



UNITED STATES
CIVILIAN BOARD OF CONTRACT APPEALS

DISMISSED FOR LACK OF JURISDICTION: March 31, 2017

CBCA 5458

CONSULTIS OF SAN ANTONIO, INC.,

Appellant,

v.

DEPARTMENT OF VETERANS AFFAIRS,

Respondent.

David R. Warner of Centre Law & Consulting LLC, Tysons Corner, VA, counsel for Appellant.

Harold W. Askins III, Office of Regional Counsel, Department of Veterans Affairs, Charleston, SC, counsel for Respondent.

Before Board Judges **VERGILIO**, **KULLBERG**, and **O'ROURKE**.

O'ROURKE, Board Judge.

On September 1, 2016, the Board docketed an appeal filed by appellant, Consultis of San Antonio, Inc. (Consultis), from a contracting officer's decision dated June 7, 2016. After reviewing appellant's motion to amend the complaint, the Board became concerned about its jurisdiction over this appeal and issued a show cause order to the parties on February 24, 2017. Both parties, Consultis and the Department of Veterans Affairs (VA or respondent), replied to the order. After reviewing their responses and the appeal file, the Board finds that the decision by the task order contracting officer was insufficient to create jurisdiction over this dispute, since it requires an interpretation of the schedule contract provisions by the schedule contracting officer. The appeal is dismissed for lack of jurisdiction.

Background

On October 1, 2013, the VA awarded task order VA248-14-F-0293 to Consultis under its Federal Supply Schedule (FSS) contract (GS-35F-0243T) with the General Services Administration (GSA). The task order was for the performance of information technology services, including installing, configuring, and maintaining the organization's server and workstations. In accordance with the task order statement of work, appellant was required to supply all necessary personnel, management, administrative support, and technical services in accordance with the statement of work. The provision referencing task order terms and conditions simply states, "Not Specified In The Contract."¹ The task order period of performance was for one base year and four option years. Multiple modifications to the contract were issued to extend the performance period, exercise options, and add funding.

During performance, a contractor employee raised concerns about the wage rates being paid to contractor personnel. An inquiry by the Department of Labor (DOL) ensued regarding applicability of the Service Contract Labor Standards (SCLS) to the contract. A wage and hour investigator in Orlando, Florida, determined that while the Service Contract Act (SCA)² clauses were included in the original GSA contract, the applicable wage determinations were not. The wage and hour office approached both the GSA contracting officer and the VA contracting officer and requested that they add the appropriate wage determinations to the task order. Both contracting officers initially declined to add them. For this reason, the wage and hour office determined that it had no enforcement authority over the issue.

Performance of the task order ended on September 30, 2015, with no changes to wage rates. Nearly six months later, on March 10, 2016, the VA contracting officer issued a unilateral modification to the task order, which incorporated four Department of Labor wage determinations for the place of performance for the task order. The modification provided the contractor with a thirty-day period to file for a wage adjustment as a result of the incorporation of the wage determinations. On May 11, 2016, appellant submitted a letter to the division chief for services contracting of "Network Contracting Office 8," in Tampa, Florida. In accordance with the instructions contained in the modification, the letter requested supplemental payment from the VA as a result of the wage determinations, and referred to an attached "invoice" showing cost calculations per employee for various labor

¹ The task order specifically included Federal Acquisition Regulation (FAR) clauses pertaining to options, as well as VA clauses.

² The SCA is now codified at 41 U.S.C. §§ 6701-6707.

categories. The letter indicated that appellant would pay the increased wages to its employees as soon as it received the additional money from the VA to cover those wages.³

In response, a contracting officer from the same network office as the division chief informed appellant by letter, dated May 25, 2016, that based on the documentation and calculations provided, compliance with the SCLS was the appellant's "sole responsibility." On June 1, 2016, appellant sent a letter to the contracting officer, requesting clarification of his statement that compliance with the SCLS was appellant's sole responsibility. The VA contracting officer issued a "Contracting Officer's Final Decision," dated June 7, 2016, which denied the payment request without addressing whether a valid claim existed. Within ninety days, on September 1, 2016, appellant filed an appeal of the denial to this Board.

In its appeal, appellant seeks various forms of declaratory relief related to the applicability of the SCLS to the task order and, in the alternative, a price adjustment in the event declaratory relief is not granted. On January 23, 2017, appellant moved to amend its complaint by withdrawing three of the four grounds for its appeal, including the monetary request.⁴ In reviewing the motion and the materials in the record, the Board raised jurisdictional concerns and issued a show cause order to the parties on February 24, 2017. As explained in the order, our jurisdiction to adjudicate contract disputes derives from the Contract Disputes Act (CDA), 41 U.S.C. §§ 7101-7109 (2012), which requires, as a prerequisite to review by the Board, a contracting officer's decision or deemed denial. *Id.* § 7103. Our jurisdictional concerns relate to the decision by the task order contracting officer. Specifically, the Board noted that the decision was signed by the ordering activity contracting officer. The ordering activity in this case was the VA. The contract was a task order placed under appellant's FSS contract with GSA. Two different contracting officers may be involved in a task order issued under an FSS contract. The nature of the dispute will determine which contracting officer ultimately addresses it.

Discussion

FAR 8.406-6 requires that disputes pertaining to the terms and conditions of schedule contracts be referred to the schedule contracting officer for resolution under the CDA,

³ It appears that the letter and invoice were not offered as a claim since neither appears to comply with the certification requirements of 41 U.S.C. § 7103(b).

⁴ Appellant asserted that three appeal grounds were "arguably not ripe for judicial determination." The Board does not decide the motion due to its jurisdictional concerns, and therefore, makes no findings on whether those grounds are ripe for review by the Board.

whereas disputes pertaining to performance of orders may be handled by the ordering activity contracting officer. 48 CFR 8.406-6 (2013).

In *Sharp Electronics Corp. v. McHugh*, 707 F.3d 1367, 1374 (Fed. Cir. 2013), the Federal Circuit held that “FAR 8.406-6 does not authorize an ordering [contracting officer] to decide a dispute requiring interpretation of schedule contract provisions, in whole or in part, regardless of whether the parties frame the dispute as pertaining to performance.” Although the focus of this appeal is the applicability of the wage determinations to the *task order*, we find that the resolution of that issue necessarily requires an examination and interpretation of the terms and conditions of the *schedule contract*. Simply because the terms and conditions are not specified in the task order does not mean they do not apply or that none exist. The SCA applies by its own terms and conditions. We are not persuaded that clauses mandated by statute in the FSS contract, including those mandating compliance with the SCLS, cannot be enforced if they are not expressly incorporated into the task order. The task order comes into existence under the schedule contract. Moreover, assertions amounting to waiver of SCLS compliance based on promises made between the parties or the bounds of DOL’s enforcement authority are unconvincing. Whether the VA contracting officer merely made explicit (by issuing the modification) what the contract already requires is an issue of contract interpretation that is appropriate for consideration by the GSA contracting officer. At the very least, it is a mixed issue, involving both performance of the order and interpretation of the schedule contract, which, under *Sharp Electronics*, also requires a decision from the GSA contracting officer.

Decision

For the foregoing reasons, this appeal is **DISMISSED FOR LACK OF JURISDICTION**.

KATHLEEN J. O’ROURKE
Board Judge

We concur:

JOSEPH A. VERGILIO
Board Judge

H. CHUCK KULLBERG
Board Judge