

PROMAC, INC.

CONTRACT NO. V650C-617

VABCA-5345

**VA MEDICAL CENTER
PROVIDENCE, RHODE ISLAND**

Christopher M. Johnson, Esq., Kilcullen, Wilson and Kilcullen, Washington, D.C.,
for the Appellant.

Patrick J. LaMoure, Esq., Trial Attorney; *Charlma O. Quarles, Esq.*, Deputy
Assistant General Counsel; and *Phillipa L. Anderson, Esq.*, Assistant General Counsel,
Washington, D.C., for the Department of Veterans Affairs.

OPINION BY ADMINISTRATIVE JUDGE PULLARA

The Government has moved to dismiss this appeal, which was taken from a Contracting Officer's final decision denying a \$301,000 reformation claim by Promac, Inc. (Promac, Appellant, or Contractor). Promac seeks reformation of the contract based on certain alleged violations of the Federal Acquisition Regulation (FAR) by the Department of Veterans Affairs (VA or Government). The Government, relying on *Whittaker Electronic Systems v. John H. Dalton*, 124 F.3d 1443 (Fed. Cir. 1997), has moved to dismiss this appeal on the basis that Appellant failed to timely assert such allegations and thus waived the right to challenge the validity of the subject contract. Appellant opposes the motion, asserting that a contractor can bring a reformation claim even after contract completion, citing *LaBarge Products, Inc. v. West*, 46 F.3d 1547 (Fed. Cir. 1995). Further, Appellant maintains that waiver is an affirmative defense and is not a proper ground for a motion to dismiss.

BACKGROUND

In June 1995, the VA issued an Invitation for Bids (IFB) No. 650-15-95 for the construction of a new research building at the VA Medical Center (VAMC), Providence, Rhode Island. The VA's final cost estimate was \$3,075,000 for the basic scope of work with three deduct alternates estimated to reduce the cost to \$2,768,000. At bid opening in August 1995, seven bids were received. The low base bid price was that of Promac in the amount of \$3,119,000. The next lowest base bid was \$3,122,000, with the other bids ranging up to \$3,354,000.

FAR 14.404-1, "Cancellation of invitations after opening," provides that after bids have been opened, award must be made to that responsible bidder who submitted the lowest responsive bid, unless there is a compelling reason to reject all bids and cancel the invitation. Subparagraph (c)(6) provides, *inter alia*, that invitations may be cancelled when all otherwise acceptable bids received are at unreasonable prices. Subparagraph (f) provides that when the agency head has determined that an IFB should be canceled and that use of negotiation is in the Government's interest, the Contracting Officer (CO) may negotiate and make award without issuing a new solicitation.

Three days after bid opening, the VA sent a letter to all seven bidders notifying them

that the IFB was cancelled because all the bids exceeded the available funds and that the procurement would be converted to a Request for Proposals (RFP) limited to the original seven bidders. Shortly thereafter, the VA issued RFP No. 650-26-95, incorporating the contents of the original IFB as amended and including 19 deductive items.

Five of the original seven bidders submitted proposals. Promac submitted the low proposed price of \$2,723,000, with an alternate deductive price of \$2,519,000. In January 1996, the VA awarded Contract No. V650C-617 to Promac in the amount of \$2,723,000. The contract called for a performance period of 400 days and Appellant subsequently performed the requirements of the contract.

On January 27, 1997, Promac filed a \$301,000 certified claim seeking reformation of the contract. That amount represented a portion of the \$396,000 difference between its original bid of \$3,119,000 and its final proposal of \$2,723,000. The other portion, \$95,000, represented the amount for which Promac adjusted its price as the result of certain changes to the project requirements. The \$301,000 represented an adjustment which Promac believed was necessary to remain competitive due to the fact that its earlier bid price had been made public at the original bid opening. Promac asserts that it had submitted a reasonably priced bid, that the VA had violated the FAR by canceling the IFB and continuing the procurement through negotiations, that the VA's actions amounted to an illegal auction, that Promac suffered damages as a result of the VA's actions, and that Promac was entitled to reformation of its contract to the extent that its price was affected by the VA's FAR violations and the implied contract to treat bidders fairly.

The CO issued a final decision in May 1997 denying the claim. The Government's position was that the original bids received were in excess of available funds and were considered unreasonable, based on comparison with the Government's estimate. The CO stated that the IFB was canceled and a contract negotiated in accordance with applicable FAR regulations. Further, the CO argued, the claim was untimely since it was filed a full year after contract award and seventeen months after Promac was notified it was the lowest offeror. This appeal followed and, in due course, the Government filed its Motion to Dismiss.

DISCUSSION

Turning first to an assessment of the procedural matter raised by Appellant, we will be guided by the Federal Rules of Civil Procedure. *Dawson Construction Company, Inc.*, VABCA No. 1967, 85-3 BCA ¶ 18,202. With respect to the propriety of asserting the affirmative defense of waiver in a motion to dismiss, we note the following:

Although, strictly speaking, a defense of waiver is not properly raised on a motion to dismiss (because it is an affirmative defense to be asserted in a responsive pleading under Rule 8(c) Fed.R.Civ.P.), when the issue is potentially dispositive it is logical and efficient to consider it on a Rule 12(b)(6) motion, and courts frequently do. See 5 Wright and Miller, *supra*, Secs. 1277, 1349, 1357 and cases cited therein.

Pepper-Reed Co. v. McBro Planning & Development Co., 564 F. Supp. 569, 571 (D.V.I. 1983).

The issue raised by the Government appears to be potentially dispositive. As suggested in ***Pepper-Reed***, it is logical and efficient to consider the matter at this time. Accordingly, we consider the motion to dismiss herein.

The Government does not contest the Board's jurisdiction to address Appellant's claim for reformation of Contract No. V650C-617. Instead, the Government asserts that, by failing to timely assert a violation of the FAR, Appellant waived the right to challenge the validity of the contract on the basis of its award procedure, even if it is assumed that FAR clauses were actually violated. ***Whittaker Electronic Systems v. John H. Dalton***, 124 F.3d 1443 (Fed. Cir. 1997). Appellant argues, on the other hand, that this matter is governed by ***LaBarge Products, Inc. v. West***, 46 F.3d 1547 (Fed. Cir. 1995).

In ***Whittaker***, the negotiated contract involved the development of radar simulators for the U.S. Air Force. The contractor, Whittaker Electronic Systems (WES), argued that the contract was *void ab initio* because it contained a certain option clause, which placed "undue risks" on the contractor, in violation of DAR regulations. The court stated that because the contractor failed to make a timely objection to the option clause, raising the "undue risk" it believed was improperly allocated to it or asserting a violation of the regulation, the contractor waived the right to challenge the validity of the contract under the DAR. The court also stated:

The doctrine of waiver precludes a contractor from challenging the validity of a contract, whether under a DAR or on any other basis, where it fails to raise the problem prior to execution, or even prior to litigation, on which it later bases its challenge.

Finally, the court stated, the fact that the contractor failed to complain and substantially completed the contract, constituted a waiver of the grounds for rescinding or voiding the contract, even assuming the option clause indeed violated the regulation.

LaBarge Products, Inc., involved a contractor claim for *reformation* of its negotiated contract with the U.S. Army to provide a quantity of pipe couplings. There, declining to award a contract to LaBarge Products, Inc. (LaBarge) at its initially proposed low base unit price of \$38.50 per coupling, the Army requested best and final offers. LaBarge was awarded the contract at its best and final offer price of \$32.90 per coupling. Following successful contract completion, LaBarge submitted an \$800,000 claim to the Army in which it sought to have the per unit price in the coupling contract reformed to the \$38.50 per unit price contained in its original proposal. LaBarge asserted that reformation was necessary in order to compensate it for improper acts of certain Army personnel involved in the procurement, including an alleged conspiracy to direct the contract to another company. LaBarge claimed that, but for improper conduct, it would have been awarded the coupling contract at its higher, initial proposed price.

In dealing with what amounts to a waiver issue, the court stated:

According to the government, LaBarge's allegations of government misconduct are the kind of allegations that are ordinarily made in pre-award bid protests, not after award of a contract. However, if government officials make a contract they are not authorized to make, in violation of a law enacted for the contractor's protection, ***the contractor is not bound by estoppel, acquiescence or failure to protest.*** [Citations omitted.] In cases in which a breach of law is inherent in the writing of the contract, ***reformation*** is available despite the contractor's initial adherence to the contract provision later shown to be illegal.

46 F.3d at 1552 (emphasis added).

The court went on to state that "LaBarge was not harmed by the disclosures in any concrete way contemplated by the FAR and, therefore, is not entitled to relief." However, we are not concerned here, in ruling on the instant motion, with the merits of this matter.

After consideration of the parties' arguments, we are persuaded that ***LaBarge*** applies in the instant case. There, as here, the contractor made a proper claim under the *Contract Disputes Act (CDA)* for reformation of a contract based on procurement regulation violations and the court found that waiver (actually, "estoppel, acquiescence or failure to protest") did not apply. In contrast, the same court in ***Whittaker***, dealing with a claim seeking to declare the contract *void ab initio* following performance of the contract, found that waiver did apply. Since the appeal before us involves reformation, we find ***LaBarge*** to be controlling. Promac has properly asserted a claim under the *CDA* for reformation of the contract and as such has a right to be heard on the merits of its case.

DECISION

The Government's Motion to Dismiss VABCA-5345 is denied.

Date: **May 5, 1998**

Morris Pullara, Jr.
Administrative Judge
Panel Chairman

We Concur:

Guy H. McMichael III
Chief Administrative Judge

Richard W. Krempasky
Administrative Judge