

ARMED SERVICES BOARD OF CONTRACT APPEALS

Appeal of --)
)
General Construction Services, Inc.) ASBCA No. 57187
)
Under Contract No. 000000-00-0-0000)

APPEARANCE FOR THE APPELLANT: Mr. Richard H. Schultz
Project Manager and
Corporate Secretary

APPEARANCES FOR THE GOVERNMENT: Thomas H. Gourlay, Jr., Esq.
Engineer Chief Trial Attorney
Margaret P. Simmons, Esq.
Steven W. Feldman, Esq.
Engineer Trial Attorneys
U.S. Army Engineer District,
Huntsville

OPINION BY ADMINISTRATIVE JUDGE TUNKS
ON GOVERNMENT'S MOTION FOR SUMMARY JUDGMENT

General Construction Services, Inc. (GCS) requests payment of \$142,922 for work allegedly performed at the Munson Army Health Center (MAHC), Ft. Leavenworth, Kansas, between 15 November 2007 and 15 April 2008. The government moves for summary judgment alleging that GCS did not have a contract with the government. GCS opposes the motion on the ground that it had a verbal contract with Mr. Richard Purkett, Chief of the Logistics Division and Facility Manager for MAHC to perform the work. In addition to serving as the Chief of the Logistics Division for MAHC, Mr. Purkett was the ordering officer and contracting officer's representative (COR) for Task Order No. 0038 under Contract No. W912DY-04-D-0022, a maintenance contract being performed by VW International (VWI).¹

¹ The appeal from the denial of the claim was initially docketed as ASBCA No. 57067 on 15 December 2009 and dismissed for lack of certification on 12 March 2010. Appellant subsequently certified the claim and re-submitted it to the contracting officer. The contracting officer issued a second final decision on 25 March 2010, which we docketed as ASBCA No. 57187 on 8 April 2010. Since the government did not submit a separate Rule 4 file for ASBCA No. 57187, we have used the Rule 4 file in ASBCA No. 57067 and the supplemental Rule 4 documents submitted by GCS in reaching our decision.

STATEMENT OF FACTS (SOF) FOR PURPOSES OF THE MOTION

1. On 30 September 2006, VWI accepted Task Order No. 0038 under Contract No. W912DY-04-D-0022 for facility operation and maintenance (O&M) support at MAHC (R4, tab 16).

2. At the time, Mr. Purkett was Chief of the Logistics Division and Facility Manager for MAHC. On 21 March 2007, the contracting officer (CO) appointed him as the ordering officer and COR for Task Order No. 0038 (R4, tab 14). Mr. Purkett had the following contract authorities:

2. [H]e could make purchases using service order procedures not to exceed \$2,500. Service orders exceeding the \$2,500 limit [had to] be approved by the [CO]. [He] could not split purchases to avoid the monetary limitation. He could not make any changes in the terms and conditions of the contract or task order, and he could not delegate his authority to any other person.

3. [He] was not empowered to award, agree to, or sign any contract or modification thereto, or in any way to obligate the Government. Contractual agreements, commitments, or modifications which might involve prices, quantities, quality, or delivery schedules could only be made by the [CO].

4. [He also] had a government credit card (and could...write government checks) to make purchases not to exceed \$2,500.

(R4, tab 6)

3. Mr. Richard H. Schultz, GCS's corporate secretary and project manager, alleges that he entered into a verbal contract with Mr. Purkett to perform certain work on the second floor of MAHC. The contract was allegedly in effect from 15 November 2007 to 15 April 2008. (R4, tab 7 at 5) The work included unpacking, assembling, and distributing equipment to the second floor; recording and installing locks on every door on the second floor; changing every room number on the second floor; overseeing the commissioning of all VAV boxes with Johnson Controls; replacing every paper towel dispenser, soap dispenser, and toilet paper dispenser on the second floor; patching and painting holes; repairing and moving equipment; and installing all government-furnished property equipment (R4, tab 7 at 8-9). In addition, Mr. Schultz was allegedly asked to serve as the project coordinator and quality control manager for the project (R4, tab 7 at

4-5). According to Mr. Schultz, Mr. Purkett agreed to pay GCS \$70 per man hour plus 20 percent profit per month (*id.*).

4. On 13 March 2008, Mr. Purkett issued a government check in the amount of \$2,492.79 to GCS which was purportedly for installing battery operated paper towel and soap dispensers on the second floor (R4, tab 3).

5. On 4 November 2008, Mr. Schultz notified COL Vivian T. Hutson, Deputy Commander for Administration, who had succeeded Mr. Purkett as COR in October 2008, that the government owed him about \$90,000 for providing project coordination for the 2nd floor renewal project and reconfiguring the basement for the Logistics Division. In his conversation with COL Hutson, Mr. Schultz admitted he did not have a contract or a service order with the government authorizing GCS to perform the work. When asked why he waited six months to request payment, Mr. Schultz stated that he thought the government would eventually pay for the work. (R4, tabs 3, 13 at 6)

6. On 6 November 2008, COL Hutson received two invoices from GCS totaling \$91,873 (R4, tab 4). Invoice GCS1405 dated 21 March 2008 requested payment of \$15,785 for work performed in the basement. Invoice GCS1410 dated 15 April 2008 requested payment of \$76,088 for work performed on the second floor. (R4, tab 4)

7. CPT Semone M. Dilworth conducted an investigation pursuant to Army Regulation 15-6. She found that Mr. Schultz had performed some work at MAHC, and that he had been issued a CAC card and a MAHC identification card (R4, tab 7). In response to questions from CPT Dilworth, Mr. Schultz stated that Rich Purkett had hired him and that he “worked with only a verbal contract on this project, that is all I needed” (R4, tab 7 at 5). Mr. Purkett denied hiring Mr. Schultz (*id.* at 23). VWI’s Mr. Clarke stated that he recommended to Mr. Purkett that Mr. Schultz be hired, but that he (Mr. Clarke) did not hire him (R4, tab 7 at 32-33). CPT Dilworth concluded that “Mr. Purkett was the only person who could have requested a modification of the contract that would allow a contractor to perform the services that Mr. Schultz performed” (R4, tab 8 at 2). She recommended that Mr. Schultz be paid the fair market value for some of the work performed, if permissible by law, but only after more research was conducted into the exact type of work performed. In particular, she questioned whether GCS installed the battery operated paper towel and soap dispensers and locks on the second floor. (*Id.*)

8. On 26 August 2009, Mr. Schultz submitted an uncertified claim in the amount of \$142,922 for work performed from 19 December 2007 through 15 April 2008 in support of the VWI contract. Mr. Schultz alleged that GCS unpacked, assembled, and distributed all of the equipment on the second floor and hauled off and disposed of all shipping containers and wrapping material. He also alleged that GCS recorded and installed locks on every door on the second floor, that it received and distributed (but did

not hang) all wall art for the first and second floors, changed every room number on the second floor, oversaw the commission of all “VAV” boxes with Johnson Controls, located each thermostat and documented on red line drawings, replaced every paper towel dispenser, every liquid soap dispenser, and every toilet paper dispenser on the second floor, patched and painted holes as needed, repaired damaged equipment and moved equipment in rooms 2B01, 2B26, 2A39, 2A03, 2B38, 2B29, 2B35 where the equipment would not fit as desired, and installed all government furnished property in the rooms. (R4, tab 1)

9. The CO denied the claim on 19 October 2009 stating, in part, as follows:

In your claim, you stated that you performed services in support of the transition work under VWI Contract W31RY0-8282-0094. This is not a contract number[.] [T]his is a Huntsville Center purchase request number.... I have contacted VW[I]...and they stated that while they were aware that you were working at Ft. Leavenworth, they did not have a contract with you, nor did they hire you for any work to be performed [there]. They stated that you were performing work under the direction of Richard Purkett.... To my knowledge, you have no written contractual agreement with the Federal Government.

...Your claim states that you worked for six months and did not submit a request for payment for an additional six months. COL Hutson stated that you had informed her that your paperwork had gotten destroyed in a tornado, and since the previous COR had left Ft. Leavenworth, you wanted her to pay for these services. Since there was no contract in place between you and The Corps of Engineers or between you and any of our prime contractors, specifically VW[I], I informed Ft. Leavenworth that we would not be ratifying your claim....

....

Your claim is denied in full. There was no contract in place with the government and specifically, The Corps of Engineers. Your claim is for work that is outside of the OMEE maintenance contract. It is too vague to support a finding of entitlement. No proof exists that all the alleged work has been performed.

(R4, tab 2)

10. On 12 December 2009, GCS appealed the CO's final decision to the Board, where it was docketed as ASBCA No. 57067. On 2 February 2010, GCS certified the claim in accordance with the Contract Disputes Act, 41 U.S.C. § 7103(b). On 12 March 2010, the Board dismissed ASBCA No. 57067.

11. On 25 March 2010, the CO denied the claim as certified. GCS appealed the CO's final decision to this Board on 7 April 2010. We docketed the appeal as ASBCA No. 57187 on 8 April 2010.

DECISION

Summary judgment is proper only where there is no genuine issue of material fact and the moving party is entitled to judgment as a matter of law. FED. R. CIV P. 56(a); *Mingus Constructors, Inc. v. United States*, 812 F.2d 1387, 1390-91 (Fed. Cir. 1987). The government, as the moving party, bears the burden of proving the absence of any genuine issue of material fact. A material fact is one that may affect the outcome of the decision. *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 248-49 (1986).

GCS alleges that Mr. Purkett hired it and that it had a verbal contract. A binding contract with the government, whether express or implied-in-fact, requires that the government representative who entered into or ratified the contract have actual authority to do so:

The general requirements for a binding contract with the United States are identical for both express and implied contracts. The party alleging a contract must show a mutual intent to contract including an offer, an acceptance, and consideration. A contract with the United States also requires that the Government representative who entered or ratified the agreement had actual authority to bind the United States. Anyone entering into an agreement with the Government takes the risk of accurately ascertaining the authority of the agents who purport to act for the Government, and this risk remains with the contractor even when the Government agents themselves may have been unaware of the limitations on their authority.

Trauma Service Group v. United States, 104 F.3d 1321, 1325 (Fed. Cir. 1997) (citations omitted).

The undisputed facts show that Mr. Purkett did not have authority to bind the government to purchases of more than \$2,500 and that the CO refused to ratify any order

that was placed (SOF ¶¶ 2, 9). Accordingly GCS has not proved that it had a contract with the government on which it may recover.

CONCLUSION

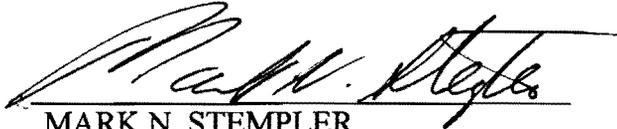
The government's motion for summary judgment is granted. The appeal is denied.

Dated: 4 August 2011


ELIZABETH A. TUNKS
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. 57187, Appeal of General Construction Services, Inc., rendered in conformance with the Board's Charter.

Dated:

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