

ARMED SERVICES BOARD OF CONTRACT APPEALS

Appeals of -- )  
)  
Seven Seas Shipchandlers, LLC ) ASBCA Nos. 57875, 57876, 57877  
) 57878, 57879  
Under Contract Nos. W91B4L-09-P-0518 )  
W91B4L-09-P-0318 )  
W91B4L-09-P-0436 )  
W91B4L-09-P-0465 )  
W91B4L-09-P-0585 )

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APPEARANCES FOR THE GOVERNMENT: Raymond M. Saunders, Esq.  
Army Chief Trial Attorney  
CPT Tудо Pham, JA  
Trial Attorney

OPINION BY ADMINISTRATIVE JUDGE GRANT  
ON APPELLANT'S MOTION FOR PARTIAL SUMMARY JUDGMENT

Appellant Seven Seas Shipchandlers, LLC (Seven Seas) has moved for partial summary judgment in these five appeals, asserting that the government has not proved its affirmative defense that Seven Seas was paid for performance on the contracts. Seven Seas contends the record shows, without dispute, that the individual who received the cash payment for performance of these contracts and then absconded with the money was not a company employee, and not authorized to receive payment. The government opposes the motion, asserting that there are issues of fact that defeat ruling on the matter on summary judgment. For the reasons stated below, we deny the motion.

STATEMENT OF FACTS (SOF) FOR PURPOSES OF THE MOTION

1. Between January and May 2009, Seven Seas and the Kandahar Regional Contracting Center, Kandahar Air Field (KAF), Afghanistan, entered into five separate contracts that are the subject of these appeals. The contracts covered a variety of commercial item products such as generators, cables, phones, video adapters, cables, and refrigerant line sets. (R4, tabs 1, 10, 19, 28, 36) Seven Seas delivered the supplies and the government accepted them (R4, tabs 4, 11, 24, 33, 37).

2. The first three contracts did not contain any specific payment clauses, only the general commercial items clause, FAR 52.212-4, CONTRACT TERMS AND CONDITIONS--COMMERCIAL ITEMS (OCT 2008), which, among other things, sets out when and how electronic funds transfer (EFT) information is to be provided. FAR 52.212-4(g)(1)(x). These first three contracts are Contract No. W91B4L-09-P-0318 (Contract 0318) awarded on 28 January 2009 for \$96,430; Contract No. W91B4L-09-P-0436 (Contract 0436) awarded on 12 March 2009 for \$14,442; and Contract No. W91B4L-09-P-0465 (Contract 0465) awarded on 28 March 2009 for \$2,483. (R4, tabs 10, 19, 28)

3. The fourth contract, Contract No. W91B4L-09-P-0518 (Contract 0518), was awarded on 23 April 2009 for \$125,886 and, in addition to the commercial items clause (March 2009 version), contained two payment-specific clauses. The first clause, FAR 52.232-34, PAYMENT BY ELECTRONIC FUNDS TRANSFER—OTHER THAN CENTRAL CONTRACTOR REGISTRATION (MAY 1999), specified that payment “shall be made by electronic funds transfer (EFT)” unless the government is “unable” to pay by EFT, in which case, check or “some other mutually agreeable method of payment” would be authorized. The second clause allowed payment in local currency (cash), check, or EFT:

952.232-0002 PAYMENT IN LOCAL CURRENCY  
(AFGHANISTAN) (MAR 2009)

....

(c) Payment by the U.S. Government may be made in any of the following or in a combination of the following formats:

(1) Cash (Afghani), dispersed [sic] in a manner prescribed by the U.S. Military Local Finance Office; and/or

(2) Check, drawn on a U.S. Government account in a local national bank; and/or

(3) Electronic Fund Transfer (EFT).

(R4, tab 1 at 1, 4, 7, 18) The contract also required that invoices include specific EFT information.

4. The last contract, Contract No. W91B4L-09-P-0585 (Contract 0585), was awarded on 3 May 2009 for \$1,339. In addition to the commercial items clause, it contained one payment clause—the same local currency clause, 952.232-0002 PAYMENT IN LOCAL CURRENCY (AFGHANISTAN) (MAR 2009) as Contract 0518, quoted above, that allowed payment in local currency, check, or EFT. This contract also required that invoices include specific EFT information. (R4, tab 36 at 1, 6, 8)

5. Seven Seas subcontracted with a local Afghan company, Aman Khan Nariwal (AK Nariwal), for maintenance of vehicles in connection with an Australian Defense Forces contract. Mr. Muhammad Qahir was an employee of AK Nariwal and worked periodically with Seven Seas personnel. (R4, tab 7 at 125, decl. of Raja Khan (Kahn decl.) ¶¶ 3, 4) He was not expressly authorized by Seven Seas to receive payments for Seven Seas from the U.S. government either in U.S. dollars or Afghan currency (R4, tab 7 at 132, decl. of Sadiq Maruf (Maruf decl.) ¶ 5; Khan supp. decl. ¶ 8).

6. On 7 February 2009, the government informed Seven Seas that payment could be made in cash in U.S. dollars if Seven Seas wanted to avoid the EFT fee charged by its non-Afghan bank. On 8 February 2009, Seven Seas Operations Executive Mr. Maruf agreed to “accept cash in US \$. Kindly note the following personnel are authorized to collect cash from you. 1) Mr. Raja Khan. 2) Mr. Saeed Khan. 3) Mr. Shabbeer Bajwa.” (R4, tab 7 at 122, -123) No specific contracts were identified; as concerns the five contracts at issue here, this correspondence presumably related, at this time, only to Contract 0318 because the other four had not been awarded yet (SOF ¶¶ 2-4).

7. On 25 March 2009, under the direction of Seven Seas officials, Mr. Qahir delivered four invoices to the contracting office related to payment due under some unspecified contracts not at issue in this appeal. Mr. Qahir then went to the paying office, where he was given 4,693,973 in Afghan currency (cash), which he delivered to Mr. Bajwa of Seven Seas. On 27 May 2009, the same thing happened, and Mr. Qahir received payments in Afghan currency which he then delivered to Mr. Khan. (Khan decl. ¶ 4; answer ¶¶ 15, 16, 18) Seven Seas officials only authorized Mr. Qahir to deliver invoices to the contracting office, not to receive cash from the paying office, and those officials were concerned on both occasions when this happened (Maruf decl. ¶¶ 3, 7; Khan supp. decl. ¶ 3).

8. It is not clear whether, in other instances, Mr. Qahir accompanied Seven Seas officials when they picked up payments on other contracts; that assertion has been reported but the report does not identify the person making the assertion, nor have any specifics been presented, such as who Mr. Qahir accompanied, when, why, or in connection with what contracts (R4, tab 7 at 112).

9. The parties dispute whether, when, or how Seven Seas told the government not to make any more payments in Afghan currency. Mr. Maruf states he specifically told the contracting officer (CO), Mr. Austin DeRose, soon after 25 March 2009, “not to make any further payments in Afghan currency, and...that all future payments should be done by electronic bank transfers or paid in US Dollars cash” (Maruf decl. ¶ 4). The CO states that neither Mr. Maruf nor any other Seven Seas representative told him, at any time between 25 March 2009 and 10 June 2009, “not to make any further payments to Seven Seas in Afghan currency” (gov’t opp’n, decl. of Austin DeRose (DeRose decl.) ¶ 2).

Seven Seas did not tell the government that Mr. Qahir was not authorized to receive payments for Seven Seas until after 10 June 2009 (DeRose decl. ¶ 3).

10. In early June 2009, the parties communicated several times with each other concerning banking information and EFT payments. According to Mr. Khan, he spoke with the CO on 6 June 2009 and was told of a “new system” for paying Seven Seas via EFT (Khan supp. decl. ¶ 5). Also on 6 June 2009, Mr. Maruf emailed the CO stating that “[r]eference to your conversation with Mr. Raja [Khan] regarding payment, please note our bank details below” (R4, tab 7 at 138). On 9 June 2009, the CO emailed Seven Seas asking for some banking information as he was trying to “process payment for several contracts today” (*id.* at 129). Mr. Maruf replied later that morning with the requested information (*id.* at 128). The CO states his email was prompted by information from the KAF finance office that cash payments were to be discontinued and all payments made by EFT, not because Seven Seas asked for another method of payment (DeRose decl. ¶ 4). Seven Seas states it provided its banking information “to facilitate EFT settlements of all future Seven Seas invoices” (Khan decl. ¶ 4; Khan supp. decl. ¶ 5). Regardless of what prompted them, these communications reflect the parties’ intentions to shift to payment by EFT, to the extent that was not previously occurring or required.

11. On 10 June 2009, Mr. Qahir showed up at the KAF finance office, and was paid \$12,027,496 in Afghan currency (valued at \$240,549 in U.S. dollars) in full payment for the five contracts at issue here (Statement of Undisputed Material Facts (SUMF) ¶ 7; answer ¶ 23).<sup>1</sup> He signed the vouchers “Raja,” the first name of Mr. Khan of Seven Seas (R4, tabs 2, 14, 22, 32, 40). There is a dispute as to whether Mr. Qahir also presented invoices; Mr. Kahn states that Mr. Qahir had no invoices to present, whereas an unidentified government person reportedly stated that Mr. Qahir did present invoices (Khan decl. ¶ 5; R4, tab 7 at 112). Mr. Qahir did not deliver the money to Seven Seas and has not been seen by the parties since receiving the money at the KAF finance office (SUMF ¶ 8; answer ¶ 24).

12. An investigation was conducted by the Defense Criminal Investigative Service (DCIS). DCIS appears to have adopted the Army’s view, contested here, that there was no loss of U.S. funds because Mr. Qahir had received payments for Seven Seas in the past (albeit under other contracts), Seven Seas had not notified the Army that Mr. Qahir was *not* authorized to receive payments under these five contracts, and therefore, by paying Mr. Qahir, the Army effectively paid Seven Seas. DCIS was unable to locate Mr. Qahir, and the investigation was closed on 16 February 2010. (R4, tab 6 at 91, ¶ 4)

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<sup>1</sup> This amount varied from the total award value by \$30 due to currency conversion related to Contract 0518 (R4, tab 2).

13. Seven Seas submitted five claims, for full payment under all five contracts, on 1 September 2011 (the one for Contract 0518 was certified as required), and on 8 October 2011, the CO denied all claims (R4, tabs 8, 9, 17, 18, 26, 27, 34, 35, 42, 43). Seven Seas appealed all five decisions to the Board, one on 8 December 2011 and the other four on 9 December 2011.

### DECISION

This case concerns whether Mr. Qahir had apparent authority to receive payments on behalf of Seven Seas for these five contracts in Afghan currency. Seven Seas' view is that the record does not show that Mr. Qahir had apparent authority to receive payment for Seven Seas, and that consequently, "the Government has failed to satisfy its burden of proof that the Government 'correctly gave the funds to the contractor's authorized agent'" (app. mot. at 2). The government's position is that there are material facts in dispute sufficient to defeat summary judgment (gov't opp'n at 1).

Summary judgment may be granted only where there is no genuine issue of material fact and the movant is entitled to judgment as a matter of law. *Mingus Constructors, Inc. v. United States*, 812 F.2d 1387, 1390 (Fed. Cir. 1987). We do not weigh evidence and decide the issue, but determine only whether there is a genuine issue for trial. If the factual issues could reasonably be resolved in favor of either party, then summary judgment is not appropriate. *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 249-50 (1986).

To begin our analysis, we note that the doctrine of apparent authority, although not applicable to the government, can be applied to contractors. *Peter Bauwens Bauunternehmung GmbH & Co. KG*, ASBCA No. 44679, 98-1 BCA ¶ 29,551 at 146,497, *aff'd*, 194 F.3d 1338 (Fed. Cir. 1999) (table). Apparent authority is determined by looking at *the conduct of the principal* to assess whether the principal created a *reasonable belief* that the actor was authorized by the principal in the manner relied on. *American Anchor & Chain Corp. v. United States*, 331 F.2d 860, 861 (Ct. Cl. 1964) (Apparent authority may be "created by written or spoken words or other conduct of the principal which, if reasonably interpreted, causes a third person to believe that the principal consents to have the act done on his behalf by the person purporting to act for him."). For the government to prevail on its affirmative defense of payment, it must prove that Mr. Qahir had apparent authority to receive payments for Seven Seas under these contracts in Afghan currency. *S.A.S. Bianchi Ugo fu Gabbriello*, ASBCA No. 53800, 05-2 BCA ¶ 33,089 at 164,025 ("the government must prove it correctly gave the funds to the contractor's authorized agent").

Here, we address the issue in the context of Seven Seas' motion for partial summary judgment, looking at whether there is an "absence of evidence to support the non-moving party's case" (*Celotex Corp. v. Catrett*, 477 U.S. 317, 325 (1986)), or, in

contrast, if “reasonable minds could differ as to the import of the evidence.” *Liberty Lobby*, 477 U.S. 250-51. In this case, the facts, disputes, and holes in the record preclude us from granting the motion. First, in the government’s favor, is the fact that Mr. Qahir delivered invoices and picked up cash payments twice before on other contracts and delivered the money to Seven Seas, and Seven Seas never told the government that Mr. Qahir was not authorized to receive payments (SOF ¶¶ 7, 9). Second, there are disputes of fact as to whether Mr. Qahir presented invoices for these five contract payments (SOF ¶ 11), or whether Seven Seas told the government to stop making payments in Afghan currency (SOF ¶ 9); either of these points, if proved in the government’s favor, would further support its position. Third, it is unclear whether Mr. Qahir accompanied Seven Seas officials on other occasions when Seven Seas picked up payments (SOF ¶ 8), or what the standard payment practices at the KAF finance office were. KAF payment practices might well differ substantially from those in a U.S. finance office and, without knowing these practices, we cannot assess the reasonableness of the parties’ decisions. Together, these facts, disputes, and omissions prevent us from categorically concluding, as Seven Seas does, that Mr. Qahir had no apparent authority.

Seven Seas argues that, regardless of what the government might have believed based on these facts, there was no *conduct by the principal* that could be reasonably viewed as indicating that Mr. Qahir was authorized to act for the company. In particular, Seven Seas argues that silence as to lack of authority does not constitute “written or spoken words or conduct” (app. reply at 14-16).<sup>2</sup> However, this is not necessarily the case. Treatises and courts have noted that acts not disavowed by the principal can lead to a conclusion of apparent authority. RESTATEMENT (THIRD) OF AGENCY § 3.03 cmt. b (2006) (“A principal's inaction creates apparent authority when it provides a basis for a third party reasonably to believe the principal intentionally acquiesces in the agent's representations or actions.”); Williston on Contracts, 3<sup>rd</sup> Ed., § 277, at 213 (“Apparent authority may also be derived from a course of dealing or from ...the fact that other acts...similar to the one in question were...not disavowed by the principal”); see *Bethany Pharmacal Co. v. QVC, Inc.*, 241 F.3d 854, 860 (7<sup>th</sup> Cir. 2001) (under Illinois law, “apparent agency may arise from the silence of the alleged principal when they knowingly allow another to act for them”); *Borg-Warner Leasing v. Doyle Electric Co.*, 733 F.2d 833, 836 (11<sup>th</sup> Cir. 1984), *cert. denied*, 475 U.S. 1140 (1986) (under Florida law, “apparent agency can arise even in the face of the principal’s silence when the principal by its actions creates a reasonable appearance of authority”). Silence—i.e., not disavowing the supposed agent’s past conduct—could, depending on the circumstances, contribute to a reasonable belief by a third party that the actor was authorized by the principal to continue acting in that capacity.

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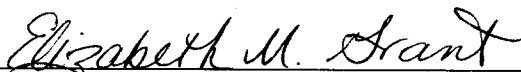
<sup>2</sup> Seven Seas also argues that, in any event, it was not silent because it told the government to change payment procedures after the two earlier cash payments to Mr. Qahir (app. reply br. at n.10). However, as this allegation is disputed by the government, it does not advance Seven Seas’ motion.

This does not mean that the factual issues present here can only be reasonably resolved in favor of the government. A contrary conclusion is also possible, but we do not decide this on summary judgment. One of the purposes of summary judgment is to dispose of factually unsupported claims and defenses. It is appropriate when there is a "complete failure of proof", or only a "scintilla" of evidence as to an essential element of the case. *Celotex*, 477 U.S. at 323-24 (1986). Here, we do not find the evidence "so one-sided that one party must prevail as a matter of law." *Liberty Lobby*, 477 U.S. at 252.

CONCLUSION

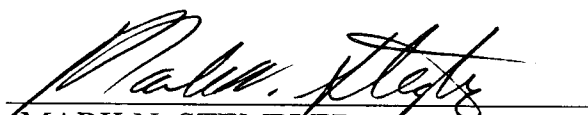
For the reasons stated above, Seven Seas' motion for partial summary judgment is denied.

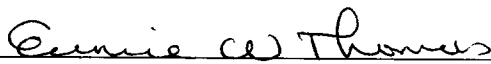
Dated: 26 November 2012

  
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ELIZABETH M. GRANT  
Administrative Judge  
Armed Services Board  
of Contract Appeals

I concur

I concur

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

  
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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. 57875, 57876, 57877, 57878, 57879, Appeals of Seven Seas Shipchangers, LLC, rendered in conformance with the Board's Charter.

Dated:

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JEFFREY D. GARDIN  
Recorder, Armed Services  
Board of Contract Appeals