

ARMED SERVICES BOARD OF CONTRACT APPEALS

Appeal of --)
)
DRC, Inc.) ASBCA No. 54206
)
Under Contract No. 62747)

APPEARANCES FOR THE APPELLANT: Karl Dix, Jr., Esq.
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U.S. Agency for International
Development
Washington, DC

OPINION BY ADMINISTRATIVE JUDGE DELMAN
ON MOTION TO DISMISS FOR LACK OF JURISDICTION

The U.S. Agency for International Development (USAID or government) moves to dismiss this appeal for lack of jurisdiction. Appellant, DRC, Inc. (DRC) opposes the motion. For reasons stated below, we believe that we do not have jurisdiction over the dispute arising from this contract, and we dismiss the appeal.

STATEMENT OF FACTS FOR PURPOSES OF MOTION

1. On 29 December 2000, "Fondo Hondureno de Inversion Social" (FHIS), a ministry of the Honduran government, entered into the above-captioned contract with DRC for the construction of a water and sewer treatment facility for the nation of Honduras under reconstruction program Group I-A. The performance period was 11 months. (R4, tabs 1E, 1S)

2. Insofar as pertinent the contract provided as follows (R4, tab 1E):

TWENTY-FIVE: LEGAL EFFECTS OF USAID
APPROVAL. This contract shall be financed with USAID funds and USAID reserves the right to approve the terms of

this contract, the CONTRACTOR, and any and all plans, reports, specifications, subcontracts, bidding documents, designs or other documents associated with this contract. The parties further understand and agree that USAID, in reserving any or all of the foregoing approval rights, is acting solely as a financing entity to assure the proper use of funds provided by the U.S. Government and that any decision by USAID to exercise or refrain from exercising these approval rights shall be in its capacity as the financing entity in the course of financing this project and should not be construed as making USAID a party to this contract.

Attachment A to the contract, Mandatory Clauses, Construction Services Contracts, paragraph 2, “LEGAL EFFECT OF USAID APPROVALS AND DECISIONS” also contained provisions which, in all material respects, were identical to the above. This Attachment also contained provisions for dispute resolution, paragraph 9, “SETTLEMENT OF DISPUTES.” In brief, this provision provided for resolution of disputes by the Engineer identified in the contract and/or by arbitration. The parties did not select this Board to adjudicate their contract disputes. (R4, tab 2E at 0041, 0042, 0056)

3. FHIS issued a notice to proceed on 4 January 2001. By letter dated 23 February 2001, USAID informed FHIS that it was suspending the financing of the contract (R4, tab 11).

4. By letter dated 26 February 2001, FHIS gave DRC notice that the contract was suspended due to USAID’s withdrawal of funding. By letter dated 1 March 2001, FHIS directed DRC to incur no further expenses or commitments in performance of the contract. (R4, tab 13E)

5. FHIS sought guidance from USAID regarding the termination of the contract. USAID proposed that the contract be terminated by mutual agreement, at which time USAID would request an assignment from FHIS of its rights and liabilities, and would thereafter negotiate a settlement of the terminated contract directly with DRC. (R4, tabs 17, 18)

6. On 21 August 2001, DRC wrote USAID and stated that it would be agreeable to a termination by mutual consent but “that such termination be effective only upon the simultaneous execution of a negotiated agreement between USAID and DRC, under which USAID agrees to negotiate and provide the termination settlement with DRC, as if the Group I-A Contract had been terminated for the convenience of the Government,

under the standard Termination for Convenience clause for construction contracts in the U.S. Federal Acquisition Regulations.” DRC sought to make USAID a party in a tripartite agreement amongst FHIS, USAID and DRC. (R4, tab 21)

7. USAID responded to DRC on 27 August 2001. The government stated that “USAID will not be a party to an agreement to terminate Contract IA since Contract IA is a host country contract to which USAID is not a party.” Rather, USAID proposed that in the event the contract was terminated by mutual agreement, it would be willing to accept an assignment from FHIS to negotiate directly with DRC a settlement of costs associated with DRC’s mobilization. The letter further stated: “USAID will not enter into a tripartite agreement with DRC, Inc. and FHIS. The Termination for Convenience clause for construction contracts under the U.S. Federal Acquisition Regulations has no application to a USAID-fund[ed] host country contract. That clause is accordingly irrelevant to these proceedings.” (R4, tab 22)

8. By mutual consent, DRC and FHIS terminated the contract on 23 October 2001 (compl., ex. A, tab 1 at 32-34).

9. Following the termination, FHIS assigned and subrogated its rights and obligations arising from the agreement for termination of the contract to the USAID (R4, tab 27E). DRC was not a signatory to this assignment.

10. DRC submitted a termination proposal to the USAID in the amount of \$1,855,553, dated 21 January 2002 (R4, tab 40 at 0000, 0069). The government audited the proposal, using the FAR as a general guide to determine the reasonableness and allocability of the costs claimed. Most of DRC’s costs were questioned (compl., ex. F at 4).

11. DRC and the government entered into negotiations. Title to inventory did not transfer to USAID; it ultimately became the property of FHIS (app. opp’n, ex. A at 5; USAID letter dated 13 August 2002). The negotiations failed to result in an agreement, and by letter to DRC dated 11 March 2003, the government determined the final settlement of the claim, in the amount of \$257,889 (R4, tab 37). From this letter, DRC filed the subject appeal to this Board.

DECISION

Insofar as pertinent, under the Contract Disputes Act (CDA), 41 U.S.C. § 602(a), our jurisdiction is limited as follows:

§ 602. Applicability of law

(a) Executive agency contracts. Unless otherwise specifically provided herein, this Act 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;
- (2) the procurement of services;
- (3) the procurement of construction, alteration, repair or maintenance of real property; or,
- (4) the disposal of personal property.

Clearly, the record shows that the USAID did not enter into an express or implied contract with DRC for the procurement of personal property, services, construction, maintenance of real property or disposal of personal property. The underlying construction contract was solely between FHIS and DRC; USAID was merely the financier. After this contract was terminated with the consent of the parties, USAID agreed with FHIS to settle the terminated contract. DRC was not a signatory to this assignment. USAID did not intend to procure, nor did it in fact procure any goods or services for the executive agency in carrying out its duties under this assignment. The legal relationship between USAID and DRC was not at any time like that of a buyer and seller so as to fall under the above-referenced provisions of the CDA. *G.E. Boggs & Associates, Inc. v. Roskens*, 969 F.2d 1023 (Fed. Cir. 1992).

We have considered appellant's arguments and cited cases but they are distinguishable. They do not persuade us that we have jurisdiction over this dispute under the CDA. That the government audited appellant's claim using the FAR as a general guide can have no effect on our jurisdiction, which is statutory. Appellant also has not shown that the parties under the subject construction contract agreed to take their disputes to this Board under the SETTLEMENT OF DISPUTES provision of their contract (finding 2), under which jurisdiction may lie under certain circumstances pursuant to the agreement of the parties. *E.g., G.E. Boggs & Associates, Inc.*, ASBCA Nos. 34841 *et al.*, 91-1 BCA ¶ 23,515 at 117,906.

The appeal is dismissed for lack of jurisdiction.¹

Dated: 16 June 2004

JACK DELMAN
Administrative Judge
Armed Services Board
of Contract Appeals

I concur

I concur

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

EUNICE W. THOMAS
Administrative Judge
Vice Chairman
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. 54206, Appeal of DRC, Inc., rendered in conformance with the Board's Charter.

Dated:

DAVID V. HOUBE
Acting Recorder, Armed Services
Board of Contract Appeals

¹ After the government's motion to dismiss was filed, appellant sought discovery in support of its claim, which the government moved to stay pending disposition of its motion to dismiss. The government's motion is now moot. We believe that the contractual relationships amongst the participants here are sufficiently clear on this record to permit us to conclude that we lack jurisdiction. Appellant has not persuaded us that discovery would cause us to reach a different conclusion.