



UNITED STATES
CIVILIAN BOARD OF CONTRACT APPEALS

MOTION TO DISMISS DENIED: December 2, 2011

CBCA 2294

AMERICOM GOVERNMENT SERVICES,

Appellant,

v.

GENERAL SERVICES ADMINISTRATION,

Respondent.

Kenneth A. Martin of The Martin Law Firm, McLean, VA, counsel for Appellant.

Jennifer L. Howard, Office of General Counsel, General Services Administration, Washington, DC, counsel for Respondent.

Before Board Judges **BORWICK**, **POLLACK**, and **GOODMAN**.

POLLACK, Board Judge.

This is a timely appeal from a November 15, 2010, final decision of the General Services Administration (GSA) denying American Government Services' (AGS or appellant) claim for \$597,456.80, related to satellite support services for the United States forces in South Korea. AGS claims that it is entitled to receive payment from GSA for Host Nation Licensing (HNA) fees and for frequency taxes associated with the Government's purchase and use of terminals for the satellite support services. GSA denied the claim, citing appellant's lack of documentation as to the claimed government authorization/request for terminal services, lack of financial documentation to support invoices, lack of documentation that work associated with the HNA licensing was actually performed, and lack of documentation that the taxes and fees claimed were paid to the Korean government.

In its complaint, appellant asserts that its claim arose under GSA Indefinite Delivery/Indefinite Quantity (IDIQ) contract number GS-35F-301N, task order number 9T3APN018. Appellant says that pursuant to the task order, AGS was to provide HNA training and translation services to support thirteen new terminals to be used as part of the Defense Intelligence VSAT¹ Network. AGS charges that thereafter, the Government acquired fifty additional terminals; however, those terminals were not purchased from AGS and in that task order 9T3APN018, the Government did not purchase any HNAs or support services for those terminals. It appears that the parties agree that the task order for the fifty terminals was issued by a Department of the Interior (DOI) contracting officer. However, according to AGS, without HNAs and support, the terminals could not be used. Therefore, to enable their use, the Government directed AGS to acquire fifty HNAs and to perform support services for them under its task order number 9T3APN018, the GSA task order. AGS is asserting that GSA did not pay AGS for acquiring the HNAs or for added work or costs associated with supporting them. GSA filed an answer in April 2011, where it restated its contention that the claim should be denied, based on lack of support and documentation. The answer did not raise any jurisdictional issue.

Thereafter, the parties exchanged documents. On June 15, 2011, GSA filed a motion to dismiss. The motion was based upon documentation provided to GSA by AGS. GSA charged that AGS's claim should have been presented to DOI and not GSA. We will not go into detail as to the remainder of the GSA motion other than to state that GSA contended that there was no contract for the claimed services between GSA and AGS, but instead an ordering document for fifty terminals issued by DOI.

AGS responded that notwithstanding the fact that a DOI contract was used to purchase the fifty workstations, HNAs, which must accompany all workstations into the network, can only be purchased by GSA under its contract with AGS and must be purchased under AGS's contract number GS-35F-0301N. AGS states that contract GS-35F-0301N was entered into for the purpose of enabling the United States Air Force to fulfill its requirement for commercial satellite services (bandwidth, teleport, and host nation support) between Hawaii and South Korea. In contrast, the DOI contract was solely for the acquisition of computer work stations and limited support.

¹ VSAT stands for "very small aperture terminal," which is a system providing for connection of data, voice, and other communications between transceivers which connect with a satellite and an indoor device which connects to the transceiver.

AGS then proceeded to detail what occurred, provided background as to the practices and application of HNAs, and finally made legal assertions as to what contract controlled the services it provided. Particularly material to GSA's motion is an affidavit from Roy Flores, Jr., an AGS employee, who states that AGS billed GSA for the 50 HNAs under task order 9T3APN018; GSA reviewed, approved, and paid AGS's invoice; and later, without explanation, GSA commenced short paying the AGS invoices for subsequent satellite services. Whether appellant can sustain the testimony of Mr. Flores is a matter to be determined after trial or submittal on the record. However, as to the key issue involved in the motion to dismiss, GSA's contention that there was no GSA contract, AGS has established a prima facie case in its favor.

A motion to dismiss is appropriate where one can decide a matter on the pleadings. Clearly, that cannot be done here. This case is not appropriate for a motion to dismiss nor at this point would it sustain a motion for summary relief. Lacking the legal prerequisites, GSA's motion is denied.

Decision

Accordingly, we **DENY** GSA's motion to dismiss.

HOWARD A. POLLACK
Board Judge

We concur:

ALLAN H. GOODMAN
Board Judges

ANTHONY S. BORWICK
Board Judge