



UNITED STATES
CIVILIAN BOARD OF CONTRACT APPEALS

DISMISSED FOR LACK OF JURISDICTION: March 29, 2018

CBCA 5559

DEVIN RICHARDSON,

Appellant,

v.

DEPARTMENT OF JUSTICE,

Respondent.

Devin Richardson, pro se, Albany, NY.

William D. Robinson and Sarah K. Bloom, Commercial Law Branch, Federal Bureau of Prisons, Department of Justice, counsel for Respondent.

Before Board Judges **HYATT**, **VERGILIO**, and **RUSSELL**.

HYATT, Board Judge.

Devin Richardson filed this appeal seeking relief from the Bureau of Prisons' alleged breach of an agreement in which he agreed to participate in a Residential Drug Abuse Treatment Program (RDAP agreement). The Board issued an order to show cause as to why the appeal should not be dismissed for lack of subject matter jurisdiction, explaining to Mr. Richardson that the contract in issue did not appear to be a procurement contract within the scope of the Contracts Disputes Act, 41 U.S.C. §§ 7101-7109 (2012) (CDA). In response to that order, the Bureau of Prisons filed a motion to dismiss the appeal for lack of

jurisdiction. Because we conclude that we have no jurisdiction to entertain this appeal, we grant the motion and dismiss the appeal.

Background

At the time he entered into the treatment program, and when he filed this appeal, Mr. Richardson was incarcerated in the custody of the Federal Bureau of Prisons at the Schuylkill Federal Correctional Institution (FCI-Schuylkill) in Minersville, Pennsylvania. While there, Mr. Richardson applied for admission to, and was accepted by, the residential program for treatment of drug abuse. This treatment program is offered to inmates who have a documented substance abuse disorder, who volunteer to undergo treatment, and who have sufficient time remaining in their sentence to complete the entire program. Participating inmates are housed separately from the general prison population and must complete a course of activities administered by treatment specialists and a drug abuse program coordinator. Participants are required to complete a minimum of 500 treatment hours, which usually takes somewhere from nine to twelve months to achieve.

In his complaint, Mr. Richardson states that although the RDAP agreement, which he identifies as the contract that respondent has allegedly breached, specified a start date of April 4, 2016, he was required to enter the program on February 24, 2016. Appellant further states that he was told that this early placement would not accrue treatment hours until April 4, 2016. Appellant contends that the early placement violated the terms of the RDAP agreement by increasing the number of hours he had to remain in the program and forcing him to forgo income he would have received from his prison employment detail if he had not been placed in the program on the earlier date.

The RDAP agreement memorializes Mr. Richardson's election to participate in the drug abuse treatment program provided by the Bureau of Prisons. The document sets forth the rules and requirements of the program. In signing the document, the participant confirms that he understands what is expected of program participants and recognizes the consequences for failing to comply with the enumerated rules, requirements, and expectations. There are no contract terms and conditions that would customarily be included in a contract covered by the CDA.

Mr. Richardson unsuccessfully appealed his early start date through FCI-Schuylkill's administrative procedures. He then submitted a letter to the doctor in charge of the drug abuse treatment program, who did not respond to his claims. Thereafter, appellant appealed what he considered to be the deemed denial of his claim to the Board, seeking redress for income he lost due to his early entry into the program, and requesting an order compelling the Bureau of Prisons to adhere to the terms of the treatment contract dated February 4, 2014.

After reviewing the notice of appeal and supporting documentation provided by Mr. Richardson, the Board issued an order directing him to show cause why the appeal should not be dismissed for lack of subject matter jurisdiction.

Mr. Richardson filed no response to that order. The Bureau of Prisons filed a motion to dismiss the appeal for lack of subject matter jurisdiction. The Board forwarded to appellant a copy of that motion, together with an additional copy of the show cause order, again requesting appellant's response. Despite subsequent efforts to contact Mr. Richardson, he has responded neither to the Board nor to the Government. As a consequence, respondent filed a second motion, seeking to have the appeal dismissed for failure to prosecute. No response to that motion has been filed by Mr. Richardson.

Discussion

Pursuant to the CDA, the boards of contract appeals have jurisdiction to decide disputes arising under certain Federal Government contracts. Jurisdiction is a threshold inquiry, to be resolved before considering any other issues presented to the tribunal. *Aurora, LLC v. Department of State*, CBCA 2872, 16-1 BCA ¶ 36,198, at 176,647 (2015) (citing *ARI University Heights, LP v. General Services Administration*, CBCA 4660, 15-1 BCA ¶ 36,085, at 176,188). 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. *Omni Pinnacle, L.L.C. v. Department of Agriculture*, CBCA 2452, 14-1 BCA ¶ 35,538, at 174,160; *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))).

It is well established that not every contract to which the Government is a party falls within the scope of the CDA. *Coastal Corp. v. United States*, 713 F.2d 728, 730 (Fed. Cir. 1983); *accord North Star Steel Co. v. United States*, 477 F.3d 1324, 1331-32 (Fed. Cir. 2007); *G.E. Boggs & Associates, Inc. v. Roskens*, 969 F. 2d 1023, 1026 (Fed Cir. 1992). Rather, subject matter jurisdiction under the CDA is limited to the resolution of disputes arising under procurement contracts, that is, contracts 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); *Omni Pinnacle*, 14-1 BCA at 174,161.

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.” *Omni Pinnacle*, 14-1 BCA at 174,161 (citing *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 *M.I.T. International Commercial Lending, LLC v. General Services Administration*, CBCA 5720, 17-1 BCA ¶ 36,794, at 179,336 (quoting *Bonneville Associates v. United States*, 43 F.3d 649, 653 (Fed. Cir. 1994); *Inversa, S. A. v. Department of State*, CBCA 440, 07-2 BCA ¶ 33,690, at 166,778-79. 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.” 48 CFR 2.101 (2017). Such an acquisition requires that the Government obtain goods or services in exchange for some obligation of appropriated funds. *Lublin Corp. v. United States*, 84 Fed. Cl. 678, 682 (2008). Further, the CDA does not apply to contracts which are basically grants or sociological type contracts designed to accomplish the Government’s social policy goals. See *Blanco-Mora Enterprises, Inc.*, HUD BCA 94-G-136-C5, 94-3 BCA ¶ 26,974, at 134,366-67 (citing *Coastal Corp.*, 713 F.2d at 730).

Neither the treatment program nor the RDAP agreement signed by Mr. Richardson required him to provide any services or goods to the Government. There are no mutual obligations undertaken by the parties with respect to his participation in the program. The agreement bears no hallmarks of a traditional procurement contract. It contains none of the essential terms and conditions required under the FAR, it was not negotiated and approved by an authorized contracting official, it is not supported by consideration, and there is no evidence of any intent on the Government’s part to be bound to any of its particulars. Cf. *Rockies Express Pipeline LLC v. Salazar*, 730 F.3d 1330, 1336 (Fed. Cir. 2013) (holding that these indicia, when present, supported a finding that a procurement contract had been created). Nothing in the documents submitted by Mr. Richardson establishes the type of buyer and seller relationship contemplated by the CDA. Appellant has not met his burden to establish that the Board possesses jurisdiction to consider this appeal.

Lacking jurisdiction, we do not address the Government’s motion to dismiss for failure to prosecute, which, if granted, would effectively act as an adjudication of the merits. See *M.I.T. International Commercial Lending, LLC*, 17-1 BCA ¶ 36,794, at 179,337-38 (citing *Summit Commerce Pointe, LLC v. General Services Administration*, CBCA 2652-R, et al., 14-1 BCA ¶ 35,581, at 174,360).

Decision

For the foregoing reasons, this appeal is **DISMISSED FOR LACK OF JURISDICTION**.

CATHERINE B. HYATT
Board Judge

I concur:

BEVERLY M. RUSSELL
Board Judge

VERGILIO, Board Judge, concurring.

This is a simple matter. A review of the agreement and the plain language of the statute readily compels the resolution. Case law poses no obstacle. I write separately, concurring in the dismissal for lack of jurisdiction, because the length of, and numerous references in, the majority opinion gives the impression that this jurisdictional issue is more complicated to resolve than it is.

The appellant signed an agreement to participate in a residential drug abuse program for treatment. Because the agreement is not a contract for the Government's procurement of goods or services, or for its disposal of personal property, it is not a contract falling within the scope of the Contracts Disputes Act, 41 U.S.C. § 7102(a) (2012). Therefore, this Board lacks jurisdiction over the dispute.

JOSEPH A. VERGILIO
Board Judge