



UNITED STATES
CIVILIAN BOARD OF CONTRACT APPEALS

MOTION TO DISMISS FOR LACK OF JURISDICTION DENIED: August 24, 2010

CBCA 1975

EYAK TECHNOLOGY, LLC,

Appellant,

v.

DEPARTMENT OF HOMELAND SECURITY,

Respondent.

Kathy C. Potter of Benton Potter & Murdock, PC, Washington, DC, counsel for Appellant.

Susan C. Murray, Office of Chief Counsel, Customs and Border Protection, Department of Homeland Security, Washington, DC, counsel for Respondent.

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

STERN, Board Judge

We have before us a motion to dismiss for lack of jurisdiction filed by the U.S. Customs and Border Protection Agency of the Department of Homeland Security (DHS). Eyak Technology, LLC (Eyak) opposes the motion.

Background

On September 16, 2008, DHS issued a delivery order to Eyak in the amount of \$1,177,488.09, pertaining to the upgrading of communication sites in Maine. DHS unilaterally amended the delivery order on May 11, 2009, with the issuance of a contract modification (mod 2) increasing the contract funding by \$656,960.60 and changing some of the scope of work. This modification used funds authorized by the American Recovery and Reinvestment Act of 2009 (ARRA), Pub. L. No. 111-5, 123 Stat. 115 (2009). The original purchase order was issued before the passage of the ARRA. Eyak submits that it was not informed at the time mod 2 was issued that ARRA funds were being used to cover the increase in funding. Further, the clause mandated by the Federal Acquisition Regulation (FAR) for inclusion in contracts using ARRA funds (FAR clause 52.204-11) was not incorporated into the contract. 48 CFR 52.204-11 (2009). The ARRA (and the FAR clause) mandates that firms receiving ARRA funds report numerous items of information online, including the names of some executives and the amount of their compensation.

On October 15, 2009, DHS informed Eyak that mod 2 had been funded with ARRA funds and that Eyak was subject to the ARRA reporting requirements. Eyak refused to comply. DHS then placed Eyak on a list of non-compliant contractors and published that list on the internet. During December 2009, DHS purported to issue two modifications to remove the ARRA funding added by mod 2. DHS later disclaimed the two modifications. In January 2010 DHS forwarded a proposed contract modification to Eyak incorporating the FAR's ARRA funding clause. Eyak rejected DHS's request.

Eyak filed a claim for breach of contract as a result of various actions taken by DHS relating to DHS demands upon Eyak. Eyak alleges, *inter alia*, that DHS arbitrarily designated ARRA funding to the contract; erroneously reported to Congress, Government agencies, and the public that Eyak was a non-compliant ARRA contractor; damaged Eyak's reputation; and caused Eyak to be targeted by the Department of Labor for an audit, all of which cost Eyak considerable time and expense.

In its complaint Eyak alleges breach of contract and requests, among other things, that the Board require DHS to comply with the new modifications it purported to issue to remove the ARRA funding; that the Board require DHS to report to Congress that Eyak is not a recipient of ARRA funds and that it was an error to list Eyak as not compliant with the ARRA; and that the Board award Eyak damages and legal fees arising from its increased costs arising as a result of this dispute.

DHS submits that the Board lacks jurisdiction over this appeal since Eyak is requesting relief that the Board is unable to grant. Specifically, DHS submits that the Board

cannot order it to comply with the two modifications that Eyak seeks to enforce as this would amount to an action of specific performance. DHS further argues that the Board lacks jurisdiction to grant the injunctive relief sought by Eyak's request that DHS be required to report to Congress that it is not a recipient of ARRA funds.

We agree with DHS that the Board will be unable to grant some of the relief in the manner sought by Eyak. The Board does not have jurisdiction to order specific performance or grant injunctive relief. *See Pacific Legacy, Inc. v. Department of Agriculture*, CBCA 641, 08-1 BCA ¶ 33,740 (2007). However, DHS neglects to refer to Eyak's prayer for damages resulting from DHS's actions. We may grant or deny Eyak's request for an equitable adjustment to the contract resulting from DHS's actions in this matter. While this alone provides a basis to deny DHS's motion, we note that we are not limited to granting only the relief sought in the complaint. *See Fed. R. Civ. P. 54(c); United States v. Maryland Casualty Co.*, 384 F.2d 303 (2d Cir. 1967); *Roubin & Janeiro, Inc.*, GSBCA 6042, 82-2 BCA ¶ 15,802. In reaching the decision on damages the Board is likely to interpret the contract and determine the validity of the three contract modifications in issue. The net effect of a favorable determination for Eyak could well provide the relief that Eyak desires. The failure of Eyak to properly articulate the remedy available from the Board does not deprive us of jurisdiction over this matter.

Decision

The motion to dismiss for lack of jurisdiction is **DENIED**.

JAMES L. STERN
Board Judge

We concur:

JERI KAYLENE SOMERS
Board Judge

CATHERINE B. HYATT
Board Judge