ARMED SERVICES BOARD OF CONTRACT APPEALS

Appeals of --	)	
	)	
Arthur E. Lees	)	ASBCA Nos. 52040, 52207
	)	
Under Contract No. S-CH500-98-0004	)	

APPEARANCE FOR THE APPELLANT: Arthur Edward Lees, Esq.
Pro Se

APPEARANCE FOR THE GOVERNMENT: Dennis J. Gallagher, Esq.
Trial Attorney
Department of State
Washington, DC

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

Under these appeals, Mr. Arthur E. Lees (appellant) seeks to rescind or reform his contract with the United States and Foreign Commercial Service (US&FCS) of the International Trade Administration (ITA), Department of Commerce. This contract was to perform commercial related personal services for the American Consulate in Chengdu, China in 1997-1998. The Government has filed a motion for summary judgment, contending that it is entitled to judgment as a matter of law. Appellant has filed in opposition to the motion.[1] For reasons stated below, we grant the Government's motion.

FINDINGS OF FACT

1. During 1997, the American Consulate in Chengdu, China was in need of a person to provide personal, commercial related services in China to further the mission of the consulate. The Consulate obtained authorization to hire a person under a personal services contract by telegram dated 31 July 1997. Said telegram stated, in pertinent part, as follows (app. R4 supp., 52040, tab 6, ex. J):

> US&FCS Chengdu is authorized to hire a commercial representative under a personal services contract at grade FP 5/6. . . . Execution of the contract, to begin on or about August 1, 1997 and carry over to the same date in 1998, is subject to the availability of funds. Annualized costs will be approximately USD 38,000. This contract may be renewed annually for up to five years, again subject to the availability of funds.

2. Appellant, an attorney and former employee of the Department of the Army, was in country in late 1997, seeking professional growth and studying Mandarin Chinese at Southwest Jiaotong University in Chengdu.

3. In September 1997 appellant visited the Consulate and met Mr. Robert Tansey, Commercial Officer. Mr. Tansey requested and received appellant's resume. In October 1997 Mr. Tansey contacted appellant and explained the Government's needs, and provided him with a copy of a vacancy announcement. The Government does not dispute, and we find that it did not publicize a proposed contract action in the Commerce Business Daily or as otherwise provided by regulation, *see generally* FAR 5.1, 5.2, nor did it use sealed bidding or competitive proposals to solicit appellant's services, *see* FAR 37.105, 6.401, nor does it appear that the Government followed any regulation to support a deviation from these procedures.

4. Appellant expressed interest in working with the Consulate, and the Government sought to engage his services. By letter to appellant dated 21 November 1997, the U.S. Embassy personnel officer in Beijing advised appellant as follows (R4, 52207, tab 6):

> I am pleased to inform you that you have been selected to fill the Commercial Representative position for the American Consulate in Chengdu. You will be appointed at an annual salary of $30,751. Please be aware that this appointment, like all appointments at the American Consulate, is temporary and may be terminated at any time.
>
> *The Consulate does not provide housing or health benefits with this position* as it is considered a local hire position. Social Security and Taxes will be withheld from your salary. Should you have any questions please call me. Congratulations on being selected to the position and we look forward to working with you.
>
> Please indicate below your acceptance of this position and return the memo to Personnel. (Emphasis added)

Appellant accepted the Government's terms by signing and dating the letter on 24 November 1997 and returning it to the Government.

5. By telegram to the Department of Commerce, Washington, DC dated 27 November 1997, the U.S. Embassy "request[ed] approval of personal services contract for new FCS Chengdu commercial representative, Arthur Edward Lees". Authorization was granted by telegram dated 4 December 1997 (R4, 52207, tab 12).

6. On 17 December 1997, appellant executed a contract entitled "Personal Services Contract Between the U.S. Department of Commerce and Arthur E. Lees." Mr. Michael Yen, Contracting Officer, signed on behalf of the Government,[2] as did the Embassy's personnel officer and the budget and fiscal officer. The period of performance was from 15 December 1997 to 30 September 1998. The services to be provided were stated as follows (R4, 52207, tab 15):

> The Contractor will provide the following types of services in the execution of his/her duties:
>
> Working directly under the Commercial Officer, incumbent performs, in effect, the duties of a junior FCS Officer. Incumbent produces alert market reports on trade, investing and licensing opportunities in China. Incumbent contributes to post production of Industry Sub-sector Analyses, Trade Opportunity Reports, Comparison Shopping Services and other standard FCS information products. Incumbent counsel [sic] U.S. companies on doing business and assists U.S. companies involved in trade disputes with Chinese organizations. Incumbent counsels Chinese organizations seeking to import U.S. products and helps facilitate chinese [sic] buying missions to the U.S. and participates in mission trade promotion activities. Incumbent serves as FCS staff contact with Chinese officials and U.S. company representatives for working group meetings. As required, incumbent undertakes special projects assigned by the Commercial Officer.

The contracting officer also executed a JF-62, Personal Services Contracting Action, on 18 December 1997. This form provided that the subject contracting action was an "Appointment under Personal Services Contract" (*id*., tab 16). Appellant was identified as a "contractor", not an employee. A copy of the form was to be provided to appellant.

7. On the front page of appellant's contract, prominently displayed in the middle of the page above the signatures, was the following statement (R4, 52207, tab 15):

> . . . THE CONTRACTOR is NOT a direct-hire employee of the U.S. Government . . . . (Emphasis in original)

8. We also find the following contract clauses pertinent:

> CLAUSE IV. ESTIMATED COST

The estimated cost of this Contract, exclusive of travel, for satisfactory actual work performed under this contract will be calculated at a rate of USD 14.73 per hour . . . .

. . . .

E. Health Insurance. The contractor shall be provided a maximum contribution of up to 50% against the actual costs of annual health insurance costs, provided that such costs may not exceed the maximum U.S. Government contribution for direct-hire personnel.

. . . .

CLAUSE X. SOCIAL SERVICES

Contract employees are to be considered as employees for the purposes of any United States or foreign law of general applicability to an employer and employee. Personal Services Contractors who are U.S. citizens or resident aliens shall have deducted from their pay F.I.C.A. (Social Security) contributions and U.S. federal income tax withholding in accordance with the regulations and rulings of the Social Security Administration and the Internal Revenue Service. . . .

. . . .

CLAUSE XII. DISPUTES

This Contract is subject to the Contract Disputes Act of 1978 (41 USC 601-613 The Act). Except as provided in the Act, all disputes arising under or relating to this Contract shall be resolved by submitting a claim, in writing, from either party to the Contracting Officer for a written decision. The Contracting officer's decision shall be final unless the Contractor appeals or files a suit as provided in the Act.

. . . .

CLAUSE XVI. AVAILABILITY OF FUNDS

The Government's obligation under this contract is contingent upon the availability of appropriated funds from

> which payment for Contract purposes can be made. No legal liability on the part of the Government for any payment may arise until funds are made available to the Contracting Officer in this Contract and until the contractor receives notice of such availability, to be confirmed in writing by the Contracting Officer.

The Government did not include an options clause in appellant's contract. Appellant does not allege in its claims that any authorized Government contracting agent represented to him that such a clause would be included in his contract or that the Government would renew appellant's contract.

9. It appears that during the performance of the contract there arose a number of disputes as to appellant's remuneration and the renewal of the contract. By memorandum dated 8 September 1998, appellant sought a contracting officer's decision under the Disputes clause of his contract, seeking a contract interpretation to the effect that his contract was one of federal employment and that he had been appointed as a federal employee in the civil service (R4, 52207, tab 20).

10. Appellant's claim was denied by contracting officer's decision dated 9 November 1998. Insofar as pertinent the contracting officer stated as follows (R4, 52207, tab 21):

> 1) The Contract is entered into pursuant to statutory authority (pub. L. 105-119, 11[1] Stat. 2472) provided to the Department of Commerce for "employment of Americans and aliens by contract abroad."
>
> 2) As stated on its cover page, the Contract is a "personal services contract"; i.e. one which establishes an employer-employee relationship between the Government and the contractor (cf. FAR 37.104).
>
> 3) Also as stated on the cover of the Contract, the Contract does not make the contractor a "direct-hire employee" (i.e., a member of the statutory civil service or Foreign Service personnel systems).
>
> 4) While the Embassy has used the terms "appointment" and "position" in referring to your contract employment, it is clear that you have not been appointed to a civil service or Foreign Service position [citations omitted].

5) The Contract, whose term has now expired, is valid and effective in accordance with its terms.

Appellant filed an appeal of this decision, and it was docketed by the Board as ASBCA No. 52040.

11. By letter to the contracting officer dated 9 February 1999, appellant asserted a second claim, contending that he was entitled to reformation or rescission of his contract (1) due to mistakes and misrepresentations regarding the nature of the contract and compensation and (2) due to the improper procedures used by the Government to solicit and award the contract. Appellant requested, *inter alia*, that an option clause be added to his contract and that it be immediately exercised in his favor; he also sought increased annual and sick leave, a higher salary rate, hardship differential, a cost of living adjustment, and medical and life insurance premium reimbursement and housing expenses. (R4, 52207, tab 22)

12. Appellant's second claim letter refers to a conversation between appellant and the personnel officer at the Embassy, prior to appellant's execution of the contract, to the effect that compensation under the contract was not negotiable (*id*., at 6). The Government's offer, which appellant accepted and signed, also stated that appellant was not entitled to housing benefits (finding 4). Appellant's claim letter does not allege that the contracting officer misrepresented the nature or amount of his compensation.

13. The contracting officer issued a decision dated 8 April 1999, which for the most part denied appellant's claim. The contracting officer conceded that appellant was entitled to a reimbursement for certain annual health insurance costs pursuant to the contract (finding 8), and requested documentation to support the claim. As far as this record shows, appellant provided this documentation and the Government reimbursed these insurance costs pursuant to the contract.

14. Appellant also filed an appeal of this contracting officer's decision, and it was docketed by the Board as ASBCA No. 52207.

15. The US&FCS Operations Manual, Chapter 523.1, Revised 03/96, provides in pertinent part as follows (app. R4 supp., 52207, tab 35):

523.1 Personal Service Contracts

SECTION 1. OBJECTIVE

To establish procedures for Personal Service Contracts (PSCs)

SECTION 2. GENERAL DESCRIPTION

A. Definition

A PSC is a contract with an individual which makes the contractor appear to be, in effect, a U.S. Government (USG) employee. A PSC contractor is, among other things, subject to the relatively continuous supervision and control of a USG employee . . . .

B. Authority

US&FCS's authority to enter into domestic and foreign PSCs is based upon ITA's annual appropriation law which is subject to possible revision each fiscal year.

Specific authorities/requirements of Federal Acquisition Regulations, 48 CFR 6.1 et seq. and 48 CFR 37.1 apply. Overseas PSCs are subject to regulations in 3 Foreign Affairs Manual (FAM) 171.4 through 179.2, and 3 FAM 926.

C. Policy

PSCs are not covered by any benefit plan or law administered by the Office of Personnel Management (OPM), e.g., programs such as annual and sick leave, health and life insurance and retirement plans. …

DECISION

By its very terms, appellant's contract was identified as a personal services contract. The contract expressly provided that appellant was not a direct hire employee (findings 6, 7). Insofar as pertinent, the FAR provides as follows with respect to personal services contracts:

37.104 Personal services contracts.

(a) As indicated in 37.101, a personal services contract is characterized by the employer-employee relationship it creates between the Government and the contractor's personnel. The Government is normally required to obtain its employees by direct hire under competitive appointment or other procedures required by the civil service laws. Obtaining personal services by contract, rather than by direct hire, circumvents those laws

> unless Congress has specifically authorized acquisition of the services by contract.
>
> (b) Agencies shall not award personal services contracts unless specifically authorized by statute (e.g. 5 U.S.C. 3109) to do so.

The Omnibus Consolidated Appropriations Act, 1997, Pub. L. No. 104-208, 110 Stat. 3009, 3009-32 (September 30, 1996) provided annual appropriations for the Department of Commerce, International Trade Administration activities for fiscal year 1997 as follows:

> *For necessary expenses for international trade activities of the Department of Commerce provided for by law, and engaging in trade promotional activities abroad, including* expenses of grants and cooperative agreements for the purpose of promoting exports of United States firms, without regard to 44 U.S.C. 3702 and 3703; full medical coverage for dependent members of immediate families of employees stationed overseas and employees temporarily posted overseas; travel and transportation of employees of the United States and Foreign Commercial Service between two points abroad, without regard to 49 U.S.C. 1517; *employment of Americans and aliens by contract for services*; *..*." (Emphasis added)

The Continuing Appropriations Act, 1998, Pub. L. No. 105-46, 111 Stat. 1153 (September 30, 1997) generally provided that pending further Congressional action, fiscal year 1998 funds would be available under the same authority and conditions that governed fiscal year 1997 appropriations. The Departments of Commerce, Justice, and State, the Judiciary and Related Agencies Appropriations Act, 1998, Pub. L. No. 105-119, 111 Stat. 2440, 2471, 2472 (November 26, 1997), also recited verbatim the above appropriation provision.

In accordance with the US&FCS Manual, this legislative appropriation language is the agency's authority for personal service contracting (finding 15). The contracting officer's decision also apparently relied on this language as authorizing personal service contracting (finding 10). We agree that the ITA annual appropriation legislation provides the statutory authority for the award of appellant's personal services contract as contemplated by the FAR.

We conclude that appellant's personal services contract was authorized by statute, provided for the use of appropriated funds and was subject to the FAR and those acquisition procedures pertinent thereto.[3] It also follows that we have jurisdiction over this personal services contract dispute under the CDA, 41 U.S.C. §§ 601 *et seq*. We now proceed to address the merits of the Government's summary judgment motion.

The law governing summary judgment is familiar. As we recently stated in *Elam Woods Company, Inc.*, ASBCA No. 52448, 2001 LEXIS 32 (February 15, 2001):

> Summary judgment is properly granted when there is no genuine issue of material fact, and the movant is entitled to judgment as a matter of law. The moving party bears the burden of establishing the absence of any genuine issue of material fact [citations omitted].
>
> . . . .
>
> The burden on the movant is to point out that there is an absence of evidence to support the nonmoving party's case. *Sweats Fashions, Inc. v. Pannill Knitting Co.*, 833 F.2d 1560, 1563 (Fed. Cir. 1987). Once the moving party has met its burden, the nonmovant must proffer countering evidence sufficient to create a genuine factual dispute. Conclusory statements, denials, or arguments do not raise a genuine issue of fact. *Applied Companies v. United States*, 144 F.3d 1470, 1475 (Fed. Cir. 1998); *Paragon Podiatry Laboratory, Inc.* v. *KLM Laboratories, Inc.*, 984 F.2d 1182, 1190 (Fed. Cir. 1993). A genuine issue of material fact arises when the nonmovant presents sufficient evidence upon which a reasonable fact finder, drawing the requisite inferences and applying the applicable evidentiary standard of proof, could decide the issue in favor of the nonmovant. *Anderson v. Liberty Lobby, Inc., supra*, at 254-55; C. *Sanchez and Son, Inc. v. United States*, 6 F.3d 1539, 1541 (Fed. Cir. 1993).

The movant will be entitled to summary judgment if the nonmovant is unable to provide evidence of all elements esssential to the establishment of its *prima facie* case. *Dairyland Power Cooperative v. United States*, 16 F.3d 1197, 1202 (Fed. Cir. 1994).

Appellant seeks to rescind or void his written contract to obtain the fair market value of the services he rendered. In order to obtain the equitable remedy of rescission, it is well settled that appellant must prove mutual mistake, fraud, or illegality in the formation of the contract. *Dow Chemical Co. v. United States*, 226 F.3d 1334 (Fed. Cir. 2000). As stated in *Dairyland, supra*, at 1202, in order to establish mutual mistake, a party must show the following:

> (1) the parties to the contract were mistaken in their belief regarding a fact;

(2) that mistaken belief constituted a basic assumption underlying the contract.
(3) the mistake had a material effect on the bargain; and
(4) the contract did not put the risk of the mistake on the party seeking reformation.

Appellant has failed to offer evidence – as opposed to argument – to support these four elements. Appellant has failed to adduce any evidence to the effect that he and the contracting officer erroneously believed that he was hired as a federal employee under the civil service laws. Indeed, the contract that both parties signed stated clearly to the contrary. Nor did any conceivable misunderstanding on appellant's part have a material effect on the bargain since appellant accepted his position at a stated compensation which was non-negotiable and which clearly did not include reimbursement for housing expenses (finding 12). Appellant may not recover on the ground of mutual mistake.

Nor has appellant alleged any fraud in its claim and may not recover on this basis. With respect to allegations regarding the formation of the contract, we note that the Embassy contracting officer who executed the contract was authorized to do so. The record, however, reflects that the Government failed to follow the FAR in a number of respects in the solicitation and award of this contract (finding 3). Assuming, *arguendo*, that these regulations were promulgated for the benefit of contractors, we must conclude that appellant participated in, and benefited from the acquisition process to which it now objects and must be considered as having unclean hands so as to be precluded from obtaining the equitable remedy. *Promac, Inc. v. West*, 203 F.3d 786, 789 (Fed. Cir. 2000).

Alternatively, appellant seeks to reform the contract by changing its terms and conditions to afford him compensation that his written contract denied him. Generally, such a remedy may be available under certain circumstances where the parties' writing fails to express their actual agreement, *see* RESTATEMENT (SECOND) OF CONTRACTS, § 155 (1981); or where an authorized party makes a unilateral mistake of a material fact, *i.e*., a bid mistake, during the formation of the contract which the other authorized party had reason to know and failed to seek correction thereof, see *Giesler and Coniglio v. United States*, 232 F.3d 864 (Fed. Cir. 2000); or where an authorized party misrepresents the contents or effect of a writing prior to its execution upon which the other party justifiably relied and which induced said party to assent to the writing, see RESTATEMENT (SECOND) OF CONTRACTS, § 166 (1981).

We have reviewed the record and find no evidence – as opposed to argument – that would support a *prima facie* case for contract reformation on any of these theories. Appellant fails to suggest, let alone provide any evidence to the effect that the Embassy contracting officer misrepresented appellant's compensation which reasonably induced appellant to sign his contract. Appellant accepted the Government's written terms and conditions, and executed his personal services contract, with full knowledge of their

contents in all material respects. With respect to appellant's claim regarding the renewal of his contract, appellant has not shown that an options clause was required by law to be included in his contract and/or that the Government was otherwise obligated to renew his contract.

For the foregoing reasons, we conclude that appellant may not recover on his claims and that the Government is entitled to judgment as a matter of law. The appeals are denied.[4]

Dated: 26 March 2001

JACK DELMAN
Administrative Judge
Armed Services Board
of Contract Appeals

I concur

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

I concur

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

NOTES

[1] Appellant also filed a motion for protective order, objecting to the inclusion in the Government's Rule 4 file of two personnel forms completed by appellant – "SF85, Questionnaire for Non Sensitive Positions" (R4, 52207, tab 3), and "SF86, Questionnaire for National Security Positions" (*id*., tab 17) – on the grounds that they contain information that is confidential and/or irrelevant to these appeals. We agree that these personnel forms are not relevant to these appeals. We hereby

strike them from the record and return them to the Government (under separate cover).

[2] Mr. Yen was an authorized contracting officer for the Department of State, U.S. Embassy Beijing. He was authorized to enter into this contract on behalf of the Department of Commerce pursuant to 48 CFR 601.603-70(a)(1)(ii).

[3] We note that in a number of unpublished GAO opinions, the GAO has dismissed protests filed by appellant, stating that the enabling statutory language above – "employment…by contract for services" – envisions *employment* actions under federal employment laws rather than personal service contracts under the FAR. *Arthur Lees-Protests and Reconsideration Requests*, B-281181.3 et seq. (May 20, 1999). *Arthur Edward Lees-Reconsideration*, B-281181.5 (February 11, 2000) (attached to the Government's motion). We have reviewed these opinions and are not persuaded to follow them. We are not persuaded that the use of the term "employment" in this context necessarily invokes appointments under federal civil service, foreign service or other federal employment laws or procedures. *See, e.g*. 5 U.S.C. § 3109 ("employment" of experts and consultants by contract is not an appointment under federal civil service laws).

[4] The Board is mindful that while appellant has already obtained considerable document discovery in these appeals it has not obtained all of the discovery it desires. Appellant has filed multiple sets of voluminous discovery (hundreds of interrogatories and document requests) and the Government has filed a motion for protective order related thereto. In view of our disposition of these appeals, we need not address these motions. We are not persuaded that appellant's requests for Government information, even if granted in total, would reasonably lead to the discovery of evidence, particularly as to appellant's own conduct or justifiable reliance, that would be necessary to establish a *prima facie* case on any of the equitable theories it has advanced.

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. 52040 and 52207, Appeals of Arthur E. Lees, rendered in conformance with the Board's Charter.

Dated:

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