



UNITED STATES  
CIVILIAN BOARD OF CONTRACT APPEALS

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MOTION TO DISMISS DENIED: August 9, 2012

CBCA 2452

OMNI PINNACLE, L.L.C.,

Appellant,

v.

DEPARTMENT OF AGRICULTURE,

Respondent.

Adrian A. D'Arcy of Shields Mott Lund, L.L.P., New Orleans, LA, counsel for Appellant.

Josh A. Newton, Office of General Counsel, Department of Agriculture, Little Rock, AR, counsel for Respondent.

Before Board Judges **HYATT**, **DRUMMOND**, and **WALTERS**.

**HYATT**, Board Judge.

This appeal concerns a claim asserted under an alleged implied contract for channel excavation and removal of sediment from Bayou Terre Aux Boeufs, Louisiana. The claim was presented by appellant, Omni Pinnacle, L.L.C. (Omni), to respondent, the Natural Resources Conservation Service (NRCS), a component of the Department of Agriculture. Funding for the services performed by Omni was to be provided under a cooperative agreement between NRCS and St. Bernard Parish (the Parish), Louisiana, pursuant to the Emergency Watershed Protection Program. Omni asserted entitlement to an adjustment of its contract price because of inaccurate estimates of the quantity of sediment to be removed.

Respondent has moved to dismiss the appeal on the ground that the Board lacks subject matter jurisdiction to entertain it. For the reasons stated herein, we deny the motion.

### Background

Under the Emergency Watershed Protection Program, section 216 of Public Law 81-516, and title IV of the Agricultural Credit Act of 1978, Public Law 95-334, NRCS provides funding for emergency measures required to safeguard lives and property from floods, drought, and the results of erosion on any watershed whenever fire, flood, or any other natural occurrence is causing or has caused a sudden impairment of the watershed. NRCS financial assistance is available only to a “qualified sponsor,” either a state or a political subdivision of a state, such as a city, county, general improvement district, or conservation district.

On April 17, 2009, NRCS and the Parish entered into a cooperative agreement under which NRCS agreed to provide financial and other assistance to the Parish for the purpose of installing emergency watershed protection measures to relieve hazards and damages created by Hurricane Katrina. The cooperative agreement provided that the Parish was to be responsible for, inter alia, contracting for the watershed improvements to be performed, paying the contractor(s), and taking reasonable measures necessary to dispose of any and all contractual disputes, claims, and litigation resulting from the projects listed in the cooperative agreement.

In March 2010, the Parish entered into a contract with Omni to perform channel excavation and sediment removal of Bayou Terre Aux Boeufs, a major stream within the Parish. Under this contract, Omni was to be paid for its work by the Parish. Under the terms of the cooperative agreement, NRCS would reimburse the Parish for approved expenses incurred by the Parish for the watershed improvements made by Omni under its contract with the Parish.

The contract between Omni and the Parish specified that the work to be performed by Omni would be reimbursed on a stated price per cubic yard basis. The contract estimated that there would be about 119,580 cubic yards of sediment to be removed from the Bayou. According to Omni, the specifications were inaccurate and only 49,888.69 cubic yards of sediment were ultimately removed.

Omni realized that the estimate was overstated in the early stages of the project and requested a meeting to discuss, among other matters, this issue and renegotiation of the contract price. A meeting took place on June 22, 2010, and was attended in person by representatives of Omni, the Parish, and the project engineers. A representative of NRCS

participated by telephone. At the meeting, Omni voiced its reluctance to move forward based on the original contract price. According to Omni, the NRCS representative responded that Omni should either attempt to renegotiate the price at that time, or perform the work and submit its actual costs at the end of the project. Omni understood this to mean NRCS would pay Omni on a cost reimbursement basis.

Omni maintains that, in reliance on its understanding that it would be paid its costs, it proceeded to complete the work without renegotiating the price. Omni further alleges that NRCS at all times was fully directing the administration of the contract and disbursement of contract funds. Omni also alleges that NRCS was heavily involved in the preparation of bid specifications and estimates. Additionally, NRCS, according to Omni, made numerous owner-type decisions under the contract. Taken as a whole, Omni asserts that NRCS, through its actions, effectively entered into an implied-in-fact contract with Omni.

At the conclusion of contract performance, Omni sought to get paid for its work on a cost-plus-fee basis, and submitted a request for payment to NRCS.<sup>1</sup> The agency responded that it had no contract with Omni and advised that the Parish was the party responsible for paying for the work. Subsequently, Omni submitted a certified claim to an NRCS contracting officer and requested a final decision pursuant to the Contract Disputes Act (CDA). The NRCS representative responded that since the contract was between Omni and the Parish she had no authority to issue a final decision. Omni then appealed the deemed denial of its claim to the Board.

### Discussion

Appellant alleges that NRCS entered into an implied-in-fact contract with it to perform channel excavation and sediment removal in Bayou Terre Aux Boeufs. Respondent questions whether subject matter jurisdiction exists such that the Board may entertain this appeal.

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<sup>1</sup> Omni advises that it has sought payment from the Parish, as well, but has not been paid by either the Parish or NRCS.

Initially, respondent made two principal arguments: (1) there was no express or implied contract between Omni and NRCS<sup>2</sup>; and (2) even if there was such a contract, the construction services procured were not for the direct benefit of the Government and thus it was not the type of contract that is covered by the CDA.

In this regard, the Board's subject matter jurisdiction under the CDA "applies to any express or implied contract . . . made by an executive agency for" --

- (1) the procurement of property, other than real property in being;
- (2) the procurement of services;
- (3) the procurement of construction, alteration, repair or maintenance of real property; or
- (4) the disposal of personal property.

41 U.S.C. § 7102(a). The Court of Appeals for the Federal Circuit has explained that the term procurement refers to "the acquisition by purchase, lease or barter, of property or services for the *direct benefit or use* of the Federal Government." *Wesleyan Co. v. Harvey*, 454 F.3d 1375, 1378 (Fed. Cir. 2006) (quoting *New Era Construction v. United States*, 890 F.2d 1152, 1157 (Fed. Cir.1989)); *accord Inversa, S. A. v. Department of State*, CBCA 440, 07-2 BCA ¶ 33,690, at 166,778-79. Under the Federal Acquisition Regulation (FAR), a "contract" is defined to be "a mutually binding legal relationship obligating the seller to furnish the supplies or services (including construction) and the buyer to pay for them. . . . Contracts do not include grants and cooperative agreements covered by 31 U.S.C. § 6301, et seq." 48 CFR 2.101 (2011).

The use of cooperative agreements by a federal agency is governed by the Federal Grants and Cooperative Agreements Act, which addresses the distinction between a grant and a procurement, stating that:

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<sup>2</sup> Respondent's initial brief in support of its motion was filed prior to the decision issued by the Court of Appeals for the Federal Circuit in *Engage Learning, Inc. v. Salazar*, 660 F.3d 1346, 1353-54 (Fed. Cir. 2011), holding that a litigant need only allege a non-frivolous implied-in-fact contract to avoid dismissal for lack of subject matter jurisdiction.

An executive agency shall use a cooperative agreement as the legal instrument reflecting a relationship between the United States Government and a State, a local government, or other recipient when –

(1) the principal purpose of the relationship is to transfer a thing of value to the State, local government, or other recipient to carry out a public purpose of support or stimulation authorized by a law of the United States instead of acquiring (by purchase, lease or barter) property or services for the direct benefit or use of the United States Government; and

(2) substantial involvement is expected between the executive agency and the State, local government, or other recipient when carrying out the activity contemplated in the agreement.

31 U.S.C. § 6305.

Ordinarily, an arrangement such as the one originally contemplated by NRCS and the Parish would not give rise to a cause of action under the CDA. The underlying arrangement, a cooperative agreement between the Federal Government and a local government, is a use of grant funds not subject to the provisions of the CDA. *Nutritional Support, Inc.*, AGBCA 2002-141-1, 03-1 BCA ¶ 32,115 (2002). This is so even if there is substantial federal government involvement with the agreement between the municipality and contractor.

The United States Court of Appeals for the Federal Circuit has held that the unambiguous language of the CDA is limited to express or implied contracts for the procurement of services and property and for the disposal of personal property. The CDA does not cover all government contracts. *Coastal Corp. v. United States*, 713 F.2d 728, 730 (Fed. Cir. 1983). The Federal Circuit has stated:

In determining whether contracts are within the scope of the Contract Disputes Act, we are mindful of the legislative intent behind that Act. Congress created the Contract Disputes Act to promote economy, efficiency and effectiveness in the government's procurement of goods. Accordingly, the associated regulations emphasize the buyer-seller relationship.

*G. E. Boggs & Associates, Inc. v. Roskens*, 969 F.2d 1023, 1027 (Fed. Cir. 1992); see also *Delta Steamship Lines, Inc. v. United States*, 3 Cl. Ct. 559, 569 (1983) (the conventional contract for the direct procurement of property, services and construction, to be used directly by the Government, is the type of Government contract covered by the Act.); *Opportunities*

*for the Aging Housing Corp. v. Department of Housing & Urban Development*, CBCA 1501, 10-1 BCA ¶ 34,311 (2009).

In its recent decision in *Engage Learning, Inc. v. Salazar*, 660 F.3d 1346, 1353-54 (Fed. Cir. 2011), the Court of Appeals for the Federal Circuit ruled that to invoke the Board's jurisdiction to entertain an appeal relative to an express or implied contract under the CDA, a contractor need only allege the existence of a contract with an executive agency. The contractor is then entitled to the opportunity to pursue discovery and attempt to prove that a contract existed. If appellant is thereafter unable to establish the existence of an alleged contract with the Government, the proper remedy is dismissal for failure to state a claim. *Id.* at 1354.

In light of the *Engage Learning* opinion, NRCS refocused its arguments on the second prong of its argument. Accepting, for the purpose of going forward, the proposition that there was an implied contract between NRCS and Omni, NRCS maintains that such a contract would nonetheless not qualify as a procurement contract as that term is defined in the CDA. Respondent argues that *Engage Learning* did not address or alter the jurisdictional requirement for a procurement contract and cites various decisions in which no procurement contract was found to have existed. *See, e.g., Rick's Mushroom Service, Inc. v. United States*, 521 F.3d 1338, 1343-44 (Fed. Cir. 2008) (affirming dismissal of claim for lack of subject matter jurisdiction where the cost-sharing contract between Rick's Mushroom and the Government was not a procurement contract within the meaning of the CDA).

Respondent points out that the relationship between it and the Parish is solely that of grantor/grantee under the emergency watershed protection program, an arrangement not encompassed within the FAR's definition of a contract. The parties entered into a cooperative agreement under which the Parish was defined to be a sponsor for the purposes of obtaining the agreed-to improvements and repairs. The Court of Appeals for the Federal Circuit has observed that "the government's involvement in the financing and supervision of a contract between a public agency and a private contractor does not create a contract between the government and the contractor, for the breach of which the contractor may sue the government." *New Era Construction v. United States*, 890 F.2d 1152, 1155 (Fed. Cir. 1989). Thus, even if Omni can meet its burden to prove that an implied contract with NRCS came into existence, respondent maintains that such an instrument would nonetheless not be a procurement contract as defined by statute, regulation, and the case law.

NRCS urges that even if Omni's allegation that there is an implied contract between it and NRCS is sufficient to establish jurisdiction, the alleged contract cannot satisfy the requirement that the contract be one for the procurement of property, services, and

construction for the direct benefit of the Government. Omni responds that the Government received a direct benefit through the achievement of its mandate under the Emergency Watershed Protection Program. It also maintains that it is entitled to proceed at this juncture because it is enough to allege that the implied contract created between it and NRCS is a procurement contract. Although respondent's position may ultimately be determined to be valid, it would be premature for the Board to come to this conclusion now.

Appellant has alleged that the implied contract was a procurement contract. Under the reasoning of *Engage Learning*, this assertion suffices to invoke our CDA jurisdiction. Thus, this question is a matter to be addressed on a fully developed record after Omni has had an opportunity to conduct discovery with respect to whether the alleged contract would qualify as a CDA procurement. Omni may well not be able to prove that the alleged implied contract was a procurement contract within the meaning of the CDA. Indeed, at its inception, the matter involved a grant agreement between the Parish and NRCS, and was clearly not within the purview of the Board's jurisdiction. At this preliminary stage of proceedings, however, Omni has alleged that an implied contract for the procurement of construction services for the benefit of the Government came into existence. Appellant must be afforded the opportunity to prove its allegations. Once discovery is completed, it may be appropriate to reassess whether a procurement contract was created between the two parties.

### Decision

The motion to dismiss for lack of jurisdiction is **DENIED**.

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CATHERINE B. HYATT  
Board Judge

We concur:

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JEROME M. DRUMMOND

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RICHARD C. WALTERS

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Board Judge

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