

ARMED SERVICES BOARD OF CONTRACT APPEALS

Appeals 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
ON APPELLANTS' MOTION FOR RECONSIDERATION

On 10 March 2010, we issued our decision denying the three subject appeals. *Al-Dhiyaa Bureau for General Contracting, Al-Ghadeer Bureau for General Contracting, Al-Sa'Doon Bureau for General Contracting*, ASBCA Nos. 55788, 55789, 55790, 10-1 BCA ¶ 34,391. By email dated 19 March 2010, Mr. Al-Ali submitted arguments as to why our decision was unfair. We deemed that email to constitute a timely motion for reconsideration pursuant to Board Rule 29. We received the government's reply to the motion on 29 April 2010. For ease of reference the three contractors will be collectively referred to as appellant. Familiarity with our initial decision is presumed.

DISCUSSION

When deciding a motion for reconsideration we determine if the motion is based on newly discovered evidence, errors in our findings or legal theories we failed to

consider in reaching our decision. *L&C Europa Contracting Co.*, ASBCA No. 52617, 04-2 BCA ¶ 32,708. We do not afford a party an opportunity to reargue contentions already fully considered and rejected by the Board. *HAM Investments, LLC*, ASBCA No. 55070, 07-1 BCA ¶ 33,552.

Appellant makes eight numbered arguments to support its contention that our decision was “UNFAIR” which we interpret to mean wrong. We will quote each argument, state our understanding of what that argument means if necessary, discuss it and decide it below.

For its first argument, appellant states:

You didn’t provide us (Al-Dhiaa’, Al-Ghadeer & Al-Saadoon Bureaus) tangible evidence showing Thorn contacted the contractors using both e-mail and telephone numbers in the contracts. The contractors are asking the Board to give them convinced answer that someone contacted them!!They want a proof of the contacting operation (e-mail sent).

We understand this argument as a challenge to our finding 26 that Thorn “testified that he contacted the contractors using both email and telephone numbers in the contracts” (10-1 BCA ¶ 34,391 at 169,818). Apparently Mr. Al-Ali wants more than Thorn’s testimony to prove that the “real” contractors were contacted. The record does not include any additional evidence of those contacts. Mr. Al-Ali was given the opportunity to cross-examine Thorn and did so, but did not ask him about how he contacted the contractors to set up the meeting.

This challenge is not based upon newly discovered evidence, and does not identify an error in our findings. It is a challenge to the weight of the evidence and does not require a different result.

For the second challenge to our decision, appellant states:

The contractors (Abdul-Abbas Mukhtad Salman {Al-Dhiyaa’ Bureau} and Alaa’ Abdul-Ameer Khudair {Al-Ghadeer Bureau}) were present at the pre- trial proceedings time and I personally told you, at that time, the contractors were present and if you have any question for them? I ask you to get back to the voice recordings of the trial at that time and listen. I reiterate that the contractors are ready to answer any question from the court or the Board.

Our understanding is that appellant contends that Mukhtar and Khudair were available to testify at the hearing and that the Board was advised that they were present if we had any questions for them. We presume that appellants are troubled by the statement in the decision portion of our opinion that “[o]f 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” (10-1 BCA ¶ 34,391 at 169,824).

Indeed, the record reflects that Mr. Al-Ali advised during the hearing that a contractor was sitting next to him and if the judge wanted to question him, the contractor was ready to answer questions (tr. 95). This was at a point in the hearing when Mr. Al-Ali had completed his direct examination of Ra’ Afat Aqeel and government counsel was about to cross-examine. The hearing judge acknowledged the offer but did not ask any questions of this person whose name was not given. Under our system, the burden was on the appellant to call and to question its own witnesses. Mr. Al-Ali could have, but did not call any more witnesses. Moreover, if Mukhtar and Khudair have something to say that is not in the record, it is not newly discovered, but evidence existing and known to be existing at the time of the trial. Therefore, the second basis for reconsideration is not persuasive.

For its third argument, appellant says:

Khudair initiated e-mail correspondence with government officials seeking to recover payments under all three contracts because the three contractors (Mukhtad, Khudair & Mustafa) agreed to make Khudair initiate the correspondence. The relationships among the contractors didn’t change during that time and the[y] kept good relations with each other and the proof is that, they authorized Khudair verbally to initiate correspondence with officials to get their money back.

We have no quarrel with the first part of the first sentence of this argument as we said as much in the decision.¹ However, we have no evidence to support the remaining allegations and there is no basis for reopening the record to receive such evidence since it is not newly discovered. To the extent appellant may be arguing that the purported verbal authorization from all contractors for Khudair to get their money back proves they did not get paid, that argument fails due to lack of proof.

Appellant’s fourth argument is as follows:

¹ We stated in the decision that “[w]hile Khudair...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.” 10-1 BCA ¶ 34,391 at 169,824.

Concerning identification cards, all know that Saddam's regime was very strict regarding forgery and any kind of crimes. So, all Iraqis were afraid of doing wrong things even after the liberation of Iraq. Here I ask the Board why the contracting officer did [not] ask for passport or ration cards of the contractors. Such identification cards are valid and durable especially the passport.

Appellant appears to be challenging findings 28 and 29 of the decision wherein we found that guards used personal identification to grant entry through the gate and proof of contractor status was possession of a copy of the contracts and visual identification by the contracting officer. The first, second and fourth sentences constitute evidence not in the record nor is it newly discovered and thus may not form the basis for reconsideration. The third sentence on its face asks the Board about what the contracting officer did, but the subtext seems to be a challenge to the sufficiency of the evidence we relied upon in finding the identification process to be reasonable. We based our findings on the evidence in the record, gave weight to the methodology used by the contracting officer, and had no contrary evidence. Accordingly, this argument fails.

For its fifth challenge to our decision, appellant states:

Thorn said that the contracting officer visually identified the three persons as people with whom he had don[e] business in the past, having worked with them on more than one contract. Do the Board or the contracting officer have a tangible evidence or any other contract refers to the contractors have worked before with the contracting officer?

While posed as a query to the Board and the contracting officer, this argument seems to challenge our finding that the contracting officer visually identified the contractor representatives based upon having worked with them before on other contracts. That is the extent of the evidence in the record, no new evidence is offered, and neither is enough to reconsider our decision.

The sixth argument is:

The reason why Khudair started emailing the US government officials after one year of payments being made (as you said) is that, when the three contractors exhausted all efforts trying to contact any officer in US army to help them get back their money, they (Khudair) initiated correspondence with officials about the payment.

Our decision to conclude that payment was in fact made to the contractors was based in large part on the inexplicably long period of time that elapsed before payment was sought. Appellant has not pointed to any evidence in the record that we overlooked. Nor has it identified any newly discovered evidence which explains why it took over a year after the work was completed to complain about payments not having been made. Accordingly, this argument fails.

The seventh argument is:

No labor strikes had been threatened if payment was not paid. Who told the contracting officer that strikes would occur if payment was not made? We need clarification concerning this issue.

The evidence is otherwise than suggested by the first sentence and no contrary evidence was offered during the hearing by appellant. The question posed should have been asked before and/or during the hearing, not now after the decision has been made. There is simply nothing in this allegation to support a reversal of our decision.

The eighth and final argument follows:

Concerning copies of the contracts, does the contracting officer ha[ve] tangible evidence that persons who came to receive money had such contracts.

We have already found, based upon Thorn's testimony, that the persons in fact had the contracts. The argument suggests we might need more evidence to support that finding. We are satisfied that our finding is supported by the record and no contradictory evidence has been offered or even suggested.

CONCLUSION

Having considered all of the arguments and questions raised by appellant, we find no basis for reversing our decision denying the three appeals. Accordingly, upon reconsideration, our decision is affirmed.

Dated: 16 June 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