ARMED SERVICES BOARD OF CONTRACT APPEALS

Appeal of --	)	
	)	
Visicon, Inc., d/b/a Hope Hotel & Conference Center	)	ASBCA No. 51706
	)	
	)	
Under Lease No. WP-89-001	)	

APPEARANCES FOR THE APPELLANT: Robert E. Lachey, Esq.
Bradley C. Smith, Esq.
Flanagan, Lieberman, Hoffman & Swaim
Dayton, OH

APPEARANCES FOR THE GOVERNMENT: COL Alexander W. Purdue, USAF
Chief Trial Attorney
LT COL Daniel F. Doogan, USAF
Senior Trial Attorney
Libbi Finelsen, Esq.
Trial Attorney

OPINION BY ADMINISTRATIVE JUDGE DELMAN

Under the subject lease Visicon, Inc., d/b/a Hope Hotel and Conference Center (appellant) seeks, *inter alia*, to recover state sales taxes imposed by the State of Ohio in conjunction with its construction of a visiting officers' quarters and conference center on land owned by the Department of Air Force (AF or Government) at Wright-Patterson AFB, Ohio. The jurisdiction of the Board is at issue here. The Government avers that we lack jurisdiction to hear this appeal under the Contract Disputes Act (CDA), 41 U.S.C. §§ 601-613, as amended. Appellant contends we have jurisdiction under the Act, and that the Government misrepresented the applicability of state sales tax to its construction materials and other supplies on which it relied to its detriment. Assuming that there is jurisdiction, the Government denies any material misrepresentation regarding state sales tax and/or any reasonable detrimental reliance by appellant. A hearing was held on entitlement only, and the parties briefed the jurisdictional and substantive issues.

FINDINGS OF FACT

1. In November 1987 the Government issued a request for proposals (RFP) to lease federal property located on Wright-Patterson AFB in exchange for a promise to develop, build, and operate a visitors' quarters and conference center on said property to be owned by the lessee (hereafter the "hotel"). As stated in the RFP (ex. G-1, I.A):

I. INTRODUCTION

A. Purpose

> The Air Force has identified a need for additional visitors quarters at Wright-Patterson AFB for military officers and DOD civilian personnel traveling in support of the Air Force mission. The Air Force desires to outlease a parcel of land at Wright-Patterson AFB to a private party who will finance, design, construct, own, operate and maintain a 250 room visitors quarters facility . . . .

2. The RFP provided that the successful offeror was also to provide a conference facility as part of the hotel, including one room to accommodate at least 500 seated people, 4 additional conference rooms to accommodate at least 50 people each, and a conference support administrative area capable of supporting 5 simultaneous conferences, including standard office furnishings and copying equipment. This conference center was to be for the use of hotel patrons but was also to be made available to persons (*i.e.*, authorized AF personnel) who were not occupants of the hotel. (Ex. G-1, III, B.2)

3. The RFP stated that the authority for the lease was 10 U.S.C. § 2667. Under Part B, Jurisdiction, the RFP stated in relevant part as follows:

> [P]roposer's counsel should review 10 U.S.C. 2667(2) [sic] and the Buck Act, 4 U.S.C. 105-110, and the court cases under them to determine whether the leased premises will be subject to state and local taxes.

4. Insofar as pertinent, 10 U.S.C. § 2667 provides as follows:

> (a) Whenever the Secretary of a military department considers it advantageous to the United States, he may lease to such lessee and upon such terms as he considers will promote the national defense or be in the public interest, real or personal property that is-
>
> (1) under the control of that department;
> (2) not for the time needed for public use; and
> (3) not excess property, ...
>
> . . . .
>
> (e) The interest of a lessee of property leased under this section may be taxed by State or local governments. A

> lease under this section shall provide that, if and to the extent that the leased property is later made taxable by State or local governments under an Act of Congress, the lease shall be renegotiated.

5. In relevant part, 4 U.S.C. § 105, known as the Buck Act, provides as follows:

> (a) No person shall be relieved from liability for payment of, collection of, or accounting for any sales or use tax levied by any State, or by any duly constituted taxing authority therein, having jurisdiction to levy such a tax, on the ground that the sale or use, with respect to which such tax is levied, occurred in whole or in part within a Federal area; and such State or taxing authority shall have full jurisdiction and power to levy and collect any such tax in any Federal area within such State to the same extent and with the same effect as though such area was not a Federal area.

6. The RFP also included a sample lease and operating agreement, which would be signed by the successful offeror. Insofar as pertinent, the lease stated as follows with respect to taxes (ex. G-1, Attachment 2):

> 15. TAXES: The Lessee shall pay to the proper authority, when and as the same become due and payable, all taxes, assessments, and similar charges which, at any time during the term of the lease, may be taxed, assessed, or imposed upon the Lessee's interest in the leased premises. In the event any taxes, assessments, or similar charges are imposed, with the consent of Congress, upon property owned by the Government and included under this lease (as opposed to the leasehold interest of the Lessee therein), they shall be paid by the Government, in which event the lease shall then be negotiated to increase the consideration provided above in the amount of such taxes, assessments, or similar charges paid by the Government, or at the option of the Government, by the Lessee.

7. The lease was to run for 40 years and appellant was to pay a nominal rent in the amount of $1.00 for the entire lease term, plus provide "other good and valuable consideration" to the AF as set forth in the lease (R4, tab 1, ¶ 1). The lease provided that the AF reserved the right to obtain hotel rooms and conference facilities on a priority basis at specified rates. The successful offeror was to be compensated by the rates and fees charged for the hotel rooms and conference facilities and for restaurant food and beverage service. At the expiration of the lease the lessee was to vacate the premises, remove the

improvements and restore the premises to the AF's satisfaction, but the AF reserved the right to accept the hotel in lieu of restoration. (R4, tab 1, ¶ 17(c))

8. On 15 December 1987, a pre-proposal conference was held. Representatives of appellant's predecessor attended.[1] At the conference, questions raised by the potential offerors were noted with a promise to send out answers to the questions. (Tr. 92) On 8 January 1988, the AF provided the answers in writing (ex. G-3). Insofar as relevant to the present dispute, the following question was presented:

> 64. Q. Do state sales taxes apply?
>
> A. State sales and income taxes apply to the extent provided for by the United States Congress. In this regard, se[e] 10 U.S.C. [§] 2667(e) and 4 U.S.C. [§§] 105-110. Consult your attorney for the specific application of taxes to the VQ [Visitors Quarters].

9. The RFP required submission of a multi-volume proposal, to include the proposed design, the construction and the furnishings of the proposed facility, the proposed services to be provided to the customers, and facility maintenance and repair management. The proposals were to undergo a rigorous evaluation and source selection process, not unlike those for competitively negotiated procurements. The AF had the right to approve or reject the final design (ex. G-1, VIII, A.1). AF representatives were to be given access to construction activities at all reasonable times (*id.*, at A.5).

10. After initial proposals were received and evaluated, the Government met with the offerors to discuss the proposals. On 12 May 1988, Government personnel met with appellant. Mr. Titone, the chief of the programming branch for civil engineering, took notes or minutes of the meeting for the Government. According to the minutes, Mr. Waker, a member of the AF cost analysis team, pointed out that property taxes and the provisions of the Davis Bacon Act did not apply to this project.[2] (R4, tab 7 at 5, 7)

11. Mr. Titone testified that the minutes were not a transcript, but rather a summary and were not intended to be all inclusive. Mr. Titone stated at the trial that he did not have any present recollection of the meeting; however he believed that the minutes accurately reflected what he had heard at that time. (Tr. 12-14) He did not remember any discussion of state sales tax, nor did his notes contain any reference to sales tax. Mr. Titone also stated that since sales tax would be a significant issue, he would have written about it if there had been such a discussion. He admitted, however, that it may have been possible for people to discuss issues outside his presence. (Tr. 15, 95)

12. Mr. Meyers, an officer of appellant, testified that he was present at the 12 May 1988 meeting. He testified that he remembered Mr. Waker responding to a question on property taxes, stating that real property tax did not apply to the project. Mr. Meyers

testified that Mr. Waker also stated that sales tax would not apply to construction materials. As a result of these statements, Meyers said that appellant's proposal was revised to delete these taxes (tr. 23-24).

13. Mr. Waker was a cost analyst for the Air Force Logistics Command at the time of the hotel project (tr. 105). He was not a contracting officer, nor was he shown to have had the authority to make authoritative or binding statements regarding taxation under the RFP or the lease. At the hearing Mr. Waker specifically denied making any comment on sales taxes at the meeting (tr. 115). He also testified that he did not recall making the comments about the applicability of real property taxes, but these comments were attributed to him in the AF minutes (tr. 114-15). Mr. Waker testified that it was the Government's practice not to advise prospective offerors about the applicability of any taxes. Rather, offerors were encouraged to consult their own attorneys on this subject. (Tr. 114-19) Based upon our review of the evidence, we find that Mr. Waker made the statement regarding the inapplicability of state sales tax attributed to him by appellant.

14. Appellant's initial proposed rate for a single standard room, in the amount of $29.40, had included the costs for property taxes and state sales tax for construction materials. After the 12 May meeting, appellant deleted property and sales tax from its costs, and on or about 27 May 1988 submitted its BAFO to the AF which reflected a reduced single standard room rate in the amount of $28.10. The record contains appellant's worksheet which documented this revision (R4, tab 4, last page). Based upon a meeting between the parties on 6 July 1988, appellant further clarified its BAFO.

15. On 29 December 1988, the Air Force and appellant entered into Lease No. WP-89-001 (R4, tab 1). The lease included Paragraph 15, Taxes, which was identical to the clause in the sample lease. The lease also contained a DISPUTES clause, but this clause did not reference the CDA. The Disputes clause provided as follows (R4, tab 1 at L-17):

> 23. DISPUTES:
>
> a. Except as otherwise provided in this Lease, any dispute concerning a question of fact arising under this Lease which is not disposed of by agreement shall be decided by the authorized officer of the Government, who shall reduce his decision to writing and mail or otherwise furnish a copy thereof to the Lessee. The decision of the authorized officer shall be final and conclusive unless, within thirty (30) days from the date of receipt of such copy, the Lessee mails or otherwise furnishes to the authorized officer a written appeal addressed to the Secretary of the Air Force. The decision of the Secretary or his duly authorized representative for the determination of such appeals shall be final and conclusive. This provision shall not be pleaded in any suit involving a

> question of fact arising under this Lease as limiting judicial review of any such decision to cases where fraud by such official or his representative or board is alleged: Provided, however, that any such decision shall be final and conclusive unless the same is fraudulent or capricious or arbitrary or so grossly erroneous as necessarily to imply bad faith or is not supported by substantial evidence. In connection with any appeal proceeding under this condition, the Lessee shall be afforded an opportunity to be heard and to offer evidence in support of its appeal. Pending final decision of a dispute hereunder, the Lessee shall proceed diligently with the performance of the Lease and in accordance with the decision of the authorized officer.
>
> b. This condition does not preclude consideration of questions of law in connection with decisions provided for in paragraph a. above. Nothing in this condition, however, shall be construed as making final the decision of any administrative official, representative or board on a question of law.

16. Appellant provided its construction contractor with a certificate of exemption from state sales taxes (tr. 82-83). Construction commenced in 1989 and the facility was completed and ready for occupancy in late 1990. The hotel was named the Hope Hotel and Conference Center.

17. In 1992-1993, the State of Ohio, Department of Taxation determined that appellant was liable for taxes upon the purchase of items used in the construction of the hotel, as well as taxes on supplies used to maintain the hotel. Appellant challenged this administrative decision, but it was affirmed by the Ohio Board of Tax Appeals in August 1995 (ex. G-4).

18. By letter to the AF dated 24 April 1996, appellant sought, *inter alia*, to restructure the agreed room rate schedule in the lease so as recoup these taxes (R4, tab 2).[3] It does not appear that the AF replied to this letter in writing. Appellant reiterated its request for equitable adjustment by letter to the Secretary of the Air Force dated 11 July 1997 (R4, tab 3).

19. By letter to appellant dated 18 September 1997 the Commander, 88th Air Base Wing, Wright-Patterson AFB, who had been designated by the Secretary of the Air Force as the AF authorized officer for purposes of the lease's DISPUTES clause, issued a decision denying, insofar as pertinent, appellant's request for an equitable adjustment related to its sales tax liability. (R4, tab 4)

20. Appellant did not appeal the commander's 18 September decision to the Secretary of the Air Force in accordance with the lease's Disputes clause. By letter dated 5 December 1997, appellant filed a notice of appeal with this Board under the CDA. The appeal was docketed as ASBCA No. 51212.

21. By letter dated 5 February 1998, appellant filed a claim with the AF in the amount of $749,403.51 accompanied by a certification in accordance with the CDA, requesting a final decision on entitlement and quantum (R4, tab 7).

22. By decision dated 27 May 1998, the authorized officer of the Government under the Disputes clause of the lease denied Visicon's claim (R4, tab 9). On 23 June 1998, appellant filed two letters, one an appeal to the Secretary of the Air Force and the other a status letter to the Board. In the latter, appellant stated: "We are going forward with the Secretary of the Air Force, but anticipate filing a new Appeal with the Board if a Secretarial Decision is not forthcoming or if the Decision is not in our favor." (R4, tab 11) It does not appear that the AF issued any further decisions in this matter.

23. On 24 August 1998, appellant filed a notice of appeal with this Board from the 27 May 1998 decision of the AF which was docketed as ASBCA No. 51706. On 8 September 1998, the Board dismissed ASBCA No. 51212 without prejudice to the new appeal.

DECISION

Jurisdiction

Title 41 U.S.C. § 602(a) provides that the CDA "applies to any express or implied contract . . . entered into by an executive agency for –

> (1) the procurement of property, other than real property in being;
>
> (2) the procurement of services;
>
> (3) the procurement of construction, alteration, repair or maintenance of real property; or,
>
> (4) the disposal of personal property."

Generally, leases are considered contracts and personal property that are subject to the CDA. *See Forman v. United States*, 767 F.2d 875, 879, n.4 (Fed. Cir. 1985). In *Foreman*, the Government obtained benefits under the lease as the lessee in the lease transaction; here, the Government obtained benefits under the lease as the lessor in the

lease transaction. We find this difference from *Forman* immaterial insofar as jurisdiction is concerned.

The purpose behind this lease was unequivocally set forth in the RFP issued by the AF. The Government entered into this transaction to satisfy its need for additional temporary housing for military officers and DOD civilian personnel traveling in support of the AF mission. Once the hotel opened, the Government obtained rights to obtain housing facilities and conference facilities on a priority basis at specified rates. After lease expiration, the AF retained the option of taking over the entire facility at no additional cost.

There can be no question that the AF sought and obtained valuable property rights and services as a result of this lease transaction. We find that the agreement between the AF and appellant for this hotel facility was effectively for the procurement of property and services, and that we have jurisdiction to hear disputes under that agreement under 41 U.S.C. § 602(a)(1) and (a)(2) of the CDA.[4] We also hold that appellant's appeal to this Board was within 90 days from its receipt of the AF decision denying its claim (finding 23), and was timely under the CDA, 41 U.S.C. § 606.

Alleged Misrepresentation

Appellant contends that the Government misrepresented whether appellant and/or its agents was liable to pay state sales tax on its construction-related purchases under this lease.

The law of misrepresentation is well-settled. As stated by the Court in *T. Brown Constructors, Inc. v. Pena*, 132 F.3d 724, 729 (Fed. Cir. 1997):

> . . . In order for a contractor to prevail on a claim of misrepresentation, the contractor must show that the Government made an erroneous representation of a material fact that the contractor honestly and reasonably relied on to the contractor's detriment. *See Roseburg Lumber Co. v. Madigan*, 978 F.2d 660, 667 (Fed. Cir. 1992); *Summit Timber, supra*; *Morrison-Knudsen Co. v. United States*, 170 Ct. Cl. 712, 345 F.2d 535, 539 (1965); *Restatement (Second) of Contracts* § 164 cmt. a (1979). . . .

See also, Holmes & Narver Constructors, Inc., ASBCA Nos. 52429, 52551, 2002 ASBCA LEXIS 59 (15 May 2002).

We believe appellant has not established the elements necessary to establish a *prima facie* case of misrepresentation. Assuming, *arguendo,* that Mr. Waker's statement that state sales tax was not payable was an erroneous representation of a material fact, Mr. Waker – an AF cost analyst – was not shown to have been authorized to interpret the

lease generally or to specifically provide any interpretations of tax applicability thereunder. Also, his statement directly conflicted with the clear terms of the lease, which made appellant liable for local taxation on its interest in the leased premises, *i.e.*, the hotel it built and owned (finding 6). Indeed, appellant had included sales tax in its initial proposal based upon the lease terms. We believe it was unreasonable for appellant to rely on these unauthorized representations that contradicted the lease terms. Having failed to prove reasonable reliance, appellant's claim of misrepresentation must fail. We have reviewed the cases cited by appellant in support of its position, but they are factually distinguishable and do not compel a contrary result.

The appeal is denied.

Dated: 7 June 2002

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's predecessor in interest was a joint venture known as "HAI, Inc., and the Vantage Group, Inc." Lease rights and obligations were transferred to Visicon, Inc., a newly created corporation, after lease award. For ease of reference, we shall use the term "appellant" to generally refer to both entities, as appropriate, during their respective periods of involvement in this dispute.

[2] At a later date the State of Ohio sought to assess real property taxes against appellant's leasehold interest. Appellant successfully challenged this assessment.

Visicon, Inc., d/b/a Hope Hotel v. Tracy, 83 Ohio St. 3d 211, 699 N.E.2d 89 (1998) (ex. G-5).

[3] Appellant's request also addressed real property taxes which had been levied by state and local authorities, as well as a Davis-Bacon Act issue. These matters are not presently before the Board.

[4] Because we have held that this particular lease transaction was effectively a procurement for property and services under the CDA, we need not address whether the agreement was also "the disposal of personal property" under the Act, 41 U.S.C. § 602(a)(4). *See Arnold V. Hedberg*, ASBCA No. 31747, 90-1 BCA ¶ 22,577 (a lease for growing crops on federal land is a contract under 41 U.S.C. § 602(a)(4)); *Yukong Ltd*., ASBCA No. 27666, 84-1 BCA ¶ 17,035 (a lease for the use of unneeded capacity in a federal pipeline is a contract under 41 U.S.C. § 602(a)(4)).

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. 51706, Appeal of Visicon, Inc., d/b/a Hope Hotel & Conference Center, rendered in conformance with the Board's Charter.

Dated:

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