GOVERNMENT OF THE DISTRICT OF COLUMBIA
CONTRACT APPEALS BOARD

APPEAL OF:

J.E. TIBBS CONSTRUCTION COMPANY	)	
	)	CAB No. D-1169
Under Contract P.O. No. CBOP0000809	)	

For the Appellant: Harry T. Spikes, Esq. For the District of Columbia: Jennifer L. Longmeyer, Esq., Assistant Corporation Counsel.

Opinion by Chief Administrative Judge Jonathan D. Zischkau, with Administrative Judge Matthew S. Watson, concurring.

OPINION

LexisNexis Filing ID 6627691

Appellant J.E. Tibbs Construction Company entered into a contract with the District of Columbia at a stated price of $33,079 to paint the 6th floor at the District's One Judiciary Square building. After the work was completed, though not fully to the satisfaction of the District, the contracting officer notified Tibbs that its contract was "cancelled", apparently because the contracting officer had violated law and regulation in executing the contract, and that Tibbs should submit a claim for compensation based on Tibbs' actual costs of performance. Tibbs submitted a claim in the amount of $30,747.76. In his final decision, the contracting officer determined that Tibbs had established performance costs of $10,517.82, but, after deducting amounts for an improper advance payment made to Tibbs at the start of performance, and damages Tibbs caused during performance, he concluded that Tibbs had been overpaid by $4,703.02. The District filed a claim against Tibbs for the overpayment. Tibbs appealed both the final decision and the District claim. Tibbs claims he is entitled to $13,974. We conclude that Tibbs is entitled to a contract balance of $10,487.47, which amount will be withheld by the District until Tibbs has shown that it has fully paid its workers the amounts they are due as determined by the United States Department of Labor and complied with applicable payroll tax laws.

BACKGROUND

On September 22, 2000, Purchase Order No. CBOP0000809 was awarded to Appellant J.E. Tibbs Construction Company to paint the 6th floor, housing the Office of the Attorney General (formerly the Corporation Counsel) at the District Government's One Judiciary Square building, located at 441 4th Street, N.W. (Appeal File ("AF") Ex. 1). The work was to begin immediately and was to be finished on or before September 30, 2000. (AF Ex. 2). At Tibbs' request, the District issued an advance payment in the amount of $11,026.33. (AF Ex. 4, at Bates No. 0000064; Hearing Transcript ("Tr.") 275-76). The total contract amount listed on the purchase order was $33,079, and corresponds to the low bid made by Tibbs. (AF Ex. 2). Mr. Debor Dosunmu, a contracting officer for the District, signed the purchase order on behalf of the District. (AF Ex. 2). Mr. John Tibbs is the owner of J.E. Tibbs Construction Company. (Vol. 1 Tr. 205). On September 23, 2000, Tibbs

began performance. Ms. Sherry Roberts, support services manager for the Office of the Attorney General, testified that from the very beginning, there were serious performance problems. (Vol. 1 Tr. 133). On the Monday after Tibbs began the painting work, she was bombarded with complaints from District employees on the 6th floor who complained of paint on the floors and desks, missing items from their offices, broken glass in a picture frame, and beer cans "spread over the office." (Vol. 1 Tr. 133-37, 138-41). The missing items included postage stamps, CDs, running shoes, a briefcase, and office property including cell phones and tape recorders. (Vol. 1 Tr. 135; AF Ex. 4, at bates 65). Although these were serious concerns, Ms. Roberts did not feel that Tibbs' contract should be terminated for default at that early point in performance but instead she chose to work with Mr. Tibbs to have his company correct the performance problems. (Vol. 1 Tr. 133-34). When Ms. Roberts told Mr. Tibbs of the problems from the initial weekend, he assured her that he would take care of the problems and indicated to her that he had already spoken with his workers about their prior work. (Vol. 1 Tr. 138-39). Ms. Roberts met with Mr. Tibbs on a near daily basis. (Vol. 1 Tr. 136, 212). Ms. Roberts continued to inform Mr. Tibbs about problems on the job site, including paint on the carpets, missing items from the offices, and Tibbs' employees drinking alcoholic beverages on the job. (Vol. 1 Tr. 137-39; Vol. 2 Tr. 17, 160). If Mr. Tibbs was not available, Ms. Roberts spoke with Tibbs' foreman, Mr. Richmond. (Vol. 2 Tr. 16, 161; Vol. 1 Tr. 137-38). If neither Mr. Tibbs nor his foremen were available, Ms. Roberts would leave handwritten notes telling them what work had to be done and what, if any, problems that had to be corrected that day. (Vol. 1 Tr. 141).

Tibbs did not complete the contract work until mid- to late-October 2000. (Vol. 1 Tr. 159, 166, 212). By the time of job completion, Ms. Roberts concluded that Tibbs had done "a shabby job." (Vol. 1 Tr. 138, 174-75; Vol. 2 Tr. 140). As an example, Tibbs' workers did not move furniture away from the office walls, but painted around the furniture. (Vol. 1 Tr. 185). This "shabby job" included paint stains all over the carpet on the 6th floor. (Vol. 1 Tr. 164, 165). When informed of the paint stains, Tibbs offered to clean the carpet but he was unsuccessful in his attempt to clean the carpet stains. (Vol. 1 Tr. 165). In order to clean the paint stains from the carpet, the District was forced to bring in its maintenance company, Design Mark Services, and pay a fee in addition to its regular cleaning contract with Design Mark. (Vol. 1 Tr. 101, 188-191, 121-125). The area manager for the Office of Property Management, Mr. Leon Walker, was responsible for contacting Design Mark about cleaning the 6th floor. (Vol. 1 Tr. 187; 188). Mr. Walker measured the 6th floor and submitted the total square footage of the 6th floor to Design Mark for pricing. (Vol. 1 Tr. 189-190; AF Ex. 1, at bates 27-30). Design Mark cleaned the paint stains from the carpet and was paid $3,126.20 for cleaning the carpet on the 6th floor. (Vol. 1 Tr. 102, 119, 192-193).

By letter dated November 29, 2000, the contracting officer stated to Tibbs:

> This is to notify you that the purchase order . . . in the amount of $33,079.00 is hereby cancelled. The remaining balance from that purchase order is also cancelled.
>
> If you have any claim against this purchase order, you may forward your claim in writing to Mr. Debor Dosunmu . . . .

(AF Ex. 3). The letter does not expressly state that it is a final decision nor does it advise Tibbs of

its appeal rights. (Vol. 1 Tr. 33, 39). The contracting officer testified that he cancelled the contract at the direction of the Chief Procurement Officer because *inter alia* the purchase order amount of $33,079 exceeded the small purchase authority limit of $25,000 provided by the Procurement Practices Act. (AF Ex. 1). Because of this procurement violation, the District's Chief Procurement Officer reprimanded the contracting officer. (Vol. 1 Tr. 26-27). There is no evidence in the record that a contracting officer with contracting authority above the small purchase authority ratified the contract at the amount of $33,079.

As a result of the November 29, 2000 letter, Mr. Dosunmu met with Mr. Tibbs on three separate occasions, on December 1 and 19, 2000, and March 18, 2001, concerning his claim for costs, during which Tibbs submitted or resubmitted various receipts, times sheets, certified payroll records, and other documentation of its actual costs of performance. (Vol. 1 Tr. 42-46; AF Exs. 1, 4).

The contracting officer testified that he had his staff send two final decision letters, both dated June 20, 2001, by certified mail and facsimile to Tibbs. (Vol. 1 Tr. 77-78; *cf*. Nov. 27, 2002 Dosunmu Aff. ¶¶ 3-5).

One was a final decision (1) declaring the contract void for violating statute and regulation, (2) determining that Tibbs actual costs of performance were $10,517.82, (3) assessing deductions against Tibbs for the District's expense in cleaning paint stains from the carpets ($3,126.20), and the replacement cost for missing District items ($1,068.31), (4) deducting an advance payment of $11,026.33 made to Tibbs, and (5) concluding that Tibbs owed the District $4,703.02. (AF Ex. 1). This first decision informed Tibbs of its right to appeal to the Board within 90 days from the date of receipt of the decision.

The other final decision determined that Tibbs had been overpaid in the amount of $4,703.02 and demanded return of the overpayment within 30 days. This decision did not set forth the contractor's appeal rights.

Tibbs testified that he never received the first final decision relating to the contract cancellation and his claim, but rather received two envelopes around June 20, 2001, one containing an original, the other containing a copy, of the same final decision relating to the District claim against Tibbs for overpayment. Tibbs' attorney submitted an affidavit supporting Tibbs' testimony that he did not receive notice of the first final decision until October 15, 2001, when Tibbs's attorney handed Tibbs a copy of that final decision. On October 16, 2001, Tibbs filed a notice of appeal from the final decision canceling the purchase order and denying Tibbs' claim for compensation.

DISCUSSION

We exercise jurisdiction over this appeal pursuant to D.C. Code § 2-309.03(a)(2).

The first issue we decide concerns timeliness of the appeal of the first final decision. The District claims that Tibbs untimely filed its notice of appeal from the final decision which declared the contract void and denied Tibbs any compensation. After reviewing the record, we conclude that Tibbs timely filed the notice of appeal on October 16, 2001, based on the testimony of Tibbs and his attorney that Tibbs first received notice of the decision on October 15, 2001. The contracting officer did not persuasively contradict Tibbs' version of receiving an original and a copy of the other final decision which demanded that Tibbs repay the District for a claimed overpayment. Since the second final decision did not contain a notice of appeal rights, it was timely appealed as well.

The second issue is whether the Chief Procurement Officer correctly determined that the purchase order was void *ab initio* based on the purchase order exceeding the small purchase dollar threshold, the inadvertent omission from the purchase order of the applicable provisions of the Service Contract Act, and the erroneous allowance of an advance payment to Tibbs. We conclude that these violations do not render the contract void *ab initio*. The applicable Service Contract Act provisions are incorporated into the contract by operation of law and thus the provisions are applicable even if not expressly identified in the contract documents. The advance payment is not a violation that strikes at the formation of the contract and thus it provides no basis for declaring the contract void. The purchase order's price which exceeds the small purchase threshold presents the more difficult issue. In this case, we look to the partial validity rule found in the Restatement (Second)of Agency, § 164, which provides:

> § 164 Contracts Unauthorized in Part
>
> (1) Except as stated in subsection (2), an agent for a disclosed or partially disclosed principal who exceeds his powers in making an unauthorized contract with a third person does not bind the principal either by the contract as made or by the contract as it would have been made had he acted in accordance with his authority.
>
> (2) Where the only difference between the contract as authorized and the contract as made is a difference as to amount, or the inclusion or exclusion of a separable part, the principal is liable upon the contract as it was authorized to be made, provided that the other party seasonably manifests his willingness to accept the contract as it was authorized.

See DeBoer Construction, Inc., v. Reliance Insurance Co., 540 F2d 486, 493 (10th Cir. 1976), *cert. denied*, 429 U.S. 1041 (1977). In the present case, no contracting officer with authority in excess of the small purchase authority ever ratified the contract. However, Tibbs manifested its willingness to accept the contract as valid at the amount of $25,000. (Appellant's Post Hearing Reply Brief, at 3). Accordingly, the contract is valid at the amount of $25,000.

The District claims a deduction for the District's expense in cleaning paint stains from the carpets caused by Tibbs in the amount of $3,126.20. We conclude that the evidence supports the District's offset for cleaning of the carpets by Design Mark Services and we have found adequate evidence from the testimony that Design Mark was paid that amount for the cleaning. (Vol. 1 Tr. 116-128). The District also seeks an offset of $1,068.31, constituting the replacement cost for missing District items allegedly stolen by some of Tibbs' workers. The District did not meet its burden of establishing either the amount of the expenses or that Tibbs' workers were responsible for all of the missing items. Finally, there is no dispute that Tibbs received an advance payment of $11,026.33 which must be offset against the total due to Tibbs. Subtracting the carpet cleaning expenses and the advance payment from the purchase order amount of $25,000 results in a contract balance amount due to Tibbs of $10,847.47.

The record indicates that the proper payment of Tibbs' workers is unresolved. Some workers have not received full payment of wages and the contracting officer referred an issue regarding the appropriate classification and pay of Tibbs' workers to the United States Department of Labor.

On the issue of workers not receiving full payment, Tibbs submitted for the first time at the hearing AF Exhibit 7 containing labor summaries, IRS Forms 1099-Misc, and what Mr. Richmond testified were the "master payroll spreadsheets" he had prepared under the contract. (AF Ex. 7, bates 80-98, 99-101; Vol. 2 Tr. 82-108, 195-203). Mr. Tibbs testified that the information in Exhibit 7 in its entirety is accurate. (Vol. 2 Tr. 108). The second through fourth pages of Exhibit 7 contain a summary of the 20 individuals who Tibbs and Richmond state provided labor under the contract. (AF Ex. 7, bates 81-83). The total dollar amount of the wages is $21,779.58. The summary sheets and the testimony indicate that some of the laborers have not been paid their full amounts. (AF Ex. 7, bates 82-83; Vol. 2 Tr. 189-194). According to Messrs. Tibbs and Richmond, the master payroll spreadsheets of Exhibit 7 are a more accurate statement of the labor incurred by Tibbs in performing the work than in found in the 6-page payroll "worksheets" previously provided to the contracting officer, which only have a labor total of $7,389 (*see* AF Ex. 1, at bates 6, 7-12).

On the issue regarding compliance with federal labor laws, the contracting officer states in his final decision:

> Wage Determination No. 1994-2103, Revision No. 21 (06/09/00), the pertinent wage determination issued by the Wage and Hour Division, Employment Standards Administration of the U.S. Department of Labor, setting forth minimum monetary wages and benefits for service employees was not incorporated into this contract in accordance with the Service Contract Act of 1965, as amended. As a result, there remains an issue regarding the appropriate rate of pay for all the classifications of personnel of J.E. Tibbs Construction listed in the submitted notarized payroll document (Attachment B). I am referring the issue to the U.S. Department of Labor for advice and/or resolution.

Because AF Exhibit 7 contains the accurate statement of labor provided by Tibbs's personnel, the Department of Labor must determine the appropriate rate of pay for all of the workers listed on AF Exhibit 7 and then the District must verify that Tibbs pays the workers any additional amounts (and

amounts that were previously withheld by Tibbs) to which the workers are entitled. The District shall withhold the $10,847.47 contract balance until Tibbs has fully paid his workers the amounts they are due and submits to the District proper evidence of the same, including Tibbs' compliance with payment of required payroll taxes.

CONCLUSION

Tibbs is due a contract balance of $10,847.47, which will be paid to Tibbs by the District after Tibbs has shown that it has fully paid its workers the amounts they are due and has paid applicable payroll taxes.

SO ORDERED.

DATED: September 2, 2005

/s/ Jonathan D. Zischkau
JONATHAN D. ZISCHKAU
Chief Administrative Judge

CONCURRING:

/s/ Matthew S. Watson
MATTHEW S. WATSON
Administrative Judge