ARMED SERVICES BOARD OF CONTRACT APPEALS

Appeal of --	)	
	)	
Servicios y Obras Isetan S.L.	)	ASBCA No. 57584
	)	
Under Contract No. FA5575-08-C-0008	)	

APPEARANCE FOR THE APPELLANT: Mr. Francisco Gutierrez
Chief Executive Officer

APPEARANCES FOR THE GOVERNMENT: Alan R. Caramella, Esq.
Air Force Chief Trial Attorney
Lawrence M. Anderson, Esq.
Maj J. Bryan Warnock, USAF
Trial Attorneys

OPINION BY ADMINISTRATIVE JUDGE WILSON

This matter arises out of an appeal from the contracting officer's (CO) decision to terminate the contract for default because appellant allegedly submitted falsified documentation in order to secure the contract. Appellant disputes the allegation and further alleges in its complaint that the government owes it funds for overhead costs and the return of retained amounts. The government has moved to dismiss these monetary amounts for lack of jurisdiction as they were not filed with the CO as required by the Contract Disputes Act (CDA), 41 U.S.C. §§ 7101-7109. The government also moved to dismiss the entire appeal for lack of jurisdiction, or alternatively to deny the appeal, as the contract is *void ab initio* because it was allegedly obtained through fraud in the inducement. We decide this appeal on the written record pursuant to Board Rule 11.

FINDINGS OF FACT

A. *The Contract/Award Phase*

1. On 27 August 2008, Servicios y Obras Isetan S.L. (Isetan or appellant), in response to Solicitation No. FA5575-08-R-0006 issued by the United States Air Force (government or AF), submitted an offer to construct the Fire Training Hardstand at Morón Air Base, Spain (R4, tab 1). After the proposal was deemed technically acceptable by the government (R4, tab 2), the government awarded Contract No. FA5575-08-C-0008 to Isetan in the amount of 594,978€ (R4, tab 3). The firm fixed-price contract required appellant to furnish tools, equipment, labor, materials and transportation for the construction project (*id.* at 6). The contract consisted of a single performance period of 210 calendar days (*id.* at 1).

2. The contract incorporated the following standard Federal Acquisition Regulation (FAR) and Defense Federal Acquisition Regulation Supplement (DFARS) clauses: FAR 52.233-1, DISPUTES (JUL 2002); FAR 52.243-4, CHANGES (JUN 2007); FAR 52.249-10, DEFAULT (FIXED-PRICE CONSTRUCTION) (APR 1984); DFARS 252.243-7001, PRICING OF CONTRACT MODIFICATIONS (DEC 1991); and DFARS 252.243-7002, REQUESTS FOR EQUITABLE ADJUSTMENT (MAR 1998) (R4, tab 3 at 14-15).

3. Section H of the contract, entitled SPECIAL CONTRACT REQUIREMENTS, required appellant "[w]ithin (10) calendar days after...contract award" to furnish the CO "a Bank Letter of Guarantee for the performance of the work" in a specified amount and "[f]ailure to furnish the letter...may be deemed a breach of contract." Section H also informed appellant that the CO would not "issue the Notice to Proceed until approval and acceptance" of the letter. (R4, tab 3 at 12)

4. Also section H contains a "CERTIFICATE OF CLASSIFICATION" requirement, which provides as follows:

> The Contractor and/or their subcontractors shall hold an updated Certificate of Classification issued by "Registro de Contratista de Obras del Estado" of the "Ministerio de Economía y Hacienda" covering the following groups, subgroups, and categories:

Group	Subgroup	Category
A	1 & 2	c
E	7	c
H	2	b
I	6	a

(R4, tab 3 at 12)

5. During the solicitation phase, appellant submitted a "Certificate of Classification" with its offer which showed that Isetan was only qualified in one of the categories (R4, tab 1 at 3).

6. In order to obtain a more favorable evaluation, as part of its technical proposal, Isetan submitted an alleged agreement with the Spanish company Heliopol, S.A. (Heliopol). This "Private Contract" was signed by Mr. José Antonío Gutiérrez González on behalf of Isetan and Mr. Miguel Rus Palacios on behalf of Heliopol. (R4, tab 1 at 6, tab 27 at 6) Appellant also submitted a Certificate of Classification for Heliopol, which demonstrated that it met numerous classification categories (R4, tab 1 at 2). Appellant also submitted past performance information for Heliopol (R4, tab 1 at 4-5).

7. After evaluating the technical proposal submitted by appellant, the Chief of Engineering (the "Chief") determined that Heliopol had all certificates with the exception of one (R4, tab 2 at 2).

8. The Chief evaluated appellant's technical proposal and determined the following:

> Helliopol S.A., the participating merchant company of Servicios y Obras Isetan, S.L., has demonstrated adequate financial resources to perform the contract, ability to comply with the delivery or performance schedule, availability of the necessary organization, experience, accounting and operational controls, and technical skills, availability of the necessary production, construction, and technical equipment and facilities, and a very good total number of years experience in performing recent and relevant contracts. This offeror and his collaborator Heliopol, S.A. have all the Certificate of Classification issued by the "Registro de Contratista de Obras del Estado" of the "Ministerio de Economía y Hacienda" except the group, subgroup, and category: H 2 b. (R4, tab 2 at 2)

9. The Chief further determined that the second proposed subcontractor, Martín Casillas S.L., possessed the remaining required classification. As a result, appellant's offer was assigned an acceptable rating. (*Id.*) We find that the inclusion of the Heliopol and Martín Casillas certifications enhanced appellant's ability to obtain the contract.

10. On 19 September 2008, the CO awarded the contract to appellant (R4, tab 3 at 2).

11. The contract also required appellant to "furnish the Contracting Officer a Bank Letter of Guarantee" within ten calendar days of contract award. Appellant failed to do so; however, the CO issued the Notice to Proceed on 29 September 2008. (R4, tab 3 at 12, tab 4) On or about 22 January 2009, appellant provided the CO the required bank guarantee (R4, tab 24).

B. *Performance*

12. Appellant had yet to commence construction and, on 13 February 2009, the CO issued a "Letter Of Concern" to appellant ordering that the construction should begin "immediately on this order and is completed [no later than] Tuesday, 28 April 2009." The letter also informed appellant that "[f]ailure to commence work [would] result in cancellation of [the] award in its entirety." (R4, tab 6)

13. Appellant responded to the CO's letter on 19 February 2009 explaining that changes in suppliers, meetings to discuss designs, and issues with the sample affected the start time. Appellant also indicated that it sent a letter on 25 November 2008 that included a manufacturer proposal and advised that any changes would require a contract time extension. (R4, tab 6 at 2)

14. According to appellant, the modification would save the government 11,311.47€ but would require an extension of 128 days. Appellant requested a new contract completion date of 3 September 2009. (R4, tab 6 at 3)

15. By letter dated 19 March 2009, the CO accepted appellant's proposed modification. However, she declined the 128-day extension to the contract date. Instead, she granted a 50-day extension, which extended the contract completion date to 17 June 2009. (R4, tab 7)

16. By 15 May 2009 appellant had not started construction and on 28 May 2009, submitted its revised progress schedule (R4, tabs 8, 9).

17. On 29 May 2009, the bank that appellant claimed issued the letters of guarantee informed the CO that it had no record that guarantees for the work under the contract had ever been issued. On this same date, the CO sent written notice to appellant informing it that the letters were invalid and as such the "contracts are not covered by any guarantee." The CO gave appellant until 5 June 2009 to "submit valid Bank Letters of Guarantee." (R4, tabs 10, 28) We find that the record does not demonstrate that appellant ever submitted a valid Bank Letter of Guarantee for the contract that is the subject of this appeal.

18. On 8 June 2009, the Chief of Contracting informed the Air Force Office of Special Investigations (AFOSI) that she believed that appellant had forged the Bank Letter of Guarantee to perform the contract (R4, tab 16 at 4).

19. AFOSI initiated an investigation into the allegations and issued an initial report dated 31 July 2009. The report provided facts and evidence with regard to the alleged fictitious bank letters. (R4, tab 16)

20. On 26 August 2009, the CO contacted the attorney for sub-contractor Heliopol via email regarding the purported private contract between Heliopol and appellant. The CO attached the alleged "Private Contract" between the parties to the attorney. (R4, tabs 13, 25)

21. On 27 August 2009, the attorney for Heliopol, Mr. Bernabé Infantes Nieves, responded to the CO's email, informing her that he did not "recognize...the content [of] or the signature" on the contract. He went on to say that the signature on the contract

"[did] not belong to either Mr. Miguel Rus Palacios or to any other representative or attorney-in-fact of HELIOPOL" and that he "deeply regret[s] the unlawful use of the good name and reputation of HELIOPOL." Mr. Nieves closed the letter with a request for a meeting with the CO. (R4, tab 25)

22. AFOSI issued a subsequent final investigation report on appellant, dated 6 November 2009, which addressed the facts and circumstances surrounding the Heliopol allegations (R4, tab 19). The final report indicates that the meeting between Mr. Nieves, his client, Mr. Palacios, the CO and AF personnel was held on 9 September 2009. Mr. Palacios stated that "he had no knowledge of the arrangement and at no time had signed the private contract." Mr. Palacios indicated that he was angry that "his name and...reputation would be used without his permission to win contracts with the US Government." Mr. Palacios provided the government with a copy of his Spanish identification and signature. (*Id.* at 9) The record in this appeal also includes a statement from Mr. Palacios which states in pertinent part:

> I have never entered into any agreement to partner or cooperate with Isetán in any projects on Morón Air Base. No authorized agent of Heliopol signed the [Private Contract] nor entered into any agreement to partner or cooperate with Isetán in any projects at Morón Air Base.

(R4, tab 29) We find that appellant misrepresented its relationship with Heliopol to the government in order to obtain a more favorable evaluation of its proposal.

23. On 17 September 2009, appellant was suspended from Federal contracting by the Department of the Air Force (Air Force) for submitting "forged bid bonds" (R4, tab 19 at 81, 88). On 2 June 2010, the suspension was lifted by the Air Force (R4, tab 17).

24. On 28 September 2009, appellant submitted Invoice No. 37/2009 for payment in the amount of 112,439.80€, which the CO "RECEIVED AND ACCEPTED" on 30 September 2009 (R4, tab 11). The government paid the invoice, but retained 10% (11,243.98€) (*id.*, compl.). The record does not show that appellant did any further work on the contract after this date.

25. By letter dated 3 November 2010, the Contracting Director informed appellant that the contract was terminated "in its entirety" for default. She noted specifically that appellant was in default "for the submission of a fraudulent bid bond" for the contract. (R4, tab 14) Although the letter was dated 3 November 2010, it was postmarked on 7 January 2011 and the government has no evidence that appellant received the termination notice prior to 7 January 2011 (gov't br., proposed finding of fact ¶ 3).

26. By letter dated 4 April 2011, appellant filed an appeal with this Board. We find that the appeal was timely filed. On 12 April 2011, the appeal was docketed as ASBCA No. 57584. (R4, tab 18) The parties opted to have the appeal decided on the written record pursuant to Board Rule 11.

27. By letter date 16 May 2011, appellant set forth its complaint and alleged as follows:

> Complain A:
> According to our attached letter date[d] 4 April 2011, we explain that on 27 May 2009 we had already all requirements to start our work on site, as explained we had not any answer from Contracting Officer up to 3 November 2010.
>
> ....
>
> As we use some of this [sic] workers and equipment for other jobs, we will find a fair way charge [sic] to the US Government...a total of 51,289.90€
>
> Complain B:
> With the payment of our invoice 37/2009 of 112,439.80€, Government make retention of 10% (11,243.98€) for the material already provided by us.... Government must give back us [sic] such amount (retention) because material is already and fully in Government property.
>
> Complain C:
> Termination for Default is unacceptable for us by simple reasons shown in our letter of 4 April 2011.

28. In its answer and subsequent Rule 11 brief, the government alleges that the termination for default was proper and "Complain A" and "Complain B" should be dismissed for lack of jurisdiction because these monetary claims were not submitted to the CO and as such, there is no final decision for the Board to consider. The Board ordered appellant to provide evidence that the above-mentioned claims were submitted to the CO for a final decision. In response, appellant submitted what appears to be a court order from a Spanish tribunal that neither mentions anything relating to the contract that is the subject of this appeal nor speaks of any claims pending before the CO. We find that appellant has not offered any evidence to show that these claims were submitted to the CO for consideration.

DECISION

Motion to Dismiss/Motion to Strike

We analyze the government's motion to dismiss in terms of a motion to strike "Complain A" and "Complain B" of appellant's complaint. *See Joiner Systems, Inc.*, ASBCA No. 57097, 11-2 BCA ¶ 34,782 at 171,181, 171,184 n.1 (motions to dismiss not the entire appeal but only portions of the complaint are treated as motions to strike).

For a contractor monetary claim, the CDA requires that: (1) the contractor must submit the demand in writing to the CO; (2) the contractor must submit the demand as a matter of right; and, (3) the demand must contain a sum certain. *ERKA Construction Co.*, ASBCA No. 57618, 12-2 BCA ¶ 35,129 at 172,473 (citing *H.L. Smith, Inc. v. Dalton*, 49 F.3d 1563, 1565 (Fed. Cir. 1995)). The claim must request, expressly or implicitly, a final decision of the CO. If the contractor's claim exceeds $100,000, it must be certified. *See* 41 U.S.C. § 7103(b)(1).

With regard to the government's motion, based on the finding that appellant did not submit the demands in its complaint in writing to the CO prior to filing its appeal (finding 28), we must hold that we do not have jurisdiction over the portions of the complaint containing a monetary request. Accordingly, "Complain A" and "Complain B" are hereby stricken from the complaint.

Motion to Dismiss/Contract void ab initio

The government also moves to dismiss the appeal for lack of jurisdiction, or alternatively to deny the appeal, because the contract is *void ab initio* for fraud in the inducement as appellant knowingly submitted the fictitious Heliopol contract in order to obtain the contract and subsequently knowingly submitted a fictitious bank letter of guarantee in order to begin performance (gov't br. at 15, 20). Appellant responds that the government had knowledge of appellant's relationship with Heliopol and offers mobile phone records of conversations with Mr. Miguel Rus Palacios (Heliopol); and that the contract was awarded to Isetan alone and was not a joint venture. We have jurisdiction to determine whether the contract is *void ab initio* and accordingly proceed on that basis. We conclude that the record does not contain any credible or persuasive evidence rebutting the government's evidence that appellant's Heliopol submission was a material misrepresentation.

In general, a contract tainted by fraud or wrongdoing is *void ab initio*. *Godley v. United States*, 5 F.3d 1473, 1475 (Fed. Cir. 1993). It is well established that a contract is void or voidable where its award resulted from misrepresentations in the contractor's bid. *See J.E.T.S., Inc.*, ASBCA No. 28642, 87-1 BCA ¶ 19,569; *J.E.T.S., Inc. v. United States*, 838 F.2d 1196 (Fed. Cir. 1988). That severe remedy is couched in the potential for injury

to the public interest by actions which compromise the integrity of the Federal contracting process. *United States v. Mississippi Valley Generating Co.*, 364 U.S. 520 (1961). Most importantly, it is not limited to situations where the contractor has been convicted in a criminal action stemming from the misrepresentation. *Id.*, *United States v. Acme Process Equipment Co.*, 385 U.S. 138 (1966).

Moreover, in order to render a contract voidable, three requirements must be met in addition to the requirement that there must have been a misrepresentation: (1) the misrepresentation must have been either fraudulent or material; (2) the misrepresentation must have induced the recipient to make the contract; and (3) the recipient must have been justified in relying on the misrepresentation. RESTATEMENT (SECOND) OF CONTRACTS § 164(l) (1981).

Here, based on the record, there is enough evidence to conclude that appellant materially misrepresented its relationship with Heliopol to the government. Additionally, the government has demonstrated that it relied on appellant's misrepresentation in awarding the contract (finding 9), and that the government's reliance on said misrepresentation was reasonable. Based on the fact that appellant did not possess the requisite certifications on its own (finding 5), we further conclude that appellant would have been deemed technically unacceptable had it not misrepresented itself to the government. Accordingly, the contract is *void ab initio*.

As the contract is deemed *void ab initio*, we need not address the government's other arguments.

CONCLUSION

The appeal is denied.

Dated: 5 April 2013

OWEN C. WILSON
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. 57584, Appeal of Servicios y Obras Isetan S.L., rendered in conformance with the Board's Charter.

Dated:

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