



UNITED STATES  
CIVILIAN BOARD OF CONTRACT APPEALS

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DISMISSED FOR LACK OF JURISDICTION: June 26, 2008

CBCA 1096

BOB MINOR dba BOB MINOR IRRIGATION PARTS & SERVICE,

Appellant,

v.

DEPARTMENT OF AGRICULTURE,

Respondent.

Bob Minor, President of Bob Minor Irrigation Parts & Service, Salmon, ID, appearing for Appellant.

Heather R. Hinton-Taylor, Office of the General Counsel, Department of Agriculture, Ogden, UT, counsel for Respondent.

Before Board Judges **DeGRAFF**, **VERGILIO**, and **STEEL**.

**STEEL**, Board Judge.

Bob Minor Irrigation Parts & Service entered into an emergency equipment rental agreement (EERA) with the Department of Agriculture's Forest Service (FS) for weed washing units. Appellant filed a claim with the contracting officer for personal injury due to alleged discrimination because the FS ordered a weed washing unit from another contractor. The contracting officer denied appellant's claim for \$32,156 and appellant timely appealed to this Board. The Government moved to dismiss the appeal on the ground that the Board lacks jurisdiction over this matter because the EERA was not a contract. Oral argument was held by telephone so that Mr. Minor could respond to the motion.

### Findings of Fact

On May 14, 2007, the FS entered into EERAs with appellant and others for weed washing units. Appeal File, Exhibits A, D. The EERAs set the daily rate that would be paid and provisions that would apply if the FS ordered such equipment and the party accepted the order. *Id.* Appellant's EERA covered the time period from May 31, 2007, through June 1, 2009. *Id.*, Exhibit A. Appellant filed his claim for personal injury (i.e., breach damages) because the FS on some occasions did not order from appellant, but on some occasions ordered non-conforming equipment from a competitor. Complaint ¶ 4.

The EERA in question states as the preamble to the agreement:

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.

Appeal File, Exhibit A at 3.

### Discussion

Appellant brings this action pursuant to the Contract Disputes Act of 1978, 41 U.S.C. §§ 601-613, as amended. The Government argues that the agreement reached by appellant and the FS is not an express or implied contract, such that the Board lacks jurisdiction over this matter. The Board's jurisdiction to hear this appeal is a threshold inquiry that must be resolved before proceeding to the merits of an action. If the Board does not have jurisdiction over the subject matter of this claim, the appeal must be dismissed.

The Government's argument is correct. EERAs such as the one at issue lack the essential elements of a legally binding contract, and thus are "written instruments of understanding that contain clauses that will apply to future contracts, but are themselves not contracts." *Petersen Equipment*, AGBCA 94-163-1, *et. al.*, 95-2 BCA ¶ 27,676.

Neither the Government nor appellant has made a binding commitment to either request or furnish the emergency equipment. It is "axiomatic that a valid contract cannot be based upon the illusory promise of one party, much less illusory promises of both parties." *Ridge Runner Forestry v. Veneman*, 287 F.3d 1058, 1062 (Fed. Cir. 2002). Without binding

commitments, there is no contract between appellant and the Government. Without a contract, this Board has no jurisdiction to hear the matter.

Decision

The Government's motion to dismiss is granted. The appeal is **DISMISSED FOR LACK OF JURISDICTION.**

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CANDIDA S. STEEL  
Board Judge

We concur:

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MARTHA H. DEGRAFF  
Board Judge

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JOSEPH A. VERGILIO  
Board Judge