



UNITED STATES
CIVILIAN BOARD OF CONTRACT APPEALS

RESPONDENT'S MOTION FOR SUMMARY RELIEF GRANTED IN PART;
APPELLANT'S MOTION FOR SUMMARY RELIEF DENIED: August 13, 2014

CBCA 2294

AMERICOM GOVERNMENT SERVICES, INC.,

Appellant,

v.

GENERAL SERVICES ADMINISTRATION,

Respondent.

Thomas L. McGovern, III and Brendan M. Lill of Hogan Lovells US LLP, Washington, DC, counsel for Appellant.

Jennifer L. Howard, Office of General Counsel, General Services Administration, Washington, DC, counsel for Respondent.

Before Board Judges **POLLACK**, **GOODMAN**, and **SHERIDAN**.

POLLACK, Board Judge.

This matter arises under indefinite delivery indefinite quantity (IDIQ) contract number GS-35F-0301N (the contract) and task order number 9T3APN018, between GSA and Americom Government Services, Inc. (AGS). AGS provided host nation authorizations (HNAs) through GSA for use with satellite terminals owned by United States Forces Korea (USFK). GSA was the sole and exclusive purchasing agent for HNAs for USFK at the time.

GSA alleges that AGS performed additional, unauthorized work for which GSA improperly paid it. Once GSA realized what it has characterized as a mistake, GSA proceeded to recoup the funds from other GSA/AGS contract work. That recoupment is the subject of the appeal. Among issues we must resolve are whether the work for which AGS was paid was authorized and ordered under an express or implied contract, and whether the purchase was institutionally ratified. Absent a contract or ratification, appellant cannot prevail in its challenge to the GSA recoupment action. The parties have filed cross-motions for summary relief. We find in favor of GSA in part and deny appellant's motion for summary relief in its entirety. The matter of institutional ratification remains to be resolved.

Facts

In August 2003, GSA issued a request for quotations (RFQ) for commercial satellite services in support of USFK. The purpose of the RFQ was to solicit quotations on the basis of which a task order could be awarded under the GSA Federal Supply Schedule (FSS) to a vendor who would meet the requirements identified in the statement of work (SOW) attached to the RFQ. Specific work activities were to be ordered through a task order. The RFQ provided that GSA would award the task order on the basis of best value. The SOW contained the following language:

International Commercial Satellite Services: Provide Host Nation Authorizations (HNA) in Korea; Negotiate and provide HNA, Transponder tax, and local frequency licensing IAW [in accordance with] Korean Military Information and Communications (MIC) for each terminal and within each province region; Provide ROK [Republic of Korea] installation service at each site; Training and Translations with Korea host nation, Negotiate and provide Korean training instructors, translation of technical manuals, and technical translator services for meetings between ROK and American technicians and managers.

HNAs are essentially licenses to operate satellite terminals in foreign countries. Without the HNAs, terminals cannot be operated as intended.

AGS sent a proposal in response to the RFQ, pricing HNAs for thirteen terminals. AGS placed an asterisk by its price quote and there noted, "Additional Terminals can be added at a cost of \$5,000 per terminal." AGS states that at the time of the task order, there was an expectation on the part of both AGS and GSA for additional HNAs. In response to AGS's proposal, GSA awarded Task Order 9T3APN018 to AGS on August 28, 2003, for thirteen HNAs. The record identifies David Williams as GSA's contracting officer (CO) on the task order. In addition to calling for AGS to provide thirteen HNAs, the task order set

the period of performance as October 1, 2003, through September 30, 2004. The award document said services were to be provided in accordance with the contract, the SOW, and AGS's proposal. Thereafter, the original performance period for the task order was extended by GSA to May 31, 2005. The extension was done through four written modifications.

Services had to be provided under the auspices of a local Korean company, and AGS provided the thirteen HNAs under the task order through ISS, which was a local license holder. As will be noted later, ISS was also the company involved in providing the additional (fifty) HNAs in dispute.

The initial value of the task order was set at \$2,914,339. GSA states that it advised AGS that the task order would be incrementally funded via modification to the full ceiling price of \$5,115,611, based on availability of funds. The task order provided that the contract was not to exceed the total task dollar value ceiling. GSA advised AGS that subsequent increments of funding would be obligated via the "in theatre maintenance/contract" (ITM/CO). The award provided that any work done or expenditures made, beyond the increments of the funding obligated to the contractor, would be at the contractor's risk.

USFK provided funding to GSA to pay for services under the task order by issuing three military interdepartmental purchase requests (MIPRs) - MIPR3HOAF00354, MIPR4BOAF00096, and MIPR5DOAF00305. GSA thereafter issued four modifications to the task order, which took the total task order ceiling value to \$5,115,611. The totals under each MIPR were as follows: MIPR3HOAF00354, \$1,990,431.80; MIPR4BOAF00096, \$3,249,479; and MIPR5DOAF00305, \$1,329,120. Ultimately, the total amount USFK provided to GSA under the three MIPRs was \$6,569,030.80.

The parties appear to agree that the MIPRs were not contracting documents and none of them obligated money to a particular task order. However, task order 9T3APN018 appears to be the only task order in place between GSA and AGS at the time of the referenced MIPRs, and the only task order in place for purchase of HNAs serving USFK. According to GSA, the relevant document to determine what services were contracted for by GSA is the task order and not USFK's funding MIPRs.

For purposes of this ruling, the parties have agreed that AGS provided USFK with the fifty additional HNAs in issue. They were provided at some time in 2004 to meet a need created by a purchase for USFK of fifty additional terminals. Those fifty terminals had been purchased for USFK through a Department of the Interior (DOI) task order (BCHF040378). GSA was not a party to the purchase of the fifty terminals. The terminals were secured for USFK through the efforts of Mr. Mitchell Stevens, a Northrop Grumman employee, who

worked as technical manager and engineer to support the USFK/Defense Intelligence Agency combined intelligence network.

As noted above, in order to operate, terminals must have HNAs. The only government contract for USFK to secure HNAs was purchase through GSA. The record shows that Mr. Stevens was tasked with securing the needed HNAs. According to AGS, Mr. Stevens secured the HNAs from ISS, told ISS to invoice AGS for the work, and advised AGS that USFK had provided GSA the funds to pay for the additional HNAs. Mr. Stevens then told AGS to bill GSA for the HNAs under task order 9T3APN018.

It appears that USFK did in fact provide funds to GSA and intended those funds to be used for payment for the fifty HNAs in issue. There is no evidence that GSA was informed at the time of either the purchase of the terminals (through DOI) or Mr. Stevens' dealings with ISS and AGS as to the HNAs. AGS paid ISS for the fifty HNAs and then submitted invoice 90037154 to GSA, on June 22, 2005, for payment in the amount of \$579,793.52 for the fifty HNAs. It appears AGS's invoice contained no information referencing task order 9T3APN018. However, based on evidence provided, 9T3APN018 was the only task order (involving HNAs for USFK) in existence between AGS and GSA at the time.

On September 15, 2005, GSA paid AGS's invoice in full (\$579,793.52). According to AGS, at that point, GSA still had \$1,105,464.72 in available funds out of the \$5,115,611 total funding level. Prior to paying AGS for the invoice, GSA conducted some type of review. The parties stipulated to the following concerning the approval form that was signed and paid by GSA:

GSA transaction records note the following for AGC Invoice 90037154: "Client Date Reviewed: 8/14/2005", "Client Authorization, Accepted" *Accepted by Elizabeth Bigger at 8/23/2005 11:43:44 PM.* See IT-Solutions Shop Acceptance Information Invoice 90037154, attached as Attachment 1. In August 2005 Elizabeth Bigger was a Technology Project Adviser working for GSA Federal Technology Service, Asia Business Team.

GSA acknowledged that it used money from one of the MIPRs to pay AGS for invoice 90037154. GSA, however, later recouped that sum through short payment on other obligations owed to AGS. That recoupment is at issue in this proceeding. GSA states that while the MIPR was used for Task Order 9T3APN018, the funding from the MIPRs could have been used for other task orders.

As appellant emphasizes, and taking all inferences in its favor, the payment and approval document signed by Ms. Bigger indicates that GSA's client, USFK, and GSA reviewed the invoice before GSA paid AGS, and that a GSA official with voucher approving authority approved the voucher. However, a number of material facts are not evident: What did GSA and the client agency know? What did GSA think it was paying for? What was the full role and status of Ms. Bigger, and to whom, if anyone, did she report?

At some time in October 2005, GSA became aware that Task Order 9T3APN018 did not cover the effort to secure the additional fifty HNAs for which AGS had billed and been paid. At some point thereafter (on a date that has not been established) GSA began its recoupment action, by short paying invoices to AGS in connection with work that would otherwise have been payable. We lack information as to what triggered that GSA knowledge of overpayment and what actions it then took. The record is not clear as to how and on what dates GSA made its recoupments, what if any contacts were made with AGS or USFK as to the matter, and whether at the time of the initial recoupment GSA provided AGS with an explanation linking the short payments to GSA's earlier payment for the fifty HNAs.

In either January or March 2006, GSA returned \$597,566.08 to USFK as unobligated funds. That figure was the sum of funds that USFK had provided to GSA to pay the invoice and which, according to the parties, was funded through MIPR4BOAF00096. Again, details surrounding that transaction are lacking. Apparently, at a point prior to returning the funds, GSA had from USFK the initial total of \$5,971,464.72 plus an additional \$597,566.08 in funding. As noted above, it is not clear why GSA returned the funding, who was involved, and whether GSA notified AGS of the pending return. AGS has argued that it should be paid, because GSA mismanaged the funds.

The Claim

The record is not clear as to what occurred from the start of the short payments to the submission of a claim by AGS. We know that AGS submitted a claim dated March 18, 2008, for \$597,456.80. The claim asserted that AGS did not receive payment for the HNA licensing and frequency taxes. There were some communications between AGS and GSA after submission of the claim, but we lack details about those communications. Then, on November 15, 2010, the contracting officer CO at that time, Mr. Stephen Durrett, issued his final decision denying the claim. In his decision, he stated that upon his assignment as CO on June 21, 2010, he had requested that AGS provide (1) documentation to support the government authorization/request for additional terminal services, (2) financial documents to support payment of the ISS invoices, and (3) documentation to establish that the HNA

licensing and frequency taxes were actually paid to the Korean government. He stated that to that date, the requested supporting documentation had not been received.

Appellant filed a timely appeal.

Discussion

Positions of the Parties

The parties have filed cross-motions for summary relief. Appellant contends that it was authorized under the task order (express contract) with GSA through GSA's CO, Mr. Williams, to provide the fifty HNAs, and as such, should be paid. Appellant further contends that if that is not found to be the case, then the procurement of the fifty HNAs was contractually ratified (implied contract) by GSA through the payment of the voucher. Alternatively, if the transaction was not ratified by an authorized contracting official, appellant asserts the procurement was institutionally authorized. Finally, appellant argues it is entitled to relief on basis of *quantum valebant*.

GSA contends that the express contract did not cover the fifty HNAs, no GSA official authorized or ratified their purchase, and there was no institutional ratification. GSA asserts that benefit to GSA, and not simply benefit to the Government (in this case USFK), is a requirement for institutional ratification and that GSA secured no benefit from the procurement. GSA further argues that *quantum valebant* is not available, for in order to recover under *quantum valebant* there must be either an express or implied contract, and neither exists. GSA also provides arguments that the payment was improper because of language barring the contractor from exceeding the contract's cost ceiling.

Express and Implied Contract

The parties agree that the language from the SOW, quoted above, was the only place in the SOW where the HNA requirement was discussed. In answer to GSA's contention that the fifty HNAs were unauthorized as they were never ordered by GSA, appellant asserts the following:

The text of the SOW requirement for HNAs shows that [GSA] authorized AGS to support the HNA requirements of the USFK's satellite network. See JS [Joint Statement] at 2. The requirement broadly authorized AGS to "Provide Host Nation Authorizations (HNA) in Korea," and "Negotiate and provide HNA . . . for each terminal and within each province region," without restricting or limiting the number of HNAs to be provided. *Id.* Consistent

with this broad authorization, AGS noted in the HNAs section of its pricing proposal that “Additional Terminals can be added at a cost of \$5,000 per terminal.” JS at 4.

From the above, AGS argues that the Board should find that the additional fifty HNAs ordered through Mr. Stevens were not a change or extra requirement, but rather were contemplated and covered by the contract. As such, appellant argues GSA had no need to separately order the HNAs in order for them to be authorized. In reaching this conclusion, AGS relies heavily on our decision in *DSS Services, Inc. v. General Services Administration*, CBCA 1093, 10-2 BCA ¶ 34,532 (*DSS II*). In addition, appellant argues that the language of the SOW that addresses HNAs neither restricts nor limits the number of HNAs to be provided under task order 9T3APN018. AGS further states that there is no language in the SOW which indicates that AGS would provide HNAs for a finite number or specific set of satellite terminals; therefore, the number was open. Appellant continues that because the contract did not specifically say that no other HNAs could be ordered, and because GSA accepted AGS’s proposal (which, by asterisk, offered additional HNAs at \$5000 each), GSA in fact authorized AGS to provide additional HNAs beyond the thirteen initially provided. There is no question that Mr. Williams, who was the CO at the time of award, had contracting authority.

GSA reads the language differently. GSA states that the contract and task order do not authorize procurement of additional HNAs absent a specific order from the CO or other authorized contracting official. It does not interpret the asterisk and absence of limitations to provide authority to add more HNAs. Rather, GSA contends that to add more than the thirteen HNAs initially specified, there had to be a specific contractual order. GSA says the asterisk language relied upon by AGS is in the nature of an option. It is simply a mechanism by which additional HNAs could be purchased, if wanted, by GSA. We note that the parties appear at times to use the concepts of “authorized” and “ordered” interchangeably. For purposes of the motions, we accept that GSA could have ordered additional HNAs under the contract. However, that does not establish either an express or implied contract. In order to show an express or implied contract, AGS must show that an authorized contracting official, either expressly ordered, impliedly ordered, or ratified the purchase of the fifty HNAs. There is simply no evidence to support such a finding.

As to AGS’s reliance upon *DSS II*, we agree with GSA that the case does not help appellant. Critical to that conclusion is that in *DSS II*, the Board found that the contracting officer was aware of and in fact authorized purchase of the contested equipment. While the Board rejected GSA’s argument that the ordering was not authorized by the contract, the decision turned on the fact that the item was in fact properly ordered. Here, there is no evidence that Mr. Williams or any contracting official knew of or authorized the purchase

of the HNAs at the time AGS provided the items to USFK. There is also no evidence that Mr. Williams ratified their purchase. What is clear is that the HNAs were purchased under direction of Mr. Stevens, who was not a government employee. Further, there is no evidence of any interaction between Mr. Stevens and the CO, or AGS and the CO, at the time of the purchase of the additional fifty HNAs.

Turning to the respective interpretations of the parties as to the meaning of the language in the SOW and task order, we find nothing in the language that allows AGS to provide HNAs without an order from GSA. The task order was a procurement for a set number (thirteen) of HNAs and was not an agreement to go beyond that by the CO. At best what appellant provided with the asterisk was an option, and for an option to proceed, the option must be exercised by a contracting official. That did not happen here. While in accepting appellant's proposal GSA may well have had the right to order more HNAs at the \$5000 price offered by appellant, that still had to be done under specific government direction and not unilaterally by appellant or through an unauthorized direction from a non-governmental official. Accordingly, we find that there was no express contract.

We also find there was no implied contract. For there to be an implied contract, appellant must show that an authorized contracting official accepted, through actions or inactions, the work performed by appellant, even though there was no proper contractual instrument. An implied contract requires the involvement or knowledge (constructive or actual) of the contracting official at the time the work was performed or ratified. *Engage Learning, Inc. v. Department of Interior*, CBCA 1165, 12-1 BCA ¶ 34,960. Absent contracting by an authorized contracting official, the Government is not bound on an express or implied contract. *Federal Crop Insurance Corp. v. Merrill*, 322 U.S. 380, 384 (1947). We have no evidence that Mr. Williams, the only contracting official identified, had any knowledge as to the actions surrounding the purchase of the fifty HNAs in issue, or any evidence that he took any action after their purchase. Accordingly, there was no implied contract. While Ms. Bigger, a GSA official, approved the voucher and money was in fact paid to appellant for the work, the law is clear that the act of payment, without more, does not constitute contractual acceptance or ratification. *United States v. Mead*, 426 F.2d 118, 124 (9th Cir. 1970).

Quantum Valebant

Recovery under *quantum valebant* is appropriate, to avoid unjust enrichment by the Government through taking and retaining benefit without paying. As this Board stated in our decision on motions in *DSS Services, Inc. v. General Services Administration*, CBCA 1093, 09-1 BCA ¶ 34,119 at 168,711 (*DSS I*), in order to recover under either the equitable doctrine of *quantum valebant* or *quantum meruit*, the contractor must establish that an

implied-in-fact contract existed. *See International Data Products Corp. v. United States*, 492 F.3d 1317, 1325-26 (Fed. Cir. 2007); *United Pacific Insurance Co. v. United States*, 464 F.3d 1325, 1329-30 (Fed. Cir. 2006); *United States v. Amdahl Corp.*, 786 F.2d 387 (Fed. Cir. 1986).

We have determined that there was no implied-in-fact contract. Furthermore, the Board in *DSSI* provided that a necessary factor for *quantum valebant* is that the government representative, whose conduct was relied upon, had actual authority to bind the Government in contract. 09-1 BCA at 168,711; *see also Lewis v. United States*, 70 F.3d 597, 600 (Fed. Cir. 1995). The evidence in this case does not support any such finding.

Institutional Ratification

Contractual ratification in government contracts may be accomplished by a contracting official accepting government responsibility either directly or implicitly through his or her actions, and sometimes inactions. Ratification may also occur through institutional ratification, which does not require the ratification to be made by an authorized contracting official. *Janowsky v. United States*, 133 F.3d 888, 891-92 (Fed. Cir. 1998); *Silverman v. United States*, 679 F.2d 865 (Ct. Cl. 1982). We earlier concluded that the additional HNAs were not procured through either the direct or implicit action of an official with contracting authority and therefore not contractually ratified. Accordingly, there can be no basis for contractual ratification.

Institutional ratification, however, is a distinct alternative remedy and creates a separate but limited avenue for recovery in the absence of contractual ratification. In limited and exceptional instances, courts and boards have found that the Government can be bound to pay for otherwise unauthorized contract work, even though neither the initial commitment nor ratification was carried out by an official empowered with contracting authority. *See Janowsky; Silverman*.

The parties have extensively briefed institutional ratification. For purposes of resolving these motions, we will not review the multiple cases cited to us. Rather, we find that *Janowsky* and *Silverman*, along with the *City of El Centro v. United States*, 922 F.2d 816, 820-21 (Fed. Cir. 1990) (*El Centro*), identify the elements of institutional ratification. These three cases provide us with the broad parameters which need to be established. Each can be factually distinguished from the matter before us, and there are factual differences within the cases themselves. The three cases illustrate that institutional ratification does not have to fit a specific fact pattern. Rather, while the cases do require that certain threshold matters be met, once the parameters are met, we still must evaluate whether institutional ratification is proper under the facts.

The following thresholds must be met in order to prove institutional ratification: (1) the Government received and retained benefits from the unauthorized contract; (2) the ratification was not done by mistake but with knowledge of the work being paid for; and (3) the ratifying official must be one who either because of position or status, makes ratification reasonable. *Janowsky*; *Silverman*; *El Centro*.

In *Silverman*, the Court found institutional ratification of the purchase of transcripts through the actions of an official of the Federal Trade Commission (FTC), who had authority to approve vouchers for payment, but who did not possess contracting authority. The Court stated that the Government ratified “by accepting the benefits flowing from the senior FTC official’s promise of payment.” 679 F.2d at 705, 709. In *El Centro*, 922 F.2d at 821, the Court rejected institutional ratification, focusing on two elements that had been established in *Silverman*, but were not established in *El Centro*. The Court found that the border patrol agent, who was identified as the ordering party, did not have sufficient status to bind the Government and also found that there was no consideration or benefit flowing to the Government from the procurement. As to the latter, the Court found that the hospital’s treatment of the illegal aliens did not qualify as a government benefit. In deciding *El Centro*, the court did not overrule *Silverman* or negate the theory of institutional ratification as an alternative remedy. Rather, the Court concluded that the necessary elements were not established.

Janowsky, a more recent case, was an appeal from a ruling by the Court of Federal Claims granting summary relief on behalf of the Government. The case arose out of a Federal Bureau of Investigation sting operation. In vacating the decision of the lower court, the Federal Circuit stated that the lower court had erred when it dismissed *Janowsky*’s claim without considering whether the agency ratified the proposed contract by allowing the sting operation to continue and by receiving the benefits from it. 133 F.3d at 892.

It is clear that one does not have to have specific contracting authority in order for institutional ratification to occur. In fact, institutional ratification is only raised in instances where a party cannot link a contracting official to the governmental action. Therefore, to the extent GSA has argued that contracting authority is a needed element for institutional ratification, that position is in error.

For purposes of deciding motions for summary relief, we must take all reasonable inferences in favor of the non-moving party. *Mingus Constructors, Inc. v. United States*, 812 F.2d 1387, 1390 (Fed. Cir. 1987). We find summary relief in favor of the moving party “[w]here the record taken as a whole could not lead a rational trier of fact to find for the non-moving party.” *Matshushita Electric Industrial Co. v. Zenith Radio Corp.*, 475 U.S. 574, 587 (1986).

In this case, appellant has identified enough facts that the Board could conclude, particularly in the absence of evidence to the contrary, that Ms. Bigger qualified as to status and that she was aware of what was being paid for. As to benefit, we discuss that below. We also note that GSA in opposing appellant's motion has provided sufficient evidence to justify denying appellant summary relief. Taking evidence in GSA's favor, we could find that Ms. Bigger did not have adequate status and may have paid by mistake. As we stated earlier in this ruling, we find on the record before us that many significant facts relating to institutional ratification remain unclear and unexplained. Among them are matters regarding the operation and use of the MIPRs, information as to interaction between GSA and USFK both during the AGS performance and in returning the money, and details as to the actions and status of Ms. Bigger and what she knew when she approved the vouchers. In addition, the record is not clear as to facts surrounding the recoupment actions. For those reasons, summary relief for either party is unwarranted and inappropriate.

Accordingly, we deny both parties' motions for summary relief as to institutional ratification.

Other issues

We briefly comment on two other issues raised in the briefing by the parties. In arguing against institutional ratification, GSA asserted that institutional ratification requires that the benefit to the Government be to the agency (here, GSA) which is the party in litigation. According to GSA, USFK may have received a benefit, but that is not transferable or applicable to GSA. We note that case law does not define whether the benefit must be to a specific agency or to the Government in general, and GSA has provided no authority or case law for its contention. While GSA has argued that the benefit must be directly to GSA, we look at the matter more broadly. GSA in this case was operating as an agent of USFK in securing HNAs and paid the money in issue to AGS in that capacity. GSA recouped the money in dispute from otherwise valid obligations. While agencies are in fact independent, we will not parse out the Government into pieces for purposes of defining benefit in a case where the agency recouping funds is recouping them based on a transaction involving benefits to another agency, in this case USFK. Further, there are additional questions raised by appellant as to whether GSA received a commission or fee.

GSA also argues that the claim cannot be paid because the task order contained a ceiling price which AGS was not to exceed and that payment of the sum sought would violate that ceiling price. Both parties have made numerous assertions relating to the operation of payment instruments, and on the record before us we can draw no conclusions without further detail and amplification. This matter is not ripe for summary relief consideration on the basis of the claimed violation of the ceiling price. Moreover, while we

do not here decide issues relating to the ceiling price, we do point out that we have reservations as to whether the ceiling issue is at all relevant in connection with our analysis as to institutional ratification. The ceiling issue may well have been important if there was an express or implied contract, but we find that neither such contract came into being.

Decision

Accordingly, we **GRANT** the GSA motion as to there not being an express or implied contract. We **DENY** the GSA motion as to institutional ratification. We **DENY** appellant's motion in full. The case shall proceed on the matter of institutional ratification.

HOWARD A. POLLACK
Board Judge

We concur:

ALLAN H. GOODMAN
Board Judge

PATRICIA J. SHERIDAN
Board Judge