UNITED STATES
CIVILIAN BOARD OF CONTRACT APPEALS

DENIED: August 26, 2016

CBCA 2882

BRYAN CONCRETE & EXCAVATION, INC.,

Appellant,

v.

DEPARTMENT OF VETERANS AFFAIRS,

Respondent.

Bradley W. Andersen and Timothy J. Calderbank of Landerholm, P.S., Vancouver, WA, counsel for Appellant.

Brian R. Reed, Kristin Langwell, Glenn Sebesta, and Brent Pope, Office of Regional Counsel, Department of Veterans Affairs, Chicago, IL, counsel for Respondent.

Before Board Judges **SOMERS**, **DRUMMOND**, and **ZISCHKAU**.

SOMERS, Board Judge.

Bryan Concrete & Excavation, Inc. (BCE) appealed a contracting officer's decision to terminate a contract with BCE for default for failure to make progress. The contract required BCE to upgrade chiller and air handling equipment at a Department of Veterans Affairs (VA or the Government) medical facility in Danville, Illinois. Pending before us is the VA's motion for summary relief. The VA asserts that the contract, which was set aside

100% for eligible Service Disabled Veteran Owned Small Businesses (SDVOSB),[1] was void ab initio because BCE falsely certified that it was an eligible SDVOSB and the Government relied upon that misrepresentation in making the decision to award the contract. For the reasons explained below, we grant the VA's motion and find that the contract is void ab initio.

Background

In 1999, Jerry D. Bryan, a veteran of the United States Marine Corps with a 100% disability rating, started BCE. Mr. Bryan, together with his wife, Sherry Bryan, have always been the sole owners and managers of the company. Mr. Bryan is the president and the chair of the board of directors. Mrs. Bryan is the vice-president, secretary, and treasurer.

Mr. Bryan met Wayne Singleton in 2006, when Mr. Singleton hired BCE as a subcontractor on a federal fish hatchery project in White Salmon, Washington, where BCE performed some excavation and construction work for him. Apparently satisfied with the work, Mr. Singleton used BCE as a subcontractor in two other federal projects. During one of these projects, Mr. Singleton became aware that Mr. Bryan was a disabled veteran. Mr. Singleton told Mr. Bryan about various opportunities for disabled veterans to bid on federal projects that had been set aside for eligible SDVOSBs.

In 2008, Mr. Singleton offered to help BCE get qualified as a SDVOSB, to bid on federal contracts, and to manage those projects. Mr. Singleton volunteered to assist BCE in obtaining the required bonding, insurance, and subcontractors necessary to fulfill contract requirements. Mr. Singleton, doing business as Singleton Enterprises, a Georgia sole proprietorship, entered into a teaming agreement with BCE on January 20, 2009. Under the teaming agreement, BCE agreed to do several things, including (1) open a business checking

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[1] Eligible SDVOSBs are defined as: "[A] business not less than 51 percent of which is owned by one or more service-disabled veterans, or in the case of any publicly owned business, not less than 51 percent of the stock of which is controlled by one or more service disabled veterans, or in the case of a veteran with a permanent and severe disability, a spouse or permanent caregiver of such veteran." 38 CFR 74.1. The VA's Center for Veterans Enterprise (CVE) (now known as the Center for Verification and Evaluation) requires that the business must be directly owned by one or more veterans or service-disabled veterans, that the ownership be unconditional, and that the veterans or service-disabled veterans exercise control of "both the day-to-day management and long term decision-making authority of the business." Id. 74.3, 74.4.

account in Georgia for the purpose of receiving electronic wire transfer payments on contracts, with Mr. Singleton and one of his employees as signatories; (2) maintain workers' compensation, general liability, and automobile insurance, the cost of which would be reimbursed as part of BCE's direct costs; and (3), of particular relevance here,

> Upon award of each and every SDVOSB set-aside contract awarded to BCE, BCE will enter into a subcontract agreement with Singleton whereby the parties will agree that Singleton will perform all work required under the subject contract for an amount equal to the direct costs and overhead estimated to complete the subject contract plus ninety percent (90%) of the estimated gross profit for the subject contract.

Respondent's Motion for Summary Relief, Exhibit 6.

On March 11, 2010, the VA issued a solicitation for the upgrade of the chiller and air handling requirement, which indicated that the contract was 100% set aside for eligible SDVOSBs. The solicitation further indicated that the SDVOSB firm awarded the contract must perform at least 25% of the work with its own labor force.

The contracting officer received three bids in response to the solicitation. The first apparent low bidder submitted a teaming agreement for review. The contracting officer referred the matter to the Small Business Administration (SBA). When the apparent low bidder failed to provide information in response to SBA inquiries, the contracting officer decided to award the contract to BCE, which did not submit a teaming agreement.

At the time of contract award, the Veterans Benefits, Health Care, and Information Technology Act of 2006 (the Veterans Benefit Act or the Act), Pub. L. No. 109-461, §§ 502-503 (codified at 38 U.S.C. §§ 8127-818 (2012)) required an applicant to self-certify its status as an eligible SDVOSB in order to be listed on the database. The Act also required a company to certify its eligibility status in any proposal it submitted in order to be considered for an award. *See* Veterans Affairs Acquisition Regulation (VAAR), 48 CFR 819.7003(b) (2010). Thus, before she awarded the contract to BCE, the contracting officer confirmed that BCE was listed as an eligible SDVOSB on the Vendor Information Pages (VIP) website, an electronic database maintained by the VA pursuant to statutory requirements. *See* 38 U.S.C. § 8127(f) ("[T]he Secretary shall maintain a database of small business concerns owned and controlled by veterans and the veteran owners of such business concerns."); *Id*., § 8127(e) ("A small business concern may be awarded a contract under this section only if the small business concern and the veteran owner of the small business concern are listed in the database of veteran-owned businesses by the Secretary under subsection (f).").

After confirming BCE's status as an eligible SDVOSB, the VA awarded the contract to BCE on June 10, 2011. On or about July 5, 2011, the contracting officer received a call from Mr. Bryan, who advised her that BCE may have made a mistake in its bid. The contracting officer advised Mr. Bryan that he should have told her about the mistake in bid when she requested information related to her responsibility determination, or during a conversation that he had with another VA employee on June 7, 2010. Mr. Bryan informed the contracting officer that he did not actually speak with the VA, and that another person, Wayne Singleton, who Mr. Bryan identified as his business manager, had represented himself to be Mr. Bryan during the telephone call. The contracting officer expressed her dismay and asked Mr. Bryan to speak with Mr. Singleton about the need to properly identify himself to callers or on e-mail messages when dealing with the VA on contract matters.

The contracting officer sent Mr. Bryan a notice of contract award and other information by e-mail on July 19, 2010. The notice of award informed BCE of the due date for submitting performance and payment bonds, together with a current certificate of insurance. On July 21, 2010, the contracting officer received an e-mail message from Mr. Bryan in which BCE asserts that it had made a mistake in bid because it failed to include the cost for one of the contract requirements, specifically, asbestos removal.[2] In a telephone conversation on July 29, 2010, the contracting officer told Mr. Bryan that any asbestos abatement work would be paid for by the VA either through a modification to the contract or by a purchase order. Mr. Bryan informed the contracting officer that Mr. Singleton would be available on August 5, 2010, and would be working on obtaining the performance and payment bonds.

When the contracting officer did not receive the bonds when promised, she sent an e-mail message to BCE seeking an update on the status of those bonds, and later, on August 30, 2010, the contracting officer sent, by certified mail, a cure notice advising BCE that it was in danger of having the contract terminated for default based upon its failure to provide the required bonds. The cure notice was returned unclaimed on September 24, 2010. The contracting officer then contacted Mr. Bryan by e-mail, forwarding a copy of the cure

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[2] The contracting officer's declaration of July 14, 2016, asserts that the letter concluded by requesting "modification of our bid by $185,163, the amount of our mathematical bid mistake, to our intended bid amount of $2,249,708." The contracting officer also states that Mr. Bryan did not state in the letter that he wished to withdraw BCE's bid, that Mr. Singleton had signed the contract on his behalf, or that Mr. Singleton had forged his signature, allegations appellants have raised in this litigation. The letter referenced does not appear in the appeal file.

notice and a copy of the unclaimed receipt. Mr. Bryan responded by e-mail on September 26, 2010, informing the contracting officer that the bonds and insurance certificate had been mailed. Mr. Bryan explained, "We haven't been back to Washington in quite a while." He provided the contracting officer with an alternative address in Georgia and a new office phone number, fax number, and e-mail address. Mr. Bryan stated, "In my absence, Wayne Singleton, one of our project managers, has the authority to act and sign on our behalf with respect to any matters related to the above referenced contracts."

The contracting officer received the performance and payment bonds on September 30, 2010. She held a preconstruction conference on October 1, 2010. Mr. and Mrs. Bryan attended the conference, as did several others. The participants completed a preconstruction checklist and conducted a site visit.

After a series of problems occurred during performance of the contract, the contracting officer terminated the contract for default. BCE appealed the termination to the Board. During the course of discovery, the VA discovered that BCE had entered into a teaming agreement with Mr. Singleton (who was not a service-disabled veteran), through which Mr. Singleton took over management and control of BCE. BCE did not meet the eligibility requirements for SDVOSB contracts as a result of the teaming agreement.

BCE maintains that Mr. Singleton did not possess authority to sign documents and enter contracts on behalf of BCE. BCE contends that Mr. Singleton, and not Mr. Bryan, signed the contract by forging Mr. Bryan's signature. BCE admits, however, that it and/or its representative submitted paperwork to the VA certifying that it was an eligible SDVOSB for the purposes of receiving set-aside contracts, despite the existence of the teaming agreement. BCE's attorney, in a declaration dated March 16, 2016, stated that Mr. Singleton had "suckered the Bryans and other disabled veterans into allowing him to bid for them on federal contracts using their disabled status, otherwise known as the 'rent-a-vet' scheme."[3]

[3] A press release issued on June 20, 2013, by Sally Quillian Yates, then the United States Attorney for the Northern District of Georgia, stated that "Arthur W. [Wayne] Singleton has been sentenced to two years in prison for fraudulently obtaining several government construction contracts reserved for veterans with service-related disabilities." The release noted that Mr. Singleton's prison sentence would "be followed by two years of supervised release" and that Mr. Singleton would be required to pay restitution in the amount of $181,000.

Discussion

I. The Standard for Summary Relief

A party seeking summary relief bears the burden of establishing the absence of any genuine issue of material fact, and all justifiable inferences must be drawn in favor of the non-movant. *Celotex Corp. v. Catrett*, 477 U.S. 317 (1986); *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242 (1986). All significant doubt over factual issues must be resolved in favor of the party opposing summary relief. *Systems Management & Research Technologies Corp. v. Department of Energy*, CBCA 4068, 16-1 BCA ¶ 36,333, at 177,128 (citations omitted). However, "the party opposing summary judgment must show an evidentiary conflict on the record; mere denials or conclusory statements are not sufficient." *Mingus Constructors, Inc. v. United States*, 812 F.2d 1387, 1390-91 (Fed. Cir. 1987); *Turner Construction Co. v. Smithsonian Institution*, CBCA 2862, et al., 15-1 BCA ¶ 36,139, at 176,394.

If a motion is made and supported as required by Rule 56(a) of the Federal Rules of Civil Procedure, the adverse party may not rest upon the mere allegations or denial in its filings, but must set forth specific facts showing there is a genuine issue for trial. Fed. R. Civ. P. 56(e); *Celotex Corp.,* 477 U.S. at 322-24; *Partnership for Response & Recovery, LLP v. Department of Homeland Security*, CBCA 3566, et al., 14-1 BCA ¶ 35,805, at 175,114. "The non-movant must be able to provide additional evidence or point to some part of the record before the Board which indicates that the facts differ significantly from the way the moving party has presented them, or that they are subject to a reasonable interpretation other than that presented in the motion for summary judgment." *P.J. Dick Contracting, Inc.*, VABCA 3386, et al., 92-1 BCA ¶ 24,599, at 122,727 (1991) (quoting *Fire Security Systems, Inc.*, VABCA 3086, 90-3 BCA ¶ 23,235). "A fact is considered to be material if it will affect the Board's decision, and an issue is genuine if enough evidence exists that the fact could reasonably be decided in favor of the non movant after a hearing." *Tucci & Sons, Inc. v. Department of Transportation*, CBCA 4779, 16-1 BCA ¶ 36,258, at 176,887 (citing *V.I.C. Enterprises, Inc. v. Department of Veterans Affairs*, CBCA 1598, 09-2 BCA ¶ 34,284, at 169,363; *Charles Engineering Co. v. Department of Veterans Affairs*, CBCA 582, et al., 08-2 BCA ¶ 33,975, at 168,055-56). "Allegations without support are not evidence." *McAllen Hospitals LP v. Department of Veterans Affairs*, CBCA 2774, et al., 14-1 BCA ¶ 35,758, at 174,970 (quoting *Max Castle*, AGBCA 97-128-1, 97-1 BCA ¶ 28,833, at 143,845).

VA alleges that BCE knowingly misrepresented its status as an eligible SDVOSB in order to receive awards under VA's SDVOSB program, and that the Government relied on that representation in making its award decision. In light of this misrepresentation, the Government asserts that the contract is void ab initio.

It is well established that when a party to a contract induces the other party to enter into an agreement through fraud or misrepresentation, the contract 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); *J.E.T.S., Inc. v. United States*, 838 F.2d 1196, 1197, 1200 (Fed. Cir.) (1988); *Butte Timberlands, LLC, v. Department of Agriculture*, CBCA 3232, 14-1 BCA ¶ 35,794, at 175,077; *Dongbuk R&U Engineering Co.,* ASBCA 58300, 13 BCA ¶ 35,389, at 173,637. As the Court of Appeals for the Federal Circuit explained in *J.E.T.S., Inc.*:

> The contract . . . was procured by and therefore permeated with fraud. . . . J.E.T.S. obtained this contract by knowingly falsely stating that it was a small business. Had it stated the truth about its size, it would not have received the contract. A government contract thus tainted from its inception by fraud is void ab initio....

838 F.2d at 1200; *accord Long Island Savings Bank*, 503 F.3d at 1246. "This general rule protects the integrity of the federal contracting process and safeguards the public from undetectable threats to the public fisc." *Godley*, 5 F.3d at 1475 (citing *United States v. Mississippi Valley Generating Co.*, 364 U.S. 520, 565 (1961)). "It is this inherent difficulty in detecting corruption which requires that contracts made in violation of [a conflict of interest statute] be held unenforceable, even though the party seeking enforcement ostensibly appears entirely innocent." *Mississippi Valley Generating Co.*, 364 U.S. at 565.

"[T]o prove that a government contract is tainted from its inception by fraud and is thus 'void ab initio,' the government must prove that the contractor (a) obtained the contract by (b) knowingly (c) making a false statement." *Long Island Savings Bank*, 503 F.3d at 1246. In this case, the Government presents evidence that meets the *Long Island Savings Bank* test. There is no dispute that BCE obtained the contract. By its own admission, BCE, through its authorized representatives, filed paperwork with the VA to certify BCE's eligibility as an SDVOSB, but failed to disclose the teaming agreement which made BCE ineligible to bid on the contract.[4]

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[4] In its Response to VA's Statement of Uncontested Facts, BCE admits that "[p]rior to award of the subject contract, BCE and/or its representative submitted paperwork to VA's Center for Veterans Enterprise (CVE) certifying that it was an eligible Service Disabled Veteran Owned Small Business (SDVOSB) for purposes of receiving set-aside contracts", and that "Contract No. VA251-C-0837 was set-aside for SDVOSBs." BCE does not dispute that "Mr. Singleton took advantage of Jerry Bryan's disabled status and eligibility under the Set-Aside Program to gain improper control over BCE," and claims that as the result "of a forged signature, the June 11, 2010 chiller contract was not valid when

In sum, the Government has shown here that BCE obtained the contract through a knowing material misrepresentation of its eligibility to bid on SDVOSB set-aside contracts at the VA and with the intention of securing those contracts, and that the VA relied on BCE's misrepresentation in awarding those contracts.

As noted above, a nonmoving party need not present its entire case in response to a motion for summary relief to defeat the motion, but must present sufficient evidence to show evidentiary conflicts exist on the record as to "material" facts at issue. *Armco, Inc. v. Cyclops Corp.*, 791 F.2d 147, 149 (Fed. Cir. 1986); *A-Sons's Construction, Inc. v. Department of Housing & Urban Development*, CBCA 3491, et al., 15-1 BCA ¶ 36,089, at 176,206 (citing *Mingus Constructors, Inc.*, 812 F.2d at 1390-91). Here, in response to the VA's motion, BCE agrees that "Singleton's involvement in the submittal of the bid may have also rendered BCE ineligible under the set-aside program rules, which also served to render the VA's acceptance of that offer invalid," and admits that "at the time Singleton submitted the forged bid on April 12, 2010, Singleton's financial arrangement with the Bryans likely would have made BCE ineligible under the set-aside program."

Nonetheless, in an apparent attempt to create genuine issues of material fact, BCE presents several theories which, it asserts, require further development of the facts. The first theory appears to be that the parties entered into an "expressed or equitable agreement" between the VA and BCE, when BCE allegedly informed the contracting officer that the signature on the contract had been forged. BCE claims that the contracting officer ordered BCE to proceed with the project on September 30, 2010, and that the new contract was formed as either an express or implied-in-fact contract when BCE acknowledged receiving the notice to proceed on October 1, 2010.

We are not persuaded that the parties entered into an express or implied-in-fact contract. The evidence in the record does not support BCE's claim of a subsequent oral or implied contract agreement. In fact, BCE fails to cite to any documents, including its own discovery responses, correspondence between the parties at the time of the alleged oral agreement, or deposition testimony that supports its newly discovered theory of the case.[5] BCE never alluded to this agreement (or, indeed, to the alleged forged signature) in its notice of appeal or in its pleadings in this case. Despite years of discovery, the only evidence to

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the VA accepted the invalid offer."

[5] For example, despite having deposed the contracting officer, appellant does not provide any citations to the deposition transcript. Presumably, if appellant believed that the parties had entered into a new contract, appellant's counsel would have delved into this through questions to the contracting officer.

support the alleged "oral agreement" is the declarations submitted by appellant to support its opposition to the motion for summary relief. The declarations, submitted at the last hour without any contemporary support, are simply not credible. BCE presents no other affirmative evidence that would allow a reasonable fact finder to conclude otherwise. *See Anderson*, 477 U.S. at 248 (issues of fact are genuine for summary judgment purposes only "if the evidence is such that a reasonable jury could return a verdict for the nonmoving party"). Finally, to the extent that BCE asserts the existence of an implied-in-fact contract, an "express contract precludes the existence of an implied contract dealing with the same subject, unless the implied contract is entirely unrelated to the express contract." *JAVIS Automation & Engineering, Inc. v. Department of the Interior*, CBCA 938, 09-2 BCA ¶ 34,309, at 169,480, (citing *Atlas Corp. v. United States*, 895 F.2d 745, 754-55 (Fed. Cir. 1990) (citations omitted)). The implied-in-fact contract covers precisely the same subject matter as the express contract that had been awarded to BCE based upon its misrepresentations of its SDVOSB status.

Nor is BCE's appeal salvaged by its other legal arguments.[6] For example, BCE contends that it is entitled to assert promissory estoppel against the VA because it was somehow induced to perform the contract against its wishes. To the extent that BCE seeks relief under this doctrine, its argument fails. "[A] contractor cannot pursue, before the Board, a cause of action against the Government founded upon promissory estoppel." *1-A Construction & Fire, LLP v. Department of Agriculture*, CBCA 2693, 15-1 BCA ¶ 35,913, at 175,562 (citing *Embarcadero Center, Ltd.*, GSBCA 8526, 89-1 BCA ¶ 21,362, at 107,681).

Another theory presented by BCE is the claim of equitable estoppel, which, BCE says, can be used by a contractor to prevent the Government from changing positions. To invoke equitable estoppel, BCE must establish that (1) the Government knew the facts; (2) the Government intended its conduct to be acted on or its conduct must be such that the contractor reasonably believed that it was so intended; (3) the contractor was ignorant of the true facts; and (4) the contractor relied to its detriment on the Government's conduct. *Emeco Industries, Inc. v. United States*, 774 F.2d 1110, 1113 (Fed. Cir. 1985); *American Electronic Laboratories, Inc. v. United States*, 485 F.2d 652, 657 (Ct. Cl. 1973); *J.A. Jones Construction Co.*, ASBCA 43344, 96-2 BCA ¶ 28,517. As noted by BCE, the law also requires a showing of affirmative misconduct as a prerequisite for invoking this doctrine against the Government. *Rumsfeld v. United Technologies Corp.*, 315 F.3d 136, 1377 (Fed. Cir. 2003). The only evidence presented by BCE to support this theory is appellant's affiants' suggestion

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[6] Although we do not address each and every one of BCE's legal theories, we have considered them and find that they cannot overcome the fact that the contract is void ab initio based upon BCE's admitted fraudulent representations.

that the contracting officer knew that the contract was invalid, yet "to avoid the hassle of going through a new bid process, she threatened BCE into complying with its terms." In her declaration, the contracting officer denies being informed that Mr. Bryan's signature was a forgery, or that BCE did not meet the eligibility requirements for this set-aside contract. And, as noted by the Government, nothing in the written record, including BCE's responses to discovery or contemporary correspondence in the record, supports the theory that the contracting officer somehow knew that the contract was invalid, yet forced BCE to continue contract performance. Finally, BCE cannot establish the third element of the test, because it cannot show that it was ignorant of the true facts.

In sum, while BCE may believe that it has the right to enforce a new agreement that "adopts the terms of the agreement that has been deemed void," whether through equitable estoppel, promissory estoppel, or other legal theories, the law does not work that way. "No tribunal of law will lend its assistance to carry out the terms of an illegally obtained contract." *See Dongbuk R&U Engineering Co.*, ASBCA 58300, 13 BCA ¶ 35,389, at 173,639 (citing *Atlantic Contacting Co. v. United States*, 57 Ct. Cl. 185, 196 (1922))
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Decision

The appeal is **DENIED**.

JERI KAYLENE SOMERS
Board Judge

We concur:

JEROME M. DRUMMOND
Board Judge

JONATHAN D. ZISCHKAU
Board Judge