



UNITED STATES
CIVILIAN BOARD OF CONTRACT APPEALS

DISMISSED FOR LACK OF JURISDICTION: June 29, 2010

CBCA 1895

PEARSON E. DUBAR,

Appellant,

v.

DEPARTMENT OF AGRICULTURE,

Respondent.

Pearson E. Dubar, pro se, Overland Park, KS.

Elin M. Dugan, Office of the General Counsel, Department of Agriculture, Washington, DC, counsel for Respondent.

GOODMAN, Board Judge.

Appellant, Pearson A. Dubar, an attorney, entered into a contract and a subsequent purchase order with respondent, the Department of Agriculture's Natural Resource and Conservation Service, to represent respondent in Equal Employment Opportunity Commission (EEOC) matters. He appeals respondent's contracting officer's denial of his claim to this Board and has elected to proceed pursuant to Board Rule 52, Small Claims Procedure (48 CFR 6101.52 (2009)).¹ This decision is rendered pursuant to that rule by the presiding judge in summary form, is final and conclusive, and has no value as precedent.

¹ The small claims procedure is available for claims of \$150,000 or less if the appellant is a small business concern. The amount at issue in this case is \$56,250. Appellant alleges in his complaint that he is a small business concern. Respondent does not challenge this statement. For the purpose of this case, we assume the statement to be true.

Respondent has filed a motion to dismiss the appeal for lack of jurisdiction. We grant respondent's motion and dismiss the appeal.

Findings of Fact

On May 23, 2001, appellant was awarded Contract No. 53-3A75-1-047 (the contract) for EEO Representation Services through December 31, 2005. On January 27, 2006, appellant was awarded Purchase Order No. AG-3A75-P-06-0017 (the purchase order), which expired on September 30, 2006. The purchase order was separate and distinct from the contract. Under the purchase order, appellant represented respondent in the hearing of an EEOC case (the EEOC case) in July 2006. Appellant was paid for his representation of respondent in the EEOC case when he submitted a final invoice. Thereafter, respondent issued no other written contracts or purchase orders to appellant.

Appellant alleges that, after he concluded his representation of respondent in the EEOC case, he entered into an oral agreement with an agency "contact person." There is no dispute that the contact person was not the contracting officer. However, appellant believed the contact person had actual authority to enter into a contract, because he asserts that the normal procedure under the purchase order was that he would communicate with the contact person, reach an oral agreement as to assignment of work, and then the contracting officer would "prepare the paperwork for the appellant to sign ratifying the oral agreement."

According to appellant, the oral agreement arose when the contact person told him to retain the files for the EEOC case so that he could prepare respondent's response when the decision in the case was appealed. Appellant concludes that it was "normal [that I] would expect to receive the paperwork for the oral agreement already reached with [the contact person] to prepare respondent's response to the appeal."

Appellant further alleges that he was later told by the contact person that there were no funds to issue a purchase order for his representation during the appeal process and respondent would therefore assign the representation to an agency employee. Thereafter, appellant discovered that the agency had contracted with another individual to represent respondent in the appeal of the EEOC case instead of assigning the work to an agency employee.

On October 9, 2009, appellant submitted to the contracting officer a claim pursuant to the Contract Disputes Act (CDA), referencing both the contract and the purchase order. He claimed that, as a result of performing under the contract and the purchase order, he had entered into a subsequent oral agreement to represent respondent in the appeal of the EEOC case and that the oral agreement was "terminated" by respondent's decision to have someone

else perform the work. Appellant sought \$56,250, the amount which he alleges he would have received had he represented respondent in the appeal of the EEOC case at the hourly rate he negotiated with the contact person.

The contracting officer issued a final decision dated November 30, 2009, denying the claim on the basis that appellant had been paid for all work performed under the contract and the purchase order and that there was no contract between appellant and respondent with regard to appellant representing respondent in the appeal of the EEOC case. Appellant appealed the contracting officer's denial of his claim to the Board on February 26, 2010, and designated his Notice of Appeal and attached documents as his complaint.²

Discussion

Respondent has filed a motion to dismiss for lack of jurisdiction on the alternative grounds that 1) appellant's claim is a bid protest; 2) there was no contract between the parties from which a dispute could arise; or 3) at most there was an agreement to enter into a contract in the future. Under any of these grounds, respondent asserts, the Board lacks jurisdiction.

Respondent's second ground is dispositive. The existence of a contract to which the Government and the contractor are parties is an essential prerequisite to this Board's jurisdiction under the CDA. *Presidio County, Texas v. General Services Administration*, CBCA 1209, 08-2 BCA ¶ 33,976. The facts as stated by appellant do not support appellant's allegation that his claim arises from a contract between him and respondent. Appellant's contract with respondent expired in 2005, before he represented respondent in the EEOC case. The subsequent purchase order pursuant to which he represented respondent in the case expired in September 2006, and he was paid for all services rendered under that purchase order. Appellant bases his claim on representations by a person who was not a contracting officer that he would in the future be assigned representation of respondent when an appeal was filed in the case.

Corners and Edges, Inc. v. Department of Health and Human Services, CBCA 648, 07-2 BCA ¶ 33,706, *recon. denied*, 08-1 BCA ¶ 33,741 (2007), contains circumstances similar to the instant appeal. In that case, appellant asserted that a government project manager who was not the contracting officer verbally agreed to an extension of a purchase

² Appellant alleged in his designation of complaint that the agency's actions were malicious and motivated by bad faith and racial animus. As the Board finds that it lacks jurisdiction in this appeal, these allegations are not addressed in this decision.

order and that the Government thereafter breached the verbal agreement when no additional orders were placed during the period of the alleged extension. The Board held that no extension of the purchase order had been created, as the project manager had no authority to enter into a contract or a contract modification.

In so holding, this Board cited the Federal Acquisition Regulation (FAR) which provides that “[c]ontracts may be entered into and signed on behalf of the Government only by contracting officers.” 48 CFR 1.601(a). Furthermore, the FAR provides that “only contracting officers acting within the scope of their authority are empowered to execute contract modifications on behalf of the Government.” 48 CFR 43.102(a). The Board noted that the Court of Appeals for the Federal Circuit has emphasized that, in light of these regulations, “[w]here a party contracts with the government, apparent authority of the government’s agent to modify the contract is not sufficient; an agent must have actual authority to bind the government.” *Winter v. Cath-dr/Balti Joint Venture*, 497 F.3d 1339, 1344 (Fed. Cir. 2007). Thus, the Court concluded that actions of a project manager, in the absence of ratification by the contracting officer, could not bind the Government to contract modifications.

Similarly, in the instant appeal, appellant alleges that a person who was not a contracting officer, without actual authority to bind the Government, made representations that future work would be assigned. Despite appellant’s expectations that the contracting officer would “issue paperwork” ratifying these representations, there is no evidence, nor does appellant allege, that the contracting officer took any further action. The actions of a government employee without actual authority cannot bind the Government. *California Business Telephones v. Department of Agriculture*, CBCA 135, 07-1 BCA ¶ 33,553. Accordingly, as there is no contract between appellant and respondent for appellant’s representation of respondent in the appeal of the EEOC case, this Board lacks jurisdiction. *Presidio County, Texas*.

Decision

Respondent’s motion to dismiss is **GRANTED**. This appeal is **DISMISSED FOR LACK OF JURISDICTION**.

ALLAN H. GOODMAN
Board Judge