

ARMED SERVICES BOARD OF CONTRACT APPEALS

Appeal of --)
)
Alan Waller) ASBCA No. 55010
)
Under Contract No. -----)

APPEARANCE FOR THE APPELLANT: V. John Ella, Esq.
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APPEARANCES FOR THE GOVERNMENT: COL Samuel J. Rob, JA
Chief Trial Attorney
Craig S. Clarke, Esq.
Supervisory Trial Attorney
Scott N. Flesch, Esq.
Trial Attorney

OPINION BY ADMINISTRATIVE JUDGE FREEMAN

Alan Waller appeals the deemed denial of his claim for breach of an alleged contract between himself and the Coalition Provisional Authority (CPA) in Iraq. The government moves to dismiss for lack of jurisdiction on the ground that “there is no privity of contract between the Army and Mr. Alan Waller” (gov’t mot. at 1).¹ We grant the motion and dismiss the appeal.

STATEMENT OF FACTS
FOR PURPOSES OF THE MOTION

1. On 13 April 2003, the Commander of the Coalition Forces that invaded and occupied Iraq created the CPA. On 13 May 2003, the Secretary of Defense designated Ambassador Paul Bremer as “Administrator” of the CPA with responsibility for “the temporary governance of Iraq.” See *United States of America ex rel. DRC, Inc. v. Custer Battles, LLC*, 376 F. Supp. 2d 617, 620-21 (E.D. Va. 2005). On 16 May 2003,

¹ While the government states “Army” in its motion, we consider the motion as referring to the CPA. Mr. Waller refers throughout his declaration to the persons he dealt with regarding the alleged contract as CPA personnel. (App. resp., ex. 1)

Ambassador Bremer issued CPA Regulation Number 1 vesting the CPA with “all executive, legislative and judicial authority necessary to achieve its objectives.”²

2. The CPA conducted its operations and awarded contracts for reconstruction projects in Iraq using both funds appropriated by Congress and non-appropriated funds.³ CPA Memorandum Number Four, effective 20 August 2003, specified procedures for contracts and grants using the non-appropriated funds. Appendix B to Memorandum Number Four specified standard terms for non-appropriated fund solicitations and contracts exceeding \$5,000. The standard contract terms included the following clause:

16. Disputes. This contract is not subject to the Contract Disputes Act of 1978 as amended (41 U.S. Code, Sections 601-613). Failure of the parties to this contract to reach agreement on any request for equitable adjustment, claim, appeal, or action arising under or relating to this contract shall be a dispute to be resolved in accordance with the United States Federal Acquisition Regulation Clause 52.233-1, Disputes, which is incorporated herein by reference except that appeals from final decisions of a Contracting Officer may only be appealed to the U.S. Armed Services Board of Contract Appeals (ASBCA). The decision of the ASBCA shall be final. The contractor shall proceed diligently with performance of this contract, pending final resolution of any dispute arising under the contract.

CPA Memorandum Number Four, App. B at 20.

3. From 16 September 2003 through 13 April 2004, Mr. Alan Waller was employed by Research Triangle Institute (RTI) as an Operations Officer working in Iraq under an RTI contract with the U.S. Agency for International Development (USAID) (gov’t mot., ex. 2 at 1-2). RTI’s contract required among other things that: “The Contractor will need to work closely with civilian administrators, local leaders,

² All CPA Official Documents are available through 20 June 2006 at <http://www.cpa-iraq.org/regulations>.

³ The non-appropriated funds consisted principally of (i) Iraqi funds confiscated by the U.S. President and vested in the U.S. Treasury; (ii) Iraqi funds seized by the military in the course of the occupation of Iraq; and (iii) Iraqi oil revenues, repatriated seized assets, and international donations deposited in the Development Fund for Iraq. See *United States of America ex rel. DRC, Inc. v. Custer Battles, LLC*, *supra* at 623-27.

representatives of the international military force(s) and others in facilitating the delivery of essential services to the populace” (app. resp., ex. 1/3 at 1).

4. Mr. Waller’s duties for RTI included operations and logistics activities supporting the CPA local government teams in southern Iraq (gov’t mot., ex. 2 at 1-2). Mr. Waller’s employment contract with RTI included the following provision:

During Employee’s employment with RTI, Employee shall devote Employee’s full business time, energy, and ability exclusively to the business and interests of RTI, and shall not, without RTI’s prior written consent, render to others services of any kind for compensation, or engage in any other business activity that would materially interfere with the performance of Employee’s duties under this Agreement. Employee represents to RTI that Employee has no other outstanding commitments inconsistent with any of the terms of this Agreement or the services to be rendered under it.

(Gov’t mot., ex. 2 at 1-2)

5. At a meeting of the local CPA Governorate in Nasiriyah in September 2003, the Governorate Coordinator, Mr. Bourne, asked if anyone knew how to get two reverse osmosis (RO) water purification plants manufactured and installed quickly and reliably. Since he had completed five other water projects in Iraq when previously employed by the American Refugee Committee (ARC), Mr. Waller volunteered his services for the project. (App. resp., ex. 1 at 1-2) On 11 October 2003, he coordinated a survey of the area designated for the construction of the water plants by a water engineer “on behalf of ARC” (app. resp., ex. 1 at 2, ex 1/4 at 2).

6. On 24 November 2003, Mr. Waller met at Nasiriyah with the Deputy Governorate Coordinator, Maj. Adrian Weale and the Governorate Finance Officer, Capt. Alan Lawson. Maj. Weale and Capt. Lawson were U.K. Army officers. At this meeting, Capt. Lawson gave Mr. Waller \$100,000 cash of a projected \$200,000 to build the two water plants. Mr. Waller signed a receipt for the money. The receipt was also signed and sealed by Capt. Lawson. The receipt stated:

November 24, 2003

Alan Waller on behalf of RTI has received the sum of \$100,000.00 (US) for two (2) water projects in Chubayish [sic]. This is the initial flow of funds for a total of \$200,000.

(Gov't mot., ex. 3 at 1, 5)

7. Capt. Lawson has declared under penalty of perjury that: "I understood that Mr. Waller was employed by RTI. I never considered our dealings with Mr. Waller as being in his personal capacity" (gov't mot., ex. 3 at 1). A photograph of Mr. Waller at a meal following the 24 November 2003 meeting shows the \$100,000 stacked on a table and Mr. Waller wearing an RTI employee identification badge. (Gov't mot., ex. 3 at 1-5)

8. On 25 November 2003, Mr. Waller wrote to Maj. Weale on RTI letterhead in relevant part as follows:

To: Major Adrian Weale – CPA Nasiriya
From: Alan Waller – RTI Nasiriyah
Subject: Al-Chibaysh District
Date: 11/25/03

Adrian:

As per your instructions, I have tasked ARC to conduct an immediate assessment of the drinking water requirements in the district of Al-Chibaysh. Abu Jassim, whom you know has been tasked to coordinate this project through ARC's water engineer Qusay Umar.

....

The contractor for the project has already been chosen
The first two water units will be as per the original specification given to Alan (CPA) at a cost of \$99,000.00 per unit. . . .

The water units are currently under construction in Al-Amarah and will be transported to Al-Chibaysh when ready. In addition, the building contractor has also been tasked to begin construction for the housing units.

I would also like to confirm that RTI signed for a deposit in the amount of \$100,000.00 which will be passed directly on to ARC.

....

Alan J. Waller
RTI – Team Leader
Nasiriyah

(Gov't mot., ex. 7)

9. On 1 December 2003, Mr. Waller signed “For ARC” a contract between ARC and an Iraqi firm for construction of the water plants at a price of \$164,000. On the same day he signed “For and On Behalf of American Refugee Committee” a contract between ARC and a second Iraqi firm for construction of the on-site facilities for the water plants at a price of \$15,000. Each contract stated: “This Agreement (the Agreement) is made by and between American Refugee Committee (ARC) . . .and [the Iraqi contractor].” (App. resp., ex. 1 at 3; gov't mot., exs. 8, 9)

10. The Chibayish water plants were completed and installed in April 2004 (app. resp., ex. 1 at 3). On 12 May 2004, Mr. Jay Lucas, a CPA officer who had not previously been involved in the Chibayish project, sent an email to Mr. Waller requesting an accounting of the funds provided to him for the project. Mr. Lucas' email stated in relevant part:

I have met the contractor now – both of them (RO Unit and Installation).

They brought me copies of their ARC contracts and payment receipts. They appear to have only been paid \$41,000 and \$5,000 respectively. This means that there is a balance of the \$99,000 CPA paid to you for use on this contract still not-disbursed. We will need these funds returned to us before we can act on the outstanding balance.

(App. resp., ex. 1-8 at 2)

11. Following Mr. Lucas' email, a number of emails passed between Mr. Waller and various CPA officers regarding payment of the Iraqi water plant contractors and the funds that had been provided to Mr. Waller for that purpose on 24 November 2003 (app. resp., exs. 1-7 through 1-10). In an email dated 15 May 2004, Mr. Waller told the CPA that “at least one of the contractors will be paid out tomorrow” (app. resp., ex. 1-7). Mr. Waller paid an additional \$20,000 to the water plant manufacturer, but neither the manufacturer nor the site installation contractor was “paid out” fully by Mr. Waller.

12. The exchange of emails with Mr. Waller was concluded by an email from the Director, Regional Contracting Office – South, dated 8 September 2004. This email

stated that the Iraqi contracts were with ARC, not the CPA, that Mr. Waller had paid only \$66,000 to the Iraqi contractors of the \$100,000 that had been given to him for that purpose, and that if additional payments were found to be due either contractor “then PCO [the successor to the CPA] will pay those vendors directly.” (App. resp., ex. 1-9)

13. On 25 February 2005, Mr. Waller submitted a certified claim to “The Contracting Officer for the United States Government in Southern Iraq” for \$98,000. Mr. Waller alleged that he had entered into a “verbal” contract in September 2003 with the CPA to provide the two water purification plants at Chibayish for \$198,000. He further alleged that the work had been completed, and that the government had failed to pay on demand the balance due of \$98,000. (Compl., ex. 1). The contracting officer to date has not issued a final decision on this claim. On 9 May 2005, Mr. Waller appealed the deemed denial.

DECISION

The government moves to dismiss Mr. Waller’s appeal on the ground that “[i]f a contract existed it was not with Mr. Waller” (gov’t mot. at 1). The evidence on the motion overwhelmingly supports the government’s position. Mr. Waller’s contacts with the CPA officials in Nasiriyah regarding the Chibayish water project were in his capacity as the RTI-Team Leader in Nasiriyah. Mr. Waller’s work arranging for construction of the project was within the scope of his duties as an RTI employee working on RTI’s USAID contract to “work closely with civilian administrators, local leaders, representatives of the international military force(s) and others in facilitating the delivery of essential services to the populace. *See* findings 3, 4.

At the 24 November 2003 meeting at which he received the \$100,000 to get the project started, Mr. Waller signed a receipt for the money “on behalf of RTI.” *See* finding 6. At this meeting, he was wearing an RTI employee identification badge and the CPA official who gave him the money “never considered our dealings with Mr. Waller as being in his personal capacity.” *See* findings 6, 7. On the following day, Mr. Waller sent a memorandum to the Deputy CPA Governorate Coordinator, on RTI letterhead, again identifying himself as an RTI employee and confirming the arrangements he was making for the project. In that memo, Mr. Waller also confirmed that: “RTI signed for a deposit in the amount of \$100,000 which will be passed directly on to ARC.” There is no reference in the memorandum to himself as being the contractor for the project. *See* finding 8. Finally, both contracts which Mr. Waller arranged with Iraqi firms for manufacture of the RO plants and construction of the on-site facilities were made in the name of ARC, not in the name of Alan Waller, and were signed by Mr. Waller not for himself but “For ARC” and “For and on behalf of American Refugee Committee.” *See* finding 9.

Mr. Waller argues that when he signed the receipt on 24 November 2003 for the \$100,000 “on behalf of RTI,” he did not accept it as RTI’s employee “but as an individual as part of his efforts to help the RTI and CPA team in the region” (app. resp. at 7). Mr. Waller’s memorandum of 25 November 2003, however, belies this argument, as does his signature on the ARC contracts with the Iraqi contractors which performed the work. *See* findings 8, 9. RTI had a contract with the government to provide operational and logistical support to the CPA local governance teams in Iraq. The CPA local governance team in Nasiriyah entrusted \$100,000 in CPA funds to Mr. Waller as an RTI employee to arrange for construction of the water project. Mr. Waller did so by arranging for contracts between a non-governmental organization (ARC) and two Iraqi contractors. This activity was fully consistent with his job as an RTI employee to provide operational and logistical support to the CPA local governance team.

Mr. Waller argues that “even if the November 23, 2003 contract [sic] was not with Waller, the Government formed a new contract with Waller after he left RTI by continually looking to him personally to finish the project” (app. resp. at 12). The project was completed in April 2004. The subsequent contacts by the CPA and its successor organization (the PCO) with Mr. Waller, beginning on 15 May 2004 were to find out why the Iraqi contractors which had completed the work had been paid only \$46,000 of the \$100,000 that had been provided to Mr. Waller to get the project started. They were not looking to Mr. Waller to finish the project. The project had already been completed. *See* findings 10-12.

We have carefully considered the other arguments made by Mr. Waller and find them without merit. Since there was no contract between Mr. Waller in his personal capacity and the CPA for construction of the water project at Chibaysh, we need not consider whether we have jurisdiction over CPA contracts.

The appeal is dismissed.

Dated: 31 January 2006

MONROE E. FREEMAN, 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. 55010, Appeal of Alan Waller, rendered in conformance with the Board's Charter.

Dated:

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