



UNITED STATES
CIVILIAN BOARD OF CONTRACT APPEALS

MOTION TO DISMISS FOR LACK OF JURISDICTION DENIED:
March 27, 2013

CBCA 3084

SELRICO SERVICES, INC.,

Appellant,

v.

DEPARTMENT OF JUSTICE,

Respondent.

Theodore M. Bailey of Bailey & Bailey, P.C., San Antonio, TX, counsel for Appellant.

Joshua A. Mandlebaum, Commercial Litigation Branch, Civil Division, Department of Justice, Washington, DC, counsel for Respondent.

Before Board Judges **DANIELS** (Chairman), **SOMERS**, and **KULLBERG**.

DANIELS, Board Judge.

The contractor alleges that money owed it under a contract with the United States Marshals Service was improperly offset to pay a debt owed by a different company which previously held a contract with the Department of the Army. We have jurisdiction to hear this case. We consequently deny a motion by the respondent, the Department of Justice, to dismiss the case for lack of jurisdiction.

Background

In the spring of 2004, the Department of the Army sought to have a Sprung structure installed at Tallil Air Base, Iraq, to serve as a gymnasium. Sprung structures are made by Sprung Instant Structures, Inc. They feature an aluminum substructure covered with highly tensioned fabric panels.

Sprung Instant Structures, Inc. told the Army that although it sold these structures, it did not install them. It suggested that the Army deal with its “Strategic Alliance Partner, Selrico Services,” to supply and install the product. Subsequently, Selrico Services, Inc., through Buddy Aleman, presented the Army with its “quote for a total ‘turnkey’ setup of the Sprung Structure.” Mr. Aleman later wrote, “Our company name operating in IRAQ is as follows: Selrico International.” He also provided the contractor and government entity (CAGE) code¹ which is associated with Selrico Services, Inc. He signed his letter, “Buddy Aleman, Vice President, Selrico Services, Inc., Selrico International.”

Selrico Services, Inc. and Selrico International, Inc. are separate, though affiliated, corporations. They have the same address and the same president (John R. “Rick” Aleman). According to the appellant, the two companies have different but overlapping ownership. Each has its own CAGE code. Each has its own taxpayer identification number, and each files its own tax return. Selrico International, Inc. sometimes did business as Selrico Services International.

On May 13, 2004, the Department of the Army entered into a contract with “Selrico International” for the supply and installation of a Sprung structure at Tallil Air Base. The contract includes, however, the CAGE code for Selrico Services, Inc. The initial amount of the contract was \$348,986.34. This amount was later increased to \$365,386.34.

The contract required the Army to pay the contractor a mobilization fee of 30% of the contract price. The Government issued a check dated May 25, 2004, to Selrico International Inc. in the amount of \$104,695.91 (30% of \$348,986.34).

¹ As explained by the Comptroller General, “CAGE codes . . . are assigned to discrete business entities for purposes of executing payments under government contracts . . . ; CAGE codes are used to dispositively establish the identity of a legal entity for contractual purposes.” *Perini/Jones, Joint Venture*, B-285906 (Nov. 1, 2000); *see also Gear Wizzard, Inc.*, B-298993 (Jan. 11, 2007).

The Army accepted the Sprung structure on October 8, 2004. The next day, Selrico Services, Inc. sent to the Army an invoice in the amount of \$365,386.34 for erection of this structure. The invoice includes the taxpayer identification number and CAGE code of Selrico Services, Inc., and specifically states, "Remit Payment to: Selrico Services, Inc."

The Army paid this amount by electronic funds transfer on or about October 30, 2004. The Army's records state that the payee was "Selrico International," but show the CAGE code and taxpayer identification number of the payee as those of Selrico Services, Inc. According to a declaration of a Defense Finance and Accounting Service (DFAS) accounts receivable technician, which the appellant asks us to exclude from the record, "It would have been normal practice for the invoiced payment to have been made to the bank account associated with the CAGE Code on the Invoice and on the Contract."

In April 2010, the Army discovered that it had paid more than the agreed-upon amount on this contract. In August 2010, DFAS wrote to Selrico International, Inc., asking it to remit the amount of the overpayment (the mobilization fee of \$104,695.91) or, if it believed that the debt was invalid or the amount incorrect, to request a review of the agency's determination. After Rick Aleman, on behalf of Selrico International, Inc., told DFAS that the company would research the matter, Selrico International, Inc. did not respond further.

In November 2010, DFAS began preparations to refer the debt to the Department of the Treasury for collection from Selrico Services, Inc. The debt was so referred.

Department of the Treasury records appear to reflect that on or before March 30, 2011, Selrico Services, Inc. disputed the debt. In August 2011, and again in April 2012, the department asked collection companies to collect the debt from Selrico Services, Inc. In June 2012, Selrico Services, Inc.'s attorney wrote to one of the collection companies, disputing the debt. He asserted, "This debt is improperly being demanded of the wrong company, Selrico Services, Inc. . . . The correct company is Selrico International, Inc."

In February 2012, the United States Marshals Service (USMS) contracted with Selrico Services, Inc. to provide food services at the Service's facility in Pineville, Louisiana, at specified times during that year. The USMS acknowledges that this contract was performed without incident. During 2012, Selrico Services, Inc. sent to the USMS invoices in the total amount of \$106,539.20 (March 12, \$22,510.68; April 20, \$22,510.68; June 5, \$54,617.84; August 6, \$6900). The USMS did not remit payment in response to all of these invoices. Also during 2012, the Department of the Treasury transferred \$84,040.12 from the USMS to DFAS (May 11, \$22,492.68; July 5, \$54,599.84; August 16, \$65.60; August 24, \$6882).

On August 9, 2012, Selrico Services, Inc. submitted to the contracting officer on the Marshals Service contract a claim in the amount of \$99,639.20. The claim letter asserted that the USMS owed Selrico Services, Inc. that amount for its services under that contract, and that the Government had improperly set off the money against a debt owed by a different company, Selrico International, Inc. By letter dated October 18, 2012, the amount of the claim was increased to \$106,535.20 and the claim was certified.

The Marshals Service contracting officer denied the claim on November 20, 2012. The contracting officer stated in her decision:

[T]he USMS does not have, and never has had, a dispute with Selrico about payment for the work performed under the contract. . . . There were no contract issues between Selrico and the USMS during the course of the contract, and the USMS accepted the services performed by Selrico. With the exception of one invoice which you sent with Selrico's claim, and which is being processed for payment, all the invoices submitted by Selrico were paid in full. The USMS did not withhold any money from the contract payments made to Selrico.

Selrico Services, Inc. now states that the first invoice was paid and maintains that "only \$84,028.52 was erroneously withheld on the USMS Contract."

Discussion

We set out in *Ron Anderson Construction, Inc. v. Department of Veterans Affairs*, CBCA 1884, et al., 10-2 BCA ¶ 34,485, the standards under which a motion to dismiss a case for lack of jurisdiction is to be considered:

Appellant bears the burden of establishing subject matter jurisdiction by a preponderance of the evidence. In assessing whether the Board has subject matter jurisdiction, the allegations of the complaint should be construed favorably to the pleader. When a motion to dismiss for lack of subject matter jurisdiction challenges the truth of alleged jurisdictional facts, the Board may consider relevant evidence beyond the pleadings to resolve disputed facts.

10-2 BCA at 170,070 (citations omitted).

The Contract Disputes Act provides:

The Civilian Board [of Contract Appeals] has jurisdiction to decide any appeal from a decision of a contracting officer of any executive agency (other than the Department of Defense, the Department of the Army, the Department of the Navy, the Department of the Air Force, the National Aeronautics and Space Administration, the United States Postal Service, the Postal Regulatory Commission, or the Tennessee Valley Authority) relative to a contract made by that agency.

41 U.S.C. § 7105(e)(1)(B) (Supp. IV 2011). This case involves an appeal from a decision of a contracting officer of the United States Marshals Service, an executive agency which is not excluded from our jurisdiction. The question posed by the USMS's motion is whether the decision is relative to a contract made by that agency.

The common law right of the Government to set off against moneys due a contractor as a means of recovering previous erroneous payments has long been recognized. *United States v. Munsey Trust Co.*, 332 U.S. 234, 239 (1947); *East Coast Security Services, Inc. v. Department of Homeland Security*, DOT BCA 4469R, et al., 06-1 BCA ¶ 33,290, at 165,062-63 (citing cases). "This right extends to offsets between separate contracts which the debtor may have with the Government." *Cecile Industries, Inc. v. Cheney*, 995 F.2d 1052, 1054 (Fed. Cir. 1993). The Government may use offsets to recover erroneous payments "without recourse to the procedures of the Contract Disputes Act [which is now at 41 U.S.C. §§ 7101-7109]." *Applied Companies v. United States*, 144 F.3d 1470, 1478 (Fed. Cir. 1998). As provided in the regulations governing offsets:

When an offset occurs, the debtor has received payment in full for the underlying obligation represented by the payment. . . . [I]f an agency certifies a payment to a Federal contractor for work completed or services provided, and that payment is offset to collect a delinquent debt that the contractor owes to another Federal agency, the contractor has been paid in full for its services.

31 CFR 285.5(e)(9) (2010).

The Government believes that is precisely what has happened here – it has offset, from payments due to Selrico Services, Inc. under the USMS contract, to recover money it mistakenly paid to that firm under the Army contract. The dispute does not concern an action taken by the USMS contracting officer relative to the contract made by the USMS. Under the rule established in *Applied Companies*, Contract Disputes Act procedures are not available to challenge the Government's action; the Board has no jurisdiction under that Act to hear the case.

Selrico Services, Inc. maintains, to the contrary, that the Government has taken money rightfully due to it under the USMS contract for the purpose of recouping funds mistakenly paid under the Army contract to a different company, Selrico International, Inc. To rectify the error, Selrico Services, Inc. has filed a claim with the USMS contracting officer to recover money which the contracting officer has wrongfully withheld, since Selrico Services, Inc. performed the USMS contract without incident. The appellant contends that the Board has jurisdiction over the claim for the withheld money.

We conclude that Selrico Services, Inc. has the better of the argument regarding jurisdiction. If payments under the Army contract were actually made to Selrico International, Inc. – a different company from Selrico Services, Inc. – the Government could not properly recoup its overpayment to that company by offsetting money otherwise due to Selrico Services, Inc. Construing the allegations of the complaint favorably to the pleader, as we must at the moment, we recognize that Selrico Services, Inc. could have a valid claim for that money relative to the USMS contract. *See J.G.B. Enterprises, Inc. v. United States*, 497 F.3d 1259 (Fed. Cir. 2007). Selrico Services, Inc. may challenge the offset determination, as it did, by filing a Contract Disputes Act claim with the USMS contracting officer. *Kearfott Guidance & Navigation Corp.*, ASBCA 49263, 99-2 BCA ¶ 30,518, at 150,696. This case is different from those cited by the respondent – *Applied Companies* and *AMEC Construction Management, Inc. v. General Services Administration*, CBCA 389, et al., 07-1 BCA ¶ 33,505 – for there, the contractor from which a payment was offset was the same company as the one which had been overpaid under another contract.

We hasten to add that based on the information presented thus far, it appears that Selrico Services, Inc. will have a difficult task ahead in attempting to persuade us that the second payment made under the Army contract went to Selrico International, Inc., and not Selrico Services, Inc. The payment was made in response to an invoice from Selrico Services, Inc. which featured the CAGE code and taxpayer identification number of Selrico Services, Inc. Even if we are to give no credence to the declaration of the DFAS accounts receivable technician, we would find it hard to believe that an electronic funds payment would have gone to a company other than one with the CAGE code and taxpayer identification number on the invoice. It is the identity of the payee on the Army contract, not the identity of the contractor, that matters here. Nevertheless, we will afford Selrico Services, Inc. an opportunity to prove its case.

Decision

The respondent's **MOTION TO DISMISS FOR LACK OF JURISDICTION** is **DENIED**.

STEPHEN M. DANIELS
Board Judge

We concur:

JERI KAYLENE SOMERS
Board Judge

HAROLD C. "CHUCK" KULLBERG
Board Judge