

## **Board of Contract Appeals**

General Services Administration  
Washington, D.C. 20405

---

GRANTED: October 18, 2004

---

GSBCA 16115-CFTC

WEIDEMANN ASSOCIATES, INC.,

Appellant,

v.

COMMODITY FUTURES TRADING COMMISSION,

Respondent.

Anthony H. Anikeeff and Aaron S. Goldsmith of Bracewell & Patterson, L.L.P.,  
Washington, DC, counsel for Appellant.

Martin B. White, Office of General Counsel, Commodity Futures Trading  
Commission, Washington, DC, counsel for Respondent.

Before Board Judges **DANIELS** (Chairman), **NEILL**, and **GOODMAN**.

**GOODMAN**, Board Judge.

Appellant, Weidemann Associates, Inc. (Weidemann or appellant), has appealed a contracting officer's decision denying its claim for breach of the contract entered into between appellant and respondent, the Commodity Futures Trading Commission (CFTC or respondent). Both parties have filed motions for summary relief. We deny respondent's motion, grant appellant's motion, and grant the appeal.

## Background<sup>1</sup>

### The Director Position

In 2001, the CFTC began efforts to recruit a qualified individual to serve as Director of its new Division of Market Oversight (the Director position). Respondent's Supplementary Appeal File, Exhibit 42 (Declaration of Richard Shilts (Shilts Declaration) (February 26, 2004)) ¶ 2; Id., Exhibit 44 (Declaration of Eric Oleson (Oleson Declaration) (March 1, 2004)) ¶ 3. The CFTC's management contemplated that the Director position would be a non-career Senior Executive Service (SES) position. Oleson Declaration ¶ 4.

### CFTC's RFP and Appellant's Proposal

In February 2002, the CFTC issued a request for proposals (RFP) seeking proposals from executive search firms to assist the Commission in recruiting an individual for the Director position. Appeal File, Exhibit 1. In late February 2002, appellant, a consulting company with expertise in assisting organizations with recruiting efforts for senior consultant and management personnel, submitted a proposal in response to the RFP. Appellant's Supplementary Appeal File, Exhibit 33 (Declaration of Wesley Weidemann (Weidemann Declaration) (January 13, 2004)) ¶¶ 3, 5; Id., Exhibit 34 (Declaration of Alvin Bunker (Bunker Declaration) (January 13, 2004)) ¶ 2; Appeal File, Exhibit 2.

### Respondent's Efforts to Fill the Director Position

While receiving and evaluating proposals in response to the RFP, respondent used its own efforts to locate a candidate for the Director position. In early March 2002, an employee of the CFTC in Chicago was asked by the Acting Director of the CFTC's Division of Economic Analysis (Acting Director) if he knew of any individuals who would be good candidates for the Director position. The Chicago employee identified Dr. Michael Gorham as a potential candidate. On March 5, 2002, the Acting Director obtained Dr. Gorham's resume from the website of his employer and supplied a copy of the resume to the office of the Chairman of the CFTC. Shilts Declaration ¶¶ 3-6; Respondent's Supplementary Appeal File, Exhibit 40 (Declaration of William C. Konkitis (Konkitis Declaration) (February 24, 2004)) ¶¶ 1-7; Appeal File, Exhibit 21.

Several days later, Dr. Gorham was contacted by Chief of Staff to the Chairman of the CFTC (Chairman's Chief of Staff), who described the Director position to him. They exchanged e-mail messages and had one or more telephone conversations concerning the Director position. Respondent's Supplementary Appeal File, Exhibit 38 (Declaration of Michael Gorham (Gorham Declaration) (February 20, 2004)) ¶ 5; Appeal File, Exhibit 4 at 1.

On March 22, 2002, appellant was selected for award of the contract, but the CFTC postponed award because Dr. Gorham was under consideration for the Director position. Oleson Declaration ¶ 5. On March 26, 2002, Dr. Gorham traveled to Washington, D.C., to

---

<sup>1</sup> The following facts are not disputed.

interview for the Director position. During these meetings Dr. Gorham was offered the Director position. Gorham Declaration ¶¶ 6-7; Appeal File, Exhibit 7 at 1.

By undated letter attached to an e-mail message dated April 7, 2002, Dr. Gorham declined to accept the CFTC's offer of the Director position. In that letter he stated that he did not want the CFTC to "come back" to him in the future if the CFTC could not find someone to fill the position. Respondent's Supplementary Appeal File, Exhibit 50.

#### Contract Award and Provisions of the Contract

After Dr. Gorham was offered the Director position and definitively declined to accept it, respondent scheduled a meeting with appellant to finalize and award the contract. Oleson Declaration ¶ 7; Respondent's Supplementary Appeal File, Exhibit 50. On April 19, 2002, appellant's owner, vice-president, and senior recruiter met with the Chief of Staff to the Chairman and the human resource specialist at the CFTC involved in the search for a Director (CFTC's human resource specialist). Appellant's attendees expressed concern about a provision in the proposed contract which read as follows:

The CFTC reserves the right to publicly announce all vacancies and any candidate may submit an application to the CFTC. CFTC will consider all qualified candidates, whether or not the Contractor referred those candidates to the CFTC.

Weidemann Declaration ¶ 14; Appeal File, Exhibit 1 at 6.

Respondent's attendees informed appellant's attendees that respondent had held discussions with and offered the position to an individual who had declined the position. They did not identify Dr. Gorham by name. They also advised appellant's attendees that the CFTC had no other candidates under consideration and did not intend to formally advertise the position. Oleson Declaration ¶ 8.

A contract was forwarded to appellant later that day and executed by the parties. Except for changes made in the length of the contract and content of the Advance Notice (the RFP required that the Advance Notice contain each candidate's home address and social security number, while the contract required a business or home telephone number instead of this information), the language of the contract was the same as that in the RFP. Appeal File, Exhibits 1, 10.

The contract required the contractor to assist the Commission in finding an individual to fill the Director position. The CFTC would consider all qualified candidates, whether or not the contractor referred those candidates to the CFTC. Qualified candidates had to possess all or a majority of six specified characteristics. The contractor was required to refer qualified candidates to the CFTC. The contractor was to screen candidates against the six basic qualification requirements, which are listed in the contract, and refer all candidates who appeared to meet those requirements. A candidate could submit an application directly to the CFTC, or the contractor could submit an application on a candidate's behalf. To be credited with the referral, the contractor was required to provide an Advance Notice to the CFTC prior to submission of the "formal application." The date of referral was identified by the

postmark of an Advance Notice made through postal services, or the date of transmission of a faxed or e-mailed Advance Notice. The Advance Notice was to include the full name and business or home telephone number of the candidate and the date of referral.

Under the contract, the contractor could earn a base fee of 28% of the hired candidate's starting annual salary and an additional incentive fee premium of 50% of the base fee (up to a maximum premium payment of \$32,000), if the successful candidate was referred within the first thirty days of the contract. Payment to the contractor was to be made only if a candidate was hired, the hired candidate was referred to the CFTC by the contractor, the contractor made the referral during the effective period of the contract, and the contractor complied with the Advance Notice procedures. If the hired candidate was not referred to the CFTC by the contractor, the contractor would not be paid a fee under the contract. Appeal File, Exhibit 10.

### Contract Performance

On April 22, 2002, appellant's senior recruiter (the recruiter) began contacting potential candidates for the Director position and sending Advance Notices by e-mail to the CFTC as required by the contract. Appeal File, Exhibit 14 at 79. During his discussions with potential candidates, he informed them about the position, sought their interest, and forwarded to them information about the position. Appellant's Supplementary Appeal File, Exhibit 35 (Declaration of Daniel E. Lounberg (Lounberg Declaration) (January 12, 2004)) ¶¶ 19-20.

Shortly after beginning performance of the contract, the recruiter independently identified Dr. Michael Gorham as a potential candidate for the Director position. He contacted Dr. Gorham by telephone on April 29, 2002, and described the position. Dr. Gorham informed the recruiter that he had already interviewed for, been offered, and rejected the position. Gorham Declaration ¶ 9; Lounberg Declaration ¶ 28. Based on what Dr. Gorham told the recruiter, appellant's owner and the recruiter concluded that Dr. Gorham was likely the prior candidate who had been described but not identified by the CFTC representatives at the April 19, 2002, meeting. Weidemann Declaration ¶ 21; Lounberg Declaration ¶ 28; Appeal File, Exhibit 14 at 164. On the morning of April 30, 2002, the recruiter sent an Advance Notice to respondent containing the personal information of twenty-eight individuals, including Dr. Gorham, whom he had contacted the previous day. Weidemann Declaration ¶ 21; Lounberg Declaration ¶ 28; Appeal File, Exhibit 14 at 164.

On May 2, 2002, Dr. Gorham contacted the Chief of Staff of the Chairman of the CFTC and expressed what respondent characterizes as "renewed interest" in the Director position. Gorham Declaration ¶¶ 11-12; Oleson Declaration ¶ 11. This was the first time Dr. Gorham had any discussions or communication with the CFTC concerning the Director position from the time that appellant executed the contract. Appellant's Supplementary Appeal File, Exhibit 32.

### Dr. Gorham's Application - May 13, 2002

On May 13, 2002, CFTC's human resource specialist sent Dr. Gorham an e-mail message directing him to complete an "Online Application" required by the Presidential

Personnel Office for a non-career SES position. Appeal File, Exhibit 14 at 259. Dr. Gorham completed and submitted the application. Appeal File, Exhibit 14 at 260.

#### New Legislation and the Vacancy Announcement

On May 13, 2002, the same day that Dr. Gorham completed the "Online Application," Congress enacted legislation that removed the CFTC from the SES system. As a result, the Director position could not be filled by a non-career SES employee. Oleson Declaration ¶ 13. The CFTC determined that the position had to be filled by a competitive service appointment. Oleson Declaration ¶ 13. CFTC asserts that under the rules applicable to competitive service appointments, the CFTC was required to publicly announce the position and solicit written applications. Oleson Declaration ¶ 14. On June 12, 2002, the CFTC published a vacancy announcement soliciting applications for the Director position. Appeal File, Exhibit 15 at 22-24.

Also on June 12, 2002, the CFTC's contracting officer sent a letter to appellant which stated that the CFTC had "our candidate, Michael Gorham, for the position of Director [of the DMO]." The letter stated further that Dr. Gorham would not receive the non-career appointment in the SES specified in the contract as a result of the CFTC having been removed from the SES by law. Appeal File, Exhibit 16 at 1.

#### Applications in Response to the Vacancy Announcement and Dr. Gorham's Appointment

In order to be considered for the Director position, Dr. Gorham was required to respond to the vacancy announcement and submit all required information in the format specified in the announcement. Appeal File, Exhibit 15. On June 17, 2002, Dr. Gorham e-mailed his application in response to the CFTC's vacancy announcement. Gorham Declaration ¶ 14. The application contained his resume and a written statement revised to the guidelines and responding to the Quality Ranking Factors contained in the vacancy announcement. Appeal File, Exhibit 15 at 34. The CFTC reviewed and scored Dr. Gorham's application based on the Quality Ranking Factors. Appeal File, Exhibit 15 at 44-48. The CFTC issued a Certificate of Eligibles dated June 25, 2002, indicating Dr. Gorham's eligibility for appointment. *Id.* at 50. Following review of all applications received in response to the CFTC's vacancy announcement, Dr. Gorham was appointed to the Director position on June 26, 2002. Oleson Declaration ¶ 15. Dr. Gorham's starting salary was \$138,200 per year. Appeal File, Exhibit 52.

#### Appellant's Request for Payment and Respondent's Denial of the Request

In response to the contracting officer's letter dated June 12, 2002, identifying Dr. Gorham, appellant's vice-president sent a letter dated June 21, 2002, to the Chairman's Chief of Staff stating that appellant had given Advance Notice of Dr. Gorham to the CFTC. Appeal File, Exhibit 17 at 1. On the same date, appellant faxed to respondent an invoice, seeking payment of the base and incentive fee for the referral of Dr. Gorham. Because the CFTC had not revealed Dr. Gorham's salary to Weidemann at the time, appellant submitted the invoice with "TBD" inserted in the "amount" columns, with the amount to be determined by multiplying the percentages stated in the contract by Dr. Gorham's actual salary. Appeal

File, Exhibit 17 at 2-4; Bunker Declaration ¶ 27; Appellant's Supplementary Appeal File, Exhibit 51.

On July 24, 2002, the CFTC's contracting officer sent a letter responding to the June 21, 2002, letter from appellant's vice-president, denying that payment was due appellant under the contract. He stated that Dr. Gorham's candidacy began in March 2002, when Dr. Gorham initially met with the CFTC to discuss the Director position, and that Dr. Gorham's contact with CFTC regarding this position was not the result of a referral by appellant. Rather, the contracting officer asserted that Dr. Gorham had applied to the CFTC for this position prior to award of the contract and well before receipt of the Advance Notice from appellant. The contracting officer stated further that appellant was "apprised of this candidacy, though not of his name, in the April 19 meeting preliminary to signing of the contract." Appeal File, Exhibit 19 at 1.

On August 29, 2002, appellant's counsel wrote to the contracting officer, requesting a copy of Dr. Gorham's formal application for the Director position. Appeal File, Exhibit 20. By letter dated September 23, 2002, the contracting officer responded to appellant's counsel. He stated that the term "formal application" was not a term of art in the hiring process for the position when Dr. Gorham's resume had been received, "via the internet, by Commission staff on or before March 6, 2002," prior to his interviewing with Commission staff and before the contract between the parties was entered into. The contracting officer concluded that Dr. Gorham's application to the Commission preceded the award of the contract and in no manner resulted from the process encompassed by the contract. To support his conclusion, the contracting officer asserted that appellant "was aware from the outset that the CFTC would consider candidates independent of the . . . contract. . . . [T]he fact that discussions had occurred with one particular candidate, which was Dr. Gorham, was discussed with [appellant] at the time the contract was executed. . . . Dr. Gorham was a candidate under consideration by the Commission more than a month before [appellant] attempted to refer his name to the Commission. Under these circumstances we do not understand Dr. Gorham to have been a candidate 'referred' to CFTC by [appellant] within the meaning of the contract." Appeal File, Exhibit 21.

#### Appellant's Claim and Appeal

On December 19, 2002, Weidemann submitted a claim to the contracting officer pursuant to the Contract Disputes Act (CDA), 41 U.S.C. §§ 601-613 (2000). The claim alleged that respondent's refusal to pay appellant's invoice was a breach of contract, as appellant was entitled to payment of both the base fee and incentive fee as the result of its timely referral of Dr. Gorham, who was hired by respondent. Appeal File, Exhibit 22 at 2-3. By letter dated February 14, 2003, the contracting officer issued a decision denying appellant's claim. Appeal File, Exhibit 23. Appellant filed a notice of appeal at this Board on April 16, 2003. Thereafter, both parties filed motions for summary relief.

---

Discussion

Appellant and respondent have filed motions for summary relief in this appeal. Summary relief is appropriate when there are no genuine issues of material fact in dispute and the moving party is entitled to relief as a matter of law. Celotex Corp. v. Catrett, 477 U.S. 317 (1986); Matsushita Electric Industrial Co. v. Zenith Radio Corp., 475 U.S. 574 (1986). Because there are no genuine issues of material fact in dispute and because appellant is entitled to relief as a matter of law, we grant appellant's motion for summary relief, deny respondent's motion, and grant the appeal.

Appellant alleges that it fulfilled the requirements of the contract. Appellant asserts that, after the contract was executed, appellant independently identified Dr. Gorham as a potential candidate for the Director position (not knowing that he was the person who had previously been offered the position), contacted him, screened him against the basic qualifications, and referred him to the respondent as a qualified candidate by sending the contractually required Advance Notice containing the required information within the first thirty days of contract performance. According to appellant, Dr. Gorham thereafter submitted a formal application for the Director position and respondent subsequently hired Dr. Gorham, entitling appellant to payment of both the base fee and incentive fee.

Respondent denies that appellant is due payment under the contract, because Dr. Gorham had applied and been interviewed for the Director position before respondent and appellant entered into the contract. Accordingly, respondent asserts that, even though Dr. Gorham was contacted by appellant during the contract performance period, he could not have been referred by appellant. In support of its position in this appeal, respondent argues that 1) Dr. Gorham's candidacy for the Director position was continuous from March 2002 until he was hired; 2) appellant could not have referred Dr. Gorham, based upon its interpretation of the term "refer" in the contract; 3) reservation language in the contract precluded appellant from referring Dr. Gorham; and 4) appellant could not be credited with the referral of Dr. Gorham in any event, as Dr. Gorham had submitted an application for the Director position before appellant submitted an advance notice containing Dr. Gorham's contact information.

As discussed below, respondent's arguments lack merit. Appellant fulfilled the requirements of the contract and is entitled to payment of both the base fee and the incentive fee.

Dr. Gorham's "Candidacy" Was Not Continuous from March 2002 until He Was Hired

Respondent asserts that Dr. Gorham's candidacy for the Director position was continuous from March 2002 until he was ultimately hired. The contracting officer's contention in his letters dated July 24, 2002, and September 23, 2002, that appellant was informed of Dr. Gorham's continuing "candidacy" prior to executing the contract is contrary to the evidence in this appeal. The CFTC human resource specialist involved in this matter confirms in his sworn affidavit that the CFTC postponed awarding the contract to appellant until it had received a definitive response from Dr. Gorham to the offer of the Director position. He states that, immediately before the parties executed the agreement, the CFTC informed appellant that an offer had been made to an individual who had declined the

position, and that the CFTC had no other candidates under consideration. Accordingly, as Dr. Gorham had declined the position and the CFTC had no other candidates under consideration, respondent had no candidates under consideration when the contract was executed.

Respondent's contention that Dr. Gorham's candidacy was continuous is also contradicted by Dr. Gorham's statement in his letter declining to accept the offer of the Director position that he did not want the CFTC to "come back" to him in the future if its search for a Director proved unsuccessful. Under such circumstances, an offeree's power of acceptance is terminated by his rejection of the offer. Restatement (Second) of Contracts § 38 (1981). Having declined to accept the CFTC's offer, Dr. Gorham was not a candidate for the Director position as of April 19, 2002, and became a candidate again only after appellant referred him to the CFTC.

#### Appellant Referred Dr. Gorham Pursuant to the Contract

Respondent takes the position that because the CFTC had previously interviewed Dr. Gorham before it entered into the contract, appellant could not and did not refer Dr. Gorham to the CFTC pursuant to the contract. Respondent asserts that the term "refer" is not explicitly defined in the contract, and that, in the case of Dr. Gorham, a referral cannot be equated with the giving of an Advance Notice, the purpose of which was "simply to establish an unambiguous date for the referral, and not the referral itself." Respondent's Motion at 17-18.

Respondent's interpretation of "refer" and "referral" is contrary to the plain meaning of the contract, when the contract is read as a whole. "Refer" is the step in the recruitment process set forth in the contract by which the contractor informs the agency that it has located an individual who it believes meets the qualifications of the Director position and identifies that individual by submission of the Advance Notice, which must contain the "[f]ull name of referral; . . . business or home telephone number; and date of the referral." The Advance Notice is not merely to establish a date for the referral, as suggested by respondent. Rather, the Advance Notice contains all essential information the CFTC needs in order to proceed in the hiring process, and the submission of the Advance Notice is therefore the "referral." Accordingly, appellant referred Dr. Gorham to the CFTC by submitting an Advance Notice containing Dr. Gorham's required information.

#### The Contract Did Not Preclude Appellant from Referring Dr. Gorham

Respondent interprets the following contract provision as precluding appellant from referring Dr. Gorham:

The CFTC reserves the right to publicly announce all vacancies and any candidate may submit an application to the CFTC. CFTC will consider all qualified candidates, whether or not the Contractor referred those candidates to the CFTC.

This provision does not prohibit appellant from referring Dr. Gorham. The first sentence states CFTC's right to "publicly announce" the Director position to recruit



candidates independent of appellant's recruitment efforts. After Dr. Gorham declined to accept the Director position, the CFTC did not continue to recruit Dr. Gorham on its own, by public announcement or otherwise, nor did it undertake its own recruitment efforts with regard to Dr. Gorham prior to appellant contacting him and submitting the Advance Notice referring him. Respondent did not issue a vacancy announcement until after appellant submitted its Advance Notice referring Dr. Gorham and the CFTC made a decision that it wished to hire him.

The second sentence states the CFTC's ability to consider qualified candidates not referred by the contractor. This provision does not apply to the circumstances of this case, as Dr. Gorham was referred by appellant.

#### Dr. Gorham's Formal Application for the Director Position Was Submitted After Appellant's Advance Notice

As discussed above, appellant's submission of its Advance Notice containing the required information concerning Dr. Gorham was a referral of Dr. Gorham under the contract. The contract contained an additional requirement that "[t]o be credited with the referral, the Contractor must provide an Advance Notice to CFTC prior to submission of the formal application." Respondent argues that Dr. Gorham's application for the Director position was received before the contract was executed and therefore appellant cannot be credited with a referral of Dr. Gorham. In support of this argument, respondent relies upon the contracting officer's letter dated September 23, 2002, in which he asserts that, even though the term "formal application" was not a term of art in the hiring process at that time, Dr. Gorham's resume "received via the internet" by CFTC staff on or before March 6, 2002, is a formal application which was submitted before appellant's Advance Notice.

This argument lacks merit. Dr. Gorham did not transmit his resume to the CFTC in March 2002. Rather, a CFTC employee reviewed Dr. Gorham's resume on the internet after Dr. Gorham was identified as a possible candidate and forwarded the resume to the office of the CFTC Chairman for review before Dr. Gorham was contacted by the CFTC and interviewed. There is no evidence that Dr. Gorham submitted a "formal application" before he was offered and declined the Director position in April 2002.

According to the contracting officer, the term "formal application" first appeared in the hiring process when it was included in the contract between appellant and respondent. A "formal application" could therefore only be an application submitted after the contract was executed, and not before. After receipt of appellant's Advance Notice referring Dr. Gorham, respondent directed him to submit two applications, both required at the time they were submitted in order for Dr. Gorham to be hired. On May 13, 2002, Dr. Gorham completed an "Online Application," and in June 2002, he submitted a second application in response to the vacancy announcement that was evaluated by the agency to support Dr. Gorham's eligibility for the Director position. We find that either application met the contractual requirement of a formal application. Pursuant to the terms of the contract, receipt of either of these formal applications after appellant's referral of Dr. Gorham results in the referral being credited to appellant.

#### Appellant Is Entitled to Payment Under the Contract

Dr. Gorham was hired, he was referred to the CFTC by the appellant, and the appellant made the referral during the effective period of the contract. Appellant provided an Advance Notice to the CFTC prior to submission of Dr. Gorham's formal application. Appellant therefore fulfilled all requirements for payment pursuant to the contract. As the Advance Notice containing Dr. Gorham's information was submitted within the first thirty days of contract performance, appellant is entitled to both the base fee and the incentive premium payment.

Quantum

The contract is clear and unambiguous as to quantum. Dr. Gorham's annual starting salary was \$ 138,200. The base fee of 28% of salary equals \$38,696. The incentive premium payment of 50% of the base fee (to a maximum of \$32,000) equals \$19,348. Accordingly, appellant is entitled to payment of \$58,044.

---

Decision

There are no material facts in dispute, and appellant is entitled to judgment as a matter of law. Accordingly, respondent's motion for summary relief is denied; appellant's motion for summary relief is granted; and the appeal is **GRANTED**. Appellant is entitled to payment of its claim in the amount of \$58,044, plus interest, in accordance with the Contract Disputes Act, 41 U.S.C. § 611.

---

ALLAN H. GOODMAN  
Board Judge

We concur:

---

STEPHEN M. DANIELS  
Board Judge

---

EDWIN B. NEILL  
Board Judge