UNITED STATES
CIVILIAN BOARD OF CONTRACT APPEALS

DISMISSED FOR LACK OF JURISDICTION: June 21, 2013

CBCA 3081

HART VENTURES, INC.
d/b/a A-1 FIRE SERVICES,

Appellant,

v.

DEPARTMENT OF AGRICULTURE,

Respondent.

Alvern Charles Weed, Kalispell, MT, counsel for Appellant.

Jennifer T. Newbold, Office of the General Counsel, Department of Agriculture, Missoula, MT, counsel for Respondent.

Before Judges **DANIELS** (Chairman), **SOMERS**, and **GOODMAN**.

GOODMAN, Board Judge.

Appellant, Hart Ventures, Inc. dba A-1 Fire Services (appellant), has filed this appeal from the contracting officer's decision. The Department of Agriculture (respondent) has moved to dismiss the appeal for lack of jurisdiction. We grant the motion and dismiss the appeal.

Background

On April 28, 2010, respondent entered into blanket purchase agreement no. AG-0343-B-10-7042 (the agreement) with appellant. Under the agreement, appellant made

available water tender equipment for wildland fires when accepting dispatch orders for resources to suppress fires. Appeal File, Exhibit 1 at 29.

The agreement contained the following language:

> PRICING AND ESTIMATED QUANTITY
>
> This solicitation will result in multiple agreements. The dollar limitation for any individual order is $150,000. Since the needs of the Government and availability of Contractor's resources during an emergency cannot be determined in advance, it is mutually agreed that, upon request of the Government, the Contractor shall furnish the resources listed herein to the extent the Contractor is willing and able at the time of order. Due to the sporadic occurrence of Incident activity, the placement of any orders IS NOT GUARANTEED.

Id.

Respondent's contracting officer issued a decision dated August 23, 2012, terminating the agreement. The decision read in relevant part:

> On August 15, 2012 I verbally informed you that your agreement, AG-0343-B--10-7042 was suspended from receiving any further resource orders with the intention of terminating this agreement when all resources currently on assignment are released. This letter is to inform you that your agreement is formally terminated in its entirety for the following reasons.

Appeal File, Exhibit 1. The decision alleged three reasons for termination of the agreement, stated that it was a final decision of the contracting officer, and advised appellant of appeal rights to this Board and to the United States Court of Federal Claims. *Id.*

Appellant appealed the contracting officer's termination of the agreement to this Board. In its complaint, appellant asserts that the agreement, a blanket purchase agreement, was a contract under which multiple orders were placed. Complaint ¶ 7. Appellant also states that it accepted a dispatch order to provide fire services at the Rosebud Complex fire on August 2, 2012. Relief sought by appellant included conversion of the termination for cause to a termination for the convenience of the Government, payment to appellant of all costs allowable pursuant to a termination for convenience, including payment for services performed, and costs allowable, but as yet unpaid, under the terminated contract.

Discussion

Respondent has filed a motion to dismiss the appeal, asserting that the agreement does not constitute a contract and therefore, the Board lacks jurisdiction over this appeal.

Appellant maintains that the agreement is a contract, as it incorporates Federal Acquisition Regulation contract clauses. Appellant also notes that the contracting officer issued a final decision advising the contractor of its right to appeal the decision. Appellant concludes that because a termination for cause is considered to be a government claim against a contractor, the agreement must be a contract. If it is not, then the Board should reform the agreement and make it a contract. Alternatively, appellant argues that respondent should be estopped from denying that the agreement is a contract as respondent treated the agreement as such.

Appellant's arguments fail with regard to the agreement. Interpreting blanket purchase agreements containing language substantially similar to that included in the agreement at issue, this Board, its predecessor boards of contract appeals, and courts have concluded that such agreements are not contracts as they do not manifest the necessary mutuality of consideration required for an enforceable contract. In reaching this conclusion, the decisions refer specifically to the language in the agreements that states that the Government does not guarantee the placement of orders under the agreement and allows the "contractor" to furnish resources when an order is placed to the extent the contractor is "willing and able."

Thus, the agreements are not contracts because neither party is obligated to perform. The Government is not required to place any orders, nor is the contractor required to furnish resources in response to any order placed. As the agreements are not contracts, the boards and courts conclude that contracting officer decisions terminating the agreements are not appealable under the Contract Disputes Act, even though they might be phrased as contracting officer final decisions. *Ridge Runner Forestry v. Veneman*, 287 F.3d 1058 (Fed. Cir. 2002); *Crewzers Fire Crew Transport, Inc. v. United States,* No. 12-064C (Fed. Cl. May 31, 2013); *Crewzers Fire Crew Transport, Inc. v. United States*, 98 Fed. Cl. 71 (2011); *Dr. Lewis J. Goldfine v. Social Security Administration,* CBCA 2549, 12-1 BCA ¶ 34,926*; Tenderfoot Equipment Services v. Department of Agriculture*, CBCA 1865, 10-2 BCA ¶ 34,527; *Columbia Coach Service, Inc. v. Department of Agriculture*, CBCA 587, 07-2 BCA ¶ 33,584; *Petersen Equipment*, AGBCA 94-163-1, et al., 95-2 BCA ¶ 27,676; *Ann Riley & Associates, Ltd.*, DOT BCA 2418, 93-3 BCA ¶ 25,963.

As the agreement is not a contract, the Board lacks jurisdiction over the appeal. The Board has no authority to reform the agreement to make it a contract, nor does the fact that

a termination is generally considered to be a government claim with regard to a contract transform the terminated agreement into a contract.

Appellant makes additional arguments with regard to the dispatch orders issued pursuant to the agreement. Appellant asserts that the termination of the agreement resulted in the cessation of work under two dispatch orders that had been previously offered by respondent and accepted by appellant. Appellant notes that respondent acknowledges in its motion that a binding contract arises when a dispatch order is offered and accepted under the agreement at issue. Appellant therefore argues:

> In light of the fact that the termination action and Final Decision should have been directed at the actual contracts, i.e., the accepted dispatch orders, the failure of the [respondent] to do so renders the Contracting Officer's Final Decision, which was directed against the [agreement], defective. Therefore, the Board should deem the appeal filed against the termination of the [agreement] to have been filed against the contemporaneous constructive termination of the said dispatch orders, and find jurisdiction on that basis.

It is true that a contract is formed between a contractor and the government when two conditions are met: an order must be placed under the agreement, and the contractor must accept that order. *Tenderfoot.* Therefore, the dispatch orders accepted by a contractor, if such exist, may be contracts. Even so, this Board cannot deem the termination of the agreement to be the termination of any accepted dispatch orders. If appellant has claims for payment of services rendered and costs incurred in the performance of dispatch orders, these claims must be presented to the contracting officer and addressed in a contracting officer's decision before they can be considered by this Board. These claims were not addressed in the contracting officer's decision that is the subject of this appeal.

Decision

The respondent's motion to dismiss the appeal **FOR LACK OF JURISDICTION** is granted. The appeal is **DISMISSED.**

ALLAN H. GOODMAN
Board Judge

We concur:

STEPHEN M. DANIELS
Board Judge

JERI K. SOMERS
Board Judge