UNITED STATES
CIVILIAN BOARD OF CONTRACT APPEALS

MOTION TO INTERVENE DENIED: March 10, 2020

CBCA 6543

CSI AVIATION, INC.,

Appellant,

v.

GENERAL SERVICES ADMINISTRATION,

Respondent.

Jason N. Workmaster, Abigail T. Stokes, and Caroline J. Watson of Miller & Chevalier Chartered, Washington, DC, counsel for Appellant.

Sarah Park, Office of General Counsel, General Services Administration, Washington, DC, counsel for Respondent.

Before Board Judges **DRUMMOND**, **KULLBERG**, and **CHADWICK**.

CHADWICK, Board Judge.

This appeal concerns task orders placed under a General Services Administration (GSA) schedule contract. The contractor submitted a certified claim to the GSA schedule contracting officer and appealed from a deemed denial. The ordering agency, a component of the Department of Homeland Security (DHS), moves "to intervene as a respondent" alongside GSA, arguing that it "has a financial and legal interest in" the outcome. We deny the motion because the real party in interest on the government side is already before us. That party is the United States. GSA is the respondent named under the Board's Rules to speak for the United States. We need not add a second respondent.

Background

We need not say much about the underlying dispute to describe the context of the motion to intervene. The appellant, CSI Aviation, Inc. (CSI), sells air transportation services to government agencies under a GSA schedule contract. From 2014 to 2018, CSI provided charter flights to Immigration and Customs Enforcement (ICE) under five task orders that ICE placed under the schedule contract.

In April 2019, CSI submitted a certified claim to the ICE contracting officer for a sum certain of flight cancellation fees but specifically asked him to "immediately refer the claim to CSI's GSA Schedule contracting officer," pursuant to Federal Acquisition Regulation 8.406-6(b) (48 CFR 8.406-6(b) (2018)) (an ordering activity "shall refer all disputes that relate to the contract terms and conditions to the schedule contracting officer"). CSI identified the GSA contracting officer in its claim and sent him a copy of the claim. In June 2019, having had no response from GSA, CSI filed this appeal from a deemed denial of its claim under 41 U.S.C. § 7103(f)(5) (2012). Counsel for GSA have litigated the case, including filing an opposition to a pending motion by CSI for partial summary judgment. The GSA contracting officer also issued a decision denying the claim in September 2019.

In November 2019, ICE, through a DHS lawyer who did not file a notice of appearance under Board Rule 5(b) (48 CFR 6101.5(b) (2019)), moved "to intervene as of right or by permission to assert defenses against CSI's contract claims." ICE relies, by analogy, on Rule 24 of the Federal Rules of Civil Procedure and on the parallel rule of the United States Court of Federal Claims. *See* Board Rule 1(c) ("The Board may apply principles of the Federal Rules of Civil Procedure to resolve issues not covered by [our] rules."). ICE argues primarily that it "is the real party in interest as it is ICE's task orders and CSI's performance thereof that provide the backdrop for the chain of events in dispute," that "ICE's legal and financial interests may be at variance with GSA's interests," and that "this matter . . . could impact other pending matters before the Board, for which ICE is the named respondent." CSI opposes ICE's intervention. GSA does not.

Discussion

Federal government contracts are contracts with the Federal Government, not with one agency. *See* 41 U.S.C. § 7101(7) ("contractor" in the Contract Disputes Act (CDA) "means a party to a Federal Government contract other than the Federal Government"); *Texas Health Choice, L.C. v. Office of Personnel Management*, 400 F.3d 895, 899 (Fed. Cir. 2005) ("[T]he CDA sets forth the process for resolving claims by a contractor against the United States relating to a contract[.]"); *Bank of America, National Ass'n v. Department of Housing & Urban Development*, CBCA 5571, 18-1 BCA ¶ 36,927, at 179,889 (2017) ("[T]he claim

before us under the [agency] contract is ultimately against the United States, not against [an agency]."). In the contracting officer's signature block on a standard procurement contract are the words, "United States of America." This means what it says. Liability under such government contracts lies with the United States. *See* 31 U.S.C. § 1304(a)(c)(3) (awards against the Government by boards of contract appeals are payable from the Department of the Treasury's permanent indefinite judgment fund); 41 U.S.C. § 7104(b)(1); 28 U.S.C. § 1491(a) (in lieu of appealing a denial of a CDA claim to a board, a contractor may sue in the Court of Federal Claims, which can enter judgments "based . . . upon any express or implied contract with the United States").

"The Board's ministerial practice of docketing CDA appeals naming agencies as the respondents does not affect the underlying government contracts." *CSI Aviation, Inc. v. Department of Homeland Security*, CBCA 6581, et al. (Feb. 21, 2020). A contractor that performs a task order placed under the Federal Supply Schedule (FSS) has two operative contracts: the schedule contract and the order contract. *See Kingdomware Technologies, Inc. v. United States*, 136 S. Ct. 1969, 1978 (2016) ("An FSS order creates mutually binding obligations: for the contractor, to supply certain goods or services, and for the Government, to pay. The placement of the order creates a new contract; the underlying FSS contract gives the Government the option to buy, but it does not require the Government to make a purchase or expend funds."). These two contracts may be awarded at different times by different agencies, but fundamentally, the schedule contractor has a unified contractual relationship with "the Government" of the United States. *Id*.

When a CDA claim for money comes before the Board, we need only possess jurisdiction to make a "monetary award" on the claim. 41 U.S.C. § 7108(b). We define a "respondent" as "the government agency whose decision, action, or inaction is the subject of [the] appeal." Rule 1(b). We must be satisfied that we have a proper respondent only because we must ensure that the responsible contracting officer had an opportunity to decide the claim. *See Sharp Electronics Corp. v. McHugh*, 707 F.3d 1367, 1373–74 (Fed. Cir. 2013); *see also* 41 U.S.C. § 7105(e)(1)(B) (establishing our "jurisdiction to decide any appeal from a decision of a contracting officer of" most civilian agencies "relative to a contract made by that agency"). Exactly which agency may ultimately pay a CDA award is not our concern. As one of our predecessor boards explained in a closely related context almost four decades ago, "If the Government is in breach of its contract, and if the 'cognizant' board of contract appeals so holds, who ultimately foots the bill is a matter between the agencies who are pointing fingers at each other, not for the Board." *S & W Tire Services, Inc*., GSBCA 6376, 82-2 BCA ¶ 16,048, at 79,615 (adding that agencies are free to "do battle over which must reimburse" the judgment fund after an award is paid from that appropriation); *see Business Management Research Associates, Inc. v. General Services Administration*,

CBCA 464, 07-1 BCA ¶ 33,486, at 165,989 (full Board) ("[T]he holdings of our predecessor boards shall be binding as precedent in this Board.").

We therefore deny ICE's motion to "intervene" because ICE is not a new party and cannot, by definition, have interests "at variance" to those of the Federal Government. If ICE is dissatisfied with GSA's conduct as the respondent, or if ICE wishes to aid GSA in the case, ICE may communicate such concerns to GSA, not to us. We need not decide whether to apply Rule 24 of the Federal Rules of Civil Procedure here by analogy.

ICE notes that one judge of our Board ruled in resolving a discovery dispute that a GSA lawyer had no attorney-client relationship with a separate agency, the Social Security Administration, for purposes of invoking the attorney-client privilege, as "an attorney who is employed by a government agency does not represent another agency when he or she appears before the Board." *LFH, LLC v. General Services Administration*, CBCA 395, 08-2 BCA 33,915, at 167,820 (single-judge order). We would not necessarily view the *LFH* order as binding on us, *see* Rule 1(d) ("Only panel and full Board decisions are precedential."), but in any event, we do not read it as contradicting the ample authority cited above for the proposition that a respondent *agency* appears before us on behalf of and in the interests of the United States and not of the agency alone.

ICE also raises several arguments to suggest that the GSA contracting officer lacked authority to decide CSI's claim. We note that the GSA contracting officer did not agree in his September 2019 decision. He interpreted the schedule contract, applying its order of precedence clause. At this time, we do not doubt that CSI properly presented the claim to GSA because the claim "requires interpretation of the schedule contract's terms and provisions." *Sharp Electronics*, 707 F.3d at 1374. Should doubts arise about our jurisdiction, we will take them up with CSI and GSA.

Decision

ICE's motion to intervene is **DENIED**.

Kyle Chadwick

KYLE CHADWICK
Board Judge

We concur:

Jerome M. Drummond
JEROME M. DRUMMOND
Board Judge

H. Chuck Kullberg
H. CHUCK KULLBERG
Board Judge