UNITED STATES
CIVILIAN BOARD OF CONTRACT APPEALS

MOTION TO DISMISS FOR LACK OF JURISDICTION DENIED: June 28, 2019

CBCA 6360

AVUE TECHNOLOGIES CORPORATION,

Appellant,

v.

DEPARTMENT OF HEALTH AND HUMAN SERVICES,

Respondent.

Andy Liu and Jason C. Lynch of Nichols Liu LLP, Washington, DC, counsel for Appellant.

Richard G. Bergeron and Tami S. Hagberg, Office of the General Counsel, Department of Health and Human Services, Washington, DC, counsel for Respondent.

Before Board Judges **SHERIDAN**, **O'ROURKE**, and **CHADWICK**.

O'ROURKE, Board Judge.

Avue Technologies Corporation (Avue) licenses software that another company sells through the Federal Supply Schedule (FSS). Avue submitted a certified claim to a purchasing agency, then appealed the deemed denial of its claim to the Board, arguing that the FSS contractor need not sponsor the claim because Avue is in privity of contract with the purchaser through an end user licensing agreement. The agency seeks dismissal of the appeal for lack of jurisdiction on the grounds that Avue is a subcontractor under the FSS. We deny the motion because Avue non-frivolously alleges that it has its own written procurement contract with the Government.

Background

Carahsoft Technology Corp. (Carahsoft) sells information technology products and services to government agencies under a "Schedule 70" FSS contract with the General Services Administration (GSA). Avue is one of Carahsoft's subcontractors on the schedule. Avue offers solutions for managing human resources, such as position development and job classification software.

In 2015, the Food and Drug Administration (FDA) ordered a subscription to one of Avue's products through Carahsoft's FSS contract. The order included a base year and up to four option years. At the end of the first year, the FDA did not exercise the option to continue. Avue alleges that FDA downloaded more than 5000 position descriptions from Avue's database, purchased a less expensive database from a different source, then populated the new database with the downloaded position descriptions.

In March 2018, Avue submitted a certified claim for $41,398,796.80 to the FDA contracting officer. Avue asserted in the claim that "[t]he Carahsoft FSS contract expressly incorporate[d]" an end user licensing agreement (or EULA) called "the Avue Master Licensing Agreement," and that "FDA users . . . had to 'click' the box representing their agreement to the terms of [the license]. *Thus, FDA and FDA users had privity of contract with Avue through its licensing agreements*." (Emphasis added.)

In August 2018, the FDA contracting officer advised Avue that he would not act on Avue's claim because FDA "does not have a contract with Avue. Rather, FDA has a contract with Carahsoft. . . . If Avue wishes to pursue its 'claim,' it can . . . hav[e] Carahsoft assert a pass-through claim against FDA on Avue's behalf."

Avue filed this appeal in January 2019. Before Avue filed its complaint, the respondent, Department of Health and Human Services (HHS), FDA's parent agency, filed a motion to dismiss the appeal for lack of jurisdiction, "premised on the well established law that this Board lacks jurisdiction over a direct appeal filed by a subcontractor absent sponsorship of the claim by the prime contractor." Opposing dismissal, Avue acknowledges that it is Carahsoft's subcontractor under the FSS but argues that it is not an "ordinary subcontractor," in that, "regardless of whether Avue has privity [with FDA] via the FSS, it . . . has [privity] via the EULA that FDA breached when it misappropriated Avue's intellectual property." Avue later argues that "a party can enter two contracts concerning the same transaction . . . and [this] was done here" by FDA.

Discussion

We agree with Avue that HHS's jurisdictional argument does not address the gravamen of Avue's claim. HHS's argument that a subcontractor cannot pursue its own claim under the Contract Disputes Act (CDA), 41 U.S.C. §§ 7101-7109 (2012), is correct where applicable. *E.g.*, *Erickson Air Crane Co. v. United States*, 731 F.2d 810, 814 (Fed. Cir. 1984); *United States v. Johnson Controls, Inc.*, 713 F.2d 1541 (Fed. Cir. 1983). The twist here is that Avue is not pursuing its claim as a subcontractor. Avue alleges that it is a contractor. More than this, Avue points to a specific writing (the EULA, allegedly "incorporated" in the FSS contract) that it considers a government contract. These allegations of the existence of a contract suffice to take the claim out of the realm of subcontractor claims and into the world of claims within our CDA jurisdiction, provided the other jurisdictional requirements are met. *See, e.g.*, *Engage Learning, Inc. v. Salazar*, 660 F.3d 1346, 1353 (Fed. Cir. 2011) (holding that "a plaintiff [sic] need only allege the existence of a contract to establish the Board's jurisdiction under the CDA"); *Gould, Inc. v. United States*, 67 F.3d 925, 929 (Fed. Cir. 1995) ("[T]here is no question that Gould's complaint alleges the existence of an express contract . . . . This is sufficient . . . to confer [CDA] jurisdiction in the Court of Federal Claims.").

Whether Avue's contract claim has merit is an issue for another day—as would be any additional questions pertaining to our jurisdiction. In particular, since this appeal may require us to interpret the FSS contract with GSA, we encourage the parties to consider whether Avue submitted its claim to the proper contracting officer. *See Sharp Electronics Corp. v. McHugh*, 707 F.3d 1367 (Fed. Cir. 2013); *Consultis of San Antonio, Inc. v. Department of Veterans Affairs*, CBCA 5458, 17-1 BCA ¶ 36,701.

Decision

The motion to dismiss for lack of jurisdiction is **DENIED**.

Kathleen J. O'Rourke
KATHLEEN J. O'ROURKE
Board Judge

We concur:

Patricia J. Sheridan
PATRICIA J. SHERIDAN
Board Judge

Kyle Chadwick
KYLE CHADWICK
Board Judge