



UNITED STATES
CIVILIAN BOARD OF CONTRACT APPEALS

DISMISSED FOR FAILURE TO STATE A
CLAIM UPON WHICH RELIEF MAY BE GRANTED: May 29, 2014

CBCA 3537

MUSE BUSINESS SERVICES, LLC,

Appellant,

v.

DEPARTMENT OF THE TREASURY,

Respondent,

Anthony L. Washington, Washington, DC, counsel for Appellant.

William J. Erle, Office of Chief Counsel, Office of the Comptroller of the Currency, Department of the Treasury, Washington, DC, counsel for Respondent.

Before Judges **SOMERS**, **STERN**, and **DRUMMOND**.

DRUMMOND, Board Judge.

Muse Business Services, LLC (Muse) alleges that the Office of the Comptroller of the Currency (OCC), a bureau within the Department of the Treasury, breached a written contract, in the form of a blanket purchase agreement (BPA), and seeks damages totalling \$333,672.89. The OCC has moved to dismiss the appeal for lack of jurisdiction. The OCC maintains that the Board lacks jurisdiction over the appeal because no contract exists between Muse and the OCC. Muse opposes the OCC's motion.

We find that the OCC is correct that no contract exists between the parties. Absent a contract, we must dismiss the appeal for failure to state a claim upon which relief may be granted, rather than for lack of jurisdiction.

Background

On February 16, 2010, the OCC issued request for quotes (RFQ) 438505, seeking multiple service providers for non-personal litigation support services for a five-year period. The RFQ called for prospective service providers “to propose fully burdened fixed unit prices by task, as identified in the Performance Work Statement.”

On August 1, 2010, the OCC established BPAs with Muse and another service provider. Both BPAs are identical and incorporated the terms of the RFQ. Part 1.1 of the BPA, “Pricing,” states, in part, that “[t]his BPA does not obligate any funds. The terms and conditions included in this BPA apply to all purchases made pursuant to it.”

The BPA states that each task call will have its own specific statement of work. Part 2.8 of the BPA, “Frequency of Calls,” states that the “OCC estimates [that] it will issue 20 task calls a year.” The OCC asserts that the estimate is a “good faith estimate made by the requiring activity” and based on the number of calls placed against an earlier BPA. Muse alleges that based upon the estimate, it expected to receive several orders per year. The BPA does not guarantee the award of any specific number of orders during any given year, nor does it require the OCC to order from Muse.

Part 3.0 of the BPA, “Subsequent Order Procedures,” states, in part: “[F]or all calls against the BPA, the OCC will forward the requirements to all BPA holders for quote.” Although the BPA provides procedures for the OCC to follow in accepting a quote, it contains no requirement that Muse or the other service provider submit quotes for task calls against the BPA.

The BPA also included an information security clause that stated the “service provider shall maintain a computing environment with adequate security at all times.” The OCC states that because the BPA is a framework for future contracts, the requirement to maintain security “at all times” means at all times when performing under an OCC task call issued against the BPA. Muse alleges that it incurred costs complying with this requirement. The BPA contains no provision for reimbursing Muse for those costs.

On October 18, 2010, the OCC issued its first task call requesting a quote from Muse and the other service provider. The instructions stated that “the OCC requests a Firm-Fixed Price Quote for the attached BPA Call Requirement.” After evaluating the quotes, the OCC awarded this order to the other service provider. Subsequently, the OCC issued two additional RFQs which also resulted in contracts awarded to the other service provider.

On June 19, 2012, Muse wrote to the OCC, requesting that it provide Muse with information concerning future task call requirements. By email message dated June 27, 2012, the OCC responded that the information concerning future task calls was being evaluated. The OCC promised to notify Muse as to any future updates.

On April 29, 2013, Muse submitted to the OCC a certified claim asserting that the OCC had breached the BPA. Muse sought breach damages totaling \$333,672.89¹ for costs that it incurred in anticipation of orders. The OCC denied Muse's claim, stating, in part, that Muse's BPA:

is neither an indefinite delivery, indefinite quantity (IDIQ) nor requirement type contract, and as such there is no guaranteed minimum quantity. Additionally, 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.

Muse filed a timely appeal and complaint. Muse's complaint argues that the BPA was a binding contract that placed specific obligations upon the OCC; namely, the OCC was obligated to provide Muse and the other service provider with "task order" opportunities and, in return, Muse and the other service provider were to provide quotes and be ready to perform future orders. Muse's complaint alleges further that the OCC breached the contract by issuing an improper and bad faith estimate and the OCC breached its covenant of good faith and fair dealing by refusing to provide Muse with information concerning future orders.

Discussion

Muse alleges that the OCC breached a written contract, the BPA. To prevail, Muse must establish both the existence of a contract and its breach. *United States v. Winstar Corp.*, 518 U.S. 839, 871-72 (1996); *Anderson v. United States*, 344 F.3d 1343, 1353 (Fed. Cir. 2003). The OCC denies the existence of a contract with Muse and argues that the Board lacks jurisdiction to grant the requested relief.

¹ Muse's damages included bid and proposal costs, lease space, equipment, and salaries.

Jurisdiction

The Court of Appeals for the Federal Circuit has instructed that where a plaintiff alleges the existence of a contract between it and the Federal Government, a court or board of contract appeals has jurisdiction to consider the case. *Engage Learning, Inc. v. Salazar*, 660 F.3d 1346, 1353 (Fed. Cir. 2011); *see JRS Management v. Department of Justice*, CBCA 2475, 12-1 BCA ¶ 34,962. There is no question that Muse pled the existence of a valid contract. The proper question, despite Muse's label, is whether Muse has stated a claim upon which relief can be granted. In this case, construing the OCC's motion as a motion to dismiss for failure to state a claim does not prejudice Muse, since the critical issue of whether a contract was formed remains the same and has been fully briefed by the parties. Accordingly, we treat the OCC's motion as a motion to dismiss for failure to state a claim.

Failure to State a Claim

We must accept as true the complaint's undisputed factual allegations and should construe them in a light most favorable to appellant. However, if a contractor asserts facts that, even if true, would not entitle it to relief, then dismissal for failure to state a claim upon which relief can be granted is appropriate. *Conley v. Gibson*, 355 U.S. 41, 45-46 (1957). Therefore the question here is whether Muse presented a well-pled allegation that the BPA between Muse and the OCC constituted a binding contract so as to establish a claim over which we possess jurisdiction.

Muse concedes that BPAs are generally not considered contracts, but asserts that this BPA was a binding contract because it placed specific obligations on the parties. Muse maintains that the OCC was obligated to provide Muse and the other service provider with "task order" opportunities and, in return, Muse and the other service provider were to provide quotes and be ready to perform future orders. Muse asserts further that the OCC breached the contract by issuing an improper and bad faith estimate and breached its covenant of good faith and fair dealing by refusing to provide Muse with information concerning future orders.

The OCC's view is different. The OCC maintains that the BPA lacks mutuality of intent and consideration, and therefore is not a contract. We agree with the OCC.

Interpreting BPAs containing language substantially similar to that included in this agreement, this Board, its predecessor boards, and the courts have consistently found that BPAs are not contracts, as they do not manifest the necessary mutuality of consideration required for an enforceable contract. *See Crewzers Fire Crew Transport, Inc. v. United States*, No. 2013-5104 (Fed. Cir. Feb. 6, 2014) (affirming Court of Federal Claims decision that a BPA is not a binding contract); *Ridge Runner Forestry v. Veneman*, 287 F.3d 1058,

1062 (Fed. Cir. 2002) (citing Restatement (Second) of Contracts § 71(1)); *see also Modern Systems Technology Corp. v. United States*, 24 Cl. Ct. 360, 362 (1991), *aff'd*, 979 F.2d 200 (Fed. Cir. 1992); *Hart Ventures, Inc. v. Department of Agriculture*, CBCA 3081, 13 BCA ¶ 35,336; *Dr. Lewis J. Goldfine v. Social Security Administration*, CBCA 2549, 12-1 BCA ¶ 34,926. In reaching this conclusion, the decisions observed that the agreements are not contracts because neither party was obligated to perform.

Unlike the case cited by Muse, *Ace-Federal Reporters, Inc. v. Barram*, 226 F.3d 1329 (Fed. Cir. 2000), which found consideration in the context of a requirements contract, this BPA did not obligate any funds or require the OCC to order only from Muse and the other service provider. While the BPA did provide that “[f]or all calls against the BPA, the OCC will forward the requirement to all BPA holders for quote,” neither this provision nor any other in the BPA required Muse to respond with a quote. Muse’s choice to submit a quote did not place an obligation on the OCC. *See Ridge Runner Forestry*, 278 F.3d at 1062. Likewise, Muse’s choice to incur costs in preparation for future orders did not place an obligation on the parties. Muse assumed the risk of not receiving task calls and the associated opportunity to recoup its costs. *Potomac Computers Unlimited, Inc. v. Department of Transportation*, DOT CAB 2603, 94-1 BCA ¶ 26,304 (1993). This BPA unambiguously limited the OCC’s liability to future purchases. *See Crewzers Fire Crew Transport, Inc. v. United States*, 98 Fed. Cl. 71, 79 (2011) (quoting *Zhengxing v. United States*, 204 F. App’x 885, 886-87 (Fed. Cir. 2006)). Likewise, as the BPA contained no assurances of recouping preparation costs, Muse’s choice to incur costs in anticipation of future calls represents the cost of doing business. Simply put, Muse assumed the risk of not receiving task call orders and the associated opportunity to recoup preparation costs. “It is an axiomatic that a valid contract cannot be based upon the illusory promise of one party, much less the illusory promise of both parties.” *Ridge Runner Forestry*, 278 F.3d at 1062.

Muse’s remaining breach claims are dependent on an underlying contractual relationship that does not exist. Muse’s claim that the OCC issued an improper and bad faith estimate and is therefore liable for breach of contract must be dismissed for failure to state a claim because no contract exists. Likewise, Muse’s claim that the OCC breached the covenant of good faith and fair dealing must also be dismissed for failure to state a claim. The “implied obligation of good faith and fair dealing must attach to a specific substantive obligation, mutually assented to by the parties.” *Alaska v. United States*, 35 Fed. Cl. 685, 704 (1996), *aff'd*, 119 F.3d 16 (Fed. Cir. 1997) (table). Since the BPA is not a binding contract, it cannot give rise to a breach of the implied covenant of good faith and fair dealing. We must therefore dismiss the case for failure to state a claim upon which relief may be granted.

Decision

This case is **DISMISSED FOR FAILURE TO STATE A CLAIM UPON WHICH RELIEF MAY BE GRANTED.**

JEROME M. DRUMMOND
Board Judge

We concur:

JERI KAYLENE SOMERS
Board Judge

JAMES L. STERN
Board Judge