UNITED STATES
CIVILIAN BOARD OF CONTRACT APPEALS

MOTION TO DISMISS DENIED: May 2, 2016

CBCA 4968

OPTIMUM SERVICES, INC.,

Appellant,

v.

DEPARTMENT OF THE INTERIOR,

Respondent.

James W. Copeland of Copeland Law Firm, LLC, Atlanta, GA, counsel for Appellant.

Paul Sax, Office of the Solicitor, Department of the Interior, Lakewood, CO, counsel for Respondent.

Before Board Judges **HYATT**, **VERGILIO**, and **KULLBERG**.

KULLBERG, Board Judge.

Respondent, Department of the Interior (DOI), requests dismissal of this appeal on the ground that a decision by the Government Accountability Office (GAO)[1] regarding a protest

[1] On July 7, 2004, the General Accounting Office was renamed the Government Accountability Office. Pub. L. No. 108-271, § 8(a), 118 Stat. 814 (2004). References to GAO in this decision can mean either the Government Accountability Office or the General Accounting Office depending on the period when that name was in use.

brought by appellant, Optimum Services, Inc. (OSI), is res judicata with regard to OSI's claim in this appeal. For the reasons stated below, the Board denies DOI's motion to dismiss.

Background

On December 23, 2008, the National Park Service (NPS), an agency within DOI, awarded to OSI contract C2000091200 (contract). The contract was an indefinite-delivery/indefinite-quantity contract with a base year and four option years for restoration services in the Everglades National Park. The contract provided that "[t]he contractor is guaranteed a minimum of $2 million during the life of the contract." The contract incorporated in full text the following Federal Acquisition Regulation (FAR) clauses: 48 CFR 52.233-03 (2007) (FAR 52.233-03), Protest after Award, August 1996; FAR 52.249-02, Termination for Convenience of the Government (fixed price), May 2004; and FAR 52.233-01, Disputes, July 2002, alternate I.

Westwind Contracting, Inc. (WCI)[2] filed a protest of the award of the contract at the United States Court of Federal Claims (COFC) on January 12, 2009. In response to the protest, NPS agreed to terminate the award of the contract to OSI and issue a new solicitation, and COFC dismissed the protest on January 22, 2009.[3] On January 23, 2009, OSI filed a protest with GAO, which challenged NPS' decision to issue a new solicitation. On January 26, 2009, NPS terminated for convenience its contract with OSI.

GAO denied OSI's protest. *Optimum Services, Inc.*, B-401051 (Apr. 15, 2009). In its decision, GAO stated the following:

> [W]e generally decline to review the termination of contracts because such actions are matters of contract administration which are appropriate for resolution by the contracting agencies and contract appeals boards under the disputes procedure, see Bid Protest Regulations, 4 C.F.R. § 21.5(a) (2008)[;] we will review the propriety of a termination where it flows from a defect the contracting agency perceived in the award process. In such cases, we examine the award procedures that underlie the termination action for the limited

---

[2] Initially, NPS awarded the contract to WCI, which resulted in OSI filing a protest with GAO on October 3, 2008. During subsequent discussions, NPS awarded the contract to OSI.

[3] *Westwind Contracting, Inc. v. United States*, No. 09-25C (Fed. Cl. Jan. 22, 2009) (order of dismissal).

> purpose of determining whether the initial award was improper and, if so, whether the corrective action taken is proper.

Id.

On January 21, 2010, OSI submitted to NPS' contracting officer (CO) its termination settlement proposal, which included costs related to the termination of the contract and its breach of contract claim. An exchange of communications between OSI and NPS regarding the termination settlement proposal continued for several years, and on January 15, 2015, OSI submitted to NPS its claim for termination costs in the amount of $21,468 and a breach of contract claim in the amount of $584,785.[4] In its claim, OSI argued that DOI had breached the contract because it failed to order the required minimum under the contract, which takes precedence over the Termination for Convenience clause, and the termination of the contract was in bad faith.

The CO's decision, which was dated June 12, 2015, allowed payment of only $21,468 in termination costs and denied the remainder of the claim. Additionally, the CO stated that "GAO held that the NPS acted reasonably when it terminated OSI's contract for convenience and cancelled the underlying solicitation." OSI filed a timely appeal of the CO's decision. On November 30, 2015, DOI filed its motion to dismiss this appeal, and argued that OSI's claim is barred "pursuant to the doctrine of res judicata."

Discussion

The issue in this matter is whether GAO's decision regarding OSI's January 23, 2009, protest, which was brought under the Competition in Contracting Act (CICA), 31 U.S.C. §§ 3551-3556 (2012), precludes OSI on the grounds of res judicata from bringing this appeal pursuant to the Contract Disputes Act (CDA), 41 U.S.C. §§ 7101-7109. DOI argues that "GAO acted in a judicial nature when deciding OSI's bid protest and there is no specific authority that allows the CBCA to review the GAO bid protest decision de novo," and "GAO afforded OSI a fair opportunity to litigate its grievances and ultimately decided OSI's bid protest on the merits." OSI contends that GAO lacks both judicial capacity and the ability to grant complete relief because its decisions regarding protests are nonbinding on an executive agency.

---

[4] On November 7, 2011, the Board docketed OSI's appeal of the CO's denial of an earlier submission of its claim, and on June 4, 2012, the Board dismissed the appeal at the request of the parties because OSI's claim had not been certified. *Optimum Services, Inc. v. Department of the Interior*, CBCA 2617 (June 4, 2012).

It is well established that "to prevail on a claim of *res judicata*, the party asserting the bar must prove that (1) the parties are identical or in privity; (2) the first suit proceeded to a final judgment on the merits; and (3) the second claim is based on the same set of transactional facts as the first." *Ammex, Inc. v. United States*, 334 F.3d 1052, 1055 (Fed. Cir 2003). Included within the doctrine of res judicata are issue and claim preclusion. *Phillips/May Corp. v. United States*, 524 F.3d 1264, 1267 (Fed. Cir. 2008). Issue preclusion bars a party from litigation of those matters that were actually litigated in a prior proceeding, and claim preclusion bars litigation of those matters that a party could have raised or litigated in an earlier proceeding but failed to do so. *Carson v. Department of Energy*, 398 F.3d 1369, 1375 n.8 (Fed. Cir. 2005).

The doctrine of res judicata applies "to the final judgment of an administrative agency, such as a board of contract appeals, that 'is acting in a judicial capacity and resolved disputed issues of fact properly before it which the parties have had an adequate opportunity to litigate.'" *Phillips/May Corp.*, 524 F.3d at 1268 (quoting *United States v. Utah Construction & Mining Co.*, 384 U.S. 394, 422 (1966)). Additionally, "it is the remedies *available* to the plaintiff in a forum of limited jurisdiction, not the remedies *sought* by the plaintiff, that determine whether res judicata bars a subsequent claim in a different forum." *Cunningham v. United States*, 748 F.3d 1172, 1180 (Fed. Cir. 2014) (citing Restatement (Second) of Judgments § 26(1)(c)). A party, therefore, is "not barred from pursuing a second claim, against the same party based on the same set of transactional facts, in a court that has the authority to grant the relief that was unavailable to him in the first action." *Id*. Accordingly, the Board's discussion in this matter requires analysis of the authority of GAO and this Board, respectively, in terms of judicial capacity and available remedies.

Statute provides that GAO "is an instrumentality of the United States Government independent of the executive departments." 31 U.S.C. § 702(a). "The head of [GAO] is the Comptroller General of the United States." *Id*. at § 702(b). Broadly stated, the Comptroller General is tasked with investigating "all matters related to the receipt, disbursement, and use of public money." *Id*. at § 712(1). With regard to whether it possesses judicial authority, GAO has recognized that it is "an administrative agency and not a judicial body, [and its] decision would not render [a] matter res judicata." *K.B.J. Engineering, Inc.*, B-190818 (Dec. 8, 1977).

The Supreme Court has held that the "Comptroller General and the GAO are 'a part of the legislative branch of the Government.'" *Bowsher v. Synar*, 478 U.S. 714, 731 (1986) (quoting Reorganization Act of 1949, Pub. L. No. 81-109, § 7, 63 Stat. 203, 205 (1949); Reorganization Act of 1945, Pub. L. No. 79-263, § 7, 59 Stat. 613, 616 (1945)). "[C]ongressional control over the execution of the laws . . . is constitutionally impermissible." *Id*. at 726-27. Given those guidelines, the Court concluded that the

Comptroller General "may not be entrusted with executive powers." *Id*. at 732. GAO, therefore, is part of the legislative branch of the Government, and its decisions are recommendations that are not judicial and do not bind the executive branch of the Government. Our inquiry then turns to whether GAO's function under CICA is also subject to those same constraints.

CICA requires that "the Comptroller General shall provide for the inexpensive and expeditious resolution of protests." 31 U.S.C. § 3554(a)(1). "With respect to a solicitation for a contract, or a proposed award or the award of a contract . . . the Comptroller General may determine whether the solicitation, proposed award, or award complies with statute and regulation." *Id*. § 3554(b)(1). If GAO decides that any of those actions violate statute or regulation, the following remedies may be recommended:

> (A) refrain from exercising any of its options under the contract;
>
> (B) recompete the contract immediately;
>
> (C) cancel the solicitation issued pursuant to the public-private competition conducted under Office of Management and Budget Circular A-76 or any successor circular;
>
> (D) issue a new solicitation;
>
> (E) terminate the contract;
>
> (F) award a contract consistent with the requirements of such statute and regulation;
>
> (G) implement any combination of recommendations under clauses (A), (B), (C), (D), (E), and (F); or
>
> (H) implement such other recommendations as the Comptroller General determines to be necessary in order to promote compliance with procurement statutes and regulations.

Id. In addition to the above, the Comptroller General also has authority to recommend that an agency pay an interested party the costs of "filing and pursuing the protest, including reasonable attorneys' fees and consultant and expert witness fees; and . . . bid and proposal preparation." *Id*. § 3554(c)(1).

In addressing a challenge to the constitutionality of CICA, the Third Circuit Court of Appeals reiterated that "the Comptroller General is a member of the Legislative branch for separation of powers purposes." *Ameron, Inc. v. Army Corps of Engineers*, 809 F.2d 979, 982 (3rd Cir. 1986), *cert. granted*, 485 U.S. 958 (1988), *and cert. dismissed*, 488 U.S. 918 (1988) (citing *Synar*, 478 U.S. at 732). The court further recognized that "CICA therefore does not authorize the Comptroller General to execute the procurement laws." *Id*. at 995. "A GAO decision adverse to an agency is only a recommendation–the GAO has no enforcement powers." *Advanced Systems Development, Inc. v. United States*, 72 Fed. Cl. 25, 30 (2006).[5] GAO's authority under CICA, consequently, is consistent with its role as part of the legislative branch of the Government, and the Board's discussion, accordingly, turns to the extent that a GAO decision affects the authority of this Board to hear OSI's appeal.

This Board's jurisdiction under the CDA is to hear appeals of CO decisions from executive agencies "other than the Department of Defense, the Department of the Army, the Department of the Navy, the Department of the Air Force, the National Aeronautics and Space Administration, the United States Postal Service, the Postal Regulatory Commission, or the Tennessee Valley Authority." 41 U.S.C. § 7105(e)(1)(B). A CO's decision need not include specific findings of fact, but "[i]f made, specific findings of fact are not binding in any subsequent proceeding." *Id*. § 7103(e). This Board's review of a CO's decision is, therefore, de novo. *See Wilner v. United States*, 24 F.3d 1397, 1401 (Fed. Cir. 1994) (en banc). Once an appeal is brought following the CO's decision, "the parties start . . . before the board with a clean slate." *Id*. at 1402.

A board of contract appeals has the authority under the CDA to "grant any relief that would be available to a litigant asserting a contract claim in the United States Court of Federal Claims." 41 U.S.C. § 7105(e)(2). The authority of the boards of contract appeals under the CDA has been summarized as follows:

> The Board of Contract Appeals is not a court of the United States as defined by 28 U.S.C. § 451. However, the Board has been created by Congress pursuant to its powers under Article I of the Constitution, in order to hear and adjudicate claims by or against the United States arising out of contract. The Board does act in a "judicial capacity" when it adjudicates claims before it. *United States v. Utah Construction & Mining Company*, 384 U.S. [at 422]. Its

---

[5] Although GAO decisions are not binding on an agency, it has also been observed that "agencies rarely fail to comply with a GAO decision." *See* Michael J. Schaengold, T. Michael Guiffré & Elizabeth M. Gill, *Choice of Forum for Federal Government Contract Bid Protests*, 18 Fed. Cir. B.J. 243, 293 (2009).

> determinations are *res judicata* as to the facts determined. Appeals from Board decisions are resolved by a United States Court of Appeals, solely on the basis of the record created at the Board, without the trial *de novo* normally available to review other administrative determinations.

Inslaw, Inc., DOT BCA 1609, et al., 89-3 BCA ¶ 22,121, at 111,252 (footnotes omitted). Additionally, the drafters of the CDA recognized that a contract appeals board is "an entity quite distinct from the contracting agency . . . [and] 'boards of contract appeals . . . function as quasi judicial bodies.'" *Boeing Petroleum Services, Inc. v. Watkins*, 935 F.3d 1260, 1261 (Fed. Cir. 1991) (quoting S. Rep. No. 95-1118, 26 (1978), *as reprinted in* 1978 U.S.C.C.A.N. 5235, 5260).

It does not appear from a review of the parties' submissions and a review of precedent that the question of whether the doctrine of res judicata applies to a board of contract appeals when GAO decides a protest under CICA, but several board of contract appeals decisions have ruled on whether GAO decisions related to matters other than CICA affect that board's authority to render a decision under the CDA. The General Services Board of Contract Appeals (GSBCA) held that it was not bound by a GAO decision as to whether a claim was barred by the statute of limitations because "[a] Comptroller General Decision is not binding on boards of contract appeals in the decision of cases brought under the [CDA]." *Baker & Ford Co.*, GSBCA 5723, 81-1 BCA ¶ 14,918, at 73,820 (citing *Central Navigation & Trading Co.*, ASBCA 23909, 80-2 BCA ¶ 14,497, at 71,465). "The result we reach, then, is that this Board has the power to decide the dispute in this appeal unfettered by the Comptroller General's decision in the same dispute." *Id*. at 73,821.

In *HLI Lordship Industries, Inc.*, VABCA 1785, 86-3 BCA ¶ 19,182 (1985), the Veterans Administration Board of Contract Appeals (VABCA) rejected the Government's argument that the VABCA should apply, as a matter of comity, a GAO decision that had addressed the Veterans Administration's earlier request for a determination as to whether the appellant should be relieved from a termination for default.[6] *Id*. at 97,024. The VABCA held that following the GAO's decision would deprive the appellant of its remedy under the CDA. *Id*. (citing *Central Navigation*, 80-2 BCA at 71,465). At most, the VABCA would only recognize the Comptroller General's decision as "nonbinding legal authority." *Id*.

As discussed above, GAO's decision in OSI's protest is res judicata in this appeal only if DOI has established that GAO acted in a judicial capacity when it decided OSI's protest

---

[6] *H.L.I. Lordship Industries, Inc.*, B-197847, 81-2 CPD ¶ 88, *aff'd on reconsideration*, 81-2 CPD ¶ 416 (1981).

and GAO had the ability to offer complete relief for OSI. *See Cunningham*, 748 F.3d at 1180; *Phillips/May Corp.*, 524 F.3d at 1267. On both of those grounds, DOI's motion fails. GAO did not act in a judicial capacity when it decided OSI's protest because GAO's decisions under CICA are only recommendations that are not binding on the executive branch of the Government. To the extent that GAO's decision commented on NPS' decision to terminate OSI's contract, the Board is not bound by GAO's reasoning nor is it bound by the CO's reliance on GAO's decision. GAO's decision is, at most, nonbinding legal authority. There is, consequently, no judgment by GAO in OSI's protest that precludes the Board from hearing this appeal.

Additionally, GAO could not offer OSI complete relief in its protest. OSI seeks remedies in this appeal that were not available in its protest before GAO. This appeal concerns the termination of OSI's contract and OSI's claim for monetary damages as a result of that termination. GAO had no authority under CICA to award damages related to either a termination for convenience or breach of contract. OSI submitted a certified claim to the CO, which was denied, and the appeal of that denial is now before the Board.

DOI erroneously argues that "there is no precedent that once OSI elected to pursue CICA relief . . . that Congress intended to grant OSI a 'second bite at the apple' to appeal or relitigate the GAO decision to the CBCA via a CDA claim." Such an argument fails to distinguish the result of OSI's protest with the different remedies available in a protest before GAO and an appeal at this Board. Regardless of whether OSI was satisfied with the result of its protest at GAO, that result does not preclude this appeal. In this appeal, OSI seeks payment under the terms of its contract, and those issues of monetary damages were not and could not have been addressed in its protest before GAO. OSI has appealed the CO's denial of its claim, and under the CDA, it is the purpose of this Board to hear OSI's appeal de novo. The Board, accordingly, finds that DOI has failed to establish that this appeal is barred under the doctrine of res judicata.

Decision

The motion to dismiss is **DENIED**.

H. CHUCK KULLBERG
Board Judge

We concur:

CATHERINE B. HYATT
Board Judge

JOSEPH A. VERGILIO
Board Judge