

ARMED SERVICES BOARD OF CONTRACT APPEALS

Appeal of -- )  
 )  
William Thomas Elam ) ASBCA No. 55521  
 )  
Under Contract No. 442-S-00-00-00087-00 )

APPEARANCE FOR THE APPELLANT: Mr. William Thomas Elam

APPEARANCE FOR THE GOVERNMENT: Warren D. Leishman, Esq.  
Senior Counsel  
U.S. Agency for International  
Development  
Washington, DC

OPINION BY ADMINISTRATIVE JUDGE THOMAS  
ON THE GOVERNMENT’S MOTION FOR SUMMARY JUDGMENT

William Thomas Elam appeals from a government claim for repayment of living quarters allowance payments to the extent they exceeded his actual costs. The government has moved for summary judgment and appellant opposes the motion. We grant the motion and deny the appeal.

STATEMENT OF FACTS FOR PURPOSES OF THE MOTION

1. In September of 2000, the U.S. Agency for International Development (USAID or the government) contracted with Mr. Elam to become “[t]he Thailand Country Program Coordinator [to] serve as USAID’s representative for Thailand programs, to be based in Bangkok” (R4, tab 1 at 1, 2 of 44).

2. The contract’s General Provisions (GP) state the contractor will be granted a living quarters allowance (LQA) in accordance with U.S. Department of State Standardized Regulations Section 130 (R4, tab 1 at 13-14 of 44).

3. GP.6(a)(2) LIVING QUARTERS ALLOWANCE gives the following guidance regarding the nature and allowability of expenses under the contract:

Living quarters allowance is an allowance granted to reimburse an employee for substantially all of his/her cost for either temporary or residence quarters whenever Government-owned or Government-rented quarters are not

provided to him/her at his/her post without charge. Such costs are those incurred for . . . one unit of residence quarters (living quarters allowance) and include rent, plus any costs not included therein for heat, light, fuel, gas, electricity and water.

(R4, tab 1 at 14-15 of 44)

4. Section 130 of the U.S. Department of State Standardized Regulations provides:

131 Definitions

131.1 “Living quarters allowance”, hereinafter referred to as LQA, means a quarters allowance granted to an employee for the annual cost of suitable, adequate, living quarters for the employee and his/her family.

131.2 “Rent”, exclusive of heat, light, fuel (including gas and electricity), water and taxes, means the annual cost of suitable, adequate living quarters for an employee and his/her family. When approved by the head of agency as necessary to provide such living quarters, rent may include in addition to the basic annual rental, the cost of . . . separate rental of necessary furniture . . . .

131.3 Scope

The LQA rates are designed to cover substantially all of the average employee’s costs for rent, heat, light, fuel, gas, electricity, water, taxes levied by the local government and required by law or custom to be paid by the lessee, insurance required by local law to be paid by the lessee, and agent’s fee required by law or custom to be paid by lessee.

. . . .

132.5 Costs

Employees shall submit written estimates of costs, or actual costs if they are known, to the head of agency . . . whenever an LQA grant commences. Thereafter, each employee shall show the actual annual expenses of rent and utilities, supported by receipts or other satisfactory evidence,

whenever requested by the officer designated to grant allowances . . . .

. . . .

#### 134 Determination of rate

Except as otherwise prescribed . . . an employee shall receive an allowance for allowable quarters costs for items listed in Sections 131.2 and 131.3 or the maximum rate for the post . . . *whichever is less* . . . . [Emphasis added]

(R4, tab 6 at 1-3 of 9)

5. On 22 July 2000, the contracting officer (CO) informed Mr. Elam of his selection for the position, subject to a security clearance. Also in that communication, the CO explained that “[t]he contract will provide for furnished housing in Bangkok (or you will be provided a living quarters allowance to cover this expense). The cost of furnishings and utilities will be included in your contract.” (R4, tab 7 at 1)

6. Mr. Elam responded by e-mail on 31 July 2000 asking for additional information regarding housing, specifically asking: “How do you actually handle the payments on rent and utilities?” By e-mail of the same date, the CO replied:

Regarding the planned allowable housing for your position-- once I do authorize you to incur costs-- for your planning purposes we will authorize up to \$1,800 per month for furnished housing in Bangkok. The cost for utilities is additional, at cost. The furnishings can be supplied by the landlord or these can be your own possessions. The method of payment will be cost reimbursement, i.e. we will ask you to pay these costs and then we will reimburse you through direct deposit to your bank account in the US. We will authorize payments for advance rental periods since we know this is customary in Thailand, up to three months in advance.

(R4, tab 7 at 3) Mr. Elam acknowledged this financial arrangement by e-mail on 1 August 2000, writing: “The reimbursement for costs is Ok as the contract goes along” (R4, tab 7 at 5).

7. On or about the first of October 2000, Mr. Elam submitted a voucher for a security deposit of 100,000 baht and rent of 66,660 baht, based on monthly rent of 50,000 baht, for the period 20 September to 30 September and for October. He enclosed

a receipt showing those amounts. The government reimbursed him in full. On or about the first of November and December 2000, he submitted vouchers for 50,000 baht per month and was reimbursed in full. Reimbursement was in dollars. The exact amount varied each month depending upon the exchange rate, and totaled \$3,902.48 for the period 22 September to 31 December 2000 exclusive of the security deposit. (R4, tabs 3 at 1-5, 10 at 2)

8. In mid-December 2000, an unidentified USAID employee determined that Mr. Elam should be paid LQA at the maximum rate for the Bangkok posting. Effective 3 December 2000 the maximum rate increased from \$14,900 per year to \$32,400 per year. On or about 22 January 2001, the government paid Mr. Elam an additional amount of \$1,677.29, based on the applicable maximum rate, for the period 20 September through 31 December 2000. On or about the same date, the government also paid Mr. Elam \$2,751.78, based on a maximum rate of \$32,400 per year, for January 2001. Starting in January, Mr. Elam's costs included approximately 10,000 baht for utilities as well as the 50,000 baht for rent. Using the amount of 60,000 baht, Mr. Elam's costs for January 2001 were \$1,389.53, or \$1,362.25 less than the amount he was paid based on the maximum rate. (R4, tabs 3 at 6, 7, 10, 10 at 2)

9. The government continued to pay Mr. Elam the maximum LQA, rather than his cost, through March 2004 (R4, tab 10).

10. From the record, it appears that sometime between March and April 2004 someone in the government recognized that Mr. Elam had been paid the maximum allowable LQA for in excess of three years without proof of his actual expenses. Beginning with the April 2004 housing voucher, the government reimbursed Mr. Elam only for his actual expenses. (R4, tabs 3 at 46-47, 10 at 2)

11. By e-mail of 31 May 2004, the government notified Mr. Elam that a review of his file indicated that the actual costs of his housing and maintenance had not been properly documented in accordance with government regulations. As a result, the government requested he provide receipts of actual rental payments since the inception of the lease through April 2004. (R4, tab 3 at 50)

12. Mr. Elam replied that he "was told that no receipts are needed and thus did not regularly save them." He asserted in a memorandum dated 7 June 2004 that "[t]he amount of LQA was higher than my actual costs but I was told [by USAID] that it doesn't matter what my costs are this is the set amount . . ." He stated that upon the issue being raised in early 2004, "I agreed to change the allotment to equal exact costs (*I had never expected more than this anyway*)." (R4, tab 8 at 8, 10-11, emphasis added)

13. The government calculated the overpayment to total \$52,026.73 which was reduced to \$24,801.47 after deducting repatriation expenses and three months of

reimbursable LQA (R4, tabs 9 at 6-10, 10). By final decision dated 10 May 2006, the government made a formal demand for payment of \$24,801.47 informing Mr. Elam of his right to appeal to this Board (R4, tab 5). Mr. Elam filed this timely appeal which was docketed on 2 August 2006.

14. Mr. Elam offers the following explanation of the LQA payments in his complaint, which the government accepts as true for purposes of its motion:

I began my contract . . . with USAID in Thailand contracted out of their Cambodia office which then had regional responsibilities. This was in September 2000. I arrived in Cambodia and met the administrative officer and the financial officer who explained my living quarter allowance to me. I had never before worked for USAID or seen this kind of arrangement in my previous USG work. They were long term career USAID people so I trusted what they told me. They showed me the State Dept book of world wide living quarter allowances and showed me the amount for Thailand where I was assigned. They filled in the first LQA voucher for me and told me to do it like this every month. In the first few months I sent them receipts for all living expenses since my contract seemed to indicate this was needed and it also seemed like normal procedure to me. I was told within a month or two to stop sending receipts because this was a flat rate I was given and USAID was saving money by not having to process lots of receipts every month. So I followed their directions and sent them only the vouchers each month filled in as they had directed me. Then after a while they also told me to not send in the vouchers to them anymore but that they would just do it for me in Cambodia. This went on for at least a few years after which they wanted me to do vouchers again but still not receipts. So USAID deposited the State dept. listed LQA to me every month and never asked for any receipts and told me this was their system. There were a series of very experienced admin and finance officers at USAID in Cambodia and they all continued and confirmed this information to me.

(Compl. at 2 of 4; gov't mot. at 1-2)

#### DECISION

Summary judgment may be granted where no material facts are genuinely in dispute and the moving party is entitled to judgment as a matter of law. *Mingus Constructors, Inc. v. United States*, 812 F.2d 1387, 1390 (Fed. Cir. 1987). The Board resolves all inferences in favor of appellant, as the party against whom the motion is directed. *JT Construction Co.*, ASBCA No. 54352, 06-1 BCA ¶ 33,182 at 164,464. A material fact is one that may affect the outcome of the case. *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 248 (1986).

Summarizing the government's argument, the contract and regulations provide that the government will reimburse the contractor for actual costs incurred in maintaining housing where those expenses are less than the maximum LQA. USAID mistakenly paid Mr. Elam the maximum LQA in lieu of his expenses and, therefore, is entitled to reimbursement of the amount of its claim.

Mr. Elam has not disputed the government's contractual argument. He argues:

Of course I did know the contract language which is why I assumed I should send receipts and justify costs every month when I started. But the USAID admin and finance officers had more than 20 years USAID experience in their positions as did their replacements. When they told me to stop sending receipts and showed me exactly how to fill in the vouchers every month and then later told me not to even send vouchers, I was in no position to question their knowledge and authority.

(App. opp'n dated 13 March 2007)

Essentially, Mr. Elam's opposition appears to be based upon a theory of detrimental reliance lending itself to an affirmative defense of estoppel against the government from seeking repayment. When estoppel is asserted against the government, one of the necessary elements is that "the contractor must be ignorant of the true facts." *JANA, Inc. v. United States*, 936 F.2d 1265, 1270 (Fed. Cir. 1991). *See also Rumsfeld v. United Technologies Corp.*, 315 F.3d 1361, 1377 (Fed. Cir. 2003) (requirement for a showing of affirmative misconduct as a prerequisite for invoking equitable estoppel against the government).

There are no facts in dispute, which if proven, could meet the necessary element that Mr. Elam be ignorant of the true facts. Those facts were that he was only entitled under the contract to his actual costs, since they were less than the maximum LQA. Upon contract inception, Mr. Elam sought the advice of the CO. The CO gave him advice which was in accord with the contract and the corresponding U.S. Department of State Standardized Regulations. Specifically, the contracting officer wrote Mr. Elam

that: “The method of payment will be cost reimbursement, i.e. we will ask you to pay these costs and then we will reimburse you . . . .” (SOF ¶ 6) For the first few months of the contract Mr. Elam conducted his affairs accordingly and was reimbursed for the costs he incurred. However, beginning in January 2001, when Mr. Elam began receiving the maximum LQA, which exceeded what he knew to be the amount of his rent and other reimbursable expenses, he was in violation of the contract. As he later stated, when challenged, “I had never expected more than [exact costs] anyway” (SOF ¶ 12).

Appellant also makes an appeal for relief on humanitarian grounds. The Board is not authorized to grant relief on this basis.

CONCLUSION

The government has established that it is entitled to summary judgment. The appeal is denied.

Dated: 20 March 2008

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

I concur

I concur

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

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ALEXANDER YOUNGER  
Administrative Judge  
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. 55521, Appeal of William Thomas Elam, rendered in conformance with the Board's Charter.

Dated:

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