



UNITED STATES
CIVILIAN BOARD OF CONTRACT APPEALS

MOTION FOR SUMMARY RELIEF DENIED: August 8, 2013

CBCA 3232

BUTTE TIMBERLANDS, LLC,

Appellant,

v.

DEPARTMENT OF AGRICULTURE,

Respondent.

Todd R. Johnston and Christopher R. Page of Hershner Hunter LLP, Eugene, OR, counsel for Appellant.

Benjamin R. Hartman, Office of the General Counsel, Department of Agriculture, Portland, OR, counsel for Respondent.

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

SHERIDAN, Board Judge.

Butte Timberlands, LLC (appellant or Butte) filed an appeal from the cancellation of a timber sale contract solicited by the Department of Agriculture's Forest Service (respondent or Forest Service). Appellant has filed a motion for summary relief in an attempt to resolve this dispute. For the reasons set forth below, we deny the motion.

Background

On December 7, 2007, respondent issued a solicitation to prospective bidders for a timber sale contract for a portion of the Okanogan-Wenatchee National Forest. Appeal File, Exhibit 3.¹ This sale became referred to as the Iron Reoffer Timber Sale. *Id.* Butte appeared twice on the list of potential bidders showing two representatives, Mr. Rick Brewer, with an address in Fall Creek, Oregon, and Mr. Kevin Fiske, with an address in Woodway, Washington. Exhibit 1 at 1.² On January 7, 2008, Mr. Fiske responded to this solicitation with a bid listing him as Butte's "Washington Manager." Exhibit 5 at 15. Mr. Fiske also listed himself, along with Mr. Rick Brewer and Mr. Gordon Brewer, as a partner or affiliate of Butte on this bid. *Id.* Mr. Fiske's Washington address served as Butte's address on the bid. *Id.* The bid required a \$5200 guarantee, which was paid using a cashier's check made out to the Forest Service and referencing "Kevin K. Fiske" on the check's face. Exhibit 6. No information regarding Butte was present on the face of the check. *Id.*

On January 8, 2008, Mr. Fiske attended a bid meeting and listed Butte as his organization on the attendance sheet. Exhibit 7. At this bid meeting, Mr. Fiske was the highest bidder on the contract. Exhibit 9. One of the other attendees at this meeting also signed in listing Butte; however, the signature is illegible and the identity of this individual is unclear from the record. On January 10, 2008, the contracting officer (CO) informed Mr. Fiske that Butte had won the contract and accordingly needed to make a \$5600 down payment and post a \$6000 performance bond. Exhibit 10 at 1, 3. A cashier's check was issued for the additional \$400 not covered for the down payment by the original \$5200 guarantee, again listing only Mr. Fiske's name in the subject line and containing his written signature. Exhibits 13-14. Similarly, a cashier's check listing only Mr. Fiske's name and signature was submitted as payment for the \$6000 performance bond. Exhibits 12, 14. Mr. Fiske signed the contract as Butte's "Managing Partner." Exhibit 18 at 1. The contract's original termination date was March 31, 2012. *Id.* It does not appear from the record that any work was performed on the contract by Mr. Fiske or Butte personnel. All relevant correspondence was sent to the Washington address listed by Mr. Fiske in the solicitation mailing list. Exhibits 22-23. On November 19, 2008, Mr. Fiske advised the CO, via handwritten note, of a change of address to Leavenworth, Washington. Exhibit 24.

On October 20, 2010, respondent received word from the Wanatchee Valley Medical Center regarding Mr. Fiske's health. Exhibit 40. In a letter, Dr. Jeffrey S. Clarke explained

¹ All exhibits are found in the Appeal File, unless otherwise noted.

² Mr. Fiske's address appears to be a residential address according to the contracting officer. Declaration of Susan Rinke (June 13, 2013) at 2, ¶ 3.

that Mr. Fiske had developed “severe cognitive dysfunction” and was being relocated to Minnesota to be closer to his family. *Id.* Mr. Fiske’s doctor also noted that Mr. Fiske would no longer be able to manage the contract and recommended respondent release him from his responsibilities and liabilities therein. *Id.*

The CO received a letter from Mr. Fiske’s brother on November 1, 2010, identifying himself as Mr. Fiske’s attorney-in-fact. Exhibit 41. In this letter, Mr. Fiske’s brother stated that Mr. Fiske was the “managing partner” of Butte, ran the company alone, and, due to his ailment, was no longer able to manage the contract. *Id.* He also represented that Butte had no physical assets, as it subcontracted out all of its business. *Id.*

Following this letter, the CO decided to investigate the formation of the contract. Rinke Declaration at 4, ¶¶ 13-14. The CO found that Butte was an Oregon limited liability company not registered to do business in the state of Washington. Exhibit 42. She also found that Mr. Rick Brewer was Butte’s agent and a member of the company. *Id.* Mr. Fiske was listed neither as Butte’s agent nor its member in the Oregon Business Registry. *Id.* Finally, the CO also determined that the contract file lacked written authorization for Mr. Fiske to act on Butte’s behalf. Exhibit 44. Concerned as to whether Butte had ever actually authorized Mr. Fiske to bid on the contract, the CO attempted to contact Mr. Brewer for clarification. Exhibit 43.

The CO first attempted to contact Butte on December 6, 2010, using the address provided in the Oregon Business Registry, but the letter was returned as undeliverable. Exhibit 45. The CO successfully delivered a letter dated December 15, 2010, to Mr. Brewer using Butte’s Oregon address from the solicitation. Exhibit 46. The letter asked Mr. Brewer to determine what “plans you have to complete [the contract],” and advised that an initial periodic payment of \$18,900 was due on May 19, 2012.³ *Id.* The CO and Mr. Brewer subsequently spoke on the phone on December 21, 2010, at which point Mr. Brewer stated that he knew Mr. Fiske, but had not seen him in a long time, and was unaware of Mr. Fiske’s bidding on the contract. Rinke Declaration at 5, ¶ 17; *see also* Exhibit 47. When asked about Mr. Fiske’s authorization to bid on Butte’s behalf, Mr. Brewer told the CO that he would check his files for any such authorization and then asked the CO to forward to him a copy of the contract. *Id.* On December 21, 2010, the CO sent Mr. Brewer a copy of the contract. Exhibit 48.

³ The contract originally called for an initial periodic payment of \$18,900 on February 19, 2010. Exhibit 18 at 7. At this early stage of proceedings, the source of the two-year gap between payment dates is unclear.

The CO informed Mr. Brewer via a letter dated January 3, 2011, that “[p]rior to allowing any operations on this sale I am requiring you to provide me with documentation that supports [Mr. Fiske] had the authority to represent [Butte] in both bidding on the sale and signing the timber sale contract.” Exhibit 50. Mr. Brewer alleges that sometime after receiving this letter, he spoke on the phone with the CO and told her that Butte was going to perform the contract and that Mr. Fiske had authority to bind appellant. Declaration of Richard Brewer (Apr. 29, 2013) at 2, ¶ 6.⁴ The CO claims to have no recollection or notes of such a conversation. Rinke Declaration at 6, ¶ 20. On January 14, 2011, Mr. Brewer wrote a letter detailing his previous communications with Mr. Fiske with supporting documentation. Exhibit 51. The documentation attached to this letter was dated from 2003 to 2004. *Id.* at 3-6.

On February 24, 2011, Butte submitted an operating schedule dated February 14, 2011, showing a start date for the work of February 15, 2011. Exhibit 51. Also on February 24, a Forest Supervisor sought authorization from the Regional Forester for the CO to cancel the contract on the grounds that Mr. Fiske had lacked authority to bind appellant when executing the contract. Exhibit 54. The Forest Supervisor also requested the contract be prepared for resale. *Id.* The Deputy Regional Forester determined on March 17, 2011, that Mr. Fiske’s bid should have been rejected and the contract should be cancelled pursuant to 36 CFR 223.116(a)(2) (2010),⁵ noting the “action [was] of advantage to the United States or not prejudicial to its interests.” Exhibit 55.

In her declaration, the CO explained that, in considering the totality of the circumstances before her, she determined “that Butte had not authorized [Mr. Fiske] to bid on or sign” the contract. Rinke Declaration at 7, ¶ 24. She also noted that, in at least one of Butte’s previous contracts where Mr. Fiske played a role, Mr. Brewer’s involvement was “obvious.”⁶ On March 23, 2011, the CO cancelled the contract pursuant to 36 CFR 223.116(a)(2). Exhibits 56, 63. The CO sent the notice of cancellation to Mr. Fiske, but not

⁴ In his declaration Mr. Brewer also states that Mr. Fiske was Butte’s agent, who “was paid for various tasks on behalf of Butte . . . wholly unrelated to procuring timber sales.” Brewer Declaration at 1, ¶ 3.

⁵ Title 36, section 223.116 sets forth the authority for cancellation of a timber sales contract, and in pertinent part provides that a timber sale may be cancelled “[u]pon application, or with the consent of the purchaser, when such action is of advantage to the United States or not prejudicial to its interests.” 36 CFR 223.116(a)(2).

⁶ For example, Mr. Brewer signed a 2005 Forest Service contract and expressly designated Mr. Fiske as Butte’s purchaser representative. Rinke Declaration at 7, ¶ 23.

to Mr. Brewer or Butte. Refunds of deposits made on the contract were sent to Mr. Fiske, and on May 10, 2011, Mr. Fiske's brother and attorney-in-fact was informed that the sale was closed and all necessary refunds had been made to Mr. Fiske. Exhibits 57, 63.

On June 3, 2011, the Forest Service sent letters to Butte and other "Okanogan-Wenatchee National Forest Timber Sale Purchasers and Interested Parties" asking them to complete a form to continue receiving information about upcoming timber sales. Exhibit 66. Even though Butte did not respond to this letter, the Forest Service determined that it would keep Butte and the other potential bidders on their list for future sales. *Id.* Respondent resolicited the contract on August 19, 2011, but for less timber than originally solicited due to mortality of timber and other factors. Exhibits 68, 72. This sale was referred to as the Ironic SBA Timber Sale. Exhibit 73. Butte was mailed a copy of the solicitation, but did not bid on the sale. Exhibits 71, 73, 74.

Early in May 2012, Mr. Brewer and the CO had a phone conversation where Mr. Brewer was informed the contract had been cancelled. Exhibit 77. In a May 30, 2012, letter to the CO, Mr. Brewer sought unspecified compensation for what he represented was an unjust cancellation of a valid contract. *Id.* In this letter, Mr. Brewer expressed surprise at the contract's cancellation, stating the contract with Mr. Fiske properly bound appellant, and that Butte had always been committed to completing the contract. *Id.* On June 4, 2012, the CO responded with a time line discussing the history of the contract. Exhibit 78. She noted that the contract was cancelled in March of 2011 and that Butte was "not provided a copy of the cancellation letter because the Forest Service [did] not recognize [Butte] as the purchaser of the Iron Reoffer Timber Sale." *Id.* The CO also noted that Butte had been contacted regarding the resolicitation, but did not respond. *Id.*

On November 10, 2012, appellant submitted a certified claim seeking \$706,659.55 "for damages owed . . . due to unauthorized cancellation of this contract, in accordance with BT9.2 [the contract's Disputes Clause]." Exhibit 80. When the CO failed to issue a final decision on the claim, Butte appealed the deemed denial of its claim, which was docketed as CBCA 3232.

Discussion

Appellant posits that Mr. Fiske had authority to bind Butte or, alternatively, that Mr. Brewer later ratified the contract, thus binding Butte and the Forest Service to an enforceable agreement that was later unjustifiably terminated by respondent. Appellant argues these facts are uncontested and that it is, accordingly, eligible for summary relief.

Respondent has not cross-moved for summary relief, but argues appellant should not be granted summary relief because Mr. Fiske did not have the authority to bind Butte and a question of material fact exists regarding whether Mr. Brewer ratified the contract.

“Summary relief is only appropriate where there is no genuine issue as to any material fact and the moving party is entitled to relief as a matter of law.” *Greene v. Department of Homeland Security*, CBCA 49, 07-2 BCA ¶ 33,668, at 166,700 (citing *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 247 (1986)). A fact is material when it might affect the outcome of the suit at hand. *Anderson*, 477 U.S. at 248. “Any doubt on whether summary relief is appropriate is to be resolved against the moving party,” in this case respondent. *Greene* at 166,700 (citing *Celotex Corp. v. Catrett*, 477 U.S. 317, 325 (1986)).

As a preliminary matter, appellant argues “[a]s a matter of law, [respondent] cannot create an issue of fact regarding whether or not Mr. Fiske had . . . authority” to bind appellant to the contract. However, this argument is based on the presupposition that “there is no dispute of the facts that Mr. Fiske was authorized by Butte to enter into the contract.” This is simply not the case, however. Respondent can, and indeed does, argue that there is an issue of material fact as to whether Mr. Fiske was authorized by appellant to enter into this contract. To prove Mr. Fiske had adequate authority here, appellant must show evidence that Mr. Fiske was Butte’s authorized agent. *See* Restatement (Third) of Agency § 1.01 (2006). “Agency is the fiduciary relationship that arises when one person (a ‘principal’) *manifests assent* to another person (an ‘agent’) that the agent shall act on the principal’s behalf and subject to the principal’s control, and the agent manifests assent or otherwise consents so to act.” *Id.* (emphasis added). Accordingly, without the principal’s manifested assent, an agent cannot have acted on the principal’s behalf. *Id.*

Here, a genuine issue of fact exists as to whether Mr. Fiske was Butte’s agent. It cannot be said that there is “no genuine issue as to any material fact” on this point, as there is conflicting evidence regarding whether Butte manifested any assent to being bound to the contract. For example, it appears that Mr. Fiske paid for the necessary down payments on the contract using cashier’s checks referencing his name rather than Butte’s name.⁷ According to Mr. Brewer, Mr. Fiske’s past experience with Butte was “wholly unrelated to procuring timber sales.” The CO noted that when Mr. Fiske had worked with Butte several years earlier, Mr. Brewer’s involvement was “obvious.” According to the CO, Mr. Brewer appeared surprised to find out that Mr. Fiske had bid on the contract, and needed to be sent a copy of the contract. These considerations convinced the CO that Butte did not know that

⁷ No evidence has been submitted indicating that Butte reimbursed Mr. Fiske for the payments he made to the Forest Service under the contract.

Mr. Fiske had entered into this contract in the first place. As respondent argues, this suggests that Mr. Fiske acted alone in executing the contract using Butte's name. Finally, Butte is a limited liability company registered to do business in Oregon, and it is unclear at this point whether Butte could properly do business in Washington state.

In the original solicitation, Mr. Fiske was listed as a representative of Butte, and it also appears that Mr. Fiske had some business with Butte several years earlier. However, the facts relating to this contract do not conclusively establish the scope of Mr. Fiske's relationship with Butte or that Butte authorized Mr. Fiske to execute this contract on its behalf. Rather, at best, the facts leave unresolved questions as to the truth of the assertion that Mr. Fiske was authorized to enter into the contract on behalf of Butte. Accordingly, this motion for summary relief must be resolved in favor of the nonmoving party, respondent. *Greene*, 07-2 BCA at 166,700.

Appellant also contends that even if Mr. Fiske was not authorized to enter into the contract on Butte's behalf, summary relief is still appropriate because appellant later ratified the agreement. Butte supports this position by positing that "Mr. Rick Brewer told [the CO] during a telephone conversation that Butte Timberlands would complete the timber sale contract despite the mental health issues plaguing Mr. Fiske." Respondent, however, disputes whether this phone call ever occurred. Thus, the parties dispute the fact that appellant informed the CO that it "ratified" Mr. Fiske's action in entering into the contract. Even if the conversation occurred, appellant fails to explain how it can ratify a contract with the Government that may have been entered into by an individual who may not have ever been an agent of appellant. The facts relating to this point are material and, given the presumption in favor of respondent, summary relief is inappropriate.

The evidence in the record is insufficient to justify summary relief. There are genuine issues of fact regarding, among other things, whether there was a meeting of the minds sufficient to form a binding contract, Mr. Fiske's authority to enter into the contract, Butte's purported attempt to ratify Mr. Fiske's actions, and the cancellation (unilateral or mutual) of the contract by the Forest Service. We conclude the parties must be afforded the opportunity to develop the record further on these, and other, points.

Decision

For the reasons set forth above, appellant's **MOTION FOR SUMMARY RELIEF** is **DENIED**.

PATRICIA J. SHERIDAN
Board Judge

We concur:

ALLAN H. GOODMAN
Board Judge

JONATHAN D. ZISCHKAU
Board Judge