



UNITED STATES
CIVILIAN BOARD OF CONTRACT APPEALS

DISMISSED FOR LACK OF JURISDICTION: January 14, 2022

CBCA 6360, 6627

AVUE TECHNOLOGIES CORPORATION,

Appellant,

v.

DEPARTMENT OF HEALTH AND HUMAN SERVICES,

Respondent in CBCA 6360,

and

GENERAL SERVICES ADMINISTRATION,

Respondent in CBCA 6627.

Andy Liu and Andrew Victor of Nichols Liu LLP, Washington, DC, counsel for Appellant.

Lucy G. Mac Gabhann and Douglas W. Kornreich, Office of the General Counsel, Department of Health and Human Services, Baltimore, MD, counsel for Respondent in CBCA 6360.

Fallyme E. Guerrero and James T. Van Biber, Office of General Counsel, General Services Administration, Kansas City, MO, counsel for Respondent in CBCA 6627.

Before Board Judges **SHERIDAN**, **O'ROURKE**, and **CHADWICK**.

CHADWICK, Board Judge.

These consolidated appeals raise a novel issue. The appellant, Avue Technologies Corporation (Avue), developed and licenses software that another company sells to the Government under a schedule contract awarded by the General Services Administration (GSA). The Food and Drug Administration (FDA) acquired a subscription to the software from the schedule contractor. Avue now seeks damages under Avue's software license agreement, which, as discussed below, we may assume is fully incorporated in the prime contractor's schedule contract and in FDA's order from the prime contractor.

The parties briefed cross-motions for summary judgment on entitlement, but we focus on a jurisdictional issue on which we invited supplemental briefing after the respondent agencies raised it in their reply. We must decide without benefit of precedent directly on point whether Avue's claim that FDA breached the software license is a claim under a procurement contract within our limited jurisdiction under the Contract Disputes Act (CDA). We hold that we lack jurisdiction because Avue does not seek relief under a CDA contract.

Background

The Board previously addressed these appeals in *Avue Technologies Corp. v. Department of Health & Human Services*, CBCA 6360, 19-1 BCA ¶ 37,375 (denying a motion to dismiss arguing that "Avue is [only] a subcontractor"), and *Avue Technologies Corp. v. Department of Health & Human Services*, CBCA 6360, et al., 20-1 BCA ¶ 37,503 (denying two motions to dismiss arguing that (1) Avue submitted its claim to the wrong agency, and (2) Avue had no GSA contract and "[n]ever dealt directly with GSA"). We focus here on the background relevant to the current jurisdictional issue and rely on undisputed facts propounded by Avue to support its merits motion. See Board Rule 8(f)(1), (2) (48 CFR 6101.8(f)(1), (2) (2020)).

Avue developed a software "platform" that allows government agencies "to automate federal job classification" by interacting with a database. Access to Avue's software, called Avue Digital Services (ADS), is sold commercially for a fixed annual subscription. Avue does not sell subscriptions to the Government directly. Rather, Carahsoft Technology Corp. (Carahsoft) is an authorized reseller of ADS subscriptions under Carahsoft's Federal Supply Schedule (FSS) contract with GSA.

Carahsoft and GSA added ADS to Carahsoft's existing FSS contract by modification in May 2012. Box 14 of the modification form states in part, "GSA approved EULA [end user license agreement] rider are [sic] hereby incorporated into this contract." The context indicates that the "EULA rider" described as being "incorporated" is what Avue calls its master subscription agreement (MSA). The attachments to the 2012 modification include an unsigned, undated template version of Avue's MSA (with the words "CLIENT NAME"

on the title page where the subscriber's name would be), which Carahsoft had forwarded to GSA earlier in May 2012. As noted below, the MSA refers to itself as a "standard commercial license" for software services and contains terms purporting to bind agency subscribers. The respondent agencies decline to admit that the Avue MSA was "incorporated" in the FSS contract or in an FDA order, and they emphasize that the MSA in the modification file is unsigned. They identify no document other than the MSA, however, that could be the end user license agreement that the modification says it incorporates. *Cf. Ciyasoft Corp.*, ASBCA 59519, 18-1 BCA ¶ 37,084 ("If not the licensing agreement advanced by appellant then what is the licensing agreement that the contract refers to?").

The template version of the MSA appended to the modification states, just above the empty signature blocks, "In the event this agreement is incorporated into a government contract award, execution by the parties is not necessary." (Capitalization altered.) The document has seventeen sections with paragraphs numbered 1.0 to 17.6. As pertinent here, paragraph 3.2 states, "For federal government Subscribers, the Subscribed Services are commercial items under [48 CFR] 2.101 and this standard commercial license to the Subscribed Services shall be incorporated into and attached to the applicable contract." Section 5 (paragraphs 5.1 through 5.9) is titled, "Right to Use Avue Digital Services." This section distinguishes "Client Data" from "ADS Material" and sets limits on Avue's permission to use the latter. Paragraph 5.2 provides, subject to conditions, "Subscriber shall have a non-exclusive, non-transferable, limited right to use [ADS] for access to the Subscribed ADS Modules during the relevant Subscription Period under this Agreement, including the right to make use, for its own internal operations, of any printable output (whether in hard copy or electronic form) of data that it generates or downloads[.]"

In September 2015, FDA placed an order under the FSS contract for a subscription to ADS, including a base year and four option years. FDA used the software but did not exercise the option after the base year.

Avue accuses FDA of misappropriating proprietary ADS data in violation of the MSA license. Avue submitted a certified claim for approximately \$41.4 million to the FDA contracting officer in March 2018 and submitted a substantially identical, "protective" claim to the GSA schedule contracting officer in June 2019. We consolidated Avue's appeals from the denials of its claims and held that the agencies' three previous jurisdictional objections lacked merit or should be deferred, as we explained in our 2019 and 2020 *Avue* decisions cited above. Avue's complaint alleges breach of contract by FDA. Avue argues in opposing the agencies' summary judgment motion that "[t]he MSA is a EULA expressly between Avue and FDA" and is a "direct contract" between Avue and FDA.

Discussion

The agencies argue that “even if the Board were to find that the . . . MSA establishes an independent contract between the Government and Avue as Avue alleges,” we lack jurisdiction to decide the case because the MSA is not a “procurement contract within the meaning of” the CDA. *See, e.g., Richardson v. Department of Justice*, CBCA 5559, 18-1 BCA ¶ 37,018 (the Board’s “subject matter jurisdiction under the CDA is limited to . . . disputes arising under procurement contracts”); *Omni Pinnacle, L.L.C. v. Department of Agriculture*, CBCA 2452, 14-1 BCA ¶ 35,538. We agree.

This is the first case of which we are aware in which a software licensor that is not the prime contractor has brought a claim under the license before a board of contract appeals. We have heard a claim by a prime contractor alleging breach of the prime contract by overdeployment of software as a “pass-through” claim on behalf of the third-party software vendor. *immixTechnology, Inc. v. Department of the Interior*, CBCA 5866, 19-1 BCA ¶ 37,247 (2018). In *CiyaSoft*, a contractor that was the software developer and licensor pursued a claim before a board for breach of its prime contract. In *ABB Enterprise Software, Inc.*, ASBCA 60314, 16-1 BCA ¶ 36,425, the board found based on the record that “the execution of the license agreement was part and parcel [of] the [licensor’s] performance of the [prime] contract” such that the board could entertain the contractor’s claim under the license. Alternatively, an aggrieved software licensor may sue the Government for copyright infringement under the Tucker Act, 28 U.S.C. 1491 (2018), in the United States Court of Federal Claims. *See Bitmanagement Software GmbH v. United States*, 989 F.3d 938 (Fed. Cir. 2021); *cf. Microsoft Corp. v. Harmony Computers & Electronics, Inc.*, 846 F. Supp. 208 (E.D.N.Y. 1994) (private copyright suit by a licensor against a party that purchased the software from others). We think we are the first tribunal to consider whether a software license agreement in isolation qualifies as a contract for “the procurement of services” so as to make it subject to the CDA. *See* 41 U.S.C. § 7102(a)(2).

We may assume that the MSA license is binding on the Government based on the language in the 2012 schedule contract modification incorporating the MSA as a EULA. GSA’s designation of the MSA as an “approved EULA” makes sense only if GSA intended the MSA to apply to “end users” (subscribing agencies) such as FDA. As Avue notes, courts hear suits brought by software licensors under contract theories against end users who did not purchase the software directly from the licensor. *See ProCD, Inc. v. Zeidenberg*, 86 F.3d 1447, 1450 (7th Cir. 1996) (suit for “an injunction against further dissemination that exceed[ed] the rights specified in the licenses”); *i.Lan Systems, Inc. v. NetScout Service Level Corp.*, 183 F. Supp. 2d 328, 338 (D. Mass. 2002) (“The only issue before the Court is whether clickwrap license agreements are an appropriate way to form contracts, and the Court holds they are.”). This case would be in a similar posture if it went forward. Because we conclude that we lack jurisdiction, we need not and will not decide whether the MSA

establishes privity of contract between Avue and the Government, other than to note that the MSA appears to contain commercially significant promises that might be deemed contractual. *See, e.g., License*, Black’s Law Dictionary (11th ed. 2019) (“A permission, usu[ally] revocable, to commit some act that would otherwise be unlawful.”). The important point for our jurisdictional analysis is that, while the MSA may, like many agreements, “have elements that make it a contract, not all contracts fall within the ambit of the CDA.” *Delta State University v. Department of Justice*, CBCA 6768, 20-1 BCA ¶ 37,612.

A “procurement contract” subject to the CDA must be a contract for “the acquisition by purchase, lease or barter, of property or services for the *direct benefit or use* of the Federal Government.” *New Era Construction v. United States*, 890 F.2d 1152, 1157 (Fed. Cir. 1989) (quoting *Mayer*, HUD BCA 83-823-C20, 84-2 BCA ¶ 17,494); *accord Wesleyan Co. v. Harvey*, 454 F.3d 1375, 1378 (Fed. Cir. 2006) (“The purchase orders . . . involve the exchange of property for money, and thus involve ‘procurement.’”). We have also looked to the definition of “contract” in the Federal Acquisition Regulation (FAR) as “a mutually binding legal relationship obligating the seller to furnish the supplies or services . . . and the buyer to pay for them.” 48 CFR 2.101 (2021), *quoted in Richardson*.

We conclude that the MSA standing alone lacks core aspects of a CDA procurement contract. Most significantly, the Government has arranged to purchase and acquire ADS subscriptions from Carahsoft under FSS orders—not directly from Avue under the MSA. The MSA defines what an agency can procure from Carahsoft. The scope of the license to end users may be considered an integral feature of Carahsoft’s FSS offering of ADS, but the “acquisition by purchase” of ADS occurs when an agency orders a subscription from Carahsoft, the schedule holder. *See Wesleyan*, 454 F.3d at 1378. Agencies do not make FSS acquisitions from Avue. Applying the FAR definition of “contract,” the MSA does not, by its own terms, obligate Avue to “furnish” any services *unless* the MSA is incorporated in a *separate* federal contract (which the MSA calls the “applicable contract”) and does not obligate the Government to “pay” Avue directly “for” an ADS subscription under any circumstances. *See* 48 CFR 2.101. An ordering agency owes payments under FSS orders only to the schedule contractor, Carahsoft. *See Kingdomware Technologies, Inc. v. United States*, 579 U.S. 162, 174 (2016). For these reasons, a claim by Avue in its own capacity for breach of the MSA/EULA is not, regardless of its viability, a claim by a contractor under a CDA procurement contract that our Board may resolve.

Avue argues that the MSA is a CDA contract or, in the alternative, that we have jurisdiction because the MSA is “related to” a procurement contract. We disagree. Avue argues that the MSA is a procurement contract because “it was Avue, not Carahsoft, that provided the services” and “FDA specifically sought to procure a software license” which the agency could get only from Avue. These statements merely describe the common situation of a vendor or subcontractor that transacts with a government agency through a

reseller, distributor, or other prime contractor. As explained, we need not deny that Avue has a licensing relationship with the Government in order to conclude that the Government did not acquire anything directly from Avue under a procurement contract with Avue. FDA purchased the ADS subscription from Carahsoft and paid Carahsoft for it.

Avue's argument that the MSA suffices to support CDA jurisdiction because the MSA is "directly 'related to' FDA's order to Carahsoft for ADS" fares no better. The "related to" analysis benefits only CDA contractors who have agreements "related to" and enmeshed with CDA procurement contracts. Avue cites *ABB Enterprise Software, Wesleyan*, and *Applied Cos. v. United States*, 144 F.3d 1470 (Fed. Cir. 1998). In the first two cases, the claimant was undisputedly the contractor under a CDA contract and argued that an ancillary agreement was sufficiently related to the contract to be considered part of it for purposes of a CDA claim. In *Applied Cos.*, the Court held that "a government claim arising from a computer error" did not create "a [CDA] claim relating to a contract." 144 F.3d at 1478. No court or board of which we are aware has held that a party other than the prime contractor can establish CDA jurisdiction by relying on a separate agreement that relates to a CDA procurement contract. We will not be the first.

In the absence of a claim arising under a CDA contract, we lack jurisdiction. *Delta State University*.

Decision

These consolidated appeals are **DISMISSED FOR LACK OF JURISDICTION**.

Kyle Chadwick

KYLE CHADWICK
Board Judge

We concur:

Patricia J. Sheridan

PATRICIA J. SHERIDAN
Board Judge

Kathleen J. O'Rourke

KATHLEEN J. O'ROURKE
Board Judge