



UNITED STATES
CIVILIAN BOARD OF CONTRACT APPEALS

DISMISSED: April 19, 2007

CBCA 587

COLUMBIA COACH SERVICE, INC.,

Appellant,

v.

DEPARTMENT OF AGRICULTURE,

Respondent.

Mark Renner, President of Columbia Coach Service, Inc., Washougal, WA, appearing for Appellant.

Jennifer T. Newbold, Office of the General Counsel, Department of Agriculture, Missoula, MT, counsel for Respondent.

POLLACK, Board Judge.

Background

This appeal, filed December 21, 2006, is from an October 5, 2006, decision of the contracting officer (CO), Forest Service (FS), Region One, Missoula, Montana. Appellant, Columbia Coach Service, Inc. (Columbia Coach) has elected to have the case handled as a small claim, using expedited procedures. Under such procedures, the Board decision is rendered by a single judge and is non-appealable. Decisions rendered under the small claims procedure are not cited as precedent. Here, the Board provides a summarized decision.

The appeal arises out of Emergency Equipment Rental Agreement (EERA) AG-0343-S-06-8041, dated June 17, 2006, between the FS and appellant. The critical facts are undisputed. Appellant responded to the Government's Water Handling Equipment Solicitation, Region 1. The solicitation was for equipment to be used for the upcoming fire

season. It called for equipment to be ordered from vendors on an as-needed basis. The Government was to order from various host dispatch centers, among which was the dispatch center in Bitterroot National Forest. The solicitation provided that the host dispatch center would give ordering priority to its assigned best value equipment. Various equipment suppliers, such as appellant, were listed in a priority order and those higher on the list were to be called first. According to the FS, the 2006 fire season was the first time Region One had completed and awarded engine and water tenders through a web-based program. Under the agreement, in those instances where appellant was to provide water tender equipment, it was to be paid at a rate of \$1482 per day.

The FS does not dispute that the EERA contemplated that the ordering of water tenders would be based on a priority list for the Gash Creek Fire, and it further does not dispute that starting on two separate dates -- July 28 and August 10, 2006 -- the FS ordered a water tender from someone lower on the priority list than appellant. Appellant notified the FS of this as soon as it found out, but the FS did not act to substitute appellant for the party to which it gave the work order. In this appeal, appellant claims lost revenue of \$10,374 for the days on which the FS used tenders from vendors below it on the priority list.

The contract includes several clauses which address the fact that the issuance of work orders was not guaranteed and indeed was uncertain. That was due to conditions during a fire season not being fully predictable. Both parties understood the lack of guarantee as to the work; however, both parties also understood that when equipment was to be ordered, the priority list was to be followed.

Key to our decision here, however, is wording set out in the preface to the General Clauses to EERA Form OF-294. That wording provides:

Since the equipment needs of the Government and availability of Contractor's equipment during an emergency cannot be determined in advance, it is mutually agreed that, upon request of the Government, the Contractor shall furnish the equipment listed herein to the extent the Contractor is willing and able at the time of order

Soon after receiving the appeal, the Board scheduled a telephone conference and directed the FS to provide the Board with citations to the legal authority being relied on by the FS for the proposition that because the FS had not acted in bad faith, there was no breach. The FS was given until March 12, 2007, to file that information as well as address a number of items for which it claimed it lacked sufficient information to take a position. At that time the Board also set a tentative hearing for March 28, 2007.

On March 12, 2007, the Board received Memorandum of Law or Alternatively, Motion To Dismiss from the FS asking that the appeal be dismissed for lack of jurisdiction. In its motion the FS asserted that the Board did not have jurisdiction, as there was no enforceable contract. The FS cited *Petersen Equipment*, AGBCA 94-163-1, et al., 95-2 BCA ¶ 27,676.

Upon receiving the FS motion, the Board scheduled a conference for March 14, 2007, between Mr. Mark Renner of Columbia Coach and Jennifer Newbold, Esq., counsel for the FS. At the time of the conference, Mr. Renner had not received the motion as it had been sent to him by regular mail. Nevertheless, the Board reviewed with the parties its understanding of the basis of the FS motion and additionally shared its understanding of the law, based on the Board's initial research.

In that regard, the Board directed the parties to the decision in *Ridge Runner Forestry v. Veneman*, 287 F.3d 1058 (Fed. Cir. 2002). The Board pointed out that *Ridge Runner*, not *Petersen* appeared to be the controlling law. The former was decided by the Court of Appeals for the Federal Circuit, the appellate tribunal to which decisions of this Board are appealed. In *Ridge Runner*, the Court affirmed a decision of the Department of Agriculture Board of Contract Appeals (AGBCA), *Ridge Runner Forestry*, AGBCA 2000-161-1, 01-1 BCA ¶ 31,300, concerning a contract, similar, but not identical to the contract in issue in this appeal. Although the *Ridge Runner* contract was not identical to Columbia Coach's contract, the language used by the Court in its decision in *Ridge Runner* made clear that the Court was concluding that where either party lacked an obligation to perform, that lack of obligation, alone, translated into an unenforceable contract. Therefore, although the AGBCA decision on appeal in *Ridge Runner* had relied upon two elements -- (1) the lack of obligation on the part of the contractor and (2) the fact that the FS was also not obligated to satisfy its requirements from only sources which had signed the agreement -- the Court decision made it clear that either element was sufficient to create an unenforceable contract.

As the Court stated in *Ridge Runner*,

“To be valid and enforceable, a contract must have both consideration to ensure mutuality of obligation . . . and sufficient definiteness so as to ‘provide a basis for determining the existence of a breach and for giving the appropriate remedy.’” *Ace-Federal Reporters, Inc. v. Barram*, 226 F.3d 1329, 1332 (Fed. Cir. 2000) (internal citations omitted).

“To constitute consideration, a performance or a return promise must be bargained for.” *Restatement (Second) of Contracts* § 71(1) (1979). And the “promise or apparent promise is not consideration if by the terms the promisor

or purported promisor reserves a choice of alternative performances. . . .” *Id.*
§ 77.

287 F.3d at 1061.

Additionally, the Court addressed Ridge Runner’s argument that the agreement was a binding contract because it placed specific obligations upon the Government to use Ridge Runner and other winning vendors for the Government’s firefighting needs, and in return, Ridge Runner and others had to remain ready with acceptable equipment and staff, so as to answer a Government call. Ridge Runner contended that the above facts placed the contract within the holding in *Ace-Federal* and thus was enforceable. The Court, however, found otherwise. It distinguished *Ace-Federal*, pointing out that in *Ace-Federal*, the contract obligated the Government to fulfill all of its requirements for transcription services from the enumerated vendors or otherwise obtain a waiver. That was not the case as to Ridge Runner and the other vendors under the agreement at issue there.

The Federal Circuit then continued, summing up its position with the following:

The government had the option of attempting to obtain firefighting services from Ridge Runner or any other source, regardless of whether that source had signed a tender agreement. The Agreements contained no clause limiting the government’s options for firefighting services; the government merely “promised” to consider using Ridge Runner for firefighting services. Also the Tender Agreement placed no obligation upon Ridge Runner. If the government came calling, Ridge Runner “promised” to provide the requested equipment only if it was “willing and able.” **It is axiomatic that a valid contract cannot be based upon the illusory promise of one party, much less illusory promises of both parties. See *Restatement (Second) of Contracts* § 71(1).**

287 F.3d at 1061-62 (emphasis added).

The Columbia Coach contract, just as that of Ridge Runner, contained the “willing and able” language. Based on the Court’s conclusion that “willing and able” is not a binding promise, and based upon its conclusion that there cannot be an enforceable contract when the promise of even “one” of the two parties is illusory, there is no option other than to conclude that, under *Ridge Runner*, there is no enforceable contract that was breached in this case. As such, the Board must dismiss the appeal. The fact that the agreement contained language which clearly required the FS to order based on priority is not sufficient to overcome the decision in *Ridge Runner*. While various terms of the agreement would

control, once a specific order was given, the agreement provides no right to force the FS to honor the priority schedule in issuing orders.

Here it is undisputed that Columbia Coach did not have to accept any orders. What the Federal Circuit held in *Ridge Runner* was that where “one or both” parties are not obligated, there is no enforceable agreement.

As was set out in the Board letter memorializing the conference, it is evident that in granting the motion, the net result is that the FS is not held accountable, notwithstanding the fact that the priority ordering framework was included in the agreement and was not followed. There appears here to be a disconnect, in that although there is a multi-page agreement and the parties have set expectations, including express expectations as to ordering work, the Court had found that agreement on those expectations was not enough, simply because the agreement allowed either party to opt out on some orders, if it so chose.

As is the case with all tribunals, we are bound to follow the precedent of the appellate court to which our decisions are appealed. While the Board recognizes differences between this agreement and that in *Ridge Runner*, those differences are not sufficient to provide justification or a basis to distinguish this case from the *Ridge Runner* holding. That holding clearly makes obligation of both parties a necessary element, so as to allow us to enforce an ordering provision, such as that in this agreement.

Decision

The appeal is **DISMISSED**.

HOWARD A. POLLACK
Board Judge