Board of Contract Appeals

General Services Administration
Washington, D.C. 20405

MOTION TO DISMISS GRANTED: March 27, 2006

GSBCA 16777

VIRGINIA ELECTRIC AND POWER COMPANY
d/b/a DOMINION VIRGINIA ELECTRIC,

Appellant,

v.

GENERAL SERVICES ADMINISTRATION,

Respondent.

David K. Wilson and Joseph R. Lawhon of Troutman Sanders LLP, Atlanta, GA; Charles Z. Zdebski of Troutman Sanders LLP, Washington, DC; and John D. Sharer of Dominion Resources Services, Inc., Richmond, VA, counsel for Appellant.

Robert M. Notigan, Office of General Counsel, Washington, DC, counsel for Respondent.

Before Board Judges **BORWICK**, **HYATT**, and **GOODMAN**.

BORWICK, Board Judge.

This appeal involves a claim for the cost of unmetered electricity service at a facility of the United States Customs Service in Springfield, Virginia. Respondent General Services Administration (GSA) moves to dismiss, arguing that the Board lacks jurisdiction under the Contract Disputes Act (CDA), 41 U.S.C. § 601-613 (2000). Respondent argues that the claim arises under a contract between the United States Customs Service and appellant and that any appeal should have been filed at the Department of Transportation Board of Contract Appeals. Appellant opposes the motion, arguing that the claim arises under an

areawide utility contract entered into between GSA and appellant, that a properly certified claim was submitted to the GSA contracting officer, and that an appeal is therefore properly before the General Services Board of Contract Appeals on a deemed denial basis.

We agree with appellant that we would have jurisdiction over an appeal filed on the basis of a deemed denial by the GSA contracting officer. But here, the appeal was taken from a purported decision of a GSA contracting officer. Unfortunately, the GSA contracting officer did not issue a decision on appellant's claim. Instead, a United States Customs Service contracting officer's representative (COR) issued a letter, styled as a contracting officer's decision, which, in fact, was not a decision of the GSA contracting officer. We must therefore dismiss this appeal for lack of jurisdiction, with leave for appellant to re-file the appeal on a deemed denial basis.

Background

Contract terms and conditions

On January 30, 1989, respondent awarded contract GS00-P-89-BSD-0005 (the '0005 contract) to the appellant for a term commencing on January 1, 1989 and ending on December 31, 1998. Complaint, Exhibit A, GS00-P-89-BSD-0005. That contract was signed by a contracting officer of the General Services Administration. *Id*. The contract contained a scope of contract clause, which provided in pertinent part:

> The Contractor agrees to furnish to the Government, and the Government agrees to purchase from the Contractor[,] such electric services as may be requested by an Ordering Agency within the respective service areas of the Contractor pursuant to written Authorizations of the Ordering Agency (Exhibit A Virginia) . . . attached hereto and made a part hereof.
>
> . . . .
>
> The provisions of this Contract shall not be binding upon any Agency, Executive Agency, or upon the Contractor, until both the Ordering Agency and the Contractor execute an Authorization for electric service under this Contract. It is the intent of both parties to generally attempt to require or cause Ordering Agencies to place all Federal accounts *under executed Authorizations under this Contract.*

Id. at 5 (Article 2(b)) and 6 (Article 2d)) (emphasis supplied).

The term agency meant: "any executive branch agency or any establishment in the legislative or judicial branches of the Government, or any mixed ownership corporation" as defined in statute. Complaint, Exhibit A, GS00-P-89-BSD-0005, at 4 (Article 1(b)). The term ordering agency meant:

> any Federal agency [as defined in Article 1(b) partially quoted in the preceding sentence], which enter[ed] into a written authorization under Article 2 to acquire electric services under this Contract.

Id. at 5 (Article 1(f)).

GSA also put in place a successor ten-year areawide contract, number GS-00-P-98-BSD-0086 (the '0086 contract). That contract too was signed by an official of the General Services Administration. Complaint, Exhibit A. That contract contains the same definitions of "agency" and "ordering agency" as were contained in the predecessor contract. *Id*., GS-00-P-98-BSD-0086 at 5 (Article 1.1).

Article 2.2 of the '0086 contract provides in pertinent part:

> Within the franchise territories of the Contractor, the Contractor agrees to furnish the Government, and the Government agrees to purchase from the Contractor[,] such Electric Service as may be requested pursuant to written Authorizations of the Ordering Agency. . . . The provisions of this Areawide Contract shall not apply to the Contractor's service to any Agency until both the Ordering Agency and the Contractor execute a written Authorization for Electric Service . . . under this Areawide contract. Upon bilateral execution of an Authorization, the Contractor agrees to furnish to the Ordering Agency, and the Ordering Agency agrees to purchase from the Contractor, the above noted services for the installation(s) or facilities named in the authorization *pursuant to the terms of this Areawide contract.* It is the intent of both parties to require or cause Ordering Agencies to place all Federal accounts under executed Authorizations under this Areawide Contract where practical.

Complaint, Exhibit A, GS00-P-89-BSD-0086 at 7 (emphasis supplied).

Article 14 of the '0005 contract incorporated the standard Disputes Clause (April 1984) and the General Services Administration Acquisition Regulation (GSAR) provision at 552.233-70 concerning disputes about utility contracts. Complaint, Exhibit A, GS00-P-89-BSD-0005, at 21. The GSAR section supplemented the Disputes Clause by providing that matters involving the interpretation of retail rates, rate schedules, tariffs, and tariff-

related terms provided under the contract, and conditions of service, were subject to the jurisdiction and regulation of the applicable utility rate commission. *Id*.

Article 14 of the '0086 contract also incorporates by reference the standard Disputes Clause (Oct. 1995) and (Alternate 1) (December 1991). Complaint, Exhibit A, GS00-P-98-BSD-0086 at 17. Article 14.2 of the '0086 contract supplements the Disputes Clause by providing that matters involving the interpretation of the contractor's rates and terms and conditions applicable to the areawide contract would be subject to jurisdiction and regulation of the public utility commission. *Id*.

The Board requested the parties to provide applicable written authorizations for provisions of electricity service under the most recent and past areawide contracts. Appellant stated that due to the passage of time, it could not locate authorizations issued under the '0005 contract, but that appellant's policy before June 1987 and continuing to the present was to use the areawide contracts to provide the commodity of electricity to federal executive branch agencies such as the United States Customs Service and to require an executed authorization before providing the electricity to executive branch agencies. Appellant's Second Supplemental Memorandum, Declaration of Mr. Robert D. Smith (Smith Declaration) ¶¶ 4-5 (Mar. 9, 2006).[1] Appellant has provided two authorizations under the '0086 contract for electricity service to the United States Customs Service facility at 7681 Boston Boulevard, Springfield, Virginia. The first authorization is for the facility itself, for an annual estimated service cost of $373,872, and the second is for "unit B" at an annual estimated service cost of $241,842. Appellant's First Supplemental Memorandum, Attachment A.

The claim

Appellant alleges that it had entered into the areawide contracts to provide electricity to the United States Customs Service building at 7681 Boston Boulevard, Springfield, Virginia. Complaint ¶ 1.[2] On or about March 2004, appellant discovered an unmetered service point at the facility when smoke from an electrical cabinet caused appellant to make

[1] Pursuant to an order of the Board dated February 22, 2006, appellant submitted two supplemental memoranda. The first supplemental memorandum was filed on March 3, 2006, and the second supplemental memorandum was filed on March 10, 2006.

[2] For the purpose of ruling on the motion to dismiss, we take the factual allegations of the complaint as true, particularly since the Government does not at this stage of the proceedings challenge the truth of those allegations. *Reynolds v. Army & Air Force Exchange Service*, 846 F.2d 746, 747 (1988).

a thorough visual inspection of the facility. *Id*. On or about June 29, 2004, appellant installed a new meter at the service point. *Id*., Exhibit B. Appellant states that the Government received, but has not paid for, electric service at the service point from June 1987 to June 28, 2004. *Id*. at ¶ 1.

On June 10, 2005, appellant submitted a CDA claim to Mr. Lindsey Lee, a GSA contracting officer in the agency's National Capital Region, and sought payment of $991,728.16 for the alleged un-metered electricity service. Complaint, ¶ 2 and Exhibit B. On September 12, 2005, Ms. Mary B. Eichelberger, Director of the Resource Management Group in the United States Customs Service's Office of Information and Technology, in her self-described capacity as the "CBP Contracting Officer's Representative," issued what she said was a contracting officer's decision denying all but $62,032.48 of appellant's claim. She also stated that appellant could appeal the decision to the General Services Board of Contract Appeals. Complaint ¶ 10.

The appeal

On December 6, appellant submitted an appeal to this Board from the purported contracting officer's decision of September 12, 2005. Complaint ¶¶ 3-4. On December 29, 2005, respondent submitted its motion to dismiss for lack of jurisdiction. Appellant replied on January 19, 2006.

Discussion

Respondent alleges that this Board lacks jurisdiction to entertain this dispute because the proper board of contract appeals is the Department of Transportation Board of Contract Appeals, not this Board. Motion to Dismiss at 4. Respondent argues that the contract at issue is between appellant and the United States Customs Service and argues that claims relating to the contract must be presented to a contracting officer of that agency. *Id*. at 5. In respondent's view, the areawide contracts do nothing more than "outline a method of contracting for service," Motion to Dismiss at 5, and the contracts required the United States Customs Service and appellant to execute written separate contracts in the form of authorizations to complete the purchase of electrical service. Respondent thus views as the contract to which the dispute pertains the individual authorizations between the United States Customs Service and appellant, not the areawide contracts between respondent GSA and appellant. *Id*. The Department of Transportation Board of Contract Appeals is the appropriate forum in respondent's view, because the United States Customs Service is part of the Department of Homeland Security and appeals from decisions of that Department's contracting offices are taken to the Department of Transportation Board of Contract Appeals. *See* 41 U.S.C. § 607(c), (d).

During all relevant times, statute authorized the Administrator of General Services to enter into contracts up to ten years in length for utility services on behalf of Executive Branch agencies. 40 U.S.C. § 481(a)(3) (1982)[3]. The Federal Acquisition Regulation (FAR) implemented the statutory scheme by providing that GSA would "enter into areawide contracts with suppliers for the furnishing of utility services to Federal agencies located within the service areas of those suppliers." 48 CFR 8.304-2(a) (1987). *See also* 48 CFR 41.204 (a) (2004). Under the FAR, any Federal agency having a requirement for utility services within an area covered by an areawide contract shall acquire services under that areawide contract unless service is available from more than one supplier or the head of the contracting agency or his designee determines that use of the areawide contract is not advantageous to the Government. 48 CFR 41.204(c)(1) (2004). The previous version of the FAR was substantively the same. 48 CFR 8.304-3(c) (1987).

Each areawide contract is to contain an authorization form for ordering service under the areawide contract. Upon execution of the authorization by the contracting officer and utility supplier, the utility supplier is required to furnish the service without further negotiation at the current applicable published or unpublished rates, unless other rates have been separately negotiated by the Federal agency with the supplier. 48 CFR 41.204(c)(3) (2004); 48 CFR 8.304-3(e) (1987). Agencies shall acquire utility services by separate contract only in the absence of an areawide contract or an interagency agreement, subject to the requirements of the FAR and subject to separate agency contracting authority. 48 CFR 41.205(a) (2004); 48 CFR 8.304-3(c) (1987).

GSA has delegated its authority to enter into utility service contracts not exceeding ten years in length to the Department of Energy and the Department of Defense and to the Department of Veterans Affairs for connection charges only. 48 CFR 41.103(b) (2004). The United States Customs Service is not a delegated agency which is authorized to separately contract for utility services.

It is evident from the statute, the FAR, and the terms of the areawide contracts themselves that the authorizations are not, as respondent argues, separate contracts, but rather serve as the ordering devices to secure service under the areawide contracts that GSA entered into with appellant.

Here it is not disputed that the United States Customs Service and appellant signed authorizations pursuant to the areawide utility contracts for the delivery of electricity to the facility at 7681 Boston Boulevard, Springfield, Virginia. Significantly, the respondent has

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[3] The current statute, substantively the same, is codified at 40 U.S.C. § 501(b)(1)(A), (B) (2002).

not identified a separate contract other than the areawide contract under which that agency purported to purchase electricity for the facility. The United States Customs Service never made the determinations required by the FAR to enable a non-delegated agency to separately contract for utility services at the Springfield, Virginia facility. The appellant sold, or intended to sell, electricity to United States Customs Service at the Springfield facility only under the areawide contracts administered by GSA. Indeed, the evidence is unrefuted that at the facility it was appellant's policy to supply electricity only under authorizations issued under the areawide contracts.

We now address the significance of the facts and the applicable law to our CDA jurisdiction. Appellant's appeal is premised on the proposition that appellant is owed for unmetered electricity under the areawide utility contracts between appellant and GSA. Appellant submitted a properly certified claim to the contracting officer for GSA, the agency that administers the areawide contracts. Although the claim made its way from GSA to Ms. Eichelberger, a COR with the United States Customs Service, it was the GSA contracting officer's duty to issue a decision on appellant's properly certified claim within sixty days or a specified reasonable time. 41 U.S.C. § 605(c)(2)(A), (B). Ms. Eichelberger's purported decision cannot trigger the appeal, because she is a COR for the United States Customs Service, not a contracting officer with GSA. *See Dulles Networking Associates, Inc.*, VABCA 6077, et. al., 00-1 BCA ¶ 30,775 (Board lacked jurisdiction over appeal from Program Manager's purported termination for default decision). Therefore, we must dismiss this appeal for lack of jurisdiction.

However, since the GSA contracting officer, from his receipt of the claim on or about June 10, 2005, has failed to issue a decision within sixty days or provide a date when he would issue the decision, an appeal would be properly before the Board on a "deemed denial" basis. 41 U.S.C. § 605(c)(5); *Dalton v. Cessna Aircraft Company*, 98 F.3d 1298, 1302 n.2 (Fed. Cir. 1996) (citing *Pathman Construction Co. v. United States*, 817 F.2d 1573 (Fed. Cir. 1987)). Appellant may re-file its appeal on that basis.

Decision

Respondent's motion is **GRANTED**. The appeal is **DISMISSED** for lack of jurisdiction.

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ANTHONY S. BORWICK
Board Judge

We concur:

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CATHERINE B. HYATT	ALLAN H. GOODMAN
Board Judge	Board Judge