



UNITED STATES
CIVILIAN BOARD OF CONTRACT APPEALS

DISMISSED IN PART FOR LACK OF JURISDICTION: January 24, 2012

CBCA 2549

DR. LEWIS J. GOLDFINE,

Appellant,

v.

SOCIAL SECURITY ADMINISTRATION,

Respondent.

Dr. Lewis J. Goldfine, pro se, Baltimore, MD.

Uri R. Ko and Ryan M. Warrenfeltz, Sr., Office of the General Counsel, Social Security Administration, Baltimore, MD, counsel for Respondent.

Before Board Judges **DANIELS** (Chairman), **STEEL**, and **McCANN**.

DANIELS, Board Judge.

The Social Security Administration (SSA), respondent, moves the Board to dismiss in part, for lack of jurisdiction, an appeal filed by Dr. Lewis J. Goldfine. According to SSA, the Board lacks jurisdiction of two portions of the case. First, the agency maintains, we may not consider Dr. Goldfine's demand for money damages because he has never submitted a claim to the contracting officer or certified such a claim. Second, SSA says, we may not consider the doctor's demand for reinstatement of the blanket purchase agreement (BPA) at issue because a BPA is not a contract and the demand therefore does not engender a contractual dispute.

We grant the motion, dismissing the two aspects of the case addressed by the motion but preserving for our consideration the aspect of the case not so addressed – Dr. Goldfine’s challenge to the termination of the “call order” which SSA issued under the BPA.

Background

On April 28, 2011, SSA awarded a BPA to Dr. Lewis J. Goldfine to “assess and document impairment severity in SSA disability claims.” The duration of the BPA was lengthy. It was stated inconsistently as “from date of award through 12/31/2015”; “60 months from the award unless otherwise terminated or extended”; and June 1, 2011, through May 31, 2016.

The BPA lists two tasks and contains prices for the performance of each of them. For each independent case review Dr. Goldfine performed, he was to be paid \$82, and for each hour he devoted to non-case services ordered by the agency, he was to be paid \$123. As with BPAs generally, however, this BPA did not obligate any funds. It explained, “The Government is obligated only to the extent of authorized call orders (also referred to as ‘calls’) placed under this agreement.”

On May 18, 2011, SSA issued call order number 1 to Dr. Goldfine, for services to be performed between June 1, 2011, and February 29, 2012. The total amount of the award was \$49,200.

On the afternoon of June 10, 2011, Dr. Goldfine and some SSA employees engaged in a discussion about a case he was reviewing. According to the SSA employees, the discussion became heated; Dr. Goldfine was aggressive, intimidating them and making them feel uncomfortable. According to Dr. Goldfine, the discussion was reasonable, though one of the SSA employees became angry and slammed a manual on her desk. Later in the day, Dr. Goldfine and the supervisor of the employees conversed about the discussion.

Six days later, on June 16, a SSA contracting officer wrote to Dr. Goldfine:

You are hereby notified that, effective immediately, the referenced BPA is cancelled and the referenced BPA Call Order is terminated for the convenience of the Government. Both contract actions are taken as a result of an incident that occurred on June 10, 2011.

In accordance with the BPA terms and conditions at Clause C-3.16(n)(iv), Removal from Duty, the Government may remove a contractor from working under the contract based on conduct that occurs after a favorable suitability

determination. The Government has determined that your disorderly conduct, loud, disruptive demeanor, quarreling, and intimidation of others warrants your removal.

The BPA does not contain a clause bearing the number noted by the contracting officer. It does, however, contain the following clause:

C-3.20 0401 – SECURITY AND SUITABILITY REQUIREMENTS (NOV 2010)

m. Government Control

The Government has full control over and may grant, deny, or withhold access to a facility, site, system, or information and may remove contractors . . . from performing under the contract for reasons related to conduct even after the individual has been found suitable to work on the contract (see paragraph o., below).

. . . .

o. Removal From Duty

SSA may remove a contractor . . . from working under the contract based on conduct that occurs after a favorable suitability determination. . . . The Government's determination may be made based on, but not limited to, incidents involving the misconduct or delinquency as set forth below:

. . . .

iv. Disorderly conduct, use of abusive or offensive language, quarreling, intimidation by words or actions, or fighting. Also, participating in disruptive activities that interfere with the normal and efficient operations of the Government.

Dr. Goldfine sent the contracting officer on June 23 what he described as a "final invoice" for work he performed under the BPA and Call Order – twenty-six case reviews. At \$82 per case review, the total amount of the invoice was \$2132. SSA paid this amount.

The doctor objected to the way in which the agency was treating him, however. On July 6, he told the contracting officer, "I feel my BPA was withdrawn without good cause,

and in part, to satisfy a policy of OMVE [Office of Medical and Vocational Expertise] staff reduction.” On July 19, he requested reconsideration of the June 16 decision, saying, “[M]y actual work has been deemed very satisfactory by both the former and current chiefs at SSA. In 20 years I have never been disciplined, and I presume my age is not a hidden factor.”

On September 1, 2011, the contracting officer issued a unilateral modification to the call order. The modification stated that its purpose was “to terminate the order for the Convenience of the Government and to de-obligate the remaining funds. As a result, the total obligated amount of the order is hereby decreased from \$49,200.00 by \$47,068.00 to \$2,132.00.”

On September 9, Dr. Goldfine appealed what he called the “wrongful termination” of the BPA and the call order. In the notice of appeal, Dr. Goldfine stated:

Among other things, my due process rights have been violated. There was no notice of appeal in the termination letter, there was no opportunity for a hearing, and I was told that I did not have the right to an appeal by [the contracting officer]. I am 76-years-old. My termination also was unlawful as it constitutes age discrimination.

The amount in controversy is in excess of \$800,000.

In the course of the appeal, Dr. Goldfine filed a complaint. In the complaint, he “seeks reversal of the contract termination” and “seeks monetary damages, including pay for lost work and compensation for violating his due process rights in the amount of at least \$60,000.” Later, Dr. Goldfine filed an amended complaint in which he additionally states that he is Jewish and alleges that his “contract was terminated by SSA because of his religious affiliation.” According to the amended complaint, Dr. Goldfine “seeks monetary damages in the amount of \$150,000.”

Discussion

SSA correctly understands that the Board has jurisdiction over this appeal to the extent that it challenges the termination of the call order. We note, in this regard, that –

A court or board of contract appeals may find that a termination for the convenience of the Government constituted a breach of contract only if the tribunal finds that the termination was motivated by bad faith or constituted an abuse of discretion, or that the Government entered into the contract with no intention of fulfilling its promises. *Greenlee Construction, Inc. v. General*

Services Administration, CBCA 415, et al., 07-2 BCA ¶ 33,619, at 166,510 (citing *T & M Distributors, Inc. v. United States*, 185 F.3d 1279, 1283 (Fed. Cir. 1999); *Krygoski Construction Co. v. United States*, 94 F.3d 1537, 1541, 1543-44 (Fed. Cir. 1996); *Caldwell & Santmyer, Inc. v. Glickman*, 55 F.3d 1578, 1581 (Fed. Cir. 1995)).

Oregon Woods, Inc. v. Department of the Interior, CBCA 1072, 09-1 BCA ¶ 34,014, at 168,202 (2008), *reconsideration denied*, 09-1 BCA ¶ 34,063, *aff'd sub nom. Oregon Woods, Inc. v. Salazar*, 355 F. App'x 403 (Fed. Cir. 2009). If Dr. Goldfine is able to prove what he alleges – that SSA's termination of the call order was an abuse of discretion (in that it ignored a record of twenty years of very satisfactory service) or was motivated by bad faith (in that it was caused by discrimination on the basis of age and religious affiliation) – he will prevail on this portion of the matters addressed in the appeal.

SSA maintains, however, that we may not consider either the doctor's requests for monetary damages or his contention that the cancellation of the BPA was impermissible. In this opinion, we consider these points.

Money damages

Under the Contract Disputes Act, a claim relating to a government contract may be made by a contractor by submitting a demand to the contracting officer. 41 U.S.C.A. § 7103(a)(1) (West Supp. 2011). The contracting officer is to issue a decision in writing on a claim. *Id.* § 7103(a)(3), (d). The contractor may appeal any contracting officer decision to the appropriate agency board of contract appeals. *Id.* § 7104(a). This Board has jurisdiction to decide appeals from decisions of contracting officers of most executive agencies. *Id.* § 7105(e)(1)(B).

The contracting officer's decision which Dr. Goldfine has appealed states that it did two things – it canceled the BPA and terminated for the convenience of the Government the call order which was issued under the BPA. The decision did not mention money damages, and there is no evidence that Dr. Goldfine ever submitted to the contracting officer a claim for money. While he did submit an invoice under the call order, that invoice was paid and is not in dispute. The amounts of money he now seeks – variously, “in excess of \$800,000” (in the notice of appeal), “at least \$60,000” (in the complaint), and \$150,000 (in the amended complaint) – were never the subject of a claim submitted to the contracting officer.¹ The

¹ Dr. Goldfine maintains in his opposition to the motion that:

contracting officer, consequently, never decided whether Dr. Goldfine is entitled to any amount of money. We, as a result, have no jurisdiction over the doctor's request for money. *England v. Swanson Group, Inc.*, 353 F.3d 1375, 1379 (Fed. Cir. 2004); *James M. Ellett Construction Co. v. United States*, 93 F.3d 1537, 1541-42 (Fed. Cir. 1996); *C-Shore International, Inc. v. Department of Agriculture*, CBCA 1696, 10-1 BCA ¶ 34,379, at 169,741; *California Valley Miwok Tribe v. Department of the Interior*, CBCA 817-ISDA, 07-2 BCA ¶ 33,680.

Cancellation of blanket purchase agreement

The Contract Disputes Act “applies to any express or implied contract . . . made by an executive agency for” any of four matters, one of which is “the procurement of services.” 41 U.S.C.A. §7102(a). SSA urges that a BPA is not a contract, so Contract Disputes Act procedures (such as an appeal of a contracting officer's decision) do not apply to decisions involving such an instrument. Dr. Goldfine notes that the BPA relevant to this dispute is replete with references to itself as a contract, and he concludes that because the agency calls it a contract, it must be one.

A BPA is “a simplified method of filling anticipated repetitive needs for supplies or services by establishing ‘charge accounts’ with qualified sources of supply.” 48 CFR 13.303-1(a) (2010). It is, in essence, a framework for future contracts, which come into being when orders are placed and accepted under it. Because a BPA, such as the one involved in this case, lacks mutuality of consideration (or, said another way, does not create binding rights and obligations), it is not itself a contract. *Zhengxing v. United States*, 204 F. App'x 885 (Fed. Cir. 2006), *aff'g* 71 Fed. Cl. 732 (2006); *Modern Systems Technology Corp.*

[t]here was one and only one dollar amount at issue in this dispute – \$49,200 – the fixed and set amount of the contract at issue here. . . . By repeatedly referencing the contract at issue in his emails to the contracting officer . . . , it is plain that Dr. Goldfine gave more than ample notice to the contracting officer of the amount of the claim. Simply put, by directing the contracting officer over and over again to the one and only one contract amount at issue – \$49,000 – Dr. Goldfine easily satisfied the sum certain requirement.

We have reviewed all of the e-mail messages in the record which were sent by Dr. Goldfine to the contracting officer and can find no mention of \$49,000 or any other dollar figure (other than the figure in the final invoice). The only dollar figures mentioned by the doctor are contained in the notice of appeal, the complaint, and the amended complaint – all of which were filed with the Board and submitted to us, not the contracting officer, for decision.

v. United States, 979 F.2d 200 (Fed. Cir. 1992). Thus, “there is no factual or legal predicate establishing jurisdiction under the [Contract Disputes Act].” *Zhengxing*, 71 Fed. Cl. at 738 (citing *Julian Freeman*, ASBCA 46675, 94-3 BCA ¶ 27,280). The fact that the BPA which SSA issued to Dr. Goldfine calls itself a contract brings to mind a quotation attributed to President Lincoln: “If you call a tail a leg, how many legs does a dog have? Four. Calling a tail a leg doesn’t make it a leg.”

Decision

SSA’s motion is granted. The appeal is **DISMISSED IN PART FOR LACK OF JURISDICTION**. We will continue to consider the appeal to the extent that it challenges SSA’s termination for convenience of the call order the agency issued to Dr. Goldfine.

STEPHEN M. DANIELS
Board Judge

We concur:

CANDIDA S. STEEL
Board Judge

R. ANTHONY McCANN
Board Judge