

ARMED SERVICES BOARD OF CONTRACT APPEALS

Appeal of --)
)
GarCom, Inc.) ASBCA No. 55034
)
Under Contract Nos. DABK41-03-C-0142)
W9124R-04-C-0109)
W9124R-04-C-0126)
W9124R-04-C-0140)

APPEARANCE FOR THE APPELLANT: Mr. Jesus Garcia
President

APPEARANCES FOR THE GOVERNMENT: COL Samuel J. Rob, JA
Chief Trial Attorney
CPT Sean M. Connolly, JA
MAJ Eugene Y. Kim, JA
Trial Attorneys

OPINION BY ADMINISTRATIVE JUDGE DICUS
PURSUANT TO BOARD RULE 12.3

This appeal is taken from a contracting officer's decision denying the 31 January 2005 claim of GarCom, Inc. (GarCom) seeking \$63,578.28 for the cost of the State of Arizona Transaction Privilege Tax.¹ The underlying contracts are for telecommunications construction work. Appellant has elected to proceed under Board Rule 12.3.² The parties have waived a hearing pursuant to Board Rule 11. We deny the appeal.

SUMMARY FINDINGS OF FACT

Arizona Transaction Privilege Tax

1. The State of Arizona imposes a transaction privilege tax (TPT), a tax on the privilege of doing business in Arizona, on persons doing business in the state, pursuant to § 42-5008 of the Arizona Revised Statutes. The tax is payable by prime contractors and

¹ The amount has subsequently been increased to include, *inter alia*, additional interest and late fees (compl., ex. F).

² Board Rule 12.3 provides for a decision within 180 days from election of the procedure and for summary findings and conclusions.

based on the amount or volume of business transacted. (R4, tabs 50, 51) “Person” is defined, *inter alia*, as including individuals and corporations at § 42-5001 (R4, tab 53 at 2 of 5). It is, therefore, applicable to GarCom, which is a corporation (R4, tab 17). Pursuant to § 42-5075, the tax base for prime contractors is generally 65 percent of the gross proceeds of sales or gross income (R4, tab 52 at 1 of 8).

The Blanket Ordering Agreement and Contracts Thereunder

2. On 28 April 2003 the Army issued Solicitation No. DABJ49-03-R-0013 to establish a basic ordering agreement (BOA) for fiber optic installation projects at Yuma Proving Grounds (YPG) (R4, tab 2). The solicitation and resulting contracts incorporated by reference FAR 52.212-4, CONTRACT TERMS AND CONDITIONS--COMMERCIAL ITEMS (FEB 2002), paragraph (k) of which states “[t]he contract price includes all applicable Federal, State, and local taxes and duties” (*id.* at 2).

3. The BOA solicitation also included the following:

Any questions concerning this solicitation and the contents thereof must be submitted in writing no later than seven (7) calendar days prior to the closing date of the solicitation. Telephonic questions will not be permitted. All questions shall be submitted to the attention of Ms. Jacque Phillips by either facsimile to (928) 328-6849 or by e-mail to Jacque.Phillips@yuma.army.mil by the deadline herein. Questions received after that time may not receive a response.

(*Id.* at 10)

4. GarCom, a company with experience in government contracts going back to 1996, submitted a proposal for the first task under the BOA on 28 May 2003 with a lump sum price of \$425,037.62 (R4, tab 15 at 2 of 11, tab 42 at 14, 17). GarCom was not awarded the contract for the first task (R4, tab 42 at 38). GarCom’s headquarters are in El Paso, Texas (compl.).

5. The BOA, No. DABK41-03-G-0004, between GarCom and YPG was executed 12 August 2003 with an effective date of 5 August 2003. Becci Winkler was the contracting officer. (R4, tab 3)

6. Jacqueline Phillips was a contract administrator at YPG (R4, tab 46). On 27 August 2003, Ms. Phillips sent an e-mail to GarCom and others under the BOA with a solicitation for another task that initially included four new projects at YPG (R4, tab 18).

Paragraph three of the electronic solicitation discussed a site visit and included the following:

. . . In order to make it fair to all offerors and ensure that the same information is imparted to all bidders, any and all questions asked by you and other contractors competing for this project SHALL be submitted in writing, through Jacque Phillips, Contact [sic] Administrator at Yuma Proving Ground. Any questions that the site visit may generate must be submitted in writing. Any questions answered directly at the site visit are not considered to be binding unless they are published in a formal amendment to this request for proposal. You are not permitted to directly contact YPG's personnel with questions or to discuss this project with YPG personnel other than during the site visit.

(Id.)

7. Relevant to the dispute are the following four firm-fixed-price contracts (R4, tab 42 at 50) that were issued to GarCom under the BOA, all of which incorporated the provisions of the BOA:

28 September 2003 – Contract No. DABK41-03-C-0142 (contract 0142), in the total amount of \$596,019.42 (R4, tab 4);

23 December 2003 – Contract No. W9124R-04-C-0109 (contract 0109), in the total amount of \$258,124.56 (R4, tab 31);

24 March 2004 – Contract No. W9124R-04-C-0126 (contract 0126), in the total amount of \$364,046.00 (R4, tab 35); and

17 June 2004 – Contract No. W9124R-04-C-0140 (contract 0140), in the total amount of \$155,700.00 (R4, tab 6).

8. Ms. Phillips was clearly identified as a contract administrator and “POINT(S) OF CONTACT” for contract 0142 (R4, tab 4). There is no evidence that she was the contracting officer on any contract relevant to this appeal. We find she was not the contracting officer on contracts relevant to this appeal.

The 23 September 2003 Telephone Conversation

9. The crux of this dispute is to be found in the radically different versions of telephone conversations of 23 September 2003 Ms. Phillips had with Jesus Garcia, GarCom's president, and Brisa Garcia, GarCom's business administrator. Ms. Phillips categorically denies that anyone from GarCom asked about taxes prior to award of the BOA or contract 0142. She asserts that if such an inquiry had been made, she would have told the questioner to submit the question in writing, which the solicitations required, whereupon she would have submitted the question to the contracting officer, Becci Winkler, or Ann Sanchez, further up the chain of command. She notes that this procedure was followed when Mr. Garcia submitted an e-mail seeking information about tax exemption forms. (R4, tab 46, ¶ 9; *see also* tabs 45, 47, 49) Mr. Garcia asserts that Ms. Phillips told him not to include state and local taxes in his price (R4, tab 41, ¶¶ 12(a), 15(a)(d), tab 42 *passim*). Mr. Garcia testified at his deposition that he relies on the contracting officer in such matters (R4, tab 42 at 23). However, there is some conflict about dates in appellant's record representations. First, there is a conflict between the claim (R4, tab 10) and complaint, which state October 2003 as the date of the call about taxes, and answers to interrogatories (R4, tab 41, ¶ 12(a)) and Mr. Garcia's deposition (R4, tab 42 at 43) which state the date was 23 September 2003. We find there was a telephone call between Mr. Garcia and Ms. Phillips on 23 September 2003. Similarly, Mr. Garcia testified that GarCom was given "the tax-exempt," which we interpret as the SF 1094, before bidding (R4, tab 42 at 21). We find the SF 1094 was not provided until November 2003 (findings 10, 11, *infra*). Ms. Garcia generally supports Mr. Garcia's assertions (R4, tab 43 *passim*; *but see id.* at 28).

Tax Exemption Certificates

10. On 29 October 2003 Mr. Garcia sent an e-mail to Ms. Phillips in which he asked "I wanted to know if you all have a tax-exempt form/number for out of state purchases. If so, may I please have that number to put in our files." Ms. Phillips sought counsel from Ms. Sanchez on 30 October 2003 in an email asking "How should we answer this one? We have FFP on the contracts issued to him, (he is a BOA holder and his jobs are in the working process at YPG)." Ms. Sanchez told Ms. Phillips she thought they could issue a tax exemption form, but that Ms. Phillips should check further within the organization. Ms. Phillips did so. (R4, tab 27)

11. On 4 November 2003 a U.S. Tax Exemption Certificate, Standard Form No. 1094, was issued, signed by Janet Gonzales, contracting officer. The body of the certificate states "I certify that I have purchased for the exclusive use of the United States Government from [GarCom] delivered at [YPG] (Description, quantity, and unit price) which has (or have) been delivered, or which will be delivered and invoiced pursuant to purchase orders issued under [various contracts] FOR ONE YEAR" (R4, tab 5) A

second certificate was requested by Ms. Garcia in an e-mail of 29 December 2004 and issued on 3 January 2005, signed by Cynthia Ford (R4, tabs 7, 8).

The Arizona Audit and the Claim

12. The State of Arizona audited GarCom's records and notified GarCom in January 2005 that it owed taxes (R4, tab 10). By letter of 31 January 2005 GarCom related this to YPG and sought reimbursement in the amount of \$63,578.28 from YPG, stating that it had been told by a YPG contracting officer in October 2003 not to include any taxes in its bids. The letter also mentioned other items. GarCom's 31 January 2005 claim letter specifically mentions only contracts 0140 and 0126. However, the full amount at issue is set forth in an attachment titled "State of Arizona State Sales Tax." (R4, tab 10) On 14 February 2005 Arizona issued a letter formally seeking from GarCom payment of \$63,578.28 for transaction privilege tax and interest (R4, tab 40). A 6 April 2005 contracting officer's decision denied the claim for the Arizona TPT, referencing specifically contracts 0140 and 0126, and acknowledging that the amount at issue was \$63,578.28. The decision also mentions the BOA and the provision therein stating the contract price should include all applicable taxes. The decision refers to the taxes as on "the original award amounts." The amount claimed cannot reasonably be construed as only on "original award amounts" for contracts 0126 and 0140. The decision does not specifically deny the other items. (R4, tab 11) Thereafter, the other items mentioned in the 31 January 2005 claim letter were settled in modifications issued 11 April 2005 (R4, tabs 12, 13). A notice of appeal dated 24 May 2005 was filed with the Board. The complaint and notice of appeal repeat the October 2003 date of the alleged conversation. (Exs. A to G)

DECISION

Jurisdiction

The Army argues that we have no jurisdiction over the amounts at issue from contracts 0109 and 0142 because neither the claim nor the contracting officer's decision mentioned those contracts (gov't br. at 44). This was raised in a telephone conference and the impediment to full disposition discussed with the parties. GarCom elected to take the risk of proceeding notwithstanding potential jurisdictional impediments on a part of its claim. (3 Oct. 2005, Telephone Conf. Mem.) We think there is enough here for jurisdiction. The contracting officer recognized that the BOA was the agreement under which the contracts giving rise to the dispute were issued, and the basis for the claim (assessment of the TPT by Arizona and an allegation that a contracting officer had directed GarCom not to include the TPT in its price) was also clearly stated and understood. Moreover, there was a sum certain that could not have been based only on contracts 0126 and 0140. The contracting officer thus had adequate notice of the basis

and amount of GarCom's claim. *H.L. Smith, Inc. v. Dalton*, 49 F.3d 1563 (Fed. Cir. 1995). We hold that we have jurisdiction.

The Merits

The contract unequivocally makes GarCom responsible for state taxes (findings 2, 7). At issue is GarCom's claim for reimbursement for Arizona TPT. GarCom argues that Ms. Phillips' statements in a telephone conversation led it to exclude the TPT costs from its proposal (12 Oct. 2005, Summary of Events & Facts at 1). It also argues that the tax exemption certificates were false and misleading (28 Nov. 2005, br. at 1). As to this last argument, we note that three of the four contracts were awarded after issuance of the SF 1094 (findings 7, 11). The government argues, *inter alia*, that Ms. Phillips unambiguously denies making any such statement to GarCom and that GarCom should not be believed because it has been inconsistent in its assertions as to the timing and content of the statements (gov't br. at 40-41). In this dispute, GarCom as claimant has the burden of proof and must, therefore, establish disputed facts by a preponderance of the credible evidence. *Sphinx International Inc.*, ASBCA No. 38784, 90-3 BCA ¶ 22,952.

There is no legal issue as to Arizona's right to impose the TPT. The United States Supreme Court in *Arizona Department of Revenue v. Blaze Construction Co.*, 526 U.S. 32 (1999) (hereinafter "*Arizona*") upheld application of the Arizona TPT to federal contractors. In that case, the Court analyzed and applied its holding in *United States v. New Mexico*, 455 U.S. 720 (1982). Specifically, the Court looked to its holding in that case that:

Tax immunity is appropriate in only one circumstance: when the levy falls on the United States itself, or on an agency or instrumentality so closely connected to the Government that the two cannot realistically be viewed as separate entities, at least insofar as the activity being taxed is concerned.

Id. at 735.

While neither party argues that GarCom is immune from Arizona's imposition of the TPT, it is nonetheless instructive to examine the Court's reasoning in *Arizona*. The Court summarized the outcome in *United States v. New Mexico* as holding that "A State generally may impose a nondiscriminatory tax upon a private company's proceeds from contracts with the Federal Government." *Arizona* at 34. In so holding the Court reversed an Arizona Court of Appeals decision, *State of Arizona v. Blaze Construction Co.*, 190 Ariz. 262, 947 P.2d 836 (1997) (hereinafter "*State of Arizona*"). There, the Court of Appeals had held that federal law impliedly preempted imposition of the TPT on work

done for the United States Bureau of Indian Affairs (“BIA”). *State of Arizona* had considered state, federal and Native American interests in determining whether Blaze was entitled to a credit for transaction privilege taxes it had paid to the state under BIA contracts for building roads on Indian reservations in Arizona. *Id.* The Supreme Court characterized *State of Arizona* as an attempt at balancing those interests, while observing “we have never employed this balancing test in a case such as this one where a State seeks to tax a transaction between the Federal Government and its non-Indian private contractor.” *Arizona* at 37. The Court reversed the Arizona Court of Appeals and affirmed a state’s right to tax federal contractors. It thereby imposed “a bright-line standard for taxation of federal contracts, regardless of whether the contracted-for activity takes place on Indian reservations.” *Id.* The Court thus left no doubt that the law of the land, unless changed by the state or federal legislature, affords no relief from imposition of the TPT on federal contractors.³

Significant to our holding here is the Court’s recognition and articulation of the nature of the relationships involved vis-à-vis the entity upon whom the TPT is assessed: “The incidence of Arizona’s transaction privilege tax falls on [the private contractor], not the Federal Government.” *Id.* at 36. The rule that a state may not impose a tax the legal incidence of which falls on the federal government does not apply. *United States v. New Mexico, supra*, at 742. The TPT was not a tax from which the federal government could shield its contractors absent an express Congressional exemption. The Court’s clear statement provides the basis for our resolution of the dispute insofar as it may be seen to arise from YPG’s issuance of a tax exemption certificate and any misunderstanding by GarCom on the reach of the exemption thereunder.

The tax exemption form issued, SF 1094, was that prescribed by FAR 29.302(b), which also instructs “[w]hen it is economically feasible to do so, executive agencies shall take maximum advantage of all exemptions from State and local taxation” The SF 1094 is specifically cited by FAR 29.305(a)(3) as evidence that may be provided to sellers to help establish exemption from state and local taxes. Moreover, FAR 29.305(b) provides, with respect to contracts such as the ones at issue which do not contain the clauses at FAR 52.229-3 or FAR 52.229-4:

(b) *Furnishing proof of exemption.* If a reasonable basis to sustain a claimed exemption exists, the seller will be

³ In this regard, the Arizona Court of Appeals has stated, in enforcing the TPT and refusing to allow a deduction for certain fringe benefits, that the general rule is against exemptions from taxation statutes. *J. H. Welsh & Son Contracting Co. v. Arizona*, 420 P.2d 970 (Ariz. 1966).

furnished evidence of exemption as follows:

....

(3) . . . if—

(i) Requested by the contractor and approved by the contracting officer or at the discretion of the contracting officer; and

(ii) Either the contract price does not include the tax or, if the transaction or property is tax exempt, the contractor consents to a reduction in the contract price.

The FAR thus provides for use of the SF 1094 as evidence of a tax exemption where the contractor has requested it and a reasonable basis for claiming an exemption exists. Here, GarCom requested the SF 1094. As to the reasonable basis for claiming an exemption, Arizona tax law provides at A.R.S § 42-5155 A.:

There is levied and imposed an excise tax on the storage, use or consumption in this state of tangible personal property purchased from a retailer or utility business, as a percentage of the sales price.

That tax is inapplicable where the storage, use or consumption of the personal property is not subject to state tax under the constitution or laws of the United States. A.R.S. § 42-5159. Thus, sales taxes on the purchase of some generators were refunded to an Air Force contractor when it was proved that use of the generators was as directed by and title to the generators was held by the United States government. *State Tax Commission v. Graybar Electric Company, Inc.*, 86 Ariz. 253, 344 P.2d 1008 (1959). As the laws of Arizona exempt the United States from excise tax on personal property it stores, uses or consumes, there was a reasonable basis for claiming an exemption and YPG's issuance of the SF 1094 did not violate the FAR.

The SF 1094, on its face, covered only taxes on purchases for the exclusive use of the federal government (excise tax) and was not misleading as to other taxes, like the TPT (finding 11). It cannot reasonably be read as extending to the TPT. The legal incidence of the taxes exempted by the SF 1094 was on the federal government, not GarCom. The TPT was on GarCom and was based on GarCom's gross proceeds of sales or gross income (finding 1), and not based on purchases made for the federal government. Accordingly, we hold that GarCom's assertion that the tax exemption

certificates were false and misleading is without merit.⁴ Indeed, the federal government cannot exempt its contractors from state taxes where the United States Supreme Court has expressly held those taxes are applicable to federal contractors and immunity is not appropriate because the levy thereof is not on the United States itself. The federal government can and did, however, properly issue certificates granting an exemption for state taxes such as the excise tax from which it was exempt where the legal incidence was on the United States (finding 11). Additionally, and assuming, *arguendo*, GarCom did not include the TPT in its price because it understood the TPT to be covered by the tax exemption certificates, GarCom is not entitled to relief because, as the Supreme Court has held:

. . . Protection of the public fisc requires that those who seek public funds act with scrupulous regard for the requirements of law; [the contractor] could expect no less than to be held to the most demanding standards in its quest for public funds. This is consistent with the general rule that those who deal with the Government are expected to know the law and may not rely on the conduct of Government agents contrary to law.

Heckler v. Community Health Services, 467 U.S. 51, 63 (1984).

As to the 23 September 2003 telephone conversation, we cannot conclude GarCom has carried its burden of proof. There is enough uncertainty as to dates regarding both the telephone conversation and the SF 1094 in GarCom's filings and depositions (finding 9) that we are insufficiently comfortable with this record to conclude the preponderance of the evidence favors GarCom. Moreover, Ms. Phillips' denial is unequivocal and the fact that she is retired adds to her credibility.

Even assuming, *arguendo*, that Ms. Phillips told Mr. and/or Ms. Garcia not to include state and local taxes in GarCom's price, appellant cannot prevail. Contractors must act reasonably in relying on oral representations. *Heckler v. Community Health Services, supra*, at 66. GarCom is charged with knowledge of laws and regulations, including the FAR. *MTD Transcribing Service*, ASBCA No. 53104, 01-1 BCA ¶ 31,304. It was instructed in the solicitation that all questions must be in writing. GarCom knew that the contract for which it was seeking award contained FAR 52.212-4, which made it responsible for the cost of all relevant taxes, and it executed that contract and others with the same provision. Yet, it alleges that it went forward based on an oral representation

⁴ Contract 0142 preceded the issuance of the SF 1094 and was priced before the SF 1094 was provided by YPG (findings 7, 11). We cannot, therefore, in any event find that GarCom was misled by the SF 1094 as to the price of contract 0142.

from a government employee other than the contracting officer. The reliance thereon alleged by GarCom was not a reasonable reliance and cannot provide the basis for requiring YPG to reimburse it for the TPT. *Heckler, supra*, at 65-66. The appeal is denied.

Dated: 14 December 2005

CARROLL C. DICUS, JR.
Administrative Judge
Armed Services Board
of Contract Appeals

I concur

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. 55034, Appeal of GarCom, Inc., rendered in conformance with the Board's Charter.

Dated:

CATHERINE A. STANTON
Recorder, Armed Services
Board of Contract Appeals