ARMED SERVICES BOARD OF CONTRACT APPEALS

Appeal of --	)	
	)	
Shawview Cleaners, LLC	)	ASBCA No. 56938
	)	
Under Contract No. SHA 05-602	)	

APPEARANCE FOR THE APPELLANT: Allen Jackson Barnes, Esq.
Columbia, SC

APPEARANCES FOR THE GOVERNMENT: Craig S. Clarke, Esq.
Army Chief Trial Attorney
CPT Elisabeth L. Gilman, JA
Trial Attorney

OPINION BY ADMINISTRATIVE JUDGE DELMAN ON GOVERNMENT'S MOTION FOR SUMMARY JUDGMENT

In this appeal Shawview Cleaners, LLC (Shawview or appellant) seeks reimbursement of $63,915 from the "Army and Air Force Exchange Service" (AAFES) related to back wages it had to pay for failure to comply with the Department of Labor (DOL) wage determination included in its contract with AAFES. The contract was for laundry, alterations and dry cleaning services at Shaw AFB, South Carolina.

Shawview claims that AAFES personnel fraudulently induced it to enter into the contract by misrepresenting to Shawview that the DOL wage determination in the contract was merely a guideline and not a mandatory contract requirement. The government has filed a motion for summary judgment, contending that the DOL wage determination was included in, and was a requirement of the contract; the contracting officer (CO) did nothing to eliminate or waive the wage determination requirement; and assuming that certain AAFES service business managers misrepresented to Shawview the mandatory nature of this contract requirement prior to award, they were without authority to do so and hence appellant may not recover as a matter of law. Appellant opposes the motion, contending that there are genuine issues of material fact regarding "AAFES tactics in negotiating and executing the contract" and whether those who allegedly misrepresented to appellant had the "apparent authority" to bind the government (opp'n at 1). We have jurisdiction under the Contract Disputes Act (CDA), 41 U.S.C. § 602(a).

STATEMENT OF FACTS (SOF) FOR PURPOSES OF THE MOTION

1. On 18 November 2005, the AAFES awarded a contract to Shawview for operation of laundry, dry cleaning and clothing alteration services. The contract term was from 21 November 2005 through 20 November 2010. Mr. Thomas Brent Elmore (Brent Elmore) signed the contract on behalf of appellant and CO Karen Skinner signed on behalf of AAFES. Messrs. Brent Elmore and Gary Elmore are the only members of Shawview, a limited liability company licensed under the laws of South Carolina. (R4, tab 1; compl. ¶ 2)

2. The contract included Exhibits A through K. Exhibit A, GENERAL PROVISIONS, CONTRACT FOR SERVICES (Oct 98), included the following[1]:

> 1. **AUTHORITY TO BIND (JAN 94)**
>
> a. "Contracting Officer" means a person authorized by the Commander, AAFES to execute and administer contracts, purchase orders, or other agreements on behalf of AAFES. **Only contracting officers may waive or change contract terms**; impose additional contract requirements; issue cure, show-cause and termination notices; issue claims against contractors, and issue final decisions on contractor claims.
>
> b. Other AAFES and government officials may be authorized by the contracting officer to perform actions of an administrative nature, forwarding requests for contract changes to the contracting officer, collecting contract payments, and processing routine documents. These officials are not contracting officers, as defined in a. above.
>
> c. **AAFES has no obligation to recognize or accept waivers or changes to this contract that result from**

[1] We note that the CO issued Amendment No. 2 on or about 14 February 2007 which, *inter alia*, purported to delete the "Oct 98" version of the General Provisions and replace it with the "Sep 06" version (R4, tab 9). This amendment/modification was not signed by appellant and it appears it was issued unilaterally. Except as otherwise specifically provided in the contract, contract modifications were required to be bilateral. General Provisions ¶ 5 (R4, tab 1, ex. A). However we need not pass on the binding nature of Amendment No. 2, since the contract provisions cited herein are identical in both versions.

the actions of officials other than the contracting officer. Claims based on such actions may be denied. Questions concerning the authority of other AAFES or government officials should be referred to the contracting officer.

....

4. **ORAL REPRESENTATIONS (JAN 94)** This contract represents the entire agreement of the parties. **Any changes or amendments thereto may not be recognized by AAFES unless committed to writing and incorporated by reference into the contract by the contracting officer.**

(R4, tab 1 at 8, 9) (emphasis added)

3. Exhibit B, LABOR PROVISIONS, CONTRACT FOR SERVICES (WITH SCA) – APRIL 98, provides in pertinent part as follows:

7. **SERVICE CONTRACT ACT OF 1965 AS AMENDED.**

a. This contract is subject to the Service Contract Act of 1965, as amended (41 U.S.C. 351 et seq.) and is subject to the following provisions and to all other applicable provisions of the Act and regulations of the Secretary of Labor issued thereunder (29 CFR Part 4).

b.

(1) Each service employee in the performance of this contract by the contractor or any subcontractor shall be paid not less than the minimum monetary wages and shall be furnished fringe benefits in accordance with the wages and fringe benefits determined by the Secretary of Labor or authorized representative, as specified in any wage determination attached to this contract.

....

(3) If, as authorized pursuant to section 4(d) of the Service Contract Act of 1965 as amended, the term of this contract is more than 1 year, the minimum monetary wages

> and fringe benefits required to be paid or furnished thereunder to service employees shall be subject to adjustment after 1 and not less often than once every 2 years, pursuant to wage determinations to be issued by the Wage and Hour Division, Employment Standards Administration of the Department of Labor as provided in such Act.
>
> ....
>
> ARMY AND AIR FORCE EXCHANGE SERVICE
>
> EMPLOYEE CLASSIFICATIONS
>
> This statement of equivalent AAFES rates is required to be made by AAFES in accordance with Section 2(a)(5) of the Service Contract Act, but a successful offeror under this solicitation is not required to pay the rates set forth on this page. The contractor is required to pay rates in accordance with any applicable currently effective wage determination from the Department of Labor made part of this contract.... [Emphasis in original]

(R4, tab 1 at 16, 17, 19, 26)

4. Exhibit K of the contract contained Wage Determination No. 94-2475, Revision No. 28, setting forth the minimum wage rates and fringe benefits required to be paid in the area (R4, tab 1 at 61). By letter to appellant dated 26 October 2007, the CO issued Amendment No. 3 to the contract to change this wage determination to Wage Determination No. 2005-2475, Revision No. 3 (R4, tab 12)[2].

5. AAFES employees Brett McCormick and Robert Werner were Services Business Managers (SBMs) during contract performance, and Mr. Kevin Lanham was the SBM on a previous contract Shawview performed at Shaw AFB. According to appellant,

[2] Amendment No. 3, revising the wage determination, was issued unilaterally by the CO (*see* note 1, *supra*). However, it appears that the contract and the Service Contract Act, incorporated herein, provide for this type of unilateral adjustment (*see* ex. B, LABOR PROVISIONS, ¶ 7 b.(3) (SOF ¶ 3)). It also appears that the government's audit of appellant's records was conducted in the summer of 2007, and perforce was based upon the original wage determination in the contract and not the wage determination incorporated under Amendment No. 3 in October, 2007 (SOF ¶ 7).

during the negotiation of the earlier contract, Lanham represented to appellant that the wage determination in the contract was a suggestion or guideline and the wages to be paid by Shawview "were up to" Shawview (compl. ¶¶ 5, 6). As for the subject contract, appellant contends that Mr. McCormick also advised Shawview, pre-award, that the wage determination was a suggestion, as prior AAFES employees had so represented to other contractors (compl. ¶ 15).

6. Under the terms of the contract only the CO was authorized to waive or change contract terms (SOF ¶ 2). There is no evidence showing that Mr. Lanham, Mr. McCormick or Mr. Werner was a CO or was authorized to change, interpret or explain the meaning of the contract terms and conditions. CO Skinner's notice of award letter to appellant for the subject contract, dated 18 November 2005, identified Mr. Tom Werner as a SBM who would monitor performance and be responsible for day-to-day operational affairs. Mr. McCormick was identified as the one responsible to schedule a pre-performance conference. The CO stated in this award letter that "contractual matters" should be addressed to the contracting office. The CO's letter also invited appellant's attention to ¶ 7. b. of ex. B of the contract that dealt with the wage determination. (Gov't mot., encl. 1)

7. Mr. Gary Elmore had a partial ownership interest in another dry cleaning business, Little's Personal Cleaners. In June 2007, Little's Personal Cleaners was audited by the DOL. The audit was expanded to include Shawview. At or around this time, DOL determined that Shawview was not in compliance with the wage determination in this contract, and as a result required Shawview to pay $63,915 for back wages. (Compl. ¶¶ 21, 22) Because of this payment and the wages required by the wage determination, Shawview no longer found the contract economically feasible. By letter to the CO dated 21 August 2008, Shawview provided notice of its termination of the contract (R4, tab 14). It appears that appellant agreed to stay on the job until the end of October 2008 to give the government an opportunity to issue a new solicitation (R4, tab 18, ¶ 4).

8. On 7 May 2009, Shawview submitted a claim to AAFES in the amount of $63,915 seeking reimbursement for these back wages, alleging that AAFES, represented by Messrs. Brett McCormick and Robert Werner "[i]n their capacity as contracting officers for AAFES," made pre-award representations to Shawview regarding the non-mandatory nature of the wage determination that were "justifiably relied upon" by Shawview to its detriment, which representations, upon information and belief, fraudulently induced Shawview to enter into this contract. According to appellant, the government's inducement was necessary because otherwise "it was impossible to make money under the contract" (R4, tab 19). The CO denied Shawview's claim on 10 June 2009 (R4, tab 20).

9. Shawview was dissolved as an LLC on 18 June 2009 (compl. ¶ 1). This appeal followed.

10. In opposition to the government's motion for summary judgment, Shawview filed an affidavit from one of its principals, Mr. Brent Elmore, as well as a transcript of a claimed recorded conversation between Elmore and SBM Werner that transpired just prior to the termination of Shawview's contract. In summary, Mr. Elmore stated in his sworn statement: (1) that he had been told at various times by AAFES officials, SBMs Kevin Lanham, Brett McCormick and Robert Werner, with whom he dealt on solicitation and negotiation issues and whom he believed "spoke with authority," that the wage determination set forth in Exhibit K was a suggestion and not mandatory; and (2) that CO Kay Dunbar told him after the contract was terminated that it had been her understanding that the listed wages in the wage determination also were "suggested wages" and "that she had recently been retrained on the subject" (app. opp'n, ex. A, Elmore aff., ¶¶ 2, 3, 5, 6). In the transcript of the recorded conversation between Mr. Elmore and Mr. Werner, Mr. Elmore explained to Mr. Werner that Shawview was "led to believe that [the wage determination] wasn't a requirement it was kind of a guideline...." Mr. Werner acknowledged that "that was the way it was told to me, too. That it was more of a guideline than it is a mandatory..." (app. opp'n, ex. 1 at 2, Recorded Conversation).

11. The government disputes that any of these statements were made by the SBMs or CO Dunbar, but has not filed any affidavits or declarations from these persons to support its position.

PRELIMINARY MATTER

Shawview filed articles of dissolution on 18 June 2009, shortly after its claim was denied and before it filed its appeal. The Board, *sua sponte*, required appellant to address whether Shawview had standing as a contractor to file and pursue this appeal and whether the Board had jurisdiction under the CDA.

In response, Shawview filed a supplemental brief[3] which maintains that the South Carolina Limited Liability Act of 1996 (Act) governs the dissolution process of Shawview (a South Carolina LLC). S.C. CODE ANN. § 33-44-802(a) states that "a limited liability company continues after dissolution only for the purpose of winding up its business." Section 33-44-804 gives the members of a dissolved LLC, winding up its business, the same powers and subjects the members to the same liability those members

[3] The government was given an opportunity to file a reply to the supplemental brief which it declined.

had prior to dissolution. Section 33-44-803 details the right to wind up a limited liability company's business, as follows:

> (c) A person winding up a limited liability company's business may preserve the company's business or property as a going concern for a reasonable time, prosecute and defend actions and proceedings, whether civil, criminal, or administrative, settle and close the company's business, dispose of and transfer the company's property, discharge the company's liabilities, distribute the assets of the company pursuant to Section 33-44-806, settle disputes by mediation or arbitration, and perform other necessary acts.

S.C. CODE ANN. § 33-44-803(c) (1996).

We conclude that appellant's filing and prosecution of this appeal falls under the authority granted by the statute for a dissolved LLC to prosecute actions to wind up its business in accordance with S.C. CODE ANN. § 33-44-803(c). Therefore, Shawview retains its standing as the "contractor" in this appeal and the Board has jurisdiction under the CDA.

DECISION

Summary judgment is properly granted where no material facts are in dispute and the moving party is entitled to judgment as a matter of law. *Mingus Constructors, Inc. v. United States*, 812 F.2d 1387, 1390 (Fed. Cir. 1987). Material facts are those that may affect the outcome of the case. *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242 (1986). More than mere assertions of counsel are necessary to counter a motion for summary judgment. *Pure Gold, Inc. v. Syntex (U.S.A.), Inc.*, 739 F.2d 624 (Fed. Cir. 1984). Any doubt regarding the presence of a material fact in dispute must be resolved in favor of the party opposing the motion. *Lemelson v. TRW, Inc.*, 760 F.2d 1254 (Fed. Cir. 1985).

The Service Contract Act of 1965, as amended, 41 U.S.C. § 351 *et seq.*, requires the payment of minimum prevailing locality wage rates on government service contracts governed by the Act. The subject contract is for laundry and dry cleaning services and is covered by the Act. 29 C.F.R. § 4.130(a)(28); FAR 22.1003-5(e). The contract also clearly stated this statutory requirement and included a DOL wage determination in accordance with the statute, 41 U.S.C. § 351(a) (SOF ¶¶ 3, 4).

Appellant fails to cite to any statutory provision, regulation or case law – and we have found none – that gives any government contracting person the authority to waive, modify or exempt a service contract from the mandatory operation of the statute and the related wage determination. Rather, this authority resides within the Secretary of Labor.

See 41 U.S.C. § 353(b); FAR 22.1003-4. The general rule is that even a contracting officer does not have the authority to waive requirements imposed by statute unless the statute so provides. *See LaCoste Builders, Inc.*, ASBCA No. 29884 *et al.*, 88-1 BCA ¶ 20,360 at 102,981-82 (CO had no authority to waive Buy American Act, exceptions not shown); *Hawaii CyberSpace*, ASBCA No. 54065, 04-1 BCA ¶ 32,455 at 160,535 (CO had no authority to waive CDA requirement that claim be certified). *See M-R-S Manufacturing Co. v. United States*, 492 F.2d 835 (Ct. Cl. 1974) (statutory duty to furnish accurate, complete and current data under TINA cannot be waived by a government agent).

Clearly, the SBMs – regardless of their "contractual authority" – did not have the authority to dispense with the mandatory nature of the statutory wage determination as it applied to this service contract. To the extent appellant relied upon their legal opinions or representations otherwise, this reliance was without legal basis and was unjustified as a matter of law. "A misrepresentation, even if relied upon, has no legal effect unless the recipient's reliance on it is justified." RESTATEMENT (SECOND) OF CONTRACTS § 164 cmt. d (1979).

In view of the foregoing, the purported disputed facts raised by appellant regarding appellant's negotiation of the contract with the SBMs and their "apparent authority" to make representations to appellant about the statutory DOL wage determination are not material to the outcome of this appeal. There are no material facts in dispute, and the government is entitled to summary judgment as a matter of law.

CONCLUSION

The appeal is denied.

Dated: 15 September 2010

JACK DELMAN
Administrative Judge
Armed Services Board
of Contract Appeals

(Signatures continued)

I concur

MARK N. STEMPLER
Administrative Judge
Acting Chairman
Armed Services Board
of Contract Appeals

I concur

EUNICE W. THOMAS
Administrative Judge
Vice Chairman
Armed Services Board
of Contract Appeals

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. 56938, Appeal of Shawview Cleaners, LLC, rendered in conformance with the Board's Charter.

Dated:

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