



UNITED STATES
CIVILIAN BOARD OF CONTRACT APPEALS

DENIED IN PART AND DISMISSED IN PART: February 24, 2016

CBCA 4996

G2G, LLC,

Appellant,

v.

DEPARTMENT OF COMMERCE,

Respondent.

Darren Rittenhouse, Sole Member of G2G, LLC, Gainesville, VA, appearing for Appellant.

Lisa J. Obayashi and Heidi Bourgeois, Office of the General Counsel, United States Patent and Trademark Office, Department of Commerce, Alexandria, VA, counsel for Respondent.

Before Board Judges **DANIELS** (Chairman), **SHERIDAN**, and **ZISCHKAU**.

DANIELS, Board Judge.

G2G, LLC (G2G), which held a contract with the Department of Commerce's (DOC's) Patent and Trademark Office (PTO), claimed entitlement to \$1,296,168, which it characterized as "the remaining balance" of the contract. G2G also asked the contracting officer to place "the Contract requirement . . . back into [the] SBA [Small Business Administration] 8(a) program." The contracting officer denied the claim and declined to address the request. G2G appealed the contracting officer's decision.

The PTO moves the Board to grant summary relief by denying and/or dismissing the appeal. G2G opposes the motion. We grant the motion and thereby deny the appeal in part and dismiss it in part.

Uncontested Facts

On September 8, 2009, the SBA and the DOC entered into a partnership agreement whereby the SBA delegated to the DOC the authority to award contracts under section 8(a) of the Small Business Act, 15 U.S.C. § 637(a) (2006). *See also* 13 CFR pt. 124 (2009); 48 CFR subpt. 19.8 (2008). All DOC contracting offices, including those of the PTO, were authorized to exercise this authority.

This paragraph addresses a matter which is contested. The appeal file submitted by the PTO includes a letter dated September 8, 2009, through which the PTO offered to the SBA a requirement for general storage and delivery of stored goods by a specific contractor for the base period of October 1, 2009, to September 30, 2010, and four successive option periods of one year each. G2G maintains that because it has not been provided an “original electronic copy” of the offering letter which is contained in the appeal file, it cannot be certain that this letter was actually sent to the SBA. The contractor further maintains that even if the letter in the appeal file was sent, it is defective in that it does not include several items required by 13 CFR 124.502 and 48 CFR 19.804-2. The PTO asserts that the hard copy of the letter in the appeal file is genuine and that the agency no longer has a copy of the letter in electronic format. As we explain in the Discussion section of this decision, whether the letter was sent and whether it is defective are not dispositive of this case.

Under the procedure described in the partnership agreement, if the SBA did not reject an offering within five working days of receipt of the offer, acceptance would be assumed unless an extension of time had been requested and approved. The record contains no indication of an SBA response to the offer contained in the PTO’s September 8, 2009, letter.

On September 30, 2009, the PTO awarded to G2G the contract for the requirement offered to the SBA, for “general storage of stationary [sic], forms, publications, copier paper, and other miscellaneous items,” and for “transportation for delivery of inventory to [PTO]

offices.”¹ The contract’s duration was a base year of October 1, 2009, through September 30, 2010, with four successive option years following the base period.

The contract contained clause H.2, “Option to Extend the Term of the Contract – Fixed-Price Contract.” This clause states:

The Government has the option to extend the term of this contract for three (3) additional period(s).² If more than 30 days remain in the contract period of performance, the Government, without prior written notification, may exercise this option by issuing a contract modification. To exercise this option within the last thirty (30) days of the period of performance, the Government must provide to the Contractor written notification prior to that last 30-day period. This preliminary notification does not commit the Government to exercising the option. Exercise of an option will result in the following contract modifications:

The “Period of Performance” clause will be modified as follows:

Option 1 - October 1, 2010 to September 30, 2011

Option 2 - October 1, 2011 to September 30, 2012

Option 3 - October 1, 2012 to September 30, 2013

Option 4 - October 1, 2013 to September 30, 2014

A PTO contracting officer exercised the option for option year 1 on September 8, 2010, and the option for option year 2 on September 29, 2011. The contract period was consequently extended through September 30, 2012.

On September 11, 2012, the PTO contracting officer’s technical representative provided G2G written notice that all PTO inventory was to be delivered to the agency by September 30, 2012. Delivery was actually completed on September 28, 2012. G2G submitted invoices for services performed during September 2012 and all previous contract months, and the agency paid the requested amounts.

¹ Although G2G now says that the PTO merely *purported* to award this contract – evidently because the requirement may not have been offered to the SBA and/or because the offering letter was defective – the contract itself bears the signature of the contractor’s sole member.

² Although the clause speaks of “three (3) additional period(s),” it lists four such periods.

The PTO did not exercise its option to extend the contract further. The contract thus expired on September 30, 2012.

By letter dated July 16, 2015, G2G submitted to a PTO contracting officer a certified claim for \$1,296,168, which it called “the remaining balance of [the] Contract . . . for option years 3 (October 1, 2012 - September 30, 2013) and 4 (October 1, 2013 - September 30, 2014).” G2G expressed concern that the SBA had stated that the contract was not found in SBA records as an 8(a) contract and that the PTO “has violate[d] SBA and GOA^[3] policy and procedure and a number of statutes.” G2G requested “that the Contract requirement be place[d] back into [the] SBA 8(a) program.”

In response, the contracting officer said that contract clause H-2 “permits the Government to **unilaterally** exercise Options 1 through 4” and “does not require the Government to affirmatively cancel un-exercised options.” He also stated that “G2G has not identified what SBA or ‘GOA’ statute, policy or regulation that the [PTO] has violated and how such alleged violation relates to the Government’s decision not to exercise the final two option periods. Without such specificity, I am not able to respond to this portion of G2G’s claim.” He denied the claim.

G2G appealed the contracting officer’s decision to the Board.

Discussion

Resolving a dispute on a motion for summary relief is appropriate when the moving party is entitled to judgment as a matter of law, based on undisputed material facts. The moving party bears the burden of demonstrating the absence of genuine issues of material fact. All justifiable inferences must be drawn in favor of the nonmovant. *Celotex Corp. v. Catrett*, 477 U.S. 317 (1986); *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242 (1986). Although G2G posits some issues of fact here, none of those issues is material to our analysis.

G2G contends that it is entitled to the money it would have received if the PTO had exercised its options to continue the contract beyond September 30, 2012. This is not a viable claim. “An option clause does not obligate the Government to exercise an option. The clause simply gives the Government the discretion to decide whether to exercise an option and unless the contract says otherwise, the Government’s discretion is nearly complete.” *Integral Systems, Inc. v. Department of Commerce*, GSBICA 16321-COM, 05-2

³ The meaning of the term “GOA” is unexplained.

BCA ¶ 32,984, at 163,472 (citing *Government Systems Advisors, Inc. v. United States*, 847 F.2d 811 (Fed. Cir. 1988)). “[O]ption contracts generally bind only the option giver, and not the option holder. The clause does not impose on the Government a legal obligation to exercise the option and require the work; the contractor has no right to the option work unless and until the Government exercises the option.” *Aspen Helicopters, Inc. v. Department of Commerce*, GSBCA 13258-COM, 99-2 BCA ¶ 30,581, at 151,024. “[T]he Government’s decision not to exercise an option can provide a vehicle for relief only if the contractor proves that the decision was made in bad faith or was so arbitrary or capricious as to constitute an abuse of discretion.” *Greenlee Construction, Inc. v. General Services Administration*, CBCA 416, 07-1 BCA ¶ 33,514, at 166,062.

G2G does not allege that the PTO’s decision not to exercise its options to continue the contract for its last two potential years was made in bad faith or was an abuse of discretion. Instead, the contractor maintains that the contract was improperly awarded because (a) the PTO may not have informed the SBA that it desired to award the contract under the program established under section 8(a) of the Small Business Act, and (b) even if the PTO did so inform the SBA, the information provided to the SBA was incomplete. The contractor also notes that under the partnership agreement between the DOC and the SBA, the DOC (including its constituent entities, such as the PTO) is required to provide “advance notice to SBA (as the prime contractor) prior to issuance of a final notice terminating the contract in whole or in part.” There is no evidence, G2G points out, that the PTO gave advance notice to the SBA that it was going to terminate the contract.

These arguments are to no avail. As to the first: Any defects in the process leading to the formation of the contract were not prejudicial to G2G; to the contrary, to the extent that there were any such defects, they eased the sole-source award of the contract to this company. Even if defects existed, courts are reluctant to “annul performed contracts when the government did not comply with a statutory or regulatory requirement.” *American Telephone & Telegraph Co. v. United States*, 177 F.3d 1368, 1376 (Fed. Cir. 1999) (en banc). To the extent that a violation of such a requirement is essentially one of “governmental non-compliance with internal review and reporting procedures,” *id.* at 1376, it is, absent some specific statutory direction to the contrary, viewed as “simply a failure to abide by housekeeping rules” that does not give rise to an “actionable claim.” *American Telephone & Telegraph Co. v. United States*, 48 Fed. Cl. 156, 160 (2000), *aff’d*, 307 F.3d 1374 (Fed. Cir. 2002). *See also United States v. Amdahl Corp.*, 786 F.2d 387 (Fed. Cir. 1986) (where invalidity of contract award was not plain, award must be deemed lawful and contractor must be paid for the goods or services it provided). The PTO has already paid for all the services that G2G provided under the contract in question. There can be no justification for forcing the agency to pay for services which were not performed because options were not exercised, whether a contract was awarded properly in the first place or not.

As to G2G's second argument: The requirement in the partnership agreement for advance notice to the SBA pertains only to terminations of contracts. "Terminations" of government contracts are of specified varieties, "complete or partial termination of contracts for the convenience of the Government or for default." 48 CFR 49.000. This contract was not terminated; it simply came to the end of the duration which was prescribed in the instrument itself. The notice provision of the partnership agreement does not apply here.

The remaining matter in this case is G2G's request that the Board direct the PTO to place back into the 8(a) program the requirement for the services which were described in the contract. As explained clearly in *Western Aviation Maintenance, Inc. v. General Services Administration*, GSBCA 14165, 98-2 BCA ¶ 29,816, waivers of sovereign immunity are to be strictly construed; they "can only be ascertained by reference to underlying congressional policy." *Id.* at 147,641 (quoting *Quality Tooling, Inc. v. United States*, 47 F.3d 1569, 1575 (Fed. Cir. 1995) (citing *Franchise Tax Board of California v. United States Postal Service*, 467 U.S. 512 (1984))). Because Congress has not waived the immunity of the United States from suits for specific performance under the Contract Disputes Act, 41 U.S.C. §§ 7101-7109 (2012), *Western Aviation*, 98-2 BCA at 147,642; *see also Eyak Technology, LLC v. Department of Homeland Security*, CBCA 1975, 10-2 BCA ¶ 34,538, at 170,340, the Board does not have the authority to direct the PTO to take the action G2G desires.

Decision

The PTO's motion for summary relief is granted. G2G's claim for monetary relief is **DENIED**. The contractor's request for specific performance is **DISMISSED**. The case is thus fully resolved.

STEPHEN M. DANIELS
Board Judge

We concur:

PATRICIA J. SHERIDAN
Board Judge

JONATHAN D. ZISCHKAU
Board Judge