ARMED SERVICES BOARD OF CONTRACT APPEALS

Appeals of --	)	
	)	
Real Estate Technical Advisors, Inc.	)	ASBCA Nos. 53427, 53501
	)	
Under Contract No. DASW01-98-C-0028	)	

APPEARANCE FOR THE APPELLANT: Mr. Dennis Cotto
President

APPEARANCES FOR THE GOVERNMENT: COL Michael R. Neds, JA
Chief Trial Attorney
LTC Daniel K. Poling, JA
Trial Attorney

OPINION BY ADMINISTRATIVE JUDGE DICUS

Real Estate Technical Advisors, Inc. (RETA or appellant), contracted with the Defense Supply Service-Washington (DSSW), to provide facilities management and related services for the Defense Modeling and Simulation Office (DMSO). In the second year of the contract, appellant submitted a monetary claim to the contracting officer. The contracting officer denied RETA's claim and asserted a Government claim for overpayment. RETA has moved for summary judgment seeking rulings that the Government is liable to appellant for constructive changes and that RETA is not liable to the Government for overpayment. The motion is denied.

FINDINGS OF FACT FOR PURPOSES OF THE MOTION

1. DSSW awarded a fixed-price contract, No. DASW01-98-C-0028, to RETA on 18 March 1998 (App. Statement of Material Facts Not in Dispute & Gov't resp., ¶ 1). Under the contract, RETA was to provide facilities management, technical, and administrative support services for DMSO (R4, tab 1, Statement of Work at 1). This included providing office space and parking for DMSO at 1901 North Beauregard Street, Alexandria, Virginia. In order to provide those facilities to DMSO, RETA entered into a five-year lease with the Marc Center Plaza II Limited Partnership (Marc Center). (App. Statement of Material Facts Not in Dispute & Gov't resp., ¶ 4) Under the lease, RETA is identified as the "Tenant" and agreed to pay Marc Center a base rent of $326,212.56 for the first year with annual escalations of $14,830. RETA also agreed to pay a percentage of Marc Center's operating charges and real estate taxes. (SR4, tab G-33) Prior to the RETA contract, DMSO had occupied space in Marc Center. The RETA contract did not end DMSO's existing relationship with Marc Center. (App. Statement of Material Facts Not in Dispute & Gov't resp., ¶ 4)

2. The contract between RETA and DSSW was awarded for one base year with four one-year option periods. The base year commenced on 18 March 1998. The amounts to be paid RETA for each year of the contract, which totaled $3,000,000, were as follows:

Base Year	$675,000
Option Year One	555,750
Option Year Two	573,750
Option Year Three	589,750
Option Year Four	605,750

(R4, tab 1 at B-1-2; App. Statement of Material Facts Not in Dispute & Gov't resp., ¶ 1)

3. The contract incorporated by reference FAR 52.243-1, CHANGES – FIXED PRICE (AUG 1987). The contract also included, in Clause I.44, DFARS 252.201-7000, CONTRACTING OFFICER'S REPRESENTATIVE (DEC 1991). That clause provided:

> (a) Definition. "Contracting officer's representative" means an individual designated in accordance with subsection 201.602-2 of the Defense Acquisition Regulation Supplement and authorized in writing by the Contracting Officer to perform specific technical or administrative functions.
>
> (b) If the Contracting Officer designates a contracting officer's representative (COR), the Contractor will receive a copy of the written designation. It will specify the extent of the COR's authority to act on behalf of the Contracting Officer. The COR is not authorized to make any commitments or changes that will affect price, quality, quantity, delivery, or any other term or condition of the contract.

(R4, tab 1)

4. No written designation of a contracting officer's representative (COR) *per se* was prepared (compl. & answer, ¶ 3). Appellant did not request a copy of the COR's written designation (app. resp. to Gov't Interrogatory No. 37). However, at paragraphs C.2 and F.3, the contract specified that reports and deliverables were to be sent to the "Contracting Officer's Representative" at the following address: "OSD/DMSO, ATTN: Mr. Debraux, 1901 North Beauregard Street, Suite 504, Alexandria, VA 22311" (R4, tab 1 at C-1, F-1). Waverly Debraux functioned as the COR on the contract at issue (compl. & answer, ¶ 3). Mr. Debraux was also the Financial Manager for DMSO (SR4, tab G-35; R4, tab 20; app. br. at 18).

5. Kathy J. Dobeck was the contracting officer (CO) on the subject contract from its award in March 1998 through mid-1999 (decl. of Kathy J. Dobeck, ex. 4 to the Gov't brief, ¶ 1).[1] Alyssa A. Murray was the contracting officer from 18 October 1999 through its expiration (decl. of Alyssa A. Murray, ex. 5 to the Gov't brief, ¶ 1). Joyce Rose was the CO for a short period of time (decl. of Kathy J. Dobeck, ¶ 1).

6. Before the effective date of the RETA contract, DMSO had negotiated with Marc Center for construction work at 1901 North Beauregard Street (R4, tab 8). At some point, appellant became involved with DMSO and Marc Center in the construction work (R4, tabs 11, 12). The parties dispute whether the costs of construction were properly authorized for payment out of the RETA contract with DSSW (R4, tab 18 at 2; SR4, tab G-39; decl. of Kathy J. Dobeck; decl. of Alyssa A. Murray).

7. RETA submitted invoices for $675,000, the entire base year contract amount, in the first few months of the contract. The Government paid that amount. (App. Statement of Material Facts Not in Dispute & Gov't resp., ¶ 20). According to appellant, it did not have enough money to make its rental and other payments to Marc Center, which it asserts was because of the additional services and items requested by the COR (app. br. at 20). As a result, RETA failed to make payments to Marc Center at various times and appellant and DMSO were threatened with eviction (R4, tabs 13, 15, 16, 23, 28).

8. The Government added $175,000 to the contract on 19 March 1998 through Modification No. P00001 and removed that same amount on 15 April 1998 by Modification No. P00002, thus returning the contract amount to $675,000 (R4, tabs 2, 3). On 7 December 1998, the Government exercised the first option year effective 18 March 1999 with funding of $500,000. This extended the contract through 17 March 2000 at a price of $555,750. The contract amount for the base year and option year was $1,230,750. (R4, tab 4; Mod. P00003)

9. The Government unilaterally, under Ms. Murray's signature, added funding in the amount of $55,750 to the contract in October 1999 (R4, tab 5; Mod. P00004), $220,921 in December 1999 for a revised "unit price amount" of $776,671 (R4, tab 6; Mod. P00005), and $138,942 in January 2000 for a revised "unit price amount" of $915,613 (R4, tab 7; Mod. P00006).[2] The revised amounts are for CLIN 0002, Option Year One (*id*.). However, the continuation sheets for Modification Nos. P00005 and P00006 show total funding of $1,451,671 and $1,590,613 under Summary for Payment Office. RETA continued to have difficulties making its lease and other payments to Marc Center during the first option year of the contract (R4, tabs 15, 16, 23, 28).

10. RETA's initial claim was submitted on 17 November 1999. Arguing that there had been constructive changes to the contract, appellant sought $774,430. (R4, tab 22) The claim was certified in August 2000 (SR4, tab G-41). Appellant's claim contends that, from

the outset of the contract, the COR ordered other services and items outside the scope of the contract. These included both services and items from outside vendors that RETA was directed to pay as well as services and items ordered directly from RETA. The particular items identified by appellant as constructive changes included construction, construction management, furniture, cabling, labor, lease deposits, additional interest, storage, courier services, coffee service, and others (R4, tab 22 at 4-5). Appellant supports its contention that the Government was aware of the work and payments at issue with copies of four letters to Mr. Debraux dated 16, 24 and 27 April 1998, and 4 January 1999 (R4, tab 22, ex. D). It supports its position that Mr. Debraux reviewed various invoices and approved payment with copies of invoices and vouchers which appear to bear his signature (*id.*, ex. E). To establish proof of Mr. Debraux's contracting authority, appellant included a 5 February 1998 letter agreement between DMSO and Marc Center for costs of building permits associated with the lease between DMSO and Marc Center (*id*., ex. A).

11. The contracting officer, Ms. Dobeck, acknowledged receipt of appellant's claim in an 8 December 1999 letter. The letter also contains the parties' agreement on certain points and a concurrence line signed by RETA's president, Dennis Cotto. The letter states in relevant part:

> The parties agree that the first contract option year covering the 12-month period of March 18, 1999 through March 17, 2000 at a fixed price of $555,750 ("Option Year One") was properly exercised and that the contractor is obligated to perform in accordance with the contract terms. The parties also agree that the government is obligated to pay for all contractually authorized, acceptable, and properly invoiced services performed in Option Year One.
>
> In addition to the $195,886.68 that RETA has been paid to date for performance under Option Year One, the government further represents that the requiring activity has transmitted an additional $359,863 to the contracting officer for obligation for RETA's performance under Option Year One up through March 17, 2000 to yield the total fixed price of $555,750 for Option Year One. You are authorized to perform under Option Year One up to the amount of $555,750 and to invoice a pro-rata amount of $46,312 per month. Upon execution of this letter agreement, you are authorized to invoice the government for $220,921 which represents the pro-rate amounts due and not yet paid for Month 1, (March 18, 1999) through Month 9 (December 1, 1999) of Option Year One. You are also authorized to invoice the government the remaining pro-rata monthly amount of $46,312 during each of

> the last three months of Option Year One (January, February and March 2000). Approval of invoices for payment is contingent upon the contracting officer's determination that the contractor has performed in accordance with the terms of the contract for Option Year One. The contracting officer will use best effort to expedite processing of the invoices.

(R4, tab 26)

12. The Government has filed declarations from COs Dobeck and Murray in which they state they did not authorize the COR, or anyone else, to make changes to the contract, they did not approve any changes to the contract, and they did not ratify any changes to the contract. They also state that if the COR, or anyone else, directed changes to the contract, they were not aware of it. (Decl. of Kathy J. Dobeck, ¶ 3; decl. of Alyssa A. Murray, ¶ 4) The declarations are inconsistent with Mod 5, which references the 8 December 1999 letter and recognizes some funds "originally obligated . . . have been expended for additional work" (R4, tab 6).

13. The Government did not exercise any options after the first option year and the contract ended on 17 March 2000 (Gov't resp. to app. Interrogatory No. 135). The Government paid RETA a total of $1,590,613 for the Base Year and Option Year One (R4, tab 30 at 2; SR4, tab G-45). The original fixed-price amounts for the Base Year and Option Year One totaled $1,230,750 ($675,000 + $555,750) (R4, tab 1 at B-1; App. Statement of Material Facts Not in Dispute & Gov't resp., ¶ 1). Some of the invoices submitted by RETA and later paid by the Government were forwarded directly to the Government's finance office by the COR and were not seen by the contracting officer (decl. of Kathy J. Dobeck, ¶ 4). Moreover, evidence establishes a dispute of fact as to whether the Government saw the four letters submitted as exhibit D of the claim contemporaneously with contract performance (decls. of Kathy J. Dobeck, Alyssa A. Murray, Gary Yerace).

14. Appellant added $299,924.25 to its claim in July 2000, bringing the total to $1,074,154.25. Appellant resubmitted copies of invoices and vouchers to support its claim. (R4, tab 29; SR4, tab 39) Although the total of the amounts listed in RETA's claim submissions was $1,074,354.25, the DCAA determined in a 10 January 2001 report that the total claimed was $1,072,948 (SR4, tab G-43; *see also* SR4, tab G-40). Appellant apparently now agrees that the latter amount is correct (app. br. at 3).

15. On 19 April 2001, the contracting officer, Ms. Murray, denied the claim. She found that RETA was not entitled to any payments above the original contract amounts for the base year and the first option year (a total of $1,230,750). She went on to find that RETA had been overpaid $359,863 and demanded repayment from appellant (R4, tab 30).

16. RETA appealed the contracting officer's decision. The appeal was docketed as ASBCA No. 53427. The Government claim was subsequently assigned a separate appeal number, ASBCA No. 53501. The appeals were consolidated for filing purposes in September 2001. RETA has moved for summary judgment and the Government has responded.

DECISION

Appellant seeks summary judgment as to both appeals. RETA requests rulings that it is entitled to recover for constructive changes to the contract and that the Government is not entitled to the return of any funds already paid to appellant. RETA's motion does not include quantum as to either appeal. The Government opposes summary judgment arguing that there are genuine issues of material fact. We deny the motion.

Summary judgment is proper when there are no genuine issues of material fact, and the movant is entitled to judgment as a matter of law. *Speedy Food Service, Inc.*, ASBCA No. 51892, 99-2 BCA ¶ 30,395. In deciding a motion for summary judgment, we do not resolve factual disputes, but only ascertain whether material disputes of fact are present. *DynCorp*, ASBCA No. 49714, 97-2 BCA ¶ 29,233. As the moving party, appellant has the burden of establishing that there are no genuine issues of material fact. The nonmoving party must respond by setting forth specific facts showing that there are genuine and material factual issues. *Ver-Val Enterprises, Inc.*, ASBCA No. 49892, 01-2 BCA ¶ 31,518. The evidence of the nonmovant is to be believed, and all reasonable factual inferences are to be drawn in its favor. *Id.* Nevertheless, the genuineness of a dispute as to a material fact arises only when the nonmovant presents sufficient evidence upon which a reasonable fact finder, drawing the requisite inferences and applying the applicable evidentiary standard, could decide the issue in favor of the nonmovant. *Id.* As ASBCA No. 53427 is an affirmative claim by appellant, it would bear the burden of proof at trial. Where the movant has the burden of proof his showing must be sufficient that no reasonable trier of fact could find other than for the movant. *Calderone v. United States*, 799 F.2d 254, 259 (6th Cir. 1986), citing W. Schwarzer, *Summary Judgment Under the Federal Rules: Defining Issues of Material Fact*, 99 F.R.D. 465, 487-88 (1984). As appellant has submitted no affidavits and relies heavily on the Government's Rule 4 file, it faces an uphill struggle to meet the foregoing standard.

Appellant seeks to demonstrate its entitlement to an increase in the contract price in ASBCA No. 53427 by arguing that there were constructive changes to the contract. While appellant's arguments do not separately address ASBCA No. 53501, it asserts that the contracting officer increased funding by $359,863 (the amount at issue in the Government claim) and that invoices were processed and paid to cover work beyond the scope of the contract. We proceed, therefore, on the assumption that appellant's constructive change arguments apply with equal vigor to ASBCA No. 53501 and the underlying Government claim that appellant was overpaid by $359,863.

In order to establish constructive changes, RETA must prove: (1) that the Government compelled it to perform work not required under the terms of the contract; (2) that the person directing the changes had contractual authority to alter unilaterally its duties under the contract; (3) that its performance requirements were enlarged; and (4) that the added work was not volunteered but resulted from the direction of a Government officer. *Monterey Mechanical Co.*, ASBCA No. 51450, 01-1 BCA ¶ 31,380 at 154,953.

Appellant says that the changes it asserts were requested or ordered by the COR, Mr. Debraux. The parties dispute the ability of the COR to bind the Government. As the Government points out, the contract clearly provides that the COR did not have contracting authority (finding 3). RETA argues that the Government is bound by the COR's actions based on the theories of implied actual authority, imputed knowledge, implied ratification, and estoppel.

Only persons with contracting authority can bind the Government. "[A]nyone entering into an arrangement with the Government takes the risk of having accurately ascertained that he who purports to act for the Government stays within the bounds of his authority." *Federal Crop Insurance v. Merrill,* 332 U.S. 380, 384 (1947); *City of El Centro v. United States*, 922 F.2d 816, 820 (Fed. Cir. 1990), *cert. denied*, 501 U.S. 1230 (1991). The authority of a Government official to bind the Government may, in certain limited circumstances, arise from "implied actual authority." Such authority may be implied when it is integral to the performance of the Government employee's duties. *H. Landau & Co. v. United States*, 886 F.2d 322, 324 (Fed. Cir. 1989). We do not interpret the discussion in *Reliable Disposal Co*., ASBCA No. 40100, 91-2 BCA ¶ 23,895, relied on by appellant, to be inconsistent with the above precedents.

Appellant's factual showing with respect to this issue is meager. It cites a 5 February 1998 letter agreement between DMSO and Marc Center that was signed by Mr. Debraux (finding 10) as evidence that Mr. Debraux executed contractual documents on behalf of the Government (app. br. at 21). The letter agreement did not arise under this contract (finding 10). As the record is silent regarding whether that agreement was within the scope of Mr. Debraux's authority at the time, it is insufficient to establish his authority as undisputed in the face of contrary contract provisions (finding 3). RETA also argues that the Government did not identify Mr. Debraux as the COR and did not provide appellant with a written designation of the COR's authority (app. br. at 21). The Government concedes that, other than references in the contract, it did not provide a specific written designation of the COR but asserts and has offered evidence that RETA never requested one and that Mr. Debraux was identified as the COR in paragraphs C.2 and F.3 of the contract (finding 4; Gov't br. at 17, 19). It further asserts that the authority of the COR, including the limitation on his ability to contract, was set out in paragraph I.44 of the contract (finding 3; Gov't br. at 17, 19). We agree that the contract provisions identifying Mr. Debraux as the COR and delineating with particularity Mr. Debraux's lack of actual contracting authority raise a genuine issue of material fact as to an essential element of appellant's argument.

Appellant has also failed to establish as undisputed that the authority to contract for the claimed changes was integral to the performance of the COR's general responsibilities. *MTD Transcribing Service*, ASBCA No. 53104, 01-1 BCA ¶ 31,304. Mr. Debraux was a financial manager (finding 4). Appellant has not shown that to be a role for which contracting authority is essential. The contract itself, by specifically limiting the COR's authority (finding 3), establishes a dispute of fact as to whether contracting authority is integral to the duties of the COR. Accordingly, we find a dispute of fact exists as to that element of implied actual authority.

Appellant also relies on *Reliable Disposal* in arguing that the asserted changes ordered by the COR were ratified by persons with contracting authority. The FAR sets out specific criteria for ratification at FAR 1.602-3. *MTD Transcribing Service*, 01-1 BCA at 154,540. Ratification generally requires that the superior official had authority to ratify, knowledge of the subordinate's unauthorized act, and then acted to adopt the unauthorized action. *Reliable Disposal*, 91-2 BCA at 119,717. The superior must have had knowledge of the material facts pertaining to the unauthorized act. *Dolmatch Group, Ltd. v. United States*, 40 Fed. Cl. 431, 438 (1998). That knowledge may have been actual or constructive. *Harbert/Lummus Agrifuels Projects v. United States*, 142 F.3d 1429, 1433 (Fed. Cir. 1998), *cert. denied*, 525 U.S. 1177 (1999). Constructive knowledge can be found where it is fair to impute the subordinate's knowledge to the superior. *Sociometrics, Inc.*, ASBCA No. 51620, 00-1 BCA ¶ 30,620.

RETA appears to make three points with respect to ratification. The first is that it informed the Government, through letters to the COR, that at least some of the claimed changes were outside the scope of the contract (app. br. at 18). Appellant then says that it submitted invoices for these changes which the COR reviewed and approved (app. br. at 20). Finally, it says that the Government paid the invoices and, in some cases, increased the contract price to do so (app. br. at 22). The Government responds and has submitted evidence that it did not receive appellant's letters to the COR until well after the fact (finding 12; Gov't br. at 12-15, 33-34). The Government does not deny that appellant submitted invoices which were paid or that the contract price was increased. The Government has, however, submitted evidence that the contracting officers were unaware that payments were made and did not know the payments were for changes (findings 11, 12; Gov't br. at 34-36 and exs. 4, 5). Accordingly, we conclude there are genuine issues of fact concerning the contracting officers' knowledge of material facts relating to the asserted constructive changes.

In addition, one of the contracting officers has specifically stated that some of RETA's invoices were approved and sent for payment without her knowledge (finding 12). While the declaration may be adequate to establish a dispute of fact for purposes of defending against a summary judgment motion, we would be remiss not to note the existence of evidence that a contracting officer or officers knew or should have known that amounts in excess of the contract amount had been obligated. Specifically, Modification Nos. P00005 and P00006 include revised "unit price" amounts for Option Year One which clearly take the amount funded beyond the option year price of $555,750, and Modification No. P00005 acknowledges "additional work." Moreover, finance office summaries on the continuation sheets show amounts for the modifications that far exceed the total contract amount of $1,230,750. (Finding 9) A credibility issue is raised as a result, but credibility is best addressed at a hearing. Accordingly, under these circumstances, we cannot find summary judgment appropriate as to ratification of the COR's actions.[3]

Finally, appellant appears to contend that the Government should be estopped from denying the claimed constructive changes. As to estoppel, RETA must prove that the Government had knowledge of the true facts, that the Government intended that its conduct would be acted upon by appellant, that appellant did not have knowledge of the true facts, and that appellant relied upon the Government's conduct to his injury. *Emeco Industries, Inc. v. United States*, 485 F.2d 652, 657 (Ct. Cl. 1973), citing *United States v. Georgia-Pacific Company*, 421 F.2d 92, 96 (9th Cir. 1970). Appellant has not attempted to demonstrate these elements. In any event, the United States will not be estopped to deny the acts of officials who have acted beyond the scope of their actual authority. *Yosemite Park and Curry Co. v. United States*, 582 F.2d 552 (Ct. Cl. 1978).

Appellant's motion for summary judgment is denied.

Dated: 18 November 2002

CARROLL C. DICUS, JR.
Administrative Judge
Armed Services Board
of Contract Appeals

I concur

I concur

MARK N. STEMPLER
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] We note, however, that Ms. Dobeck signed a bilateral letter agreement on 8 December 1999 (finding 11, *infra*).

[2] The last two increases total $359,863, the amount of the Government's overpayment claim in ASBCA No. 53501 (findings 14, 15).

[3] Appellant does not argue there was an express ratification and the present record would not support such a conclusion were the argument to be made.

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. 53427, 53501, Appeals of Real Estate Technical Advisors, Inc., rendered in conformance with the Board's Charter.

Dated:

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