

ARMED SERVICES BOARD OF CONTRACT APPEALS

Appeal of -- )  
 )  
NOVA Technology Corporation ) ASBCA No. 57943  
 )  
Under Contract No. DAMD17-03-2-0007 )

APPEARANCE FOR THE APPELLANT: Mr. Michael Campbell  
President

APPEARANCES FOR THE GOVERNMENT: Raymond M. Saunders, Esq.  
Army Chief Trial Attorney  
CPT Michael E. Barnicle, JA  
Trial Attorney

OPINION BY ADMINISTRATIVE JUDGE JAMES  
ON RESPONDENT'S MOTION TO DISMISS  
FOR LACK OF SUBJECT MATTER JURISDICTION

NOVA Technology Corporation (NOVA) appeals to the ASBCA from the letter of MAJ GEN James K. Gilman, Commanding General of the U.S. Army Medical Research and Material Command, which denied NOVA's appeal under the captioned cooperative agreement and found that NOVA owed \$234,382.07 to the government. On 5 March 2012 respondent moved to dismiss this appeal for lack of subject matter jurisdiction under the Contract Disputes Act of 1978 (CDA), 41 U.S.C. § 7105(e)(1)(A) (gov't mot. at 3). On 3 April 2012 appellant replied to the motion.

STATEMENT OF FACTS (SOF) FOR PURPOSES OF THE MOTION

1. On 4 November 2002, U.S. Army Medical Research Acquisition Activity (USAMRAA) Contracting Officer Cheryl R. Miles accepted NOVA's 9 July 2002 proposal and issued to NOVA Cooperative Agreement No. DAMD17-03-2-0007 (CA07) for the estimated cost of \$546,100 for "Application of the NOVA Dermal Phase Meter to Measure Hemorrhagic in Swine." CA07 stated: "This award is made under the authority of 31 U.S.C. 6305 and 10 U.S.C. 2358." CA07's ¶ A, provided: "GOVERNMENT INTERACTION (NOV 2000) (USAMRAA) The active participants in this award are the U.S. Army Medical Research and Material Command...and its laboratories identified herein.... Uniformed Services University of the Health Sciences Facility, Bethesda, MD." CA07's ¶ D.1 required NOVA to prepare and submit annual reports and a final report to the Commander, U.S. Army Medical Research and Material Command, of its research findings and accomplishments with respect to NOVA's Dermal Phase Meter, which showed promise of adaptation to the "measurement of soldier dehydration as well

as wound and burn healing from conventional and chemical weapons.” (Ex. G-1 at 1-5, ex. G-2 at 2)

2. CA07 did not incorporate any clause set forth in FAR Part 52 (ex. G-1). CA07 was “subject to the USAMRAA General Terms and Conditions (1 Oct 2002)” (ex. G-1 at 4), whose ¶ 2, “ADMINISTRATION AND COST PRINCIPLES (NOV 2000) (USAMRAA)” prescribed, *inter alia*, “Federal Acquisition Regulation, Part 31.2 for Commercial Organizations,” (ex. G-3) and whose ¶ 17 provided:

DISPUTES (NOV 2000) (USAMRAA)

Disagreements regarding issues concerning assistance agreements between the recipient and the Grants Officer shall, to the maximum extent possible, be resolved by negotiation and mutual agreement at the Grants Officer level. If agreement cannot be reached, it is our policy to use alternative dispute resolution (ADR) procedures that may either be agreed upon by the Government and the recipient in advance of the award or may be agreed upon at the time the parties determine to use ADR procedures. If the parties cannot agree on the use of ADR procedures, the recipient can submit, in writing, a disputed claim or [disputed] issue to the Grants Officer. The Grants Officer will consider the claim or disputed issue and prepare a written decision within 60 days of receipt. The Grants Officer’s decision will be final. The recipient may appeal the decision within 90 days after receipt of such notification. Appeals will be resolved by the Head of the Contracting Activity. The decision by the Head of the Contracting Activity will be final and not subject to further administrative appeal. However, the recipient does not waive any legal remedy, such as formal claims, under Title 28 [U.S.] Code 1492, by agreeing to this provision.

(Ex. G-3 at 8-9)

3. On 16 September 2005 Modification No. P00003 extended CA07 to 31 October 2006 and increased its estimated cost to \$3,499,465 (ex. G-1 at 15, 18).

4. Defense Contract Audit Agency Audit Report No. 2901-2206M10100008 of 23 July 2008 addressed NOVA’s direct and indirect costs in its fiscal year ended 30 September 2006 (FY 2006) under Contract No. N66001-05-C-8015 (the Navy contract) and CA07. Of the \$1,320,161 FY 2006 direct and indirect costs NOVA allocated to CA07, DCAA disallowed \$260,645, including \$73,392 in direct labor,

consulting, materials and other direct costs, (\$79,946) in fringe benefits and \$267,200 in overhead costs.<sup>1</sup> (App. appx. II at 13, 41) Of those \$267,200 overhead costs, DCAA disallowed \$113,321 for legal expenses it reclassified as “direct costs of [CA07]...deemed unallowable by the Contracting Officer’s representative prior to this audit,” and \$4,432 for Mr. Campbell’s salary attributable to such legal expenses (app. appx. II at 6, 11, 47-48, 51).

5. On 25 January 2011 Micaela Bowers, USAMRAA “Contract/Grants Officer,” issued a decision that NOVA was indebted to the government in the amount of \$260,645. Her letter advised NOVA of its right to file a written appeal from her decision within 90 calendar days to the “Grant Appeal Authority,” MAJ GEN James K. Gilman, Commanding General, U.S. Army Medical Research and Material Command. (Ex. G-4)

6. The undated letter of MAJ GEN Gilman to NOVA in an envelope postmarked 27 October 2011, found that NOVA’s submissions contained no new evidence to support its appeal under CA07 and that NOVA owed the government \$234,382.07<sup>2</sup> (ex. G-5).

7. On 20 January 2012 NOVA appealed to the ASBCA from MAJ GEN Gilman’s 27 October 2011 letter “[i]n accordance with the Contract Disputes Act of 1978, 41 U.S.C. § 601 *et seq.*” and the appeal was docketed as ASBCA No. 57943. NOVA also has pending consolidated appeals relating to fiscal year 2006 costs in ASBCA Nos. 57783 and 57909.<sup>3</sup>

8. NOVA’s 16 February 2012 complaint in ASBCA No. 57943 alleged:

3. The relevant contract to this matter in dispute is DAMD17-03-2-0007, a Cooperative Agreement....

....

7. On January 20<sup>th</sup>, 2012, NOVA...filed a timely Notice of Appeal to an undated final decision of MG James K. Gilman...postmarked October 27<sup>th</sup>. 2011.... The final decision denied NOVA their certified claims in their entirety, and asserted the Government’s claim of \$234,382.07....

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<sup>1</sup> DCAA’s figures total \$260,646, apparently rounded to \$260,645.

<sup>2</sup> The record does not explain the difference between \$234,382.07 and \$260,645 decided by Ms. Bowers.

<sup>3</sup> ASBCA Nos. 57783 and 57909 relate to both the Navy contract and CA07. The government has not filed a motion to dismiss those appeals as they relate to CA07 and, accordingly, that issue is not before us.

8. On February 2<sup>nd</sup>, 2012, NOVA filed with the ASBCA, a Request to Combine Docket #57943 with ASBCA Dockets #57783 and #57909 to consolidate the three Appeals....

### Positions of the Parties

Moyant argues that CA07 is not a CDA contract because FAR 2.101 defines a “contract” as “a mutually binding legal relationship obligating the seller to furnish the supplies or services (including construction) and the buyer to pay for them.... **Contracts do not include grants and cooperative agreements covered by 31 U.S.C. 6301, et seq.**”; NOVA admits that CA07 is a cooperative agreement, not a contract; and CA07 did not procure any goods or services. (Gov’t mot. at 4-5) NOVA argues that the DCAA auditor, the DCMA ACO, and the USAMRAA “Contract Officer”<sup>4</sup> all treated the Navy contract and CA07 “in tandem,” the results of their decisions affect both “contracts,” and ASBCA Nos. 57783, 57909 and 57943 address disputed indirect costs and rates, so the three appeals should be consolidated (app. reply at 1-2).

### DECISION

The CDA “applies to any express or implied contract...made by an executive agency for—(1) the procurement of property, other than real property in being; (2) the procurement of services,” 41 U.S.C. § 7102(a), and prescribes jurisdiction to the ASBCA with respect to “a contract made by” the Department of the Army, other defense agencies and NASA, 41 U.S.C. § 7105(e)(1)(a). The CDA does not define the term “contract.” Therefore, we turn to the FAR, which implements the CDA. *See Parsons Global Services, Inc. v. McHugh*, 2012 U.S. App. LEXIS 8062, at \*8-9 (Fed. Cir. 2012) (“Because the [CDA] itself does not define what constitutes a ‘claim,’ we evaluate whether a particular request for payment amounts to a claim based on the FAR implementing the CDA, the language of the contract in dispute, and the facts of each case. *James M. Ellett Constr. Co. v. United States*, 93 F.3d 1537, [1541-42] (Fed. Cir. 1996); *Reflectone, Inc. v. Dalton*, 60 F.3d 1572, 1575 (Fed. Cir. 1995) (en banc).” *Parsons* cited the FAR 2.101 definition of “claim.”).

FAR 2.101 defines a “contract” as “a mutually binding legal relationship obligating the seller to furnish the supplies or services (including construction) and the buyer to pay for them.... Contracts do not include grants and cooperative agreements covered by 31 U.S.C. 6301, et seq.” Here there is no dispute that CA07 is a cooperative agreement made under the authority of 31 U.S.C. § 6305.

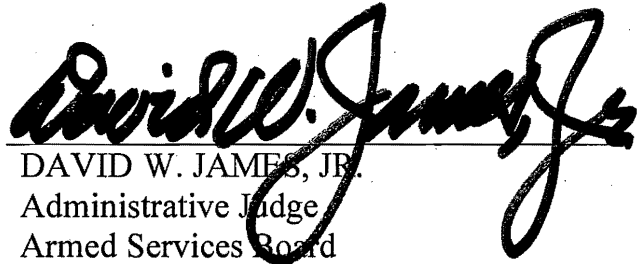
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<sup>4</sup> Actually USAMRAA Account Manager Ethan J. Mueller (app. appx. I at 2).

Furthermore, under CA07 NOVA did not sell goods or services to USAMRAA. CA07 provided funding assistance for the primary purpose of stimulating and supporting NOVA's research on the adaptation of its dermal phase meter to soldier dehydration and healing, from which USAMRAA did not benefit directly. Accordingly, CA07 did not provide for procurement of property or services within the meaning of the CDA. See *Rick's Mushroom Service, Inc. v. United States*, 521 F.3d 1338, 1344 (Fed. Cir. 2008) (A long term contract pursuant to which the contractor would construct and operate its transfer facility in accordance with government specifications in return for cost-share payments, was not a CDA "procurement contract" because it "did not provide for transfer of goods or services to the government, there was no evidence of a buyer-seller relationship, and the government did not receive a direct benefit from the operation of" the contractor-leased spent mushroom substrate transfer facility).


We hold that CA07 is not a "contract" under 41 U.S.C. § 7102(a) and, therefore, the ASBCA lacks CDA jurisdiction of ASBCA No. 57943. We dismiss the appeal for lack of jurisdiction. Accordingly, we deny appellant's 2 February 2012 request to consolidate ASBCA No. 57943 with ASBCA Nos. 57783 and 57909.

Dated: 30 May 2012



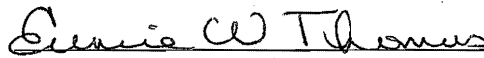
DAVID W. JAMES, JR.  
Administrative Judge  
Armed Services Board  
of Contract Appeals

I concur



MARK N. STEPLER  
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. 57943, Appeal of NOVA Technology Corporation, rendered in conformance with the Board's Charter.

Dated:

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