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PSBCA

APPEAL OF MIDWEST TRANSPORT, INC.

UNDER CONTRACT 015KE ET AL.

March 21, 2008

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OPINION OF THE BOARD ON MOTION TO DISMISS

Appellant, Midwest Transport, Inc., held a number of mail transportation Contracts with Respondent, United States Postal Service. In a 2005 letter to Appellant, Respondent asserted that it was entitled to recover certain rebates or discounts Appellant received from its fuel supplier. For a substantial period thereafter, the parties attempted to negotiate a settlement of Appellant's alleged liability but failed to reach an agreement. In 2007, Appellant filed an appeal of the 2005 letter.

Respondent has filed a motion to dismiss, contending that the contracting officer's 2005 letter was not a final decision under the Contract Disputes Act and that, accordingly, the Board is without jurisdiction to consider Appellant's appeal. Appellant opposes the motion.

The following findings are made solely for purposes of deciding the motion.

FINDINGS OF FACT

1. Appellant held approximately 132 mail transportation Contracts with Respondent, having become a party to the Contracts via novation from a predecessor company in late 2003 (Appellant's First Amended Complaint filed November 23, 2007 ("Complaint"), ¶¶ 4, 5, 10, 12, 18; Attachment A to Appellant's Response to Respondent's Motion to Suspend Proceedings, "Answer and Counterclaims of Defendant Midwest Transport, Inc.," ¶¶ 1, 20, Counterclaim ¶ 27).

2. Between October 2003 and August 2005, Appellant and its predecessor received discounts or rebates from their fuel supplier, Pilot Corporation (Complaint ¶¶ 29, 30, 33, 35, 36 and Attachments 2 and 5).

3. By letter dated October 31, 2005, Respondent's Manager, Surface Transportation, at Postal Service Headquarters, advised Appellant that the Postal Service Office of Inspector General ("OIG") had reviewed Pilot Corporation's records of fuel discounts/rebates granted to Appellant and its predecessor. According to the letter, the investigation revealed that Appellant and its predecessor had received fuel discounts/rebates from Pilot Corporation totaling \$1,051,523.78. The letter did not explain further the OIG's investigation or provide details of Respondent's calculation of the amount of discounts/rebates, and it did not identify the individual Contracts at issue. The letter concluded,

"The intent of the USPS Fuel Purchase Plan, which is incorporated into all of the Postal Service highway transportation Contracts, is to specifically compensate the supplier for no more than their actual cost of fuel per gallon. Therefore, highway transportation suppliers are required to pass any fuel rebates or discounts back to the Postal Service. Based on our records and information provide[d] by the Inspector General, it has been determined that the Postal Service is entitled to \$1,051,523.78 for the fuel overpayment to MTI [Appellant's predecessor] and MWT [Appellant]. Payment should be made within 30 days of receipt of this letter.

You are reminded that all future cost savings due to rebates received must be passed on to the Postal Service in accordance with the Fuel Purchase Plan. Should you wish to discuss this matter in more detail, please feel free to contact me."

(Complaint ¶ 20 and Attachment 2; Declaration of Russell Sykes, ¶ 2).

4. The Manager, Surface Transportation, did not intend the letter to be a final decision under the Contract Disputes Act and did not intend that his letter would initiate litigation with Appellant (Declaration of Russell Sykes, ¶ 2).

5. The parties, acting through counsel, attempted to resolve the matter informally thereafter for a substantial period of time, but they eventually reached an impasse (Complaint ¶ 20; Declaration of Russell Sykes, ¶ 3; Appellant's Response to Respondent's Motion to Dismiss, Statement of Facts, p. 4).

6. On October 15, 2007, Appellant filed this appeal of the October 31, 2005 letter.

DECISION

Respondent argues that this appeal should be dismissed for lack of jurisdiction because Appellant's potential liability to Respondent stemming from Appellant's receipt of fuel purchase discounts/rebates has not been the subject of a contracting officer's final decision. Absent a final decision by the contracting officer asserting a Postal Service claim against Appellant, the Board is without jurisdiction to consider such claim. See 41 U.S.C. §§605(a), 607(c); *Paragon Energy Corp. v. United States*, 227 Ct. Cl. 176, 177, 645 F.2d 966, 967 (1981); *Larry J. Miller*, PSBCA No. 3632, 95-1 BCA ¶ 27,448.

Appellant counters by arguing that the October 31, 2005 letter from Respondent's Manager, Surface Transportation (Finding 3), was a contracting officer's final decision constituting a Postal Service claim and that Appellant's appeal of that letter gives the Board jurisdiction. For two reasons, we reject Appellant's assertion of Board jurisdiction based on the October 31, 2005 letter.

First, there is no evidence or allegation that the author of the letter was the contracting officer on the Contracts at issue or that he was a contracting officer at all. Appeal of a decision signed by one who is not a contracting officer does not support Board jurisdiction. See 41 U.S.C. §§605(a), 606, 607(c); *Dulles Networking Associates, Inc.*, VABCA-6077, VABCA-6078, 00-1 BCA ¶ 30,775; *Iowa-Illinois Cleaning Co. v. General Services Administration*, GSBCA No. 12595, 95-2 BCA ¶ 27,628 at 137,743.

Second, even if the Manager, Surface Transportation, was an appropriate contracting officer when he signed the October 31, 2005 letter, the letter does not reflect that it is a final decision asserting Respondent's claim against Appellant regarding the fuel purchase rebates. For example, the letter did not include the standard language identifying the letter as a final decision and advising Appellant of its appeal rights, language that Postal Service regulations require to be included in contracting officers' final decisions, 39 C.F.R. §601.109 (g) (7); 70 Fed. Reg. 20296, April 19, 2005. While that omission is consistent with a conclusion that the letter was not a final decision, Appellant correctly notes that under *Placeway Constr. Corp. v. United States*, 920 F.2d 903 (Fed. Cir. 1990), absence of the standard appeal language, in and of itself, does not prevent the October 31, 2005 letter from being considered a final decision under the Contract Disputes Act. However, in *Placeway* the decision of the contracting officer at issue was the government's final word on its claim against *Placeway*. The Court found that the contracting officer "effectively granted the government's claim . . . when he declined to pay *Placeway* the balance due on the Contract." *Id.* at 906. To the same effect is *Alliant Techsystems, Inc. v. United States*, 178 F.3d 1260 (Fed. Cir. 1999), where the contracting officer's letter unequivocally rejected *Alliant's* position and "the contracting officer indicated that his decision was effective and not subject to further discussion." *Id.* at 1267- 1268. Respondent's October 31 letter, in contrast, did not effect collection of the discounts/rebates, as in *Placeway*, or indicate that Respondent's stated position was not subject to further discussion, as in *Alliant*. Neither Respondent's conduct nor the language of the October 31 letter reflected that a contracting officer had given his final word on collection of the fuel discounts/rebates.

Furthermore, in *Sharman Co. v. United States*, 2 F.3d 1564, 1571 (Fed. Cir. 1993), reversed on other grounds, *Reflectone, Inc. v. Dalton*, 60 F.3d 1572 (Fed. Cir. 1995), the Court distinguished *Placeway* by finding that a contracting officer's demand letter that omitted the standard final decision language and invited the contractor to submit a proposal for deferment of collection if it disputed the amount claimed by the government was not a final decision on a government claim. In his October 31, 2005 letter, the Manager, Surface Transportation, concluded, "Should you wish to discuss this matter in

more detail, please feel free to contact me." He thus offered Appellant an opportunity to address the issue through further discussions in a manner comparable to the offer in Sharman.

Moreover, it is apparent that from the sparse information provided in the letter, Respondent could not reasonably have expected that Appellant would have a practical understanding of the method or calculations by which the stated amount was derived without some discussion between the parties. The October 31 letter did not set forth a clear statement of the legal basis of the demand and did not include the OIG report or details of the OIG investigation (Finding 3). Appellant's alleged liability was potentially based on fuel purchases under up to approximately 132 Contracts over two years (Findings 1, 2, 3). Discussions between the parties would have been necessary, at a minimum, to flesh out Respondent's demand. Such discussions were invited by the letter's author, and Appellant evidently understood that the Manager was extending such an invitation as it participated in negotiations for a lengthy period after receiving the letter and before filing its appeal (Findings 5, 6).

The letter's omission of the standard language, the apparent but unexplained complexity of Respondent's calculation of Appellant's substantial potential liability, the lengthy discussions after issuance of the letter, and Appellant's failure to file an appeal with the Board for two years after receiving the letter all support Respondent's argument that the letter was not a final decision, and also that Appellant did not consider it to be a final decision when received. That the Manager, Surface Transportation, subjectively intended his letter to open discussions and not to be a final decision (Finding 4) is not dispositive, but it is consistent with the circumstantial evidence discussed above that the October 31, 2005 letter was not a final decision regarding Appellant's potential liability under the Contracts' fuel purchase plan.

According to Appellant, the October 31, 2005 letter is an appealable final decision because it met all the requirements for a claim as set forth in *Reflectone, Inc. v. Dalton*, 60 F.3d 1572 (Fed. Cir. 1995). Appellant points to language in *Reflectone* stating that under the applicable FAR provision there are "only three requirements of a non-routine 'claim' for money: that it be (1) a written demand, (2) seeking, as a matter of right, (3) the payment of money in a sum certain." *Id.* at 1576. Appellant finds the three elements present in the October 31 letter and concludes that, therefore, it is an appealable, Postal Service claim against Appellant. [FN1]

In *Reflectone*, the Court considered whether a contractor's demand for money under the Contract could be considered a "claim" if the subject of the demand had not first ripened into a dispute between the contractor and the Government. The Court determined that the FAR definition of a claim did not require as an additional element to the three mentioned above--in writing, as a matter of right, for a sum certain--that the subject of the claim have been in dispute before its submission, reversing the Court's previous decisions requiring such a pre-existing dispute. The Court did not say that every letter from a contracting officer that states the government's position on a contractor's liability by identifying the amount of potential liability and the contractual basis for the government's position automatically becomes an appealable final decision on a government claim. As discussed above, lacking the requisite finality, the October 31, 2005 letter stating Respondent's view as to Appellant's Contract liability did not become a Postal Service claim entitling Appellant to file an appeal.

Respondent's regulations reflect Postal Service policy that Contract disputes be settled if possible: "Efforts to resolve differences should be made before the issuance of a final decision . . ." 39 C.F.R. §601.109(b); 70 Fed. Reg. 20295, April 19, 2005. The policy is found in the Contract Disputes Act as well. Cibinic and Nash, Administration of Government Contracts, Third Ed., 1995, at 1282-1283. [FN2] This policy encourages contracting officers to gather and consider relevant information concerning a potential dispute-- information that could certainly include the views of the contractor--to attempt to negotiate a settlement, and to issue a final decision only if negotiations are unsuccessful. [FN3] This requires that Respondent's officials be able to initiate discussions with a contractor, through a statement of position, tentative demand, or otherwise, without automatically authorizing the contractor to bypass settlement efforts and initiate litigation. See Crippen & Graen Corp. v. United States, 18 Cl. Ct. 237, 240 (1989). We are satisfied that the Manager, Surface Transportation, was attempting to engage Appellant in the negotiation process through the tentative determination of liability expressed in the October 31, 2005 letter. See Sharman Co. v. United States, 2 F.3d 1564, 1571 (Fed. Cir. 1993), reversed on other grounds, Reflectone, Inc. v. Dalton, 60 F.3d 1572 (Fed. Cir. 1995).

Respondent's October 31, 2005 letter was not a contracting officer's final decision asserting a claim against Appellant. Absent a final decision, we are without jurisdiction to consider Appellant's appeal. Respondent's Motion to Dismiss is granted, and the appeal is dismissed. [FN4]

Norman D. Menegat

Administrative Judge

Board Member

I Concur:

William A. Campbell

Administrative Judge

Chairman

I Concur:

David I. Brochstein

Administrative Judge

Vice Chairman

FN1. The FAR does not apply to Respondent's Contracts, 39 U.S.C. §410(a); Overflo Public Warehouse, Inc., PSBCA Nos. 4531, 4550, 4649, 04- 1 BCA ¶ 32,488 at 160,713, and we have not been provided copies of the Contracts or a definition of "claim" applicable to the Contracts at issue in this appeal. Appellant's argument assumes a definition comparable to that in the FAR, and we make the same assumption for purposes of considering Appellant's

position.

FN2. The legislative history of the CDA includes, "It is still the policy of Congress that contractor claims should be resolved by mutual agreement, in lieu of litigation, to the maximum extent possible." 124 Cong. Rec. H. at 10725.

FN3. "Hence, a final decision under the Disputes clause has always been regarded as a last resort." Cibinic and Nash, *Administration of Government Contracts*, Third Ed., 1995, at 1282.

FN4. In view of this disposition, we have not addressed Respondent's other grounds for dismissal or its alternative Motion to Suspend Proceedings. Respondent's Motion to Strike Sentence from Board's Notice of Docketing and Answer Due Date is moot. Appellant requested oral argument on the motions, but we found that the written submissions adequately presented the parties' positions and were sufficient to decide this motion. Accordingly, the request for an oral hearing is denied.

PSBCA No. 6132