



UNITED STATES
CIVILIAN BOARD OF CONTRACT APPEALS

DISMISSED FOR FAILURE TO STATE A CLAIM: March 1, 2012

CBCA 2475

JRS MANAGEMENT,

Appellant,

v.

DEPARTMENT OF JUSTICE,

Respondent.

Jacqueline Sims, Owner of JRS Management, Lawrenceville, GA, appearing for Appellant.

William D. Robinson and Oleta L. Thomas, Office of General Counsel, Federal Bureau of Prisons, Department of Justice, Washington, DC, counsel for Respondent.

Before Board Judges **GOODMAN** and **DRUMMOND**.

DRUMMOND, Board Judge.

JRS Management (JRS or appellant) alleges breach of contract and seeks damages totaling \$2200. Appellant has elected to proceed under the accelerated procedure pursuant to 41 U.S.C.A. § 7106(a) (West Supp. 2011) and Board Rule 53, 48 CFR 6101.53 (2011). The accelerated procedure permits issuance of a decision by two judges rather than three.

The Federal Bureau of Prisons (BOP), an entity within the Department of Justice, opposes appellant's claim and has moved to dismiss this appeal for lack of jurisdiction. BOP maintains that the Board lacks jurisdiction over the appeal because no contract exists between

the parties. Appellant opposes BOP's motion. For the reasons stated below, we dismiss this appeal for failure to state a claim.

Background

In October 2010, BOP issued a request for quotations (RFQ) for on-site phlebotomy services at a Federal Prison Camp (FPC) in Pensacola, Florida. The RFQ was issued pursuant to the simplified acquisition procedures at Federal Acquisition Regulation (FAR) Part 13. The RFQ notes that the anticipated contract would be procured through individual delivery or task orders issued by a BOP contracting officer (CO).

The RFQ provided detailed specifications regarding the specific duties to be performed by the phlebotomist, and it required prospective quoters to submit the name and qualifications of the individual to perform the services under the proposed contract. Each proposal was also to include the resume of the proposed phlebotomist. The RFQ also required the successful contractor and the on-site phlebotomist to meet certain security requirements prior to commencing work on the contract.

Appellant responded to the RFQ and proposed Tequisha R. Morine as the on-site phlebotomist. The resume for Ms. Morine submitted with appellant's quote indicated that she last worked for appellant in January 2010 and currently worked in Texarkana, Texas. On December 9, 2010, in response to a request for clarification from BOP, appellant confirmed that Ms. Morine would perform the services under any subsequent contract.

On January 31, 2011, BOP issued to appellant order number DJBP03100000012 on a standard form (SF) 1449 for phlebotomist services. The SF 1449, which was signed by the CO, specified that the phlebotomist services were to be performed by Ms. Morine and incorporated appellant's initial quotation, which proposed Ms. Morine as the phlebotomist, and an email message dated December 9, 2010, which confirmed that Ms. Morine would perform the contract services. The SF 1449 stated that appellant had until February 9, 2011, to accept the terms and conditions as stated therein and to complete certain paperwork on Ms. Morine, or otherwise the offer would expire. The SF 1449 also required Ms. Morine to report at the FPC by February 14, 2011, to complete certain security requirements prior to the contract start date. There is no evidence in the record that appellant submitted the required paperwork for Ms. Morine or that Ms. Morine reported at the FPC by the times specified.

Block 28 of the SF 1449 states, in part: "Contractor agrees to furnish and deliver all items set forth or otherwise identified above and on any additional sheets subject to the terms and conditions specified herein." The SF 1449 did not include a provision authorizing appellant to substitute another individual for Ms. Morine.

The SF 1449 incorporated by reference FAR clause 13.004, Legal Effect of Quotations, and FAR clause 52.212-4, Contract Terms and Conditions-Commercial Items, which states, in relevant part, that the “contractor shall only tender for acceptance those items that conform to the requirement of the contract” This clause also states that “[c]hanges in the terms and conditions of this contract may be made only by written agreement of the parties.”

On February 7, 2011, appellant signed the SF 1449 and substituted Peggy McFadden for Ms. Morine as the phlebotomist for the contract. In a cover letter that accompanied the SF 1449, appellant informed BOP for the first time that it had hired Ms. McFadden as a replacement phlebotomist because Ms. Morine had not accepted the position. Appellant included an authorization for the release of information, signed on February 4, 2011. Appellant also offered to have Ms. McFadden report to the FPC for a background check at a later date.

By letter dated February 8, 2011, BOP advised appellant that it considered the proposed substitution to be a counter-offer and had concluded that it would not be in the best interest of the Government to accept. Specifically, the letter stated:

On January 31, 2011, the Government issued an offer of award to you, upon specified terms and conditions, for the provision of phlebotomy services at FPC Pensacola, Florida. The Government received your correspondence dated February 7, 2011, in which you took exception to the government’s offer of award by changing the terms and conditions of the Government’s offer, specifically the proposed service provider. Inasmuch as there is no mutual agreement between the Government and Contractor, no contractual agreement is established, thus no contract award. Your counteroffer is not accepted by the Government and will not receive any further consideration. This is your official notification that your offer is no longer being considered, in accordance with FAR 52.212-1b(11), due to your February 7, 2011, response rejecting the terms and conditions of the Government’s offer of award.

BOP amended the original RFQ to allow additional quotations. Appellant did not submit a new quotation for the amended RFQ.

On May 23, 2011, appellant wrote to BOP asserting that BOP had breached appellant’s contract. Appellant sought breach damages totaling \$2200. The claimed damages consist of

\$200 for recruitment costs for Ms. McFadden, \$800 for failing to process a background check for Ms. McFadden, and \$1200 for lost profits.

On June 23, 2011, BOP wrote to appellant stating that there was no mutual agreement between the parties and therefore the alleged claim is not a valid claim. BOP stated further that: "There is no contract; therefore the CO will not be issuing a . . . Final Decision." BOP concluded that JRS lacked standing on which to base its claim and is not entitled to any sum requested.

Appellant filed an appeal. Appellant's complaint alleges that by signing the SF 1449 it had entered into a contract with BOP, and that BOP had breached the contract by refusing to allow it to substitute a different service provider. Appellant contends that in the absence of a Key Personnel clause it was free to substitute a different service provider after acceptance.

Discussion

In this case, appellant's complaint alleges that BOP breached appellant's contract. To prevail, appellant must allege facts showing both the formation of an express contract and its breach. BOP denies the existence of a contract with appellant and argues that the Board lacks jurisdiction to grant the requested relief.

Jurisdiction

Under the Contract Disputes Act, 41 U.S.C.A. §§ 7101 - 7109 (CDA), we have jurisdiction to "decide any appeal from a contracting officer of any executive agency [other than those specifically named, none of which is the Department of Justice] relative to a contract made by that agency." *Id.* § 7105(e)(1)(B). Although BOP argues that jurisdiction is lacking because there was no enforceable contract, the law is clear that, for the Board to have jurisdiction, a valid contract must only be pleaded, not ultimately proven. *See Engage Learning, Inc. v. Salazar*, 660 F.3d 1346, 1353-54 (Fed. Cir. 2011) (citing *Total Medical Management, Inc. v. United States*, 104 F.3d 1314, 1319 (Fed. Cir. 1997); *Lewis v. United States*, 70 F.3d 597, 602 (Fed. Cir. 1995); *Gould, Inc. v. United States*, 67 F.3d 925, 929 (Fed. Cir. 1995)). There is no question that appellant pleaded the existence of a valid contract here.

The proper question, despite BOP's label, is one of merits: whether appellant failed to state a claim upon which relief can be granted. In this case, construing BOP's motion as a motion to dismiss for failure to state a claim does not prejudice appellant, since the critical issue of whether a contract was formed remains the same and has been fully briefed by the parties. Accordingly, we assume jurisdiction and treat BOP's motion as a motion to dismiss for failure to state a claim. *See Brach v. United States*, 443 F. App'x 543 (Fed. Cir. 2011); *Oswalt v. United States*, 41 F. App'x. 471, 472 (Fed. Cir. 2002).

Failure to State a Claim

In reviewing a dismissal for failure to state a claim, we must “accept as true the complaint’s undisputed factual allegations and should construe them in a light most favorable to” appellant. *See Cambridge v. United States*, 558 F.3d 1331, 1335 (Fed. Cir. 2009). However, if a contractor asserts facts that, even if true, would not entitle it to relief, then dismissal for failure to state a claim upon which relief can be granted is appropriate. *See Lindsay v. United States*, 295 F.3d 1252, 1257 (Fed. Cir. 2002).

Appellant’s complaint alleges that a contract exists between the parties. Appellant asserts that by signing the SF 1449 it accepted the Government’s offer. Appellant further asserts that BOP breached the contract by refusing to allow appellant to substitute the service provider. Appellant maintains that in the absence of a Key Personnel clause it was free to substitute a different service provider after acceptance.

BOP challenges appellant’s contract allegation. BOP maintains that appellant did not unequivocally accept the Government’s offer for Ms. Morine’s services. Rather, BOP asserts that appellant rejected the proposed offer by making a counter-offer in terms of who would perform the services by substituting Ms. McFadden for Ms. Morine. BOP asserts further that it rejected appellant’s counter-offer and therefore appellant has no claim, as no contract ever came into existence.

The party alleging a contract must show mutual intent to contract, including an offer, an acceptance, and consideration. *See Trauma Service Group v. United States*, 104 F.3d 1321, 1325 (Fed. Cir. 1997). To form a binding contract, an acceptance must comply with the requirements of the offer. A purported acceptance which is at variance with the offer becomes a counter-offer. Restatement (Second) of Contracts §§ 58-59 (1979).

In this case, a contract did not arise with BOP issuing the SF 1449 in response to receipt of quotations. Regulation specifies the legal effect of quotations:

A quotation is not an offer and, consequently, cannot be accepted by the Government to form a binding contract. Therefore, the issuance by the Government of an order in response to a supplier’s quotation does not establish a contract. The order is an offer by the Government to the supplier to buy certain supplies or services upon specified terms and conditions. A contract is established when the supplier accepts the offer.

48 CFR 13.004.

The SF 1449 was thus an offer to appellant for Ms. Morine to provide the required services. The fact that the RFQ did not name the service provider is irrelevant. Moreover, the fact that appellant may have believed that it could substitute the service provider is also irrelevant. The Government's offer is clear and unambiguous.

Although appellant signed the offer, it is clear that appellant did not accept the offer unequivocally. Rather, by proposing Ms. McFadden, appellant rejected the Government's proposed offer for Ms. Morine to provide the contract services. Since the Government rejected appellant's counter-offer, no contract, express or implied, ever came into existence. *See C&M Machine Products, Inc.*, ASBCA 39635, 90-2 BCA ¶ 22,787. Because the existence of a contract is a necessary element of appellant's claim, the claim is not properly presented. We grant the Government's motion to dismiss.

Decision

The appeal is **DISMISSED FOR FAILURE TO STATE A CLAIM.**

JERMOME M. DRUMMOND
Board Judge

I concur:

ALLAN H. GOODMAN
Board Judge