



UNITED STATES
CIVILIAN BOARD OF CONTRACT APPEALS

CBCA 2719 DISMISSED FOR LACK OF JURISDICTION: September 14, 2012

CBCA 2718, 2719

GTSI CORPORATION,

Appellant,

v.

EQUAL EMPLOYMENT OPPORTUNITY COMMISSION,

Respondent in CBCA 2718

and

GENERAL SERVICES ADMINISTRATION,

Respondent in CBCA 2719.

Joseph J. Petrillo of Petrillo & Powell, PLLC, Washington, DC, counsel for Appellant.

Kathleen Oram, Office of Legal Counsel, Equal Employment Opportunity Commission, Washington, DC, counsel for Respondent in CBCA 2718.

Jennifer L. Howard, Office of General Counsel, General Services Administration, Washington, DC, counsel for Respondent in CBCA 2719.

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

SHERIDAN, Board Judge.

Appellant, GTSI Corporation (GTSI), seeks \$285,876.85 in termination costs associated with a delivery order (DO) issued by the Equal Employment Opportunity Commission (EEOC) under a General Services Administration (GSA) federal supply

schedule (FSS) contract. Appellant submitted identical claims seeking the \$285,876.85 both from the GSA contracting officer responsible for administering the FSS contract and from the EEOC contracting officer responsible for administering the DO. The EEOC contracting officer issued a final decision denying the claim and the GSA contracting officer did not respond to the claim. GTSI filed an appeal with this Board from the EEOC's final decision, which was docketed as CBCA 2718, *GTSI Corp. v. Equal Employment Opportunity Commission*. The GSA contracting officer's failure to issue a final decision was also appealed by GTSI, and it was docketed as CBCA 2719, *GTSI Corp. v. General Services Administration*.

The Board has consolidated the two appeals for the purpose of issuing a decision as to which agency, the EEOC or the GSA, is the proper respondent to this dispute. The parties briefed the issue. Each agency argued that it is not the proper party to defend the Government in this dispute, while appellant argued that both parties should remain as respondents. The GSA, in CBCA 2719, submitted a motion to dismiss for lack of jurisdiction. We conclude that the Board possesses jurisdiction to decide CBCA 2718, but not CBCA 2719. The GSA's motion to dismiss CBCA 2719 is granted.

Background

The GSA awarded FSS contract GS35F4120D (the FSS contract) to GTSI for the general purpose of leasing and purchasing commercial information technology equipment during the period covering April 1, 1996, through January 2, 2011. The EEOC issued DO EECDO100087 against GTSI's schedule contract on June 17, 2010, for "the lease of a data backup system and associated software and support." The total lease term was thirty-six months and included a "base period + option year 1 + option year 2."

Pertinent to this dispute, GTSI's lease quote reference 052710EEOC was incorporated into the DO. That lease quote reference stated it was made pursuant to option two of the FSS contract and included a termination ceiling table. Option two of the GSA FSS contract contained several lease terms, a statement of government intent, and the terms under which the lease could be terminated.

By email message dated March 17, 2011, the EEOC contracting officer contacted GTSI stating, "Due to budgetary constraints, it does not appear that EEOC will exercise Option Year 1 under the [] delivery order"; he asked for information about equipment removal. GTSI provided the removal information and noted it would be assessing a termination fee as provided for in the DO. On April 26, the EEOC contracting officer responded:

EEOC reserves the right to exercise the option to extend the term of the delivery order in accordance with Note E of Attachment No. 1. You are hereby notified that EEOC has elected not to exercise Option 1 under Delivery Order No. EECDO100087. Based on the foregoing, EEOC is not liable for any other costs beyond 17 JUN 2011.

GTSI proceeded to remove the equipment and on September 14, 2011, it submitted identical certified claims seeking \$285,876.85 in termination costs to both the EEOC contracting officer administering the DO and the GSA contracting officer administering the FSS contract.

In a final decision issued on November 3, 2011, denying the claim made to the EEOC, the EEOC contracting officer stated:

EEOC's decision not to exercise Option Year 1 of Delivery Order No. EECDO100087 was a "Termination for Non-Appropriation" in accordance with Paragraph 4(c) of GSA Schedule Contract No. GS-35F-4120D entitled "Lease Termination". There was a continuing need, but adequate funds were not made available to the ordering office in an amount sufficient to continue to make the lease payments beyond the base period of the delivery order (June 17, 2011).

The GSA contracting officer failed to issue a final decision on the claim made to the GSA.

Discussion

The issue currently before the Board is one of jurisdiction and which agency, the ordering agency (EEOC) or the agency issuing the FSS contract (GSA), is the proper agency in a dispute where the ordering agency decides not to exercise the option years of a DO citing lack of appropriations as authority for its actions. The ordering agency has invoked the termination for non-appropriation clause set forth in the FSS contract as supporting its right to not exercise option year one. If the facts do not support application of the aforementioned clause, the ordering agency may be liable for termination for convenience costs in accordance with Federal Acquisition Regulation (FAR) 52.212-4 paragraph (1), 48 CFR 52.212-4 (1) (2011), as well as early termination charges.

To begin our analysis of which agency is the proper respondent to defend this appeal we turn to the FAR Part 8. Originally, the FAR Part 8 provisions pertinent to GSA FSS contracts and the DOs issued against them required all unresolved disputes to be referred to

the GSA contracting officer for resolution. *See* FAR 8.405-7 (2000). Effective July 29, 2002, the FAR Council issued a final rule modifying FAR Part 8. *See* 65 Fed. Reg. 79,702-03 (Dec. 19, 2000). The revised disputes provision was renumbered as FAR 8.406-6.

The revised FAR 8.406-6 gave ordering office contracting officers the authority to issue final decisions on disputes “pertaining to the performance of orders” and gave FSS contracting officers authority to resolve disputes “pertaining to the terms and conditions” of the FSS contracts:

(a) Disputes pertaining to the performance of orders under a schedule contract.

(1) Under the Disputes clause of the schedule contract, the ordering activity contracting officer may-

(i) Issue final decisions on disputes arising from performance of the order (but see paragraph (b) of this section); or

(ii) Refer the dispute to the schedule contracting officer.

(2) The ordering activity contracting officer shall notify the schedule contracting officer promptly of any final decision.

(b) Disputes pertaining to the terms and conditions of schedule contracts. The ordering activity contracting officer shall refer all disputes that relate to the contract terms and conditions to the schedule contracting officer for resolution under the Disputes clause of the contract and notify the schedule contractor of the referral.

(c) Appeals. Contractors may appeal final decisions to either the Board of Contract Appeals servicing the agency that issued the final decision or the U.S. Court of Federal Claims.

48 CFR 8.406-6 (2002).

In commenting on the verbiage that ultimately formed FAR 8.406-6, the American Bar Association noted the new regulation could create technical and jurisdictional issues for vendors. William Gormley & Larry Allen, *Leasing*, in John W. Chierichella & Jonathan S. Aronie, *Multiple Award Schedule Contracting* (2006) (citing draft ABA comments dated Feb. 20, 2001). Indeed, FAR 8.406-6 proved problematic in several appeals, particularly

where performance disputes require *some* interpretation or application of an FSS clause or an FSS clause needed to be applied in the context of performance disputes. Where, as occurs in this appeal, the dispute pertains to the performance of the DO as well as which FSS clause should be applied to resolve the dispute, and the issues seem inextricably intertwined, a contractor can be left with a conundrum as to the proper contracting officer to approach with a claim.

As ordering agencies increasingly use FSS contracts to fulfill their needs, there is also an increased potential for disputes arising out of the task and delivery orders issued by the ordering agencies. Oftentimes, the facts giving rise to the dispute are held exclusively by the ordering agency and which FSS contract provision applies to the dispute is only a tangential issue. To the extent the FAR Council, in revising FAR 8.406-6, was attempting to provide ordering agencies increased responsibility, and authority to issue final decisions in contracts, where the facts solely arose out of actions (or inactions) on the part of ordering agency, the FAR revisions are unclear. Several disputes pertaining to the “performance of orders under a schedule contract,” to *some* degree, also pertain to *some* provision contained in the schedule contract, *i.e.*, the termination clauses, changes clause, etc. To resolve the problem of which agency had the authority to act on its claim, GTSI submitted its claim to both the EEOC contracting officer and the GSA FSS contracting officer.

We conclude on the facts before us that the EEOC contracting officer had authority to issue the final decision and, thus, the EEOC is the proper respondent.¹ We reach this conclusion because the terms and operation of the FSS termination for non-appropriations clause are not at issue. The issue is purely factual and the facts are solely relevant to the EEOC: was the status of EEOC’s appropriations sufficient to invoke the termination for non-appropriations clause? This issue is appropriately addressed by the EEOC contracting officer, not a remote GSA contracting officer who has no knowledge of EEOC’s appropriations.

We did not make this decision lightly, and carefully studied appropriate case law that has addressed similar situations. The problems inherent in interpreting the current FAR 8.406-6 have been addressed by the Armed Services Board of Contract Appeals. *Waterstone Environmental Hydrology and Engineering, Inc.*, ASBCA 57557, 12-1 BCA ¶ 35,028; *Spectrum Resources, Inc.*, ASBCA 55120, 06-2 BCA ¶ 33,377 (involving a Department of Veterans Affairs FSS contract); *Sharp Electronics Corp.*, ASBCA 54475, 04-2 BCA ¶ 32,704.

¹ The EEOC contracting officer did not refer the matter to the GSA contracting officer for resolution as it had the option to do pursuant to FAR 8.406-6 (a)(1)(ii).

In the appeal before us, it was not the terms and conditions of the FSS contract clauses or their interpretation that caused this dispute. Rather, it was the action (or inaction) of the ordering agency, by refusing to exercise an option, that caused the dispute. Whether the EEOC lacked sufficient appropriated funds and was entitled to invoke the termination for non-appropriation clause is not a dispute concerning the FSS contract terms and conditions. The FSS provisions merely provide a context in which to interpret the ordering agency's actions or inactions. We believe that the GSA, in taking the position that it was not the proper party to defend this action, recognized the facts that drive this dispute. A member of the FAR Council that issued the revised FAR 8.406-6, the GSA appears to implicitly understand that to treat the FAR revision any other way would essentially render the revision an absurdity because there would rarely, if ever, be circumstances in which performance issues would be disputed without the context of some FSS contract provision.

Ultimately, since this dispute arises primarily from the EEOC's non-performance, and the terms and conditions of the FSS contract are only tangentially at issue, this matter was properly presented to and decided by the EEOC contracting officer.

Decision

The GSA's motion is granted, and CBCA 2719 is **DISMISSED**. The Board retains jurisdiction over CBCA 2718.

PATRICIA J. SHERIDAN
Board Judge

We concur:

ANTHONY S. BORWICK
Board Judge

CATHERINE B. HYATT
Board Judge