UNITED STATES
CIVILIAN BOARD OF CONTRACT APPEALS

DISMISSED FOR LACK OF JURISDICTION: August 21, 2014

CBCA 3618

CHLOETA FIRE, LLC,

Appellant,

v.

DEPARTMENT OF AGRICULTURE,

Respondent.

Paige A. Masters of Crowe & Dunlevey, Oklahoma City, OK, counsel for Appellant.

Mark R. Simpson, Office of the General Counsel, Department of Agriculture, Atlanta, GA, counsel for Respondent.

Before Board Judges **SOMERS**, **HYATT**, and **POLLACK**.

HYATT, Board Judge.

Chloeta Fire, LLC (Chloeta) alleges that the Department of Agriculture's Forest Service breached a contract between the two parties for the supply of water handling equipment for the emergency suppression of wildland fires. Choleta has appealed the contracting officer's deemed denial of its breach claim. Respondent has filed a motion to dismiss the appeal for lack of jurisdiction. For the reasons discussed herein, we grant the motion.

Background

On May 18, 2010, respondent entered into a Virtual Incident Procurement (VIPR) agreement with Chloeta, a small-disadvantaged Native American-owned business, for the

provision of wildland fire engines as needed to respond to incidents in the Forest Service's southern region and throughout the nation. The VIPR agreement is a type of basic purchasing agreement (BPA) that was created by respondent to secure the appropriate mix of the resources needed when a fire incident occurs. The VIPR agreement implements a pre-planning process whereby the Forest Service identifies, evaluates, and ranks potential suppliers and equipment prior to the fire season.

The agreement stated the following:

> The solicitation will result in multiple agreements. . . . 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.

In addition, the agreement provided that each dispatch center was required to "give priority to [the] resource offering the greatest advantage to the Government for emergency wildland fire suppression . . . BEFORE all other private resources not under th[e] Agreement." Chloeta had been predetermined to offer the greatest advantage to the Government for emergency wildland fire suppression for the equipment it provided and thus was listed as number one on the dispatch priority list.

In late July 2012, the Ozark National Forest experienced numerous wildland fire incidents requiring the assistance of outside resources. Chloeta's engine was available during this time. Additionally, Chloeta employees routinely communicated with the staff of the Arkansas-Oklahoma Interagency Coordination Center (AOICC)[1] regarding the availability of its engine.

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[1] The AOICC serves as the Initial Attack Fire Dispatch Office for the Ouachita and Ozark-St. Francis National Forests and the Bureau of Indian Affairs in Oklahoma. AOICC coordinates the movement of resources for federal and state agencies within Arkansas and Oklahoma. These agencies include the Forest Service, Bureau of Indian Affairs, National Park Service, United States Fish & Wildlife Service, Bureau of Land Management, Arkansas Forestry Commission, and Oklahoma State Forestry.

According to Chloeta, rather than order its engine, the Forest Service instead contracted with the Choctaw Nation to supply a similar engine for a total of fourteen shifts for various initial attack fires. Chloeta states that the Forest Service did not have a cooperative agreement with the Choctaw Nation to provide this resource. Shortly after learning that the Choctaw Nation engine had been dispatched in response to these incidents, Chloeta's personnel traveled to AOICC's offices in Hot Springs, Arkansas, to discuss the matter. They met with a Forest Service staff officer who agreed that Chloeta's engine should have been ordered. This individual is alleged to have instructed the AOICC assistant center manager to place an order for the Chloeta engine for the same incident. Chloeta states that it accepted this offer and confirmed to AOICC that the resource was available. Chloeta further alleges that there was a mutual understanding that appellant would take no further action given the pending order. Thereafter, the Government allegedly reneged on this promise and refused to issue the order.

Chloeta submitted a claim to the contracting officer seeking the amount of $39,275.30, revenue it says was lost as a result of the utilization of a "non-VIPR contract" engine in the Ozark National Forest during the 2012 fire season in violation of the VIPR agreement. The claim made no mention of the events that occurred with respect to Chloeta's dealings with the AOICC, but focused primarily on the failure to follow the process detailed in the VIPR agreement. When no decision was forthcoming after approximately six months, appellant appealed the deemed denial of its claim.

Discussion

The Forest Service filed a motion to dismiss for lack of jurisdiction shortly after the appeal was filed, contending that there was no binding contract between the parties; the VIPR agreement was, in essence, a basic purchasing agreement (BPA) that imposed no obligation on either party. Appellant opposes the motion, maintaining that it has alleged an implied contract to supply its equipment to the Forest Service, which is all that is required to establish jurisdiction under the rationale of *Engage Learning, Inc. v. Salazar*, 660 F.3d 1346 (Fed. Cir. 2011).

To invoke the Board's jurisdiction under the Contract Disputes Act (CDA), 41 U.S.C. §§ 7107-7109 (2012), appellant must show the existence of a contract, express or implied, for the procurement of (1) property, other than real property in being; (2) services; (3) construction, alteration, repair, or maintenance of real property; or (4) the disposal of personal property. *Id.* § 7102(a). The Forest Service argues that, under well-settled precedent, appellant did not have a contract to perform the subject services for the Forest Service and thus cannot pursue an appeal at the Board.

In particular, the Forest Service relies on the language of the VIPR agreement stating that the Government did not have to place orders with Chloeta and that Chloeta was under no obligation to perform if an order were placed. For a binding contract to come into existence a resource order must be placed by the Forest Service and accepted by the contractor. Respondent directs our attention to precedent of the Court of Appeals for the Federal Circuit, construing virtually identical language under similar facts and holding that this type of agreement did not, in and of itself, create a binding contract. To constitute a valid and enforceable contract, there must be both consideration to ensure the mutuality of obligation and adequate definiteness to create a basis for determining that a breach occurred and to fashion an appropriate remedy. *Crewzers Fire Crew Transport, Inc. v. United States*, 741 F.3d 1380, 1382 (Fed. Cir. 2014) (Tucker Act). Moreover, the ranking of eligible providers in BPAs has expressly been rejected as giving rise to any contractual obligation to award to the highest-ranked contractors under the VIPR agreements. Absent a binding contract, there is no Contract Disputes Act jurisdiction. *Ridge Runner Forestry v. Veneman*, 287 F.3d 1058, 1062 (Fed. Cir. 2002) (Contract Disputes Act); *accord Modern Systems Technology Corp. v. United States*, 24 Cl. Ct. 360, 362 (1991), *aff'd*, 979 F.2d 200 (Fed. Cir. 1992); *Muse Business Services, LLC v. Department of the Treasury*, CBCA 3537 14-1 BCA ¶ 35,619; *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.

Chloeta opposes the motion, conceding that the BPA by itself did not create an enforceable contract, but countering that, nonetheless, an implied contract was created based on the dealings it had with the Forest Service, which are detailed in its complaint. Since it has alleged the creation of a specific oral contract pursuant to the VIPR agreement, Chloeta reasons that it has met the CDA's jurisdictional requirement to allege the existence of a procurement contract entered into by the parties and thus is entitled to remain before the Board to endeavor to prove its case. *See Engage Learning*, 660 F.3d at 1354.

The problem with Chloeta's argument is that none of the facts alleged by Chloeta in its complaint to establish an implied contract were mentioned in the claim letter submitted to the contracting officer. In the claim submitted to the contracting officer, Chloeta focused solely on the award of work to the Choctaw Nation, which apparently had no VIPR agreement with the Forest Service. In its claim, Chloeta maintains only that this award violated the agency's express policies and procedures as set forth in the VIPR agreement.

Any appeal filed with the Board under the Contract Disputes Act must be "based on the same claim previously presented to and denied by the contracting officer." *Scott Timber Co. v. United States*, 333 F.3d 1358, 1365 (Fed. Cir. 2003) (quoting *Cerberonics, Inc. v. United States*, 13 Cl. Ct. 415, 417 (1987)); *accord Qwest Communications Co. v. General Services Administration*, CBCA 3423 (July 1, 2014); *EHR Doctors, Inc. v. Social Security*

Administration, CBCA 3522 (June 11, 2014); *Ketchikan Indian Community v. Department of Health & Human Services*, CBCA 1053-ISDA, et al., 13 BCA ¶ 35,436, at 173,808. These authorities also provide that the claim must arise from the same operative facts and seek essentially the same relief. If the claim asserted before the Board differs in its essential nature or basic operative facts from the original claim, it cannot have been considered by the contracting officer in his decision. Without the presentation of the claim to the contracting officer, the Board does not have jurisdiction to consider the matter. *Qwest Communications Co.*, slip op. at 4; *Walsh/Davis Joint Venture v. General Services Administration*, CBCA 1460, 10-2 BCA ¶ 34,479, at 170,056-57, *reconsideration denied*, 10-2 BCA ¶ 34,498.

Here, although the amount claimed is unchanged, the operative facts asserted in Chloeta's claim cannot reasonably be regarded as encompassing those subsequently included in the complaint. The contracting officer has not had the opportunity to consider these facts or whether an implied contract may have been formed in the circumstances. In short, the Board does not have jurisdiction to consider the claim as restated by appellant in its complaint because those operative facts have not been presented to the contracting officer for a decision. We also lack jurisdiction to consider the appeal based on the claim actually presented to the contracting officer because the BPA was not a binding contract.

Decision

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

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CATHERINE B. HYATT
Board Judge

We concur:

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JERI KAYLENE SOMERS
Board Judge

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HOWARD A. POLLACK
Board Judge