UNITED STATES
CIVILIAN BOARD OF CONTRACT APPEALS

MOTION TO CONSOLIDATE GRANTED; MOTIONS TO DISMISS FOR LACK OF JURISDICTION, TO STAY, AND TO DESIGNATE LEAD RESPONDENT DENIED:
February 21, 2020

CBCA 6581, 6582

CSI AVIATION, INC.,

Appellant,

v.

DEPARTMENT OF HOMELAND SECURITY,

Respondent in CBCA 6581,

and

GENERAL SERVICES ADMINISTRATION,

Respondent in CBCA 6582.

Jason N. Workmaster, Abigail T. Stokes, and Caroline J. Watson of Miller & Chevalier Chartered, Washington, DC, counsel for Appellant.

Cassandra A. Maximous, Office of the Principal Legal Advisor, Immigration and Customs Enforcement, Department of Homeland Security, Washington, DC, counsel for Respondent in CBCA 6581.

Sarah E. Park, Office of General Counsel, General Services Administration, Washington, DC, counsel for Respondent in CBCA 6582.

Before Board Judges **DRUMMOND**, **KULLBERG**, and **CHADWICK**.

CHADWICK, Board Judge.

In *Avue Technologies Corp*. v. *Department of Health & Human Services*, CBCA 6360, et al. (Feb. 3, 2020), the Board deferred resolution of motions by the General Services Administration (GSA) and by an ordering agency asking us to decide which agency was the proper respondent in a dispute about an order placed under a GSA schedule contract. We reasoned that, where we docketed two appeals on the same claim, and we would have jurisdiction in one appeal or the other, "[t]he issue of which appeal is properly before us in the consolidated case has little practical significance for now and is, as a legal matter, neither so urgent that we must decide it now nor so obvious that we can decide it on the existing record." Similarly, here, where a contractor cautiously filed two appeals, one of which is necessarily protective, in a dispute involving schedule orders by a civilian agency, we will defer ruling on jurisdiction until we can say for sure that the dispute either does or does not require us to interpret the schedule contract. The alternative to waiting—i.e., identifying one respondent before we hear all of the merits arguments—will not move cases like this any faster and could turn the rule of *Sharp Electronics Corp. v. McHugh*, 707 F.3d 1367 (Fed. Cir. 2013), under which such a claim must "go to" GSA "if" but only if "it requires interpretation of the schedule contract's terms and provisions," *id*. at 1374, into a slow-acting solvent that could unexpectedly dissolve our jurisdiction later in the proceedings.

The contractor, CSI Aviation, Inc. (CSI), moves to consolidate its two appeals but asks us to stay CBCA 6581, which CSI considers its protective appeal, and to "designate GSA as the responsible agency" in the combined case. CSI relies on a provision of the schedule contract as its basis for liability and argues that we must interpret that provision to decide the merits. GSA argues that it is "not a party to the dispute" and seeks dismissal of CBCA 6582 for lack of jurisdiction. The Department of Homeland Security (DHS), the parent agency of the ordering agency, agrees with GSA that DHS is the proper respondent. DHS argues that CSI's request to stay CBCA 6581 is an improper attempt to "cut [the ordering agency] out of the case." DHS also opposes consolidation, arguing that "the matter cannot proceed to the merits until . . . CSI's complaint is clear and the Board has opined on which matter already pending before the Board should continue in proceedings."

We agree in part with CSI and DHS. We consolidate the appeals but do not stay either appeal or purport to "designate" a lead agency. The agencies will need to coordinate just as they would if this matter were before the Court of Federal Claims and the agencies were represented by the Department of Justice. As in *Avue*, we reject the argument that we "cannot proceed to the merits" of the claim while deferring a ruling on jurisdiction.

Background

CSI sells air transportation services to federal agencies under a GSA schedule contract. This dispute involves five charter flight orders placed by Immigration and Customs Enforcement (ICE). In early 2019, CSI invoiced ICE for $21,100,214.74, which CSI said it was owed after "rounding up" the durations of those flights "to the nearest flight hour," citing language of the schedule contract. ICE did not pay the invoices.

In May 2019, CSI submitted a certified claim for the disputed amount to the ICE contracting officer but specifically asked him to "immediately refer the claim to CSI's GSA Schedule contracting officer," pursuant to Federal Acquisition Regulation 8.406-6(b) (48 CFR 8.406-6(b) (2018)) (an ordering activity "shall refer all disputes that relate to the contract terms and conditions to the schedule contracting officer"). CSI identified the GSA contracting officer in its claim and sent him a copy of the claim. The ICE contracting officer did not refer the claim to GSA. In July 2019, he instead issued a decision denying the claim, finding that the rounding language in the schedule contract did not apply to the task orders because the orders were not priced by "estimated or actual block hours," the topic of the schedule contract provision. CSI filed CBCA 6581 from that denial in August 2019.

On the same day that it filed CBCA 6581, CSI filed CBCA 6582, from what CSI termed a deemed denial of its claim by GSA, the agency that CSI had wanted to decide the claim. A flurry of motions followed. In September 2019, CSI moved to stay CBCA 6581 and urged the Board to proceed in CBCA 6582. In October 2019, near the date by which the Board had ordered GSA to submit a contracting officer's decision in CBCA 6582, GSA moved to dismiss CBCA 6582 for lack of jurisdiction and to stay that appeal pending resolution of GSA's motion. In November 2019, after unsuccessfully moving to strike the appeal file submitted by DHS in CBCA 6581, CSI moved to consolidate the two appeals and to "designate" GSA the lead respondent on the grounds that "the ICE contracting officer had no authority to render his purported final decision, rendering it a nullity." In short, both agencies want us to proceed only in CBCA 6581, while CSI wants us to proceed only in CBCA 6582 but to leave CBCA 6581 on our docket. All of the motions are briefed.

Discussion

We grant CSI's motion to consolidate. These appeals are, at bottom, exactly the same matter, complicated only by jurisdictional issues unique to the schedule contracting environment. It really requires no analysis to find that two appeals about the same claim "involve common questions of law or fact." Board Rule 2(f) (48 CFR 6101.2(f) (2019)).

Indeed, all parties have already briefed a common question: whether the ICE contracting officer or the GSA contracting officer had authority to decide the claim. *Sharp Electronics* tells us that the answer depends on the nature of "the dispute." 707 F.3d at 1374–75. But what if, as here, one side says the dispute requires us to interpret the schedule contract, but the other side says, no, the dispute is all about the task order language? It is sometimes important for us to resolve such disagreements early, if we have only one agency before us and we will lack jurisdiction if the case requires the presence of the other agency. *E.g.*, *immixTechnology, Inc. v. Department of the Interior*, CBCA 5866, 19-1 BCA ¶ 37,247 (2018); *Consultis of San Antonio, Inc. v. Department of Veterans Affairs*, CBCA 5458, 17-1 BCA ¶ 36,701; *see also Impact Associates, Inc.*, ASBCA 57617, 13 BCA ¶ 35,289.

This case, like *Avue*, is different. No party gives us grounds to think we lack jurisdiction in *both* appeals. We can decide CSI's claim in one appeal or the other. In the big picture, moreover, this case involves a contract claim by CSI against *the United States*, which acted here through two of its agencies. *See* 41 U.S.C. § 7101(7) (2012) ("contractor" in the Contract Disputes Act (CDA) "means a party to a Federal Government contract other than the Federal Government"); *Bank of America, National Ass'n v. Department of Housing & Urban Development*, CBCA 5571, 18-1 BCA ¶ 36,927, at 179,889 (2017) ("[T]he claim before us under the [agency] contract is ultimately against the United States, not against [an agency]."). The Board's ministerial practice of docketing CDA appeals naming agencies as the respondents does not affect the underlying government contracts. Whether a CDA claim went to the right contracting officer is an important threshold issue, but it is not urgent to decide it when both United States agencies are before us and we know the answer must be yes because the contractor sent the claim to both contracting officers.

The question of which agency is the proper respondent under *Sharp Electronics* qualifies as a "difficult" question of statutory jurisdiction that we may "reserve" for later decision so long as "the case alternatively could be resolved on the merits in favor of" a party challenging jurisdiction. *Minesen Co. v. McHugh*, 671 F.3d 1332, 1337 (Fed. Cir. 2012) (quoting *Steel Co. v. Citizens for a Better Environment*, 523 U.S. 83, 110–11 (1998) (Breyer, J., concurring in part and in the judgment) (internal quotation marks omitted)); *see Servitodo LLC v. Small Business Administration*, CBCA 6055, 18-1 BCA ¶ 37,170, at 180,938 n.5. The jurisdictional issue is difficult because it appears to be substantially or exactly the same as the merits dispute, i.e., whether the language of the schedule contract governs CSI's entitlement. That merits dispute is not yet joined. Alternatively, we might never have to rule on jurisdiction. Should we adopt substantially the ICE contracting officer's reasoning, we might deny both appeals on the merits without needing to decide where the claim should have gone. As a further alternative, if we rule for CSI on the merits, we will know then whether our decision depended on interpreting the schedule contract, and we will know which agency to dismiss from the case.

The *risk* of dismissing an appeal too early, by contrast, is that we could end up without jurisdiction in the other appeal under *Sharp Electronics* if we later changed our minds about the crux of the dispute. That risk of inefficiency and wasted resources outweighs any benefits that might result from issuing a decision on jurisdiction now.

In addition to citing *Sharp Electronics*, GSA argues that GSA cannot be "deemed" to have denied CSI's claim under 41 U.S.C. § 7103(f)(5) because the GSA contracting officer would "not have authority to issue a final decision on a claim that DHS ICE ha[d] already addressed." This argument simply assumes that the ICE contracting officer had authority to act and thus does not add anything to the debate over jurisdiction. GSA also cites decisions holding that a contracting officer cannot decide a CDA claim when the claim is "in litigation," *e.g.*, *McDonnell Douglas Corp. v. United States*, 37 Fed. Cl. 285, 289 (1997), but, first, those decisions turn on the authority of the Attorney General under 28 U.S.C. § 516 to litigate cases at the Court of Federal Claims, and thus are not pertinent to Board cases, and second, CSI filed both appeals on the same day, so the asserted deemed denial did not occur while a claim was in litigation.

The Board seeks "the just, informal, expeditious, and inexpensive resolution of every case." Rule 1(c). For the reasons we have given, we find proceeding in the consolidated case to be the option most in keeping with our mission. All parties seem concerned that having two agencies in the case may be "confusing" or inefficient. We do not see why that should be true and we trust counsel to cooperate to avoid it. We deny CSI's request to "designate" a primary respondent over the agencies' objections. No such designation is necessary to encourage the parties to coordinate among themselves. A case involving two agencies should be no more onerous to conduct at the Board than it would be at a court.

Decision

The Board **GRANTS** the motion to consolidate and **DENIES** the motions to dismiss CBCA 6582 for lack of jurisdiction, to stay CBCA 6581, and to designate a lead respondent.

Kyle Chadwick

KYLE CHADWICK
Board Judge

We concur:

Jerome M. Drummond
JEROME M. DRUMMOND
Board Judge

H. Chuck Kullberg
H. CHUCK KULLBERG
Board Judge