UNITED STATES
CIVILIAN BOARD OF CONTRACT APPEALS

DISMISSED FOR LACK OF JURISDICTION: February 28, 2014

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.

Omni Pinnacle, L.L.C. (Omni), appellant, maintains that it had an implied-in-fact contract with respondent, the Natural Resources Conservation Service (NRCS), a component of the Department of Agriculture, for channel excavation and removal of sediment from Bayou Terre Aux Boeufs, Louisiana. 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 claims

entitlement to an adjustment of its contract price because of inaccurate estimates of the quantity of sediment to be removed.

When the appeal was docketed, respondent promptly moved for its dismissal, asserting two grounds to support a finding that the Board lacked jurisdiction to entertain it: (1) there was no implied or express contract between Omni and NRCS; and (2) even assuming arguendo that Omni could establish an implied contract, it would not qualify as a procurement contract within the meaning of the Contract Disputes Act (CDA). Because Omni had alleged the existence of an implied procurement contract, the Board denied the initial motion to dismiss. *Engage Learning, Inc. v. Salazar*, 660 F.3d 1346, 1353-54 (Fed. Cir. 2011). Given the early stage of proceedings, the Board instead permitted discovery to allow Omni the opportunity to develop its case. *Omni Pinnacle, L.L.C. v. Department of Agriculture*, CBCA 2452, 12-2 BCA ¶ 35,118. The Board expressly stated that "[o]nce discovery is completed, it may be appropriate to reassess whether a procurement contract was created between the two parties." *Id.* at 172,442.

Following the conclusion of discovery, the Government filed a motion for summary relief, asserting that there are no material facts in dispute and that there is no implied contract as a matter of law. It also renewed its motion to dismiss for lack of jurisdiction on the ground that Omni has not, even with the benefit of discovery, established that the alleged implied contract was a procurement contract that operated to provide a direct benefit to the Federal Government. For the reasons stated, we now dismiss this appeal for lack of jurisdiction.

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 a natural occurrence is causing or has caused a sudden impairment of the watershed. NRCS's financial assistance is available only to a "qualified sponsor," either a state or a political subdivision of a state.

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 damage 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 executed 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 required to be removed.

In the early stages of the project, Omni realized that the estimate of work was overstated and requested a meeting to discuss, among other matters, the inaccurate estimate and the need to renegotiate the contract price. A meeting took place on June 22, 2010, and was attended in person by representatives of Omni and the Parish, including 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. The NRCS representative, who was a contracting officer with a small dollar warrant at that time, suggested 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 interpreted this to mean NRCS would pay Omni on a cost-reimbursement basis.

Omni maintains that, in reliance on this understanding, 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 that, taken as a whole, NRCS's actions established 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. 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), 41 U.S.C. §§ 7101-7109 (Supp. IV 2011). The NRCS representative responded that, because 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

Respondent has styled its motion as one to dismiss for failure to state a claim upon which relief can be granted or, alternatively, as one for summary relief. It states the following reasons as support for the motion: (1) Omni cannot establish the existence of a contract with NRCS; (2) even if there were a contract between NRCS and Omni, the contract would lack the federal procurement aspect required by the CDA, and (3) based on undisputed facts and evidence, the NRCS employee who allegedly contracted with Omni had no actual authority to enter into such a contract. Omni opposes the motion.

Respondent initially questioned whether the Board has subject matter jurisdiction to entertain this appeal. The Board allowed discovery on both the ability to prove an implied contract and as to whether a procurement contract would have been created. Regardless of whether an implied contract may be established, we have no authority to consider the case unless appellant can first establish that any contract that might have been created is indeed a procurement contract under the CDA. The Board, before considering any other basis for summarily disposing of this appeal, must first ascertain whether it in fact has the requisite jurisdiction to proceed. *See Monster Government Solutions, Inc. v. Department of Homeland Security*, DOTBCA 4532, 06-2 BCA ¶ 33,312, at 165,155 ("When jurisdiction is lacking, we cannot proceed to decide a case. Our only function is to announce the lack of jurisdiction and dismiss the case.") (citing *Steel Co. v. Citizens for a Better Environment*, 523 U.S. 83, 94 (1998)).

Once sufficient facts are presented to bring into question the jurisdiction of the Board to hear the dispute, it is incumbent upon appellant to come forward with evidence establishing jurisdiction. NRCS has made a convincing showing that, even if Omni could prove the existence of an implied contract with NRCS, it was not a procurement contract. Omni now bears the burden to establish subject matter jurisdiction by a preponderance of the evidence. *McNutt v. General Motors Acceptance Corp.*, 298 U.S. 178, 189 (1936); *Reynolds v. Army & Air Force Exchange Service*, 846 F.2d 746, 748 (Fed. Cir. 1988); *Red Gold, Inc. v. Department of Agriculture*, CBCA 2259, 12-1 BCA ¶ 34,921 (2011); *Opportunities for the Aging Housing Corp. v. Department of Housing and Urban Development*, CBCA 1501, 10-1 BCA ¶ 34,311, at 169,488 (2009).

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. Furthermore, 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 threshold issue here is whether the Federal Government may be said to have received a direct benefit from the work performed by Omni under its contract with the Parish, such as to permit us to consider whether an implied contract for these dredging services was created.

As we pointed out in our earlier decision, 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:

> 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 (emphasis added). *Omni Pinnacle*, 12-2 BCA at 172,441; *see also CMS Contract Management Services. v. United States*, 110 Fed. Cl. 537, 552-53 (2013).

We acknowledged in the *Omni Pinnacle* decision that "[o]rdinarily, 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." 12-2 BCA at 172,441 (citing *Nutritional Support, Inc.*, AGBCA 2002-141-1, 03-1 BCA ¶ 32,115 (2002)).

Here, the express contract for the procurement of services was the contract between Omni and the Parish. The Parish, so far as we know, owned the property and procured the work. The Parish, not NRCS, received the direct benefit or use of Omni's work. The cooperative agreement between NRCS and the Parish was not one for the procurement of services by an executive agency. The cooperative agreement was for the financing of procurement of such work by a non-federal agency -- the Parish.[1]

Omni has directed our attention to *City of Cincinnati v. United States*, 39 Fed. Cl. 271 (1997), suggesting that this decision establishes that local storm drainage systems confer a benefit on the federal government. This case was filed by the City of Cincinnati to recover an amount charged for the provision of storm drainage services to property owned and occupied by the Federal Government within the city. The issue was not whether, in that capacity, the Government benefited from the services, but whether the charge was a tax or a user fee. At best, one may infer from this case that utilities and other systems of this nature, customarily provided by a municipality, confer a direct benefit on the Federal Government as a user of the services. Omni has not contended that the Government owns or occupies any property affected by the bayou dredged by Omni, nor has it identified any benefit other than that NRCS has accomplished its mission to protect the watershed as a result of the dredging work performed by Omni. This is insufficient to demonstrate that there was a procurement contract under the meaning of the CDA.

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[1] It is well established "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." *Giljoy Technology, Inc. v. Department of Housing and Urban Development*, CBCA 1988, 10-2 BCA ¶ 34,552, at 170,401 (quoting *New Era Construction v. United States*, 890 F.2d 1152, 1155 (Fed. Cir. 1989), *aff'g New Era Construction*, HUD BCA 88-3406-C6, 89-1 BCA ¶ 21,376 (1988)).

Discovery has been completed. Omni has neither identified nor produced evidence of any particular direct benefit to NRCS. Nor has it effectively rebutted the Government's position that the primary purpose of the cooperative agreement and any NRCS involvement in the arrangement was to finance the Parish's acquisition of services for the primary benefit of the Parish.

Omni has failed to meet its burden to show that any implied-in-fact contract here would have been a procurement contract entered into for the direct benefit of the Federal Government. We thus have no jurisdiction to entertain this matter any further.

Decision

This appeal is **DISMISSED FOR LACK OF JURISDICTION**.

CATHERINE B. HYATT
Board Judge

We concur:

JEROME M. DRUMMOND
Board Judge

RICHARD C. WALTERS
Board Judge