



UNITED STATES
CIVILIAN BOARD OF CONTRACT APPEALS

GRANTED: September 16, 2008

CBCA 964

GOVERNMENT MARKETING GROUP,

Appellant,

v.

DEPARTMENT OF JUSTICE,

Respondent.

Timothy Sullivan and Katherine S. Nucci of Thompson Coburn LLP, Washington, DC, counsel for Appellant.

Todd R. Bailey, Office of General Counsel, Federal Bureau of Prisons, Department of Justice, Washington, DC, counsel for Respondent.

Before Board Judges **DANIELS** (Chairman), **SOMERS**, and **STERN**.

SOMERS, Board Judge.

This appeal is from a decision of a contracting officer of the Department of Justice (DOJ), Federal Prison Industries, Inc. (FPI), doing business as UNICOR, asserting that Government Marketing Group (GMG) is indebted to the FPI in the amount of \$791,136. We have before us the parties' cross motions for summary relief. For the reasons discussed below, we deny respondent's motion for summary relief and grant appellant's motion for summary relief.

Background

FPI, operating under the trade name UNICOR, is a wholly-owned government corporation, as defined by 31 U.S.C. § 9101 (2000), within the Department of Justice.

UNICOR is a non-appropriated fund instrumentality (NAFI). *Government Marketing Group v. Department of Justice*, CBCA 71, 08-1 BCA ¶ 33,834, at 167,457 (citing *Logan Machinists, Inc. v. Federal Prison Industries*, DOTBCA 4184, 05-1 BCA ¶ 32,894).

On September 14, 1999, UNICOR awarded to GMG a contract which required GMG to provide a dedicated sales and customer service staff throughout the United States to market and sell specified furniture products, manufactured by federal prisoners, to government agency customers. The contract also included design services and delivery/installation services. Appeal File, Exhibit 4. The contract provided that the period of performance was one five-year base period and five one-year option periods. *Id.*

Under the terms of the contract, UNICOR agreed to pay GMG a monthly commission, using a formula set forth in the contract which was based upon a percentage of sales, and amounts for installation and design services based upon specified hourly rates. The contract's formula for the payment of commissions to GMG for sales of UNICOR products was based upon an averaging of the prior three fiscal years' actual net sales. According to the contract, "net sales are established when products are shipped, however, vertical integration sales to other factories will be excluded." Appeal File, Exhibit 4. The average net sales figure was called the "annual quota," and eighty percent of the annual quota was called the "annual base." The "monthly base" was calculated by dividing the annual base by twelve. *Id.*

On November 24, 1999, GMG and UNICOR representatives met to discuss various contract issues, including the costs associated with hiring and establishing a sales force. Respondent's Reply and Cross Motion for Summary Relief, Exhibit 1 (Declaration of Wendell Chandler (June 4, 2008)); Appellant's Reply to Respondent's Cross Motion for Summary Relief, Exhibit A (Declaration of James W. Yeatts (June 19, 2008)). The parties negotiated and agreed to numerous changes to the contract, which the parties confirmed in a bilateral modification. *Id.* Modification 0002, dated November 24, 1999, "establish[ed] the actual Base and Quota levels for the covered product lines; establish[ed] a start up payment schedule; to include Systems Furniture and Signage to the contract; establish[ed] a new pricing format; and incorporate[d] sales office locations." Appeal File, Exhibit 6. With respect to the "start up payment schedule," the modification provided as follows:

Thru February 2000, in lieu of the monthly fees as outlined in the contract, the contractor shall be paid a reduced monthly fee in the amount of \$197,784. This fee shall be paid by the 15th of the month

beginning December 15, 1999 through March 15, 2000. The monthly sales fee calculations shall begin with the month of March 2000.

Id. The modification reduced the quota fee from 5% to 4%. *Id.* Notably, the modification did not provide for or require repayment by GMG to UNICOR, either directly or by offset from future commissions, of the four reduced monthly payments made in December 1999 and January through March 2000. *Id.*

GMG performed the contract during the five-year base period and a portion of the first option period. In 2004, during the first option year, the parties mutually agreed to terminate the contract for the convenience of the Government. On January 13, 2005, they negotiated and executed a termination settlement agreement, set forth in contract modification 0013, making the termination effective January 31. Appeal File, Exhibit 17. The settlement agreement set forth the terms and conditions under which GMG would complete the installation of all pending orders and UNICOR would pay GMG for its services. The settlement agreement concluded with the following language:

The parties agree that this modification shall settle all outstanding issues related to this contract. In consideration of the modification set forth herein, the parties mutually release each other from any and all known or unknown liability relating to this contract.

Id.

In August 2005, a dispute arose between the parties concerning UNICOR's right to withhold payments due GMG pursuant to the settlement agreement. On December 23, 2005, the contracting officer issued a final decision "[p]ursuant to Federal Acquisition Regulation (FAR) 33.211" asserting that GMG owed UNICOR \$564,797.66. Appeal File, Exhibit 48. As to the final decision, GMG filed an appeal, which became CBCA 71. The parties jointly moved to stay the proceedings in CBCA 71 in order to attempt to settle their dispute. In its October 9, 2007, answer to GMG's complaint in CBCA 71, UNICOR alleged that "the parties did not provide for, and Modification No. 0002 did not include, any consideration in exchange for the agreed to monthly payments of \$197,784.00" and "these monthly payments must be repaid and remain a debt to the Respondent." On October 17, 2007, GMG moved to strike that portion of UNICOR's answer on the ground that the Government's claim had not been the subject of a final contracting officer's decision.

On November 6, 2007, UNICOR issued a final decision, asserting that GMG is indebted to FPI in the amount of \$791,136 under the contract on the ground that the four monthly payments made to GMG per the terms of modification 0002 “were not provided in return for any of the other goods or services listed in the modification” and “[i]n effect, . . . acted as contract financing to assist GMG in ramping up its activities and beginning performance on the contract.” Notice of Appeal, Exhibit. GMG filed its notice of appeal of the final decision with the Civilian Board of Contract Appeals (CBCA) on November 7, 2007. The CBCA docketed the appeal as CBCA 964.

At the parties’ joint request, the CBCA consolidated the appeal with GMG’s then-pending appeal in CBCA 71. On April 2, 2008, the Board issued its decision in CBCA 71 on the parties’ cross motions for summary relief. The Board determined that it had jurisdiction to decide the appeal and therefore denied respondent’s motion to dismiss for lack of jurisdiction. The Board also granted most of the relief sought by GMG. *Government Marketing Group v. Department of Justice*, CBCA 71, 08-1 BCA ¶ 33,834.

Pending before us are appellant’s motion for summary relief, the Government’s cross motion, and the parties’ reply briefs. We will address the jurisdictional issue raised by the Government first, and then move on to the merits.

Discussion

Jurisdiction

Section 847 of Public Law 109-163 established the CBCA and terminated the civilian agency boards of contract appeals established pursuant to section 8 of the Contract Disputes Act of 1978 (CDA), 41 U.S.C. 607. This legislation imbued the CBCA with jurisdiction as provided by section 607(d) of Title 41. It also provided:

The Civilian Board may, with the concurrence of the Federal agency or agencies affected--

(A) assume jurisdiction over any category of laws or disputes over which an agency board of contract appeals established pursuant to section 607 of this title exercised before the effective date of this section; and

(B) assume any other function performed by such a board before such effective date on behalf of such agencies.

41 U.S.C.A. § 438(c)(2) (West Supp. 2007). Further, in a “saving provision” Congress provided that this legislation would not affect any proceedings pending before any terminated agency board of contract appeals and required that any such proceedings be continued by the CBCA. Pub. L. No. 109-163, § 847(c)(2), 119 Stat. 3136, 3393 (2006).

The Government argues that this Board lacks jurisdiction to hear this appeal because the language of the statute, which grants the Board jurisdiction, states that the Board may only exercise jurisdiction over an appeal with the concurrence of the federal agency affected. This argument, however, is flawed. As we have previously ruled, according to the terms of the contract and applicable regulation, DOJ, of which UNICOR is a part, and appellant agreed to have their disputes decided by an agency board. At the time, DOJ had designated the Department of Transportation Board of Contract Appeals as the agency board to hear the dispute; DOJ did not have its own agency board. The fact that the legislation terminated the various civilian agency boards and established one unitary Civilian Board cannot change the primary purpose of the parties when they entered into the contract, i.e., the desire to have disputes resolved by an agency contract appeals board. 08-1 BCA at 167,458.

In reality, this appeal arises from the same facts and circumstances as CBCA 71. The central issue addressed in CBCA 71 is whether the settlement agreement resolved all claims, which would preclude UNICOR from withholding from sales commissions amounts in excess of that amount agreed upon by the parties in modification 0013. GMG argued that the modification had settled all outstanding issues relating to the contract and that the parties had mutually released each other from any and all known or unknown liability relating to the contract. In response, UNICOR contended that the settlement agreement did not preclude it from withholding amounts pursuant to the terms of the contract as they existed before the settlement agreement.

In this appeal, again, the central issue is whether or not the termination settlement agreement resolved all claims. As UNICOR initially asserted in answer to CBCA 71, and subsequently, in the November 6, 2007, contracting officer’s final decision, UNICOR contends that, despite the termination agreement, GMG was not entitled to retain the payments provided for previously pursuant to the terms of bilateral modification 0002. And in response, as in CBCA 71, GMG argues that modification 0013 served as a mutual release, resolving all outstanding claims.

Whether or not the termination settlement agreement could provide the basis for a compromise of an alleged debt to the Government that had been in existence at the time of the negotiation is an issue that arises from the same facts and circumstances as those addressed in CBCA 71. As we have already determined, we possess the jurisdiction over that appeal. Our jurisdiction over this appeal, like that over CBCA 71, is not impacted by the termination of the various civilian boards and the creation of the CBCA. We possess jurisdiction to entertain the second appeal.

Release

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 justiciable 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). When both parties move for summary relief, each party's motion must be evaluated on its own merits and all reasonable inferences must be resolved against the party whose motion is under consideration. *Anderson*, 477 U.S. at 248; *First Commerce Corp. v. United States*, 335 F.3d 1373, 1379 (Fed. Cir. 2003); *DeMarini Sports, Inc. v. Worth, Inc.*, 239 F.3d 1314, 1322 (Fed. Cir. 2001). The fact that the parties have cross-moved for summary relief does not impel a grant of one of the motions; each motion must be independently assessed on its own merit. *California v. United States*, 271 F.3d 1377, 1380 (Fed. Cir. 2001).

Here, the cross motions are based upon one central issue -- whether the settlement agreement precludes UNICOR from attempting to recoup from GMG \$791,136, which UNICOR had paid to GMG pursuant to the terms of bilateral modification 0002, on the grounds that GMG failed to provide the services for which it had been paid. UNICOR argues that the payments should be construed as unauthorized contract financing under FAR 32.001, or, alternatively, as fixed monthly fees paid for services not rendered, in violation of 31 U.S.C. § 3324. In addition, UNICOR asserts that because the parties did not discuss these payments during the negotiation of the termination settlement agreement, the parties did not intend to include resolution of this issue by the settlement agreement. Finally, UNICOR asserts that the contracting officer did not have the authority to waive or compromise the debt created by the erroneous payments.

In response, GMG contends that the four payments did not create a debt because they were made as a "reduced monthly fee" in lieu of the commission payments to which GMG was otherwise entitled under the contract. GMG notes that,

pursuant to the formula for payment contained in the contract, GMG became entitled to commission payments immediately upon award of the contract, based upon all net sales for covered UNICOR products regardless of whether GMG was responsible for the sales. Appellant's Reply to Respondent's Cross Motion for Summary Relief, Exhibit A (Yeatts Declaration ¶ 3). Thus, GMG concludes, the Board should reject UNICOR's contention that the payments should be construed as some form of unauthorized contract financing.

As we held in CBCA 71, the plain language of the agreement provides that its purpose was to terminate the contract and define "all liabilities and fees associated with this termination." 08-1 BCA at 167,462. From this language, it is clear that the parties intended to bring the contract to an end and to enumerate the outstanding obligations of the parties. *Id.* Thus, the parties set forth the basis for calculating final sales commissions. *Id.* If UNICOR believed that GMG owed UNICOR \$791,136 for allegedly improper amounts paid to GMG in accordance with bilateral modification 0002, it should have raised that issue during the negotiation of the termination settlement agreement.

Decision

Appellant's motion for summary relief is granted. As a result, the appeal is **GRANTED**. Respondent's motion to dismiss for lack of jurisdiction and its cross motion for summary relief are denied.

JERI KAYLENE SOMERS
Board Judge

We concur:

STEPHEN M. DANIELS
Board Judge

JAMES L. STERN
Board Judge