ARMED SERVICES BOARD OF CONTRACT APPEALS

Appeals of --	)	
	)	
Hewlett-Packard Company	)	ASBCA Nos. 57940, 57941
	)	
Under Contract No. GS-35F-4663G	)	
Delivery Order Nos. B301, B302	)	

APPEARANCES FOR THE APPELLANT: James D. Bachman, Esq.
Ron R. Hutchinson, Esq.
Doyle & Bachman, LLP
Arlington, VA

APPEARANCES FOR THE GOVERNMENT: Raymond M. Saunders, Esq.
Army Chief Trial Attorney
CPT Tudo Pham, JA
Trial Attorney

OPINION BY ADMINISTRATIVE JUDGE THRASHER ON JURISDICTION

This appeal concerns two Delivery Orders (DOs) issued by the U.S. Army Medical Research Acquisition Activity (Army) under a Blanket Purchase Agreement (BPA) issued by the Navy. The BPA, in turn, was issued under Hewlett Packard Company's (HP or appellant) General Services Administration (GSA) Schedule Contract. In light of the United States Court of Appeals for the Federal Circuit's recent decision in *Sharp Electronics Corp. v. McHugh*, 707 F.3d 1367 (Fed. Cir. 2013), we asked the parties to address whether the Board has jurisdiction to decide HP's breach of contract claim. The claim was appealed under the deemed denied provision (41 U.S.C. § 7103 (f)(5)) of the Contract Disputes Act (CDA), 41 U.S.C. §§ 7101-7109. For the reasons discussed below, we conclude that the Board has jurisdiction to decide these appeals.

FINDINGS OF FACT

1. The Department of the Navy issued BPA No. N00104-02-A-ZE80 to Compaq Federal, LLC, on 27 June 2002 (R4, tab 1).[1] The BPA was issued under HP's General Services Administration (GSA) Schedule Contract No. GS-35F-4663G (schedule contract) (supp. R4, tab 33). The BPA expressly limited the government's obligations,

[1] The record consists of a Rule 4 and supplemental Rule 4 for each appeal. As many of the tabs are duplicative, we cite to the record in ASBCA No. 57940 unless otherwise noted.

stating that "[t]he Government is obligated only to the extent of authorized purchases actually made under this BPA" and that "[t]here is no minimum order guarantee" (supp. R4, tab 26 at 2). The original term of the BPA was four years (R4, tab 1 at 2). The BPA was amended on 30 March 2007 by Modification No. (Mod. No.) P00010 extending the ordering period from 1 April 2007 through 31 March 2010 and again on 9 April 2010 by Mod. No. P00013 extending the ordering period from 1 April 2010 through 31 March 2013 (supp. R4, tab 26 at 1, 3; R4, tab 22 at 1, 2).

2. HP's GSA schedule contract contains separate terms and conditions applicable to three categories of products: Business Products, Enterprise Products and NonStop Products (R4, tab 33 at i). The BPA is a Defense Department Enterprise Software Agreement (ESA) issued as part of DoD's Enterprise Software Initiative (ESI) and is subject to DFARS Subpart 208.74, Enterprise Software Agreements (supp. R4, tab 26 at 6-7). The BPA states at Section C.1 that "[t]his BPA is a DoD ESA and will be posted to the DoD ESI website at http://www.esi.mil as part of the ESI Program" (supp. R4, tab 26 at 7). Accordingly, all of the software products listed in the BPA are Enterprise Products and not Business Products or NonStop Products.

3. The BPA is for the acquisition of commercial software and related software maintenance and provides for ordering of new software license enrollments which include new perpetual licenses plus three years of Software Assurance (new enrollments) and for ordering of renewal perpetual license enrollments which include Software Assurance only (renewal enrollments) (supp. R4, tab 26). The BPA provides for ordering of new and renewal software licensing enrollments of desktop configurations (CLINs 1080 through 1085) and of single software products (CLINs 0001 through S006).

4. The Army issued DO No. B301 on 26 June 2008 and DO No. B302 on 18 September 2008 to HP for Software Assurance (R4, tab 8; ASBCA No. 57914 (57914), R4, tab 8). All of the items ordered in DO Nos. B301 and B302 are single software products, including Software Assurance, listed in CLINs 0001 through S004 of the BPA. All of the items ordered in DO No. B301 are for renewal license enrollments (Software Assurance only) of single software products. The orders provided for a total fixed price of $6,761,178.51 to be paid as follows: Base Period Payment of $2,253,726.17 payable on 30 June 2008; Option Period 1 Payment of $2,253,726.17 payable 30 June 2009; and Option Period 2 Payment of $2,253,726.17 payable on 30 June 2010. (The orders also incorporated by reference FAR Clause 52.217-9, OPTION TO EXTEND THE TERM OF THE CONTRACT (MAR 2000). (R4, tabs 8, 16; 57941, R4, tabs 8, 17)

Special Item Number (SIN) 132-33

5. The BPA further states in paragraph 7, "License," that "[s]oftware licenses purchased under this BPA are perpetual software licenses subject to the licensing provisions of Microsoft Licensing Agreement/Product Use Rights (PUR) dated April 2007 and the terms of GSA Schedule SIN 132-33" (supp. R4, tab 26 at 3). Consistent with this provision in the BPA, SIN 132-33 in the schedule contract states that it covers perpetual software licenses and includes software maintenance as a product (supp. R4, tab 33 at 3) (both discussing software maintenance as a product under SIN 132-33 "Perpetual Software Licenses"). We find that SIN 132-33 is the only GSA Schedule SIN mentioned in the BPA and is the only SIN applicable to orders issued under the BPA. We also find that the schedule contract does not contain any other specific terms and conditions for Enterprise Products under SIN 132-33 that are applicable to the software products in DO Nos. B301 and B302, other than terms addressing software maintenance as a product under SIN 132-33 applicable to Enterprise Products and other general terms addressing Enterprise Products. (Supp. R4, tab 33)[2]

Order Clauses at Issue

6. Appellant's claims concern the applicability and interpretation of two clauses found in the orders: the "RETURN OF SOFTWARE UPGRADES AND UPDATES" clause and the "Non-Renewal" clause (supp. R4, tab 32). The Return of Software Upgrades and Updates clause in DO No. B301 states as follows:

> In the event (i) the Government does not exercise its option to renew the Purchase Order, or (ii) the Government terminates the Purchase Order pursuant to "Termination for Convenience"; the Government shall within ten (10) days after failure to renew or termination for convenience of the Purchase Order certify to the Contractor in writing that it has: 1) Deleted or disabled all files and copies of the upgraded or updated software that were obtained as a result of the Purchase Order from the equipment on which it was installed; 2) Returned all software documentation, training manuals, and physical media on which the upgraded or updated

[2] *See* Section 5 addressing FOB destination terms for enterprise products (supp. R4, tab 33 at 3 of 92); Section 6 addressing delivery schedule terms for enterprise products (*id.* at 3-5 of 92); Section 7 addressing discounts for enterprise products (*id.* at 5 of 92); Section 14(a) addressing contractor tasks/special requirements for enterprise products (*id.* at 6 of 92); Terms applicable to enterprise products under SINs 132-8, 132-12, 132-32, 132-34 (*id.* at 26-35 of 92).

> software obtained as a result of the Purchase Order was delivered, and 3) Has no ability to use the returned software or any software upgrades or updated obtained as a result of the Purchase Order.

(R4, tab 15 at 2) The Return of Software Upgrades and Updates clause in DO No. B302 states as follows:

> In the event (i) the Government does not exercise its option to renew the Purchase Order, or (ii) the Government terminates the Purchase Order pursuant to "Termination for Convenience"; the Government shall within ten (10) days after failure to renew or termination for convenience of the Purchase Order certify to the Contractor in writing that it has: 1) Deleted or disabled all files and copies of the upgraded or updated software that were obtained as a result of the Purchase Order from the equipment on which it was installed; 2) Returned all software documentation, training manuals, and physical media on which any software or any software upgrade or update obtained as a result of the Purchase Order was delivered, and 3) Has no ability to use the returned software or any software upgrades or updated obtained as a result of the Purchase Order.

(57941, R4, tab 16 at 2) The Non-Renewal clause of DO No. B301 states in pertinent part as follows:

> If the Government elects not to exercise its option to renew the Purchase Order for any option period the Government agrees to cease all use of any software versions that were upgraded to [sic] as a result of the Purchase Order (and revert to the prior software version) and not to replace the software with functionally similar software or replace or upgrade any software that was supported by the terminated software for a period of one (1) year succeeding the effective date of the non-renewal.

(R4, tab 15 at 3) The Non-Renewal clause of DO No. B302 states as follows:

> The Government reasonably believes that funds in an amount sufficient to make all payments for the full LP Term can be obtained and that a bona fide need for the software will

> continue to exist for the full LP Term. However, the Government has the option to renew the Purchase Order in accordance with FAR 52.217-9 for each option period beyond the base period. If the Government elects not to exercise its option to renew the Purchase Order for any option period the Government agrees to cease all use of any software and any software upgrade or update obtained as a result of the Purchase Order and not to replace the software with functionally similar software or replace or upgrade any software that was supported by the terminated software for a period of one (1) year succeeding the effective date of the non-renewal.

(57941, R4, tab 16 at 3)

7. FAR Subpart 8.4, FEDERAL SUPPLY SCHEDULES, effective 19 July 2004, prescribes in pertinent part:

> 8.406-6 Disputes
>
> (a) Disputes pertaining to the performance of orders under a schedule contract. (1) Under the Disputes clause of the schedule contract, the ordering activity contracting officer may—
>
> (i) Issue final decisions on disputes arising from performance of the order (but see paragraph (b) of this section); or
>
> (ii) Refer the dispute to the schedule contracting officer.
>
> (2) The ordering activity contracting officer shall notify the schedule contracting officer promptly of any final decision.
>
> (b) Disputes pertaining to the terms and conditions of schedule contracts. The ordering activity contracting officer shall refer all disputes that relate to the contract terms and conditions to the schedule contracting officer for resolution under the Disputes clause of the contract and notify the schedule contractor of the referral.

> (c) Appeals. Contractors may appeal final decisions to either the Board of Contract Appeals servicing the agency that issued the final decision or the U.S. Court of Federal Claims.

8. On 10 January 2011 HP submitted a certified claim to the ordering agency CO for $2,253,726.17 in breach of contract damages under DO No. B301 and $1,494,487.95 under DO No. B302, requesting a CO's final decision. HP's claims asserted that despite the fact the government did not renew the second option under the order, the government did not provide the certifications required by the contract concerning return of the software, failed to return the software upgrades and updates, did not cease to use the software versions that were upgraded and was acquiring the right to use the Microsoft Software under the contract. As a result, HP claimed it is "entitled to recover the full unpaid contract price for the software licenses delivered to the Army." (Supp. R4, tab 32)

9. After waiting a year with no decision on its claim, HP filed a notice of appeal on 18 January 2012 based upon a deemed denial of its claim. Two separate appeals were filed: ASBCA No. 57940 (B301) and ASBCA No. 57941 (B302).

10. On 19 September 2012 the Board *sua sponte* ordered the parties to address the Board's jurisdiction to hear the above-referenced appeals. Specifically, the parties were ordered to address whether the ordering agency CO had authority to consider this dispute in light of FAR 8.406-6, our decision in *Sharp Electronics Corp.*, ASBCA No. 57583, 12-1 BCA ¶ 34,903, and any other relevant precedent. The Board's decision in *Sharp Electronics* was appealed to the United States Court of Appeals for the Federal Circuit and on 22 February 2013 the Court affirmed the Board's decision as to lack of jurisdiction. *Sharp Electronics Corp. v. McHugh*, 707 F.3d 1367 (Fed. Cir. 2013). The parties were provided an opportunity to supplement their previous briefs in light of the Court's decision. Both parties elected to do so, which the parties submitted on 29 March and 5 April 2013. Appellant asserts the Board has jurisdiction; the government's position, as amended, is that we do not.

DECISION

The Federal Circuit established a "bright-line rule" in *Sharp Electronics* that "all disputes requiring interpretation of the schedule contract go to the schedule CO, even if those disputes also require interpretation of the order, or involve issues of performance under the order." *Sharp Electronics*, 707 F.3d at 1373. However, the Court explained the application of this rule is not necessarily determined by how the parties frame the issues and does not prevent the CO from construing the language of the order or to apply relevant provisions of the schedule contract as long as there is no dispute in their meaning. The Federal Circuit held:

> We hold that FAR 8.406–6 does not authorize an ordering CO to decide a dispute requiring interpretation of schedule contract provisions, in whole or in part, regardless of whether the parties frame the dispute as pertaining to performance. However, the ordering CO is certainly authorized to construe the language of the order (or its modifications). Because an order's details—not merely price, quantity, and specifications, but also permissible variation in quality or quantity, hours and location of delivery, discounts from schedule pricing, etc.—are arranged between the schedule contractor and the ordering CO, the ordering CO is able to construe these commonly disputed terms as long as the dispute does not involve interpretation of the schedule contract. We also see no reason why an ordering CO resolving a dispute cannot apply the relevant provisions of the schedule contract, as long as their meaning is undisputed.... [Footnotes omitted]

707 F.3d at 1374.

Pursuant to the bright-line rule set out in the *Sharp* decision, we must determine whether this dispute requires interpretation of schedule contract provisions, in whole or in part. Although we are not bound by how the parties have framed the issues, it is a starting point to determine whether interpretation of the schedule contract will be required to resolve this dispute. *Sharp Electronics*, 707 F.3d at 1374.

CONTENTIONS OF THE PARTIES

The dispute in these two appeals, as framed by the parties, turns upon the terms of the two orders at issue and factual determinations involving government actions during performance. Appellant's arguments, as framed in its complaint, do not rely upon interpretations of any provisions but instead rely upon the terms of the orders (compl. ¶¶ 18-37). Appellant supports the Board's jurisdiction in light of *Sharp Electronics*, arguing that this dispute pertains to the government's compliance with performance obligations pursuant to the delivery orders and does not require interpretation of any schedule contract terms and conditions (app. br. at 1). The government agrees that appellant's claims are grounded in the provisions of the orders and that the facts in this dispute are distinguishable from those in *Sharp Electronics* (gov't br. at 3-4). However, the government argues that resolution of these appeals requires the Board to examine the terms and conditions of the schedule contract and the BPA and, in light of the bright-line

rule established in *Sharp Electronics*, the Board lacks jurisdiction to hear this dispute (*id.* at 4). We will examine each of the parties' arguments in turn.

Interpretation of the Schedule Contract

Although the issues in dispute appear to only require interpretation of the orders and the facts of performance, the government argues the Board does not have jurisdiction in these appeals because resolution of this dispute requires an examination of the schedule contract in addition to the orders and performance of the parties, and under the bright-line rule enunciated in *Sharp Electronics,* any dispute that requires interpretation of the schedule contract must go to the schedule CO. The government argues this "dispute requires an examination of the Schedule Contract because the Schedule contract enumerates Special Item Numbers ('SIN'), each of which carries its own terms and conditions" and "[i]t is unclear from either the BPA or the orders which SIN is applicable to the Software Assurance ordered by the Army." (Gov't br. at 4) Furthermore, the government asserts that "[b]oth the Schedule Contract and the orders have their own termination terms and conditions, and the provisions differ considerably" (*id.* at 5). This, it is argued, would require the schedule CO to interpret the schedule contract terms and conditions. However, the government does not identify any specific schedule contract terms or conditions that require our interpretation to decide these appeals.

Appellant responds there is no dispute of fact concerning which terms and conditions of the schedule contract or BPA apply to these orders or that any of the provisions conflict with the terms of the orders (app. br. at 1-8). The facts establish, appellant argues, that only SIN 132-33 applies to the two delivery orders. SIN 132-33 is the only SIN mentioned in the BPA and the coverage of SIN 132-33 matches the items purchased under the orders (*id.* at 1-5). In addition, appellant argues the facts establish that no schedule contract terms are at issue and none require interpretation to resolve these disputes. Appellant asserts the schedule contract contains separate terms and conditions applicable to three categories of products: Business Products, Enterprise Products and NonStop Products. Because the BPA states it is a DoD Enterprise Software Agreement, appellant argues that all the software products listed in the BPA are Enterprise Products. There are no specific terms and conditions of the schedule contract addressing Enterprise Products under SIN 132-33 applicable to the delivery orders, other than terms addressing software maintenance as a product under SIN 132-33 as applicable to Enterprise Products. (*Id.* at 6)

The parties have not framed the issues as requiring an interpretation of the schedule contract. We agree with appellant that there is no dispute of fact concerning which terms and conditions of the schedule contract or BPA apply to these orders or that any of the schedule contract or BPA provisions conflict with the terms of the orders. Also, we agree there is no uncertainty as to which SIN applies to these orders. (Finding

5) The government argues we lack jurisdiction because we might have to interpret a provision of the schedule contract, but the government does not identify any such provisions and our review does not reveal any provisions of the schedule contract that would require our interpretation. As a result, we conclude that deciding these appeals does not require us to interpret the terms and conditions of the schedule contract.

Interpretation of the BPA

The government also argues the Board lacks jurisdiction over these disputes because "HP's dispute requires a further level of interpretation as the schedule contract CO would also need to interpret the BPA, which has its own terms and conditions" and that "[t]he order CO could not [do] this because the BPA was placed by the Navy, not the Army" (gov't br. at 5). Appellant disagrees, arguing, "[i]t is well established that a BPA is not a contract since a BPA lacks mutuality of consideration and disputes concerning the terms of a BPA do not give rise to any dispute subject to the Contract Disputes Act procedures." *See Zhengxing v. United States*, 204 F. App'x 885 (Fed. Cir. 2006), *aff'g*, 71 Fed. Cl. 732 (2006); *see also Julian Freeman*, ASBCA No. 46675, 94-3 BCA ¶ 27,280. (App. br. at 8) The Court of Appeals for the Federal Circuit agreed with the Court of Federal Claims in *Zhengxing* that the BPA was not a contract and, therefore, was not subject to the CDA since the agency was obligated only to the extent of individual authorized orders actually placed under the BPA and that only accepted orders would create a contractual obligation:

> The BPA, at issue, however, is merely a framework for future contracts and only creates a contractual obligation with regard to accepted orders. Specifically, the BPA states that "[t]he Agency shall be obligated only to the extent of authorized call orders actually placed under this agreement." Once an order is placed under the agreement, a contract is created with respect to that order, but the BPA in this case is not a contract because it lacks mutuality of consideration.... Accordingly, the CFC properly determined that termination of the BPA did not confer jurisdiction under the CDA.

Zhengxing, 204 F. App'x at 886-87.

Appellant also correctly points out that the Board reached a similar result in *Julian Freeman,* 94-3 BCA ¶ 27,280, where we found that a BPA was not a contract for purposes of CDA jurisdiction because it lacked mutuality of consideration and that "separate contracts would come into being each time the Government ordered services and appellant provided such services." *Julian Freeman*, 94-3 BCA ¶ 27,280 at 135,907.

We agree with appellant that the ordering CO (Army) in these appeals can independently interpret the terms and conditions of the BPA without referral to the Navy and the Board should not deny jurisdiction because the BPA was placed by a different service than the ordering agency. As in *Zhengxing* and *Julian Freeman*, the BPA here is not a contract for purpose of CDA jurisdiction, because it lacks mutuality of consideration (finding 1). A contract only arose when DO Nos. B301 and B302 were issued under the BPA and the contract that arose was between the Army and appellant. All of the terms and conditions of the BPA then became part of those separate contracts. 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 DO Nos. B301 and B302 since those orders were the vehicles that formed the contracts. As the Court held in *Sharp Electronics*, "the ordering CO is certainly authorized to construe the language of the order (or its modifications)." 707 F.3d at 1374. Consequently, the ordering CO would have the authority to interpret the incorporated terms and conditions of the BPA.

CONCLUSION

Because HP's claim can be resolved without interpreting the GSA schedule contract or the BPA, we hold the Board has jurisdiction to decide these appeals.

Dated: 9 July 2013

JOHN J. THRASHER
Administrative Judge
Armed Services Board
of Contract Appeals

I concur

PETER D. TING
Administrative Judge
Acting Chairman
Armed Services Board
of Contract Appeals

I concur

ELIZABETH M. GRANT
Administrative Judge
Acting 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 Nos. 57940, 57941, Appeals of Hewlett-Packard Company, rendered in conformance with the Board's Charter.

Dated:

JEFFREY D. GARDIN
Recorder, Armed Services
Board of Contract Appeals