



UNITED STATES  
CIVILIAN BOARD OF CONTRACT APPEALS

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RESPONDENT'S MOTION TO DISMISS  
FOR LACK OF JURISDICTION DENIED: December 8, 2010

CBCA 2054

LOCKHEED MARTIN ASPEN MED SERVICES, INC.,

Appellant,

v.

DEPARTMENT OF HEALTH AND HUMAN SERVICES,

Respondent.

Robert F. Pezzimenti, Associate General Counsel of Lockheed Martin, IS&GS Civil, Rockville, MD, counsel for Appellant.

Jonathan A. Baker, Procurement, Fiscal and Information Law Branch, Office of the General Counsel, Department of Health and Human Services, Washington, DC, counsel for Respondent.

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

**BORWICK**, Board Judge.

Respondent, the Department of Health and Human Services, moves to dismiss this appeal for lack of jurisdiction because the purported appellant, Lockheed Martin Aspen Med Services, Inc. (LMAM or appellant)<sup>1</sup>, is a subcontractor, and lacks privity to bring suit as a prime contractor. Respondent maintains that only Medical Staffing Network (MSN) was the prime contractor for the contract at issue here.

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<sup>1</sup> LMAM purchased Aspen Med Services and is the successor in interest to Aspen Med Services.

LMAM opposes the motion, maintaining that, as a participant in a Contractor Team Arrangement (CTA), it has standing as a prime contractor to submit a certified claim to the contracting officer and to file a subsequent appeal before the Board. For the reasons stated below, we agree with appellant and deny respondent's motion.

### Background

Based on the appeal file and exhibits of the parties attached to the motion to dismiss and appellant's opposition, and supplemental information requested by the Board, the Board finds the following jurisdictional facts relevant to the motion.<sup>2</sup>

On March 28, 2005, respondent issued a request for quotations (RFQ) for medical staffing services from qualified and experienced contractors via the General Services Administration's (GSA's)/Department of Veterans Affairs (VA's) Federal Supply Schedule (FSS) contract for special item number 621 (GSA FSS SIN 621).<sup>3</sup> Appeal File, Exhibit 1. The RFQ established a two-stage evaluation process, wherein vendors at the first evaluation stage were required to demonstrate that they could provide prices for the first fifty percent of the estimated quantity of hours in a temporary professional medical services (TPMS) worksheet. *Id.* at 100. Teaming was strongly encouraged to ensure that vendors met this threshold. *Id.* Any vendor who failed to meet the threshold would be eliminated from award. *Id.* at 109 (Question and Answer 39). The RFQ "strongly encouraged" offerors "to maximize teaming arrangements to propose coverage of all desired geographic service areas listed to perform the requirements of this RFQ." *Id.* at 1. Respondent, however, reserved the right to make a single award, or a multiple award, whichever was determined to be in the best interests of the Government. *Id.* at 108 (Question and Answer 38).

The RFQ emphasized that by submitting a quotation the firm was certifying that the firm held a current GSA FSS contract for SIN 621. *Id.* at 2. Indeed, each quotation was required to include a copy of the firm's GSA FSS contract. *Id.*

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<sup>2</sup> When, as in this case, a motion to dismiss for lack of jurisdiction challenges the truth of alleged jurisdictional facts, the Board may consider relevant evidence beyond the pleadings to resolve disputed facts. *Rockies Express Pipeline LLC v. Department of the Interior*, CBCA 1821, 10-2 BCA ¶ 34,542.

<sup>3</sup> Special item number 621 is for Professional and Allied Healthcare Staffing Services.

Later in the RFQ respondent stated that if a CTA is proposed, the designated team leader must provide “one comprehensive RFQ response. . . on behalf of the entire team.” Appeal File, Exhibit 1 at 7-8. The RFQ referred vendors to a GSA document explaining the concept of a CTA. That document explains that a CTA differs from the traditional prime-subcontractor relationship because each member of the CTA has privity of contract with the Government and may interact directly with the Government. Appellant’s Opposition to Respondent’s Motion to Dismiss (Appellant’s Opposition), Exhibit 2 at 3. The RFQ also required a CTA template to be used in identifying the members of the CTA and emphasized that mere teaming arrangements between a prime and a subcontractor would not be considered CTAs and would not be considered part of the terms of any blanket purchase agreement awarded to the prime contractor. *Id.*

Respondent issued amendment one to the RFQ to change certain pricing and staffing requirements and to incorporate answers to vendors’ questions. Appeal File, Exhibit 1 at 56. One vendor asked the consequences if it could not supply staffing requirements under the GSA FSS for SIN 621. Respondent stated that the vendor “should consider CTAs with other GSA SIN 621 schedule holders.” Respondent warned that if the vendor was unable to enter into a CTA with a SIN 621 FSS vendor and was not on the FSS for SIN 621, the vendor should not propose the requirements. Appeal File, Exhibit 1 at 100 (Question and Answer 2). One vendor asked about forming a CTA to capture work under an FSS and asked if it could “serve as the prime contractor.” Respondent replied that “a prime/subcontractor relationship is different than a Contractor Teaming Arrangement” and referred the vendor to the GSA’s explanation of the CTA concept. *Id.* at 115 (Question and Answer 60).

In response to a vendor question about the responsibilities of CTA members reporting FSS sales to GSA and remitting the industrial funding fee (IFF), respondent stated that each GSA FSS contract holder that was also a CTA member must report schedule sales to GSA and must remit the IFF. *Id.* at 116 (Question and Answer 64). One vendor asked, if a CTA is proposed and award is made to the team leader, whether all orders flow through the team leader or could be directly provided to a team member. This vendor also asked whether each member of the CTA would be equally and individually responsible for contract deliverables and system reports. Respondent replied that the CTA should “state in detail which team member is responsible for which aspect of the proposal.” *Id.* at 119 (Question and Answer 79).

A response to the RFQ was submitted by MSN and its CTA partners that included Aspen Med Services. Appeal File, Exhibit 2 at 1. On September 9, 2005, respondent awarded a Blanket Purchase Agreement (BPA) to MSN for TPMS to be ordered under the BPA on an as-needed basis, as requested by all of respondent’s operating divisions. *Id.*,

Exhibit 3 at 385. The BPA did not obligate funds; rather, funds were to be obligated as individual orders were placed against the BPA. *Id.* at 386.

Included in the BPA were agreements with each of MSN's CTA partners, including Aspen Med, and the identification of Aspen Med's FSS number. Appeal File, Exhibit 3 at 395. MSN was the team leader and chose to supply a single payment invoice. *Id.* at 396. However, the BPA provided for direct payments to each CTA team member if the unitary invoice indicated the GSA FSS number for the team member and the applicable product and service provided by the team leader and each team member. *Id.*

Shortly after the award of the BPA, respondent's officials met with MSN and Aspen Med personnel to discuss implementation of the BPA. Respondent's officials stated that they were concerned with continuity of service at respondent's Federal Occupational Health Service's (FOH's) Region D, and would issue a delivery order to MSN for those services, assuming that Aspen Med would continue providing them. Appellant's Opposition, Exhibit 4.

MSN and Aspen Med entered into a service agreement in which Aspen Med agreed to supply any FOH services within Maryland, Virginia, and the District of Columbia, upon the issuance of a delivery order from FOH or its agency support group, the Program Support Center (PSC). Appellant's Opposition, Exhibit 23. MSN called Aspen Med a "subcontractor."

On or about March 13, 2006, respondent issued its first delivery order to MSN for TPMS for FOH's Region D for a total award amount of eight million dollars. Declaration of Jennifer Marrion, Business Operations Manager for LMAM (Dec. 2, 2010) ¶ 2. MSN then passed the order to Aspen Med for fulfillment, since the LMAM FSS schedule contained all of the required labor categories, while the MSN schedule did not, particularly since MSN's FSS schedule has no physicians. Marrion Declaration ¶¶ 2-3. Before the summer of 2010, MSN's role in performing the order, so far as was apparent to respondent's FOH, was limited to invoicing and other communications with the Government. Declaration of Colonel Kimberly Deffinbaugh, Contracting Officer's Technical Representative (Dec. 1, 2010) ¶ 6. On or about July 2010, MSN began to provide TPMS, primarily nursing services, for Region D. *Id.* ¶ 7.

During the course of contract administration, respondent's officials directly interacted with LMAM. Respondent would discuss directly with LMAM: delivery order funding levels; changes to work hours schedules and addition of contract line items to provide for additional billings; cash awards to contractor employees; changes in personnel

service deliverables; cost estimates; and the staffing requirements and schedules for opening new sites. Appellant's Opposition, Exhibits 6-10.

Respondent's officials, through its PSC, called LMAM personnel to verify LMAM's FSS schedule pricing information. Complaint, Attachment 18. Respondent's officials discussed rates for exercising options directly with LMAM personnel and LMAM provided respondent's officials with proprietary information that LMAM did not want MSN officials to see. Appeal File, Exhibit 8 at 591. LMAM sent requests for equitable adjustments directly to respondent's officials, particularly when the request would contain LMAM proprietary information. *Id.*, Exhibit 9 at 613. Respondent's officials corresponded directly with LMAM concerning rate changes based primarily on the application of the Service Contract Act. Appeal File, Exhibit 17 at 775-76. Additionally, LMAM tracked its FSS invoices under the delivery order and reported those sales to GSA and paid GSA the IFF mandated by the LMAM FSS contract. Marrion Declaration ¶ 6.

On November 10, 2009, LMAM submitted by hand delivery a proprietary certified claim directly to the contracting officer seeking an increase in the contract price due to the allegedly late incorporation of Service Contract Act rates into the third option year. LMAM sent a courtesy copy to MSN. Appeal File, Exhibit 10; Declaration of Ariel McCabe, LMAM Senior Contracts Negotiator (Dec. 2, 2010) ¶ 5.

Earlier, LMAM had submitted a non-proprietary and non-certified claim summary to MSN. McCabe Declaration ¶ 3. It was LMAM's expectation that MSN would forward the summary to HHS, but at no point did LMAM request MSN to submit a certified claim to respondent, nor could it have, since LMAM never provided the full certified proprietary claim to MSN. Indeed, LMAM officials explicitly informed MSN that LMAM would provide the certified claim to respondent. *Id.* On November 9, 2009, MSN also submitted the claim summary to the contracting officer. *Id.* at ¶ 4.

The claim involves increased costs for services only provided by LMAM and a two percent administrative fee MSN charged Lockheed for preparing invoices. Marrion

Declaration ¶ 4.<sup>4</sup> The respondent, by contracting officer's decision dated March 23, 2010, addressed to MSN, not Lockheed, denied the claim.

### Discussion

Respondent has submitted a motion to dismiss for lack of jurisdiction, contending that LMAM lacks privity with the Government. Appellant opposes the motion. When assessing such a motion, we should construe the allegations of the complaint favorably to the pleader. *Roy Anderson Construction Inc. v. Department of Veterans Affairs*, CBCA 1884, et al., 10-2 BCA ¶ 34,485. If respondent, however, challenges jurisdictional facts upon which the complaint is based, we may consider relevant evidence beyond the pleadings to resolve disputed facts. *Cedars-Sinai Medical Center v. Watkins*, 11 F.3d 1573 (Fed. Cir. 1993); *Anderson Construction*.

In this case, LMAM has submitted an appeal from a contracting officer's decision as a contractor in privity with the Government. Respondent does not agree that appellant is a contractor, and argues that LMAM is a subcontractor to MSN, and that only MSN has standing to bring the appeal. It is beyond dispute that the Contract Disputes Act provides that only contractors may appeal decisions of contracting officers, 41 U.S.C. §§ 601(4), 605(a), and that only those in privity of contract with the Government may avail themselves of the act's procedures. *Winter v. FloorPro Inc.*, 570 F.3d 1367, 1371 (Fed. Cir. 2009).

LMAM maintains that as a member of a CTA providing services under the BPA and the subsequently issued delivery order, it stands in privity of contract with respondent and fully entitled to submit an appeal to the Board.

In support of its position, appellant relies on the case of *Key Federal Finance v. Department of Commerce*, CBCA 412, 07-1 BCA ¶ 33,555.<sup>5</sup> *Key* involved a contract

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<sup>4</sup> Under the service agreement between MSN and LMAM, MSN charges LMAM a two percent administrative fee. Marrison Declaration ¶ 4. Consequently, in order to capture that fee, LMAM adds two percent to each labor category when preparing labor rates on invoices that MSN sends to respondent. *Id.* Because of this pricing structure, respondent never sees a separate line item for MSN's administrative fee. MSN recoups that fee by remitting ninety-eight percent of the payments MSN receives from respondent to LMAM. *Id.*

<sup>5</sup> In a companion case, CBCA 411, the respondent was the General Services Administration.

where each member of the CTA provided services to respondent under its FSS vehicle that other members of the CTA were unable to provide in their respective FSS contracts. The solicitation required vendors to enter into CTAs to be eligible for award.

The Board recognized that *Key*, as a member of a CTA, was in privity of contract with the Government because the respondent, the Department of Commerce, dealt directly with each team member. The Board also noted that the Department of Commerce assigned all monies to *Key* that were due the lead CTA member, and that the Department of Commerce stated that it would have awarded the contract to whichever party had been named the “prime contractor” in the CTA. Under those circumstances, the Board held that “a special relationship was created between Commerce and *Key* that went beyond the normal contract structure in which the Government only deals with the named contractor and that contractor deals with its subcontractor.” *Key*, 07-1 BCA at 166,184.

Respondent distinguishes *Key* by arguing that, in this contract, entering into a CTA was not required, only encouraged, because in this case, respondent could have entered into multiple awards. Respondent’s Motion at 10, 13-14. Respondent argues that in *Key*, the Department of Commerce was indifferent to the identity of the firm designated as the “prime” within the CTA, while in this case the parties “respected the ordinary distance of the Government from the subcontractor.” Respondent’s Motion at 15. In this regard, respondent notes that the BPA in this appeal barely mentioned LMAM, that the award document designated MSN as the awardee, and that contract modifications were signed by MSN officials. Respondent’s Motion at 5-6. Appellant counters by stating that for all modifications involving LMAM, MSN obtained LMAM’s approval before signing them and that MSN did nothing but add a cover letter. Appellant’s Opposition at 11.

Respondent’s attempts to distinguish the facts in *Key* are unpersuasive. The salient fact in *Key* was that the Department of Commerce contracted for services with a CTA, with each member providing services under its own FSS contract and with each member deemed by the Government to be in privity. In other words, each member of the CTA possessed an existing government contract and was providing services to respondent via that contract. The contractual relationship did not stem from a prime contract that flowed down to a subcontractor through a subcontract between a prime and a subcontractor.

That is the case here. LMAM entered into a CTA with MSN, just as *Key* had entered into a CTA with its team leader, JRTI. LMAM provided services to respondent through its FSS contract, incorporating the prices of that contract into the BPA. Indeed, respondent--in question and answer 60 to the solicitation--told vendors who were competing for the requirement that CTA members were not considered subcontractors, and referred vendors to GSA’s document, the same document referenced in *Key*, which

states that CTA members are in privity with the Government. Respondent made this evident when it told competing vendors in questions and answers incorporated into the solicitation that as CTA members, they would be responsible for reporting their schedule sales to GSA and remitting the IFF. Lockheed did, indeed, as a prime contractor would, report schedule sales to GSA and remit the IFF to GSA.

Respondent further seeks to distinguish *Key* by arguing that use of a CTA was mandatory in *Key*, but not in this case. That is an unconvincing distinction. While respondent reserved the right to make multiple awards, the whole purpose of the procurement was to provide nationwide TPMS through a single BPA, to which end CTA arrangements were strongly encouraged. Finally, respondent argues that it kept the traditional distance maintained between the Government and a subcontractor. Respondent's Motion to Dismiss at 15. With all respect to respondent, this is manifestly not the case. Respondent dealt with LMAM directly on vital aspects of contract performance, including pricing, scheduling of work, and the addition of new sites for the provision of TPMS services. It is true that respondent maintained certain formalities when it issued contract modifications in the name of MSN only, but that does not change the reality of respondent's consistent dealings with LMAM in the same way the Government would deal with a prime contractor. Furthermore, in submitting its certified claim directly to respondent, LMAM acted as a prime contractor, with only a courtesy copy to MSN, explicitly stating to MSN that it would submit the complete proprietary and certified claim to respondent. Although the contracting officer addressed her decision to MSN denying LMAM's claim, respondent must have known that the claim belonged to LMAM, not to MSN, since it was LMAM who certified the claim and since it was an LMAM official who delivered the certified claim to the contracting officer.

The Board's decision in *Wackenhut, International, Inc. v. Department of State*, CBCA 1235, 09-2 BCA ¶ 34,255, does not dictate a different result. In *Wackenhut*, we dismissed the appeal for lack of jurisdiction because a member of a joint venture, rather than the joint venture itself, submitted the appeal. However, that case did not involve two members of a CTA, each providing services under its own contract.

In short, LMAM was in privity with respondent, and submitted a properly certified claim to the contracting officer. The contracting officer issued a decision from which appellant took a timely appeal.

Decision

Respondent's motion to dismiss is **DENIED**.

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ANTHONY S. BORWICK  
Board Judge

We concur:

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JEROME M. DRUMMOND  
Board Judge

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CATHERINE B. HYATT  
Board Judge