

In the United States Court of Federal Claims

No. 11-598C

This Opinion Will Not Be Published in the U.S. Court of Federal Claims Reporter Because It Does Not Add Significantly to the Body of Law.

(Filed: June 7, 2012)

PHILIP EMIABATA, d/b/a NOVA
EXPRESS,

Plaintiff,

v.

THE UNITED STATES,

Defendant.

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OPINION

ALLEGRA, Judge:

Nova Express is a sole proprietorship mail delivery company owned by Philip Emiabata and registered with the State of Texas. *See Nova Exp. v. United States*, 80 Fed. Cl. 236 (2008).

In April 2000, October 2001, and January 2002, the United States Postal Service (USPS) awarded mail delivery contracts HCR 78653, 78640 and 773L5 to Nova Express. As the first of these contracts was about to expire, in June 2003, the contracting officer notified plaintiff that that contract would not be renewed. When the contract expired on its own terms, in September 2003, USPS continued to hold \$3,516.95 that plaintiff had earned prior to the contract's expiration. Also in September 2003, the contracting officer issued final decisions terminating plaintiff's two remaining contracts – which were to run until June 30, 2005 – for default.

On or about July 30, 2004, plaintiff filed three claims with the United States Postal Service Board of Contract Appeals appealing the USPS contracting officer's decisions to terminate Nova Express' contracts and seeking payment for services rendered under these contracts. Although it denied plaintiff's appeals of the contracting officer's decisions, the Board

held that plaintiff was entitled to recover any funds held by USPS with respect to the contracts to the extent that they exceeded USPS' procurement costs, together with interest under the Contract Disputes Act, 41 U.S.C. §§ 7101-09 (2011) (CDA). See *Nova Express*, No. 5101, 2007 WL 5442323 (P.S.B.C.A. June 11, 2007) (governing contract number HCR 78640); *Nova Express*, No. 5091, 2007 WL 1405725 (P.S.B.C.A. Apr. 30, 2007) (governing contract number HCR 773L5); *Nova Express*, No. 5102, 2008 WL 103951 (P.S.B.C.A. Jan. 10, 2008) (governing contract number HCR 78653). Plaintiff appealed these decisions to the Federal Circuit, but without success. See *Nova Express v. Potter*, 314 F. Appx. 297 (Fed. Cir. 2008) (dismissing plaintiff's appeal regarding HCR 78653 as untimely); *Nova Express v. Potter*, 277 F. Appx. 990, 993 (Fed. Cir. 2008) (affirming the Board's determinations that USPS' default termination of HCR 78640 was justified and that USPS was entitled to recover its procurement costs); *Nova Express v. Potter*, 289 F. Appx. 407, 411 (Fed. Cir. 2008) (upholding the Board's finding that HCR 773L5 was fairly terminated).

On February 2, 2009, plaintiff sent the contracting officer a certified letter purporting to be a "FINAL NOTICE" (emphasis in original) demanding that USPS pay plaintiff \$7,922.82 plus CDA interest from July 30, 2004 within ten days. USPS' Transportation Contracts Manager replied by certified mail on February 13, 2009. He disagreed with plaintiff's accounting, stating that, under the Boards' decisions, plaintiff was entitled only to \$1,291.41, plus interest – corresponding to the \$6,617.24 that had been withheld by USPS less \$5,326.20 in procurement costs. This letter noted, however, that because USPS was claiming damages under a fourth contract, HCR 320SE, the \$1,291.41 would be retained by USPS as a potential offset until that fourth claim was resolved.

On August 5, 2011, plaintiff sent another letter requesting a "final decision" on his claim for funds allegedly withheld on contracts HCR 78653, 78640, and 773L5. In response to that letter, USPS conducted a complete review of plaintiff's claims. On October 25, 2011, USPS sent plaintiff a letter indicating that it owed plaintiff \$6,128.84; included with the letter was a Postal Service Form 7406 for plaintiff to accept this amount. Defendant states that plaintiff has not responded to this letter.

On September 19, 2011, plaintiff filed a complaint against the United States in this court, alleging that the USPS has "forcefully withheld" \$10,577.59 due as payment to plaintiff for services performed under the three aforementioned mail-delivery contracts. Plaintiff seeks an order requiring payment of this amount, plus CDA interest. He also seeks \$89,423.24 in additional damages apparently relating to the nonpayment of income that plaintiff believes he is owed under the aforementioned mail-delivery contracts. On December 19, 2011, defendant moved to dismiss plaintiff's complaint under RCFC 12(b)(1), for lack of subject-matter jurisdiction.¹ Briefing on that motion has been completed. Argument is deemed unnecessary.

¹ After defendant filed this motion, the court dismissed two prior suits (Nos. 07-653C and 09-339C) that had been brought by plaintiff with respect to a different mail delivery contract. See *Emiabata v. United States*, 102 Fed. Cl. 787 (2012).

Deciding a motion to dismiss “starts with the complaint, which must be well-pleaded in that it must state the necessary elements of the plaintiff’s claim, independent of any defense that may be interposed.” *Holley v. United States*, 124 F.3d 1462, 1465 (Fed. Cir. 1997) (citations omitted); *see also Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 555 (2007). The plaintiff must establish that the court has subject matter jurisdiction over its claims. *Reynolds v. Army & Air Force Exch. Serv.*, 846 F.2d 746, 748 (Fed. Cir. 1988); *Hansen v. United States*, 65 Fed. Cl. 76, 94 (2005). This court recognizes that plaintiff is acting pro se before this court, and thus the court will hold the form of plaintiff’s submissions to a less stringent standard than those drafted by an attorney. *See Reed v. United States*, 23 Cl. Ct. 517, 521 (1991) (citing *Estelle v. Gamble*, 429 U.S. 97 (1976)). Having reviewed plaintiff’s complaint, defendant’s motion and the briefing on that motion, this court, however, is certain that it lacks jurisdiction to consider the claims that plaintiff raises.

Plaintiff’s complaint first seeks to enforce the decisions reached by the Postal Service Board of Contract Appeals. This is not a case like *Bianchi v. United States*, 475 F.3d 1268 (Fed. Cir. 2007), in which the plaintiff seeks to enforce a settlement agreement resolving a Board case. Rather, here, plaintiff seeks to enforce the Board’s decisions themselves. This court is not empowered to do this. *See* 28 U.S.C. §§1491(a)(1)-(2); *see also Nwogu v. United States*, 94 Fed. Cl. 637, 657 (2010); *Bianchi v. United States*, 68 Fed. Cl. 442, 450 (2005), *rev’d on other grounds*, 475 F.3d 1268 (Fed. Cir. 2007). Rather, that power likely lies with the Board itself. *See Elec. Data Sys. Fed. Corp.*, 1989 WL 120452 (G.S.B.C.A. Oct. 10, 1989). Moreover, this court lacks jurisdiction to review the orders or decisions rendered by a Board of Contract Appeals. That jurisdiction lies exclusively with the Federal Circuit. *See* 41 U.S.C. §§ 7104(a), 7104(b)(1), 7107(a)(1)(A); *see also LAI Servs., Inc. v. Gates*, 573 F.3d 1306, 1310 (Fed. Cir. 2009).

Nor may this court consider anew claims previously rejected by the Postal Service Board, as may be the case with respect to the remainder of the damages that plaintiff seeks. Having already elected to seek review of its contract claims with the Board, plaintiff may not bring those same claims before this court. *See Texas Health Choice, L.C. v. Office of Pers. Mgmt.*, 400 F.3d 895, 899 (Fed. Cir. 2005) (“Courts have consistently interpreted the CDA as providing the contract with an either-or choice of forum.”); *Nat’l Neighbors, Inc. v. United States*, 839 F.2d 1539, 1542 (Fed. Cir. 1988) (“Once a contractor makes a binding election . . . to appeal the contracting officer’s adverse decision to the appropriate board of contract appeals, that election must stand and the contractor can no longer pursue its claim in the alternate forum.”); *Tuttle/White Constructors, Inc. v. United States*, 656 F.2d 644, 649 (Ct. Cl. 1981). And even if this were not the case from a jurisdictional perspective, there is little doubt that the decisions of the Postal Service Board, which are now final, are entitled to *res judicata* effect, precluding plaintiff from relitigating the same claims (or claims that should have been litigated before the Board) here. *See Emiabata v. United States*, 90 Fed. Cl. 22, 29 (2009); *see also Zoeller v. United States*, 65 Fed. Cl. 449, 457 (2005); *Ingalls Shipbuilding, Inc. v. United States*, 21 Cl. Ct. 117, 122-25 (1990).

Based on the foregoing, the court concludes that it lacks jurisdiction over plaintiff's complaint. Defendant's motion to dismiss under RCFC 12(b)(1) is hereby **GRANTED**. The Clerk shall dismiss the complaint.

IT IS SO ORDERED.

s/ Francis M. Allegra
Francis M. Allegra
Judge