



UNITED STATES
CIVILIAN BOARD OF CONTRACT APPEALS

DENIED: November 7, 2014

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.

This matter involves the propriety of the cancellation by respondent, the Department of Agriculture's Forest Service (FS), of a timber sales contract in which appellant, Butte Timberlands, LLC (Butte Timberlands), claims to have an interest. After considering the evidence, including testimony presented at the hearing, and the parties' post-trial briefs, we find that respondent had grounds to cancel the contract because it was bid on and executed by a third party who lacked authority to bind appellant in contract. We deny appellant's claim for damages arising from the cancellation.

Background

In 1998, Rick Brewer, along with his mother and father, created Butte Timberlands. Butte Timberlands is a limited liability company (LLC) organized in Oregon. Currently, Mr. Brewer is the sole member and manager of Butte Timberlands, which has no employees, and, thus, hires contractors to do all the work on the timber sales it purchases.

In the early 1990's, Mr. Brewer met Kevin Fiske, a representative of a log export company. In 2003, after the company for which Mr. Fiske worked closed, Mr. Fiske approached Mr. Brewer "to learn about" purchasing FS timber. During the time, Mr. Fiske was not an employee, manager, or member of Butte Timberlands. Mr. Fiske and Butte Timberlands, acting through Mr. Brewer, jointly secured three timber sales between July 2003 and May 2005. These included, in Oregon, the Bandit II and Cab timber sales contracts, which were awarded November 2003, and, in Washington, the Johnson Canyon timber sales contract, which was awarded in May 2005. Mr. Fiske did not bid on or execute the contracts on any those sales, and the precise terms of any profit sharing arrangement that Mr. Fiske had with Butte Timberlands, according to Mr. Brewer, varied by sale. Mr. Fiske's business relationship with Butte Timberlands did not preclude him from entering into contracts for himself or jointly with other individuals or companies.

In 2006, after "learning the ropes," and making no money with Mr. Brewer, Mr. Fiske started entering into timber sales contract on his own. However, Mr. Fiske continued to do business in Washington state using the name "Butte Timberlands LLC" without Mr. Brewer's knowledge or permission. On April 26, 2006, Mr. Fiske registered the business name "Butte Timberlands, LLC" with the Washington Department of Licensing. On the state form, Mr. Fiske identified himself as the owner of the company and provided his home address as the company's address. He did not identify Mr. Brewer anywhere in the state form. Mr. Brewer was unaware that Mr. Fiske had started alleging that Butte Timberlands was his own company.

That same year, Mr. Fiske purchased and operated Washington state timber sales using the business name Butte Timberlands LLC, and identifying himself as the managing member of the company, without Mr. Brewer's knowledge or involvement. In bidding on both of the state sales, Mr. Fiske represented that he was the sole decision maker for Butte Timberlands in Washington and had the authority to bind the company.¹

¹ Testimony was received as to Kevin Fiske's lack of knowledge of corporate affairs, and the possibility that he believed he was the principal of Butte Timberlands registered in Washington.

In November 2007, Mr. Fiske called Chris Gulick, who was a friend of Mr. Fiske's and had his own business as a timber cruiser, to invite him to look at a prospective timber sale together. It was the Iron Reoffer timber sale in the Wenatchee Forest, Washington.² On November 14 and 15, 2007, Messrs. Fiske and Gulick personally inspected the sale site. After their initial cruise, they decided to bid on the sale jointly, with Mr. Gulick investing one-third of the costs and taking one-third of the profits.

On December 7, 2007, respondent sent to prospective bidders a letter and timber sale prospectus advertising the Iron Reoffer timber sale in the Wenatchee Forest. The prospective timber sale bidder list included, among others:

BUTTE TIMBERLANDS LLC
Rick Brewer
P.O. Box 1035
Fall Creek, OR 37438-0035

BUTTE TIMBERLANDS LLC
Kevin Fiske
22458 Dogwood Lane
Woodway, WA 98937-8701

On January 8, 2008, the FS held an oral bid meeting. Among others, the bid sheet indicated that Kevin Fiske and Chris Gulick attended the oral bid meeting. At that meeting, Mr. Fiske made an oral bid, and he was the high bidder. In making the bid, Mr. Fiske listed himself together with others as principals of Butte Timberlands on the bid sheet. Even though he was not a member of Butte Timberlands, Mr. Fiske signed the bid sheet as the "Washington Manager" of Butte Timberlands. Mr. Fiske also signed the January 8, 2008, bid confirmation as the "Purchaser" using his own name without reference to Butte Timberlands. In addition to identifying himself as the "Managing Partner" of Butte Timberlands in the contract, in a cashier's check to the FS dated January 7, 2008, for the required \$5200 bid guarantee, Mr. Fiske included his name in the subject line. He did the same on the cashier's checks dated January 18, 2008, for the required \$6000 performance bond and the \$400 balance left on the down-payment. Mr. Fiske used his personal address in the bid form, and requested that the address for Butte Timberlands be updated so that contract documents and correspondence would go directly to his address in Washington (as opposed to Butte Timberland's address in Oregon).

²

Although the FS did not advertise the Iron Reoffer timber sale until December 12, 2007, the sale had already been publicized in November 2007; as such, it was a "reoffer."

At the hearing, Mr. Gulick offered testimony about the arrangement he had with Kevin Fiske regarding the Iron Reoffer timber sale. He stated that he was aware that Mr. Fiske had, in the past, worked with Mr. Brewer under the business name “Butte Timberlands.” He testified further that Mr. Fiske had told him that Mr. Brewer was not participating in the Iron Reoffer sale. Mr. Gulick gave Mr. Fiske a check for \$3866.26, which Mr. Gulick and Mr. Fiske agreed was the amount that Mr. Gulick needed to provide to “buy into” a one-third share of the Iron Reoffer timber sale.

The FS awarded the Iron Reoffer contract on January 20, 2008. The contract states that “[t]he parties to this contract are The United States of America, acting through the Forest Service, United States Department of Agriculture, . . . and BUTTE TIMBERLANDS LLC, a corporation organized and existing under the laws of the State of Oregon.” The contracting officer signed the contract on behalf of the FS and Kevin Fiske signed the contract on behalf of Butte Timberlands. Various extensions were requested and granted on the contract. Contract performance had not begun as of October 2010.

In October 2010, Kevin Fiske was diagnosed with severe cognitive dysfunction. This inhibited his ability to perform the Iron Reoffer timber sale contract.³ Shortly after Mr. Fiske had received his diagnosis, he was told he could not work anymore, so his brother, Patrick Fiske, traveled to Washington to help Mr. Fiske close his business affairs and bring him back to Patrick Fiske’s residence, where he could be properly cared for. As part of closing up his business affairs, Mr. Fiske told Patrick Fiske that he needed to call Mr. Gulick. When questioned as to who Mr. Gulick was, Kevin told Patrick, “He’s the guy that was going to do the timber sales contract with me.” Patrick recalls Kevin expressly telling him that Mr. Brewer was not involved in the timber sale; and that only he and Mr. Gulick were involved. Thus, together, Kevin and Patrick called Mr. Gulick and told him that Kevin would no longer be able to perform under the timber sale contract and that they had contacted the FS and asked it to cancel the contract.

On November 1, 2010, Patrick Fiske signed a letter prepared by his counsel, Bryce Mackay, formally informing the FS’ contracting officer of Kevin Fiske’s condition and asking that the contract on the Iron Reoffer timber sale be canceled. As reflected in the letter, Patrick and his counsel understood at that time that “Butte Timberlands LLC” was Kevin’s company. After the FS received the letter, the regional claims forester reviewed records from the Oregon Secretary of State’s online database that showed that Kevin was not identified as a principal or agent of the Oregon company. The regional claims forester

³ As of the hearing, in the three-and-one-half years since his diagnosis, Mr. Fiske had progressed to the final stage of early onset Alzheimer’s disease and was receiving hospice care.

recommended contacting Mr. Brewer in regard to the cancellation to make sure that he had not authorized Mr. Fiske to act as Butte Timberlands' agent for purposes of bidding and executing the Iron Reoffer timber sales contract. Following that advice, the contracting officer packaged all the materials she received from Patrick Fiske and his attorney and sent them to Mr. Brewer to determine whether he had authorized Mr. Fiske to bid on and execute the contract on Butte Timberlands' behalf.

On December 21, 2010, Mr. Brewer called the contracting officer to discuss the package he had received and the Iron Reoffer timber sales contract. During that call, the contracting officer observed that Mr. Brewer appeared to be completely unaware of the sale prior to receiving her letter. Summarizing her recollection of the call, she testified:

[Mr. Brewer was going to check] the ["Kevin file"] - to see if he had anything on file giving Kevin authorization to bid and sign on the contract and [he noted] that sometimes Kevin did these things; but he was clearly not aware of the contract. He did not have a copy of the contract and he asked me to send him a copy of the contract. He talked a bit about Kevin; that he hadn't talked with Kevin in quite a long time; and he was surprised to hear that Kevin was ill and seemed concerned about that.

That same day, the contracting officer mailed Mr. Brewer a copy of the contract along with some other materials. Indicating he had no documents related to the Iron Reoffer sale other than what the FS had sent him, Mr. Brewer agreed during the December 21 telephone conversation that he would check his files for documentation that evidenced whether Kevin Fiske had been authorized to bid on and sign the Iron Reoffer timber sales contract for Butte Timberlands. Mr. Brewer did not state during that conversation that Butte Timberlands would complete the Iron Reoffer timber sales contract.

The contracting officer followed up on her December 21 telephone call with Mr. Brewer on January 3, 2011, with a letter. She reaffirmed the conditions that needed to be met for Mr. Brewer's company to operate the Iron Reoffer timber sale. The letter stated: "Prior to allowing any operations on this sale I am requiring you to provide me with documentation that supports Kevin Fiske had the authority to represent Butte Timberlands, LLC in both bidding on the sale and signing the timber sales contract."

During the time Mr. Brewer was looking for documentation of Mr. Fiske's authority, he spoke to Mr. Mackay, who was left with the impression that Mr. Brewer was reviewing the contract for the first time. Mr. Brewer waited until January 14, 2011, to respond to the contracting officer's inquiry as to whether Mr. Fiske was authorized to bid on and sign the Iron Reoffer timber sale on Butte Timberlands' behalf. In his response to the contracting

officer, Mr. Brewer included a document that he posited contained Mr. Fiske's authorization to bid or execute the Iron Reoffer timber sales contract on Butte Timberlands' behalf. However, the package only contained an authorization, dated several years earlier, in 2003, specifically for the Fawn timber sale.

Mr. Brewer characterizes the document relating to the 2003 timber sale as a "blanket authorization." Mr. Brewer explained that the reason he identified the particular sale, Fawn, by name in the document was because he "didn't want there to be any questions as to whether he was authorized." Mr. Brewer testified that he was not aware of Kevin Fiske bidding on any other FS contracts on Butte Timberlands' behalf and the record contains no evidence that Mr. Fiske signed any other bids beside the particular one that Mr. Brewer expressly authorized him to submit (the bid for the Fawn sale). Mr. Brewer admits that there is no document that specifically gave Mr. Fiske the authority to bid on or execute the Iron Reoffer timber sales contract on Butte Timberlands' behalf.

Not satisfied that Mr. Brewer had established that Kevin Fiske was authorized to bid on or execute the Iron Reoffer timber sales contract on Butte Timberlands' behalf, the contracting officer continued the process of cancelling the contract. She did not inform Mr. Brewer that she had found the authorization to be deficient or that she was pursuing the cancellation of the contract.

On February 16, 2011, Mr. Brewer submitted a document labeled "operating schedule," setting forth some dates on which Butte Timberlands purportedly would take certain steps toward completion of the sale's requirements.. The schedule showed operations beginning on February 15, the day before the schedule was mailed. The contracting officer received the operating schedule on February 24, four days before the normal operating season ended on February 28, 2011. During the hearing, Mr. Brewer admitted that he had no intention of beginning operations that operating season.

Satisfied that her inquiry established that Kevin Fiske had not been authorized to bid on or execute the Iron Reoffer timber sales contract on Butte Timberlands' behalf, but had instead purchased the sale in his individual capacity using the name "Butte Timberlands LLC," the contracting officer worked with Patrick Fiske to mutually cancel the contract and refund the \$12,000 the agency had received from Kevin Fiske for bid deposits.⁴ The Iron Reoffer timber sales contract was canceled on March 23, 2011. On November 10, 2012, Butte Timberlands submitted a certified claim to the contracting officer seeking \$706,659.55

⁴ By that time, Patrick Fiske had informed the contracting officer that he was Kevin Fiske's attorney-in-fact.

in damages. Butte Timberlands filed an appeal with this Board on January 29, 2013, after no final decision had been issued by the contracting officer. The matter was docketed as CBCA 3232.

At a hearing conducted by the Board, Mr. Brewer testified that he participated in the cruising and bidding of the Iron Reoffer timber sale. However, his testimony was, for the most part, confused and was largely rebutted upon cross-examination. For instance, Mr. Brewer testified that he drove to the site of the Iron Reoffer sale to meet Kevin Fiske “a few weeks before” the January 8, 2008 auction. A fuel log, provided as evidence, fails to corroborate that such travel occurred. Further, Mr. Brewer revised his account of how much time he spent in the sale area. In his handwritten notes, submitted earlier as part of the record, he claimed that he spent five days at the sale area. At the hearing, he testified that he had only spent two days. When confronted with this discrepancy, Mr. Brewer stated that his “memory isn’t that great.” Mr. Brewer’s personal travel log does not support a finding that he visited the sale site in the weeks before the January 8, 2008, auction. Mr. Brewer’s corporate credit card does not show that any travel expenses occurred that could be associated with the Iron Reoffer sale. Other receipts that the Board would expect a business to keep, e.g., hotel, meals, gas, etc., were not produced for the time Mr. Brewer was allegedly visiting the sale site.

Mr. Brewer also testified that he communicated with Kevin Fiske via telephone about bidding on the Iron Reoffer timber sale. Telephone records indicate that there may have been some communication by telephone between Mr. Brewer and Mr. Fiske. However, the content of those communications cannot be verified and the records do not show any communication during the months of November and December 2007, which is when the Board would have expected the two to have been coordinating travel to the sale site, as well as the prospective bidding.⁵ Although the sale was in a remote location and they both lived hours from the site, there is no indication that Mr. Fiske and Mr. Brewer spoke during the more than two months leading up to the January 8, 2008, auction date.

Discussion

Butte Timberlands seeks damages for lost profits it claims resulted from the Forest Service’s improper cancellation of a timber sales contract in which it posits that it had an interest. The facts reveal that Kevin Fiske, a past business associate of Rick Brewer, Butte Timberlands’ only member, bid on and was awarded the Iron Reoffer timber sales contract,

⁵ Mr. Brewer’s wife prepared the telephone records by copying the pages that had relevant communications and omitting those pages that did not contain relevant communications.

using the Butte Timberlands name but without Mr. Brewer's knowledge or permission. After Mr. Fiske became incapacitated, the agency canceled the contract. At the time the contract was canceled, no performance had occurred, and Butte Timberlands had not expended any money on the contract. However, Butte Timberlands maintains that it was a party to the contract and that the FS breached the contract when it canceled the contract without Butte Timberlands' consent.

Butte Timberlands has two primary theories as to why it was a party to this contract. First, Butte Timberlands asserts it was a party through the authorized actions of its agent, Kevin Fiske. Second, even if Mr. Fiske's actions were not authorized, Butte Timberlands posits that its principal, Rick Brewer, ratified Mr. Fiske's actions and thus Butte Timberlands became a party to the contract. Based on the foregoing, Butte Timberlands asserts that the contracting officer could not properly cancel the contract and the cancellation constituted a breach entitling it to damages, including lost profits.

The FS responds that the contracting officer acted properly when she canceled the contract, as the contract was void ab initio because of Kevin Fiske's misrepresentations made while bidding on and executing the contract on Butte Timberlands' behalf. The FS asserts that Mr. Fiske signed the contract using Butte Timberlands' company name without the knowledge or authorization of Butte Timberlands. The FS posits that Mr. Fiske's deception renders the contract void from its inception because it was obtained through improper means. Alternatively, the FS posits that, if the contract is not void ab initio, the FS manifested its intent to withdraw from the contract before the appellant could ratify it, and that any subsequent attempt to ratify was, therefore, ineffective.

A fundamental element of a binding contract is the authority of the individuals executing the contract to enter into the contract. Although a government agency may only be bound by agents possessing actual authority, an agent of a government contractor may bind the contractor if the agent has either actual or apparent authority. *Federal Crop Insurance Corp. v. Merrill*, 332 U.S. 380, 383-84 (1947); *Peter Bauwens Bauunternehmung GmbH & Co. KG*, ASBCA 44679, 98-1 BCA ¶ 29,551, at 146,497. An agent has actual authority when he has express authority to act for a principal. *See Leonardo v. United States*, 63 Fed. Cl. 552, 555-56 (2005). Apparent authority can be found in the absence of actual authority by looking to the conduct of the principal to assess whether the principal created a reasonable belief that the actor was authorized by the principal in the manner relied on. *Seven Seas Shipchangers, LLC*, ASBCA 57875, et al., 13 BCA ¶ 35,193, at 172,678 (2012). The burden of establishing the requisite authority of an agent rests upon the party who asserts it. *First Annapolis Bancorp, Inc. v. United States*, 72 Fed. Cl. 369, 376 (2006).

On its face, the Iron Reoffer timber sales contract appears to be between Butte Timberlands and the FS. However, evidence was presented that indicates Kevin Fiske was misappropriating the Butte Timberlands name, wrongly substituting himself as a principal of the company, and using Butte Timberlands to obtain timber sales contracts in Washington. In the case of Butte Timberlands, the authority to bind the LLC is vested in Mr. Brewer as sole member and manager of the LLC. Mr. Brewer may also authorize an agent to act on Butte Timberlands behalf. We find that Mr. Brewer never authorized Mr. Fiske to be an agent for Butte Timberlands on this timber sales contract.

Through the testimony of Mr. Brewer, Butte Timberlands posits that Kevin Fiske was authorized to bid on and execute the Iron Reoffer timber sale on its behalf. Other than Mr. Brewer's self-interested testimony, which we did not find compelling, there is no evidence that ties Mr. Brewer or Butte Timberlands to the bidding and award of the Iron Reoffer timber sales contract. Mr. Brewer's behavior when first contacted about the Iron Reoffer timber sales contract indicates that he was unaware of the existence of the contract. When initially contacted, he had no answer for the contracting officer as to why Butte Timberlands' name was on the contract. As to the 2003 written authorization for the Fawn timber sale, we do not find that document as establishing Mr. Fiske's authority to act for Butte Timberlands on the Iron Reoffer timber sales contract. The authorization was over four years old and specifically related to the 2003 Fawn timber sale. The document only gave Mr. Fiske the authority to bid on the Fawn sale. No authority was given by the document for Mr. Fiske to execute the Fawn contract or any other contract in the name of Butte Timberlands. Furthermore, it appears that there had been significant changes in the business relationship between Messrs. Fiske and Brewer in the time between when the 2003 Fawn authorization was signed and the Iron Reoffer timber sale was bid in early 2008. It does not appear that Messrs. Fiske and Brewer had done any business with each other since around 2005.

None of the evidence that Butte Timberlands produced supports a finding that it was in any way involved in the bidding and award of the Iron Reoffer timber sales contract. The absence of any evidence, such as receipts and credit card records to back up alleged activity that Mr. Brewer claims he had regarding the Iron Reoffer timber sale, is extremely problematic for appellant's case. Notably, Butte Timberlands was unable to produce any compelling evidence that tied Mr. Brewer or Butte Timberlands to the Iron Reoffer timber sale, other than the use of the Butte Timberlands name on the bid sheet and the contract. We are not convinced that prior to cancellation of the contract Mr. Brewer ever clearly told the contracting officer he had authorized Kevin Fiske to bid on and execute the Iron Reoffer timber sales contract on Butte Timberlands' behalf. It appears from the evidence that Mr. Brewer became actively interested in the Iron Reoffer timber sales contract only after he learned it had been canceled. Based on the totality of the circumstances, we find that Mr.

Fiske was not authorized to bid on or execute the Iron Reoffer timber sales contract on the behalf of Butte Timberlands.

To the extent Butte Timberlands argues that Mr. Brewer somehow ratified Mr. Fiske's actions, we find that Mr. Brewer's attempts to do so were too little and occurred too late. The basic concept of ratification requires that a superior official "have authority to ratify, knowledge of a subordinate's unauthorized act, and then must confirm, adopt, or acquiesce to the unauthorized action of his subordinate." *California Sand & Gravel, Inc. v. United States*, 22 Cl. Ct. 19, 27-28 (1990). However, "[w]here an agent has acted without authority and it is claimed that the principal has thereafter ratified his act, such ratification can only be based upon a full knowledge of all the facts upon which the unauthorized action was taken." *United States v. Beebe*, 180 U.S. 343, 354 (1901) Furthermore, an attempted act of ratification is not effective if there has been "any manifestation of intention to withdraw from the transaction made by the third party." Restatement (Third) of Agency § 4.05 (2006).

It is clear that Mr. Brewer, the sole member and manager of Butte Timberlands, never properly ratified Mr. Fiske's actions within the time frame required to be effective. Such ratification must occur prior to the non-ratifying party indicating its intention to cancel the contract. During the first telephone conference between the FS contracting officer and Mr. Brewer, the contracting officer told Mr. Brewer about the Iron Reoffer timber sale and informed him that she was considering cancelling the contract. However, the contracting officer also told Mr. Brewer that she would consider any proof he could provide showing that Kevin Fiske had the authority to bind Butte Timberlands for purposes of bidding on and executing the contract. During that conversation, Mr. Brewer evidenced no knowledge of the contract and asked the contracting officer to send him information about the contract. At that point Mr. Brewer lacked "a full knowledge of all the facts upon which the unauthorized action was taken" and could not ratify Mr. Fiske's actions. *Beebe*, 180 U.S. at 354. To the extent that any of Mr. Brewer's subsequent actions might be viewed as an attempt to ratify Mr. Fiske's actions, they were untimely and ineffective because they occurred after the FS' manifestation of intention to withdraw from the contract.

The totality of the evidence indicates that Kevin Fiske's actions in this contract were taken without the knowledge of Mr. Brewer and without Mr. Brewer's permission for him to act on Butte Timberlands' behalf. Mr. Fiske knew or should have known he was acting without proper authority when he bid on and executed the contract on Butte Timberlands' behalf. He also knew he never was a member of Butte Timberlands, let alone a managing partner. The Iron Reoffer contract was tainted from its inception by a series of false statements and misrepresentations made by Kevin Fiske who, over the years, appears to have used Butte Timberlands' name without permission or authority. A government contract tainted by fraud or wrongdoing is void ab initio. *Long Island Savings Bank v. United States*,

503 F.3d 1234, 1246 (Fed. Cir. 2007); *Godley v. United States*, 5 F.3d 1473, 1475 (Fed. Cir. 1993); *International Oil Trading Co.*, ASBCA 57491, et al., 13 BCA ¶ 35,393.

This contract was void ab initio, and the FS acted properly in timely cancelling the contract. As the contract was properly cancelled, appellant is not entitled to recovery.

Decision

This appeal is **DENIED**.

PATRICIA J. SHERIDAN
Board Judge

We concur:

ALLAN H. GOODMAN
Board Judge

JONATHAN D. ZISCHKAU
Board Judge