



UNITED STATES
CIVILIAN BOARD OF CONTRACT APPEALS

CBCA 7323 DISMISSED FOR LACK OF JURISDICTION: September 11, 2024

CBCA 7323, 7918

BEAR MOUNTAIN CUTTERS, INC.,

Appellant,

v.

DEPARTMENT OF AGRICULTURE,

Respondent in CBCA 7323,

and

DEPARTMENT OF THE INTERIOR,

Respondent in CBCA 7918.

Joel Penoyar and Edward Penoyar of Penoyar Law Offices, South Bend, WA; and Michael W. Johns of Roberts Johns & Hemphill, PLLC, Gig Harbor, WA, counsel for Appellant.

Richard A. Grisel, Office of the General Counsel, Department of Agriculture, Portland, OR, counsel for Respondent in CBCA 7323.

Kara Borden, Office of the Solicitor, Department of the Interior, Portland, OR, counsel for Respondent in CBCA 7918.

Before Board Judges **BEARDSLEY** (Chair), **VERGILIO**, and **SHERIDAN**.

BEARDSLEY, Board Judge.

The appellant, Bear Mountain Cutters (BMC), originally appealed the denial by the Department of Agriculture-Forest Service (USDA-Forest Service) of its claim for \$451,782.33 for damage to its equipment at the Summit Trail Fire. The Board docketed the appeal as CBCA 7323. Subsequently, BMC submitted a claim to the Department of the Interior, Bureau of Indian Affairs (BIA) for \$632,010 for the same equipment damage. BIA's contracting officer denied the claim, and the Board docketed the appeal of that claim as CBCA 7918. The Board consolidated the appeals for the purpose of deciding which is the proper respondent and which appeal should go forward.

BMC filed a motion for partial summary judgment, asking the Board to find that BIA, not the USDA-Forest Service, had a contract with BMC and that BIA is responsible to BMC for any government employee negligence under the contract. A motion for partial summary judgment, however, is not the correct vehicle to determine the proper respondent in these appeals. Instead, the Board finds that it lacks jurisdiction to decide the claim against the USDA-Forest Service because there is no contract between BMC and the USDA-Forest Service. The Board finds that it has jurisdiction to decide BMC's claim against BIA in CBCA 7918 and that BIA is the proper respondent. Accordingly, we dismiss CBCA 7323 for lack of jurisdiction.

Background

On June 29, 2021, the USDA-Forest Service awarded BMC a Virtual Incident Procurement (VIPR) Incident Blanket Purchase Agreement (I-BPA) "to obtain Miscellaneous Heavy Equipment (Feller Buncher, Mulcher/Masticator, Road Grader, and Skidder) for use on a local, regional, and nationwide basis" in the protection of lands from fire and hazardous incidents. Exhibit 1 at 22.¹ The I-BPA stated that, "[a]t time of dispatch, a resource² order number will be assigned." *Id.* at 33. The resource order is a request for goods or services from pre-approved vendors like BMC. "After each operational period worked, time will be verified and approved by the Government Agent responsible for ordering and/or directing use [of] the resource." *Id.* at 46. The I-BPA provided:

Zone Supplement to D.1 – SCOPE OF AGREEMENT The Incident Commander or responsible Government Representative is authorized to administer the technical aspects of this agreement. To provide further clarification of this at-incident VIPR agreement administration role, the

¹ All exhibits are found in the appeal file for CBCA 7323 unless otherwise noted.

² Resource is defined in the I-BPA as "[e]quipment, personnel, supplies, or a service used to support incidents." Exhibit 1 at 74.

Contractor will be assigned an immediate Government representative that will administer the aspects of the agreement to include,

- 1) Verifying that the contractor performs the requirements of the contract in accordance with the contract terms, conditions and specifications
- 2) Maintain liaison and direct communications with the contractor during entire fire assignment
- 3) Monitor the contractor's performance, notify the contractor of deficiencies observed during surveillance, and direct appropriate action to effect correction
- 4) Review and sign daily all Shift Tickets (OF-297)
- 5) Fill out, discuss with Contractor, and sign any necessary performance reviews

Id. at 92. "Government representative" is defined as "[t]hose employees of the agencies listed under the definition of Government that have a designation in writing or are designated by their position." *Id.* at 72. The I-BPA stated:

C.5 - Claim Settlement Authority

For the purpose of settling claims, the successor contracting officer is any contracting officer acting within their delegated warrant authority, under the clauses of this agreement, and limits set by the incident agency.

Id. at 20. The I-BPA defined "incident" as "[a]n occurrence or event, either human-caused or natural phenomena, that requires action by emergency service personnel to prevent or minimize loss of life or damage to property and/or natural resources." *Id.* at 73. "Government" is defined as one of several agencies of the Federal Government, including the USDA-Forest Service and BIA. *Id.* at 72.

On July 31, 2021, pursuant to the I-BPA, BMC accepted a resource order from the BIA-Colville Agency for a "Masticator - Boom Mounted, Type 2" to assist in clearing the areas of brush affected by the Summit Trail Fire. Exhibit 2 at 1. The resource order assigned BMC's equipment to the Summit Trail Fire. The resource order identifies the "Jurisdiction/Agency" as the Colville Agency and the "Ordering Office" as the Colville Agency Dispatch Center. *Id.* These agencies are part of the Department of the Interior.

The masticator was destroyed in the fire on August 14, 2021. BMC submitted a claim to the USDA-Forest Service requesting \$451,782.33 for the replacement of the masticator. Exhibit 12. The USDA-Forest Service's contracting officer denied BMC's claim, referencing section C.7 of the I-BPA. Exhibit 15. BMC requested reconsideration, and upon reconsideration, the USDA-Forest Service's contracting officer again denied BMC's claim, finding that the exception in section C.8(b) of the I-BPA did not apply. Exhibit 20. The

contracting officer also indicated that she had authority to settle the claim in accordance with Section C.5 of the I-BPA. *Id.* BMC filed an appeal with the Board, which was docketed as CBCA 7323. BMC alleges in its complaint that, per I-BPA paragraph C.8(b), the Government is liable for the loss of the masticator due to the Government's grossly negligent and reckless acts that caused its destruction.

Section C.7 of the I-BPA, incorporating by full text Federal Acquisition Regulation (FAR) 52.247-21 (APR 1984), 48 CFR 52.247-21 (2020), states,

Contractor Liability for Personal Injury and/or Property Damage

(a) The Contractor assumes responsibility for all damage or injury to persons or property occasioned through the use, maintenance, and operation of the Contractor's vehicles or other equipment by, or the action of, the Contractor or the Contractor's employees and agents.

....

(d) The Government shall in no event be liable or responsible for damage or injury to any person or property occasioned through the use, maintenance, or operation of any vehicle or other equipment by, or the action of, the Contractor or the Contractor's employees and agents in performing under this contract, and the Government shall be indemnified and saved harmless against claims for damage or injury in such cases.

Exhibit 1 at 20-21. Section C.8, titled "Loss, Damage or Destruction," states:

(b) For equipment furnished under this agreement WITH operator, the Government shall not be liable for any loss, damage, or destruction of such equipment, except for loss, damage or destruction resulting from the negligence, or wrongful act(s) of Government employee(s) while acting within the scope of their employment. The operator is responsible for operating the equipment within its operating limits and responsible for safety of the equipment.

Id. at 21. Section D.21.8, titled "Payments," states under subsection (a) that "[t]he host agency for each incident is responsible for payments." *Id.* at 42.

Subsequently, BMC submitted a claim to BIA's contracting officer requesting \$632,010 in damages related to the destruction of the masticator. Appeal File (CBCA 7918), Exhibit 37. BIA's contracting officer denied the claim on September 1, 2023, citing sections

C.5, C.7, and C.8. Appeal File (CBCA 7918), Exhibit 38 at 2. BMC appealed to the Board, which docketed the appeal as CBCA 7918.

Discussion

We lack jurisdiction under the Contract Disputes Act (CDA), 41 U.S.C. §§ 7101–7109 (2018), to decide CBCA 7323 because the USDA-Forest Service did not enter into a contract with BMC. For the Board to have jurisdiction under the CDA, the claim must arise from a “contract between an agency and another party.” *Ridge Runner Forestry v. Veneman*, 287 F.3d 1058, 1061 (Fed. Cir. 2002). “To be valid and enforceable, a contract must have both consideration to ensure mutuality of obligation . . . and sufficient definiteness so as to ‘provide a basis for determining the existence of a breach and for giving an appropriate remedy.’” *Id.* (quoting *Ace-Federal Reporters, Inc. v. Barram*, 226 F.3d 1329, 1332 (Fed. Cir. 2000)). A BPA is not a contract since it “lacks mutuality of consideration.” *Brent Packer v. Social Security Administration*, CBCA 5038, et al., 16-1 BCA ¶ 36,260, at 176,897 (quoting *Julian Freeman*, ASBCA 46675, 94-3 BCA ¶ 27,280, at 135,906). “A BPA is essentially a ‘framework for future contracts, which come into being when orders are placed and accepted under it.’” *Coast to Coast Computer Products v. Department of Agriculture*, CBCA 3516, et al., 17-1 BCA ¶ 36,827, at 179,485 (quoting *Dr. Lewis J. Goldfine v. Social Security Administration*, CBCA 2549, 12-1 BCA ¶ 34,926, at 171,741). Because BPAs are not contracts, we lack jurisdiction to decide claims arising out of them. *Brent Packer*, 16-1 BCA at 176,898 (“failure to make a ‘nonfrivolous allegation’ that a BPA create[d] mutual obligations is a jurisdictional defect” (citing *Crewzers Fire Crew Transport, Inc. v. United States*, 741 F.3d 1380, 1382-83 (Fed. Cir. 2014)); see also *Zhengxing v. United States*, 71 Fed. Cl. 732, 738, *aff’d*, 204 F. App’x 885 (Fed. Cir. 2006); *Tenderfoot Equipment Services, Inc. v. Department of Agriculture*, CBCA 1865, 10-2 BCA ¶ 34,527, at 170,267 (BPA “is not a contract subject to Board jurisdiction”)).

The Board does have jurisdiction over CBCA 7918 and the claim against BIA arising out of the resource order placed pursuant to the I-BPA. A contract arose when BIA placed a resource order with BMC. “Once an order under a BPA is issued by the Government and accepted by the contractor, a contract comes into being.” *Sylvan B. Orr v. Department of Agriculture*, CBCA 5299, 16-1 BCA ¶ 36,522, at 177,926 (citing *Brent Packer*, 16-1 BCA at 176,898). Because the terms and conditions of the I-BPA are incorporated into the resource order, *Coast to Coast Computer Products*, 17-1 BCA at 179,485, and BIA has the authority to interpret those incorporated terms and conditions, *Hewlett-Packard Co.*, ASBCA 57940, et al., 13 BCA ¶ 35,366, at 173,552, BMC’s claim against BIA to recover damages under a clause of the I-BPA is properly before us. “As a matter of law, for purposes of CDA jurisdiction, any interpretation required of the terms of the BPA must be viewed as an interpretation of the terms” of the resource order since the order was “the vehicle[] that formed the contract[].” *Id.*

The USDA-Forest Service contracting officer's assertion that she had settlement authority under section C.5 does not render the I-BPA a contract or create a contractual relationship between BMC and the USDA-Forest Service as suggested by BIA. *See Devin Richardson v. Department of Justice*, CBCA 5559, 18-1 BCA ¶ 37,018, at 180,268-69 (“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 . . . and the buyer to pay for them.’” (quoting 48 CFR 2.101 (2017))). Moreover, determinations made by the USDA-Forest Service's contracting officer to resolve the claim are not dispositive, given that the Board exercises de novo review. *See* 41 U.S.C. § 7104(b)(4). Nonetheless, BIA relies on *Griz One Firefighting, LLC v. Department of Agriculture*, CBCA 6358, 20-1 BCA ¶ 37,514, to argue that the USDA-Forest Service contracting officer could decide the claim under the I-BPA. *Griz One*, however, does not reference the binding precedent of the United States Court of Appeals for the Federal Circuit that specifies that a BPA is not a contract. Here, we follow the Federal Circuit's precedent and find that there exists a contract only with BIA, not the USDA-Forest Service.

Because there is no contract with the USDA-Forest Service underlying the dispute, the Board lacks jurisdiction over CBCA 7323. BIA, not the USDA-Forest Service, is a party to the contract with BMC and the proper respondent for BMC's claim. Accordingly, we dismiss CBCA 7323 for lack of jurisdiction. BMC and BIA will continue to develop the record in CBCA 7918 to permit a resolution on the merits.³

Decision

CBCA 7323 is **DISMISSED FOR LACK OF JURISDICTION**.

Erica S. Beardsley

ERICA S. BEARDSLEY
Board Judge

We concur:

Joseph A. Vergilio

JOSEPH A. VERGILIO
Board Judge

Patricia J. Sheridan

PATRICIA J. SHERIDAN
Board Judge

³ This decision does not make any findings or determinations as to the liability of BIA or the Government for the destruction of the masticator.