

ARMED SERVICES BOARD OF CONTRACT APPEALS

Appeal of --)
)
Total Procurement Service, Inc.) ASBCA No. 53258
)
Under Contract No. ECIP)

APPEARANCE FOR THE APPELLANT: Mr. Richard Snyder
President

APPEARANCE FOR THE GOVERNMENT: Walter Thomas, Esq.
Associate General Counsel
Defense Logistics Agency
Fort Belvoir, VA

OPINION BY ADMINISTRATIVE JUDGE DICUS ON JURISDICTION

This appeal arises from the denial of appellant's request regarding certain actions involving the Electronic Commerce Interoperability Process (ECIP). Because, *inter alia*, appellant's complaint raised questions about violations of OMB Circular A-76, we questioned our jurisdiction. We conclude we do not have jurisdiction and dismiss the appeal.

FINDINGS OF FACT FOR PURPOSES OF THE MOTION

1. By letter of 22 December 1998, signed by Claudia S. Knott, the Joint Electronic Commerce Program Office (JECPO) announced "the replacement of the Value Added Network (VAN) Licensing Agreement (VLA), with the new simplified Electronic Commerce Interoperability Process (ECIP)." Appellant was informed as to how it might participate. Included with the letter were five enclosures: Terms and Conditions, Guidelines, Test Plan, Operating Characteristics and Client Application Questionnaire (CAQ). The system described appears to envision facilitation, through providers such as appellant, of electronic communications between the Government and the business community, with the providers charging the business community for their services. The Guidelines outline the total process through which an applicant is connected to the Electronic Commerce Infrastructure (ECI). The Test Plan required the applicant to send and receive test traffic over the test network and explained how the test would be conducted. The Operating Characteristics describe the technical approach and the general operating procedures within the ECI. The CAQ seeks information about the applicant and

its system. None of the enclosures requires a signature and none was signed by either party. (App. ex. 1)¹

2. The Terms and Conditions (hereinafter “the Ts and Cs”) contain no FAR clauses and no provision for disputes. The Ts and Cs states, in relevant part:

ECI Providers are Federal Government departments, services, agencies; commercial entities under contract to the Federal government to provide Gateway (GW) services; commercial Value Added Networks (VANs); or any other entity that transmits, receives, sorts, and provides access to EC/EDI messages and/or transactions via the DOD ECI. An ECI Provider may provide translation as a value-added services [sic] (VAS). Commercial Trading Partners (TPs), consistent with the EC Interoperability Process (ECIP) Guidelines, may operate as an ECI Provider on their own behalf, even if they do not intend to act as an ECI Provider for other commercial TPs.

To become an ECI Provider, applicants/clients must first complete the *Client Application Questionnaire (CAQ)*. PRIOR to submitting a completed *CAQ* applicants must carefully review the *ECI Operating characteristics* and the *ECIP Guidelines* to ensure that they are functionally and technically capable of successfully completing the entire process as described in the ECIP Guidelines. When the *CAQ* is submitted, the applicant is deemed to have accepted these *Terms and Conditions*, and agrees to operate on the ECI according to the procedures presented in the ECIP Guidelines. All applicants must then successfully complete testing in accordance with the *Interoperability Test Plan (ITP)*. . . .

REQUIREMENTS

. . . .

4. The commercial ECI Provider will not charge the Government for any costs associated with the transmission of documents and transaction acknowledgments in an electronic format including, but not limited to network, processing, or

¹ The letter and attachments were submitted with the declaration of Richard Snyder and are referred to throughout as “app. ex. 1.”

connection costs. Payments for services of the commercial ECI Provider are matters between the ECI Provider and the client with whom arrangements have been made for services.

5. The Government cannot predict any minimal level of transaction activity at any of its facilities; therefore, there is no guarantee of any traffic level when connecting to the ECI.

6. The ECI Provider is responsible for the integrity of their data, and communications of ECI transactions transmitted via the ECI by the ECI Provider. The Government will ensure, to the greatest extent possible, that all transactions received at the ECPN are delivered to the appropriate ECI Providers. In turn, it is the ECI Providers responsibility to ensure that all ECI transactions received from its customers are delivered to the appropriate ECI location.

....

10. The ECI Provider is responsible for the integrity of its data, and communications of ECI transactions transmitted via the ECI by the Provider. ECI OPS and JECPO assume no responsibility for errors or omissions of any ECI Provider and are NOT liable for the performance of ECI Providers. ECI OPS and JECPO do not imply, verify, or certify the capability of any ECI Provider connected to the ECI.

11. Each ECI Provider must accept responsibility for reporting all operational problems caused by or affecting Government processes. The Government may annually review the operations of ECI Providers. The purpose of the review will be to assess the ECI Provider system's impact upon the ECI, NOT to test the ECI Provider again. ECI Providers may request a review of transactions they or the ECI have had unusual problems with.

12. The ECI Provider will notify ECI OPS, at (703) 275-5673, of any planned system changes affecting this Agreement, or any changes to the information provided in the Client Application Questionnaire (CAQ). Failure to meet this requirement could mean disconnection from the ECI. Resolution of the issues may require additional reviews and/or evaluations at the expense of the ECI Provider.

13. The term of this Agreement is indefinite. This Agreement may be terminated in whole or in part by either party, by giving the other party written notice not less than thirty (30) calendar days prior to the date such termination is to be effective. In the event that this Agreement is terminated by either party, the ECI Provider is responsible for immediately notifying its trading partners. In the event of termination, if the ECI Provider wishes to be reconnected to the ECI, they may reapply after 90 days from the date of termination and/or disconnection. They must fully complete the ECIP again.

14. Failure to comply with any of the above requirements or to meet the year 2000 (Y2K) requirements may result in termination of this agreement.

(App. ex. 1)

3. On 27 December 2000 appellant filed a complaint with the JECPO. Appellant's complaint asserted, *inter alia*, that JECPO had breached the ECIP by allowing providers to operate in violation of OMB Circular A-76. Appellant sought corrective action. (Complaint) Ms. Knott responded by letter of 24 January 2001 in which she turned down appellant's request and denied that the Ts and Cs constituted a contract (R4, tab 1). On or about 8 February 2001 the Board received appellant's Notice of Appeal.²

4. Appellant has filed the declaration of its chief executive officer, Richard Snyder. Mr. Snyder declares that the only Government official he has dealt with is Ms. Knott, that he believed she had authority to bind the Government contractually, and that in 1996 or 1997 Ms. Knott told him that she had a warrant. We infer that Mr. Snyder uses the term "warrant" as a contracting officer's warrant. (Snyder dec.)

5. Ms. Knott, Executive Director, JECPO/e Business Office, has filed a declaration asserting that she is not a contracting officer and was not a contracting officer when she signed the 22 December 1998 letter. She does not recall telling Mr. Snyder in 1996 or 1997 that she had a warrant. She declares that the person responsible for "all matters regarding an ECIP provider or VAN participation in the ECIP" is Henry Trinkes. (Knott dec.)

6. Mr. Trinkes, Chief of JECPO's ECOPS Branch, has filed a declaration. He declares that he has "responsibility for the coordination, operation and maintenance of the

² The Notice of Appeal treats the 24 January 2001 letter as a decision denying its claim.

Electronic Commerce Interoperability Process.” Neither he nor any employees in the branch he supervises are contracting officers, nor were they contracting officers in December 1998. (Trinkes dec.)

DECISION

By letter of 28 February 2001 the Board raised the issue of jurisdiction *sua sponte*. Thereafter, by motion dated 15 March 2001, respondent also challenged the Board’s jurisdiction and moved to dismiss the appeal with prejudice. Appellant has responded with several letter briefs, the declaration of Mr. Snyder, and the Ts and Cs with accompanying materials to support its belief that the Ts and Cs are a binding contract. Respondent argues, among other things, that no one with contracting authority took action that would have contractually bound the Government. The burden of proof is on appellant as the party seeking to establish jurisdiction. *Reynolds v. Army and Air Force Exchange Service*, 746 F.2d 746, 748 (Fed. Cir.).

The Contract Disputes Act (CDA), 41 U.S.C. §§ 601-613, as amended, gives the Board jurisdiction over disputes arising from express and implied contracts. 41 U.S.C. §§ 602, 607. Formation of both express and implied contracts with the Government requires a Government official with authority to bind the Government. *Federal Crop Insurance v. Merrill*, 332 U.S. 380 (1947); *City of El Centro v. United States*, 992 F.2d 816 (Fed. Cir. 1990) *cert. denied*, 501 U.S. 1230 (1991). Appellant has only dealt with Ms. Knott, who signed the 22 December 1998 letter. The Ts and Cs was never signed by anyone. (Findings 1, 4) Ms. Knott does not have actual authority to bind the Government (finding 5).

We must also consider whether anyone with *implied* actual authority to bind the Government took contractual action that could result in an enforceable contract. In order to find implied actual authority, we must ascertain whether contracting authority is considered an integral part of the duties of the Government official or officials involved. *H. Landau & Company v. United States*, 886 F.2d 322 (Fed. Cir. 1989). The record establishes the Government official involved is Ms. Knott, as Mr. Trinkes had no contact with appellant (finding 4). As noted above, the burden of proof is on appellant. *Reynolds v. Army and Air Force Exchange Service*, *supra*. The record is silent as to how the JECPO/e Business Office operates and what the Executive Director does. We cannot, therefore, conclude on this record that contracting authority is an integral part of Ms. Knott’s duties as Executive Director, JECPO/e Business Office. Moreover, even an official with a warrant was found to be without authority to bind the Government where authority specific to the transaction was missing. *Cf. Harbert/Lummus Agrifuels Projects v. United States*, 142 F.3d 1429 (Fed. Cir. 1998), *cert. denied*, 525 U.S. 1177 (1999). We have also found implied actual authority to be missing in the case of a procurement assistant, a position to which, on its face, authority to contract is more likely to be “integral” than that of Ms. Knott.

Anchor/Darling Valve Company, ASBCA No. 46109, 95-1 BCA ¶ 27,595. Accordingly, we conclude Ms. Knott did not have implied actual authority.

The appeal is dismissed with prejudice for lack of jurisdiction.

Dated: 29 May 2001

CARROLL C. DICUS, JR.
Administrative Judge
Armed Services Board
of Contract Appeals

I concur

I concur

MARK N. STEMLER
Administrative Judge
Acting Chairman
Armed Services Board
of Contract Appeals

EUNICE W. THOMAS
Administrative Judge
Vice Chairman
Armed Services Board
of Contract Appeals

I certify that the foregoing is a true copy of the Opinion and Decision of the Armed Services Board of Contract Appeals in ASBCA No. 53258, Appeal of Total Procurement Service Inc., rendered in conformance with the Board's Charter.

Dated:

EDWARD S. ADAMKEWICZ
Recorder, Armed Services
Board of Contract Appeals