



UNITED STATES
CIVILIAN BOARD OF CONTRACT APPEALS

DISMISSED FOR LACK OF JURISDICTION: May 22, 2020

CBCA 6768

DELTA STATE UNIVERSITY,

Appellant,

v.

DEPARTMENT OF JUSTICE,

Respondent.

Jane L. Mapp, Office of the Attorney General, State of Mississippi, Jackson, MS, counsel for Appellant.

Pawandeep Bhandari and Thomas Sutton, Office of General Counsel, Federal Bureau of Prisons, Department of Justice, Washington, DC, counsel for Respondent.

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

SULLIVAN, Board Judge.

Delta State University (DSU) appeals the decision of the contracting officer for the Department of Justice, Bureau of Prisons (BOP), denying a claim for payment pursuant to the terms of a memorandum of understanding. Because the Board lacks jurisdiction to decide this appeal, we dismiss it without prejudice.

Background

DSU entered in a memorandum of understanding (MOU) with the Federal Correctional Complex, Yazoo City, Mississippi, in June 2018, titled "The Yazoo City Project

- Center for Social Justice and Civil Engagement (CSJCE).” Pursuant to the MOU, a professor within the CSJCE at DSU was to fulfill certain program goals, including “enhanc[ing] student academic success” by “provid[ing] material support to the school district.” DSU, through its efforts, was also to “encourage students to consider future employment at the Federal Complex at Yazoo City,” the only goal that mentioned the Federal Government. DSU and BOP had entered into similar arrangements for seventeen years, through which the Yazoo City School District and DSU worked together to “prepare students to continue their academic work in colleges and universities, to sharpen their employable skills, and to provide as good a candidate for federal service as possible.”

To fulfill these goals, DSU was to interview individuals in local parishes and consult with the high school to determine the needed technology and supplies to be purchased for students. In exchange for these efforts, BOP would pay invoices submitted by DSU. The work was to be conducted between May and September 2018.

In May 2019, DSU submitted a claim to the BOP contracting officer for \$86,490.06, after BOP refused to pay its invoices. In December 2019, the contracting officer denied the claim, asserting that the person who signed the MOU lacked authority so there was no valid contract. The contracting officer stated that DSU could appeal the decision to the Board or the U.S. Court of Federal Claims.

Upon docketing, the Board *sua sponte* issued an order for DSU to show cause why the appeal should not be dismissed for lack of jurisdiction because the MOU did not appear to be a procurement contract necessary for the Board to exercise jurisdiction.

Discussion

Upon review of the notice of appeal and supporting documentation provided by DSU, it appears that the Board may not properly exercise jurisdiction over this matter. “Subject matter jurisdiction is a threshold matter involving a tribunal’s ‘power to hear a case,’ and a tribunal must dismiss a case over which it lacks jurisdiction.” *McAllen Hospitals LP v. Department of Veterans Affairs*, CBCA 2774, et al., 14-1 BCA ¶ 35,758 (quoting *Arbaugh v. Y&H Corp.*, 546 U.S. 500, 514 (2006)). DSU bears the burden to establish jurisdiction. *Omni Pinnacle, LLC v. Department of Agriculture*, CBCA 2452, 14-1 BCA ¶ 35,538.

The Contract Disputes Act (CDA), 41 U.S.C. §§ 7101-7109 (2018), is the statute that provides the boards of contract appeals, including this one, jurisdiction to decide disputes arising under certain Federal Government contracts. The Board’s jurisdiction under the CDA is limited, however, to disputes arising under procurement contracts, that is, contracts made by an executive agency for “(1) the procurement of property, other than real property in

being; (2) the procurement of services; (3) the procurement of construction, alteration, repair, or maintenance of real property; or (4) the disposal of personal property.” 41 U.S.C. § 7102(a). “Procurement’ is ‘the acquisition by purchase, lease or barter, of property or services for the *direct benefit or use* of the Federal Government.” *Wesleyan Co. v. Harvey*, 454 F.3d 1375, 1378 (Fed. Cir. 2006). “The CDA does not apply to contracts which are basically grants or sociological type contracts designed to accomplish the Government’s social policy goals.” *Devin Richardson v. Department of Justice*, CBCA 5559, 18-1 BCA ¶ 37,018.

Here, while the agreement described a benefit to the Federal Government, that benefit—preparing students to be future federal employees—was an indirect benefit to BOP. Through the MOU, DSU provided direct benefits to the students of the Yazoo City School District by identifying and meeting their technology needs. *See, e.g., Omni Pinnacle* (finding no contract because local municipality received benefit of the dredging services provided by contractor, rather than the federal agency funding efforts); *Montana Human Rights Commission*, HUD BCA 90-5305-C8, 91-2 BCA ¶ 23,993 (financial and training assistance provided to state housing authority provided indirect benefit of information sharing). The future potential hiring by BOP is not the procurement of a good or service to fulfill a current requirement for BOP. *See, e.g., St. Bernard Parish Government v. United States*, 134 Fed. Cl. 730, 736 (2017) (agreement between federal agency and local municipality akin to a cooperative agreement because federal government received “generalized benefit” of reduced future flooding). While DSU notes in its response to the show cause order that the agreement involves the exchange of services for money, nothing in DSU’s response or the MOU shows how these services are for the direct benefit of BOP.

In its response, DSU highlights language from the MOU that describes the “contractual relationship” between the parties that has existed for seventeen years. DSU asserts that this language shows the mutual intent to form a binding contract. Although the MOU may have elements that make it a contract, not all contracts fall within the ambit of the CDA. *Thermalon Industries, Ltd. v. United States*, 51 Fed. Cl. 464, 470-71 (2002) (citing *Busby School of Northern Cheyenne Tribe v. United States*, 8 Cl. Ct. 596, 600 (1985)). Moreover, the MOU appears to be a cooperative agreement, which is the proper vehicle when “the principal purpose . . . is to transfer a thing of value to the State, local government, or other recipient to carry out a public purpose of support or stimulation authorized by law of the United States instead of acquiring (by purchase, lease, or barter) property or services for the direct benefit or use by the United States Government” Federal Grant and Cooperative Agreement Act, 31 U.S.C. § 6305. The Board lacks jurisdiction to consider appeals arising from cooperative agreements or similar non-procurement agreements. *Omni Pinnacle*.

Finally, neither the fact that the contracting officer issued a decision on DSU's claim nor the fact that, in that decision, the contracting officer directed DSU to file its appeal with the Board can confer jurisdiction upon the Board. *Insurance Corp. of Ireland, Ltd. v. Compagnie des Bauxites de Guinee*, 456 U.S. 694, 701-02 (1982) (jurisdiction defined by statute, not by actions of parties); *Comsat General Corp.*, DOT CAB 1226, 83-2 BCA ¶ 16,870 (contracting officer's final decision "not conclusive as to the existence of a contract or a right to appeal").

Decision

The appeal is **DISMISSED FOR LACK OF JURISDICTION.**

Marian E. Sullivan

MARIAN E. SULLIVAN

Board Judge

We concur:

Jerome M. Drummond

JEROME M. DRUMMOND

Board Judge

H. Chuck Kullberg

H. CHUCK KULLBERG

Board Judge