UNITED STATES
CIVILIAN BOARD OF CONTRACT APPEALS

COUNTERCLAIM DISMISSED FOR LACK OF JURISDICTION: January 29, 2008

CBCA 65

USPROTECT CORPORATION,

Appellant,

v.

DEPARTMENT OF HOMELAND SECURITY,

Respondent.

Shlomo D. Katz and Daniel B. Abrahams of Epstein, Becker & Green, P.C., Washington, DC, counsel for Appellant.

Jennifer L. Longmeyer-Wood, Office of the Principal Legal Advisor, Immigration and Customs Enforcement, Department of Homeland Security, Washington, DC, counsel for Respondent.

Before Board Judges **STERN**, **FENNESSY**, and **SOMERS**.

FENNESSY, Board Judge.

This appeal arose from a certified claim in the sum of $439,387 dated October 28, 2004, submitted to a contracting officer of the Department of Homeland Security (DHS) by USProtect Corporation (USProtect) for a price adjustment pursuant to the Service Contract Act (SCA). DHS did not issue a decision within sixty days of receipt of the claim, nor did it inform USProtect when a decision would be issued, as required by the Contract Disputes Act (CDA). 41 U.S.C. § 605(c)(2) (2000). When DHS did not issue a decision by

February 8, 2005, USProtect appealed to the Department of Transportation Board of Contract Appeals pursuant to 41 U.S.C. § 605(c)(5).[1]

The board received the appeal on February 9, 2005, and, on that date, issued a notice of docketing in which the board suspended proceedings and directed the contracting officer to issue a decision by March 11, 2005, in accordance with section 605(c)(5) of the CDA.

By letter dated February 22, 2005, the contracting officer explained to the board that a decision on the claim was delayed because DHS required a determination from the Department of Labor (DOL) concerning whether prescribed minimum wage rates or a collective bargaining agreement applied to the contract in issue. DHS requested an extension of time within which to issue a decision until April 30, 2005.

Thereafter, during a telephone conference among the board and the parties, the parties agreed to stay proceedings pending settlement discussions. After an extended period of time, the parties notified the Board that they had been able to settle three related cases, CBCA 66, 67, and 671; however, they were unable to settle the instant appeal.

On April 5, 2007, the contracting officer issued a decision denying appellant's claim and asserting a government claim in the amount $4,148,464 for overpayments by DHS to USProtect. The overpayments allegedly resulted from DHS's mistaken inclusion of SCA rate increases twice for the second option year. The second increase was added to the already increased rate for the second option year and was then carried forward and increased over each successive contract period.

USProtect did not appeal the contracting officer's decision of April 5, 2007, to the Board, and the time for doing so has expired. Moreover, USProtect stated in its complaint that it intends to commence an action in the United States Court of Federal Claims on the Government's claim if the parties are unable to settle it.

In its answer to the complaint, DHS asserted its counterclaim. Thereafter, appellant submitted a motion to dismiss the counterclaim for lack of subject matter jurisdiction upon

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[1]On January 6, 2007, pursuant to section 847 of the National Defense Authorization Act for Fiscal Year 2006, Pub. L. No. 109-163, 119 Stat. 3391, the Department of Transportation Board of Contract Appeals was terminated and its cases, personnel, and other resources were transferred to a newly-established Civilian Board of Contract Appeals (CBCA). The case remains as it was; the docket number has been changed to reflect the transfer to the new Board.

the grounds that USProtect's appeal to the Board from the deemed denial of its claim did not encompass an appeal of the Government's claim.

In response, DHS has moved to withdraw its counterclaim upon the grounds that the Board lacks jurisdiction to hear the counterclaim at this time. However, the Government reserves the right to reassert its counterclaim "at such time that it believes that jurisdiction does exist."

Discussion

To invoke the Board's jurisdiction pursuant to the Contract Disputes Act, a contractor must appeal a decision of an agency contracting officer denying a contractor's claim or asserting a government claim within ninety days of receipt of the decision. 41 U.S.C. §§ 605(a), 605(b), 606. Further, the CDA provides a contractor with an alternative forum in which to challenge a contracting officer's decision. Pursuant to section 609 of title 41, a contractor may commence an action in the Court of Federal Claims within twelve months of receipt of a contracting officer's decision.

In the event of delay by a contracting officer in rendering a decision on a contractor's claim, the CDA offers contractors two options for advancing the process. First, a contractor may petition a board of contract appeals to direct the contracting officer to render a decision within a specified time. 41 U.S.C. § 605(c)(4). In such an appeal, the relief requested is fully granted upon the Board's issuance of the order. A contractor may appeal a decision issued pursuant to such an order to a board or commence an action in court. *Federal Data Corp*., DOTBCA 2389, 91-1 BCA ¶ 23,459.

Alternatively, the CDA allows a contractor to appeal to a board of contract appeals or commence an action in court based upon the failure of a contracting officer to timely render a decision on a claim. Such a failure is considered a "deemed denial." 41 U.S.C. § 605(c)(5). When an appeal or action is taken under section 605(c)(5), the underlying dispute is before the elected tribunal. *Federal Data Corp*. However, the tribunal may suspend proceedings and direct a contracting officer to render a decision on the claim. Such an order does not affect the tribunal's jurisdiction since, by virtue of section 605(c)(5), the underlying dispute is already before the tribunal.

A contractor's decision to pursue its remedy in one forum over the other constitutes a binding election. 41 U.S.C. § 609(a)(1). This provides an "either-or-alternative," not "dual avenues of appeal." *Santa Fe Engineers, Inc. v. United States*, 677 F.2d 876, 878 (Ct. Cl. 1982). A contractor is deemed to have made a binding election when: 1) it has sought to avail itself of one forum over another; and 2) that forum has the ability to exercise

jurisdiction at the time the election is attempted. *Jo-Mar Corp. v. United States,* 15 Cl.Ct. 602, 605 (1988).

Here, USProtect commenced an appeal from the contracting officer's deemed denial of its claim pursuant to 41 U.S.C. § 605(c)(5). In accordance with the provisions of that section, the dispute over the USProtect's claim is within the Board's jurisdiction.

The same does not follow as to the contracting officer's assertion of the Government's claim. To challenge that decision, USProtect could have commenced a timely appeal to the Board. However, having not elected that option, USProtect may commence a timely action in court pursuant to its CDA right to elect the forum within which to litigate a dispute.

In sum, the Board continues to possess jurisdiction of the original appeal from DHS's deemed denial of appellant's claim but does not possess jurisdiction to hear and decide the Government's claim.[2]

Decision

USProtect's motions is **GRANTED**. The Government's counterclaim is **DISMISSED FOR LACK OF JURISDICTION.**.

EILEEN P. FENNESSY
Board Judge

We concur:

JAMES L. STERN
Board Judge

JERI KAYLENE SOMERS
Board Judge

[2] We note that, if USProtect commences an action in court to challenge the Government's claim, section 609(d) of the CDA permits the court to consolidate this appeal with that action in court or transfer the action to the Board.