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DECISION

THE COMPTROLLER GENERAL
OF THE UNITED STATES
WASHINGTON, D.C. 20548

FILE: B-203638 DATE: December 23, 1981

MATTER OF: Lloyd X. Smith - Claim Against the FHLBB

DIGEST: 1. Federal Home Loan Bank Board (FHLBB) has no statutory authority to "sue and be sued," and thus, except under limited statutory authority for matters related to acquisition and maintenance of its headquarters building, does not have claims settlement authority independent of that provided the General Accounting Office by 31 U.S.C. § 71 to settle and adjust all claims by and against the Government. Accordingly, authority to settle claim against FHLBB on quantum meruit grounds for compensation and expenses related to consulting services provided FHLBB rests with this Office. See statutes and Comptroller General decisions cited.

2. Claim against FHLBB for compensation and expenses related to consulting services provided to FHLBB is disallowed as doubtful claim because, based on the particular facts of case, it is impossible under a quantum meruit theory to determine whether the Government received any benefit.

Introduction

The General Counsel of the Federal Home Loan Bank Board (FHLBB) requests an advance decision concerning the claim of Mr. Lloyd X. Smith. Mr. Smith claims compensation and expenses for consulting services he provided to the FHLBB without a formal contract. Initially, the FHLBB asks whether the Bank Board or GAO has settlement authority in this case. Based on our finding that settlement authority rests with this Office, we have proceeded to consider the merits of Mr. Smith's claim against the FHLBB. It is our conclusion that due to the impossibility of accurately determining the value, if any, of Mr. Smith's services to the Bank Board, no proper basis for payment has been established.

JURISDICTION

Background

Mr. Smith's claim against the FHLBB was first submitted to the Claims Group of GAO's Financial and General Management Studies Division in February 1981. The Claims Group returned the matter to the Bank Board without disposition (Z-2828528, April 30, 1981) stating that GAO "does not have authority to settle claims against the Federal Home Loan Bank Board."

The Claims Group's conclusion concerning jurisdiction was based on two Comptroller General decisions (B-186293, July 29, 1976, and B-183332, April 28, 1975) involving 12 U.S.C. § 1438(c)(6). This provision gives the Bank Board final authority in matters related to the acquisition and management of real property for its headquarters building in Washington, D.C., including claims settlement authority. In Globe Inc. v. Federal Home Loan Bank Board, 471 F. Supp. 1103 (D.D.C. 1979), the Court held that the reach of the cited statute is narrow, and that § 1438(c) provides no implied authority for purposes other than those specified in the subsection.

The decisions relied on by the Claims Group involved procurement matters directly related to the design and construction of FHLBB headquarters. While GAO did not have authority to settle claims or resolve bid protests in these specific instances, the cited decisions are not dispositive of the general question.

Discussion and Conclusion

It is FHLBB's position that it has no specific authority to settle Mr. Smith's claim, and that the more general provisions for administrative settlement do not apply in this instance. The Bank Board cites a recent decision of this Office (59 Comp. Gen. 232 (1980)) which holds that the Contract Disputes Act of 1978 does not apply where, as here, a threshold question is whether or not a contract was ever formed. Further, the FHLBB has determined that the general procedure for agency ratification of unauthorized contracts (41 FPR § 1-1.405) is not applicable because, based on the facts of this case, there can be no finding of an "otherwise proper" contract. We agree that neither the Contract Disputes Act, nor the general ratification procedure was an appropriate avenue for settlement of this claim by the Bank Board.

GAO's claims settlement authority is provided at 31 U.S.C. § 71, which states:

> "All claims and demands whatever by the Government of the United States or against it, and all accounts whatever in which the Government of the United States is concerned, either as debtor or creditor, shall be settled and adjusted in the General Accounting Office."

While there are some specific limits on this broad grant of authority to the Comptroller General, we find none which would apply in this case. As discussed above, the Contract Disputes Act of 1978 is inapplicable where the very existence of a contractual relationship is at issue. Further, the Bank Board has no general authority to "sue and be sued," which this Office has held to include claims settlement authority (25 Comp. Gen. 685 (1946)). The FHLBB, as an independent agency of the United States, is subject to 31 U.S.C. § 71. Accordingly, the authority to settle Mr. Smith's claim rests with the Comptroller General.

THE CLAIM

Statement of Facts

The Federal Home Loan Bank Board has conducted an extensive investigation of the facts surrounding Mr. Smith's claim. This investigation included a comprehensive audit by the agency's Internal Evaluation and Compliance Office (IE&CO). The chronology reported below summarizes relevant material from the audit, FHLBB's legal brief, and several other support documents which accompanied the Bank Board's request for a decision by this Office.

In June 1980, Mr. W.C. Bradley, then the recently appointed Director of the FHLBB's Office of Minority Affairs (OMA), contacted Mr. Lloyd X. Smith. Mr. Smith is the senior partner in his Atlanta, Georgia firm, Fair Employment Practices (which is also known as the Lloyd X. Smith Group). Mr. Smith had been an employer of Mr. Bradley as recently as 1978.

In this first phone call Mr. Bradley indicated that he would need assistance in reorganizing OMA and asked Mr. Smith for an estimate. During that same conversation Mr. Smith estimated that his charge for the

work would not exceed $75,000 plus expenses, and asked Mr. Bradley for confirmation if that price was acceptable. Mr. Bradley then agreed to pay up to $1,500 to cover the cost of a trip to Washington if "necessary to assess the situation."

On July 7, 1980, after several more phone conversations in the intervening weeks, Mr. Bradley suggested that Mr. Smith come to Washington to "review specific cases and to establish priorities and discuss directions for OMA." From July 10 to July 12, 1980, Mr. Smith visited Washington, where he began work on a plan to define office goals and to reorganize OMA's staff of five. On July 18, 1980, Mr. Bradley received a bill from Mr. Smith for $1,500. On July 28, Mr. Smith forwarded his initial observations and recommendations.

In August 1980, Mr. Bradley submitted a requisition to the FHLBB's Procurement Management Branch covering Mr. Smith's $1,500 bill. The requisition was approved for payment by Mr. Cook, Chief of the Procurement Management Branch, and subsequently by Mr. Gilbert, Contracting Officer. According to the Bank Board's investigation, Mr. Cook was unaware that any work had been done by Mr. Smith until he received the $1,500 requisition in August. Because of the "relatively small amount" involved, Mr. Cook informed Mr. Bradley that he could obtain ratification for payment for the work, which was certified (by Bradley) as completed. It appears from the record that Mr. Smith subsequently received this payment from the FHLBB.

On August 13, 1980, Mr. Smith returned to Washington to discuss his findings with Mr. Bradley and other OMA staff members. At that time Mr. Smith also met with Mr. Cook and discussed the necessity of and proper format for a Government contract. As a guide, Mr. Cook supplied Mr. Smith with sample proposals. According to the record, Mr. Smith claims that Mr. Cook gave him assurances that a sole source SBA contract (an "8-A") award could be obtained. The record also indicates that because Mr. Cook was unaware of the "ongoing" nature of Mr. Smith's arrangement with Mr. Bradley, he did not order Mr. Smith to stop work during their August meeting.

On August 29, 1980, Mr. Smith again visited Washington where he met with Ms. Rita Fair, Assistant to the Chairman, and other Bank Board personnel to brief them on his work, both completed and planned. During this meeting Mr. Smith complained that he wasn't being paid. According to the record, Ms. Fair concluded that non-payment was due to procedural delay and urged that the problem be corrected. In a later interview, Ms. Fair recalled that because she reviews all Bank Board contracts in excess of $20,000, she had simply assumed that there was a valid contract with Mr. Smith for an amount under that ceiling.

August 29 was also the date of Mr. Smith's second bill to the FHLBB. The invoice for $11,630 accompanied a written report representing Mr. Smith's completion of "Phase I." By this date, although there was as yet no complete written description of the work which they anticipated, Mr. Smith and Mr. Bradley had apparently agreed to a "four-phased program."

The record also indicates that from mid-August to mid-September 1980, Mr. Smith and Mr. Bradley were in frequent contact by phone. According to Mr. Smith, much of his time was spent advising Mr. Bradley on the day-to-day operations of OMA. He also claims that his staff prepared budgets for OMA, and in one instance intervened for OMA with another Federal agency. During this same period, Mr. Bradley forwarded several current and closed discrimination complaint case files to Mr. Smith for his analysis. Mr. Smith forwarded one of these files to the New York law firm of Epstein, Becker, Borsody, and Green for evaluation. The firm billed Mr. Smith $475.55 for its review, and Mr. Smith, in turn, billed the FHLBB for this expense. In the Bank Board's view, sending the case files outside the agency violated the Privacy Act.

In late September 1980, Mr. Smith returned to Washington. On or around September 24 he attended a meeting where Mr. Bradley first submitted the invoice for Phase I to Mr. Cook. The record indicates that Mr. Cook then informed Mr. Bradley that the work should not have been done without a contract from the Bank Board. However, Mr. Cook instructed Mr. Bradley to submit a requisition for the $11,630, which he said he would try to have approved through a "confirmation" procedure used by the FHLBB. (Mr. Bradley submitted this requisition on September 25.) According to Mr. Cook, he also informed Mr. Bradley (presumably in Mr. Smith's presence) that further phases of the project should either be competed or covered by a properly executed sole source contract.

During the same several days of meetings, Mr. Smith and Mr. Bradley revised their four-phase plan to "reflect a 'closed end' project." The revised "proposal", dated September 25, 1980, was then submitted in writing by Mr. Smith under the heading "EEO/AA Project Technical Schedule 1980-1981." According to the FHLBB this document:

> "describes work already performed and proposes a four-phase program for restructuring the Bank Board's EEO program (two phases were completed) at a 'fixed cost' of $87,400 plus travel expenses. Many of the hours for which Mr. Smith billed the Board were apparently spent in preparation of this 'proposal'."

According to the voucher submitted by Mr. Bradley on September 25, 1980 (discussed above), Phase I (completed as of August 29) is outlined as follows:

"1. Review and assess previous EEO/AA goals, objectives, and departmental direction.

2. Conduct interviews with current EEO staff members.

3. Review position (job) descriptions.

4. Conduct an assessment of functions and tasks as correlated to overall FHLBB EEO objectives.

5. Review and analyze the EEO organizational structure and intra-departmental interphasing.

6. Submission of Findings and Recommendations.

7. Analytical review for scope of services to establish and structure OMA."

According to an invoice the FHLBB received from Mr. Smith on October 14, 1980 (discussed below), Phase II (completed as of September 25) is summarized as follows:

"a) Establish purpose of the Office of Minority Affairs.

b) Define departmental functions and responsibilities.

c) Outline scope of operation and services.

d) Define organizational and functional changes.

e) Develop and re-establish staff tasks and functions.

f) Presentation of Organization Plan to OMA Director and staff.

g) Submission of Organization Plan."

On October 3, 1980, Mr. Smith sent Mr. Bradley another report entitled "Technical Schedule 1980-1981, Phase II - Organization Plan (Revised)." This document expanded the Phase II outline provided in the September 25 proposal. It also contained job descriptions for the OMA staff and a flow chart indicating the ranking of the five existing positions.

On October 10, 1980, FHLBB personnel met to consider an allegation by a Bank Board employee that there had been "irregularities in the contracting procedures used with Mr. Smith." As a result of that meeting, Mr. Richard L. Petrocci, Director of Administration, ordered the FHLBB Controller to stop payment on the $11,630 voucher (which by then had moved through FHLBB's administrative process and was in the Controller's office awaiting payment). Mr. Petrocci also sent a telegram to Mr. Smith ordering that he stop all work and requesting an accounting.

On October 14, 1980, the Bank Board received Mr. Smith's response. This invoice shows charges totalling $54,420 for work and expenses claimed by Mr. Smith as of October 10. Mr. Smith's accounting lists Phase I as completed at a cost of $11,630, but provides no breakdown for this charge. Phase II is similarly listed as completed at a cost of $16,360. The charges for the October 3 submission ($2,525) and partially completed work on Phase III ($21,565) are, however, listed in terms of the hourly rates charged. Mr. Smith claims $100 an hour both for his time and for time described as "work on discrimination complaints", $75 an hour for his senior consultant, $55 an hour for his associate consultant, and $15 an hour for his secretarial and support staff. The total claim also includes travel and per diem ($50 a day) expenses of $2,340.

As discussed above, the FHLBB then conducted a thorough investigation of the circumstances which gave rise to this claim. As a result of their audit, the Internal Evaluation and Compliance Office concluded that proper procurement procedures were not followed in the case of Lloyd X. Smith. In summary form, the IE&CO report concluded that:

> "(1) work was performed that probably should have been performed independently by the Office of Minority Affairs or other agency staff;
>
> (2) assurance of receiving a quality product at a reasonable cost was not obtained, thus subjecting the agency to an unsupportable claim of $54,420.00;
>
> (3) precautions were not taken to safeguard records protected under the Privacy Act, thus subjecting the Bank Board and agency officials to potential law suits; and
>
> (4) no efforts were taken to resolve the appearance of a conflict of interest resulting from a past association between Messrs. Smith and Bradley."

Discussion

According to the record, no written agreement was ever signed, nor was such a document even drafted. The only written statement describing the scope of the work to be performed was submitted months after Mr. Bradley's first "solicitation," and was prepared by Mr. Smith himself. This document (the "EEO/AA Project Technical Schedule 1980-1981") has been characterized as a "proposal" by the FHLBB. However, the agency has also indicated that, in large part, the "Technical Schedule" represents Mr. Smith's "work-product" as well. While the document appears to have elements of both a contract proposal and performance under a contract, it fails to represent any mutual agreement on essential terms. Therefore, the "Technical Schedule" in no way satisfies the most fundamental requirements for a contract between two parties.

The record also establishes that Mr. Smith had frequent phone conversations and regular meetings with Mr. Bradley. However, none of the actions taken by Mr. Bradley in requesting any service from Mr. Smith can form the basis of an express contract. Mr. Bradley had no authority to contract for the Federal Home Loan Bank Board and, under a longstanding doctrine, the Government cannot be bound by the unauthorized acts of its employees. Federal Crop Insurance Corp. v. Merrill, 332 U.S. 380 (1947).

Although the FHLBB has declined to ratify the arrangement between Mr. Smith and Mr. Bradley, it is the Bank Board's position that a contract implied in law may be found in this case. An implied in law contract, sometimes referred to as a quasi contract, is a legal fiction. The term is used when some performance by one party has benefited another in the absence of a contract. Where equity requires that the party receiving the benefit should not gain a windfall at the expense of the performing party, the courts find an implied in law contract as the basis for either a quantum meruit or quantum valebat recovery.

> "'Quasi contracts, or contracts implied in law, arise only where one party has been unjustly enriched at the expense of another. Under such circumstances the law implies a promise to make restitution to the extent of the unjust enrichment.'" 12 Williston on Contracts § 1454 (3d ed. 1970).

In a number of cases the Comptroller General has held that there are two basic requirements for recovery when a claim against the Government stems from an implied in law contract. Payment on a quantum meruit basis

has been permitted (1) if the Government received a benefit, and (2) if the acquisition of services was implicitly ratified through the actions of agency officials recognizing that benefit. (B-177607, March 7, 1973). Recovery, however, is limited to the fair value of the benefit conferred (B-167790, April 12, 1973).

As to the first requirement, the FHLBB states that it has received a benefit from the provided services. The agency has concluded, however, that the amount Mr. Smith claims for these services is unsubstantiated. In part, the Bank Board's conclusion seems to be based on a number of discrepancies discovered in the course of its own investigation. Its audit "found the documentation supporting Mr. Smith's claim to be incomplete, perhaps inaccurate, and the work performed of questionable quality."

For example, included in the IE&CO report were the following findings:

"1. We reviewed two different source documents showing the number of hours spent by Mr. Smith and his staff on work for the Bank Board and found that the total hours differed on both documents and that neither agreed with the hours claimed on Mr. Smith's $54,420.00 bill.

2. An OMA employee prepared one of the data analysis exhibits that Mr. Smith submitted with his claim for payment.

3. Except for minor editorial changes, an employee in the personnel office wrote the position description for Mr. Bradley that was included in Mr. Smith's report, Organization Plan.

4. Our review found no evidence to support the work Mr. Smith states he performed in Phase III.

—The OMA staff orientation that Mr. Smith's bill indicates as being completed was never performed.

—Concerning the Phase III discrimination complaint process work, Mr. Smith told us that he reviewed the complaint cases during Phase I and II as a basis for his conclusions that cases had been mishandled. Consequently, the complaint case review claimed for Phase III appears to be either an error or a duplication of Phases I and II work.

—We found no documentation, such as a training agenda or handouts, other than what was developed for Phases I and II work, to support Mr. Smith's claim for costs involved in preparation of an orientation program.

5. Mr. Smith could not provide us with any workpapers to support his conclusions and recommendations on the problems of OMA as presented in his reports. According to Mr. Smith, he did not have sufficient file space to keep all of the workpapers that were prepared. (This explanation is not convincing, considering: (1) he did keep handwritten notes and (2) that his claim for payment is still pending.)

6. According to an employee of OGC, the analysis and disposition Mr. Smith prepared on one of the discrimination complaint cases basically repeats the work OMA and OGC staff had already documented and serves no useful purpose to the Bank Board. Mr. Smith acknowledged his analysis was based only on information contained in existing case files.

7. Mr. Smith's claim incorrectly calculates the cost of airfares, thus overstating the bill by $650.00."

This Office is not in a position to make an independent judgment on whether or not the Bank Board received a benefit. Nevertheless, based on the record alone (and the IE&CO audit in particular), the question is open to considerable doubt.

As a result of the IE&CO findings the Bank Board concludes that Mr. Smith's claim for $54,420 is not a fair measure of the benefit the agency asserts it has received. In order to assign a value to that benefit, the FHLBB proposes that Mr. Smith be paid an hourly rate for many of the hours he claims, plus actual travel expenses. To determine that rate the Bank Board would treat Mr. Smith as a "temporary employee" and pay him the statutory maximum for consulting work. Under 5 U.S.C. § 3109 fees for appointed consultants are limited to the maximum daily rate of pay of a GS-18. The agency's figures show that rate to be $24.09 per hour. The FHLBB has multiplied the maximum hourly rate by 525 of the hours Mr. Smith claims ($12,687.25) and added verified expenses ($1,690), recommending a total recovery of $14,377.25. (With the exception of a statement that only Phases I and II were considered, it is unclear how the total of 525 hours (approximately 13 40-hour weeks) was determined.)

The Bank Board notes that their approach for determining the amount of recovery is based on the assumption that the agency could have contracted for these services under 5 U.S.C. § 3109. In part, authority to hire consultants under this statute is limited to situations where the work performed is a federal function, under the supervision of a federal employee. The FHLBB states that Mr. Smith received "detailed supervision and direction" from Mr. Bradley. Again, however, the record indicates that there is some question concerning the extent of Mr. Bradley's supervision of Mr. Smith.

In either case, we find that the method chosen by the Bank Board to calculate the benefit received is a totally arbitrary one, based on compensation rates, not benefit to the Government. As such it is unacceptable as an accurate measure of the "fair value" of Mr. Smith's services.

Compensating Mr. Smith as a "temporary employee" at the salary at a GS-18 cannot be established either as appropriate, or as an approximation of what would have been a negotiated contract price for his services. Furthermore, even if it were possible to arrive at an acceptable method for determining the fair value of Mr. Smith's time, problems would remain in establishing the amount of time for which he should be compensated. Based on the findings of the IE&CO audit, there would appear to be no way to determine how many of the hours claimed by Mr. Smith were spent "duplicating" work already performed by agency personnel. Clearly, the Bank Board received no tangible benefit from these services.

It also appears that the nature of some of Mr. Smith's work was such that the FHLBB lacked authority to expressly contract for its performance outside the agency. This would apply both to work described by the Bank Board as "unnecessary," and to policy-related work which was the direct responsibility of agency officials (OMB Circular A-120).

Further, in the absence of a showing that the agency has received a benefit with a measurable value to the Government, it is not possible for an agency official to recognize that benefit. Consequently, the second element necessary to permit payment on a quantum meriut basis, implicit ratification, is also missing.

Conclusion

In summary, while the Bank Board apparently believes that it received some benefit from Mr. Smith's work, it also feels that much of this work should have been performed by its regular employees. The IE&CO report states that had proper procurement procedures been followed, Mr. Bradley should have withdrawn from selecting the contractor in order to avoid

even the appearance of a conflict of interest. The record also indicates that as early as August Mr. Smith was advised by Bank Board staff of the need to enter into a formal contract. Further, despite numerous opportunities to do so, neither he nor Mr. Bradley informed the staff of the extent of the ongoing work, or the estimated price in excess of $80,000 which they contemplated. Finally, in view of Mr. Smith's inadequate records, it is impossible to determine what tasks he did perform or what his actual costs were. He erroneously billed for work he did not do and for work which was a mere duplication of that already performed by Bank Board staff. His records and his billings cannot, on the basis of the IE&CO report, be used to establish either the value of any benefit which Mr. Smith may have conferred on the FHLBB, or that it was in excess of the amount he has already received.

In conclusion, based on the record in this case, there are serious questions concerning whether the Government received any measurable benefit from Mr. Smith. Accordingly, Mr. Smith's claim against the Federal Home Loan Bank Board is disallowed as a doubtful claim. The claimant is, of course, free to pursue whatever remedy may be available in the courts, where sworn testimony, cross-examination and other fact finding procedures are possible. See Charles v. United States, 19 Ct. Cl. 316, 319 (1884); Longwill v. United States, 17 Ct. Cl. 288, 291 (1881); 17 Comp. Gen. 31, 32 (1937); B-189970, July 15, 1981.

Harry R. Van Cleve

For Comptroller General
of the United States