Board of Contract Appeals

General Services Administration
Washington, D.C. 20405

MOTION TO DISMISS DENIED:
April 11, 2006

GSBCA 15160

MINNEAPOLIS COMMUNITY DEVELOPMENT AGENCY
and THE CITY OF MINNEAPOLIS,

Appellants,

v.

GENERAL SERVICES ADMINISTRATION,

Respondent.

Lawrence A. Moloney of Gray, Plant, Mooty, Mooty & Bennett, P.A., Minneapolis, MN, counsel for Appellants.

Robert C. Smith and Mark R. LaFeir, Office of General Counsel, General Services Administration, Washington, DC; and Paul J. Maxse, Office of Regional Counsel, General Services Administration, Chicago, IL, counsel for Respondent.

Before Board Judges **NEILL**, **DeGRAFF**, and **GOODMAN**.

NEILL, Board Judge.

The General Services Administration (GSA) has moved that we dismiss this case for lack of jurisdiction. For the reasons set out below, we deny the motion to dismiss. In bringing this motion to dismiss, GSA has also questioned whether this appeal was timely filed. To explore this issue, we authorized limited discovery. Having reviewed appellants' response to the Government's discovery requests and the Board's own files, we dismiss the allegation as unproven.

Background

On March 19, 1993, GSA, acting on behalf of the Federal Government, entered into a Development Agreement (the Development Agreement) with the Minneapolis Community Development Agency (the MCDA) and the City of Minneapolis (the City). Under the recitals of the Agreement, it is stated that GSA has been authorized to construct a courthouse of 300,000 occupiable square feet, plus 225 enclosed parking spaces, in the City of Minneapolis and that the project will house the United States District and Bankruptcy Courts and various executive agencies. GSA is to develop the project, including public plaza improvements, as a federal construction project through a design/build solicitation under GSA's competitive source selection procedures. Appeal File, Exhibit 22 at 1-2.

The Development Agreement's recitals further provide that the MCDA will assemble a development site and the property will be conveyed to GSA by the MCDA for development of the project. In addition, the MCDA and the City, by themselves and also in cooperation with GSA, are to carry out certain additional development activities in conjunction with the project. This includes structured parking facilities as well as tunnel and skyway connections on and around the project site. *Id.*

The recitals to the Development Agreement also envision the issuance of bonds by the City, pursuant to its port authority powers, to cover the costs of land acquisition, parking facilities, tunnel and skyway construction, and a direct financial contribution to GSA to defray a portion of the cost of the project related to the structured parking and public plaza. *Id.* at 2.

Finally, prior to GSA's award of the design/build contract, but after "remediation of environmental conditions and completion of MCDA's other site preparation responsibilities," the MCDA is to convey fee simple title to the property to GSA. *Id.* at 3.

Section 4.03 of the Development Agreement provides additional information regarding the above-cited "remediation of environmental conditions." It reads:

> The MCDA acknowledges the existence on the Property[,] as of the date of this Agreement[,] of an adverse environmental condition consisting of petroleum hydrocarbons discovered in the course of initial soil testing. Prior to conveyance of the Property to GSA[,] the MCDA shall assure remediation of all adverse environmental conditions theretofore identified by MCDA, the City or GSA. At closing[,] the MCDA will deliver an undertaking to hold harmless and defend GSA from liability in connection with the existence or remediation of adverse environmental conditions theretofore identified by MCDA, the City or GSA.

Appeal File, Exhibit 22 at 25.

On January 14, 1994, the parties amended the original Development Agreement. By then, it was clear that the completion of remediation of the contaminants had become a serious problem and posed a threat to the timely conveyance of the project site to GSA and to the commencement of construction. Appeal File, Exhibit 46.

Under the amended Development Agreement, the MCDA agreed to remain responsible for: (1) remediation of the soil contamination already known to exist at the project site; (2) remediation of the soil contamination identified, after amendment of the agreement, as a result of excavation of the property by GSA's design/build contractor; and (3) remediation of the soil contamination identified as a result of the implementation of remediation. GSA, for its part, agreed to advise its design/build contractor of the environmental condition of the property and promptly, upon award of the construction contract, to request the contractor to develop a remediation plan. Appeal File, Exhibit 46 at 3.

Under the amended Development Agreement, it was further agreed that a contract modification for the design of a remediation plan would be issued and, upon approval of the plan by the state pollution control agency, GSA would issue a contract modification to the contractor to effect the remediation efforts in conjunction with the excavation and foundation phase of construction. The MCDA agreed to pay the cost of this modification. Appeal File, Exhibit 46 at 5.

To expedite the remediation effort, the amended Development Agreement also provided that GSA could issue the contract modification on a "Price-To-Be-Determined" basis with a ceiling price to be set by GSA and paid by the MCDA. It was agreed that GSA would be liable to the MCDA for any remaining funds advanced by the MCDA but not paid to the design/build contractor for carrying out the modification. Any disagreement among the parties regarding the final contract modification price was to be subject to negotiations among the parties or subject to resolution pursuant to Article XI, Remedies, of the Development Agreement. Appeal File, Exhibit 46 at 5.

On January 19, 1994, following execution of the amended Development Agreement, the project site was conveyed to GSA. Appeal File, Exhibit 50. Appellants contend that, on September 19, 1994, after transfer of the property to GSA and GSA's award of the construction contract, they deposited with GSA $2,420,295. Complaint ¶ 1. The contracting officer accepted the money as funding for the cost of the contract modification to be negotiated with the construction contractor for the remediation effort. Appeal File, Exhibit 196 at 1.

On April 9, 1999, appellants submitted a certified claim for $2,693,055.50. The claim is based upon an alleged breach of the Development Agreement, as amended, relative to the

environmental remediation of the project site. The claim has been denied in its entirety by the contracting officer. It is her position that all costs incurred with the corrective remediation of the project site were reasonable and the sole responsibility of the City and the MCDA. Appeal File, Exhibit 258.

Discussion

Jurisdiction

Two questions present themselves with regard to the fundamental issue here of whether or not we have jurisdiction to decide this appeal. The first question stems from a provision in Article XI of the original Development Agreement. This article deals with remedies under the Development Agreement. Section 11.02 of Article XI addresses "Judicial Remedies." This section provides in part:

> Nothing in Article XI will diminish GSA's right to pursue and resolve disputes with its contractors, including, without limitation, the Design/Build Contractor, under the Contract Disputes Act of 1978 (Title 41 U.S. Code Sections 601-613) and regulations promulgated thereunder (the "Contract Disputes Act"). However, neither the MCDA nor the City shall be deemed a "contractor" for purposes of the Contract Disputes Act, and the parties agree that neither this Agreement nor any other Project Agreement to which the City or the MCDA is a party shall be deemed subject to the Contract Disputes Act.

Appeal File, Exhibit 22 at 46-47.

Apparently in recognition of this provision, upon submitting their certified claim to the contracting officer on April 9, 1999, appellants promptly initiated suit in the United States Court of Federal Claims claiming that the Court had jurisdiction over the case pursuant to the Tucker Act, 28 U.S.C. §§ 1346, 1491(a) (1994 & Supp. V 1999). In reply, the Government moved for the dismissal of the suit on the ground that the case fell squarely under the jurisdictional prerequisites of the Contract Disputes Act of 1978 (CDA), 41 U.S.C. §§ 601-613 (1994 & Supp. V 1999), which required that there be a contracting officer's final decision on the claim or that there be a deemed denial of the claim before the claimant could even file suit.

While the Government's motion to dismiss was pending before the Court of Federal Claims, the contracting officer accorded to the claim filed on April 9, 1999, treatment normally given to a claim brought under the CDA. On May 20, she advised claimants that a final decision would not be issued immediately but would be rendered no later than August 9, 1999. On that date, the contracting officer issued her decision denying the claim in its

entirety. The decision advised appellants of their right to appeal under the CDA and expressly stated that, notwithstanding section 11.02 of Article XI of the Development Agreement, the Agreement was deemed to be subject to the CDA. Appeal File, Exhibit 258.

By letter dated November 8, 1999, counsel appealed the contracting officer's final decision to this Board. Appeal File, Exhibit 259. In view of this and related events, the MCDA, the City, and the Government eventually, on December 3, 1999, filed with the Court of Federal Claims a Stipulation of Dismissal without Prejudice. The stipulation provided in part:

> The City, MCDA, and the United States agree that the Tucker Act lawsuit should be voluntarily dismissed without prejudice in light of the Government's motion to dismiss, the final decision of the GSA contracting officer, and the November 11, 1999 appeal.

Letter from Appellants to the Board (Nov. 10, 2005), Exhibit 3 at 2.

The second question that arises with regard to our jurisdiction over this case concerns the subject matter of this dispute. In moving to dismiss this case, GSA relies not only on language of the Development Agreement, which would place a dispute among the parties outside the CDA, but also on language in the CDA itself which allegedly places the subject matter of this dispute beyond coverage of the Act.

Given the position taken by the Government in the earlier suit before the Court of Federal Claims, we find it perplexing that GSA now argues that the CDA is not applicable to the claim now before us.

The language of the CDA upon which GSA relies concerns the applicability of the Act to executive agency contracts. It reads:

> Unless otherwise specifically provided herein, this chapter applies to any express or implied contract (including those of the nonappropriated fund activities described in section 1346 and 1491 of Title 28) entered into by an executive agency for --
>
> > (1) the procurement of property, other than real property in being;
> > (2) the procurement of services;
> > (3) the procurement of construction, alteration, repair or maintenance of real property; or,
> > (4) the disposal of personal property.

41 U.S.C. § 602(a).

GSA writes:

> [T]he agreement was a conveyance of a pre-existing property interest held by Appellants to the government that also required Appellants to provide a sum of money and remediation of all adverse environmental conditions on the property, not to an existing structure. It did not involve the "procurement of construction . . . of real property" as contemplated by the CDA. 41 U.S.C. § 60[2](a)(3). As such, the dispute is over the conveyance of a pre-existing real property interest and not subject to the CDA and the Board's jurisdiction.

GSA's Comments Regarding Jurisdiction at 2-3.

We find GSA's reading of the Development Agreement unduly narrow. It is, of course, true that the agreement provides for the conveyance of a pre-existing real property interest. The agreement, however, is multipurpose. It also provides for tunnel and skyway construction by the MCDA and the City. Even more significantly, it calls for the remediation of the adverse environmental conditions of the property. In our view, this commitment on the part of the MCDA and the City can be viewed either as a service to be provided or an alteration, repair, or maintenance of the real property to be conveyed. In either case, this aspect of the agreement, just as the commitment of the MCDA and the City to provide construction, in our opinion, renders the Development Agreement subject to the CDA. *See RMI Titanium Co. v. Westinghouse Electric Corp.*, 78 F.3d 1125, 1129, 1142 (6th Cir. 1996) (contractual claim related to environmental remediation of premises was "within exclusive jurisdiction of the CDA").

Admittedly, an agreement such as the one before us, which clearly has been entered into for, among other reasons, the purpose of conveying a real property interest, does pose a problem with regard to CDA jurisdiction. In this regard, the Court of Appeals for the Federal Circuit has provided useful guidance for situations such as this where a contract has been entered for some purpose in addition to the mere conveyance of a real property interest. The Court writes:

> In view of the conflict posed by this dual-purpose contract, it is necessary to examine the nature of the dispute between the parties to resolve the jurisdictional issue.

Bonneville Associates v. United States, 43 F.3d 649, 654 (Fed. Cir. 1994). If the dispute in question does not relate to the conveyance of the real property interest but to some other

aspect of the contract, then it should be resolved pursuant to the CDA. Following the Court's advice in *Bonneville*, we have examined the nature of the dispute now before us.

GSA contends that the dispute is one over the conveyance of a pre-existing real property interest. GSA's Comments Regarding Jurisdiction at 3. We disagree. The dispute in this case is not over the conveyance of the real property interest in question. The conveyance already took place several years ago. Rather, the present dispute concerns provisions in the Development Agreement, as amended, which deal with the liability of the MCDA and the City for costs associated with their continuing obligation, after conveyance, to provide remediation of adverse soil conditions known to exist in the property. Given the nature of the dispute in this case, therefore, we are persuaded that we have the jurisdiction either under section 602(a)(2) or (3) of the CDA to resolve it, notwithstanding the mixed subject matter of the Development Agreement.[1]

Having concluded that the subject matter of the dispute before us does fall under the CDA, we turn next to the question of whether the parties may, through mutual agreement to a provision within their Development Agreement, remove such a dispute from CDA coverage or applicability. This they cannot do. The provision is contrary to law to the extent that it attempts to limit the reach of the CDA. It is well settled that a contract provision "cannot stand" to the extent that it attempts to defeat jurisdiction of the CDA. *Burnside-Ott Aviation Training Center v. Dalton*, 107 F.3d 854, 858 (Fed. Cir. 1997).

Timeliness

GSA's concern regarding the timeliness of this appeal rests on the fact that the notice of appeal was stamped as received by the Board on November 15, 1999. The elapsed time between the contracting officer's decision of August 9, 1999, and the date of the Board's receipt of the notice of appeal, therefore, is said to be ninety-eight days -- eight days more than the ninety-day period provided under the CDA for appeal of a contracting officer's final decision. *See* 41 U.S.C. § 606. For this reason the Government sought and received from the Board permission to engage in limited discovery to determine, if possible, the exact date that appellants received the contracting officer's final decision.

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[1] GSA distinguishes the facts in the Court's ruling in *Bonneville* from those in this case on the ground that the dispute in Bonneville involved repairs to a structure on the premises and not alteration of the terrain itself. We find the distinction irrelevant, for we can find no justification for restricting application of section 602(a)(3) of the CDA to structures permanently attached to real property but excluding application of the same section to the very terrain from which the structure derives its identity as real property.

In reply to the authorized discovery request, counsel for appellants states that, from a review of appellants' files, it would appear that the decision was received on August 25, 1999. The decision was addressed to three individuals, (1) Lawrence Moloney, counsel for appellants; (2) Keith Ford, Interim Executive Director of the MCDA; and (3) Jay M. Heffern, City Attorney.

Mr. Moloney's copy of the decision is not date-stamped. A facsimile cover sheet, however, found in the files of his law firm, indicates that, on August 25, a copy of the final decision was sent to the City Attorney's deputy, Mr. Michael Norton. Mr. Ford's copy of the decision does have a date stamp showing receipt on August 25. A handwritten note on the first page of the letter and personally signed by Mr. Ford indicates that he passed the letter on to an employee of the MCDA, Nikki Newman, for filing.

The explanation and documentation furnished by counsel for appellants in response to GSA's discovery request presents a persuasive case for August 25, 1999, as the date of receipt of the contracting officer's decision. Assuming this to be the date of actual receipt, even the date on which the Board received appellants' notice of appeal falls within the ninety-day period for filing an appeal. However, under the Board's Rules, notice of appeal is considered filed upon the earlier of (A) its receipt by the Office of the Clerk of the Board or (B) if mailed, the date on which it is mailed. A United States Postal Service postmark is prima facie evidence that the document with which it is associated was mailed on the date thereof. Rule 101(b)(5)(i) (48 CFR 6101.1(b)(5)(i) (2005)). The envelope in the Board's files, which contained appellants' notice of appeal, bears the postmark: "NOV 08 '99." GSA's concerns with the timeliness of this appeal, therefore, remain unsupported. We find this appeal to have been submitted well within the ninety days allotted under the CDA for filing.

Decision

The Government's motion to dismiss this case for lack of jurisdiction is **DENIED**.

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EDWIN B. NEILL
Board Judge

We concur:

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MARTHA H. DeGRAFF
Board Judge

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ALLAN H. GOODMAN
Board Judge