United States Court of Appeals for the Federal Circuit

AVUE TECHNOLOGIES CORPORATION,
Appellant

v.

SECRETARY OF HEALTH AND HUMAN SERVICES, ADMINISTRATOR OF THE GENERAL SERVICES ADMINISTRATION,
Appellees

2022-1784

Appeal from the Civilian Board of Contract Appeals in Nos. 6360, 6627, Administrative Judge Kyle E. Chadwick, Administrative Judge Kathleen J. O'Rourke, Administrative Judge Patricia J. Sheridan.

Decided: March 6, 2024

MICHAEL BHARGAVA, Nichols Liu LLP, Washington, DC, argued for appellant. Also represented by ANDY LIU, ROBERT NICHOLS, MADISON PLUMMER.

DANIEL B. VOLK, Commercial Litigation Branch, Civil Division, United States Department of Justice, Washington, DC, argued for appellees. Also represented by BRIAN M. BOYNTON, PATRICIA M. MCCARTHY, CORINNE ANNE NIOSI.

Before STOLL, CUNNINGHAM, and STARK, *Circuit Judges*.

STARK, *Circuit Judge*.

Avue Technologies Corporation ("Avue") appeals a decision by the Civilian Board of Contract Appeals ("Board"), which dismissed for lack of jurisdiction Avue's appeal of a claim under the Contract Disputes Act ("CDA"). Avue nonfrivolously alleged that it is party to a procurement contract with the Food and Drug Administration ("FDA") via incorporation of Avue's end-user licensing agreement ("EULA") into an FDA task order, which is governed by a Federal Supply Schedule ("FSS") contract between a third-party and the General Services Administration ("GSA"). Such an allegation is adequate to establish the Board's jurisdiction over Avue's CDA claim. Whether Avue actually is a "contractor" for purposes of pressing the CDA claim is a matter (among others) on which Avue will have to prevail on the merits. We vacate the Board's dismissal and remand with instructions that the Board provide Avue with an opportunity to prove its claim.

I

Avue develops software that it sells to private and government entities, allowing them to automate administrative tasks while complying with statutory, regulatory, and policy requirements. Avue does not sell licenses to its software directly to federal agencies. Instead, it sells annual subscriptions – to what it calls Avue Digital Services ("ADS") – through third party Carahsoft Technology Corporation ("Carahsoft"), an authorized reseller which is itself party to an FSS contract with GSA. Avue attempts to govern its relationship with end users of its software via an

EULA, which Avue calls a master subscription agreement ("MSA").[1]

In 2012, Carahsoft and GSA amended the FSS contract to which they were both parties to include reference to Avue's ADS. The form effectuating this modification provided, among other things, that the "GSA approved EULA rider [is] hereby incorporated into this contract." J.A. 2836. An attachment to the modification form included an unsigned, undated template version of Avue's MSA, containing the words "[CLIENT NAME]" on the title page. The attached version of the MSA states, just above the empty signature blocks, "in the event this agreement is incorporated into a governmental contract award, execution by the parties is not necessary." J.A. 3001 (capitalization altered). The MSA further states that, "[f]or federal government Subscribers, the Subscribed Services are commercial items under [48 C.F.R. §] 2.101 and this standard commercial license to the Subscribed Services shall be incorporated into and attached to the applicable contract." J.A. 2993.

In September 2015, the FDA placed a task order under the FSS contract for a subscription to Avue's ADS ("Task Order"). The Task Order was for one base year and four option years. Sometime in mid-September 2016, Avue learned through "an anonymous text message" that the FDA "did not intend to renew its Avue subscription," which

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[1] The parties use the terms "MSA" and "EULA" interchangeably. *See, e.g.*, Opening Br. at 8 n.1; Oral Arg. 1:58-2:05, *available at* https://oralarguments.cafc.uscourts.gov/default.aspx?fl=22-1784_10052023.mp3 (Avue counsel stating EULA and MSA are interchangeable terms). We do so here as well. Both terms refer to the "GSA approved EULA rider [that was] []incorporated into [the amended FSS] contract" in 2012. J.A. 2836.

was due to expire on September 29, 2016. J.A. 5789; *see also* J.A. 5288. Avue also "immediately conducted an analysis of the account activity and use of FDA account holders." *Id.* On September 18, 2016, Avue accused the FDA of taking "acts in violation of Avue's end user terms and conditions, intellectual property rights, and the Trade Secrets Act." *Id.* On September 29, 2016, when the FDA chose not to exercise its option, the Task Order terminated.

Over the ensuing months, Avue sent a "Cease and Desist Letter" and a claim letter to the FDA's contracting officer. J.A. 6040-41 (cease and desist letter); J.A. 6069-86 (claim letter). Then, in a series of communications back to Avue in 2017 and 2018, the contracting officer denied Avue's allegations, pointing out that the FDA's contract was with Carahsoft, not Avue. J.A. 6067-68 (FDA's response to cease and desist letter in October 2017); J.A. 6099 (FDA's response to claim letter in August 2018). The contracting officer also noted that "[i]f Avue wishes to pursue its 'claim,' it can do so by having Carahsoft assert a pass-through claim against the FDA on Avue's behalf." J.A. 6099.

On January 22, 2019, Avue filed an appeal at the Board of the contracting officer's denial of its claim.[2] Carahsoft

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[2] The government argues that Avue's Board appeal was untimely under 41 U.S.C. § 7104. Section 7104 requires a party to file an appeal with the Board "within 90 days from the date of receipt of a contracting officer's decision under [41 U.S.C. §] 7103." The government concedes it did not raise this issue with the Board. In any event, the FDA's August 17, 2018 letter did not start the clock governing Avue's appeal since it failed to adequately "inform the contractor of the contractor's rights," 41 U.S.C. § 7103(e); *see also Pathman Constr. Co. v. United States*, 817 F.2d 1573, 1578 (Fed. Cir. 1987), and the letter did not

did not sponsor Avue's claim. Avue asserted to the Board that it was appealing from a "deemed denial" of its claim. The United States Department of Health and Human Services (HHS), of which the FDA is a part, moved to dismiss Avue's appeal for lack of subject matter jurisdiction, arguing that Avue is not a "contractor" within the meaning of the CDA. The Board denied the HHS motion. After Avue filed a "protective" claim with GSA, the Board consolidated the appeal of the GSA claim with the ongoing appeal of the HHS claim.

Following discovery, the agencies and Avue cross-moved for summary judgment. Before ruling on the parties' motions, the Board *sua sponte* ordered supplemental briefing addressing whether a software license is a procurement contract subject to the CDA. After receiving the supplemental briefs, the Board dismissed Avue's appeal for lack of jurisdiction. The Board's opinion stated that it was not deciding whether Avue's "MSA establishes privity of contract between Avue and the Government." J.A. 4-5. Rather, the Board was dismissing because it agreed with the government's view that "even if the Board were to find that the . . . MSA establishes an independent contract between the Government and Avue as Avue alleges, [the Board] lack[ed] jurisdiction to decide the case because the MSA is not a procurement contract within the meaning of the CDA." J.A. 4 (internal quotation marks omitted). In the Board's view, "the MSA standing alone lack[ed] core

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indicate that it was the contracting officer's final decision, *see* J.A. 6099 (contracting officer stating "FDA will *continue to research* the allegations presented in Avue's 'claim'") (emphasis added); *see also* 48 C.F.R. § 33.211 (requiring contracting officer's written decision to include "paragraphs substantially as follows: 'This is the final decision of the Contracting Officer . . . .'").

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