



UNITED STATES
CIVILIAN BOARD OF CONTRACT APPEALS

MOTION TO DISMISS DENIED: March 22, 2011

CBCA 2127

SAMUEL A. RUBINO,

Appellant,

v.

AGENCY FOR INTERNATIONAL DEVELOPMENT,

Respondent.

Samuel A. Rubino, pro se, Linn Creek, MO.

Jaime Areizaga-Soto, Office of General Counsel, Agency for International Development, Washington, DC, counsel for Respondent.

Before Board Judges **GILMORE**, **GOODMAN**, and **WALTERS**.

WALTERS, Board Judge.

Respondent has filed a motion to dismiss the appeal, contending that appellant's claims are "barred as a matter of law." The motion is accompanied by and relies upon an affidavit, and is being treated as a motion for summary relief. For the reasons discussed below, the Board denies the motion.

Background

Appellant, Samuel A. Rubino (Rubino), was awarded a personal services contract by respondent, the United States Agency for International Development (USAID), under contract number 650-S-00-09-00008-00 on February 22, 2009. The contract called for Rubino to provide management/executive officer services at the USAID mission in Juba, Sudan for the six-month period, from March 15, 2009, through September 15, 2009. By

modification dated August 27, 2009, the contract term was extended for an additional 18-month period through March 14, 2011. The parties are in agreement that, in January 2010, Rubino met with Mr. Peter Malnak (Malnak), the USAID Deputy Mission Director (DMD) for Juba, at Malnak's home and was advised by Malnak that USAID would be advertising the executive officer (EXO) position at Juba as a "direct hire" position. In other words, USAID was contemplating possibly converting Rubino's position from a contract position to one held by a USAID employee. Malnak indicated that USAID was providing Rubino with this information in advance, so that he might start looking for another job.

The parties are in complete agreement up to this point. In his complaint before this Board, however, Rubino alleges that, during that January 2010 meeting, Malnak further informed him that, although the timing of Rubino's replacement was uncertain, it would not be before the end of August and could be later, and that September 2010 should be used as a target date for Rubino's job search. In addition, the complaint asserts that Rubino specifically sought confirmation from Malnak that his position would be secure until at least August 2010. Rubino says that he explained to Malnak that he was in the process of acquiring a smaller home in the United States, one that he could better afford, in light of his post-divorce financial situation, and that he would not proceed with the purchase if there were any question about his contract being terminated prior to the end of August. According to Rubino's complaint, Malnak confirmed the August 2010 date, not only during their January 2010 meeting, but also on several occasions thereafter, when purportedly Rubino was assured that he "had nothing to be concerned about and needed to stop worrying." At one point, Rubino states, he sought to have Malnak provide him with "something in writing which included the Contracting Officer and the Sudan MD [Mission Director] as addressees, so there would be no question," and "was informed that the Contracting Officer does not make the determination to terminate the contract early." Further, according to Rubino, Malnak told him that "it is Mission Management which makes this type of decision and they simply instruct the Contracting Officer to carry out the necessary contracting action." Moreover, Rubino alleges, Malnak stated to him that "since he and the Sudan MD had made the decision not to terminate [Rubino's] contract before the end of August 2010, [he] could take that to the bank."

In its answer, USAID denies any and all of these additional allegations concerning assurances by Malnak regarding contract termination not being before the end of August. The answer does, however, implicitly concede the authenticity of e-mail messages between Rubino and Malnak dated April 25, 2010, which Rubino had appended to its complaint as Exhibit F, stating that "the referenced e-mail [i.e., that from Malnak to Rubino] is the best evidence of its contents." Malnak's April 25, 2010, e-mail message, responding to Rubino's inquiry regarding an exploration of potential future job plans based on "the earliest I might be asked to leave Juba," states as follows:

Hi Sam,

Thanks for your message. I wish I had more answers for you, but I am not sure what timeframe the Mission might have in mind regarding your departure. It might be as we discussed, for example, *when a new EXO arrives, or it may be after that*. As I mentioned, I have already sent those questions to David Young, Bill Hammink, and Doug Arbuckle for their consideration as we had discussed a few weeks ago. I imagine that *a new EXO will likely arrive in August*, but again, I don't know if we will require your position to be filled [i.e., if USAID would want Rubino to continue in his contract position thereafter alongside the new EXO] or if it will be converted to accommodate the new USDH [United States Direct Hire] EXO. I've copied Jeffrey Nedoroscik on this message so he can be in the loop about your question, and also follow up with the KRT [Khartoum] Front Office. Bill is currently away on leave, but perhaps Doug has some guidance so you can plan. I do realize that you must look after your future job opportunities, so if you just give us a few more days, *perhaps around the first week of May, I believe we can provide you with additional information. At that point, the Mission may be in a position to address your question more thoughtfully, while also providing you with about 3 months lead time in case your contract will be curtailed*. That is much greater lead time than stipulated in your contract. . . . (Emphasis supplied)

The complaint proceeds to relate that, in reliance on Malnak's repeated alleged assurances, Rubino went forward with the home acquisition in late February 2010 (taking on the burden of carrying mortgages on two houses) as well as with incurrence thereafter of substantial costs for repairs/modifications and appliances for the new home. Contrary to those alleged assurances, including the aforesaid April 25 e-mail assurance that Rubino would be given "about 3 months lead time" from the "first week of May," to "look after future job opportunities," "in case your contract will be curtailed," Rubino shortly thereafter received notice via contract modification from the contracting officer that, effective May 5, 2010, his contract was terminated for the convenience of the Government. The complaint seeks \$59,857, which Rubino indicates would have been the total compensation he would have been paid for the period May 5, 2010, through August 31, 2010.¹

¹The termination notice, respondent states, was issued on May 5, 2010. Appeal File, Exhibit 19. Pursuant to the Termination provision of the contract, GP 16(a)(2), convenience terminations are to have fifteen days' advance notice. Although the modification declares

Discussion

As noted above, respondent's motion is accompanied by and relies upon an affidavit, that of Peter Malnak. It thus focuses on more than simply the adequacy or content of the pleadings. Under such circumstances, the Board will treat the motion to dismiss as a motion for summary relief. *Tomas Olivas Ibarra v. Department of Homeland Security*, CBCA 1986, 10-2 BCA ¶ 34,573.

Summary relief is appropriate only where there is no genuine issue as to any material fact (a fact that may affect the outcome of the litigation) and the moving party is entitled to relief as a matter of law. *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242 (1986); *Walsh/Davis Joint Venture v. General Services Administration*, CBCA 1460, 10-2 BCA ¶ 34,479. The moving party shoulders the burden of proving that no genuine issue of material fact exists. *Patrick C. Sullivan v. General Services Administration*, CBCA 936, 08-1 BCA ¶ 33,820. All justifiable inferences must be drawn in favor of the nonmovant. *Celotex Corp. v. Catrett*, 477 U.S. 317 (1986). In this case, respondent has failed to meet its burden.

Malnak, in his affidavit, denies having made any "representation" to Rubino "that his PSC [personal services contract] would not be terminated for convenience or that it would be maintained until August 2010." The parties clearly are at odds with regard to what Malnak may or may not have told Rubino and, for purposes of evaluating a motion for summary relief, as noted previously, we must resolve this difference in favor of Rubino as the nonmovant. Respondent, in its motion, argues that, any statements Malnak may have made would not have been authorized and thus, the Government cannot be bound by them, via estoppel or otherwise. In this regard, respondent stresses that Malnak did not hold a contracting officer's warrant: "Mr. Malnak was not a contract officer and had no authority to bind the Government." Malnak, in his affidavit, affirms that, while in Sudan, he was "never appointed as a Head of Contracting Activities (HCAs), a Contracting Officer (CO), or as a Contracting Officer Representative (COR), whether pursuant to an SF 1402 or not." Malnak states further that "[t]he only time in my life that I held a warrant was for a six-week period in the summer of 2007, while covering for the EXO [in Jordan] during her home leave."

the termination to be effective May 5, 2010, respondent, in its motion, identifies May 8, 2010, as the effective date. Respondent's answer, however, asserts that appellant "was properly compensated by USAID for all salary and benefits that were due to him through May 20, 2010." The issuance and effective date of the termination and the sums paid appellant thus require further clarification.

Whether or not Malnak was a contracting officer, however, may not be dispositive of whether he would have been acting within the scope of his authority when making representations to Rubino about the timing of the contemplated termination of Rubino's contract. Although, ordinarily, a Government official other than a contracting officer may not enter into a contract or direct additional work and thus bind the Government contractually, *see Winter v. Cath-Dr/Balti Joint Venture*, 497 F.3d 1339 (Fed. Cir. 2007), our predecessor board, the General Services Administration Board of Contract Appeals (GSBCA) held that: "(i) where Government officials acting within the scope of their authority make statements to contractors, . . . (ii) the statements interpret and are not inconsistent with contract or solicitation provisions or with statute, and (iii) the recipients of these statements reasonably rely on them, the Government is estopped from acting contrary to its representations." *Kozak Micro Systems, Inc. v. General Services Administration*, GSBCA 10519, 91-1 BCA ¶ 23,342 at 117,060 (1990) (citations omitted), *reconsideration denied*, 91-1 BCA ¶ 23,593, *aff'd*, 989 F.2d 1201 (Fed. Cir. 1993). This rule would prevail, regardless of whether the statements were made by a contracting officer or by some other Government official properly designated to provide guidance with respect to the contract. *Id.*, 91-1 BCA ¶ 23,342 at 117,060, *citing Max Drill, Inc. v. United States*, 427 F.2d 1233, 1243 (1970); *see also Lublin Corp., t/a Century 21, Advantage Gold v. United States*, No. 07-206C, slip op. at 4 (Fed. Cl. Feb. 24, 2011), *citing Winter v. Cath-Dr/Balti Joint Venture*, 497 F.3d at 1346 ("Authority to bind the government may be implied when it is an integral part of the duties assigned to the particular government employee.").

Here, Malnak, in his affidavit, states that, as Deputy Mission Director (DMD) in Juba, he "managed Mr. Sam Rubino, a Personal Services Contractor." Rubino contends that, as DMD, Malnak was acting within the scope of his authority when providing guidance to him as to the Juba mission's continuing needs and the timing of the contemplated contract termination. Although USAID contends otherwise, we cannot conclude that Rubino's claims are barred as a matter of law. Rather, we find Malnak's authority to make the alleged statements to be a genuine issue of material fact that is in dispute and that cannot be resolved by means of summary relief.²

² According to a recent decision of the Court of Appeals for the Federal Circuit, equitable estoppel "requires: (1) misleading conduct, which may include not only statements and actions but silence and inaction, leading another to reasonably infer that rights will not be asserted against it; (2) reliance upon this conduct; and (3) due to this reliance, material prejudice if the delayed assertion of such rights is permitted." *Mabus v. General Dynamics C4 Systems, Inc.*, Nos. 2009-1550, et al., slip op. at 6 (Fed. Cir. Feb. 4, 2011). Rubino, to invoke the doctrine of equitable estoppel, in addition to proving that the alleged statements were actually made, thus will have to establish by a preponderance of the evidence not only

Decision

Respondent's motion is **DENIED**.

RICHARD C. WALTERS
Board Judge

We concur:

BERYL S. GILMORE
Board Judge

ALLAN H. GOODMAN
Board Judge

Malnak's authority, but also that his statements were misleading (causing Rubino to believe reasonably that the Government would not assert its convenience termination rights under the contract prior to the end of August 2010) and that they were relied upon to Rubino's material prejudice.