UNITED STATES
CIVILIAN BOARD OF CONTRACT APPEALS

MOTIONS TO DISMISS FOR LACK OF JURISDICTION DENIED: February 3, 2020

CBCA 6360, 6627

AVUE TECHNOLOGIES CORPORATION,

Appellant,

v.

DEPARTMENT OF HEALTH AND HUMAN SERVICES,

Respondent in CBCA 6360,

and

GENERAL SERVICES ADMINISTRATION,

Respondent in CBCA 6627.

Andy Liu and Andrew Victor of Nichols Liu LLP, Washington, DC, counsel for Appellant.

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

James T. Van Biber and Fallyme E. Guerrero, Office of General Counsel, General Services Administration, Kansas City, MO, counsel for Respondent.

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

O'ROURKE, Board Judge.

In these consolidated appeals, Avue Technologies Corporation (Avue) alleges that the Food and Drug Administration (FDA) breached a software license agreement with Avue. FDA obtained the software by placing an order under a Federal Supply Schedule (FSS) contract awarded by the General Services Administration (GSA) to a contractor who is not before us, Carahsoft Technology Corp. (Carahsoft). The Board earlier denied a motion by FDA's parent agency to dismiss CBCA 6360 for lack of jurisdiction. *Avue Technologies Corp. v. Department of Health & Human Services*, CBCA 6360, 19-1 BCA ¶ 37,375, at 181,706 (finding jurisdiction because Avue "alleges that it is a contractor" under the license agreement, not a subcontractor); *see Steel Co. v. Citizens for a Better Environment*, 523 U.S. 83, 89 (1998) ("[T]he [alleged] absence of a valid (as opposed to arguable) cause of action does not implicate subject-matter jurisdiction[.]"), *quoted in Reoforce, Inc. v. United States*, 853 F.3d 1249, 1264 (Fed. Cir. 2017).

Two more jurisdictional motions are before us. The Department of Health and Human Services (HHS) now asks us to dismiss CBCA 6360, in which HHS is the respondent, on the grounds that Avue directed the claim underlying that appeal to the wrong agency, as "Avue's Complaint clearly requires an interpretation of the FSS Contract by GSA." GSA, on the other hand, argues that we lack jurisdiction in CBCA 6627, where GSA is the respondent, because Avue identifies "NO contract which [Avue] signed with GSA" and "fails to allege that [Avue] ever dealt directly with GSA."

Avue and GSA both disagree with the premise of HHS's motion and contend that the Board could resolve the case without needing to interpret the GSA schedule contract. Avue, however, while recognizing that the Board must ultimately have jurisdiction in only one appeal or the other, urges us to "defer" ruling on jurisdiction until the record is developed and the issues ripen. We adopt Avue's suggestion. We have statutory authority to proceed in one of these two appeals. The issue of which appeal is properly before us in the consolidated case has little practical significance for now and is, as a legal matter, neither so urgent that we must decide it now nor so obvious that we can decide it on the existing record.

Background

We set out most of the facts bearing on jurisdiction in our prior decision. Carahsoft sells products and services to government agencies under a "Schedule 70" FSS contract. Avue is one of Carahsoft's subcontractors. Avue sells solutions for managing human resources, such as position development and job classification software.

In 2015, FDA placed an order for a subscription to one of Avue's products under 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, and 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.) Avue also alleges in its complaints filed with the Board that the schedule contract put ordering agencies "on notice" that ordering an Avue product would require entering into the EULA with Avue.

The FDA contracting officer declined to act on Avue's claim on the grounds that Avue was a subcontractor under the FSS and not a contractor. In January 2019, Avue filed CBCA 6360 from a deemed denial of its claim. In July 2019, to address a potential jurisdictional issue that we noted in our decision denying HHS's first motion, Avue submitted what it styled a "protective" certified claim to the GSA schedule contracting officer, alleging the same facts and grounds for relief. In October 2019, the schedule contracting officer wrote to Avue that, like the FDA contracting officer, he was "not in a position to render a final decision" because Avue had no contract with his agency. Avue then filed CBCA 6627, which it calls a "protective appeal" from a deemed denial by GSA.

HHS filed a renewed motion to dismiss CBCA 6360 for lack of jurisdiction in September 2019. GSA moved to dismiss CBCA 6627 for lack of jurisdiction in December 2019. The Board consolidated the two appeals over HHS's objection in December 2019 and heard oral argument from Avue and both agencies in January 2020.

Discussion

Both agencies raise colorable arguments that we may eventually adopt in dismissing one appeal or the other. Based on Avue's allegations, we suspect that, before we are through, we will need to interpret the schedule contract to determine what it would mean to "incorporate" a third-party agreement in a schedule and in an order placed under the schedule. This lends support to HHS's argument that Avue should have submitted its claim to GSA in the first instance, making GSA the proper respondent. *See Sharp Electronics Corp. v. McHugh*, 707 F.3d 1367, 1374 (Fed. Cir. 2013) ("The dispute [must] go to the GSA [contracting officer] . . . if it requires interpretation of the schedule contract's terms and provisions."); *Consultis of San Antonio, Inc. v. Department of Veterans Affairs*, CBCA 5458, 17-1 BCA ¶ 36,701. GSA correctly notes, on the other hand, that Avue's "protective" claim

to GSA and "protective" complaint in CBCA 6627 do not allege that Avue formed a contract with GSA, a theory that Avue, indeed, continues to disavow. Avue and GSA both say HHS is the proper respondent. This brings us back, however, to HHS's point that *Sharp Electronics* can be read as holding that, by regulation, "*all* disputes requiring interpretation of the schedule contract"—regardless of the claimant—"go to" GSA. 707 F.3d at 1373 (emphasis added). At oral argument, Avue and GSA did not immediately dismiss the alternative suggestion that, in this extremely rare case where the private party seeking relief under an FSS order is not the schedule contractor, *Sharp Electronics* might not apply at all.

We see several reasons not to enter this jurisdictional thicket at this time. First, we are not required to. While we take seriously the limits of our jurisdiction, we, like other tribunals, have power to "reserve difficult questions of . . . jurisdiction" when a jurisdictional issue lacks constitutional status and "the case alternatively could be resolved on the merits in favor of" the party challenging jurisdiction. *Minesen Co. v. McHugh*, 671 F.3d 1332, 1337 (Fed. Cir. 2012) (quoting *Steel Co.*, 523 U.S. at 110-11 (internal quotation marks omitted)); *see Servitodo LLC v. Small Business Administration*, CBCA 6055, 18-1 BCA ¶ 37,170, at 180,938 n.5. Both agencies' jurisdictional arguments are intertwined with and overlap arguments going to the merits of Avue's novel claim regarding whether the EULA is a freestanding contract and, if so, whom the contract binds. Answering such merits questions may shed light on jurisdictional issues.

In this case, moreover, pragmatic reasons to defer ruling on jurisdiction seem particularly strong. First, under the logic of *Sharp Electronics*, our jurisdiction in each appeal will depend on whether "the dispute" requires us to "interpret" rather than merely "apply" the schedule contract. *E.g.*, *immixTechnology, Inc. v. Department of the Interior*, CBCA 5866, 19-1 BCA ¶ 37,247, at 181,307 (2018); *ABC Data Entry Systems, Inc.*, ASBCA 59865, 16-1 BCA ¶ 36,557. This is a complicated case, and we have not yet seen all of the potentially relevant text of the schedule contract, much less considered every possible legal argument. We would be hard pressed to predict exactly what contract documents we may need to interpret. There is a good chance that we will be better able to address our jurisdiction after the record and the parties' positions are further developed.

Another pragmatic consideration specific to this case is that we see no good reason that litigation before the Board regarding an FSS order placed by a civilian agency should raise significantly different issues than would arise before the Court of Federal Claims. Had Avue filed suit on its claims in the court, the defendant would be the United States, *see* 41 U.S.C. § 7104(b)(1) (2012); 28 U.S.C. § 1491(a), represented by the Department of Justice, 28 U.S.C. § 516, working with counsel for both agencies. Assuming that Avue had, as it did here, presented both agencies with certified claims, the jurisdictional issues that the agencies raise here would not arise at the court. We may eventually need to identify the proper

respondent in this case, but we see no genuine, case-management benefits to doing so now and no genuine prejudice to either respondent resulting from our deferring resolution of their respective motions and keeping both agencies in the case.

Decision

Both motions to dismiss for lack of jurisdiction are **DENIED** without prejudice to eventual refiling at a time set by the presiding judge.

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