UNITED STATES
CIVILIAN BOARD OF CONTRACT APPEALS

DENIED: September 12, 2013

CBCA 3084

SELRICO SERVICES, INC.,

Appellant,

v.

DEPARTMENT OF JUSTICE,

Respondent.

Theodore M. Bailey and Kristin Zachman 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.

Although the United States Marshals Service (USMS) was satisfied with the performance of Selrico Services, Inc. (Services) under a contract between the parties, it did not remit to the contractor all funds promised in the contract in exchange for the services provided. Instead, some of the money was offset to pay a debt which the Government believes was owed by Services in conjunction with a Department of the Army contract. Services asserts that the offset was impermissible because the debt was owed by a separate company, Selrico International, Inc. (International), which held the contract with the Army.

We grant a motion for summary relief brought by the Department of Justice (USMS' parent agency), denying the appeal.

## Background

Earlier this year, we denied a motion by the Department which asked us to dismiss the case for lack of jurisdiction. *Selrico Services, Inc. v. Department of Justice*, CBCA 3084, 13 BCA ¶ 35,268. Many of the facts relevant to that decision are relevant to this one as well. To the extent that further details might be useful here, we refer the reader to the prior opinion. None of the facts stated there (or recited below) is contested.

### Army contract

In 2004, the Army sought to have a contractor install a structure at an air base in Iraq. The Army engaged in discussions with Albert "Buddy" Aleman, who said that his company could supply and install the product. During these discussions, the names "Selrico Services, Inc." and "Selrico International, Inc." were used interchangeably by Mr. Aleman and Army officials. The two companies are actually separate, though affiliated corporations. At the time, they had different but overlapping ownership. (The appellant informs us that since 2009, they have had common ownership.) Each has its own contractor and government entity (CAGE) code and taxpayer identification number, and each files its own tax return.

Following the discussions with Mr. Aleman, the Army entered into a contract with an entity identified as "Selrico International." The contract was initially in the amount of $348,986.34; the amount was later increased to $365,386.34.

As required by the contract, the Army paid a mobilization fee of 30% of the original contract price. The Government issued a check in the amount of $104,695.91 to International on May 25, 2004.

After the Army had accepted the structure, on October 9, 2004, Services sent the agency an invoice in the amount of $365,386.34. The invoice featured the Services logo. It included the CAGE code and taxpayer identification number of Services and specifically stated, "Remit Payment to: Selrico Services, Inc."

The Army paid this amount by electronic funds transfer. Although the agency's records state that the payee was "Selrico International," they also show the CAGE code and taxpayer identification number of the payee as those of Services. The money was deposited in a bank account of Services.

Services has served as the "banking entity" for International and other affiliates of Services. At times, Services has advanced funds to International. According to a statement submitted under penalty of perjury by the chief financial officer of Services, during 2004, when payments on outstanding accounts receivable were received by Services affiliates, including International, the funds were normally deposited in a Services bank account. The affiliated companies' accounting department would then record the payment as having been made to the affiliate, such as International. In keeping with this practice, the chief financial officer says, the second payment on the Army contract was posted to International, and that firm reported the revenue as gross sales for federal income tax purposes.

Government's collection efforts

On April 29, 2010, a representative of the Army's Joint Contracting Command's Iraq/Afghanistan contract closeout task force contacted Buddy Aleman and Michael Robinson about contract payments. Each of these individuals used an electronic mail address which included the phrase "@selricoservices.com." The Army representative was concerned that his agency should have subtracted the first payment from the total amount before making the second payment. He received no response.

On August 17, 2010, the Defense Finance and Accounting Service (DFAS) sent to International a demand for repayment of the first payment, $104,655.91. The letter was followed by a telephone call to John R. "Rick" Aleman, the president of both International and Services. (The appellant tells us that Rick Aleman was the sole shareholder of Services at all times relevant to this case; he was also the majority shareholder of International until 2009 and the sole shareholder of that company since then.) Although Rick Aleman promised DFAS that he would have Mr. Robinson research the matter, neither he nor Mr. Robinson ever responded to DFAS inquiries.

In November 2010, DFAS referred the $104,655.91 debt to the Department of the Treasury for collection. A DFAS accounts receivable technician decided to collect the debt from Services, rather than International. She believed that because the Army's second payment had gone to an entity with the CAGE code and taxpayer identification number of Services, that company had received the August 17, 2010, demand letter. Treasury later referred the debt to private collection agencies, which attempted to collect the money from Services.

In response to the debt collection efforts by the private collection agencies, Services disputed the assertion that it owed the money to the Government. Services said that "[n]o payments on the contract were made to Selrico Services, Inc." and that the debt was owed by International. Notwithstanding this assertion, DFAS asked Treasury to continue to

attempt to collect the debt from Services because DFAS believed that Services had received, on the Army contract, payment of money in excess of the amount specified in that contract.

According to information provided by the appellant, International suffered a significant financial loss in 2005, when it paid a vendor of goods fifty percent of the amount due at the time of the order, but the vendor never shipped the goods. International secured a judgment against the vendor in Dubai in 2009, but despite the efforts of International's attorneys, the company has not been able to collect on the judgment. Beginning in 2006, Services made loans to International. International ceased operations in 2010. It filed its last tax return in 2011. International now owes more than $700,000 to Services. International has not formally closed its business, however, the appellant says, because International has a remaining asset of the judgment against its former vendor in Dubai.

USMS contract

In February 2012, USMS contracted with Services to provide food services at the USMS facility in Pineville, Louisiana, at specified times during that year. The USMS acknowledges that this contract was performed without incident. During 2012, Services sent to the USMS invoices in the total amount of $106,539.20. Payments of $84,025.52 for this contract were offset by Treasury against the debt on the Army contract. This amount (less $51 in charges retained by Treasury) was transferred to DFAS.

On August 9, 2012, Services submitted to the USMS contracting officer a claim for the amount of money which had been offset, rather than paid to Services. The contracting officer denied the claim, and Services appealed her decision.

## Discussion

Resolving a dispute on a motion for summary relief is appropriate when the moving party is entitled to judgment as a matter of law, based on undisputed material facts. The moving party bears the burden of demonstrating the absence of genuine issues of material fact. All justifiable inferences must be drawn in favor of the nonmovant. *Celotex Corp. v. Catrett*, 477 U.S. 317 (1986); *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242 (1986). Nevertheless, to defeat a motion for summary relief, the nonmoving party must come forward with specific facts showing the existence of a genuine issue for trial. "Where the record taken as a whole could not lead a rational trier of fact to find for the non-moving party, there is no 'genuine issue for trial.'" *Matsushita Electric Industrial Co. v. Zenith Radio Corp.*, 475 U.S. 574, 587 (1986).

As we explained in our earlier decision in this case:

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

*Selrico Services*, 13 BCA at 173,131.

The parties agree that the Army paid more than it should have under the 2004 contract – $470,082.25, rather than $365,386.34. The parties further agree that the Government is due the difference between these two figures, $104,695.91. The parties disagree, however, as to which entity owes that sum. The Department of Justice maintains that Services, which received the Army's second payment, must repay the amount in question, and that the Government properly accomplished some of that repayment by setting off the debt against money otherwise due Services under a USMS contract. Services insists that International, which held the Army contract and ultimately ended up with the excess payment, is the debtor. The difference is critical to the outcome of the case, since International currently has no assets with which to pay the Government.

We advised the parties, in the earlier decision, that to resolve the dispute, "[i]t is the identity of the payee on the Army contract, not the identity of the contractor, that matters." *Selrico Services*, 13 BCA at 173,132. We afforded the parties ample time to find evidence which would show who that payee was. The evidence now shows without doubt that Services received the second payment from the Army. Indeed, the payment was made in response to an invoice from Services which requested the money and, by virtue of provision of Services' CAGE code and taxpayer identification number, effectively asked that the money be transferred to Services' bank account. The Army complied with the request.

Because the Army's contract was with International, not Services, Services had no right to seek or receive any of the second payment. The Government had the right to recoup the amount of that payment. Doing so by setting off $84,025.52 against the total amount due under the USMS contract was entirely permissible.

The parties have exerted enormous effort in advancing arguments which we find unnecessary to the result. The Department of Justice maintains that we could pierce the corporate veil, applying tests described in *McCall Stock Farms, Inc. v. United States*, 14 F.3d 1562, 1567-68 (Fed. Cir. 1993), to conclude that even if payment on the Army contract went exclusively to International, the debt is owed by that company's alter ego, Services. Services urges that because Services transferred to International, on the books of the affiliated companies, the payment Services received from the Army, International should be deemed to have obtained the Army's money. Services also contends that because the Government did not follow the requirements of the Debt Collection Act, at 31 U.S.C. § 3716(a) (2006), it may not collect any money from Services by way of offset.

Although these arguments consume many pages of briefing, they do not matter in this case. We have concluded that Services owes the money in question to the Government; whether Services and International are one company or two, the debt is attributable to Services. Although Services did transfer the second Army payment to International, as far as the Government is concerned, the money went to only one entity (Services), and any action that entity took with regard to the money does not affect the identity of the payee. Whether the Government needed to follow Debt Collection Act requirements or not, it clearly gave Services all that 31 U.S.C. § 3716(a) mandates: notice of the claim and an opportunity to inspect records and have the agency's collection decision reviewed internally. The Government told Services' president and his personnel, as early as 2010, that it believed Services owed the debt, and it formalized the demand through the 2012 USMS contracting officer's decision. Through this litigation, if not before, Services has had ample opportunity to inspect records and contest the Government's position. We have found that position valid.

Decision

The motion for summary relief is granted. The appeal is **DENIED**.

STEPHEN M. DANIELS
Board Judge

We concur:

JERI KAYLENE SOMERS
Board Judge

H.CHUCK KULLBERG
Board Judge