ARMED SERVICES BOARD OF CONTRACT APPEALS

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| Appeal of - | ) | |
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| Wesleyan Company, Inc. | ) | ASBCA No. 53896 |
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| Under Contract No. 000000-00-0-0000 | ) | |

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Supervisory Trial Attorney
MAJ Anissa N. Parekh, JA
Trial Attorney

OPINION BY ADMINISTRATIVE JUDGE FREEMAN

Wesleyan Company, Inc. (Wesleyan) appeals the denial of its claim for breach of an alleged contract limiting government use of the proprietary data in three unsolicited proposals to evaluation of the proposals. In our decision of 7 May 2004 on the parties' cross-motions for summary judgment, we held that the government's acceptance of the proposals for evaluation with the required DAR data rights legend on the first proposal, and with memoranda of understanding on all three, created a contract licensing use of the proposal data "in accordance with the DAR legend and memoranda of understanding." *Wesleyan Company, Inc.*, ASBCA No. 53896, 04-1 BCA ¶ 32,628 at 161,441. Subsequent to that decision, we requested the parties to brief whether that contract was within the Board's subject matter jurisdiction. The parties have done so, and the government now moves to dismiss the appeal.

The Board's subject matter jurisdiction applies to any express or implied contract for (i) the procurement of property, other than real property in being; (ii) the procurement of services; (iii) the procurement of construction, alteration, repair or maintenance of real property; or, (iv) the disposal of personal property. Contract Disputes Act of 1978 (CDA), § 3(a), 41 U.S.C. § 602(a). In *Coastal Corp. v. United States*, 713 F.2d 728 (Fed. Cir. 1983), the Federal Circuit held that an implied contract to treat a bidder honestly and fairly was not a contract for the "procurement of goods and services" and therefore not within our jurisdiction under the CDA. Although not a CDA case, the Federal Circuit in *Airborne*

*Data, Inc. v. United States*, 702 F.2d 1350, 1352 (1983) affirmed a Claims Court holding that a contract promising confidentiality for trade secrets submitted in a proposal was not a contract "for government acquisition or use of the claimed trade secrets . . . ."

Wesleyan's case is not the first at the Board addressing these issues. In *SCM Corp.*, ASBCA Nos. 26544 *et al.*, 85-1 BCA ¶ 17,783 (ASBCA No. 26788), the government had used unmarked proposal data, that the government had treated as confidential, for in-house work and disclosed it in a subsequent solicitation (85-1 BCA at 88,823). The government moved to dismiss the appeal for lack of jurisdiction. The Board said:

> In *Airborne Data, Inc. v. United States*, 702 F.2d 1350 (1983), the Court of Appeals for the Federal Circuit concluded that where a contractor submitted an unsolicited proposal which contained proprietary data and had a restrictive legend, the parties had entered into a contract implied in fact that the recipient would not reveal or otherwise utilize the proprietary data except to fairly evaluate the proposal. Reasoning from this premise, the Government now cites *Coastal Corporation v United States*, 713 F.2d 728 (1983) where the Federal Circuit held that since an implied contract to treat bidders honestly and fairly was 'preliminary and ancillary' to a contract for the procurement of services or property or the disposal of personal property, and not such a contract itself, it was thus beyond the scope of Section 3(a) of the Contract Disputes Act and not within a Board's jurisdiction to decide.

The Board found that under the circumstances in *SCM*:

> [W]e must conclude, as the Government argues, that the only plausible theory under which appellant could proceed is the breach of an implied contract as described in *Airborne Data* and held to be beyond our jurisdiction in *Coastal*. As the Court noted in *Coastal*, the Contract Disputes Act "deals with contractors, not with disappointed bidders," and when it submitted the proposals under consideration here, appellant was not acting as the incumbent under contract 0177 [a contract as to which there was jurisdiction], but as a random offeror. Under these circumstances, this appeal is not within our jurisdiction to consider and it is hereby dismissed.

85-1 BCA at 88,824.

Similarly, in *General Connectors Corp.*, ASBCA No. 32298, 87-2 BCA ¶ 19,751 at 99,943, the Board held, citing *Coastal*, that an implied-in-fact contract to keep a second-tier subcontractor's drawings confidential would also not be a contract for procurement of goods or services within our jurisdiction under the CDA. The three memoranda of understanding signed by Wesleyan when it submitted its proposals expressly stated that the government "has accepted the above proposal for the purpose of evaluating it and advising of any possible Army interest. It is further understood that such acceptance does not imply or create: a promise to pay . . ." (app. supp. R4, tabs M, AJ, BK). This language and the other terms of the memoranda and DAR-required legend promised only evaluation of the proposals, use of the proposal data only for their evaluation, and advice of any possible interest. This was not a contract for procurement of property or services, and to that extent was no different than the contracts in *Airborne Data*, *Coastal*, *SCM*, or *General Connectors*.

Subsequent to *General Connectors*, in *E. M. Scott & Associates, Inc.*, ASBCA No. 45869, 94-1 BCA ¶ 26,258 (*Scott I*), the Board denied a motion to dismiss for lack of jurisdiction (subject to an evidentiary "presentation") where the appellant contended that it had "furnished 'trade secrets' in confidence to the Navy with the understanding use of the data would be limited to evaluating proposals submitted for performance of a service contract and that the Navy did not abide by the understanding" (94-1 BCA at 130,602). In a footnote to that decision, the Board stated "although dicta in [*SCM Corp.* and *General Connectors*] could be construed as suggesting grant of the Navy's motion here, we find both decisions to be distinguishable and not persuasive with respect to the circumstances presented in this appeal" (94-1 BCA at 130,604 n.). After the evidentiary presentation, the Board dismissed the appeal because Scott had not used restrictive legends on its data and there was no other evidence supporting an implied agreement of nondisclosure. *E. M. Scott & Associates,* ASBCA No. 45869, 94-3 BCA ¶ 27,059 (*Scott II*).

We do not agree with the footnote characterization of *SCM* and *General Connectors* in *Scott I*, and to the extent *Scott I* is inconsistent with those earlier precedents, we consider those earlier precedents controlling. This is particularly so in view of their reliance on appellate authority directly in point, and the fact that the appeal in *Scott I* was ultimately dismissed in *Scott II* for lack of jurisdiction. *See Stewart & Stevenson Services, Inc.*, ASBCA No. 43631, 97-2 BCA ¶ 29,252 at 145,523 (following persuasive earlier precedent); *cf. Newell Cos. v. Kenney Manufacturing Co.*, 864 F.2d 757, 765 (Fed. Cir. 1988) (where panel decisions conflict, "the precedential decision is the first").

During the government's initial evaluation of Wesleyan's unsolicited proposals, the government requested Wesleyan to lend it a prototype of the proposed system for integration into the protective mask/suit design being prepared by another contractor for the government's command post vehicle test bed program (app. supp. R4, tab Z). On 1 December 1983, the government and Wesleyan entered into a bailment agreement in accordance with this request. The agreement did not include any provisions regarding the

safeguarding of proprietary data in the prototype system. (App. supp. R4, tab AB) During an ensuing nine-year (1983-92) evaluation of Wesleyan's unsolicited proposals, the government purchased 130 Wesleyan systems for test and evaluation. Wesleyan admits that the documents making these purchases "do not contain any express provisions on safeguarding or use of proprietary data in the purchased items" (app. br. at 6). Wesleyan argues that there was an implied provision of confidentiality in each of these purchase orders created by the DAR legend and the MOUs applicable to the evaluation of the unsolicited proposals (app. br. at 7). This argument admits that there was no confidentiality provision, express or implied, other than that in the submission and acceptance for evaluation of the unsolicited proposals. Moreover, there is no allegation with any supporting evidence that any of the purchased material was used for any purpose other than evaluation of the proposals. Accordingly, we find no independent procurement contract basis in either the 1983 bailment agreement or in the subsequent purchase orders for jurisdiction over Wesleyan's proprietary data claims.

The appeal is dismissed for lack of jurisdiction.

Dated: 22 April 2005

MONROE E. FREEMAN, JR.
Administrative Judge
Armed Services Board
of Contract Appeals

I concur

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

I concur

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. 53896, Appeal of Wesleyan Company, Inc., rendered in conformance with the Board's Charter.

Dated:

CATHERINE A. STANTON
Recorder, Armed Services
Board of Contract Appeals