



UNITED STATES
CIVILIAN BOARD OF CONTRACT APPEALS

ORDER ON FEDERAL DISTRICT COURT'S AUTHORITY TO REQUEST
ADVISORY OPINION: August 12, 2019

CBCA 5713

ADVISORY OPINION REQUEST, RE:
UNITED STATES OF AMERICA V. SAVANNAH RIVER NUCLEAR
SOLUTIONS, LLC, AND FLUOR FEDERAL SERVICES, INC.
Civil Action No. 1:16-cv-00825-JMC (D.S.C.)

Karen L. Manos, Daniel P. Chung, Jonathan M. Phillips, and Erin N. Rankin of Gibson, Dunn & Crutcher LLP, Washington, DC, counsel for Savannah River Nuclear Solutions, LLC and Fluor Federal Services, Inc.

Donald M. Yenovkian II, Senior Counsel, Fluor Federal Services, Inc., Greenville, South Carolina, counsel for Fluor Federal Services, Inc.

Kate Bushman Smith, Alexandra N. Wilson, Donald J. Williamson, United States Department of Justice, Washington, DC, counsel for United States.

Before Board Judges **SOMERS** (Chair), **GOODMAN**, and **ZISCHKAU**.

GOODMAN, Board Judge.

ORDER

The United States has raised what it characterizes as an issue of Board jurisdiction with regard to the second of two matters of contract interpretation for which an advisory opinion has been requested by the United States District Court for the District of South Carolina (the Court). This issue was first raised during an initial conference with the Board on June 6, 2017. It was again raised during a preliminary conference at the Board which preceded the Board issuing a pre-hearing order dated June 26, 2018, in which the parties were directed to file various pre-hearing submissions for the hearing to commence on October 15, 2018. The parties briefed the purported jurisdictional issue, with the United

States filing a brief on September 20, 2018, and the defendants filing a brief on October 5, 2018. The Board deferred ruling on the issue until after the conclusion of the hearing on July 10, 2019. As explained in this opinion, the issue asserted by the United States is not a question of Board jurisdiction, but one of the Court's authority to request an advisory opinion. The Court has previously decided the issue in its order issued concurrently with its request for an advisory opinion to this Board (the Court's order), and we concur in the Court's determination.

Background

By letter dated April 11, 2017, the Court requested, pursuant to 41 U.S.C. § 7107(f) (2012) of the Contract Disputes Act (CDA), that this Board issue an advisory opinion on two matters of contract interpretation under consideration by the Court. The second matter of contract interpretation, which is at issue here, was stated by the Court as follows:

2. Whether the interpretation of the provisions of Management and Operating Contract No. DE-AC09-08SR22470 and applicable regulations advanced by Savannah River Nuclear Solutions, LLC, and Fluor Federal Services—that the challenged costs are not unallowable—is reasonable.

The United States asserts that if the Board renders an advisory opinion as to this matter of contract interpretation, the Board would determine scienter, an element of fraud. The United States argues further that scienter could not be the proper subject of a final decision of a contracting officer appealable under the CDA, and therefore this Board cannot provide an advisory opinion to the Court pursuant to section 7107(f) of the CDA.

The United States' argument lacks merit for several reasons. The United States fails to recognize that section 7107(f) of the CDA is not within the definition of Board jurisdiction; rather, it defines the District Court's authority to request an advisory opinion from a board of contract appeals. The Court's advisory opinion authority was extensively argued and briefed before the Court by the parties before the Court determined the exact wording of the matters of contract interpretation to include in its request to this Board. The Court's order, issued concurrently with its request for advisory opinion, resolved the very issue that the United States asks this Board to decide, by explaining the distinction between the terms "issue" and "matters of contract interpretation" in section 7107(f) of the CDA. For these reasons, explained below, we concur with the Court that it has the authority to request an advisory opinion as to the second matter of contract interpretation. Accordingly, this Board will respond to the Court's request for an advisory opinion with regard to both matters of contract interpretation.

Discussion

The jurisdiction of the Civilian Board of Contract Appeals is defined in section 7105 of the CDA, entitled “Agency boards,” as follows:

The Civilian Board has jurisdiction to decide any appeal from a decision of a contracting officer of any executive agency (other than the Department of Defense, the Department of the Army, the Department of the Navy, the Department of the Air Force, the National Aeronautics and Space Administration, the United States Postal Service, the Postal Regulatory Commission, or the Tennessee Valley Authority) relative to a contract made by that agency.

41 U.S.C § 7105(e)(1)(B)

The authority of a federal district court to request an advisory opinion of a Board of Contract Appeals is not within section 7105. Rather, it is defined in section 7107(f) of the CDA, entitled “Judicial review of agency board decisions,” which reads in relevant part:

Advisory Opinions.—

(1) In general.—Whenever an action involving an issue described in paragraph (2) is pending in a district court of the United States, the district court may request an agency board to provide the court with an advisory opinion on the matters of contract interpretation under consideration.

(2) Applicable issue.—An issue referred to in paragraph (1) is any issue that could be the proper subject of a final decision of a contracting officer appealable under this chapter.

(3) Referral to agency board with jurisdiction.—A district court shall direct a request under paragraph (1) to the agency board having jurisdiction under this chapter to adjudicate appeals of contract claims under the contract being interpreted by the court.

As explained in the Court’s order, subparagraphs (f)(1) and (2) define the circumstances under which a district court may request an advisory opinion from the Board:

[S]ubsection (f) authorizes the court to request an advisory opinion from the relevant board of contract appeals, but it imposes a limitation on when the court may do so. It may do so “whenever an action involving . . . any issue

that could be the proper subject of a final decision of a contracting officer appealable under this chapter” is pending in the district court. 41 U.S.C. § 7107(f)(1)–(2).

Court’s Order at 8.

In the instant case, the *issue* that is pending in the Court which could be the subject of a contracting officer’s final decision is the allowability of costs under the contract. This pending issue authorizes the Court to request an advisory opinion. As further explained by the Court, a *matter of contract interpretation* that can be the subject of an advisory opinion is not limited to one which could be the subject of a contracting officer’s final decision, as argued by the United States:

[I]n determining the *matters* for which it may request an advisory opinion, *the court is not limited to seeking an opinion on only those issues that could be subject to a final decision of a contracting officer and appealable to a board of contract appeals*. Concluding otherwise would conflate the different boundaries set by the two statutory limitations.

Court’s Order at 9-10 (emphasis added).

Accordingly, while the United States asserts that the second matter of contract interpretation is an issue which could not be the subject of a contracting officer’s final decision, and that this Board therefore cannot offer an advisory opinion in response, the Court has held that the CDA does not impose such a limitation on its request for an advisory opinion.

Decision

We concur with the Court’s order, which has determined that its request for an advisory opinion complies with the CDA. The Board will respond to the Court’s request for an advisory opinion with regard to both matters of contract interpretation.

Allan H. Goodman
ALLAN H. GOODMAN
Board Judge

We concur:

Jeri Kaylene Somers
JERI KAYLENE SOMERS
Board Judge

Jonathan D. Zischkau
JONATHAN D. ZISCHKAU
Board Judge