

ARMED SERVICES BOARD OF CONTRACT APPEALS

Appeal of --)
)
Marine Contractors, Inc.) ASBCA No. 54017
)
Under Contract No. DACW59-99-C-0002)

APPEARANCE FOR THE APPELLANT: George H. Craig, Esq.
Grogan Graffam, P.C.
Pittsburgh, PA

APPEARANCES FOR THE GOVERNMENT: Thomas H. Gourlay, Jr., Esq.
Engineer Chief Trial Attorney
William A. Lubick, Esq.
Assistant District Counsel
U.S. Army Engineer District, Pittsburgh

OPINION BY ADMINISTRATIVE JUDGE STEMLER ON THE
GOVERNMENT'S MOTION TO DISMISS FOR LACK OF JURISDICTION

This appeal was brought by a subcontractor. The Government has moved to dismiss the appeal for lack of jurisdiction on the basis that the appeal is not sponsored by the prime contractor. We grant the Government's motion and dismiss the appeal for lack of jurisdiction.

FINDINGS OF FACT FOR PURPOSES OF THE MOTION

1. The U.S. Army Corps of Engineers (the Government) awarded Contract No. DACW59-99-C-0002 (the prime contract) to Airport Industrial Park, Inc. d/b/a P.E.C. Contracting Engineers (PEC) on 25 March 1999 for the construction of a new dock front at Neville Island, PA. The prime contract incorporated FAR 52.233-1 DISPUTES (OCT 1995). It did not include any language authorizing a direct appeal by a subcontractor. (R4, tab 1, Section 00700-65 (clause 69))

2. PEC entered into a subcontract with Marine Contractors, Inc. (MCI) under which MCI was to furnish marine equipment and labor (complaint at ¶ 5; Gov't mot. at ¶ 1).

3. By final decision dated 17 August 2001, the contracting officer terminated the prime contract for default (notice of appeal (NOA), encl. 3).

4. By letter dated 15 August 2002, MCI submitted a \$301,695.60 claim under the prime contract to the contracting officer and requested a final decision (NOA, encl. 2). In its claim, MCI stated, in relevant part:

Marine Contractors recognizes that under ordinary circumstances, it is required to submit its claim through its prime contractor but believes that the Contracting Officer's termination of the prime contractor has ended the Government's right to assert privity of contract against Marine Contractors. Marine Contractors is unwilling to surrender any outstanding claims it may have against PEC (claims for non-payment and for delay) in exchange for the right to bring this claim. In addition, the Government's right of set-off (for its costs in reprocurring the work) has the potential of rendering this valid claim worthless since even if Marine Contractors, Inc. were successful, the Government would assert its claims against PEC and set-off any amounts owed.

(NOA, encl. 2 at 1)

5. By letter dated 21 August 2002, the contracting officer informed MCI that he would not issue a final decision on its claim. The contracting officer stated that MCI did not have standing to bring the claim directly to the Government and that he would entertain MCI's claim if it was resubmitted and sponsored by PEC. (NOA, encl. 1)

6. By letter dated 14 November 2002, MCI appealed from the contracting officer's "decision." In its NOA, MCI acknowledged that its appeal was not sponsored by PEC, the prime contractor. (NOA at 1)

DECISION

The Government moves to dismiss this appeal on the basis that the Board does not have jurisdiction over an appeal brought by a subcontractor without sponsorship of the appeal by the prime contractor. The Contract Disputes Act of 1978, 41 U.S.C. §§ 601-613, "gives the right to appeal to a Board of Contract Appeals to contractors only and not to subcontractors." *Technic Services, Inc.*, ASBCA No. 38411, 89-3 BCA ¶ 22,193 at 111,651. A subcontractor "may prosecute its claims only through, and with the consent and cooperation of, the prime . . ." *Erickson Air Crane Co. of Washington, Inc. v. United States*, 731 F.2d 810, 814 (Fed. Cir. 1984). As we said in *Brandt-Airflex Corp.*, ASBCA No. 48436, 92-1 BCA ¶ 24,679 at 123,124:

Direct subcontractor appeals have been permitted only in "rare, exceptional cases[,]" such as when the prime contractor acts as a purchasing agent for the Government, or when the contract documents indicate that the Government intended to allow direct subcontractor appeals. *United States v. Johnson Controls*, 713 F.2d 1541, 1556 (Fed. Cir. 1983).

MCI, a subcontractor, has acknowledged that it does not have the sponsorship of PEC, the prime contractor, but argues that unique circumstances exist in this appeal that should cause the Board to conclude that it has jurisdiction. MCI frames the issue to be decided in this motion as follows:

[W]hether the strict adherence to “privity of contract” should prevent a subcontractor from bringing a valid claim arising out of a government contract when the prime contractor has already committed fraud against the subcontractor, another subcontractor and the government itself.

(MCI reply br. at 3) MCI has alleged that PEC defrauded it and another subcontractor of several thousands of dollars, that the Government was made aware of this, and that the Government failed in its duties as contract administrator. MCI urges the Board to hold that a subcontractor should not be required to seek the sponsorship of the prime contractor in the face of clear evidence that the prime contractor is untrustworthy. We have not made any findings of fact concerning MCI’s allegations because, even if the allegations were proven, our decision on this motion would be the same.

The prime contract did not provide for a direct subcontractor appeal and there is no evidence that PEC was acting as a purchasing agent for the Government. MCI’s allegations of misconduct on the part of the prime contractor, even if true, are not sufficient to bring this appeal within the rare, few exceptions to the requirement that a subcontractor appeal be sponsored by the prime contractor.

The appeal is dismissed for lack of jurisdiction.

Dated: 2 April 2003

MARK N. STEMLER
Administrative Judge
Acting Chairman
Armed Services Board
of Contract Appeals

(Signatures continued)

I concur

I concur

EUNICE W. THOMAS
Administrative Judge
Vice Chairman
Armed Services Board
of Contract Appeals

CARROLL C. DICUS, JR.
Administrative Judge
Armed Services Board
of Contract Appeals

I certify that the foregoing is a true copy of the Opinion and Decision of the Armed Services Board of Contract Appeals in ASBCA No. 54017, Appeal of Marine Contractors, Inc., rendered in conformance with the Board's Charter.

Dated:

EDWARD S. ADAMKEWICZ
Recorder, Armed Services
Board of Contract Appeals