

Board of Contract Appeals

General Services Administration
Washington, D.C. 20405

DISMISSED FOR LACK OF JURISDICTION: November 16, 2000

GSBCA 15420

TMD U.S.A., INC./VINCENT SCHICKLER,

Appellants,

v.

GENERAL SERVICES ADMINISTRATION,

Respondent.

Vincent Schickler, President of TMD U.S.A., Inc., Smithtown, NY, appearing for Appellants.

Robert T. Hoff, Office of General Counsel, General Services Administration, Washington, DC, counsel for Respondent.

Before Board Judges **DANIELS** (Chairman), **NEILL**, and **HYATT**.

DANIELS, Board Judge.

Respondent, the General Services Administration (GSA), moves the Board to dismiss for lack of jurisdiction an appeal filed by TMD U.S.A., Inc., and its owner-president, Vincent Schickler. The motion is well taken.

Background

GSA accepted from TMD U.S.A., Inc., a tender of rates for ocean freight forwarding services for a one-year period ending on January 31, 1993. During that year, GSA put TMD in non-use status and placed orders with other firms for ocean freight forwarding services. TMD submitted to the contracting officer a claim for damages incurred as a result of an alleged breach of contract. The contracting officer determined that TMD was entitled to \$158. TMD then appealed the contracting officer's decision. It maintained that the agency's having put the firm in non-use status was improper and sought damages of \$49,999.99 resulting from the action. On October 31, 1996, the Board determined that GSA had failed to follow its own regulations in putting TMD in non-use status. We held that TMD had

proven damages of \$395 and awarded that amount to the company. TMD U.S.A., Inc. v. General Services Administration, GSBCA 12296, 96-2 BCA ¶ 28,613.

On October 4, 2000, TMD and Mr. Schickler filed a notice of appeal from a GSA contracting officer's deemed denial of a claim they had submitted to him. The notice of appeal states that TMD is a "One Man Closed Corporation." Notice of Appeal at 1. The notice alleges that after improperly putting TMD in non-use status, the agency "then debarred the plaintiff without cause . . . for over five years which created and caused a loss of over 75 percent of the plaintiff's livelihood of yearly business income." Id. at 3. Further, according to the notice, during the years from 1983 to 1992, TMD averaged \$46,093.73 in profits from its business with the Federal Government under contract with GSA. Id. at 5, 9. The notice of appeal asserts that TMD and Mr. Schickler submitted to a contracting officer a claim for damages in the amount of \$253,515.52 (5.5 years of debarment times \$46,093.75¹), which represents "damages and loss [sic] business profits [resulting from the debarment's] depriving and interference [with] the plaintiff's right and ability to earn a living and pursue Government Federal business contracts and bids and offerings for over six years without cause." Id. at 8. No decision was issued on the claim within sixty days of its submission. Id. at 1.

Following receipt of the notice of appeal, GSA filed a motion to dismiss the case for lack of jurisdiction. GSA does not deny that TMD and Mr. Schickler submitted the claim referenced in the notice of appeal, or that the contracting officer did not issue a decision on the claim. GSA reads the notice to say that the damages claimed were the result of the agency's decision to debar TMD and Mr. Schickler. The agency maintains, "GSA's authority to debar a contractor does not arise under contract terms, and thus debarment is not subject to appeals procedures of the Contract Disputes Act of 1978 (41 U.S.C. § 601 et seq.)." Motion to Dismiss at 1. In support of its position, GSA cites Ben M. White Co., ASBCA 39444, 90-3 BCA ¶ 23,115.

In response to the motion, appellants say that their "claim as set forth includes damages arising strictly from acts committed during the contract year or as a direct result of the contract between GSA and [TMD]." Opposition to Motion at 1. Further, "had [TMD] not had the contract with the GSA, then no improper debarment or suspension would have taken place, because GSA based its suspension and debarment solely on the acts alleged to have occurred between the parties during the contract period. Therefore the contract itself contains the origin of the dispute, and all acts committed by the government arise from the contract." Id.

Discussion

The analysis and conclusion of the Armed Services Board of Contract Appeals (ASBCA) in White are sound and directly relate to this case. As the ASBCA explained, a board of contract appeals has jurisdiction over claims arising under the Contract Disputes Act. 41 U.S.C. § 606 (1994). That Act --

¹The total is actually one penny more than the product of the two numbers.

applies to any express or implied contract . . . 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.

Id. §602(a). The Act covers only these contracts. "It does not cover all government contracts." Coastal Corp. v. United States, 713 F.2d 728, 730 (Fed. Cir. 1983). For example, the Act does not extend to implied contracts to give bids fair and honest consideration, so boards of contract appeals do not have jurisdiction over claims arising from such contracts. Id. at 731.

Further following the ASBCA's analysis in White, if a claim for damages resulting from a debarment arises from any contract at all, that contract must be an implied contract to consider bids and award contracts fairly. This is because even though a debarment may have resulted from a firm's performance under a contract, the impact of the debarment -- the damages alleged -- comes from the failure of the Government to award future contracts. Since boards of contract appeals do not have jurisdiction over claims arising from implied contracts to consider bids and award contracts fairly, they do not have jurisdiction over claims for damages resulting from debarments.

GSA appears to be correct in reading the notice of appeal to say that the damages claimed were the result of a debarment. It is conceivable, however, that in their response to the motion, appellants are asserting that some of the damages they seek in this case result from GSA's having placed TMD in non-use status while the contract for ocean freight forwarding services during the year ending on January 31, 1993, was in effect. To the extent that appellants are seeking such damages, the claim is barred by the doctrine of res judicata, which prevents litigation of grounds for recovery that were previously available to the parties. There is an identity of parties between this case and TMD U.S.A., Inc. v. General Services Administration, GSBCA 12296, 96-2 BCA ¶ 28,613. (Since TMD is by its own description a "One Man Closed Corporation," we consider TMD to be the same entity as TMD and its owner-president.) Damages resulting from GSA's action under the contract in question were at issue in that case, and the Board decided the extent to which they should be awarded to TMD. If TMD is now claiming damages which it did not seek in that case, those damages are based on the same core of operative facts as the ones at issue there and could and should have been raised while that case was pending. Jet, Inc. v. Sewage Aeration Systems, 223 F.3d 1360, 1362-63 (Fed. Cir. 2000); Finch v. Hughes Aircraft Co., 926 F.2d 1574, 1577 (Fed. Cir. 1991); Zinger Construction Co., GSBCA 11039, 91-3 BCA ¶ 24,066, at 120,483, reconsideration denied, 92-3 BCA ¶ 25,039, motion to vacate denied, 93-1 BCA ¶ 25,426 (1992).

Decision

GSA's motion is granted. The case is **DISMISSED FOR LACK OF JURISDICTION**.

STEPHEN M. DANIELS
Board Judge

We concur:

EDWIN B. NEILL
Board Judge

CATHERINE B. HYATT
Board Judge