After several years had passed, ASBCA Nos. 43969 and 45568 were reinstated on 20 February 1998. Appellant's counsels have withdrawn from representation of appellant. Although appellant did not thereafter choose to schedule or participate in its earlier requested "full hearing" (tr. 1-6), appellant's owner, Mr. Schneider, has indicated his "wish to pursue" said appeals. By letter dated 18 August 2000, we advised the parties that

the Board would decide the pending motions for dismissal for lack of jurisdiction based upon the parties' prior written submissions and the existing evidentiary record.

FINDINGS OF FACT
FOR PURPOSES OF THE MOTION

1(a) Solicitation No. DAJA04-90-B-0021, a Standard Form 1442, sealed bid, firm-fixed price, lump sum procurement for the conversion of the heating systems in various buildings at Storck Barracks, Illesheim, was issued by the Army's Regional Contracting Office (RCO), Fuerth, Germany in the spring of 1990 (R4, tab 1). The solicitation named Mr. Goesl, a RCO Fuerth contract specialist, as the point of contact to call for information relating thereto (*id.*). Appellant's bid in response to the solicitation was signed and submitted by its owner, Mr. Schneider, on 23 April 1990 (R4, tab 1). The heat conversion project was awarded to appellant as Contract No. DAJA04-90-C-0101 (contract 0101) on 10 May 1990 in the amount of DM 10,425,254.90 (*id.*).

(b) The Government issued the Notice to Proceed by transmitting the contract to appellant on 10 May 1990 (R4, tabs 1 at ¶¶ C.5, C.15; 4). All "necessary work for the function of the heating system, domestic hot water and the system test" was to be "ready" by 30 September 1990 and all remaining work (paint work etc.) was to be complete not later than 28 February 1991 (*id.*; R4, tab 4).

(c) The Government made progress payments to appellant during contract performance (*i.e.*, payments on invoices dated 16 June 1990, 5 July 1990, 1 August 1990, 5 September 1990, 5 October 1990 and 24 April 1991) totaling DM 9,665,487.90 for work performed by appellant under contract 0101 (R4, tabs 9-11, 14-17, 31, 46). Appellant thus appears to have performed substantially all (*i.e.*, 95%) of the work under the original contract by 18 April 1991 (R4, tabs 30, 46). The Government's last payment to appellant was made in early May, 1991 (*id.*).

(d) Appellant performed work associated with two proposed change orders as well as alleged additional work associated with electrical switching boxes on various, unspecified dates during the period from December, 1990 through August, 1991 (R4, tabs 18-24, 43-46).

(e) Bilateral contract Modification No. P00001, dated 8 May 1991, extended the contract completion date to 31 May 1991, due to the previously mentioned two proposed change orders (R4, tab 32).

2. Contract 0101 contained the following relevant clauses: FAR 52.202-1 DEFINITIONS-ALTERNATE I (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. 52.225-9905 LAW

GOVERNING CONTRACTS (JAN 1986-E); FAR 52.203-7 ANTI-KICKBACK PROCEDURES (OCT 1988); DFARS 252.232-7005 PAYMENTS UNDER FIXED-PRICE CONSTRUCTION CONTRACTS (AUG 1986) (DEV.); 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. On 20 November 1990, Mr. Goesl was investigated by the Nuernberg Criminal Police Directorate. The subject of the investigation involved bribes paid to United States Government employees in order to obtain information relating to Government procurements (R4, tab 55). Mr. Goesl stated that Mr. Schneider approached him in December 1989 and asked for his assistance in “manag[ing]” the award of contract 0101 to appellant. He said he gave Mr. Schneider the source list of other interested firms on 23 March 1990. Mr. Goesl also stated that Mr. Schneider submitted an offer of \$5,135,593.00 which was below the project estimate of \$5,305,620.00 (*id.*). Mr. Goesl admitted that he received DM 200,000 from Mr. Schneider for ensuring that appellant would be awarded contract 0101. Mr. Goesl stated “shortly after the contract award on 10 May 1990, Mr. Schneider, in person, brought at first DM 100,000.00 to his house and a couple of days thereafter another DM 100,000.00.” (*Id.*) Mr. Goesl stated that the DM 200,000 bribe payment was the “biggest one that had been made to me” (*id.*; R4, tab 56). Mr. Goesl’s above described statements were freely made after he had been properly advised of his rights and signed only after he read and verified the accuracy of the transcript of his statements (*id.*).

4. On 21 December 1990, Mr. Goesl, through his attorney, provided a statement to the Nuernberg Criminal Police Directorate confirming that Mr. Schneider gave him an amount of DM 200,000.00 in May 1990 at his home for ensuring that contract 0101 was awarded to appellant (R4, tab 56).

5. On 24 January and 4 February 1991, Mr. Schneider was interviewed by the Nuernberg Criminal Police Directorate. Initially, Mr. Schneider denied that he had bribed RCO, Fuerth procurement personnel in order to obtain the award of construction contracts to his firm (R4, tab 57). However, during the 4 February 1991 interview, Mr. Schneider admitted to paying DM 200,000 in bribe money to Mr. Goesl in 1990 for ensuring the award of contract 0101 to appellant (R4, tab 58). Mr. Schneider stated that to his recollection the bribe involved a contract for the sum of about DM 10.3 million. He said he paid Mr. Goesl the above amount at Mr. Goesl’s apartment in two lump sums: DM 100,000 in May of 1990 and the other DM 100,000 in August/September 1990 (R4, tabs 58-60). Mr. Schneider stated that “I did have the feeling that if I did not pay the bribe money I would not be receiving any other contracts from [Mr. Goesl]” (*id.*). Mr. Schneider said Mr. Goesl provided him with the project estimate of DM 10.7 million and suggested Mr. Schneider bid in the neighborhood of DM 10.3 million (*id.*). Mr. Schneider also stated that “Mr. Goesl further said that he would personally take care of

the execution of the invitation for bids and that I didn't have to care for the other things, he would take care of it." (*id.*) Mr. Schneider's statements, *supra*, were all made after he had been properly advised of his rights, was represented by legal counsel and were signed only after he verified the accuracy of the transcript of his statements (*id.*; R4, tab 57).

6. On 23 May 1991, upon request from the U. S. Army Contracting Command, Europe (USACCE), the U. S. Army Europe (USAREUR) Suspension and Debarment Official suspended appellant from further competition for U. S. Army contracts (R4, tab 40).

7. The Government issued Modification No. P00002, dated 15 October 1991, terminating appellant for default under FAR 52.249-10 Default (FIXED-PRICE CONSTRUCTION) (APR 1984). The contracting officer stated that the default termination action was based on "substantial evidence indicating fraud or similar impropriety in the course of awarding the contract." The Government indicated that appellant and a former employee of the Government had admitted to bribery in exchange for award of the contract. (R4, tab 37)

8. Appellant appealed the contracting officer's termination for default by letter dated 23 December 1991 (R4, tab 39). The Board docketed the appeal as ASBCA No. 43969 on 6 January 1992.

9. On 8 January 1992, Mr. Goesl was indicted by the District Attorney's Office at the District Court, Nuernberg-Fuerth for receiving bribes in the amount of at least DM 1,106,103 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 (R4, tab 61). The indictment specifically identifies contract 0101 and the bribe amount of DM 200,000 (*id.*). On 31 August 1992, Mr. Goesl was sentenced to imprisonment of one year and 7 months because of tax evasion associated with the bribe payments he had received but had not declared as taxable income (R4, tab 62).

10. On 22 January 1992, the German Prosecutor's Office in Nuernberg, Germany (Prosecutor's office) released, through the U. S. Army Criminal Investigations Division Command (USACIDC), a series of statements relating to an ongoing investigation of hundreds of contracts awarded by RCO, Fuerth. The contracts were allegedly tainted by fraud. Several of the statements contained the admissions of substantial payments having been rendered to induce the award of contract 0101 to appellant (Gov't mot. dated 27 August 1998 at ¶6; app. resp. dated 20 November 1998 at 2).

11. By letter dated 15 May 1992, appellant submitted a certified claim in the amount of DM 264,390 for additional work performed pursuant to contract 0101 relating to "Change Order Nr. 1" (R4, tab 43). According to Appellant, "the system installed under the contract could not have been satisfactorily completed without the additional work

directed in change Request Nr. 1 and performed by our firm”. (R4, tab 43) All of this additional work apparently was performed during and after December, 1990 (*id.*). Said work was “within the scope of the contract” and involved, *inter alia*, differing site conditions and deletions of original contract work (R4, tabs 18-24). The Government’s contemporaneous cost estimates prepared in connection with said change order work contemplated a net reduction in the contract price (*id.*).

12. By letter dated 15 May 1992, appellant submitted a claim in the amount of DM 25,179.00 for additional work related to electrical switching boxes it had installed on the project (R4, tabs 44, 46). Appellant requested a contracting officer’s final decision on said claim by letter dated 30 June 1992 (R4, tab 50).

13. By a third letter dated 15 May 1992, appellant submitted its certified claim in the amount of DM 99,642.00 for additional work performed in connection with “change order Nr. 2” (R4, tab 45-6). By letter dated 30 June 1992, appellant certified and requested a contracting officer’s final decision on said claim (R4, tab 49).

14. Appellant, by another letter dated 15 May 1992, submitted final invoices for payment of the total sum of DM 759,767.42, representing funds withheld as contract retention during performance (R4, tab 46). By letter dated 28 June 1992, appellant certified said claim for contract retention funds in the amount of DM 759,767.42 and requested a contracting officer’s final decision thereon (R4, tabs 46, 48).

15. By letter dated 10 September 1992, the contracting officer stated that he intended to render a final decision on appellant’s claims no later than 10 December 1992. The 10 December 1992 decision date was given due to the complexity of the case and the fact that not all of the necessary information was on hand. (R4, tab 51-4)

16. By letter dated 30 September 1992, Mr. Schneider was debarred by the U. S. Army through 8 June 1995 from contracting with the U. S. Government (Gov’t reply at enclosure 4 to app. resp. to Gov’t mot. dated 13 November 1992)

17. On 12 January 1993, appellant filed an appeal from the contracting officer’s deemed denial of each of its claims submitted under the contract on 15 May, 28 and 30 June 1992. The Board docketed the appeal as ASBCA No. 45568 on 19 January 1993.

18. Subsequently, the Government moved to stay the appeals. By letter dated 14 January 1994, the Board sent a letter to the Prosecutor’s office regarding appeals before the Board concerning alleged bribes paid to U. S. Government employees to influence award of U. S. contracts. The letter referenced the Government’s motion to stay proceedings which contained assertions that the Prosecutor’s office was unwilling to release its criminal files concerning the firms/individuals involved in the alleged bribes.

The Board asked that the Prosecutor's office advise the Board as to whether the representations set out in the motion to stay were factually correct. (ASBCA No. 43969, Corr. file)

19. By letter dated 20 May 1994, the Bavarian Ministry of Justice responded to the Board's request and confirmed that Mr. Schneider, appellant's owner, had been indicted for paying a DM 200,000 bribe in connection with the award of contract 0101. (ASBCA No. 43969, Corr. file)

20. On 24 February 1995, appellant requested that the Board dismiss ASBCA Nos. 43969 and 45568 without prejudice under and pursuant to Board Rule 30. On 27 February 1995, the Board dismissed ASBCA Nos. 43969 and 45560 without prejudice.

21. On 30 May 1995, the Government notified appellant of Gratuities clause violation proceedings to be held pursuant to FAR 52.203-3 (finding 2; R4, tab 63).

22. By letter dated 9 January 1996, it was recommended that the Army find appellant in violation of the Gratuities clause and conclude that appellant's right to proceed under contract 0101 be terminated on the basis of payment of DM 200,000 worth of gratuities to an employee of the U. S. Government in exchange for award of the contract in violation of FAR 52.203-3. It was also recommended that exemplary damages equal to six times the gratuity amount of DM 200,000--*i.e.*, DM 1.2 million--be assessed against appellant (R4, tab 67).

23. By letter dated 22 March 1996, Mr. Kenneth J. Oscar, Deputy Assistant Secretary of the Army (Procurement), found that Schneider's payment of a total of DM 200,000 to Mr. Goesl violated the Gratuities clause. Further, the decision stated:

In accordance with FAR Clause 52.203-3, and this decision, the contracting officer shall terminate respondent's right to proceed under Contract No. DAJA04-90-C-0101. The Contracting Officer's earlier termination of these contracts does not prohibit the Army from exercising this authority. It is noted that the Contracting Officer's earlier termination action was not made under the provisions of FAR Clause 52.203-3, nor could it have been since Contracting Officers do not have the authority to take such actions under Army procedures. The Contracting Officer's earlier action was intended to preserve and protect the Army's right under this contract. The Contracting Officer's actions did not prejudice the Respondent because the termination of Respondent's right to proceed under FAR 52.203-3 is being exercised after Respondent was provided due process of law as provided under Army

procedures... The exemplary damages is [sic] appropriate in this case. The Hearing Official's recommendation of DM 1.2 million constitutes an appropriate amount of exemplary damages and is approved. This amount constitutes six times the amount of the gratuities paid to the United States employee and meets the statutory mandate that exemplary damages should be of an amount of more than three times, but not more than 10 times, the cost incurred by the contractor giving the gratuities to the employee concerned.

(R4, tab 68)

24. The contracting officer, by letter dated 4 June 1996, advised 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 22 March 1996. The termination notice also contained the Government's assessment of damages in the amount of DM 1.2 million. (R4, tab 69) The evidentiary record is silent as to whether the Government has recognized amounts which have been withheld by the Government under contract 0101 as a set-off to said assessment of exemplary damages (*id.*).

DECISION

Appellant contends that the Government's motions to dismiss subject appeals must be denied because the evidence allegedly does not establish that bribery either led to the award of the contract to appellant or affected appellant's performance of the contract work. According to appellant, any so-called "bribery" payments made by appellant were not made to induce the Government to do anything regarding this contract which the Government was not already legally obligated to do; *i.e.*, to award the contract to the lowest responsible, responsive bidder (appellant). Indeed, appellant blandly asserts that any such payments by appellant to Mr. Goesl were extorted by him and that appellant was not provided with any information which it was not independently entitled to receive as a matter of right. Further, appellant contends that the Government relied on nothing done or said by appellant, other than appellant's offered price, in making the award. At best, the Government was only entitled to timely terminate the contract once the alleged payments were known by the Government. In any case, the Government's failure to timely terminate the contract, notwithstanding its knowledge of the alleged bribery conduct, together with alleged continuing demands for and acceptance of appellant's continued performance of work during the December 1990 through August 1991 period purportedly constitutes a ratification or affirmance of the contract by the Government thus negating any inherent Government right to avoid the contract. Appellant further points to the Government's allegedly contradictory reliance upon the Disputes, Default and Gratuities clauses in other,

separate proceedings as establishing the invalidity of the Government's position herein that contract 0101 was void *ab initio*.

Appellant's arguments parrot those made by the contractor in *Schuepferling GmbH & Co., KG*, ASBCA No. 45564, 98-1 BCA ¶ 29,659 and are equally without merit. The operative facts herein clearly and convincingly establish that appellant's owner, Mr. Schneider, admits that he paid the sum of DM 200,000 to Mr. Goesl, the Government's contract specialist assigned to the procurement action that resulted in the award of contract 0101 to appellant, for the express purpose of bribing Mr. Goesl to "manage" the competitive bidding process with respect to said contract (findings 1(a), 3-5, 9-10, 18-19). Mr. Goesl admits that he provided Mr. Schneider with the source list of other firms interested in the solicitation (*id.*). Mr. Schneider admits that Mr. Goesl provided him with the Government's in-house project cost estimate for the construction project involved herein (*id.*). Mr. Goesl then "took care" of the "execution of the invitation for bids" and appellant was awarded contract 0101 (*id.*). Providing the Government cost estimate to Mr. Schneider, and not to other potential bidders, was a violation of FAR 14.211(b) and, while providing the source list to Mr. Schneider was not a violation of applicable regulations (*see*, FAR § 14.205-5), it was in furtherance of a corrupt scheme by which Mr. Goesl "took care" of the award of contract 0101 to appellant. Under these circumstances, we agree with the Government's contention that the contract was tainted by bribery from its inception. *See Schuepferling, supra* and cases cited therein; *Schuepferling GmbH & Co., KG*, ASBCA No. 45565, 98-2 BCA ¶ 29,739. Since it is plain that the instant contract was obtained through appellant's bribery of Mr. Goesl, subject contract is void *ab initio* and cannot be ratified (*id.*). Consequently, appellant is not entitled to equitable remedies for work actually performed (*id.*). This is due to 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 (*id.*).

We have considered appellant's other arguments and have determined that they are devoid of merit. It is not necessary to reach the Government's other arguments.

The Government's motions to dismiss subject appeals because the contract is void *ab initio* are granted. These appeals are dismissed with prejudice.

Dated: 30 January 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 Nos. 43969, 45568, Appeals of Schneider Haustechnik GmbH, rendered in conformance with the Board's Charter.

Dated:

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