



UNITED STATES
CIVILIAN BOARD OF CONTRACT APPEALS

DISMISSED FOR LACK OF JURISDICTION: July 5, 2022

CBCA 7311

BOARD OF EDUCATION FOR THE GALLUP-MCKINLEY COUNTY SCHOOLS,

Appellant,

v.

DEPARTMENT OF THE INTERIOR,

Respondent.

Andrew M. Sanchez of Himes, Petrarca & Fester, Chtd., Albuquerque, NM, counsel for Appellant.

Brian A. Quint, Office of the Solicitor, Department of the Interior, Washington, DC, counsel for Respondent.

Before Board Judges **GOODMAN**, **ZISCHKAU**, and **O'ROURKE**.

GOODMAN, Board Judge.

This appeal was filed by appellant, Board of Education for the Gallup-McKinley County Schools (Board of Education), from a decision issued by a program manager of respondent, the Department of the Interior (DOI), Bureau of Indian Education, denying appellant's applications for contracts pursuant to the Johnson-O'Malley Act (JOMA) of 1934, Pub. L. No. 73-167, 48 Stat. 596 (codified as amended at 25 U.S.C. §§ 5342-5348 (2018)). That decision cites appeal rights to this Board pursuant to regulations promulgated by respondent under the statute (JOMA regulations). This Board sua sponte raised the issue of whether we had subject matter jurisdiction pursuant to the Contract Disputes Act (CDA), 41 U.S.C. §§ 7101-7109 (2018). The parties briefed the issue, and thereafter respondent filed a motion to dismiss the appeal for lack of subject matter jurisdiction or for mootness.

We dismiss this case for lack of jurisdiction and deny appellant's request for additional rulings.

Background

Appellant's Contract Applications and Federal Lawsuit

In March 2021, appellant applied for contracts with respondent to receive federal funding under provisions of the JOMA that authorize the Secretary of the Interior to "enter into a contract or contracts with any . . . school . . . and to expend under such contract or contracts, moneys appropriated by Congress for the education . . . and social welfare . . . of Indians in [a] State or Territory." 25 U.S.C. § 5342.

Thereafter, appellant filed suit in the United States District Court for the District of New Mexico, *Gallup McKinley County Schools v. Haaland*, No. 1:21-CV-1005 JB/SCY (D.N.M. filed Oct. 15, 2021) (the federal lawsuit), alleging a failure by defendant to respond to its applications and seeking mandamus and other remedies. Subsequently, on or about November 16, 2021,¹ a DOI Bureau of Indian Education program manager issued a decision denying the contract applications. That decision stated the following appeal rights:

You may challenge this denial in one of two ways. The Bureau has an alternative dispute resolution (ADR) process in place If the ADR process does not result in an informal resolution of the complaint,^[2] the contractor still has the right to file an appeal with the Civilian Board of Contract Appeals under the Contract Disputes Act, 41 U.S.C. § 7101–7109, no later than 90 calendar days after the date the contractor receives the decision. 25 CFR § 273.209.

Several days after receiving the decision, appellant amended its complaint in the federal lawsuit to allege that DOI's denial of the applications was illegal. On December 21, 2021, defendant, Haaland, filed a motion to dismiss the amended complaint for lack of jurisdiction, failure to state a claim, and failure to exhaust administrative remedies under Federal Rules of Civil Procedure 12(b)(1) and 12(b)(6). In that motion, defendant alleged that appellant failed to exhaust its administrative remedies because challenges arising under the JOMA must be heard before this Board.

¹ The decision is not dated, but the notice of appeal notes the date it was issued as November 16, 2021.

² Appellant did not elect to proceed with ADR.

The Relevant JOMA Regulations

The relevant regulations issued pursuant to the JOMA pertaining to review of contract applications and appeal rights state:

Upon receiving a contract proposal,^[3] the approving official will:

(a) Notify the *applicant* in writing that the contract proposal has been received

. . . .

(f) Promptly notify the *applicant* in writing of the decision to approve or disapprove the contract proposal.

(g) If the contract proposal is disapproved, the notice will give the reasons for disapproval and the *applicant's right to appeal pursuant to subpart K of this part*.

25 CFR 273.133 (2021) (emphasis added).

Subpart K of the JOMA regulations, referenced in (g) above, reads in part as follows:

(a) A contractor may appeal:

(1) An adverse decision or action of the Bureau regarding a contract;
or

(2) A decision to cancel a contract for cause.

(b) The Secretary encourages contractors to seek all means of dispute resolution before a formal appeal.

25 CFR 273.206. Subpart K further states:

The State, public school district, or an Indian corporation may request an appeal by filing an appeal with the Civilian Board of Contract Appeals under

³ The parties refer to appellant's submissions for contracts as applications rather than proposals.

the Contract Disputes Act, 41 U.S.C. 7101–7109, no later than 90 calendar days after the date the contractor receives the decision.

Id. 273.209.

Appeal to This Board

On January 26, 2022, appellant filed a notice of appeal of the program manager’s decision to this Board, as directed in that decision, pursuant to 25 CFR 273.133(g) and 273.209. On February 2, 2022, the Board convened a telephonic conference with counsel⁴ during which the presiding judge emphasized that the dispute was in the nature of a pre-award dispute challenging the failure of the Government to award a contract and as such appeared not to be within the subject matter jurisdiction of the Board pursuant to the CDA. The parties were asked to brief the issue of subject matter jurisdiction. The Board’s conference memorandum directed the parties’ attention to *Alpine Armoring, Inc. v. General Services Administration*, CBCA 2460, 11-2 BCA ¶ 34,814, which holds that the Board does not have jurisdiction over pre-award disputes.

The parties filed the requested briefs on March 4, 2022. In its brief, appellant acknowledged that the Board does not have jurisdiction pursuant to the CDA over pre-award disputes. It stated, however, that it filed this appeal to preserve its rights of administrative appeal set forth in the program manager’s decision and in response to DOI’s position in its motion to dismiss the federal lawsuit that appellant should have exhausted its available administrative remedies, including an appeal to this Board.

Respondent initially argued that “[t]he CDA provides for the jurisdiction of the Board to hear disputes concerning Federal contracts.” Respondent’s Brief at 7. “Here, that means that the Board would have jurisdiction to hear JOM [Act] contract disputes.” *Id.* While acknowledging that “the JOM Act, itself, is silent on appeals of disputes arising within the context of JOM contracting,” *id.*, respondent interpreted the JOMA regulations to allow appeals of pre-award disputes to this Board because, “by referencing Subpart K [in 25 CFR 273.133 (g),] the JOM regulations define denials of contracts within JOM ‘contract’ actions.” *Id.* n.32. This conclusion is based upon respondent’s assertion that “the JOM regulations instruct JOM contract applicants whose proposals have been disapproved that they have a right to appeal pursuant to Subpart K,” which references appeal rights to this Board pursuant to the CDA. *Id.* at 4. Additionally, respondent stated: “Among the administrative remedies

⁴ Respondent is represented by agency counsel at this Board, while in the federal lawsuit it is represented by the Office of the United States Attorney. All communication between this Board and respondent was with agency counsel.

cited by the Government in its motion [to dismiss the federal lawsuit] is that challenges arising under JOM must be heard before this Board,” *id.* at 3, thereby adopting the position taken by defendant’s counsel in the federal lawsuit.

Thus, while asserting that contracts awarded pursuant to the JOMA are government contracts pursuant to the CDA and that contract applicants whose proposals are disapproved may appeal to this Board, respondent’s briefing failed to address (1) that the JOMA regulation allowing for “contract” appeals, 25 CFR 273.206, does not mention pre-award disputes and refers to appeal rights of “contractors” that have existing contracts; (2) that the CDA only allows appeals by contractors with regard to disputes arising from existing contracts; and (3) that the JOMA regulation concerning review of contract applications, 25 CFR 273.133, refers to the parties submitting contract proposals and receiving decisions concerning those proposals as “applicants,” not “contractors.”

Following receipt of the initial briefs, the Board issued inquiries to appellant and respondent to clarify their positions, directing them to state whether appellant, as a disappointed contract applicant, was a contractor and whether a contract existed pursuant to the definitions in the CDA. In response, respondent filed a motion to dismiss the appeal for lack of jurisdiction or mootness. In that motion, respondent advised that it had revised its position and now asserted that the Board lacks jurisdiction over the appeal. Respondent informed the Board that its program manager had issued a revised decision dated May 10, 2022. The revised decision denied appellant’s contract applications, deleted the language referencing appeal rights to this Board pursuant to the CDA, and substituted appeal rights within DOI pursuant to other agency regulations. Respondent’s amended letter reads in relevant part:

This . . . modifies the November 15 Letter’s notice of appeal rights, including the option for alternative dispute resolution. Because we have concluded, based on the proceeding in the Civilian Board of Contract Appeals, that [25 CFR 273.209] does not provide a legally viable appeal process for the decision to deny the Board [of Education]’s JOM application, the Board [of Education] instead has a right to file an appeal pursuant to [25 CFR part 2]. In addition, the ADR process described in [25 CFR 273.207] is not available to the Board [of Education] because [it] is not considered a contractor.

Respondent stated that 25 CFR part 2 “provides a mandatory route for the administrative appeal of decisions made by Indian Affairs officials within the U.S. Department of the Interior where no other regulation or Federal statute provides a different administrative appeal procedure applicable to a specific type of decision.” Respondent’s Motion at 1-2. Respondent concluded that it could “no longer point to the JOM regulations or the CDA to

establish Board jurisdiction” and moved for dismissal “because [the Board] lacks subject matter jurisdiction.” *Id.* at 3-4.

In response, appellant agreed that this Board lacks subject matter jurisdiction but denied that the case is moot and requested additional rulings. Appellant argued:

[T]he action by Respondent in attempting to now contend that the Board’s lack of subject matter jurisdiction based on its own enabling statute allows Respondent to use another set of regulations of general applicability is contrary to the [Administrative Procedures Act], notions of fair play and due process and is asserted in bad faith. *Therefore, this matter is not moot, and the Board should not be a party to the exercise of an unlawful act by Respondent through its legal counsel.*

Appellant’s Response to Respondent’s Motion at 5-6 (emphasis added). Appellant specifically requested that:

The Board should rule that the JOM Regulations are the sole and exclusive means of administrative appeal to the School District. However, those regulations are in error in concluding that [the] Board must accept the appeal under the particular facts of this case, depriving the Board of subject matter jurisdiction. In addition, the Board should not allow Respondent to refine the applicability of its regulations to avoid the language of its own regulations. The School District seeks these findings and . . . any other relief the Board may deem appropriate.

Id. at 6.

Discussion

This appeal arose because respondent’s regulations grant applicants for JOMA contracts the right to appeal to this Board, pursuant to the CDA, denials of contract applications. The JOMA regulation at issue, 25 CFR 273.133, specifically refers to the party seeking the contract as “applicant” and not “contractor.” Nevertheless, it references appeal rights provided in 25 CFR 273.206 and 273.209 that specify procedures for appealing contract claims to this Board pursuant to the CDA.

Appellant has acknowledged that it is not a contractor pursuant to the CDA and has maintained its position throughout this appeal that this Board does not have subject matter jurisdiction. It filed its appeal at this Board, however, because (1) respondent’s decision denying appellant’s contract applications referred to the appeal rights referenced in the

JOMA regulations, and (2) respondent's motion to dismiss in the federal lawsuit asserted that appellant must exhaust its administrative remedies at this Board. Despite initially asserting that this Board has jurisdiction pursuant to the JOMA regulations, respondent now agrees with appellant that we do not. Respondent has issued an amended decision denying appellant's contract applications that provides avenues of appeal available pursuant to other regulations that do not include this Board and the CDA.

It is clear that we lack subject matter jurisdiction over this appeal. Appellant sought but was not awarded a contract. Appellant is not a party to a government contract pursuant to the CDA. As such, this dispute is in the nature of a pre-award dispute by a disappointed entity that did not receive a contract award. The Board does not have subject matter jurisdiction over such disputes. *Alpine Armoring Inc.; Innovative (PBX) Telephone Services, Inc. v. Department of Veterans Affairs*, CBCA 12, et al., 07-2 BCA ¶ 33,685.

Appellant's response to respondent's motion to dismiss urges that this dispute is not moot, asserts that this Board should not "be a party" to the exercise of an alleged unlawful act by respondent through its legal counsel, and requests that we should make additional rulings.

While performing its function as a forum for dispute resolution, this Board does not, as suggested by appellant, "become a party" to actions of litigants before us or in other forums where the dispute may also be proceeding. As we lack subject matter jurisdiction, proceedings at this Board are concluded. We will not, as requested by appellant, comment, make determinations, or rule with regard to (1) the legality of respondent's actions; (2) whether the JOMA regulations are the sole and exclusive means of administrative appeal available to appellant with regard to the denial of its contract applications; or (3) whether respondent's actions in allowing appellant another avenue of administrative appeal not specified in the JOMA regulations is proper. *See Duke University v. Department of Health & Human Services*, CBCA 5992, 18-1 BCA ¶ 37,023, at 180,291 ("Once we are aware that we lack jurisdiction to entertain an appeal, we have 'no other recourse but to dispose of the case by dismiss[ing]' it based upon the jurisdictional defect." (quoting *Rex Systems Inc. v. United States*, No. 92-411C, 1993 WL 13726058, at *3 (Fed. Cl. Dec. 13, 1993), *appeal dismissed*, 41 F.3d 1517 (Fed. Cir. 1994) (table))). We dismiss this appeal for lack of jurisdiction, without addressing these issues.

Decision

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

Allan H. Goodman

ALLAN H. GOODMAN

Board Judge

We concur:

Jonathan D. Zischkau

JONATHAN D. ZISCHKAU

Board Judge

Kathleen J. O'Rourke

KATHLEEN J. O'ROURKE

Board Judge