

ARMED SERVICES BOARD OF CONTRACT APPEALS

Appeal of --)
)
Al-Dhiyaa Bureau for General Contracting) ASBCA No. 55788
Under Contract No. W914NS-05-M-9283)
)
Al-Ghadeer Bureau for General Contracting) ASBCA No. 55789
Under Contract No. W914NS-05-M-9284)
)
Al-Sa'Doon Bureau for General Contracting) ASBCA No. 55790
Under Contract No. W914NS-05-M-9285)

APPEARANCES FOR THE APPELLANTS: ASBCA Nos. 55788, 55789
Mr. Ahmed Jassim Al-Ali
Basra, Iraq

ASBCA No. 55790
Mr. Sa'Doon Mustafa
Copenhagen, Denmark

APPEARANCES FOR THE GOVERNMENT: Craig S. Clarke, Esq.
Army Chief Trial Attorney
Peter F. Pontzer, Esq.
Trial Attorney

OPINION BY ADMINISTRATIVE JUDGE SHACKLEFORD

These appeals under the Contract Disputes Act of 1978, as amended, 41 U.S.C. §§ 601-613 (CDA), are from final decisions denying claims for payment of the contract amounts under three contracts, with three different contractors, but with some commonality which permitted them to be consolidated for trial and for decision. Generally, the government claims it paid the contract amounts in person to three people who it believed to be the proper persons to pay and that its method of payment was reasonable under the circumstances. The contractors claim they were not paid, so apparently the government paid the wrong persons.

Getting these cases to trial was problematic because the Board experienced difficulties finding a hearing location accessible to all involved. Ultimately, the trial was held at the Board offices with the appellants participating by telephone and with an Arabic interpreter, government counsel and a government witness in person.

The record consists of the transcript of the one-day hearing (tr.), a Rule 4 file in each docket (*e.g.*, R4 (55788)), a supplement from the government (supp. R4) and additional documents supplied by Mr. Al-Ali and Mr. Sa'Doon Mustafa as email attachments, but organized into a usable folder by the government (app. supp. R4).

FINDINGS OF FACT

1. On or about 12 November 2004, the British General Officer commanding the South East Sector of Iraq, headquartered in Basra, issued a statement of requirement for refurbishment of certain facilities considered critical for achieving “a sound level of Operational Capability to support forthcoming General Elections and to maintain the myriad of operational security tasks supporting longer term enduring tasks.” The report went on to state that five forward operating bases (FOB) were in operation. Two FOBs were of a suitable standard and with adequate amenities. The remaining three FOBs were comprised of bombed out buildings that had suffered considerable damage inflicted by Iraqi and Coalition Forces and were further identified as FOBs at Safwan, Al Faw and Al Qurnah. (R4 (55790), tab 1)

Contract No. W914NS-05-M-9283

2. On 4 December 2004, Contract No. W914NS-05-M-9283 (Contract 9283) was awarded to Al-Dhiaa Bureau in the offer amount of \$210,000 by the Contracting Activity, Republican Presidential Compound, Baghdad, Iraq (government) to “provide all materials, equipment, labor, and transportation necessary for FOB 1, Safwan,” refurbishment and construction in accordance with specifications attached to the RFP (R4 55788, tab 1).

3. Block 30A of the contract required the name and title of the contractor or person authorized to sign for the contractor. The name included in that block was “Abdul abbas Muqtas” and his signature appears in Block 30B. Block 14 called for the name and address of the offeror and the only address given was “Basrah-ashar-Behind C.S.” The point of contact in block 14 was “Abul abbas mukhtads salman.”¹ The work was to start within 5 calendar days and be completed within 56 calendar days of award. (*Id.*)

4. Invoices were to be submitted to the USACE Finance Center in Millington, TN. The contract special instructions stated:

¹ The person signing the contract and the point of contact are one and the same despite the differences in the names (tr. 34). Two spellings, Muqtas and Mukhtads are used in the contract and a third spelling, Mukhtar is used in the transcript. Hereinafter that person is referred to as “Mukhtar.”

Payments will be paid EFT or check. Contractor must contact Major Steve Evans, Email: DBorchardt@44dashha.7sigbde.army.mil Ph: 318 250 5059

Contracting office point of contact is Don Buchanan; Email: donaldrmnbuchanan@yahoo.com; Phone +1 703 343 9222

The instructions further provided that at the option of the disbursing officer, invoices would “be paid in either new Iraq Dinars or United States Dollars (USD).” (Rule 4 (55788), tab 1 at 2, 3/10)

5. The contract incorporated FAR 52.232-5, PAYMENTS UNDER FIXED-PRICE CONSTRUCTION CONTRACTS (SEPT 2002), which provided in part as follows:

(a) *Payment of price.* The Government shall pay the Contractor the contract price as provided in this contract.

....

(h) *Final payment.* The Government shall pay the amount due the Contractor under this contract after –

(1) Completion and acceptance of all work;

(2) Presentation of a properly executed voucher; and

(3) Presentation of release of all claims against the Government arising by virtue of this contract, other than claims, in stated amounts, that the Contractor has specifically excepted from the operation of the release.

6. FAR 52.232-34, PAYMENT BY ELECTRONIC FUNDS TRANSFER-OTHER THAN CENTRAL CONTRACTOR REGISTRATION (MAY 1999) was also incorporated into the contract and provided in part as follows:

(a) Method of payment. (1) All payments by the Government under this contract shall be made by electronic funds transfer (EFT) except as provided in paragraph (a)(2) of this clause. As used in this clause, the term “EFT” refers to

the funds transfer and may also include the payment information transfer.

(2) In the event the Government is unable to release one or more payments by EFT, the Contractor agrees to either-

(i) Accept payment by check or some other mutually agreeable method of payment; or

(ii) Request the Government to extend payment due dates until such time as the Government makes payment by EFT (but see paragraph (d) of this clause).

7. The contract also incorporated FAR 52.233-1, DISPUTES (JULY 2002) and FAR 52.233-4, APPLICABLE LAW FOR BREACH OF CONTRACT CLAIM (OCT 2004), which says that United States law will apply to resolve any claim of breach of the contract. The contract further incorporated DFARS 252.233-7001, CHOICE OF LAW (OVERSEAS) (JUN 1997) which allowed that the contract be construed and interpreted in accordance with the substantive laws of the United States of America, that contractor waived its right to invoke the jurisdiction of local courts and agrees to accept the jurisdiction of the United States Armed Services Board of Contract Appeals. (R4 (55788), tab 1 at 6 and 8 of 10)

8. On or about 15 January 2005, Mukhtar executed DD Form 250, Material Inspection and Receiving Report which we take as notice that the work is completed (R4 55788, tab 2). Since Mukhtar also referenced Invoice 2612 and 2613 on the DD Form 250, we also assume the intent was to also bill the government for the contract price, \$210,000. (R4, 55788, tab 2) The invoices are also included in the record albeit in Arabic (app. supp. R4, tabs 18, 19). The record also includes a document dated 15 January 2005 wherein Mukhtar declares that the work is complete on the Safwan site and the building was handed over to the beneficiary, the Iraqi Army. That same document also includes a declaration from the cognizant Iraqi Army company commander, Najem Abdullah Awad, that he had taken over the building from Al-Dhiaa in the presence of the Coalition Forces, but the document does not show to whom it was addressed. (App. Supp. R4, tab 14). More significantly, the heading of that document reads as follows:

Al-Dhiaa Bureau
For General Contracting
Owned by: Abdul-Abbas Mukhtad Salman

Ash-Shar zone, Alwatan St., behind Ad-Deera hotel, Basra.

(*Id.*) Since this document was executed prior to any disputes arising, we find as fact that Mukhtar, who signed the contract, was the lawful owner of Al-Dhiaa Bureau. Mukhtar did not testify or otherwise participate in the pre-trial proceedings.

Contract No. W914NS-05-M-9284

9. On 10 December 2004, Contract No. W914NS-05-M-9284 (Contract 9284) was awarded to Al-Ghadeer Bureau in the offer amount of \$190,000 by the Contracting Activity, Republican Presidential Compound, Baghdad, Iraq (government) to “provide all materials, equipment, labor, and transportation necessary for FOB 2, Al FAW”, for refurbishment and construction in accordance with specifications attached to the RFP (R4 (55789), tab 1).

10. Block 30A of the contract award required the name and title of the contractor or person authorized to sign for the contractor. The name included in that block was “Alaa Abdul Ameer” and his signature appears in Block 30B. Block 14 called for the name and address of the offeror and the only address given was “Basrah-ashar.” The point of contact in block 14 was “Alaa Abdul Ameer Khudhair.”² The work was to start within 5 calendar days and be completed within 56 calendar days of award. (R4 (55789), tab 1)

11. Findings, 4, 5, 6 and 7 above which describe provisions of Contract 9283 were precisely the same for Contract 9284. (R4 (55789), tab 1)

12. On or about 20 January 2005, Khudair executed DD Form 250, Material Inspection and Receiving Report which we take as notice that the work is completed (R4 (55788), tab 2). Since Khudair also labeled the DD Form 250 as Invoice 790, we also assume the intent was to also bill the government for the contract price, \$190,000 (app. supp. R4, tab 32). The invoice is also included in the record albeit in Arabic (app. supp. R4, tab 31). The record also includes a document dated 20 January 2005 wherein Khudair declares that the work is complete on the Al Faw site and the building was handed over to the beneficiary, the Iraqi Army. That same document also includes a declaration from the cognizant Iraqi Army company commander, As’ad Makee Sadiq, that he had taken over the building from Al-Ghadeer Bureau in the presence of the

² The person signing the contract and the point of contact are one and the same despite the differences in the names. His full name is Alaa Abdul-Ameer Khudair Al-Zhergani and is sometimes also called Alaa Al-Zhergani (tr. 39). Khudair is sometimes spelled Ghadeer in this record. This person is hereinafter referred to as “Khudair.”

Coalition Forces, but the document does not show to whom it was addressed. (App. Supp. R4, tab 29) More significantly, the heading of that document reads as follows:

Al-Ghadeer Bureau
for General Contracting
Owned by: Ala'a Abdul-Ameer Khudhair

Ash-Shar zone, behind Kuwait St., Basra.

(*Id.*) Since this document was executed prior to any disputes arising, we find as fact that Khudair, who signed the contract, was the lawful owner of Al-Ghadeer Bureau. Although Khudair initiated the email correspondence with government officials seeking to recover payments under all three contracts, he did not testify or further participate in the pre-trial proceedings.

Contract No. W914NS-05-M-9285

13. On 28 November 2004, Contract No. W914NS-05-M-9285 (Contract 9285) was awarded to Sa'Doon Bureau in the offer amount of \$160,000 by the Contracting Activity, Republican Presidential Compound, Baghdad, Iraq (government) to "provide all materials, equipment, labor, and transportation necessary for FOB [3], Al Qumah," for refurbishment and construction in accordance with specifications attached to the RFP (R4 (55790), tab 1).

14. Block 30A of the contract award required the name and title of the contractor or person authorized to sign for the contractor. The name included in that block was Sadoon Kuraibut and his signature appears in Block 30B. Block 14 called for the name and address of the offeror and no address was given. The point of contact in block 14 was also Sadoon Kuraibut.³ The work was to start within 5 calendar days and be completed within 56 calendar days of award. (*Id.*)

15. Findings 4, 5, 6 and 7 above which describe provisions of Contract 9283, and which we stated in finding 11 were the same for Contract 9284 are also the same for Contract 9285. (*Id.*)

16. On or about 22 January 2005, Mustafa executed DD Form 250, Material Inspection and Receiving Report, which we take as notice that the work is completed (R4 (55790), tab 2). Since Mustafa also labeled the DD Form 250 as Invoice 766, we also

³ Sadoon Kuraibut, Sa'Doon Khuraibut Jary Al-Ali, Mustafa Sa'Doon, Mustafa Al-Sa'Doon and Sa'Doon Mustafa are all the same person (tr. 3, 29). He will be referred to herein as "Mustafa."

assume the intent was to also bill the government for the contract price, \$160,000 (R4, 55789, tab 2).

17. Mustafa testified that he asked about payment when starting the work and was told they would be paid when the project was finished. He said a month or two later he had discussions again with someone about payment and was told to sign a release and he would be paid. A week thereafter, Mustafa says he was told by a Colonel Henrick he would be paid within a week. (Tr. 24-26) Mustafa offered no further testimony as to other inquiries about payment.

18. The record does not reflect when work started, but we do know that the contract was awarded on 28 November 2004 and work was completed no later than 22 January 2005. While Mustafa's testimony is not specific enough for us to extrapolate exactly when his discussions occurred in relation to the payments actually made, we can conclude with some degree of certainty that those discussions had to have occurred in the February to March 2005 timeframe. Mustafa left Iraq in September 2007 and went to Jordan and from Jordan to Sweden (tr. 61).

19. In any event, the work called for under all three contracts was completed and the government does not dispute that it accepted the work (tr. 93; gov't proposed finding 38).

20. Steven Thorn (Thorn) testified for the government. Thorn served over ten years in the U.S. Navy and was a supply officer specializing in contracting and finance (tr. 104). He served in Iraq twice, once on the ground and once off the coast with the Navy. His ground service spanned February through July 2005 where he served as a contingency contracting officer for the Multinational Transition Training Command. (Tr. 105)

21. The Iraqi government had just been elected before Thorn entered the country, so the government was in its infancy and had not established itself at that time (tr. 105-06). Thorn described the environment in Iraq when he served there:

It was an austere, dangerous place for both coalition forces and Iraqi citizens. As part of the coalition forces, we weren't allowed to leave base unless we were in a multi-vehicle convoy. We had to be in full body armor with weapons in condition one at all times. This is mainly due to the high guerilla and faction activity outside the bases.... At any given time off of a base, you could encounter sniper attack, IEDs or attempted kidnapping.

(Tr. 105-06)

22. There was no banking system and it was not possible to wire money to contractors. Mailing a check to a contractor was not a solution both since the mail system was inoperable and since there were no banks at which to cash a check. The lack of banking and financial institutions required the government to make all payments in U.S. cash which had to be delivered personally by a courier. (Tr. 106-07)

23. By email dated 18 February 2005, Captain Diana Borchardt, contracting officer at Basra, Iraq, informed several government employees about her replacement, Captain James Atchley, and provided Captain Atchley's contact information. One of the recipients of Captain Borchardt's email, Javier Mejias, a government employee assigned to the Project and Contracting Office (PCO) – Finance, replied on 20 February 2005 to Captain Atchley stating that the PCO had received the following checks:

Sadoon Bureau	W914NS-05-M-9285	\$160,094.44
Ghadeer Bureau	W914NS-05-M-9284	\$190,112.15
Al Dhiaa Bureau	W914NS-05-M-9283	\$210,123.96

Mejias asked Atchley to let him know who his point of contact was for delivery of the checks to Basra and to have that person contact him "to schedule a time when we can give him/her the checks." (R4 55788, tab 4) Atchley replied:

I will look into finding someone heading that way to see if we can get the checks picked up, I will also double check the contract numbers first thing in the morning.

(*Id.*)

24. Using that same email stream, on 21 February 2005, Thorn corresponded with Mejias as follows:

I think I am going to be coming up to Baghdad near the end of the week to pick up the checks. However, do you know how the checks have gotten from Baghdad to Basrah in the past and how long it took. I have not been able to get a good answer to that on this end.

On the same day, Mejias emailed Thorn as follows:

In the past, it was SMSGT Lacy who transported the checks to Basra....

Basically, the procedure was the same, we would get the checks FedExed from Millington, TN and we would call him to pick up the checks to take down South. I'm not sure how often he was traveling but I suppose that made the checks take so long to deliver.

(R4 22788, tab 5)

25. Thorn traveled up to Baghdad to pick up the three checks because no one was available to bring them to Basra. Thorn had been sent to find a solution to payment problems that were potentially fueling a work stoppage that would have put the reconstruction efforts behind schedule and would leave a large number of people without work which made them easy recruits for the militias. It was very important to assure contractor payments even though there was danger in traveling from Basra to Baghdad and back. (Tr. 109-10)

26. Upon his return from Baghdad, Thorn proceeded to set up a meeting with the contractors and the Army Finance Office. He testified that he contacted the contractors using both email and telephone numbers in the contracts. Once he received a response from the contractors he set up a meeting on the base in Basra. (Tr. 109) He surmises that the meeting occurred shortly after he returned from Baghdad with the checks or about the beginning of March 2005 (tr. 111). Apparently, Thorn does not recall and does not have documents that show when the meeting precisely occurred. However, the endorsement on the check for Contract 9284 is dated 3 March 2005 which we find to be the date of the meeting with the three contractor representatives (R4 (55789), tab 2).

27. The meeting was held at the base in Basra because the Army finance people were present and required a secure private location to make the payments (tr. 111). The contractors arrived in vehicles and two people remained in the vehicles. Thorn, accompanied by the contracting officer, Atchley, met the contractors at the gate. (Tr. 111-13, 132)

28. Each of the contractors showed them a copy of the respective contracts, Thorn and/or Atchley compared the contracts brought by the contractors to the contracts for which they had payments and they matched. The guards at the gate to the base asked for and got identification from the three contractor representatives but Thorn and the contracting officer did not ask for identification cards "because at that time they were nothing more than a picture and some writing with lamination. They were very easy to copy so the contract was a much better form of identification." (Tr. 112) The contracts presented by the representatives were photo copies, not originals (tr. 133).

29. According to Thorn the contracting officer visually identified the three persons as people with whom he had done business in the past, having worked with them on more than one contract (tr. 113-14, 124-25).

30. Thorn recalls that there were four or five Iraqis who were allowed into the gate and on to the meeting (tr. 111). One was a full colonel Iraqi officer who spoke English as did one or two of the contractor representatives. One representative did not speak English. An interpreter was brought along for the non-English speaking representative. (Tr. 112-13) The evidence is unclear if the Iraqi colonel was also the interpreter.

31. Once inside the gate Thorn and Atchley drove the Iraqis to the hut where the Army finance people were located. Thorn, the Iraqi colonel, the translator and one contractor representative at a time met privately with the two finance people. Atchley remained outside the hut with the other representatives. (Tr. 114)

32. Inside the hut, for each contractor representative, the finance people again compared the photo-copied contracts with the copies in government possession, and since they matched, Thorn gave the checks to the representatives. Thereafter, the checks were endorsed, some forms were filled out and the checks were cashed by Army Finance personnel. This was done one at a time with each of the representatives. (Tr. 114-15)

33. For each contract, the record includes a document that purports to confirm that payment was delivered to the contractor and that payment was received by the contractor. For contract 9283, a check, including interest, payable to "DSSN 8748 ON BEHALF OF AL DHIAA BUREAU" in the amount of \$210,123.96 was signed for by a person whose signature appears on a receipt for the money and whose signature appears on the back of the check as an endorsement. However, the signature is illegible and does not reveal the name of that individual. Thorn also signed the receipt indicating he delivered the check to that individual and we know it is Thorn because he signed it and he printed his name. (R4 (55788), tab 3)

34. For contract 9284, a check, including interest, payable to "DSSN 8748 ON BEHALF OF AL-GHADEER BUREAU" in the amount of \$190,112.15 was signed for by a person whose signature appears on a receipt for the money and whose signature appears on the back of the check as an endorsement. The endorsement also includes the date 3 March 2005. However, the signature is illegible and does not reveal the name of that individual. Thorn also signed the receipt indicating he delivered the check to that individual and we know it is Thorn because he signed it and he printed his name. (R4 (55789), tab 2)

35. For contract 9285, a check, including interest, payable to “DSSN 8748 ON BEHALF OF SADOON BUREAU” in the amount of \$160,094.44 was signed for by a person whose signature appears on a receipt for the money and whose signature appears on the back of the check as an endorsement. However, the signature is illegible and does not reveal the name of that individual. Thorn also signed the receipt indicating he delivered the check to that individual and we know it is Thorn because he signed it and he printed his name. (R4 (55790), tab 3)

36. Thorn does not know the names of the three people who signed for and received payment, but he does know that the person who held the contract for Al-Sa’Doon Bureau signed for and received the check for Al Sa’Doon Bureau; that the person holding the contract for Al-Dhiyaa Bureau signed for and received the check for Al-Dhiyaa Bureau; and that the person holding the contract for Al-Ghadeer Bureau signed for and received the check for Al-Ghadeer Bureau (tr. 116-18).

37. Once each check was endorsed, each representative received cash from the finance people, and put the cash in pockets sewn inside their pants. Once all contracts were paid, Thorn and Atchley transported the Iraqis back to the front gate, they got into their vehicles and departed. (Tr. 118)

38. Thorn was only in Basra for about a week after this meeting and thereafter was sent to Kirkuk to investigate other issues. He spent four months in Kirkuk, one month in Diwania and departed Iraq in July 2005. (Tr. 119)

39. The record is replete with evidence of the relationship between and ownership of the three bureaus. It is clear that there was some relationship before, during and after performance of these contracts. Those relationships may even have changed during that time. Mustafa seems to argue and/or the government perceives that Mustafa argues, that he is majority owner of all three contractors. We find that the evidence is so confusing and so murky as to render a decision in that regard, mere speculation.

40. By email on 4 April 2006, more than one year after payments were made by Thorn and Army Finance, Khudair emailed someone named Don about the failure to receive payment under several contracts entered into under several different contractor names. The subject of the email was “Al-Ghadeer Group Co.Ltd/We have a problem with payment.” While he mentions amounts owed under several of the contracts, he mentions projects for FOBs at Safwan, Al-Faw and Al Qurnah without mentioning how much was owed on each. He signed the email as “Director of Al-Ghadeer Group Co.Ltd.” (R4 (55788), tab 6)

41. LCDR Kes Townsend (Townsend) responded to that email from Khudair on 5 April 2006 as follows:

Please provide the invoices for the contracts you mentioned.
Also, do you know if the DD250 was ever signed and submitted by the customer[?]

42. Khudair and Townsend exchanged emails on 8 April 2006 wherein Khudair forwarded certain invoices to Townsend and inquired about what a DD 250 was. Townsend in turn forwarded the invoices to the pay offices and sent a blank DD 250 to Khudair, telling him he needed one for each contract. (*Id.*)

43. By email dated 9 April 2006 Khudair sent a message from his usual email account to Townsend, and after asking who is to sign the DD 250s, stated in relevant part as follows:

In addition to that, I told you by cell phone about the other 3 contracts that have the same problem as with the former ones (problem with payment).Here [are their] numbers:

1. Contract No. W914NS-05-M-9283 in Safwan/Basra.The amount is: \$210,000.00.We (Abdul-Abbas Mukhtad Salman) [signed] this contract with KATHY LAUDEN on the same date as the [previous] ones,i.e. on 10/12/2004.

2.Contract No. W914NS-05-M-9284 in Faw/Basra.Its amount is: \$190,000.00. We (Alaa Abdul-Ameer Khudair)[signed] this one with KATHY LAUDEN on 10/12/2004.

3.Contract No. W914NS-05-M-9285 in Qurna/Basra.The [amount] is: \$160,000.00.We (Mustafa Fadhil Hameed) [signed] the contract with KATHY LAUDEN on 10/12/2004.

This email concluded “Best Regards, Alaa Abdul-Ameer K./Ahmed Al-Ali.” (*Id.*)

44. On 11 April 2006 Khudair and Al-Ali emailed Townsend concerning inspections and payments under several contracts and with respect to the three at issue here asked if contracts 9283, 9284 and 9285 would be inspected at the same time as the others they had been discussing and if they would be inspected by the same U.S. government representative. Townsend responded:

I did some research. The three contracts you mentioned have been paid and two were not awarded to your company. If you

have other contracts that have not been paid, I would need invoices with the contract numbers on them.

W914NS-05-M-9283 has been paid, not awarded to Al-Ghadeer Group

W914NS-05-M-9284 has been paid.

W914NS-05-M-9285 has been paid, not awarded to Al-Ghadeer Group

(*Id.*)

45. On 13 April 2006 Khudair and Al-Ali, under the subject line “Al-Ghadeer Group for General Contracts Co.Ltd,” asked Townsend to send a copy of contract 9285 as they needed it to be viewed by a U.S. government representative the next day. Townsend responded the same day:

This contract (W914NS-M-9285) was awarded to the name of another company. It also has been paid. Have you been called by another name?

(*Id.*)

46. On 15 April 2006, Townsend provided copies of the contracts to Khudair and informed him that the government was in the process of gathering information that showed the contracts were paid (*id.*). A few minutes later, Townsend submitted the following request to government employees Diane Wheeler (Wheeler) and Ernest Talerico (Talerico) :

Please forward me info that you have that shows these have been paid. The SOF sheet reflects that but the contractor is saying he has not been paid. Do you have copies of DD250s and invoices in addition to the screen shots?

Townsend included the three contract numbers in the email. (R4 (55788), tab 10)

47. On 16 April 2006, in reply, Talerico emailed Townsend certain images from the computer screen of the Gulf Region Division Office relating to Contracts 9283, 9284, and 9285, and informed Townsend that “[t]hese were all treasury checks mailed here for pick-up” (*id.*).

48. On 16 April 2006, Khudair emailed Townsend and stated:

Sir, these documents show payment has been paid, but who get the Checks??!!!. We want to know who received our money? We are now in big problem. You must help us to find out who got our money.

(R4 (55788), tab 6)

49. By email on 26 April 2006, Townsend reported to Khudair as follows:

Regarding the other 3 contracts (W914NS-05-M-9283, W914NS-05-M-9284, W914NS-05-M-9285), I found out this information. The checks were given to Captain Atchley on 3 March 2005 to take down to Basrah. Did you ever work with him? It is possible that he was never able to deliver the checks to you.

Townsend also told Khudair about his request to the finance office about a form which was required to “request checks that were not received.” (R4 (55788), tab 11)

50. On 26 April 2006, Khudair replied:

Concerning Captain Atchley, we never met or heard about him. Sir, when we finished the work of the m[e]ntioned projects, officers from British Army came and received the buildings from us, and told us that the money would come nearly. Since that time we never rec[e]ived any mon[e]y, and when we try to ask them they tell us that the paying stop[p]ed from Baghdad.

Khudair also advised that they were still waiting for the forms to fill out for checks not received. (R4 (55788), tab 6)

51. Townsend emailed Khudair on 29 April 2006, stating:

I am getting ready to send three emails that have .pdf files that show the three checks cashed for the three contracts you have inquired about as well as the attached document. The three checks were cashed in March 2005. Someone would have had to present identification to pick up the check and to cash the checks. This is all the help I can provide.

(Id.)

52. On 30 April, Khudair asked Townsend the following questions:

Would you please explain more to us about your e-mail? Do you mean that we cannot get our money for it had been paid to unknown persons??!!

Or can we get the money by these checks?Sir, please explain everything to us?What all these Info. mean?What about the form needed to request checks that were never received you told us about??When we can get it?

Townsend replied:

I sent you copies of the checks for the 3 contracts that you inquired about. Those checks were presented to someone who had valid id to pick up the checks. The signature of the person who cashed the checks is on the back of the checks. The contracts have been paid for. Since the checks were received and cashed, the finance office did not send the form.

(R4 (55788), tab 6)

53. On 4 December 2006, Al-Ali, another representative of Al-Ghadeer Group (he had also co-signed several of the April 2006 emails with Khudair, and ultimately represented Al-Ghadeer Bureau, Al-Dhiyaa Bureau and for a time, Al-Sa'Doon Bureau, in these appeals at the ASBCA), emailed Sherman Mayle (Mayle), a contracting officer. Al-Ali reiterated the events relating to the three contracts in part as follows:

In the past we were working as bureaus for general contractings [sic] as follows: Al-Dhi[y]aa Bureau, Al-Baraka, Al-Ferdose, Al-Ghadeer Bureau, Al-Saadoon Bureau. We were working as partners. Now we are Al-Ghadeer Group Co.Ltd. We performed some projects for the Coalition Forces at the bigining [sic] of 2004.

We Worked on the following conctrcts [sic]:

1. Contract No. W914NS-05-M-9283 in Safwan/Basra. The amount is:

\$210,000.00. We (Abdul-Abbas Mukhtad Salman - Al-Dhiyaa Bureau) signed [sic] this contract with KATHY LAUDEN on 10/12/2004.

2. Contract No. W914NS-M-9284 in Faw/Basra. Its amount is:

\$190,000.00. We (Alaa Abdul-Ameer Khudair – Al-Ghadeer Bureau Signed [sic] this one with KATHY LAUDEN on 10/12/2004.

3. Contract W914NS-05-M-9285 in Qurna/Basra.

The amount [sic] is:

\$160,000.00. We (Saadoon Khuraibt-Al-Saadoon Bureau) signed [sic] the contract with KATHY LAUDEN on 10/12/2004.

We didn't receive [sic] our money for all the above contracts. After we finished the works, the Iraqi Army and the Coalition Forces approved our work and we signed [sic] a document that proves our works we completed [sic]. After that, they told us that our checks didn't finish. Then, they told us the checks are in Baghdad, and after some months they told us that the checks [] are still in USA. Then we met with American Colonel who told us that we should find [sic] a Law solution for our problem. We kept asking the British forces for our checks, but no response from them and they told us the problem [sic] is 'nt [sic] with the British. We also sent an [] e-mail to the US embassy in Baghdad but no response.

(R4 (55788), tab 12)

54. Between 6 December and 14 December 2006, emails relating to the payment status for the three contracts were exchanged between Mayle, several government employees, Khudair and Al-Ali (R4 (55788), tab 15). Mayle began the series of emails on 6 December 2006 when he sent a message to Melissa George (George) and David Givens (Givens) advising that the contractor for the three contracts (described in the message) at issue claimed he was never paid. Mayle wanted "to know not only if the checks were sent to the vendor, but if they were cashed." If not cashed he believed they would be void and asked "what's required to resend them." (*Id.* at 6)

55. George in turn, on 6 December 2006, asked Anne Hartz (Hartz), with copies to Mayle, Givens and MAJ Jay Ayres (Ayres), to put a tracer on the checks (*id.*). George

(on 6 December 2006) asked Hartz to request a tracer on the checks. Still on 6 December 2006, Hartz reported that all of the checks were cashed in April 2005 and that she requested copies of the checks from the US Treasury to see who signed them. She further stated:

The checks were made out to DSSN 8748 on behalf of the vendor. Each one is made out to a different vendor name. We would have sent the checks to the PCO Finance office and they would have handed them to the vendor at the disbursing station to get cash. It may take a couple of days to get the copies because they are old checks.

(Id. at 5-6)

56. Ayres emailed Hartz and George with copies to Mayle and Givens, still on 6 December 2006, that:

These appear to have been delivered by a Capt Atchley to the Finance office in Basrah. I'm interested to see where they were cashed and who signed for them.

(Id. at 5)

57. On 8 December 2006, Hartz emailed Ayres, with copies to George, Mayle and Givens, stating:

Here are the copies of the checks that Sherman Mayle asked about. All were cashed at the DSSN 8748. All three checks are made out to different vendors and have three different signatures. As to who actually received the cash, we cannot tell from the checks.

(Id. at 4-5)

58. Mayle, in turn, emailed Khudair on 11 December 2006 advising that the "three contracts were all paid on March 3, 2005 and cashed at DSSN 8748, the Finance office in Basrah." He attached copies of the paid checks and stated:

If you believe your company has been wronged your company will have to resort to a claim / legal action for reparation.

(*Id.* at 4)

59. Khudair replied on 13 December as follows:

We thank you very much for your cooperation with us to help us get back our rights. We would like to ask you that [sic] how we resort to a claim/legal action for reparation? and where? can you help us with guiding us to the right way to do so.

Sir, you know that we lost a lot of money during all this time, so we demand a compensation for all that period. Especially for the 2 contracts of the 2 Bunkers. Is it fair that we receive the same sum of money for all this period? I hope that you refer these demands to the person who will cash us for the 2 Bunkers. It's not our fault, you know!

(*Id.* at 8)

60. By email dated 14 December 2006, Mayle responded to Khudair's inquiry on filing a claim. Mayle instructed Khudair to "explain clearly in a letter what [he was] making a claim for and the reason behind it." He was also told to include the contract numbers, the reason for making the claims, evidence to support the claim and the amount of money requested. (R4 (55788), tab 15 at 7)

61. The record also includes a document signed and apparently notarized by Iraqi Colonel Kareem Salih Al-Inizi wherein he certifies that the work was completed under contract "with ALSADOON Company for contracts and its branches, the Alsadoon, Aldhiaya and Algadeer" and further states that the "owner of this company is Mr.Sadoon khrebit Jery Al-Ali." (Supp. R4, tab 137).

Al-Dhiyaa Bureau for General Contracting Claim

62. Mukhtar submitted an undated and signed claim as follows:

I am the contractor Abdul-Abbas Mukhtad Salman who owns **Al-Dhiyaa Bureau for General Contracting, Basra, IRAQ.** Demanding **\$600000** as reparation for the Contract # **W914NS-05-M-9283**; and I submit the following certification in accordance with directions provided in **52.233-1 - Disputes.** (Emphasis in original)

(R4 (55788), tab 13)

63. On 29 December 2006, the contracting officer (Mayle) issued a final decision denying the claim. While the decision did not state the date of receipt of the claim, we know it was received somewhere between 14 and 28 December 2006. The decision, which was directed to the attention of Mukhtar and Al-Ali, was based on the following:

- 1) The Al-Dhyiaa Bureau for General Contracting, hereafter referred to as “the Contractor”, has submitted a claim for \$600,000.00 with no justification apart from an assertion that payment was never received for the subject contract. Additionally, the contractor’s request for reparation exceeded the value of the contract by approximately \$400,000.00. Even if the contractor had provided proof that payment had not been made, which he did not, such an interest penalty would far exceed an acceptable fee.
- 2) Upon request, the finance office provided proof that checks to the contractor for the subject contract were disbursed and cashed on 4 April 2005.^[4] Accordingly, I issue a decision to reject the claim in its entirety.

(*Id.*, tab 14)

Al-Ghadeer Bureau for General Contracting Claim

64. Khudair submitted an undated and signed claim as follows:

I am the contractor Alaa Abdul-Ameer Khudair who owns **Al-Ghadeer Bureau for General Contracting, Basra, IRAQ**. Demanding **\$450000** as reparation for the Contract # **W914NS-05-M-9284**; and I submit the following certification in accordance with directions provided in **52.233-1 –Disputes**. (Emphasis in original)

(R4 (55789), tab 13)

⁴ To the contrary the check was dated 16 February 2005 and was cashed on 3 March 2005.

65. On 29 December 2006, the contracting officer (Mayle) issued a final decision denying the claim. While the decision did not state the date of receipt of the claim, we know it was received somewhere between 14 and 28 December 2006. The decision, which was directed to the attention of Khudair and Al-Ali, was based on the following:

- 1) The Al-Ghadeer Bureau for General Contracting, hereafter referred to as “the Contractor”, has submitted a claim for \$450,000.00 with no justification apart from an assertion that payment was never received for the subject contract. Additionally, the contractor’s request for reparation exceeded the value of the contract by approximately \$250,000.00. Even if the contractor had provided proof that payment had not been made, which he did not, such an interest penalty would far exceed an acceptable fee.
- 2) Upon request, the finance office provided proof that checks to the contractor for the subject contract were disbursed and cashed on 16 February 2005.^[5] Accordingly, I issue a decision to reject the claim in its entirety.

(Id., tab 14)

Al-Sa’Doon Bureau for General Contracting Claim

66. Mustafa submitted an undated and signed claim as follows:

I am the contractor Sa’doon Khuraibt Jary who owns **Al-Sa’Doon Bureau for General Contracting, Basra, IRAQ**. Demanding **\$375000** as reparation for the Contract # **W914NS-05-M-9285**; and I submit the following certification in accordance with directions provided in **52.233-1 –Disputes**. (Emphasis in original)

(R4 (55790), tab 12)

67. On 29 December 2006, the contracting officer (Mayle) issued a final decision denying the claim. While the decision did not state the date of receipt of the claim, we

⁵ While the check was dated 16 February 2005, it was cashed on 3 March 2005 (R4 (55789), tab 2).

know it was received somewhere between 14 and 28 December 2006. The decision, which was directed to the attention of Mustafa and Al-Ali, was based on the following:

- 1) The Al-Sa'doon Bureau for General Contracting, hereafter referred to as "the contractor", has submitted a claim for \$375,000.00 with no justification apart from an assertion that payment was never received for the subject contract. Additionally, the contractor's request for reparation exceeded the value of the contract by approximately \$215,000.00. Even if the contractor had provided proof that payment had not been made, which he did not, such an interest penalty would far exceed an acceptable fee.
- 2) Upon request, the finance office provided proof that checks to the contractor for the subject contract were disbursed and cashed on 16 February 2005.^[6] Accordingly, I issue a decision to reject the claim in its entirety.

(*Id.*, tab 13)

68. On 7 February 2007 the Board received an email from the email account of Al-Ali, appealing each of the contracting officer's decisions with respect to the claims for payment of the contract amounts for Contracts 9283, 9284 and 9285, however, the email ended as follows: "Thank you, Alaa Abdul-Ameer Khudair."

69. On 8 February 2007, the Board docketed the appeals respectively as ASBCA Nos. 55788, 55789 and 55790. Subsequently, Mustafa entered an appearance with respect to ASBCA No. 55790.

DECISION

These appeals present a simple yet complex question. Did the government make payment to authorized representatives of the contractors? The government does not dispute that the work was completed and accepted (gov't br. at 6).

The government defense is that the contract amounts have been paid and payment is an affirmative defense. *See* FED. R. CIV. P. 8(c). The government as respondent has the burden of proving its affirmative defense. *Bridgestone/Firestone Research, Inc. v.*

⁶ See Notes 5 and 6.

Automobile Club de L'Ouest de la France. 245 F.3d 1359, 1361 (Fed. Cir. 2001). In determining whether payment has been effectively made to a contractor, we examine whether it was made at the time and place required by the contract, either to the contractor in person, or to his authorized representative. *S.A.S. Bianchi Ugo fu Gabbriell (Bianchi)*, ASBCA No. 53800, 05-2 BCA ¶ 33,089 at 164,025. In *Bianchi* we held that where the government made payment by EFT to a bank which was not authorized by the contractor, such payment was not effective and the debt remained to be paid.

On the other hand, in *Sellers Cleaning Service, Inc.*, ASBCA Nos. 23745, 23816, 79-2 ¶ 14,085, we found that payment to Mr. Sellers' estranged wife was effectively payment to the contractor because she had acted as project manager for the contractor and thus was cloaked with implied authority to receive and negotiate a check made payable to the contractor. Similarly, in *Technocratica*, ASBCA No. 46567 *et al.*, 99-2 BCA ¶ 30,391 at 150,219, where the president informed the government that a named employee was designated as a representative of the contractor who was authorized to act with the same effect as the president of the company, when that employee endorsed and deposited to his own account a contract payment, that payment was effectively made to the contractor because that employee had authority to receive payment.

While we do not know the names of the three individuals who received and cashed the checks, we believe they were authorized representatives of the contractors for the reasons discussed below.

In late February 2005, a few weeks after execution of the DD 250s on 15, 20 and 22 January 2005, by Mukhtar, Khudair and Mustafa respectively, Thorn used phone numbers and email addresses in the contract files to arrange payment to the contractors. Representatives were told to bring copies of the contracts as identification because in war torn Iraq, the contracts were better identification than picture IDs which were easy to make. Three people arrived at the agreed upon time and place and each had a copy of the respective contract and each was known to the contracting officer as a person with whom he had done business in the past.

The meeting took place; the checks were handed over and negotiated on 3 March 2005. It was not until 4 April 2006, more than one year later, that an initial inquiry was made by Khudair about payment of contract amounts. While Khudair had signed Contract 9284 (Al-Ghadeer Bureau), he inquired about all three contracts and in all subsequent inquiries and discussions prior to the claims, he purported to seek payment for all three contracts. Of the three signatories to the contracts, only one, Mustafa, testified and he did not explain why it took well over a year after the questioned payments were made, to inquire about payment status. Moreover, the labor strikes which had been threatened if payment was not made, did not occur. All of the above, especially

the lengthy time it took before payment was sought, lead us to conclude that the contractors

were in fact paid. In the unusual circumstances of this case, we find that payment was made to authorized representatives of the contractors.

Accordingly, the appeals are denied.

Dated: 10 March 2010

RICHARD SHACKLEFORD
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 Nos. 55788, 55789, 55790, Appeals of Al-Dhiyaa Bureau for General Contracting, Al-Ghadeer Bureau for General Contracting and Al-Sa'Doon Bureau for General Contracting, rendered in conformance with the Board's Charter.

Dated:

CATHERINE A. STANTON
Recorder, Armed Services
Board of Contract Appeals