Board of Contract Appeals

General Services Administration
Washington, D.C. 20405

RESPONDENT'S MOTION TO DISMISS
FOR LACK OF JURISDICTION DENIED: October 5, 2006

GSBCA 16837-ST

INVERSA, S.A.,

Appellant,

v.

DEPARTMENT OF STATE,

Respondent.

Jason A. Levin of McDermott Will & Emery LLP, Washington, DC, and Jon W. van Horne of VHT Law PLLC, Washington, DC, counsel for Appellant.

Dennis J. Gallagher and Luisa M. Alvarez, Buildings and Acquisitions, Department of State, Rosslyn, VA, counsel for Respondent.

Before Board Judges **BORWICK**, **DeGRAFF**, and **GOODMAN.**

BORWICK, Board Judge.

In this multifaceted case, respondent, Department of State, moves to dismiss that portion of the appeal which asserts claims for breach of a purported lease for United States Embassy employee housing in the Cerro Corona project, in or near Panama City, Panama (which will hereinafter be called the Cerro Corona claim).[1] Respondent moves to dismiss

[1] The other aspect of the appeal is a claim for breach of lease 1030-040003 for portions of the Torre Miramar building. The Torre Miramar claim is not involved in this motion.

the Cerro Corona claim because the purported lease--a letter of intent signed by embassy official Mr. John Ivie--was not a contract as defined by the Contract Disputes Act (CDA), 41 U.S.C. §§ 601-613 (2000). Even if the letter of intent were to be deemed a CDA contract, respondent maintains that under a specific statute, Mr. Ivie lacked authority to execute it on behalf of respondent. Therefore, respondent argues the contract is void and thus cannot be the basis for a claim under the CDA. Appellant objects to respondent's motion, arguing that the letter of intent presents a valid CDA contract and that Mr. Ivie possessed authority to sign it on respondent's behalf. Both parties have submitted documents to support the motion and opposition. We treat respondent's motion as one for partial summary relief and appellant's response as an opposition. For the reasons below, we deny respondent's motion.

Findings of Fact

The Board considers the following facts not to be in dispute. The letter of intent, dated September 23, 1987, provided in pertinent part:

> Whereas, the U.S. Government has a legal requirement to provide safe, secure and comfortable quarters for all U.S. Mission employees and families which adhere to current residential security requirements as set forth by the Department of State Bureau for Diplomatic Security and the fire, life safety specifications and floor space guidelines of the Department of State Office of Foreign Buildings Operations [FOB]; and,
>
> Whereas, there are currently no apartment buildings or facilities in the greater Panama City area known to us which conform to the aforementioned Department of State security, fire, life safety specifications of the FBO guidelines; and
>
> Whereas, you have indicated your intention to build an apartment complex in Altos del La Corona, Betania, consisting of approximately 200 units with recreational facilities consisting of a swimming pool, tennis courts, children's playground and other appropriate appurtenances; and
>
> Whereas, you have expressed the willingness that the buildings should be designed and constructed to conform to these Department of State Buildings standards;
>
> The Embassy of the United States in Panama confirms its intention that the U.S. Diplomatic Mission to Panama will lease and occupy apartments in these premises immediately upon completion, provided there are no other adequate

> apartments available at the time the lease is executed and signed. The Embassy of the United States is willing to enter into a lease for the requisite number of U.S. Government-leased residential units when approved construction drawings and the building permit issued by appropriate municipal authorities are presented to the Embassy's Contracting Officer. The lease will be effective upon execution with rental payments commencing on a unit by unit basis as each is completed, inspected and declared ready for occupancy. The U.S. Mission currently leases 125 apartments under its Government-leased program and this number is not expected to decrease before your project would be under lease and occupied. The initial period of the lease will be 9 years and 11 months. After the initial lease period of 9 years and 11 months the Embassy will continue to lease and assign occupants to these apartments exclusively until such time as other apartments which meet the aforementioned Department of State Specifications, should become available, at which point the exclusivity factor would have to be weighed against competitive pricing.
>
> . . . .
>
> This letter of intent carries the full weight of a contractual agreement entered into and adhered to [by] the Embassy of the United States in Panama.

Appellant's Opposition to Respondent's Motion to Dismiss, Exhibit A. The letter of intent was signed by Mr. John Ivie, Counselor of Administrative Affairs for the embassy and, at the time of his signature, a contracting officer. *Id*.

On August 17, 1990, the parties entered into a settlement agreement arising under lease S-132-FBO-107 [2] for the Torre Miramar building. The settlement also mentioned the Cerro Corona project:

> It is expressly acknowledged that the United States has no present liability for or interest in the Cerro Corona Project and that no person will be misled by either signatory to this Agreement that such present or potential interest exists. Notwithstanding the foregoing, because it is within the realm of possibility that in the future the Department of State may have a need for housing which could

[2] Lease S-132-FBO-107 for the Torre Miramar building was in effect earlier than Lease 1030-040003, which may have been the replacement lease executed pursuant to the settlement agreement. Appellant's Opposition to Respondent's Motion to Dismiss, Exhibit B.

> be met by one or more units which might be constructed at the site of the Cerro Corona Project, the United States will designate a representative within one hundred twenty days after the execution of this Agreement to attend a presentation at which the Owners or their representatives can present information about the Cerro Corona site and plans as well as any other data regarding the merits of the project that they may care to offer. Whether or not such a presentation is made by the Owners, the Cerro Corona project would be treated in the same manner as properties with characteristics identical or similar to it in a future procurement. The leasing of any specific apartment would be, of course, subject to the negotiation of mutually acceptable rent and lease terms.

Appellant's Opposition to Respondent's Motion to Dismiss, Exhibit B.

On November 3, 2005, appellant, through its counsel, submitted a claim to the contracting officer for breach of lease 1030-040003 for portions of the Torre Miramar building and for "breach of [respondent's] obligations under the Settlement Agreement with regard to the Cerro Corona project." Letter from Appellant to the Contracting Officer (Nov. 3, 2005). As to the latter portion of the claim, appellant maintained that the obligation to designate such a representative "was undertaken by the [respondent] as part of the consideration for [appellant's] release of many other significant claims against the [respondent], only one of which were its promises to participate in the Cerro Corona project." *Id*. at 15. Appellant stated that respondent failed to fulfill its obligation to give the Cerro Corona project "a fair and serious review." *Id*.

On December 7, 2005, the contracting officer issued his decision. The contracting officer denied the Cerro Corona claim on the grounds that the settlement had discharged any obligation of respondent on the Cerro Corona project and because the settlement agreement was not a procurement contract and was not subject to the CDA. The contracting officer also determined that since the Cerro Corona claim was not subject to the CDA, it was barred by the six-year statute of limitations, 28 U.S.C. § 2501. *Id*.

On March 6, 2006, appellant submitted a timely appeal of the contracting officer's decision. On June 15, 2006, respondent submitted a motion to dismiss that portion of the appeal involving the Cerro Corona claim. On July 18, appellant responded with its opposition, identifying the letter of intent of September 27, 1987, as the relevant CDA procurement contract. On August 18, respondent submitted a reply to appellant's opposition, disputing that the letter of intent was a valid contract, and disputing Mr. Ivie's authority to contract for short terms leases. The Government argued that the letter of intent was not a valid contract because it contained indefinite and conditional terms and was made without

authorization. Respondent's Reply to Appellant's Opposition at 10-11, 14-16. By supplemental memoranda dated August 18 and September 15, appellant addressed each of those issues. Appellant argues that the parties executed a valid contract and that Mr. Ivie possessed authority to enter into such a contract.

Discussion

Respondent seeks dismissal of the Cerro Corona claim portion of the appeal, which involves a purported lease evidenced by a letter of intent, and the terms of a settlement agreement.

The Board has jurisdiction under the CDA over procurement contracts. 41 U.S.C. § 602. The United States Court of Appeals for the Federal Circuit has noted that a "procurement" includes the "acquisition by . . . lease . . . of property . . . for the direct benefit or use of the Federal Government," i..e., "an exchange of property for money." *Wesleyan Co. v. Harvey*, 454 F.3d 1375, 1378 (Fed. Cir. 2006) (purchase orders are procurement contracts, while unsolicited proposals and bailments are donative, not contractual).

The basis of appellant's claim is not clear. If the appellant's claim rests on the settlement agreement alone, dismissal for lack of jurisdiction would be warranted. The settlement agreement, by itself, is not a procurement contract because it is not an acquisition of goods and services. However, boards have taken jurisdiction over appeals to enforce settlement agreements when the settlement agreement was a modification of an underlying CDA procurement contract that was the subject of claims before the board. *TDC Management Corp.*, DOTCAB 1802, 90-3 BCA ¶ 23,099, at 115,985 n. 10, *reconsideration denied*, 90-3 BCA ¶ 23,248. Appellant must establish that the claim is based on an alleged breach of the letter of intent, and not just on the settlement agreement. Appellant must also demonstrate that the letter of intent was a valid CDA contract. [3]

[3] The language of the settlement agreement regarding the Government's attendance at a presentation about the Cerro Corona project seems to be merely an accommodation provision, rather than imposition of additional obligations on the Government concerning the procurement of goods or services relating to the project. We also note that the settlement agreement expressly states that the Government had no present interest or liability in the Cerro Corona project. Appellant must demonstrate that the language was not intended to shield respondent from any potential liability related to the project that might arise from the agreement.

In establishing the latter, appellant has to overcome some hurdles. It is hornbook law that the existence of a Government contract depends upon an unconditional offer by a purported contractor and an unconditional acceptance by the Government. *Russell Corp. v. United States*, 537 F.2d 474, 481-82 (Ct. Cl. 1976), *cert. denied*, 429 U.S. 1073 (1977). An informal agreement, such as a letter of intent, may be considered an enforceable contract provided the agreement contains the essential terms and conditions, the agreement is made or approved by an authorized official, and the execution of a formal agreement is regarded by all parties as a technicality. *Penn-Ohio Steel Corp. v. United States*, 354 F.2d 254, 266-67 (Ct. Cl. 1965). However, a letter of intent to lease that is dependent upon the satisfaction of certain conditions precedent that may not occur is not a binding contract because the letter is not an unambiguous acceptance of an offer. Rather, it is the Government's statement of intention or prediction. *Essen Mall Properties v. United States*, 21 Cl. Ct. 430, 440 (1990).

The first hurdle appellant faces is that on its face, the letter of intent contained two conditions precedent that the appellant was required to satisfy in order to bind the Government to a lease: (1) to complete of the building, (2) to obtain from municipal authorities and submit to the Embassy contracting officer approved construction drawings and a building permit for the premises. Additionally, the letter of intent contained one condition precedent to the formation of a lease that was not dependent upon appellant's performance -- the lack of adequate apartments available at the time the lease was ready to be executed and signed. Furthermore, according to the letter of intent, the lease was not to come into being until the parties signed a formal lease, since the letter of intent stated that "the lease shall be effective upon execution." Finally, in the subsequent settlement agreement, the parties stated that the respondent had no present liability or legal interest in the Cerro Corona project, and that the need for housing that might result in a formal lease was merely a "possibility."

However, a grant of summary relief for respondent on jurisdictional grounds is not appropriate in the early stages of these proceedings, since the record is not clear as to the circumstances surrounding the execution of the letter of intent. The immediacy of the need for suitable housing at the time the letter of intent was signed, and the intent of the author, Mr. Ivie, in negotiating and signing the letter of intent, will need to be explored. Witnesses will also be expected to explain how the execution of the letter of intent would result in the procurement of goods or services that were of direct benefit or use to the respondent. Fortunately, it appears that Mr. Ivie is available for discovery and testimony, since appellant

submitted his recent affidavit to explain his position as administrative officer with the United States Embassy in Panama.[4]

The second hurdle appellant will have to overcome, assuming appellant establishes the existence of a binding lease, is the issue of Mr. Ivie's authority to execute a short-term lease on respondent's behalf. Statute at the time the letter of intent was executed provided:

> (a) Authority of Secretary of State
>
> The Secretary of State is empowered to acquire by purchase or construction in the manner hereinafter provided, within the limits of appropriations made to carry out this chapter, by exchange, in whole or in part, of any building or grounds of the United States in foreign countries and under the jurisdiction and control of the Secretary of State, sites and buildings in foreign capitals and in other foreign cities, and to alter, repair, and furnish such buildings for the use of the diplomatic and consular establishments of the United States, or for the purpose of consolidating within one or more buildings, the embassies, legation, consulates, and other agencies of the United States Government there maintained. The space in such buildings shall be allotted by the Secretary of State among the several agencies of the United States Government.

22. U.S.C. § 292 (1984). This authority also included leases. Id. § 297.

Statute also contained a limitation on subordinate officials' authority to enter into short-term leases:

> (a) Leases
>
> Notwithstanding the provisions of this chapter or any other Act, no lease or other rental arrangement for a period of less than ten years, and requiring an

---

[4] Respondent also argues that the Board should dismiss the Cerro Corona claim for laches, arguing that the length of time between the alleged breach and the filing of the appeal has prejudiced the defense of the claim. Respondent's Supplemental Memorandum in Support of Motion to Dismiss at 2. Respondent must prove prejudice arising from appellant's unreasonable delay in bringing suit. *Adelaide Blomfield Management Co. v. General Services Administration*, GSBCA 13929, 98-2 BCA ¶ 29,758. As of this writing, respondent has not shown prejudice and the availability of Mr. Ivie as a witness weakens any case of prejudice respondent might present.

> annual payment in excess of $25,000[5] shall be entered into by the Secretary of State for the purpose of renting or leasing offices, buildings, grounds, or living quarters for the use of the Foreign Service abroad, unless such lease or other rental arrangement is approved by the Secretary. The Secretary may delegate his authority under this section only to the Deputy Under Secretary of State for Administration or to the Director of the Office of Foreign Buildings. The Secretary shall keep the Congress fully and currently informed with respect to leases or other rental arrangements approved under this section.

22. U.S.C. § 301.

Appellant claims that Mr. Ivie possessed authority as a contracting officer to enter into the purported lease. Appellant's First Supplemental Opposition to Respondent's Motion to Dismiss at 4. When a contracting officer enters into a contract in violation of statute, the Government is not estopped from denying the validity of the contract:

> It is a well recognized principle of procurement law that the contracting officer, as agent of the executive department, has only that authority actually conferred upon him by statute or regulation. If, by ignoring statutory and regulatory requirements, he exceeds his actual authority, the Government is not estopped to deny the limitations on his authority, even though the private contractor may have relied on the contracting officer's apparent authority to his detriment, for the contractor is charged with notice of all statutory and regulatory limitations.

Prestex, Inc. v. United States, 320 F.2d 367, 371 (Ct. Cl. 1963); *City of Alexandria v. United States*, 737 F.2d 1022 (Fed. Cir. 1984) (Government not estopped from denying existence of contract for sale of land which would violate statutory "report and wait" provision.); *Maykat Enterprises*, GSBCA 7346, 84-3 BCA ¶ 17,510 (Government bound by only those agreements of its agents that are within the scope of their actual authority and not contrary to statutory and regulatory requirements).

In a case similar to the instant appeal, the United States Court of Federal Claims held that a purported short-term lease for housing made by the Deputy Chief of Mission of the United States Embassy in the Bahamas violated the statutory authorities quoted above and

---

[5] In 1991, the statutory dollar limit was increased from $25,000 to $50,000. Pub. L. No. 102-138, 105 Stat. 647 (1991). We refer to the dollar limit in effect when the letter of intent was signed.

dismissed the breach of lease claim. *Sam Gray Enterprises v. United States*, 43 Fed. Cl. 596 (1999), *aff'd*, 250 F.3d 755 (Fed. Cir. 2000) (table). Appellant seeks to distinguish *Sam Gray* by arguing that the Deputy Chief of Mission was not a contracting officer for the embassy, in contrast to Mr. Ivie, who was. Appellant argues that by virtue of Mr. Ivie's position of contracting officer, he possessed implied actual authority to sign a lease. Appellant's First Supplemental Opposition to Respondent's Motion to Dismiss at 8.[6] However, the doctrine of implied actual authority cannot trump a regulatory or statutory prohibition on officials' authority to enter into contracts. *Sam Gray*, 43 Fed. Cl. at 603; *Cruz-Pagan v. United States*, 35 Fed. Cl. 59, 62 (1996).

Here, 22 U.S.C. § 301 provided authority to enter into short-term leases to the Secretary of State or through the Secretary's delegation only to the Deputy Under Secretary of State for Administration or to the Director of the Office of Foreign Buildings. It appears that Mr. Ivie held none of those positions. Furthermore, appellant admits that the asserted lease fell within the prescriptions of 22 U.S.C. § 301; appellant states that the purported lease "and its amendments" "fall within the cost and time limits of 22 U.S.C. § 301." Appellant's First Supplemental Opposition at 6.[7]

Nevertheless, authorized officials may expressly or tacitly ratify the unauthorized contracting actions of subordinate or other officials. *Janowsky v. United* States, 133 F.3d 888 (Fed. Cir. 1998); *Parking Company of America*, GSBCA 7654, 87-2 BCA ¶ 19,823. Appellant requests the opportunity to establish such ratification. Appellant's First Supplemental Opposition at 7-8 n.4. Appellant will be provided that opportunity.

---

[6] Appellant notes that, as contracting officer, Mr. Ivie signed a lease and lease amendments for portions of the Torre Miramar building with appellant. Appellant's First Supplemental Opposition, Exhibits A-D. That lease was for nine years at an annual rental of $320,233.92. The legality of those leases was questioned by respondent's Office of Inspector General. Respondent's Supplemental Memorandum, Exhibit 1 at 2.

[7] The present record does not reveal any specific amendment to the letter of intent. If appellant does not mean to refer to the settlement agreement, the existence and significance of any such amendment needs to be developed as the case progresses.

Decision

Respondent's motion to dismiss for lack of jurisdiction is **DENIED**.

_____
ANTHONY S. BORWICK
Board Judge

We concur:

_____
MARTHA H. DeGRAFF
Board Judge

_____
ALLAN H. GOODMAN
Board Judge