

ARMED SERVICES BOARD OF CONTRACT APPEALS

Appeal of --)
)
Ursula Huebsch) ASBCA No. 50267
)
Under Alleged Implied-In-Fact Contract)

APPEARANCE FOR THE APPELLANT: Daniel F. Crowley, Esq.
Buechner & Crowley
Frankfurt, Germany

APPEARANCES FOR THE GOVERNMENT: Frank Carr, Esq.
Engineer Chief Trial Attorney
Paul O. Cheverie, Esq.
Shivaun White, Esq.
Laura Smith, Esq.
Engineer Trial Attorneys
U.S. Army Corps of Engineers,
Europe District

OPINION BY ADMINISTRATIVE JUDGE PAUL
PURSUANT TO BOARD RULE 11

This is a timely appeal of a contracting officer's decision denying Frau Ursula Huebsch's (Frau Huebsch) claim in an amount of DM324,175. The Contract Disputes Act (CDA), 41 U.S.C. §§ 601 *et seq.*, is invoked; only issues of entitlement are before us for decision. Respondent filed a motion to dismiss for lack of jurisdiction contending that no contractual relationship existed between the parties. Subsequently, the parties briefed this issue extensively. The Board held a hearing in Heidelberg, Germany, in which it took testimony on all entitlement issues. The parties then agreed to submit the appeal on the record pursuant to Board Rule 11. As part of this submission, respondent filed a post-hearing brief; while the appellant relied on its jurisdictional briefs.

STATEMENT OF FACTS

1. On 25 October 1989, the United States Army Corps of Engineers, Europe District (Corps), awarded Contract No. DACA90-90-C-0405 to Huebsch Industrieanlagen Spezialbau GmbH (HISG) in a fixed-price amount of DM23,522,543.38 to construct a replacement medical and dental facility at Rhein Main Air Force Base in Frankfurt, Germany (R4, tab C-1).¹

2. As part of the contract HISG was required to demolish the existing clinic and to construct a new building with access roads and parking areas. The work was divided into three phases. The original completion dates were 7 February 1992 for Phase I and 8 July 1992 for Phases II and III, respectively. As a result of Modification No. P00021, the contractual completion date was ultimately extended to 2 January 1993 for all phases (R4, tabs C-2, -3).

3. The Corps issued a Notice to Proceed to HISG on 11 December 1989 (R4, tab B), and the contractor almost immediately began to experience a series of delays (R4, tabs D-2 through D-7). The contracting officer issued two cure notices to HISG, but its performance did not improve (R4, tabs D-10, -13, -16).

4. On 9 July 1993, the contracting officer issued a final decision terminating HISG's contract for default. He cited the contract's default clause, FAR 52.249-10, DEFAULT (FIXED-PRICE CONSTRUCTION) (APR 1984), which stated, in pertinent part:

(a) If the Contractor refuses or fails to prosecute the work or any separable part, with the diligence that will insure its completion within the time specified in this contract including any extension, or fails to complete the work within this time, the Government may, by written notice to the Contractor, terminate the right to proceed with the work (or the separable part of the work) that has been delayed. In this event, the Government may take over the work and complete it by contract and otherwise, and take possession of and use any materials, appliances, and plant on the work site necessary for completing the work. The Contractor and its sureties shall be liable for any damage to the Government resulting from the Contractor's refusal or failure to complete the work within the specified time, whether or not the Contractor's right to proceed with the work is terminated. This liability includes any increased costs incurred by the Government in completing the work.

(R4, tab E-3) As part of this final decision, the contracting officer also asserted:

The remaining contract requirements will be reprocured against your account and you will be held liable for any excess costs and common law damages. The U.S. Government reserves all its rights and remedies provided by the law of the United States of America as is stated under the terms of the contract. In addition, we will assess against you the excess

costs of reprocurement and liquidated damages for a reasonable time until completion of all the work.

Finally, the contracting officer stated:

Additionally, you are hereby notified that under the terms of your contract and FAR 49.402-2, your [sic] are directed to promptly transfer title and deliver to the Government all supplies and manufacturing materials connected to the project as will be directed by the Contracting Officer. This is not meant to alter the Government's right to immediate possession and delivery of all supplies and manufacturing materials to which the Government already has acquired title under any provision of the contract, which includes all drawings, sketches, "as built" [sic] documents, manuals, operational instructions, and miscellaneous equipment, attachments, testers, locks and keys which are or became the U.S. Government's property under the terms of the contract.

(R4, tab E-3)

5. HISG appealed the contracting officer's final decision to the United States Court of Federal Claims. In an opinion issued on 24 May 1996, *Hübsch Industrieanlagen Spezialbau GmbH, in Konkurs*, No. 94-438C, the court granted the Government's motion for summary judgment and sustained the default termination (R4, tab E-6).²

6. HISG also responded to the default termination with a series of letters. For example, on 13 July 1993, Herr Gerhard Huebsch wrote to the contracting officer as follows:

After receipt of your termination letter, your Officers have forced the doors of the Office-Containers, taken the keys that were therein and then provided the containers with new locks.

We urgently ask for the following activities:

- 1) Ascertainment and handing-over of the material that is U.S. Army's property.
- 2) Removing tools and equipment of firm Hübsch from the Clinic rooms.

3) Ascertainment/determination of the present construction status.

4) Handing-over of manuals and drawings that are already completed or still in work.

5) Taking over of files, material, and tools owned by firm Hübsch GmbH.

6) Taking over of jobsite mobilization of firm Hübsch GmbH and Sub-contractors.

7) Taking over of files, material, and tools owned by the Sub-contractors.

We kindly ask for [sic] notifying us a date until Wednesday, 10.⁰⁰ 0'clock [sic].

(R4, tab D-22) Herr Huebsch did not state that any of the material or equipment at the job site was owned by his wife.

7. On 19 July 1993, Herr Huebsch forwarded another letter to the contracting officer. He asserted:

On Tuesday, 13 July 1993, the director of firm HÜBSCH INDUSTRIEANLAGEN SPEZIALBAU GMBH, Mr. Gerhard Hübsch, submitted petition to institute bankruptcy proceedings with the district court in Hanou. The petition was submitted on account of your termination of above mentioned contract.

In compliance with the bankruptcy procedure the builder (in this case the U.S. Army) is not allowed to remove stored material, to install such, or to continue the works. In particular, it is forbidden to have the works performed by thirds what [sic] would interfere in claims of firm Hübsch GmbH or thirds, e.g. subcontractors or suppliers, not yet determined and fixed.

All works of firm Hübsch GmbH have to be established by the receiver in bankruptcy appointed by the district court in order to enforce claims still existing against the U.S. Army.

In particular, besides the items stated in our letter dated July 13, 1993, further preventive measures have to be taken and

characteristics with regard to the bankruptcy proceedings have to be observed, i.e. as follows:

1) Together there must be ascertained and made a statement of the material stored at the jobsite. Hereto also the position of possession and property with regard to rights of thirds must be clarified.

2) Together with the responsible Officers of the U.S. Army the rate of performance of the individual titles must be fixed.

3) No changes at the upgrade and the technical installations are allowed to be performed as long as the inventory as mentioned under item 2) has not been made.

4) All materials stored in and around the upgrade must neither be used nor removed as long as inventory has not been made.

5) On 15.07.1993 all keys were handed over to your Mr. Martinek at the Rhein Main Air Base jobsite. As agreed with your Mr. Martinek the lock cylinders may be exchanged against those ones of the builder/(U.S. Army) during the joint reporting of inventory.

6) Expressively we point to the fact that the certain technical units, e.g. emergency power supply unit, and installations a permanent maintenance is necessary [sic]. Further, the landscaping must be maintained. By termination of contract we are now exempt from these obligations that now apply to you.

7) The use of the jobsite mobilization by you must be clarified.

We kindly ask for consideration and information as to how shall be proceeded [sic] regarding above mentioned items and those stated in our letter of 13.07.1993.

(R4, tab D-23) Herr Huebsch did not state that any of the material or equipment at the job site was owned by appellant.

8. The contract was reprocured on 3 June 1994. Pursuant to the default clause and in order to mitigate reprocurement costs which would otherwise be assessed against HISG, the material and equipment left on site by HISG were used by the reprocurement contractor. The reprocurement contract was completed on 7 January 1995, and the reprocurement contractor demobilized the site with the exception of certain material and equipment owned by HISG (R4, tab E-7).

9. On 22 March 1995, Herr Huebsch of HISG forwarded the following letter to the Government:

the [sic] clearing of the construction site of residual material will be done upon the instructions of the receiver of bankruptcy, solely by me, any directive by a third party is unlawful.

The construction material may only be picked up with my approval and/or in the presents [sic] of my representatives Thomas Laube or Heike Huebsch-Laube.

(R4, tab D-45) Herr Huebsch's letter was silent regarding his wife's ownership of any equipment or material at the job site.

10. On 29 March 1995, appellant, Frau Huebsch, informed the contracting officer in writing that she was allegedly the owner of a portion of the job site equipment and material. Frau Huebsch stated:

[T]he following jobsite mobilization was used from firm Hübsch Industrieanlagen Spezialbau GmbH i.K. (under contract DACA90-90-C-0405 till [sic] 9 July 1993:

5 Office-Container 40 ''
2 Storage-Container 40 ''
2 WC-Container 20 ''
2 Jobsite-Trailer
1 mobile Scaffolding
1 Jobsite Fence

I'm the owner of these [sic] jobsite mobilization.

Based on your direction the jobsite mobilization is used till [sic] now. With letter dated 19 July 1993 (Serial Letter no. 210) firm Hübsch GmbH asked to clarify the use of the jobsite mobilization (see enclosed letter).

Please be so kind and inform me, which is the correct address [sic] for my invoice respecting of the jobsite mobilization. I'm waiting for your answer up to 6 April 1995.

(R4, tab D-25)³ By letter dated 12 April 1995 HISG's trustee in bankruptcy (konkursverwalter), Herr Kneller, asserted that the job site equipment was the property of Frau Huebsch and, thus, was not part of HISG's bankrupt estate (R4, tab D-26).

11. Frau Huebsch's letter of 29 March 1995 represented the first time that the Government's contracting personnel had been informed that she was the purported owner of material and equipment at the job site. There is no credible evidence that the Corps' contracting personnel were apprised of this fact prior to completion of the follow-on contract (tr. 20, 27, 29-32, 36-40). Nor was Frau Huebsch's name on the list of suppliers and subcontractors which HISG forwarded to the Corps during contractual performance (R4, tab E-9).

12. During the Autumn of 1995, HISG and the Corps exchanged several letters regarding the removal of equipment and material from the job site (R4, tabs D-27 through D-36). For example, on 16 October 1995, the Corps' contracting officer, Herr Wunsche, forwarded a letter to HISG in which he stated, in pertinent part:

Please be advised that you are required to remove all of your remaining property from the former construction site referenced above. These items have remained on site subsequent to your termination for default dated 9 July 1993. Should you fail to remove your property by 20 November 1995, I will assume you have abandoned same and initiate action to dispose of this property accordingly. You will remain liable for these increased costs to the Government.

The intent of this direction is that you promptly remove **all** of your property at one time. You **will not** be allowed to partially or selective [sic] remove those items with a residual value and abandon the others.

(R4, tab D-27) HISG did not comply with this directive (R4, tabs E-10 through E-14). Accordingly, on 22 November 1995, the Corps' contracting officer informed HISG that it considered the remaining material and equipment to be abandoned (R4, tab D-41).

13. On 18 March 1996, Frau Huebsch forwarded a letter to the Corps in which she requested a response to her letter of 29 March 1995 (R4, tab D-40). On 10 May 1996,

Frau Huebsch forwarded a certified claim to the Corps in an amount of DM324,175. She stated, in pertinent part:

The circumstances concerning your use and retention of my property [sic] for your own pecuniary benefit raises a contract implied in fact between the U.S. Army and me personally. You are obligated to pay to me, under the terms of this contract, the objectively determinable real value of the jobsite mobilization equipment in accord with the values set forth in my invoice of 26 April 1996.

(R4, tab D-1)

14. On 15 July 1996, the Corps' contracting officer issued a final decision in which he denied appellant's claim in its entirety (R4, tab B). This appeal followed.

DECISION

Appellant does not allege that she entered into an express contract with the Government. Moreover, it is axiomatic that we lack jurisdiction to review claims of contracts implied-in-law. *United States v. Mitchell*, 463 U.S. 206, 218, 103 S. Ct. 2961, 2968, 77 L. Ed. 2d 580 (1983); *Olympiareinigung*, ASBCA No. 47208, 95-1 BCA ¶ 27,535. Therefore, in order to prevail, Frau Huebsch must demonstrate that she entered into an implied-in-fact contract with the Corps.

The prerequisites for such a contract are well-known. They are: 1) mutuality of intent to contract; 2) consideration; 3) lack of ambiguity in offer and acceptance; and 4) involvement of a Government representative with actual authority. *City of El Centro v. United States*, 922 F.2d 816, 820 (Fed. Cir. 1990), *cert. denied*, 501 U.S. 1230 (1991).

At least three of these elements are lacking in the present appeal. With respect to the first and third prerequisites-mutuality of intent and lack of ambiguity in offer and acceptance-the Government was unaware until 29 March 1995 of any allegations on appellant's part that she was the owner of any equipment or material located at the job site (finding 10). By this point in time, HISG's contract had been terminated for default, a procurement contract had been awarded, and work on the follow-on contract had been completed (findings 4, 8). It is impossible to ascribe any intent to contract on the Government's part under these circumstances.

In addition, the record is devoid of any evidence demonstrating that Frau Huebsch dealt with any authorized official of the Corps in a contractual context. In light of these conclusions, appellant's implied-in fact contract arguments must fail.

We also remain unconvinced by appellant's argument that the Corps was somehow placed on legal notice of her ownership of material and equipment as a result of HISG's bankruptcy filing in the German court system. HISG's trustee in bankruptcy did not place the Corps on notice of this allegation until 12 April 1995 (finding 10). By that date, the reprourement contract had been completed (finding 8). Moreover, appellant cites no persuasive authority to create an obligation on the Corps' part to discover whether any third parties owned property left at the job site by HISG.

CONCLUSION

The appeal is dismissed for lack of jurisdiction.

Dated: 14 March 2002

MICHAEL T. PAUL
Administrative Judge
Armed Services Board
of Contract Appeals

(Signatures continued)
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

NOTES

¹ Frau Huebsch's husband, Herr Gerhard Huebsch, was the managing director (geschäftsführer) of HISG (tr. 109).

² The phrase, “*in konkurs*” is translated as “in bankruptcy.”

³ The letter enclosed by appellant can be found at R4, tab D-23. We cite the letter in its entirety in finding 7.

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. 50267, Appeal of Ursula Huebsch, rendered in conformance with the Board's Charter.

Dated:

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