



UNITED STATES
CIVILIAN BOARD OF CONTRACT APPEALS

DENIED: December 3, 2008

CBCA 919

AYLWARD ENTERPRISES, INCORPORATED,

Appellant,

v.

GENERAL SERVICES ADMINISTRATION,

Respondent.

Henry W. Aylward, P.E., President of Aylward Enterprises, Incorporated, Aiea, HI, appearing for Appellant.

Leigh Erin S. Izzo, Office of General Counsel, General Services Administration, Washington, DC, counsel for Respondent.

Before Board Judges **DANIELS** (Chairman), **GILMORE**, and **HYATT**.

DANIELS, Board Judge.

The General Services Administration (GSA), respondent, moves the Board to grant it summary relief by denying an appeal filed by Aylward Enterprises, Incorporated (Aylward). We grant the motion.

Background

On January 11, 2005, Aylward submitted to a GSA contracting officer a claim in the amount of \$326,842. This amount was said to represent the cost Aylward and its subcontractors incurred in performing renovation work at Fort Shafter, Hawaii, which was

allegedly directed by Mr. William Wong of the United States Army Installation Management Agency (IMA) subsequent to the final payment under a contract Aylward had with GSA for similar work. The contracting officer denied the claim on the ground that GSA had paid Aylward all that it had agreed to pay under the contract and Aylward had released the Government from any claims arising from that contract. Aylward appealed this decision to the General Services Board of Contract Appeals. That board dismissed the appeal for lack of jurisdiction, on the ground that the claim had not been certified by the contractor. *Aylward Enterprises, Inc. v. General Services Administration*, GSBCA 16649, 06-2 BCA ¶ 33,298.

On September 23, 2005, Aylward resubmitted its claim to the GSA contracting officer, this time including the certification specified in the Contract Disputes Act of 1978, 41 U.S.C. § 605(c)(1) (2000). The contracting officer never responded to the claim as certified. Aylward has now appealed the deemed denial of that claim. After the General Services Board issued its decision and before Aylward filed its appeal, the General Services Board ceased to exist, and its functions, cases, and personnel were transferred to the Civilian Board of Contract Appeals. Pub. L. No. 109-163, § 847, 119 Stat. 3136, 3391 (2006). This appeal was filed with the Civilian Board.

The facts which were recited in the General Services Board's decision were uncontested then and remain uncontested now. As the successor to the General Services Board -- indeed, two of the members of the panel deciding this case were also members of the panel that decided the earlier case (the third member of the earlier panel has retired) -- we consider that those facts apply to this case, too. We summarize them here.

On September 25, 2002, GSA awarded to Aylward a contract for renovation work at Fort Shafter, Hawaii. The contract was subsequently amended on several occasions to add more work and increase payments. GSA ultimately paid Aylward \$1,109,434 under the contract.

On February 3, 2004, in conjunction with the final payment, Aylward's president, on behalf of the corporation, signed a release of claims which provided:

The undersigned contractor, pursuant to the terms of Contract No. GS-09P-02-KYC-0063/POA3265347 between the United States of America and said contractor for the RENOVATION OF HEADQUARTERS BUILDING 104 AND BUILDINGS 334 AND 121 FORT SHAFTER, HAWAII located at FORT SHAFTER, HAWAII hereby release[s] the United States from any and all claims arising under or by virtue of said contract or any modification or change thereof except as follows: *(Here list*

any claims against the Government and the amounts thereof. If none, so state.)

NONE.

In addition to summarizing uncontested facts from our earlier decision, we note the following additional uncontested facts. In her decision denying Aylward's uncertified claim, the contracting officer suggested that because the work in question was accomplished after the release had been signed and allegedly at the direction of an IMA employee, Aylward "may consider submitting a claim to the IMA directly." Appeal File, Exhibit 44 at 1. On March 16, 2005, Aylward wrote to the commanding officer of the IMA at Fort Shafter, asking that a contract be issued with regard to this work. Respondent's Motion for Summary Relief, Exhibit 1. In this letter, Aylward stated that "the work we did . . . was not part of the GSA contract." *Id.* at 3.

Discussion

Aylward bases its right to recovery from GSA on two assertions. First, Aylward contends that the release it signed to secure final payment from GSA has no bearing because the release states that it pertains to contract number GS-09P-02-KYC-0063, but the contract Aylward performed under was GS-09P-03-KYC-0063. We do not find the difference in contract numbers to have any significance. The contract as awarded contained the same "02" identification which is recited in the release. Appeal File, Exhibits 12, 40. The "02" designation was also used on nine of the eleven payment vouchers. *Id.*, Exhibits 17, 18, 31-33, 37-41. The notice to proceed, the four contract modifications, two of the payment vouchers, and the contracting officer's decision on the uncertified claim used the "03" designation. *Id.*, Exhibits 13, 16, 19-21, 26, 36, 44. There is nothing in the record, and nothing contained in Aylward's opposition to the motion for summary relief, which would indicate that "02" and "03" were different contracts. We see nothing more than sloppy record keeping here.

Aylward's second contention, carried forward from the earlier case, is that after it signed the release of claims on its contract with GSA, the IMA's Mr. Wong gave oral assurances that if Aylward performed additional work, it would be paid for having done so. Aylward said in the earlier case that it agreed to proceed "with the understanding that a change to the GSA contract was forthcoming." Aylward now alleges more specifically that "Mr. William [Wong] led us to belief in his words and actions that he had contract authority to modify" the GSA contract. Complaint ¶ 7.

Mr. Wong denies that he was ever a contracting officer's representative on the contract Aylward had with GSA. Respondent's Motion for Summary Relief, Exhibit 2 at 3. He also denies that he advised Aylward to perform work without a contract and that paperwork would follow. *Id.* at 4. He says that Aylward was not authorized to perform the additional work in question. *Id.* at 3.

Because Aylward is the party opposing the motion for summary relief, we must at this stage of the proceedings accept its allegations as true. Even if Mr. Wong conveyed the impression that he could modify the GSA contract to cover the work Aylward performed after it signed the release, however, that would not help Aylward secure the recovery it seeks. As the General Services Board pointed out in its decision, the best that can be said for Aylward's position is that Aylward had an implied-in-fact contract with GSA to continue working.

[T]he existence of such a contract is dependent in part on proof of actual authority on the part of a government representative to bind the government, and the contractor's pleadings cannot be stretched so far as to imply that Mr. Wong had actual authority to bind GSA. *See Wiggs v. Environmental Protection Agency*, GSBCA 16817-EPA, [06-1 BCA ¶ 33,246, at 164,775] (citing *Schism v. United States*, 316 F.3d 1259, 1278 (Fed. Cir. 2002) (en banc), *cert. denied*, 539 U.S. 910 (2003); *Flexfab, L.L.C. v. United States*, 424 F.3d 1254, 1265 (Fed. Cir. 2005)).

Aylward, 06-2 BCA at 165,129. As occurred in the case before the General Services Board, in responding GSA's current motion, Aylward has not presented any evidence that Mr. Wong had actual authority to bind GSA.

Furthermore, Aylward's actions belie its assertions. It told the IMA that it wanted to be paid by that agency for the additional work because "the work we did . . . was not part of the GSA contract."

It is plain from the uncontested facts that Aylward's contract with GSA ended in February 2004, when Aylward signed a release of claims and GSA made final payment. Aylward has not presented any evidence on the basis of which we might find that its contractual relationship continued after that time, to cover work which Aylward performed for the IMA after the release was signed -- work which, as Aylward admitted, "was not part of the GSA contract." Consequently, GSA has no liability for whatever costs Aylward may have incurred in performing that additional work.

Decision

GSA's motion for summary relief is granted. The appeal is **DENIED**.

STEPHEN M. DANIELS
Board Judge

We concur:

BERYL S. GILMORE
Board Judge

CATHERINE B. HYATT
Board Judge