In the United States Court of Federal Claims

No. 05-1246C
(Filed: August 22, 2006)

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RODGER SMITH, pro-se                          *
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                      Plaintiff,              *
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            v.                                *
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THE UNITED STATES,                            *
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                      Defendant.              *
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ORDER GRANTING MOTION TO DISMISS

This action comes before the court on a motion by the United States government ("government") to dismiss for lack of jurisdiction pursuant to Rule 12(b)(1) of the Rules of the United States Court of Federal Claims ("RCFC"). The government contends that the claim of the plaintiff, Rodger Smith ("Smith" or "plaintiff"), for damages based on a contract with a non-appropriated fund instrumentality ("NAFI") is barred by the non-appropriated funds doctrine and must be dismissed for lack of subject matter jurisdiction. For the reasons set forth below, the court agrees with the government that the action must be dismissed for lack of subject matter jurisdiction.

BACKGROUND FACTS

The facts, taken from the plaintiff's complaint, are presumed true for the purposes of the present motion. On September 23, 1998, an Air Force contracting officer at the Fairchild Air Force Base in Washington issued a solicitation for travel services on behalf of the local Morale, Welfare, and Recreation Office ("MWR"). The solicitation stated: "This non-appropriated fund (NAF) solicitation and the resultant contract are designed to provide interim travel services until the establishment of the Defense Travel System (DTS)." Compl. Ex. A at 5.[1] The solicitation further stated: "NO APPROPRIATED FUNDS OF THE UNITED STATES SHALL BECOME DUE OR BE PAID A CONTRACTOR BY REASON OF THIS CONTRACT." Compl. Ex. A at 17.

The contract was designed as a concession contract. Under the terms of the solicitation, the contractor was to pay a "concession fee" to the MWR "based on total sales of official travel (NAFI official and appropriated fund official when combined with leisure travel), leisure travel in conjunction with either type of official travel, and all other leisure travel for all modes." Compl. Ex. A at 5. The solicitation provided that the contractor would be required to pay a 1.8% concession fee to the MWR. Compl. Ex. A at 6.

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[1] Mr. Smith refers to the attachments to his complaint as "Exhibit A" (excerpts from the solicitation and the contract) and "Exhibit B" (Mr. Smith's letter to the contracting officer). Because the pages in the exhibits are not all numbered, the court refers to page numbers within the exhibits as if each of the pages (including blank pages included therein) had been numbered sequentially.

Rodger's Travel Service, which is owned by Mr. Smith, was awarded the MWR travel contract on November 4, 1998. He operated the travel facility from January 1, 1999 through June 30, 2000. During the first year of contract performance, between January 1, 1999 to December 31, 1999, Rodger's Travel Services paid the 1.8% concession fee to the MWR, including a fee on international airfares. Thereafter, the contract was amended effective January 2000. Under the amended contract, Rodger's Travel Services was no longer required to pay the 1.8% concession fee. Instead, Rodger's Travel Services paid a $750 monthly flat fee to the MWR.

In a letter that appears to be dated July 24, 2005,[2] Mr. Smith filed a claim with the contracting officer challenging the legality of the contract and seeking the reimbursement of $3,116. Comp. Ex. B. In his claim, Mr. Smith charged that the government had illegally required him to pay a concession fee on international airfares in violation of 49 U.S.C. §§ 41510 and 46309 (2000). Under 49 U.S.C. § 41510, it is unlawful for a person to charge a price for foreign air travel that is different from the price specified in the tariff of the carrier. Under 49 U.S.C. § 46309, criminal penalties are authorized against any person that receives a rebate or concession in connection with purchasing a foreign airfare at a price that varies from the tariff. Mr. Smith claimed that under those statutes it was illegal for him to have paid a "concession" to the MWR on international airfares. He

[2] The letter consists of two pages, one of which is dated June 29, 2005 and one of which is dated July 24, 2005. The government states that the claim was filed on August 3, 2005.

asked that the contract be "declared void and all rebates and concession fees paid on international airfares ($3,116.00) be refunded to the Contractor." Compl. Ex. B at 2.

The contracting officer had not issued a decision on Mr. Smith's claim when he filed suit in this court on December 3, 2005.[3]

In his complaint, Mr. Smith alleges that the government "illegally solicited, accepted and received a concession fee on international airfares" in violation of 49 U.S.C. §§ 46309 and 41510. Compl. 3. Mr. Smith states: "It is now clear that a contract was never formed and the Plaintiff now claims that all monies invested in establishing and maintaining operations in addition to travel to Fairchild Air Force Base be refunded to the Plaintiff." Compl. 4. In the complaint Mr. Smith seeks $82,635.97. In addition, he seeks a declaration that "all contracts solicited by the U.S. Air Force for concession and or remission of monies on international airfares be declared illegal, null and void." Compl. 5.

DISCUSSION

A. Standard of Review

The standards governing review of a motion to dismiss for lack of jurisdiction are well-settled. When ruling on a motion to dismiss for lack of subject matter jurisdiction, this court must accept as true the facts alleged in the complaint and must construe such

[3] At the time Mr. Smith filed suit in this court, sufficient time had elapsed since the filing of Mr. Smith's claim with the contracting officer for it to be deemed a decision by the contracting officer denying the claim under the Contract Disputes Act. 41 U.S.C. § 604(c)(5) (2000).

facts in the light must favorable to the pleader. Sheuer v. Rhodes, 416 U.S. 232, 236 (1974). Although pro se litigants are held to a lower standard in pleading the existence of subject matter jurisdiction, jurisdiction cannot be presumed. Ultimately, the burden of establishing the court's subject matter jurisdiction rests with the party seeking to invoke it. Alder Terrace, Inc. v. United States, 161 F.3d 1372, 1377 (1998).

B. This Court Lacks Jurisdiction Because the Air Force MWR is a NAFI.

Under the non-appropriated funds doctrine, the Court of Federal Claims does not have jurisdiction over contract claims involving NAFIs because "Congress intended to separate [the agency's] funds from general federal revenues." Core Concepts of Florida, Inc. v. United States, 327 F.3d 1331, 1337 (Fed. Cir. 2003); see also Lion Raisins, Inc. v. United States, 416 F.3d 1356, 1365-66 (Fed. Cir. 2005); Pacrim Pizza Co. v. United States, 304 F.3d 1291 (Fed. Cir. 2003). As such, the Court of Federal Claims does not hear contract cases against NAFIs unless the suits have been expressly authorized by Congress. Texas State Bank v. United States, 423 F.3d 1370, 1375 (Fed. Cir. 2005) ("[W]e have repeatedly held that the NAFI doctrine precludes the exercise of Tucker Act jurisdiction over contract claims against the United States based upon the contracting activities of NAFIs that are not expressly mentioned in 28 U.S.C. 1491(a) [the Tucker Act]."). Under Section 1491(a)(1), the Court of Federal Claims has jurisdiction to hear contract claims arising from contracts with the following NAFIs: the Army and Air Force Exchange Service, Navy Exchanges, Marine Corps Exchanges, Coast Guard Exchanges,

and Exchange Councils of the National Aeronautics and Space Administration. Contract disputes with NAFIs outside of those identified above are not authorized. Texas State Bank, 423 F.3d at 1375; Pacrim Pizza, 304 F.3d at 1292.

Mr. Smith does not contend that the MWR in this case is part of or closely affiliated with any of the exchanges identified in Section 1491(a).[4] Rather, he argues that his contract was not with a NAFI. In support of his contention, Mr. Smith argues that: (1) in 1992 the Air Force MWR entities were reorganized and merged into the Air Force Services Agency, which is an appropriated fund agency; (2) the contract included travel for "appropriated fund" trips when combined with leisure travel and therefore includes payments from "appropriated funds"; and (3) the contract was signed and overseen by the 92nd Contracting Squadron and therefore was not a contract with the MWR. Each of these arguments will be addressed in turn.

First, contrary to Mr. Smith's contentions, the MWR did not become an "appropriated agency" when the Air Force Services Agency took over the supervision of MWR entities in 1992. The MWR remains a separate NAFI within the Air Force. According to the fact sheet on the Air Force Services Agency which Mr. Smith attached

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[4] As the United States Court of Appeals for the Federal Circuit explained in Pacrim Pizza, "A NAFI may be a covered contracting entity under the Contract Disputes Act if it is closely affiliated with a post exchange and meets a three-part test: it must have sufficient assets to reimburse the United States the cost of the judgment, be clearly defined as within the resale system, and provide financial data sufficient to predict the government's potential liability." 304 F.3d at 1293 (emphasis added).

to his response, the Air Force Services Agency manages "Air Force central nonappropriated funds (NAFs)" and "supports the Air Force Morale, Welfare, and Recreation Board," Pl.'s Resp. Ex. 1 at 1. However, there is nothing that indicates that the MWR loses its status as a NAFI, and in fact, there are references to "Air Force NAF" activities throughout the fact sheet.

Furthermore, the language of the subject contract specifically states that the Air Force MWR is a NAFI. With regard to the legal status of the contracting party, the contract states: "The NAFI is an integral part of the Department of Defense and is an instrumentality of the United States Government. Therefore, NAFI contracts are United States Government contracts; however, they do not obligate appropriated funds of the United States." Pl.'s Ex. A at 17. In addition, the contract provides that the word "NAFI" be substituted for the word "Government" for each of the Federal Acquisition Regulation clauses incorporated into the contract. Pl.'s Ex. A at 21. The Performance Work Statement is also entitled "NONAPPRORPRIATED FUND INSTRUMENTALITY LEISURE TRAVEL OFFICE PERFORMANCE WORK STATEMENT." Pl.'s Ex. A at 23. The contract, including the statement of work, removes any doubt that the contract was with a NAFI and not an appropriated fund agency. In view of the foregoing, the government correctly argues that the plaintiff contracted with a NAFI.

Second, the fact that the contract specified that it could cover certain "appropriated fund travel" did not convert this contract with a NAFI into a contract with an "appropriated funds" agency. The contract authorized official travel only in the context of leisure travel. This did not convert the contract into a contract with an appropriated agency.

Finally, the fact that the NAFI relied on the services of an Air Force contracting officer did not turn this contract into a contract with an appropriated fund agency. The contract, by its terms, made it clear that the Contracting Officer was the "person responsible for administering this contract on behalf of the NAFI." Pl.'s Ex. A at 15 (emphasis added). The NAFI, as a federal non-appropriated fund agency, may rely upon the services of a government contracting officer. A NAFI is a federal agency. The NAFI is subject to the non-appropriated fund doctrine, not because it is not a federal agency employing federal employees, but because Congress "has not assumed the financial obligations of NAFIs by appropriating funds to them." Texas State Bank, 423 F.3d at 1376, quoting El-Sheikh v. United States, 177 F.3d 1321, 1324 (Fed. Cir. 1999).

CONCLUSION

In view of the foregoing, the court agrees with the government that this case involves a contract with a NAFI and therefore Mr. Smith's claims are barred by the non-

appropriated funds doctrine.[5] The case must be dismissed for lack of subject matter jurisdiction.[6] Each party is to bear its own costs.

IT IS SO ORDERED.

s/Nancy B. Firestone
NANCY B. FIRESTONE
Judge

[5] Furthermore, it does not appear that there was a violation of the statutory provisions cited by Mr. Smith because the "concession" he paid was not the type covered by the provisions. Although Mr. Smith paid a "concession" to the MWR, he has not alleged that the concession was paid to obtain lower airfares than those identified by the published tariff, as prohibited by these statutes. Instead, Mr. Smith was required to pay a "concession" for the following reasons set forth in the contract: "The concession fee represents the value of what the Fund [NAFI] provides to the Contractor: (1) exclusive access to a pool of potential discretionary customers; and (2) facilities, utilities, and other services. . .". Pl.'s Compl. Ex. A at 34.

[6] Because the court does not have jurisdiction over the plaintiff's contract case, the plaintiff's claim for class certification and for declaratory relief, both of which relate to the subject contract, must also be dismissed.