

ARMED SERVICES BOARD OF CONTRACT APPEALS

Appeal of --)
)
AG Engineering, Inc.) ASBCA No. 53370
)
Under Contract No. DAKF04-94-D-0009)

APPEARANCES FOR THE APPELLANT: Dwight M. Montgomery, Esq.
Tracie Pham, Esq.
Best Best & Krieger LLP
Riverside, CA

APPEARANCES FOR THE GOVERNMENT: COL Karl M. Ellcessor, III, JA
Chief Trial Attorney
CPT Anissa N. Parekh, JA
Trial Attorney

OPINION BY ADMINISTRATIVE JUDGE TUNKS
PURSUANT TO RULE 11

This is an appeal from a contracting officer's final decision denying a claim for reimbursement of \$43,992.80 in state sales tax. The parties have agreed to submit the appeal without a hearing pursuant to Board Rule 11. Only entitlement is before us.

FINDINGS OF FACT

1. On 1 September 1993, the government issued request for proposal (RFP) No. DAKF04-93-R-0028 to replace standby generators at the National Training Center (NTC), Fort Irwin, California (R4, tab 2). The RFP was set aside for small businesses (R4, tab 3 at 5).

2. The contract incorporated FAR 52.229-4 FEDERAL, STATE, AND LOCAL TAXES (NONCOMPETITIVE CONTRACT) (JAN 1991) by reference. Subparagraphs (a) through (c) of the clause provided in part as follows:

“All applicable Federal, State, and local taxes and duties” . . . means all taxes and duties, in effect on the contract date, that the taxing authority is imposing and collecting on the transactions or property covered by this contract.

“After-imposed tax” . . . means any new or increased Federal, State, or local tax or duty, or tax . . . the Contractor is required to pay or bear as the result of legislative, judicial, or administrative action taking effect after the contract date.

. . . .

(b) Unless otherwise provided in this contract, the contract price includes all applicable Federal, State, and local taxes and duties.

(c) The contract price shall be increased by the amount of any after-imposed tax, or of any tax or duty specifically excluded from the contract price . . . if the Contractor states in writing that the contract price does not include any contingency for such tax and if liability for such tax, interest, or penalty was not incurred through the Contractor’s fault, negligence, or failure to follow instructions of the Contracting Officer.

(R4, tab 2 at I-4)

3. Appellant submitted its proposal on 21 September 1993 (R4, tab 3, pricing proposal).

4. The Defense Contract Audit Agency (DCAA) report issued on 19 April 1994 found that appellant did not include sales tax in its bid price. The report stated that “[a]s of the date of this pricing report, the Contract Administrator stated to add sales tax to the bid.” (R4, tab 3, report at 8)

5. The government’s contract specialist advised appellant during negotiations on 30 June 1994 that it was not exempt from sales tax and that it should include the tax in its bid price (R4, tab 4; Cate aff.; gov’t br. at tab 23).

6. Appellant did not increase its bid price to include sales tax (R4, tab 9).

7. On 8 July 1994, the government awarded Contract No. DAKF04-94-D-0009 in the amount of \$1,234,497 to appellant (R4, tab 1).

8. On 1 October 1996, appellant signed an unconditional release which provided in part as follows:

In consideration of. . . the sum of One Million Four Thousand Four Hundred Eighty-Five Dollars and 15/100***** (\$1,004,487.15) . . . [,] One Million Three Thousand Five Hundred Twenty-One Dollars and 90/100*** (\$1,003,521.90) of which has already been paid and Nine Hundred Sixty-Five Dollars and 25/100*** (\$965.25) of which is [yet] to be paid . . . the undersigned Contractor does, and by the receipt of said sum shall, for itself, its successors and assigns, remise, release and forever discharge the Government, its officers, agents, and employees, of and from all liabilities, obligations, and claims whatsoever in law and in equity under or arising under the contract.

(R4, tab 6)

9. The government made final payment of \$965.25 to appellant on or about 23 December 1996 (R4, tab 8).

10. On 4 February 1999, the California State Board of Equalization (State Board) assessed appellant \$75,728.90 in sales tax and \$15,052.27 in interest on parts and generators purchased in connection with this contract. The State Board recommended that no penalty be assessed because the “taxpayer was not familiar with the law . . . [and] . . . was told by [SBA] that contract with U.S. Army was exempt.” (R4, tab 10 at 3, 5)

11. Appellant received a tax exemption certificate from Ms. Virginia W. Huff, a Small and Disadvantaged Business Specialist at Fort Irwin, on 9 February 1999 (Huff aff.; app. br. at tab 2).

12. Appellant did not sign, date or complete the certificate issued by Ms. Huff (app. br. at tab 2).

13. On 26 February 1999, appellant paid the State Board \$75,729.00 (R4, tab 10 at 6).

14. On 25 February 1999, appellant requested the government to reimburse it \$43,992.80 of the amount paid to the State Board because “it was AG Engineering’s understanding from the U.S. Small Business Administration that this contract would be exempt from sales tax” (R4, tab 9). Appellant has not identified the SBA representative it contacted prior to award and did not submit any affidavits in support of its assertion.

15. On 8 March 2001, the contracting officer denied the claim, stating as follows:

In your initial letter . . . you alleged that you were not aware that you would have to pay tax. Our file shows that when your initial bid was reviewed and analyzed, the sales tax issue was addressed and the contract specialist/administrator asked you to add sales tax. . . . [T]he [Board's] report . . . stated . . . your reason for not paying tax . . . was the [SBA] advised you that contract[s] with [the] U.S. Army are exempt. . . .

. . . Our record shows that you [were] told by the Contract Specialist/Administrator to add sales tax in your bid, but you elected not to. . . .

(R4, tab 16)

16. By letter dated 30 April 2001 and received by the Board on 2 May 2001, appellant appealed the denial of its claim.

17. On 12 August 2003, one day before the extended deadline for filing its brief, the government requested leave to amend the answer to assert the affirmative defenses of release and final payment.

18. The Board granted the government's request for leave to amend the answer on 26 August 2003. The amendment provides in part as follows:

The Government asserts the affirmative defenses of release and final payment. The Appellant signed an unqualified contractor's release on October 1, 1996, and received final payment in December of 1996. . . . The Appellant submitted its claim on February 25, 1999, more than two years after final payment was received. . . . Accordingly, release and final payment bar the Appellant's recovery in this appeal.

(Amended answer at 6)

19. On 2 October 2003, appellant advised the Board that it did not intend to file a brief in response to the amendment.

DECISION

This is a claim for reimbursement of \$43,992.80 in sales tax assessed by the State of California on the purchase of parts and generators for the subject contract. The government argues that the claim is barred by the doctrines of release and final payment.

Appellant contends that its claim should be granted on the grounds of misrepresentation or estoppel.

This contract incorporated FAR 52.229-4 FEDERAL, STATE, AND LOCAL TAXES (NONCOMPETITIVE CONTRACT) (JAN 1991) by reference. Paragraph (b) of the clause states that “the contract price includes all applicable Federal, State, and local taxes and duties.” In deciding a claim under FAR 52.229-3 FEDERAL, STATE, AND LOCAL TAXES (JAN 1991), the comparable clause used in competitive contracts, the Court of Appeals for the Federal Circuit held that the language quoted above unambiguously required the contractor to pay state and local sales and use taxes. *Hunt Construction Group, Inc. v. United States*, 281 F.3d 1369 (Fed. Cir. 2002).

Appellant argues that it should not be bound by FAR 52.229-4 on the grounds of misrepresentation or estoppel. In order to prove misrepresentation, the contractor must show that the government erroneously misrepresented a material fact and that the contractor reasonably relied on that misrepresentation to its detriment. *Holmes & Narver Constructors, Inc.*, ASBCA Nos. 52429, 52551, 02-1 BCA ¶ 31,849 at 157,395, *aff’d*, 57 Fed. Appx. 870 (Fed. Cir. 2003) citing *T. Brown Constructors, Inc. v. Pena*, 132 F.3d 724, 729 (Fed. Cir. 1997). In order to prove estoppel, appellant must show at a minimum that the government knew the facts, that the government intended that its conduct would be acted upon, or so acted that the other party had a right to believe it so intended, that appellant was ignorant of the true facts and that appellant relied on the conduct of the government to its injury. *USA Petroleum Corp. v. United States*, 821 F.2d 622, 625 (Fed. Cir. 1987); *Real Estate Technical Advisors, Inc.*, ASBCA Nos. 53427, 53501, 03-1 BCA ¶ 32,074 at 158,509. We need not address any further requirements for establishing equitable estoppel against the government.

The sole evidence presented by appellant in support of these arguments is the unsubstantiated assertion that a representative of the SBA advised it that the contract was tax exempt prior to award. Appellant neither identified the SBA representative who provided the advice nor submitted any affidavits to support a finding that the alleged event took place. Unsubstantiated assertions such as this are insufficient to prove entitlement to an equitable adjustment. *See De Narde Construction Co.*, ASBCA No. 50288, 00-2 BCA ¶ 30,929. Moreover, the government offered contemporaneous documentary evidence that it advised appellant to add sales tax to its bid price during negotiations. As a result, appellant has failed to satisfy the factual predicates for the application of either misrepresentation or estoppel. In view of this conclusion, we need not reach the government’s affirmative defenses.

The appeal is denied.

Dated: 10 December 2003

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. 53370, Appeal of AG Engineering, Inc., rendered in conformance with the Board's Charter.

Dated:

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