

ARMED SERVICES BOARD OF CONTRACT APPEALS

Appeals of --)
)
Erwin Pfister General-Bauunternehmen) ASBCA Nos. 43980, 43981, 45569
) 45570
)
Under Contract Nos. DAJA04-90-C-0070)
DAJA04-90-C-0042)

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

ASBCA Nos. 43980 and 45569 are appeals from a termination for default and constructive denials of certified claims for payment of invoices for work performed, Prompt Payment Act interest and additional work under Contract No. DAJA04-90-C-0070. ASBCA Nos. 43981 and 45570 are appeals from a termination for default and a constructive denial of certified claims for payment of invoices for work performed under Contract No. DAJA04-90-C-0042. The Government moves for dismissal based on lack of jurisdiction contending that the subject contracts were tainted by bribery in the inducement and therefore void *ab initio*. Appellant's oppositions thereto denied, *inter alia*, that the contracts were either void *ab initio* or obtained through bribery and invoked its rights to hearings, pursuant to Board Rule 5(a), with respect to the facts it contended were relevant to the Government's motions. Said hearings thereon were subsequently held in Heidelberg, Germany. Both parties have fully 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

BACKGROUND

1(a). Solicitation No. DAJA04-89-R-0355, a Standard Form 1442, negotiated lump sum procurement for Project No. IG-B0135-4, the repair of sanitary rooms at Warner Barracks, Bamberg, Germany, was issued by the Army's Regional Contracting Office (RCO), Fuerth, Germany on 21 August 1989 (R4, tab 1 (ASBCA 43980, 45569)). Block 9 of the solicitation identified Ms. Derfuss (nee Mrs. Irene Gimpl), a RCO Fuerth contract specialist, as the point of contact to call for information relating thereto (*id.*). Appellant's proposal in response to the solicitation was signed and submitted by its owner, Erwin Pfister, on 20 September 1989 (*id.*). The sanitary rooms repair project was awarded to appellant as Contract No. DAJA04-90-C-0070 (contract 0070) on 25 January 1990 in the amount of DM 2,255,644.25 (*id.*; tr. 36).

(b). Solicitation No. DAJA04-89-R-0113, a Standard Form 1442, negotiated lump sum procurement for Project No. 3T-00009-7P, the overall repair of Building 357, Pinder Barracks, Zirndorf, Germany, was issued by the RCO, Fuerth, Germany on 12 April 1989 (R4, tab 1 (ASBCA 43981, 45570)). Block 9 of the solicitation identified Ms. Derfuss as the point of contact to call for information relating thereto (*id.*). Appellant's proposal in response to the solicitation was signed and submitted by its owner, Erwin Pfister, on 10 May 1989 (*id.*). The repair of Building 357 project was awarded to appellant as Contract No. DAJA04-90-C-0042 (contract 0042) on 4 December 1989 in the amount of DM 2,052,080.00 (*id.*; tr. 29).

2. Contracts 0070 and 0042 contain 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); 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); FAR 52.233-1 DISPUTES (APR 1984); FAR 52.249-10 DEFAULT (FIXED-PRICE CONSTRUCTION) (APR 1984) (R4, tab 1 (ASBCA 43980, 45569), tab 1 (ASBCA 43981, 45570)).

3. During appellant's performance of contracts 0070 and 0042, Ms. Ella Snell was the Chief, RCO, Fuerth and had overall responsibility for the administration of said contracts (Snell Deposition at 5-14). Two of her employees (Ms. Fairchild and Mr. Storch) functioned as contracting officers with respect to said contracts during appellant's performance thereof (*id.*, Fairchild Affidavit at 1, Storch Affidavit at 1).

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4. By letter dated 13 February 1990, the Government confirmed appellant's receipt of contract 0070 and notice to proceed and established a contract completion date of 30 July 1990 (R4, tab 3).

5. Contract Modification No. P00001 was executed by the parties on 24 July 1990. The completion date was extended to 31 October 1990 and the contract amount was increased by DM 121,490.00 from DM 2,255,644.25 to DM 2,377,134.25 (R4, tabs 10, 16).

6. On 28 September 1990, the Government executed bilateral Modification No. P00002. The total amount of the contract increased by DM 180,091.16 from DM 2,377,134.25 to DM 2,557,225.41 and the contract completion date was extended to 31 January 1991 (R4, tabs 17, 21).

7(a). By letter dated 28 February 1991, appellant received a notice of suspension from future contracting from the Department of Army, Headquarters, U. S. Army Europe and Seventh Army (R4, tab 73). Said suspension was "based on evidence that [Mr. Pfister] paid bribes to various employees of the United States in order to receive contracts from the United States" (*id.*).

(b). Mr. Pfister testified, without corroboration, at the hearing that both Ms. Fairchild and Mr. Storch orally assured him that he would be paid for all work performed under contract 0070 (and contract 0042) regardless of whether he had either obtained said contracts by bribery or had been suspended from obtaining new U. S. Government contracts (tr. 47-53, 73-78). The evidentiary record herein does not contain any contemporaneous documentation of said oral assurances of payment and Ms. Snell, Ms. Fairchild and Mr. Storch deny that Mr. Pfister was given any such assurances by any of them or by any other Government employee (tr. 71-72; Snell Dep. at 85-88; Fairchild Aff. at 1-2, Storch Aff. at 1-2). Mr. Pfister's testimony at the hearing regarding said oral assurances of payment appears to be the first time wherein he advanced this contention (tr. 71-78; Fairchild Aff. at 2, Storch Aff. at 2; Board files (ASBCA 43980, 43981, 45569, 45570), *passim*). Moreover, Mr. Pfister also admitted that he continued to perform work under contract 0070 (and contract 0042) on the advice of his attorney who represented him in criminal proceedings (described *infra*) because "this could only be to my [Mr. Pfister's] advantage" (tr. 73).

8. Bilateral contract Modification No. P00003, effective 18 April 1991, was issued on a no-cost basis and extended the contract completion date to 30 July 1991 (R4, tabs 26, 49; *see* Snell Dep. at 35-88).

9. Throughout the contract performance period, the Government made ten progress payments to appellant (*i.e.*, payments on invoices dated 11 April 1990, 23 May 1990, 18 September 1990, 25 October 1990, 22 November 1990, 10 and 24 January 1991, 28 February 1991, 10 April 1991 and 8 May 1991) totaling DM 1,584,186.39 for work performed by appellant under contract 0070 (tr. 36-38; R4, tabs 7-9, 11, 14, 18, 22, 24, 28, 32, 35, 38-40, 42-44, 46-47, 50-54). Appellant appears to have performed approximately 80 per cent of the work under the original contract by 8 May 1991 (R4, tab 51). The Government's last payment to appellant was made on 1 June 1991 (R4, tab 52).

10. On 7 June 1991, the contracting officer notified appellant that payment on appellant's 11th invoice in the amount of DM 161,105.21 was being withheld based on preliminary findings of an ongoing investigation by the Government that contract 0070 "was awarded under circumstances which could be viewed as fraudulent or criminal in nature" (tr. 38-39; Fairchild Aff. at 2, Storch Aff. at 1-2; R4, tabs 53-54).

11. The Government issued a show cause notice to appellant on 20 June 1991 as appellant had stopped working on the contract. The notice stated that the Government was considering terminating the contract under the provisions of the Default clause (R4, tab 55).

12. Appellant responded to the Government's show cause notice by stating that it "discontinued work because the long overdue payments have not been received by our office by June 10, 1991" (R4, tab 56).

13. On 25 July 1991, the contracting officer notified appellant that the Government was withholding payment of appellant's 12th invoice in the amount of DM 69,045.09 based on preliminary findings of an ongoing investigation by the Government that contract 0070 "was awarded under circumstances which could be viewed as fraudulent or criminal in nature" (tr. 39; R4, tab 58).

14. The Government terminated contract 0070 for default pursuant to the Default clause on 27 August 1991 based on appellant's failure to continue performance under the contract, substantial evidence indicating fraud or similar impropriety occurring in the course of awarding the contract and admissions by appellant's owner that he had paid a bribe to Mrs. Gimpl for award of the contract to his firm (R4, tab 59).

15. Appellant appealed the contracting officer's final decision terminating contract 0070 for default on 3 January 1992 (R4, tab 62). The Board docketed the appeal as ASBCA No. 43980.

16. On 28 January 1992, appellant submitted its final invoice for payment of the sum of DM 485,872.82, the remaining contract balance amount and an invoice for DM 126,570.44 for alleged additional work (tr. 39-41; R4, tabs 63-64).

17. By letter dated 15 May 1992, appellant submitted two certified claims representing DM 485,872.59[82], the final invoice for work performed under the original contract, as amended, and DM 126,570.44, representing alleged additional work performed under the contract. Appellant requested that the Government issue a final decision thereon. (Tr. 41-42; R4, tab 65)

18. By letter dated 15 May 1992, appellant submitted a certified claim for payment of the amounts invoiced in appellant's 11th invoice (DM 161,105.21) and appellant's 12th invoice (DM 69,045.09) totaling DM 230,150.30 (tr. 42-43; R4, tab 66; see findings 10, 13, *supra*).

19. On 11 January 1993, appellant appealed the constructive denial of its claims of DM 230,150.30 (invoices 11 and 12) and DM 612,443.26 (two invoices under the contract: the first was the final invoice amount for work performed under the contract and the second was an invoice for additional work allegedly performed under the contract), both dated 28 January 1992 (tr. 43; R4, tab 67; findings 16-18, *supra*). The appeal was docketed as ASBCA No. 45569.

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20. Throughout the performance of contract 0042 period, the Government made ten progress payments to appellant (*i.e.*, payments on invoices dated 8 and 30 March 1990, 8 May 1990, 6 and 18 June 1990, 5 July 1990, 14 August 1990, 8 and 25 October 1990 and 6 February 1991) for work invoiced in the amount of DM 1,846,872.72, less .5 per cent discount for payment within 20 days of receipt of appellant's invoice(s) (R4, tabs 2-6, 8-11, 15-16, 24). Appellant appears to have performed approximately 98 per cent of the work under the contract by 4 March 1991 (R4, tab 15). The Government's last payment to appellant for work performed pursuant to contract 0042 was made on 15 March 1991 (R4, tab 16).

21. Bilateral contract Modification No. P00001, for the performance of ceramic tiling and electrical system work, was executed on 20 December 1990 on a no-cost basis and extended the contract completion date from 10 September 1990 to 18 March 1991 (R4, tabs 7, 12).

22. By letter dated 28 February 1991, the Army notified appellant that it was suspended from future contracting with the Department of Army, Headquarters, U.S. Army Europe and Seventh Army (R4, tab 33). The suspension was based upon evidence that appellant paid bribes to various employees of the United States in order to receive contracts from the United States (*id.*).

23. By letter dated 20 May 1991, the contracting officer notified appellant that the Government was withholding payment on appellant's 11th invoice (dated 4 March 1991) in the amount of DM 164,166.46 based on preliminary findings of an ongoing investigation by the United States Government that this contract was "awarded under circumstances which could be viewed as fraudulent or criminal in nature" (tr. 30-33; R4, tabs 17, 25; Fairchild Aff. at 1, Storch Aff. at 1-2). It was also noted that appellant's performance under contract 0042 had numerous deficiencies which were never corrected (*id.*).

24. By letter dated 23 July 1991, appellant submitted its final invoice for DM 104,510.96 (tr. 32; R4, tabs 18, 26). On 29 July 1991, the contracting officer responded to appellant's request for payment under its final invoice by stating that the Government was withholding payment thereon based on preliminary findings of an ongoing investigation by the United States Government that contract 0042 "was awarded under circumstances which could be viewed as fraudulent or criminal in nature" (tr. 32-33; R4, tab 19).

25. On 7 October 1991, the Government terminated contract 0042 under the Default clause (R4, tabs 20-21). The basis for the termination was substantial evidence indicating fraud or similar impropriety occurring during award of the contract and admissions by appellant's owner that he had paid a bribe in exchange for receiving the award of contract 0042 (*id.*).

26. Appellant appealed the contracting officer's final decision terminating contract 0042 for default on 3 January 1992 (R4, tab 22). The appeal was docketed as ASBCA No. 43981.

27. By letter 15 May 1992, appellant submitted two certified claims requesting a contracting officer's final decision. The first claim of DM 164,166.46 represented the unpaid amount of the 11th partial invoice dated 4 March 1991 and the second claim of DM 104,510.96 represented appellant's unpaid final invoice dated 23 July 1991 (tr. 34-35; R4, tabs 15, 18, 24, 26, 28).

28. On 11 January 1993, appellant filed a notice of appeal with the Board appealing the constructive denial of the claimed amounts of DM 164,166.46 and DM 104,510.96 (R4, tab 29). The Board docketed the appeal as ASBCA No. 45570.

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29. In a series of statements, given to the German Police at the "Nuernberg Criminal Directorate, K-42" on 2, 7 November 1990 and 18-19 December 1990, Mrs. Gimpl admitted that appellant's owner, Mr. Pfister, paid her bribes in the amounts of DM 40,000 for awarding contract 0070 to appellant and DM 40,000 for awarding contract 0042 to

appellant (Supp. R4, tabs 8-10 (ASBCA 43980, 43981, 45569, 45570); R4, tab 31 (ASBCA 43981, 45570, tab 71 (ASBCA 43980, 45569)).

30. In a series of statements, given to the German Police at the “Nuernberg Criminal Directorate, K-42” on 12-14 and 17 December 1990, Mr. Erwin Pfister stated that he had paid Mrs. Gimpl bribes in the amounts of DM 67,700 for awarding contract 0070 to appellant and DM 41,050 for awarding contract 0042 to appellant (tr. 43-45, 61-68, 81; supp. R4, tabs 2-5 (ASBCA 43980, 43981, 45569, 45579); R4, tab 30 (ASBCA 43981, 45570), tab 70 (ASBCA 43980, 45569)). At trial, Mr. Pfister confirmed that he obtained the bidders lists for the procurements that led to the award of contracts 0070 and 0042 from Mrs. Gimpl in exchange for the payments of the aforesaid bribe amounts to her (tr. 45, 60-63).

31. A criminal judgment was entered against Irene Gimpl by the Nuernberg District Court on 3 December 1991 for tax evasion and for accepting bribes from appellant’s owner, Erwin Pfister, in connection with, *inter alia*, the award of contract 0070 and contract 0042 during late 1989-early 1990 (Supp. R4, tab 6 at 1-3 (ASBCA 43980, 43981, 45569, 45570); *see* R4, tab 32 at 1-2 (ASBCA 43981, 45570), tab 72 at 1-2 (ASBCA 43980, 45569)). The Court stated, in pertinent part:

In return, [Mrs. Gimpl] made sure that all the named firms were included in the list of firms invited to bid, and that besides these enterprises only firms appeared on the list which had been explicitly identified by the entrepreneur. In all the named cases [Mrs. Gimpl] failed to post the solicitation on the bulletin board of her office, in order to prevent other firms from learning of and participating in the solicitation. Of the money received [she], in each case passed on partial amounts to individuals accused in different actions.

(*Id.*) The Court found that Mrs. Gimpl:

severely violated the obligations of her labor contract by manipulating the solicitations of the projects. The entrepreneur [in the case at hand] paying the bribe already knew his “competitors” through [Mrs. Gimpl], and he was able to influence them, to make arrangements with them. By not posting the solicitation on the bulletin board of her office [she] made sure, that outsiders did not learn of the projects and consequently were not able to submit lower offers.

. . . .

Usually an upper limit for the desired profit results from the fact that, with a high profit margin, the entrepreneur must expect to be too expensive and therefore not to be awarded the contract. In the cases concerned, this limitation did not exist since the entrepreneurs did not have to expect lower offers. As an additional item in the calculation, however, the bribe paid to the accused had to be considered. Both circumstances result in an increase of the offer price in comparison with an offer a firm could and would submit under a correct solicitation.

(Supp. R4, tab 6 at 2-3 (ASBCA 43980, 43981, 45569, 45570))

32. On 2 April 1996, the District Court of Erlangen, Germany, entered a criminal judgment against appellant's owner, Erwin Pfister, imposing a (suspended) two-year sentence of imprisonment for, *inter alia*, paying bribes to Mrs. Gimpl in the amounts of DM 67,700 for the award of contract 0070 to appellant and DM 41,050 for the award of contract 0042 to appellant (Supp. R4, tab 1 at 1-3, 5-6, 10-11 (ASBCA 43980, 43981, 45569, 45570)). The Court stated that

[i]n return for the received amounts of money Mrs. Gimpl, . . . in the case of the stated contracts which were to be awarded to the accused Pfister, only added such firms to the list of offerors, whose offer could not compete with the offers of the accused so that the accused would be awarded the respective contracts.

(*Id.* at 5-6) Mr. Pfister testified, at trial, that he only agreed with bribery statements contained in said judgment "to get the sentence of two years probation" (tr. 57-59).

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33. On 24 May 1995, the Government notified appellant of Gratuities clause violation proceedings to be held with respect to contracts 0070 and 0042 pursuant to FAR 52.203-3 (R4, tabs 34-35 (ASBCA 43981, 45570), tabs 74-75 (ASBCA 43980, 45569)).

34. By letter dated 6 October 1995, it was recommended that the Army find that appellant had violated the Gratuities clause and terminate appellant's right to proceed under contracts 0070 and 0042 based upon appellant's payments of DM 86,000 in gratuities to an employee of the U. S. Government in exchange for award of said contracts in violation of FAR 52.203-3. It was also recommended that exemplary damages in the amount of DM 498,827.72—more than three times the gratuities paid but less than ten times the gratuities paid—be assessed (R4, tab 38 (ASBCA 43981, 45570), tab 78 (ASBCA 43980, 45569)).

35. A decision was rendered on 3 November 1995 by Mr. Kenneth J. Oscar, Deputy Assistant Secretary of the Army (Procurement) (SARDA) finding that Mr. Pfister's payments of DM 86,000 to Mrs. Gimpl for the award of contracts 0070 and 0042 violated the Gratuities clause (R4, tab 39 (ASBCA 43981, 45570), tab 79 (ASBCA 43980, 45569)). The decision directed, in accordance with FAR 52.203-3, the contracting officer to terminate appellant's right to proceed under contracts 0070 and 0042 (*id.*). Further, Mr. Oscar concurred with the hearing official's amount (DM 498,827.72) as exemplary damages (*id.*).

36. The contracting officer, by letter dated 20 March 1996, advised appellant that its right to proceed under contracts 0070 and 0042 was terminated in accordance with the Gratuities clause and the order of the Deputy Assistant Secretary of the Army (Procurement) dated 3 November 1995. The termination notice also included the assessment of damages in the amount of DM 498,827.72 (R4, tab 40 (ASBCA 43981, 45570), tab 80 (ASBCA 43980, 45569)).

DECISION

Appellant contends that the Government's motions to dismiss subject appeals must be denied because the evidence allegedly does not establish that bribery led to the award of the contracts to appellant. According to appellant, the payments made to Mrs. Gimpl by Mr. Pfister, on appellant's behalf, were not made to induce the Government to do anything regarding these contracts which the Government was not already legally obligated to do — *i.e.*, award the contracts involved herein to the lowest responsible, responsive bidder (appellant). Appellant asserts that it was not provided with any information which it was not independently entitled to receive as a matter of right. Appellant further contends that the Government relied on nothing done or said by appellant, other than appellant's offered price, in making the awards. At best, the Government was only entitled to timely terminate the contract(s) once the alleged bribes were known by the Government. The Government's failure to timely terminate said contracts, notwithstanding its knowledge of the alleged bribery conduct, together with alleged continuing demands for and acceptance/encouragement of appellant's continued performance of work purportedly constitutes a ratification or affirmance of the contracts by the Government thus negating any inherent Government right to avoid the contract. Appellant further points to the Government's allegedly contradictory reliance upon *inter alia* the Gratuities clause in other, separate proceedings as establishing the invalidity of the Government's position herein that contracts 0070 and 0042 were void *ab initio*.

Appellant's arguments herein duplicate the arguments made by the appellants in *Schuepferling GmbH & Co., KG*, ASBCA No. 45564, 98-1 BCA ¶29,659 and *Schneider Haustechnik GmbH*, ASBCA Nos. 43969, 45568, 01-1 BCA ¶ 31,264 and are equally without merit. Indeed, the RCO, Fuerth contract specialist (Mrs. Gimpl) involved herein

also accepted bribes to similarly manipulate the award of the Government construction contract involved in the above cited *Schuepferling* decision.

The operative facts herein clearly and convincingly establish that appellant's owner, Mr. Pfister, paid a total of at least DM 80,000 to Mrs. Gimpl for the express purpose of bribing her to manipulate the competitive bidding process with respect to ensuring the award of contracts 0070 and 0042 to appellant (findings 1(a)-(b), 29-32). In return, Mrs. Gimpl provided Mr. Pfister with the bidders lists that contained only the identities of the firms he had designated to participate in the two procurements involved herein (findings 31-32). Mrs. Gimpl also prevented other potential contractors from learning of and participating in the two procurements involved herein by failing to post the solicitations on the bulletin board of her office (*id.*). These circumstance solidly establish the existence herein of a corrupt scheme involving Mr. Pfister and Mrs. Gimpl that fatally tainted contracts 0070 and 0042 from their respective inceptions. *See Schuepferling, supra* and cases cited therein; *Schneider Haustechnik, supra*. Since contracts 0070 and 0042 were obtained through appellant's bribery of Mrs. Gimpl, each of said contracts is *void ab initio* and cannot be ratified (*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.

The Government's motions to dismiss subject appeals because the contracts involved herein are void *ab initio* are granted. The appeals designated as ASBCA Nos. 43980, 43981, 45569 and 45570 are dismissed with prejudice.

Dated: 18 May 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. 43980, 43981, 45569, 45570, Appeals of Erwin Pfister General-Bauunternehmen, rendered in conformance with the Board's Charter.

Dated:

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