

ARMED SERVICES BOARD OF CONTRACT APPEALS

Appeal of --)
)
HAM Investments, LLC) ASBCA No. 55070
)
Under Contract No. DAKF23-99-C-0347)

APPEARANCE FOR THE APPELLANT: Mr. Harold H. Hollenshead
Managing Partner

APPEARANCES FOR THE GOVERNMENT: COL Samuel J. Rob, JA
Chief Trial Attorney
Karl M. Ellcessor, III, Esq.
Trial Attorney

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

HAM Investments, LLC filed an appeal with the Board on the deemed denial of its claim for payment of \$61,994 asserting that it was an assignee of contractor Fire Security Systems, Inc. The government moves to dismiss arguing that appellant lacks privity of contract under the Contract Disputes Act of 1978, 41 U.S.C. §§ 601-613. We grant the motion.

FINDINGS OF FACT FOR PURPOSES OF THE MOTION

1. In September 1999, the Army awarded Contract No. DAKF23-99-C-0347 to Fire Security Systems, Inc. (FSS) to upgrade, install, and repair sprinkler systems located in various buildings at Fort Campbell, KY (R4, tab 1).

2. The contract incorporated by reference FAR 52.232-23, ASSIGNMENT OF CLAIMS (JAN 1986) – ALTERNATE I (APR 1984), which provides in pertinent part:

(a) The Contractor, under the Assignment of Claims Act, as amended, 31 U.S.C. 3727, 41 U.S.C. 15 . . . may assign its rights to be paid amounts due or to become due as a result of the performance of this contract to a bank, trust company, or other financing institution, including any Federal lending agency.

(R4, tab 1 at 15320-20)

3. On 19 September 2003, FSS submitted its payment estimate No. 5 based on 99% completion and showing an amount due of \$59,523 (R4, tab 34).

4. On or about 1 October 2003, appellant forwarded to the government a copy of a "Notice of Assignment" signed by Mr. Harold H. Hollenshead, managing partner of appellant. Attached to this notice was an "Assignment of Specific Account Receivable," dated 5 September 2003 signed by Mr. Hollenshead on behalf of appellant and Mr. William Ray Hayes, president of FSS. This document assigned to appellant \$50,000 apparently due to FSS by the Army for work related to the contract. In addition to specifically citing FSS's contract with the government, the document cited to provisions of the Assignment of Claims Act of 1940, as amended, 31 U.S.C. § 3727, 41 U.S.C. § 15. (R4, tabs 33, 44)

5. By letter dated 3 October 2003, FSS requested payment on the \$59,523 invoice it had previously submitted to the government. FSS wrote in pertinent part:

The assignment that Mr. Hollenshead is trying to enforce is improper as per 52.232-23 since he is not a bank, trust company or other financial institution.

(R4, tab 34)

6. By letter dated 7 October 2003 to Ms. Rosa Elmore of the government's contracting office, Mr. Hollenshead attempted to explain his relationship with Mr. Hayes and FSS:

Mr. Ray Hayes pledged the receipts from the Fort Campbell contract to me over a year ago for money I had loaned him. . . . I requested that he sign an Assignment of Specific Account Receivable for the remaining contract funds. He signed that contract on September 5, 2003 and I advanced him additional funds to be used in completion of the work at Fort Campbell, since I am responsible for the bond on that job.

Next, I contacted you . . . to make you aware of the assignment that Ray had made on behalf of Fire Securities Systems, Inc. I then discussed with you, Rosa, the paperwork necessary and you sent that to me. I filled out the paperwork you required and I returned it to you. I still need your acknowledgement of receipt of that assignment. You then made me aware that Ray has stated to you that he did not owe me any money. . . . I can assure you that statement is very untruthful. . . .

. . . I am waiting for the necessary guidance and information necessary to finalize the assignment of the proceeds to Ham Investments, LLC. The bank stands ready to provide you the information required by your regulations.

(R4, tab 35)

7. The government made payment on FSS's payment estimate No. 5, in the adjusted amount of \$59,605.55, plus interest, to FSS on 9 October 2003 (R4, tab 36).

8. By letter dated 17 October 2003, addressed to Mr. Hollenshead,¹ FSS again disputed the assignment and the amount loaned it by appellant. FSS requested that appellant stop contacting the Fort Campbell contracting office "because it is improper and not correct for you to do this." (R4, tab 37)

9. By letter dated 28 October 2003, the Fort Campbell contracting officer refused to recognize the assignment documentation submitted by appellant. The contracting officer stated:

The Army did not honor this assignment of claims because they could not confirm that Ham Investments, LLC is a financing institution.

In order for the government to accept and process assignment of claims from a contractor to assign monies due on their contract, the assignee must be licensed and registered as a financing institution.

Per our research, investments companies are not listed as financing institutions. The government contacted the Caddo Parish Chamber of Commerce, and Customer Service at Caddo Parish Business Occupational Licensing Section, in order to gain knowledge if Ham Investments, LLC is license [sic] and registered as a financing institution doing business in Shreveport, LA.

Customer Service at Caddo Parish Business Occupational Licensing Section does not have any licensing

¹ The letter was to the attention of Mr. Hollenshead at Team Spirit Petroleum with the same address as HAM Investments.

information on Ham Investments, LLC . . . and the Chamber of Commerce lists Team Spirit Petroleum, with Harold Hollenshead as point of contact, at the address listed above and is classified as an Oil and Gas Company, not a financing institution.

Therefore, the assignment of claim document submitted to the government could not be recorgnized [sic].

(R4, tab 38)

10. On 17 May 2004, the government made a final payment of \$2,398.71 to FSS (R4, tab 43).

11. By letter dated 13 September 2004, appellant submitted an “invoice” for \$61,994 seeking payment from the government for money paid to FSS. Appellant argues that the government ignored its assignment of claim letter which was filed before this payment was made to FSS. (R4, tab 44)

12. By letter dated 2 March 2005, appellant submitted a claim follow-up, again requesting payment. In this follow-up letter, appellant noted that the contracting officer cited two reasons for his refusal to make payment: (1) “the Government had no contract with HAM Investments,” and (2) the Army did not recognize appellant’s assignment as “a valid document.” (R4, tab 45)

13. By letter dated 20 June 2005 appellant appealed to the Board on a deemed denial basis.

DECISION

The Board’s jurisdiction is based on the Contract Disputes Act (CDA), which specifically refers to claims by or against contractors. 41 U.S.C. § 605(a). The CDA defines “contractor” as “a party to a Government contract other than the Government.” 41 U.S.C. § 601(4). Although appellant asserts that it was an assignee of payments pursuant to the Assignment of Claims Act of 1940, 31 U.S.C. § 3727, 41 U.S.C. § 15, the government argues that appellant is not a “contractor” as that term is defined in the CDA (mot. at 1).

Appellant opposes dismissal arguing that it has not tried to represent itself as a contractor or third-party beneficiary, but instead bases its argument on wrongful payment by the government to FSS when the lawful assignee was HAM.

Appellant has the burden of establishing jurisdiction. *Reynolds v. Army and Air Force Exchange Service*, 846 F.2d 746, 748 (Fed. Cir. 1988). As we have held previously, an assignment of proceeds arising from a government contract cannot establish or create a contractual relationship between the government and the assignee. Even if the government had acknowledged the assignment, the assignment would be an agreement between FSS and HAM only. Thus, HAM lacks the requisite privity and is not a party to the contract with the government. *Banco Disa, S.A.*, ASBCA No. 49167, 96-2 BCA ¶ 28,278. Moreover, we have no jurisdiction under the Assignment of Claims Act for a claimed wrongful payment by the government. *John E. Rogers Engineering, Co.*, ASBCA No. 41708, 91-2 BCA ¶ 23,912.

Accordingly, the appeal is dismissed.

Dated: 19 September 2006

RICHARD SHACKLEFORD
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. 55070, Appeal of HAM Investments, LLC, rendered in conformance with the Board's Charter.

Dated:

CATHERINE A. STANTON
Recorder, Armed Services
Board of Contract Appeals