

1 UNITED STATES DISTRICT COURT
2 DISTRICT OF PUERTO RICO

3 CREATION UPGRADES, INC.,

4
5 Plaintiff,

6
7 v.

8 UNITED STATES DEPARTMENT OF
9 DEFENSE, et al.,

10
11 Defendants.

Civil No. 08-2388 (JAF)

12 **OPINION AND ORDER**

13 Plaintiff, Creation Upgrades, Inc., brings this action against
14 Defendants, U.S. Department of Defense, U.S. Department of the Navy,
15 and the Department of the Navy's Base Realignment and Closure Program
16 Management Office (BRAC PMO), alleging a Freedom of Information Act
17 (FOIA) violation under 5 U.S.C. § 552 and a breach of contract claim
18 under 28 U.S.C. § 1346(a)(2). (Docket Nos. 1; 52.) Defendants move
19 to dismiss under Federal Rule of Civil Procedure 12(b)(6), arguing
20 that their court-ordered compliance with the FOIA request obviates
21 Plaintiff's claim for relief. (Docket Nos. 36; 47; 50; 54.)
22 Defendants also move to dismiss under Federal Rule of Civil Procedure
23 12(b)(1), arguing that this court lacks subject matter jurisdiction
24 to hear the breach of contract claim in Plaintiff's amended
25 complaint. (Docket No. 54.) Plaintiff opposes. (Docket Nos. 39; 62.)

I.

Factual and Procedural Synopsis

We derive the following factual summary from Plaintiff's amended complaint; exhibits attached to the initial complaint and incorporated into the amended complaint by reference; and the documents submitted by Defendants in compliance with court order. (Docket Nos. 52; 1; 47-2; 50-1.) In ruling on a motion to dismiss, we assume all of Plaintiff's allegations to be true and make all reasonable inferences in its favor. See Gagliardi v. Sullivan, 513 F.3d 301, 305 (1st Cir. 2008).

Defendants are responsible for disposing of surplus property in the U.S. Navy's possession. At some point during 2007, Defendants prepared to hold an online auction for two parcels of land on the former Roosevelt Roads Naval Station in Ceiba, Puerto Rico (Sale Parcels I & II). Plaintiff alleges that the minimum bid to be used in the planned auction for Sale Parcel II was set at \$25,000,000. Defendants eventually chose, for reasons unknown, to forego an online auction in favor of a sealed bids process. Defendants issued an Invitation for Bids (IFB) on March 14, 2008, officially soliciting public bids for both parcels. (Docket No. 1-7.) The IFB called for sealed bids to be submitted by April 30, 2008. (Id.) The highest bid to surpass Defendants' undisclosed minimum acceptable bid price (Reserve Price) would obtain the property. (Id.) If no bids meeting the Reserve Price were received, Defendants reserved the right to

1 reject all sealed bids and instead conduct an online auction. (Id.)
2 Plaintiff asserts that the Reserve Price for Sale Parcel II continued
3 to be \$25,000,000 despite the change in bidding mechanism.

4 Plaintiff, a Puerto Rico corporation, submitted a timely bid in
5 the amount of \$27,027,000 for Sale Parcel II on April 25, 2009. Only
6 two bids were received in the sealed process, with Plaintiff's being
7 the highest. (Docket No. 25.) On May 13, 2008, Defendants informed
8 Plaintiff by letter that its bid had not met the Reserve Price and
9 that, therefore, Sale Parcel II would not be sold to it. This letter
10 did not state the actual amount of the Reserve Price Plaintiff failed
11 to meet. In response, Plaintiff submitted a FOIA request to
12 Defendants seeking disclosure of the "Winning Bid";¹ the Reserve
13 Price; the identity of the official(s) who set the Reserve Price; and
14 the date on which the Reserve Price was set.

15 This initial request was denied on June 23, 2008, by James E.
16 Anderson, Director of the Navy BRAC PMO Southeast. (Docket No. 1-5.)
17 In response to Plaintiff's request to reveal the identity of the
18 "winning bidder," Anderson informed Plaintiff that no bidder had met
19 the reserve price and that, consequently, there was no "successful
20 bidder." Anderson also revealed to Plaintiff the existence of an
21 "internal working memorandum responsive to [its] request for the

¹ "Winning Bid" is a term of art employed by Defendants in their IFB referencing the highest bid received that also conformed to the form and procedures outlined in the IFB. (Docket No. 1-7.)

1 disclosure of the Navy's Reserve Price and how it was established,
2 when and by whom." (Id.) Anderson denied disclosure of this document,
3 relying on the exemptions in 5 U.S.C. § 552(b)(4)-(5) for commercial
4 or financial information that is privileged or confidential and for
5 intra-agency memos and letters not available by law to a party other
6 than an agency in litigation.

7 In a letter dated July 7, 2008, Plaintiff requested the General
8 Counsel of the Navy to reconsider the denial of its FOIA request.
9 The General Counsel did not respond to Plaintiff's request within the
10 statutorily mandated twenty-day period. See 5 U.S.C. § 552(a)(6)
11 (A)(I). Plaintiff filed its initial complaint with this court on
12 December 18, 2008, requesting that we order the production of
13 government documents to fulfill the FOIA request.

14 Defendants did not answer the complaint but instead filed a
15 motion to dismiss based solely on the 5 U.S.C. § 552(b)(5) exemption
16 to agencies' FOIA obligations. (Docket No. 22.) Plaintiff concedes
17 that "Defendants have released much of the information referred to"
18 in the initial FOIA request. (Docket No. 52.) Through Defendants'
19 motions and the court-ordered release of the "IFB Award Plan,"
20 Plaintiff has discovered the identity of the winning bidder, the
21 reserve price, and the approval date of the IFB Award Plan. (See
22 Docket Nos. 25; 50-2.) Defendants argue that, with the release of the
23 complete version of the "IFB Award Plan," they have provided in full
24 the internal memorandum referenced in their initial denial of

1 Plaintiff's FOIA request. (Docket No. 50.) Plaintiff maintains that
2 it has not received satisfactory answers to two inquiries in its
3 original FOIA request: When the reserve price was set and by whom.
4 (Docket No. 52.)

5 In the amended complaint filed on August 20, 2009, Plaintiff
6 added an additional claim for breach of contract under 28 U.S.C.
7 § 1346(a)(2). (Docket No. 52.) Plaintiff maintains that the Reserve
8 Price for Sale Parcel II was always \$25 million and was only changed
9 to \$36 million at some point after Plaintiff submitted its bid but
10 before the public opening of the bids. (Id. at 12.) By not
11 transferring Sale Parcel II to Plaintiff following receipt of its
12 winning bid over the Reserve Price, Plaintiff alleges that Defendants
13 have violated an implied contract that arose between the parties when
14 Plaintiff submitted its bid in conformity with the IFB. The only
15 remedy Plaintiff seeks for this breach is specific performance of the
16 alleged contract. (Id. at 13.)

17 Defendants move to dismiss Plaintiff's amended complaint,
18 incorporating by reference their previous motion to dismiss the FOIA
19 claim and also moving to dismiss the additional contract claim for
20 lack of jurisdiction. (Docket No. 54.) Defendants argue that the
21 Contract Disputes Act, 41 U.S.C. §§ 601-609, preempts this court's
22 jurisdiction. (Id. at 4-7) In the alternative, Defendants assert that
23 this court lacks jurisdiction under 28 U.S.C. § 1346(a)(2). (Id. at
24 7.) Plaintiff opposes. (Docket No. 62.)

1 "[a]ll parties must be given a reasonable opportunity to present all
2 the material that is pertinent to the motion." Fed R. Civ. P. 12(d).
3 The First Circuit has found exceptions to Rule 12(d) for documents
4 whose authenticity is undisputed, official public records, documents
5 central to the plaintiff's claim, or documents sufficiently
6 referenced in the complaint. Rivera v. Centro Medico de Turabo,
7 Inc., 575 F.3d 10, 15 (1st Cir. 2009).

8 **2. Analysis**

9 The Freedom of Information Act was enacted "to open agency
10 action to the light of public scrutiny." DOJ v. Reporters Comm. for
11 Freedom of the Press, 489 U.S. 749, 772 (1989) (citation omitted).
12 The statute requires government agencies to "promptly" fulfill all
13 document disclosure requests that reasonably describe the records
14 requested and comply with each agency's established FOIA procedure.
15 5 U.S.C. § 552(a)(3)(A). An agency may deny access to requested
16 information in its possession only when one of nine exemptions
17 enumerated in 5 U.S.C. § 552(b) applies. An agency's denial of a FOIA
18 request may be appealed to the agency head. Id. § 552(a)(6). Once
19 agency appeals have been exhausted, requesting parties may appeal to
20 district courts to review an agency's denial of a FOIA request. Id.
21 § 552(a)(4)(B). The District Court reviews such denials de novo.
22 Id.; see also Church of Scientology, Int'l v. DOJ, 30 F.3d 224, 228
23 (1st Cir. 1994). The burden of proving § 552(b) exemptions rests with

1 the defendant agency. Maynard v. CIA., 986 F.2d 547, 557-58 (1st Cir.
2 1993).

3 In the present case, Defendants have provided a full copy of the
4 "IFB Awards Plan," which, they assert, is the document referenced by
5 James Anderson in his initial denial of Plaintiff's FOIA request.
6 (Docket No. 50-1.) This document was not attached to Plaintiff's
7 amended complaint or Defendants' motion to dismiss the amended
8 complaint. (Docket No. 52.) Since the government has not yet filed
9 an answer in this case, the Plaintiff's amended complaint is the only
10 pleading available for us to consider. As the IFB Award Plan is
11 central to Plaintiff's claim, and as the complaint makes sufficient
12 reference to it, we find that it falls under the exceptions to Rule
13 12(d) enumerated above. We, therefore, consider this as a 12(b)(6)
14 motion and not under the more stringent Rule 56 summary judgment
15 standard.

16 Defendants argue that by disclosing a complete copy of the IFB
17 Award Plan, they fulfilled the original FOIA request. This document
18 provides the Reserve Price, the method used to determine that price,
19 and the date on which the plan received final approval. It also
20 includes the signatures of the BRAC PMO personnel responsible for
21 creating and approving the plan. As a result, there is no longer any
22 dispute as to the disclosure of the document identified in the
23 Defendants' response to the initial FOIA request.

1 This court finds no other FOIA claim on which relief could be
2 granted in Plaintiff's amended complaint. Where the agency has fully
3 disclosed all documents uncovered by its search in response to the
4 initial FOIA request, there is no basis for judicial review unless
5 the Plaintiff challenges the adequacy of the agency's search for
6 documents. Plaintiff makes no such challenge in its complaint.

7 **B. Contract Claim**

8 **1. Standard under Rule 12(b)(1)**

9 Under Federal Rule of Civil Procedure Rule 12(b)(1), a defendant
10 may move to dismiss an action against him for lack of federal subject
11 matter jurisdiction. The party asserting jurisdiction has the burden
12 of demonstrating its existence. See Skwira v. United States, 344 F.3d
13 64, 71 (1st Cir. 2003) (citing Murphy v. United States, 45 F.3d 520,
14 522 (1st Cir. 1995)).

15 Rule 12(b)(1) is a "large umbrella, overspreading a variety of
16 different types of challenges to subject-matter jurisdiction."
17 Valentin v. Hosp. Bella Vista, 254 F.3d 358, 362-63 (1st Cir. 2001).
18 A movant may base a challenge to the sufficiency of the plaintiff's
19 assertion of subject matter jurisdiction solely on the pleadings.
20 Id. at 363. In that case, we take the plaintiff's "jurisdictionally-
21 significant facts as true" and "assess whether the plaintiff has
22 propounded an adequate basis for subject-matter jurisdiction." Id. at
23 363; see Pejepsco Indus. Park, Inc. v. Me. Cent. R.R. Co., 215 F.3d
24 195, 197 (1st Cir. 2000).

1 **2. Analysis**

2 In order for a claim against the United States to survive a
3 motion to dismiss, it must be brought under an “unequivocally
4 expressed” waiver of sovereign immunity. Muirhead v. Meacham, 427
5 F.3d 14, 17 (1st Cir. 2005). In the case at bar, Plaintiff brings its
6 claim under 28 U.S.C. § 1346(a)(2). Defendants devote the lion’s
7 share of their argument to the notion that our jurisdiction over this
8 case is preempted by the Contract Disputes Act (CDA), 41 U.S.C.
9 §§ 601-609. (Docket No. 54.) The CDA, however, is completely
10 inapposite to this case. The statute encompasses neither the disposal
11 nor procurement of real property.² Plaintiff seeks redress for the
12 breach of a contract for the sale of real property. Therefore,
13 Defendants’ argument that the CDA governs this contract dispute and
14 preempts this court’s jurisdiction fails.

15 Our finding the CDA inapplicable to the instant case does not,
16 however, conclude our jurisdictional analysis. Plaintiff has brought
17 this action under the aegis of 28 U.S.C. § 1346(a)(2). This statute
18 grants concurrent jurisdiction to district courts and the Court of
19 Federal Claims for all claims against the government not exceeding
20 \$10,000 and founded on “any express or implied contract with the

² The only property-disposal contracts governed by the CDA are for the disposal of “personal property.” 41 U.S.C. § 602(a)(4). The disposal of real property, on the other hand, is impliedly exempted from the CDA. Similarly, section 602(a)(1) of the act expressly exempts procurement of “real property in being” from the ambit of the CDA. Id. § 602(a)(1) (“[T]his chapter applies to any express or implied contract . . . entered into by an executive agency for - (1) the procurement of property, other than real property in being.” (emphasis added)).

1 United States." 28 U.S.C. § 1346(a)(2). But this grant of
2 jurisdiction does not extend to "claims that seek primarily equitable
3 relief." Berman v. United States, 264 F.3d 16, 21 (1st Cir. 2001).
4 Furthermore, in cases where the only relief requested is specific
5 performance of a government contract (Docket No. 52 at 13), the First
6 Circuit has explicitly denied this court's jurisdiction. See
7 Coggeshall Dev. Corp. v. Diamond, 884 F.2d 1, 3 (1st Cir. 1989)
8 ("Federal Courts do not have the power to order specific performance
9 by the United States of its alleged contractual obligations.").
10 Thus, we lack jurisdiction under 28 U.S.C. § 1346(a)(2) to hear
11 Plaintiff's claim for breach of contract.

12 **III.**

13 **Conclusion**

14 For the reasons stated herein, we hereby **GRANT** Defendants'
15 motion to dismiss. We **DISMISS** Plaintiff's Freedom of Information Act
16 claim for failure to state a claim upon which relief can be granted.
17 We also **DISMISS** Plaintiff's breach of contract claim for lack of
18 jurisdiction.

19 **IT IS SO ORDERED.**

20 San Juan, Puerto Rico, this 25th day of September, 2009.

21 s/José Antonio Fusté
22 JOSE ANTONIO FUSTE
23 Chief U.S. District Judge