Board of Contract Appeals

General Services Administration
Washington, D.C. 20405

DISMISSED FOR LACK OF JURISDICTION: May 8, 2006

GSBCA 16649

AYLWARD ENTERPRISES, INC.,

Appellant,

v.

GENERAL SERVICES ADMINISTRATION,

Respondent.

Henry W. Aylward, P.E., President of Aylward Enterprises, Inc., Aiea, HI, appearing for Appellant.

Robert C. Smith, Office of General Counsel, General Services Administration, Washington, DC, counsel for Respondent.

Before Board Judges **DANIELS** (Chairman), **HYATT**, and **DeGRAFF**.

DANIELS, Board Judge (Chairman).

The General Services Administration (GSA), respondent, moves the Board to dismiss for lack of jurisdiction an appeal filed by Aylward Enterprises, Inc. (Aylward). Aylward opposes the motion and moves for summary relief.

We grant GSA's motion and dismiss the appeal for lack of jurisdiction. We note that even if we had jurisdiction, summary relief for the appellant would be inappropriate.

Background

On September 25, 2002, GSA awarded to Aylward a contract for renovation work at Fort Shafter, Hawaii. Appeal File, Exhibit 12. The contract was subsequently amended on several occasions to add more work and increase payments. *Id.*, Exhibits 16, 19, 26, 36. GSA ultimately paid Aylward $1,109,434 under the contract. *Id.*, Exhibits 17-18, 20-21, 31-33, 37-41.

On February 3, 2004, in conjunction with the final payment, Aylward's president, on behalf of the corporation, signed a release of claims which provided:

> The undersigned contractor, pursuant to the terms of Contract No. GS-09P-02-KYC-0063/POA3265347 between the United States of America and said contractor for the RENOVATION OF HEADQUARTERS BUILDING 104 AND BUILDINGS 334 AND 121 FORT SHAFTER, HAWAII located at FORT SHAFTER, HAWAII hereby release[s] the United States from any and all claims arising under or by virtue of said contract or any modification or change thereof except as follows: *(Here list any claims against the Government and the amounts thereof. If none, so state.)*
>
> NONE.

Appeal File, Exhibit 40; *see also id.*, Exhibit 41 (showing payment on same date that release was signed).

According to Aylward, William Wong of the United States Army Installation Management Agency (IMA) at Fort Shafter solicited from Aylward a proposal which led to the award of the contract, conducted negotiations with Aylward, and accepted a modified proposal on behalf of the Government. Appellant's Response to Respondent's Motion to Dismiss for Lack of Jurisdiction and Motion for Summary Relief (Appellant's Response) at 1-2 (citing Appeal File, Exhibit 9). Further, according to Aylward, Mr. Wong solicited, negotiated, and accepted on behalf of the Government proposals by Aylward which led to modifications of the contract which added work and increased payments. *Id.* at 2 (citing Appeal File, Exhibits 24, 34). Aylward also says that it agreed to "close out the GSA contract GS-09P-03-KYC-0063" "[b]ased on oral assurances made by Mr. Wong that [Aylward would] be paid for the work." Complaint at 2.

In its complaint, Aylward alleges that after it signed the release of claims set out above, IMA identified additional requirements for renovation work at Fort Shafter and IMA's Mr. Wong gave oral assurances that if Aylward performed the work, it would be paid for having done so. Aylward says that it agreed to proceed "with the understanding that a

change to the GSA contract was forthcoming." "GSA refused to issue any more changes," however, Aylward recites, and "Mr. Wong then decided that IMA [would] proceed to get the remaining work done under a new contract using [another Army office]." Complaint, Exhibit A at 2.

On January 11, 2005, Aylward submitted to a GSA contracting officer a claim in the amount of $326,842. This amount is said to represent the cost Aylward and its subcontractors incurred in performing the work allegedly directed by Mr. Wong subsequent to the final payment under Aylward's contract with GSA. Appeal File, Exhibit 43. The contracting officer denied the claim on the ground that GSA had paid Aylward all that it had agreed to pay under the contract and Aylward had released the Government from any claims arising from that contract. The contracting officer also stated, "Mr. Wong was not an employee of GSA, and GSA never provided him with the authority to commit GSA to the contractual modifications to the contract you assert he made, nor did the alleged improvements ever inure to the benefit of GSA." *Id.*, Exhibit 44. On May 20, 2005, Aylward appealed this decision to the Board. The appeal was docketed as GSBCA 16649.

On September 23, 2005, Aylward resubmitted its claim to the contracting officer, this time including the certification specified in the Contract Disputes Act of 1978, 41 U.S.C. § 605(c)(1) (2000). Appellant's Response, Exhibit A. The contracting officer never responded to the claim as certified. A separate appeal has not been filed from the contracting officer's deemed denial of the certified claim. *See id.* § 605(c)(5).

Discussion

The Contract Disputes Act mandates that –

> [f]or claims of more than $100,000, the contractor shall certify that the claim is made in good faith, that the supporting data are accurate and complete to the best of his knowledge and belief, that the amount requested accurately reflects the contract adjustment for which the contractor believes the government is liable, and that the certifier is duly authorized to certify the claim on behalf of the contractor.

41 U.S.C. § 605(c)(1). If the dollar value of a claim is above the certification threshold and the claim is not certified, we have no jurisdiction to consider an appeal from a contracting officer's decision on that claim. *Advanced Injection Molding, Inc. v. General Services Administration*, GSBCA 16504, et al., 05-2 BCA ¶ 33,037, at 163,757; *Hemmer-IRS L.P. v. General Services Administration*, GSBCA 16134, 04-1 BCA ¶ 32,509, at 160,814; *Keydata Systems, Inc. v. Department of the Treasury*, GSBCA 14281-TD, 97-2 BCA ¶ 29,330, at 145,823-24. Even if the contracting officer issues a decision on the uncertified

claim, that decision is considered a nullity and is therefore not a proper subject for appeal because the contracting officer has no authority to issue the decision. *P.I.O. GmbH Bau und Ingenieurplanung v. International Broadcasting Bureau*, GSBCA 15934-IBB, 04-1 BCA ¶ 32,592, at 161,243.

We do not have jurisdiction to consider this appeal because the appeal is from a contracting officer's decision on an uncertified claim in excess of the certification threshold, $100,000. We must therefore dismiss the case.

We recognize that after Aylward received this decision, it did certify the claim. Aylward maintains that this submission cured the defect of the absence of an earlier certification and therefore vested the Board with jurisdiction to hear the case. This argument is not correct. While technical deficiencies in a certification may be corrected at any time before final judgment is entered, 41 U.S.C. § 605(c)(6), the complete absence of a certification is not a correctable deficiency. *P.I.O. GmbH*, 04-1 BCA at 161,243; *Keydata Systems*, 97-2 BCA at 145,823. The contracting officer's deemed denial of the certified claim may provide a proper subject for an appeal, but it is not the subject of this appeal. Thus, though Aylward possesses a potential vehicle for placing the claim before the Board, it did not select such a vehicle. *See Virginia Electric & Power Co. v. General Services Administration*, slip op. at 7 (Mar. 27, 2006).

The reason for our dismissal of the case is addressed only briefly by the parties in the motion and opposition they filed with us. In the interest of providing guidance as to the matter on which the parties did focus, we add the following comments.

GSA contends that the Board should dismiss the case because it involves a claim which should have been submitted (if at all) to the Army's IMA, not to GSA. GSA asserts that its contract with Aylward ended when the agency made final payment and Aylward's president, on behalf of the corporation, "release[d] the United States from any and all claims arising under or by virtue of said contract." IMA's William Wong was not an employee of GSA, and GSA contends that after the date of payment and release, any actions Mr. Wong may have taken could not possibly have been on behalf of a GSA contracting officer.

Aylward maintains, to the contrary, that because Mr. Wong acted on behalf of a GSA contracting officer before and during the pendancy of the contract between Aylward and GSA, his actions after final payment under that contract should be considered to have been in furtherance of the contract. Aylward insists that it reasonably understood that by complying with Mr. Wong's directions, it was continuing contract performance or at least was participating in an implied contract with GSA. Additionally, Aylward thinks that because a GSA contracting officer issued a decision on its uncertified claim, that agency

considered the claim on its merits and abandoned any reliance on the release which the contractor signed.

Aylward's position is wanting. The contract between Aylward and GSA ended on February 3, 2004, when GSA made final payment and Aylward released the Government from claims relating to the contract. Even if what Aylward says in its complaint is true, there is no indication that after that date, Mr. Wong so much as pretended to be speaking for GSA; the best that can be said from the assertions, from Aylward's perspective, is that Mr. Wong promised to try to get GSA to fund the additional work he was asking Aylward to perform. Aylward has not suggested that there was an express contract between Aylward and GSA regarding that work. The likelihood that there was an implied-in-fact contract is remote, since the existence of such a contract is dependent in part on proof of actual authority on the part of a government representative to bind the government, and the contractor's pleadings cannot be stretched so far as to imply that Mr. Wong had actual authority to bind GSA. *See Wiggs v. Environmental Protection Agency*, GSBCA 16817-EPA, slip op. at 4 (Mar. 20, 2006) (citing *Schism v. United States*, 316 F.3d 1259, 1278 (Fed. Cir. 2002) (en banc), *cert. denied*, 539 U.S. 910 (2003); *Flexfab, L.L.C. v. United States*, 424 F.3d 1254, 1265 (Fed. Cir. 2005)).

Aylward cites cases in which government employees were considered to be authorized representatives of contracting officers. *Stephenson Associates, Inc.*, GSBCA 6573, et al., 86-3 BCA ¶ 19,071, at 96,326; *U. S. Federal Engineering & Manufacturing, Inc.*, ASBCA 19909, 75-2 BCA ¶ 11,578, at 55,298-99; *Morrison-Knudsen Co.*, ASBCA 16483, 72-2 BCA ¶ 9733, at 45,497; *Lillard's*, ASBCA 6630, 61-1 BCA ¶ 3053, at 15,801. Unlike the situation in those cases, however, here, during the time in question, no express contract existed, and it is highly unlikely that an implied-in-fact contract existed, either.

Aylward's contention that by issuing a decision on the uncertified claim, the contracting officer waived the Government's reliance on the release is similarly unavailing. It is true, as the contractor says, that "courts may refuse to bar a claim based upon the defense of accord and satisfaction where the parties continue to consider the claim after execution of a release. Such conduct manifests an intent that the parties never construed the release as an abandonment of plaintiff's earlier claim." *England v. Sherman R. Smoot Corp.*, 388 F.3d 844, 849 (Fed. Cir. 2004) (quoting *Community Heating & Plumbing Co. v. Kelso*, 987 F.2d 1575, 1581 (Fed. Cir. 1993)). The contracting officer's denial of the claim on the basis that all contract claims had been released does not qualify as a continuation of consideration of the claim, however. Aylward has presented no evidence that the contracting officer ever considered the claim on its merits.

Decision

The appeal is **DISMISSED FOR LACK OF JURISDICTION**.

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STEPHEN M. DANIELS
Board Judge

We concur:

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CATHERINE B. HYATT
Board Judge

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MARTHA H. DeGRAFF
Board Judge