The Comptroller General
of the United States

Washington, D.C. 20548

Decision

Matter of: Robert U. Bregman, M.D. - Quantum Meruit Claim for Consultant Services

File: B-214529

Date: January 19, 1988

DIGEST

A physician filed a quantum meruit claim for consultant services allegedly rendered to the Department of the Navy in the development of an improved ureteroscope. On the basis of our evaluation of the record in this matter, we find that he has not established that the government received and accepted a benefit, which is one of the criteria for recovery on a quantum meruit claim. Thus, his claim is denied.

DECISION

This decision is in response to the appeal of Robert U. Bregman, M.D., from our Claims Group's action 1/ which denied his quantum meruit claim in the amount of $35,000. Dr. Bregman seeks reimbursement of consultant services allegedly rendered to the Naval Ocean Systems Center (NOSC), Department of the Navy, San Diego, California, in the development of an improved fiber optics image scope (microendoscope) ureteroscope. For the following reasons, we conclude that Dr. Bregman has not established his quantum meruit claim, and thus we sustain our Claims Group's action which denied his claim.

BACKGROUND

According to the Navy report, Dr. Bregman has an established practice in the field of urology. In 1977, he became acquainted with Mr. Parviz Soltan, an employee of NOSC, and discussed Mr. Soltan's work in fiber optics technology with him. Dr. Bregman and Mr. Soltan developed a mutual interest regarding the improvement of a medical surgical instrument called a ureteroscope that could take advantage of fiber optics technology. The improved ureteroscope conceived by

---

1/ Settlement Certificate, Z-2863996, September 16, 1986.

Dr. Bregman and Mr. Soltan would permit the detection of kidney stones and the treatment of disorders in the ureter.

The Navy report states further that Dr. Bregman asserts his input was solicited by Mr. Soltan regarding a "medical (surgical) instrument." However, Mr. Soltan states that Dr. Bregman volunteered to finance the costs if Mr. Soltan would help with design and engineering. Subsequently, Mr. Soltan thought that a Navy sponsor might be found if Dr. Bregman and he were to sign over their patent rights to the Navy and if a need for the invention could be demonstrated to the Navy, and he so advised Dr. Bregman.

On July 22, 1982, Dr. Bregman and Mr. Soltan each executed a patent application for their ureteroscope and assigned the rights of the patent application to the government. The patent application (N.C. 65,414) initially was rejected, but the patent examiner's initial decision was subsequently reversed. Robert U. Bregman, Appeal No. 602-86, Board of Patent Appeals and Interferences, United States Patent and Trademark Office (Feb. 27, 1987). As a result, it is our understanding that a patent has been issued to the United States for the use and benefit of the Navy.

Returning now to the events of 1981 and 1982, Dr. Bregman and Mr. Soltan worked jointly to obtain a sponsor for their proposed ureteroscope. Dr. Bregman obtained letters of support from the San Diego Veterans Hospital and other medical centers, and these letters were used by Mr. Soltan in a presentation at the Office of Naval Research (ONR) in Washington, D.C. Dr. T. C. Rozzell of ONR accepted sponsorship and funded the project to develop a fiber optics ureteroscope on October 14, 1981. Mr. Soltan then told Dr. Bregman that he would recommend him as a medical consultant for the project. On February 24, 1982, Mr. Soltan submitted a status report on the project to ONR, and in this report he stated that the proposed project was beneficial and continued to merit funding. He further indicated that, under the proposed plan, Dr. Bregman would direct a group of urologists in evaluating comments on the ureteroscope.

According to the Navy report, Dr. Willis T. Rasmussen, then the Head of the Bioengineering Branch, learned that the American Optical Company had already developed a prototype

ureteroscope similar to the Soltan-Bregman design. This discovery changed the course of the NOSC program from one of development to one of evaluation and test of the American Optical ureteroscope. In February 1982, the Human Protection Committee at NOSC and the Naval Health Research Center San Diego (NHRC) stated that they would not favor any clinical trial testing of the American Optical ureteroscope through a private physician. They recommended that Dr. Bregman work independently of NOSC through a hospital that he was associated with and that NOSC should work with the Navy Hospital at San Diego, California (NHSD).

On March 12, 1982, Mr. Soltan, Dr. Rasmussen, and Dr. Frank Borkat visited Dr. Bregman's office and saw the ureteroscope Dr. Bregman had obtained from American Optical. Dr. Bregman demonstrated the probe's imaging capability and stated he would like to be paid by the Navy as a consultant on the project. Dr. Bregman was advised that, if additional consulting efforts were needed, a proposed contract would be prepared for open bidding and that he would have to respond along with other bidders. Dr. Bregman later demonstrated the use of the ureteroscope on a patient, and Dr. Borkat witnessed this test.

Subsequent talks with a representative of American Optical led to the signing of an agreement, dated June 30, 1982, under which American Optical would deliver a ureteroscope to the Navy for testing independent of any involvement by Dr. Bregman. This ureteroscope was tested at NOSC for all engineering characteristics, a report was prepared, and recommended improvements were forwarded to American Optical.

On October 29, 1982, American Optical sent a letter contract to Dr. Bregman seeking to secure his evaluation of a fiber optics image scope and indicating that Dr. Bregman would receive a fee of $3,000 for his evaluation and report on the device. Dr. Bregman's suggestions for improvements in the design and operation of this scope were solicited by American Optical, and the agreement states: "During this evaluation you will be considered a consultant for AO Scientific Instruments, Fiber Optics."

Subsequently, in a letter to the Navy dated December 9, 1982, Dr. Bregman submitted a claim for $35,000, which consisted of $5,000 for research and analysis to educate

Navy technical personnel in the function and design of the ureteroscope, $5,000 for an alleged subcontract with Karl Storz Endoscopy-America, Inc. and administrative fees connected with the clinical evaluation of the prototype, $5,000 for clinical evaluation, oral and written reports, and instrument modifications, and $20,000 for direct work and out-of-pocket expenses on the project.

Dr. Bregman's claim for reimbursement for his services was denied by the Navy and subsequently Dr. Bregman sued the United States for $35,000 for personal services rendered by him in collaborating with NOSC in the development of the improved ureteroscope. Dr. Bregman's legal theory was an implied-in-fact contract based on conversations with various government officials, none of whom had contracting officer authority to bind the government. The United States Claims Court granted the government's motion for summary judgment, and the United States Court of Appeals for the Federal Circuit affirmed. Bregman v. United States, Appeal No. 85-1949 (Fed. Cir. Sept. 10, 1985) (unpublished opinion). The appellate court held that any promises by government officials who did not have contracting officer authority could not bind the government. In addition, the court held that there was no "meeting of the minds" between Dr. Bregman and an officer of the government who had contracting officer authority.

DISCUSSION AND ANALYSIS

Before discussing our Office's criteria for quantum meruit claims, we note that the legal issue involved in Dr. Bregman's action in federal court was whether an implied-in-fact contract was formed. In the present case the issue is whether Dr. Bregman's claim meets our Office's criteria for quantum meruit (or implied-in-law contract) claims.2/ Thus, in view of the different legal issue

---

2/ The United States Claims Court views recovery on a quantum meruit basis as an action on a contract implied-in-law, as distinguished from an action on a contract implied-in-fact. Furthermore, a quantum meruit claim is viewed as beyond that Court's jurisdiction. See Gratkowski v. United States, 6 Cl. Ct. 458, 463 (1984); G. M. Shupe, Inc. v. United States, 5 Cl. Ct. 662, 677 (1984).

presented here, the doctrine of res judicata is not applicable in this case. See William C. Ragland, 62 Comp. Gen. 399 (1983).

Turning now to our Office's treatment of quantum meruit claims, we observe that in a case where, as here, no contract was ever executed and where an agency is unable to ratify a transaction since there was no commitment found by agency personnel to reimburse the provider of services, the only remaining possibility for payment is on the basis of quantum meruit. Manchester Airport Authority, B-221604, Mar. 16, 1987. Under GAO's claim settlement authority in 31 U.S.C. § 3702 (1982), the Comptroller General may authorize payment on a quantum meruit basis under certain conditions. It is an accepted principle of law that where performance of services by one party has benefited another, even in the absence of an enforceable contract between them, equity requires that the party receiving the benefit should not gain a windfall at the expense of the performing party. Thus, the law implies a promise to pay by the receiving party the reasonable value of the benefit received. Hocking International Chemical Corporation, B-225842, Mar. 20, 1987, 66 Comp. Gen. ___.

In order to recover under the quantum meruit theory before our Office, a claimant has the burden of proving that the following four elements are present: (1) the services would have been a permissible procurement had the formal procedures been followed; (2) the government received and accepted a benefit; (3) the person seeking payment acted in good faith; and (4) the amount claimed represents the reasonable value of the benefit received. 64 Comp. Gen. 727 (1985). See also Hocking International Chemical Corporation, cited above; Bank of Bethesda, 64 Comp. Gen. 467 (1985), reconsidered and affirmed in B-215145, Aug. 13, 1985.

In regard to the first element, it is clear in this case that the medical consultant services which Dr. Bregman claims to have performed are the type of services which would have been a permissible subject for procurement by the Navy had the formal procedures been followed.

As to the second element, the issue is whether the government received and accepted a benefit. For the

following reasons, we find that Dr. Bregman has not established this element of his quantum meruit claim. In our discussion of this second element, it will be helpful to divide Dr. Bregman's efforts into two periods, early 1980 to October 13, 1981, and October 14, 1981, and thereafter.

During the period from early 1980 to October 13, 1981, our evaluation of the facts of this case establishes that Dr. Bregman and Mr. Soltan were involved in a joint effort to obtain Navy sponsorship of an improved ureteroscope which they were working on. Thus, efforts which Dr. Bregman undertook, such as completing a report on patentability, attending conferences and discussions, and pursuing prototype development, were for that purpose. However, these efforts were directed primarily to obtaining government sponsorship and, therefore, were of no apparent value or benefit to the government.

On October 14, 1981, the Navy decided to sponsor a program to develop a type of improved ureteroscope other than that which Dr. Bregman and Mr. Soltan were proposing. In this regard, Mr. Soltan had informed Dr. Bregman, prior to that date, that he would try to have Dr. Bregman approved as a medical consultant for this program. A few weeks after October 14, 1981, Mr. Soltan informed Dr. Bregman that justifying him as a "sole-source" consultant would be difficult and that he would have to compete for any such contract. Dr. Bregman was thus put on notice that the regular government procurement procedures would have to be followed in order to obtain compensation for his services. In late 1981, Dr. Bregman was also informed that the Navy believed that the American Optical prototype device might satisfy its needs and that the project was to be redirected toward evaluation of this device rather than the device which Mr. Soltan and Dr. Bregman had worked on.

Dr. Bregman claims that he received the American Optical device in March 1982 and that he expended considerable effort in evaluating this device. We note, however, that this effort was after he was informed that approval of the work would have to be obtained and that there would be difficulty in justifying him as a "sole-source" consultant. Furthermore, Dr. Bregman's claim that another Navy physician, Dr. Rasmussen, made a promise in May 1982 to

American Optical that the Navy would pay Dr. Bregman for his "past and continuing work on the project" is denied by Dr. Rasmussen, whose statement is part of the Navy's administrative report on this matter. Indeed, Dr. Rasmussen states that he told American Optical that the Navy's testing on the device would be separate from Dr. Bregman's testing. We concur with the finding of the Navy's administrative report that it is highly unlikely that Dr. Rasmussen made any promise to American Optical to pay Dr. Bregman. We note that the Naval Human Protection Committee at NOSC in February 1982 had informed Dr. Rasmussen that they were not in favor of having a private physician test the device. Furthermore, we note that Dr. Rasmussen had informed Dr. Bregman on March 12, 1982, that if testing by him was needed by the Navy, he would have to compete for any such contract.

On the basis of the above, we conclude that Dr. Bregman has not shown that the work he alleges to have done was either a benefit to the government or that his work was accepted by the government. Rather, the work after October 14, 1981, seems to have been performed in an attempt to obtain a contract under the project.

Dr. Bregman relies on Department of Energy, B-207337, Dec. 15, 1982, in support of his claim. In that case, our Office allowed a recovery to a consultant who received proposals for the Department of Energy (DOE) during a first round of evaluations because DOE used the results of that round in determining grant recipients and thus the government received a benefit. However, in that same case, we also held that subsequent consultants, whose work was disregarded by DOE, could not recover on the theory of quantum meruit since their work, which was not used by DOE in determining grant recipients, did not confer a benefit on the government.

In the present case, the efforts of Dr. Bregman during the period from early 1980 to October 13, 1981, were directed primarily to obtaining government sponsorship and are of no apparent value or benefit to the government. His efforts on and after October 14, 1981, seem to have been performed in an attempt to obtain a contract under the project, despite the fact that the Navy had decided to sponsor a program to develop a type of improved ureteroscope other than that

which Dr. Bregman and Mr. Soltan were proposing. These efforts, likewise, are of no apparent value or benefit to the government, and indeed the government has not made use of the Bregman-Soltan ureteroscope. Thus, the present case is distinguishable from that part of Department of Energy, B-207337, Dec. 15, 1982, which allowed a consultant recovery on a quantum meruit theory for benefiting the government because, as shown above, the work Dr. Bregman claims to have done did not confer a benefit on the government.

In addition, Dr. Bregman contends that his expenditures for equipment purchased to conduct clinical work, his assignment of patent application rights to the Navy, the granting of a patent to the Navy for his improved ureteroscope, and various other tangible and intangible items connected therewith conferred a benefit on the government. For the following reasons, we conclude that these items were not of benefit to the government.

With regard to Dr. Bregman's expenditure of some $5,000 for equipment allegedly purchased to conduct clinical work, there is no evidence that such equipment, which apparently is owned by Dr. Bregman, was ever used by the government. Thus, we find there is no evidence that this equipment was of benefit to the government.

As noted above, Mr. Soltan and Dr. Bregman executed assignments of their patent rights to the government for the improved ureteroscope on which they were working.3/ This improved ureteroscope has been held to be patentable, and we understand that a patent has been issued to the United States for the use and benefit of the Department of the Navy. We note that but for Dr. Bregman's filing of an appeal of the patent examiner's initial decision which denied patentability, the Bregman-Soltan device would not have been held patentable. However, we do not find that Dr. Bregman's mere assignment of patent application rights to the government necessarily confers a benefit on the

---

3/ We note that Mr. Soltan, as a Government employee, was obliged to do this under Executive Order No. 10096, 35 U.S.C. § 266 note (1982). Also, in regard to the right of a joint coinventor to assign all rights in a patent application and any patent which may issue thereon to another person or entity, see 35 U.S.C. §§ 261-62 (1982).

government. Rather, it seems that the joint effort of Dr. Bregman and Mr. Soltan to conceive and develop their invention was for the purpose of filing a patent application and obtaining government sponsorship to further develop their invention. As noted above, the government ultimately decided to sponsor the American Optical device, which was not the device invented by Dr. Bregman and Mr. Soltan and the government has not used the Bregman-Soltan ureteroscope.

In regard to the granting of the patent, we likewise do not find that this, in and of itself, confers a benefit on the government. Indeed, the facts here show that the government has preferred the American Optical device and has not used the Bregman-Soltan ureteroscope. In any event, Dr. Bregman did assign his rights to the government and any challenge to the validity of that assignment and the legal consequences thereof is for the federal courts, and not our Office, to decide. Thus, we find that neither the assignment of patent application rights, nor granting of the patent, nor various other alleged tangible and intangible items connected therewith conferred a benefit on the government.

Our finding that Dr. Bregman has not established that the government received and accepted a benefit makes an analysis of the third and fourth elements of his quantum meruit claim unnecessary. Furthermore, in view of our findings in this matter, we do not believe it is appropriate to refer Dr. Bregman's claim to Congress under the Meritorious Claims Act, 31 U.S.C. § 3702(d) (1982), as he requested our Office to do, since the legal or equitable reasons for the Congress to consider this claim are not readily apparent.

Accordingly, Dr. Bregman's claim for $35,000 on the basis of quantum meruit is denied.

Milton J. Socolar

for Comptroller General
of the United States