Board of Contract Appeals
General Services Administration
Washington, D.C. 20405

DISMISSED FOR LACK OF JURISDICTION: January 28, 2003

GSBCA 15698

TOM AND TONY'S AUTO WRECKER SERVICE,

Appellant,

v.

GENERAL SERVICES ADMINISTRATION,

Respondent.

Sam Zalman Gdanski, Suffern, NY, counsel for Appellant.

Kelly A. Gillin, Office of General Counsel, General Services Administration, Washington, DC, counsel for Respondent.

Before Board Judges **PARKER**, **NEILL**, and **HYATT**.

PARKER, Board Judge.

The General Services Administration (GSA) moves to dismiss this appeal for lack of jurisdiction. For the reasons discussed below, the motion is granted and the appeal is dismissed.

Background

On March 9, 2001, Mr. Alan Belfiore, a GSA Fleet Service Representative in Fort Campbell, Kentucky, sent an electronic mail message to two United States Army employees regarding the use of Tom and Tony's Auto Wrecker Service, a motor vehicle repair and maintenance business in the Fort Campbell area. The message advised the recipients that they should not send additional vehicles to Tom and Tony's for service until further notice. The message was forwarded to other government personnel by another GSA employee later that same day.

On March 14, Belfiore sent another e-mail clarifying his prior message to state that Tom and Tony's was not being excluded from work, but rather that the work distributed

among local vendors had to be distributed more evenly. It had come to Mr. Belfiore's attention that Tom and Tony's had been receiving a disproportionalely large share of the "micro-purchase" service work compared to the other area vendors. A micro-purchase is defined in the Federal Acquisition Regulation (FAR) as "an acquisition of supplies or services . . . , the aggregate amount of which does not exceed $2,500 . . . ." 48 CFR 2.101 (2001). Pursuant to the regulation, "to the extent practicable, micro-purchases shall be distributed equitably among qualified suppliers." Id. 13.202(a)(1).

In response to Tom and Tony's complaint that the initial e-mail message constituted "breaches" of a contractual relationship, Ms. Debbie Tague, GSA's Kentucky Fleet Manager, explained to the company that during the past nine months Tom and Tony's had received $111,324 of GSA's fleet business, compared to a total of $87,075 for all of the other twenty-four local vendors combined. Ms. Tague explained that Mr. Belfiore's e-mail message was sent in light of this disparity and the FAR guideline for distributing micro-purchases. She also explained that Tom and Tony's was advised at the inception of its participation as a qualified GSA vendor that it, like the other vendors, would be an open market repair source and that no contract existed between GSA and any of the vendors. Ms. Tague did agree in response to the complaint to send another "corrective" e-mail message clarifying the situation, and she did so on April 2, 2001.

On October 4, 2001, Tom and Tony's submitted "claim letters" to GSA, also entitled Requests for Equitable Adjustments, demanding $251,931.65 in damages stemming from breaches of contract and/or reductions in GSA business. In her written response, Ms. Tague again explained that applicable regulations required that micro-purchases be distributed equitably to all qualified vendors and that Tom and Tony's was entitled only to a proportionate amount of the work. She said that all agencies had been informed that Tom and Tony's shop could be used for repair work but that their use must be in accordance with procurement regulations. Ms. Tague also pointed out that, subsequent to Mr. Belfiore's e-mail message, during the period from April 15, 200,1 to October 9, 2001, Tom and Tony's was awarded approximately twenty-seven percent of all repair work performed in the Fort Campbell area, receiving $22,200 worth of work compared to $59,000 for the other seventeen qualified vendors combined. Finally, Ms. Tague reminded Tom and Tony's that no contract existed with GSA and that, as a consequence, Tom and Tony's could not be entitled to an equitable adjustment. Tom and Tony's appealed Ms. Tague's decision to the Board.

Discussion

GSA has moved to dismiss Tom and Tony's appeal for lack of jurisdiction. In considering this motion, the Board is obliged to assume Tom and Tony's factual allegations to be true and to draw all reasonable inferences in its favor. Paul A. Preston, GSBCA 14517, 99-2 BCA ¶ 30,515, at 150,686 (citing Henke v. United States, 60 F.3d 795, 797 (Fed. Cir. 1995)). At the same time, however, Tom and Tony's bears the burden of establishing the Board's jurisdiction. Id.

Pursuant to the Contract Disputes Act, 41 U.S.C. § 607(d) (2000), "[E]ach agency board shall have jurisdiction to decide any appeal from a decision of a contracting officer

(1) relative to a contract made by its agency and (2) relative to a contract made by any other agency when such agency or the Administrator has designated the agency board to decide the appeal." The Contract Disputes Act limits the Board's jurisdiction to disputes arising from contracts, express or implied, for the procurement of property, services, or construction, or for the disposal of personal property. Coastal Corp. v. United States, 713 F.2d 728, 730 (Fed. Cir. 1983); Spencer-Adams Paint Co. v. General Services Administration, GSBCA 13762, 96-2 BCA ¶ 28,598, at 142,780.

There is no contract upon which Tom and Tony's can rely to invoke the Board's jurisdiction. As one of many local vendors, Tom and Tony's was eligible to receive individual contracts for repair work, and the company did receive many such contracts. If a dispute had arisen with respect to one of those contracts, Tom and Tony's could certainly have appealed an adverse contracting officer's decision to the Board. But Tom and Tony's "claim" here does not relate to any of the individual repair contracts to which it had been a party. Here, Tom and Tony's is claiming that GSA breached a contract by telling its agency customers not to use Tom and Tony's for their repair work. The Board does not have jurisdiction to hear such a complaint because Tom and Tony's did not have a contract with GSA to do repair work. It was simply an open market source for individual repair jobs.

Tom and Tony's assertion that an "implied contract" exists is without merit. In a January 17, 2002, order requiring Tom and Tony's to file a proper complaint, the Board stated that if Tom and Tony's were asserting the existence of an implied-in-fact contract, "the appellant must plead the factual and legal prerequisites of an implied-in-fact contract." The Board went on to provide the four requirements for establishing such a contract: (1) mutuality and intent to contract; (2) consideration; (3) lack of ambiguity in offer and acceptance; and (4) actual authority in the Government representative to bind the Government. See Barrett Refining Corp. v. United States, 242 F.3d 1055, 1060 (Fed. Cir. 2001); Prudential Insurance Co. of America v. United States, 801 F.2d 1295, 1297 (Fed. Cir. 1986).

Tom and Tony's has failed to plead, much less provide any evidence of, factual circumstances that might establish an implied-in-fact contract. Without any evidence of a mutual intent to contract, consideration, or offer and acceptance, there can be no contract, implied or otherwise.

Decision

Tom and Tony's has failed to establish the existence of a contract upon which the Board's jurisdiction may be invoked. Accordingly, the appeal is **DISMISSED**.

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ROBERT W. PARKER
Board Judge

We concur:

EDWIN B. NEILL
Board Judge

CATHERINE B. HYATT
Board Judge