

ARMED SERVICES BOARD OF CONTRACT APPEALS

Appeal of --)
)
Vertol Systems Company, Inc.) ASBCA No. 52064
)
Under Contract No. DATM01-97-C-0011)

APPEARANCE FOR THE APPELLANT: Lawrence J. Sklute, Esq.
Sklute & Associates
Washington, DC

APPEARANCES FOR THE GOVERNMENT: COL Nicholas P. Retson, JA
Chief Trial Attorney
Craig S. Clarke, Esq.
Deputy Chief Trial Attorney

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

Vertol Systems Company, Inc. (Vertol) appeals pursuant to the Contract Disputes Act of 1978 (CDA), 41 U.S.C. §§ 601-613, from the termination for default of its purchase order by Research Analysis and Maintenance, Inc. (RAM), the named party to the captioned contract. RAM is not sponsoring the appeal. The Government has filed a motion to dismiss the appeal for lack of jurisdiction upon the ground that Vertol is not in privity with it. The Government also argues that since RAM rather than a Government contracting officer terminated the contract for default, the Board has no power to intervene in the dispute (Gov't mot. at 7). Styling its response as a cross motion for summary judgment, Vertol asserts that it is in privity with the Government because RAM was acting as the Government's "purchasing agent" and that, in terminating the purchase order, RAM stood in the place of the Government (app. cross mot. at 5, n. 5). We grant the Government's motion and dismiss the appeal.

FINDINGS OF FACT FOR PURPOSES OF THE MOTION

The Army's Operational Test and Evaluation Command's (OPTEC) Threat Support Activity (OTSA), Ft. Hood, Texas, operates and maintains foreign military equipment. On 15 September 1997, OPTEC entered into support Contract No. DATM01-97-C-0011 with RAM. The contract provided that "[u]nder a GOCO [Government owned, contractor operated] contract, the contractor shall provide personnel, management, engineering, technical, intelligence, analysis, training, system

operations, and any other items and non-personal services necessary to support the OTSA mission” (Gov’t mot., encl. 2 at 4, 5 of 55, ¶¶ C.1.1, C.1.2.2)

Section H.17 of the contract, “PURCHASE ACTIONS/SUBCONTRACTING,” provided procedures for RAM to use when it was necessary to issue purchase orders to fulfill the scope of work. Paragraph A required that “[w]hen requisitioning procedures reveal that required material is not available from the Government supply system, the contractor shall, after adherence to applicable statutes, regulations, and procedures, acquire such material from commercial sources.” Paragraph B required that all purchase orders comply with Federal Acquisition Regulation (FAR) Part 13, Simplified Acquisition Procedures, and all over \$25,000 with FAR Part 44, Subcontracting Policies and Procedures. Paragraph C stated that all purchases were subject to review and consent by the contracting officer or the contracting officer’s representative. Paragraph D required RAM to advise prospective subcontractors that no solicitation on its behalf should be construed in any manner to be an obligation on its part to enter into a subcontract and went on to read, “[n]or shall any subcontract result in any claim whatsoever against the United States Government for reimbursement of costs for any efforts expended by said subcontractor.” Vertol has not pointed to any explicit reference to RAM as an “agent” or “purchasing agent” in this section of the contract or elsewhere. (Gov’t mot., encl. 2 at H-13 through H-14)

On 20 March 1998, RAM issued Purchase Order No. OM 9800098A (the PO) to Vertol. RAM employee Chizelle M. Gates signed the PO as “Buyer.” The PO required Vertol to supply Russian military equipment to RAM for a firm-fixed-price of \$213,790. The parts were to be shipped to “RAM, INC./OTSA” and invoices were to be directed to “RAM, INC.” According to Ms. Gates, the solicitation for the PO included FAR 52.212-4 CONTRACT TERMS AND CONDITIONS--COMMERCIAL ITEMS, presumably as of May 1997. FAR 52.212-4 includes a Disputes clause, which says that the contract is subject to the CDA. The PO referenced the captioned contract’s number in the upper right hand corner of the page. Vertol alleges, and we assume for purposes of the motion, that the PO also referenced a Government accounting number; that title passed to the Government upon delivery of the equipment; and that the contracting officer or her representative consented to the PO. (App. cross mot., ex. 3; app. letter 22 Oct. 1999 at 3-4; Gov’t letter 18 Oct. 1999, encl. 1)

On 25 March 1998, CW5 Jeffrey H. Stayton, OTSA Aviation Officer and contracting officer’s technical representative, addressed two documents concerning the equipment purchased under the PO, an “End Use Certificate” and “Authorization to Purchase and Import,” to Russian authorities. The end use certificate “certifies” that the subject equipment is “for the End Use of the US. [sic] Government, under DOA Contract #DATM01-97-C-0011, PO number OM 98-00098-A” and that Mr. James L. Montgomerie, Vertol’s president, is “authorized to purchase and import this equipment on

behalf of the United States Army, and the US. [sic] Government.” The other document is essentially identical. (App. cross mot., exs. 1, 2) An end use certificate is “a written agreement in connection with the transfer of military equipment or technical data to the United States that restricts the use or transfer of that item by the United States” (Gov’t letter 22 Sept. 1999, attach. 1, DOD Directive 2040.3 dated 14 Nov. 1990).

On 21 May 1998, the following notice was posted in the Commerce Business Daily (CBD) under the heading “U.S. GOVERNMENT PROCUREMENTS:”

OFFADD: OPTEC CONTRACTING ACTIVITY, BLDG
91035, P.O. BOX Y, FORT HOOD TX 76544-5056
SUBJECT: J--99 SOURCES SOUGHT FOR
MISCELLANEOUS FOREIGN GROUND EQUIPMENT
REPLACEMENT COMPONENTS
SOL 523&&&-9805-0003
POC RESEARCH ANALYSIS MAINTENANCE, INC.
ATTN: Frances Rodriquez c/o OTSA, 11301 Montana Ave,
El Paso, Texas
DESC: Department of the Army Prime Contractor is seeking
vendors as subcontractors able to provide various components
for . . . foreign military systems. . . . All end user
documentation to be supplied by sub-contractor.

(Gov’t mot., encl. 1, attach. 5, referenced in app. cross mot. at 7)

On 30 November 1998, RAM’s Ms. Gates, after issuing a show cause notice, terminated the PO for default, stating:

RAM is in receipt of your [Vertol’s] response to our show cause notice. However, it is RAM’s position that you have failed to perform. Further, it is apparent your acceptance of the Order is beyond the scope and capabilities of VSC [Vertol].

You are hereby notified that PO #OM-98-00098-A, dated 20 March 1998 is Terminated for Default, due to your failure to provide the materials listed by your promised delivery date of 25 October 1998, as noted in your 21 August facsimile transmission.

You are hereby notified to cease any attempts to deliver the order. VSC has the right to appeal under the Disputes clause of the FAR.

Point of contact in this matter is the undersigned and can be contacted at [RAM's address].

The notice did not inform Vertol of the time within which an appeal must be filed under the Disputes clause. (App. letter 8 Oct. 1999, attach. 2)

On 5 March 1999, Vertol appealed to the Board pursuant to the CDA "from the decision of Ram, Inc. for terminating Appellant's contract for default under [the PO] as a subcontractor under Ram, Inc.'s contract with [OPTEC]."

On 18 May 1999, appellant filed its complaint. Appellant alleged that "[t]here is a contract between Vertol and OPTEC, based on the totality of circumstances" (§ 3). The complaint does not allege, however, that OPTEC representatives as opposed to RAM representatives entered into a contract with Vertol (*see* ¶¶ 16-26).

On 21 June 1999, the Government filed a motion to dismiss the appeal for lack of jurisdiction, attaching a copy of the captioned contract, in lieu of an answer and Rule 4 file. Subsequently, the parties supplemented the record with documents relating to the motion.

DECISION

Preliminary Matters

Vertol objects to the Government's failure to file an answer and Rule 4 file. The Government maintains that the CDA "does not require the Government to waste its time and resources. There is no contract, no jurisdiction, nothing to put in a Rule 4, and no need for an answer" (Gov't reply at 3). The Board may accept a motion to dismiss an appeal for lack of jurisdiction in lieu of an answer. In this case, where there is a clear question as to jurisdiction, we perceive no need to require an answer before deciding the motion. The Board's rules require the Government to file a Rule 4 file even if there are few if any relevant documents and it is better practice for the Government to do so. The Government chose, instead, to attach the captioned contract to its motion to dismiss. The parties have supplemented the record with additional documents in connection with the motion. Vertol has not shown any prejudice from this procedure in this case.

Jurisdiction

The Board's jurisdiction under the CDA depends *inter alia* upon the existence of an express or implied contract between the appellant and the Government. Only a contractor, *i.e.*, a "party to a Government contract other than the Government," may appeal a contracting officer's decision (or deemed denial) to the Board. 41 U.S.C. §§ 601(4), 602, 606; *United States v. Johnson Controls, Inc.*, 713 F.2d 1541, 1550-51 (Fed. Cir. 1983). Jurisdiction also depends upon the existence of a contracting officer's decision (or deemed denial) on a claim. "Under the CDA, a final decision by the contracting officer on a claim, whether asserted by the contractor or the government, is a 'jurisdictional prerequisite' to further legal action thereon." *Sharman Co. v. United States*, 2 F.3d 1564, 1568 (Fed. Cir. 1993) (footnotes omitted). Appellant has not established that either requirement is met in this case.

Vertol argues that the requirement for the existence of a contract is met because RAM was functioning as a purchasing agent for the Government:

. . . RAM has authority to bind the Government and acts as a purchasing agent for the Government, establishing privity of contract between the Government and Vertol. Further, the totality of the Government's acts and the circumstances of the relationship between the Army's Operational Test and Evaluation Command (OPTEC) and Vertol establish there is privity of contract between Vertol and the Government.

(App. cross mot. at 4) In reply to the Government's argument that no OPTEC representative with contracting officer authority entered into an express or implied contract with it, Vertol states:

The Government's allegation — that a contracting officer did not enter into a contract with Vertol because a government employee lacked contracting authority — is irrelevant. The issue is one of privity of contract — whether or not OPTEC is liable to Vertol through the government's prime contractor — the essence of the purchasing agent doctrine. If so, Vertol is "a party to a Government contract" for purposes of direct appeal rights under the Contract Disputes Act of 1978, 41 U.S.C. § 601(4). [Emphasis in original]

(App. reply to Gov't reply to app. surreply (app. reply) at 1-2)

Johnson Controls is the controlling authority on this issue. In *Johnson Controls*, the Court of Appeals for the Federal Circuit noted that a number of exceptions to the rule that a subcontractor may not bring a direct appeal before the Board had developed prior to enactment of the CDA. The Court did not decide whether those exceptions were still valid under the CDA since their requirements were not met in the case before it. One of the exceptions, relied upon by Vertol in this appeal, was “that there can be privity of contract between the government and subcontractors where the prime contractor is a mere government agent” (713 F.2d at 1551). The Court stated that the three “crucial factors” in finding privity based upon an agency theory were that the prime contractor was:

- . . . (1) acting as a *purchasing* agent for the government,
- (2) the agency relationship between the government and the prime contractor was established by clear contractual consent,
- and (3) the contract stated that the government would be directly liable to the vendors for the purchase price.

Id. In Vertol’s case, none of these factors is present. The captioned contract did not provide that RAM was to act as a purchasing agent for the Government or clearly consent to an agency relationship; rather, it stated explicitly that any subcontract shall not “result in any claim whatsoever against the United States Government for reimbursement of costs for any efforts expended by said subcontractor.” Vertol’s arguments that this provision was waived or otherwise irrelevant are unpersuasive (letter 22 Oct. 1999 at 4).

Johnson Controls also dealt with an argument that the Government, prime contractor, and subcontractor intended that there be a direct right of appeal by the subcontractor as shown by the fact that the subcontract, like Vertol’s PO, included a standard Disputes clause. The Court concluded that “the Disputes clause was not included in the subcontract in order to provide a claims procedure for subcontractors.” 713 F.2d at 1555. In this appeal, the language in the captioned contract precluding any claim against the United States similarly indicates that the Disputes clause was not included in the PO to provide a claims procedure for subcontractors. *See also* FAR 44.203, CONSENT LIMITATIONS; *Janus Corp.*, HUD BCA No. 97-B-101-C1, 97-1 BCA ¶ 28,884 at 144,028.

Vertol alleges that the totality of the Government’s acts and circumstances created a contract with it citing various Board cases. It has not, however, alleged facts similar to those in the decisions upon which it relies. For example, Vertol cites *Westinghouse Electric Corp.*, ASBCA No. 21634, 80-2 BCA ¶ 14,726. In *Westinghouse*, Admiral Rickover required Westinghouse to set up a special purchasing group that reported directly to him and Navy contracting officers and was to work exclusively for the Navy. RAM had no such imperatives. The terms of RAM’s contract gave OPTEC approval authority over RAM’s subcontracts, but did not usurp RAM’s dealings with

subcontractors. Likewise, in *Jean Kultau GmbH & Co. KG*, ASBCA No. 45949, 94-3 BCA ¶ 26,987 at 134,410, the Government's motion to dismiss was found to be premature because an implied-in-fact contract "was not foreign to the parties since there were instances when the Government, by a Direct Payment Memorandum, did enter into a contract with appellant" Vertol has not alleged instances of other contracts with it. In *Choe-Kelly, Inc.*, ASBCA No. 43481, 92-2 BCA ¶ 24,910; *Balboa Systems Company, Inc.*, ASBCA No. 39400, 91-2 ¶ 23,715; and *Reynolds Shipyard Corp.*, ASBCA No. 37281, 90-1 BCA ¶ 22,254, the parties submitted conflicting affidavits which raised genuine issues of material fact regarding the existence *vel non* of a contract created by oral representations of Government officials. Vertol has not alleged that OPTEC representatives, as opposed to RAM acting as a purchasing agent, entered into a contract with it. Vertol points to such evidence as the references in the PO to the captioned contract, the end use certificates, and the CBD notice. None of this evidence is sufficient to establish the existence of a contract between OPTEC and Vertol as opposed to a conventional prime contractor/subcontractor relationship. Vertol does not assert that CW5 Stayton, who signed the end use certificates as the contracting officer's technical representative, had contracting authority (*see app. reply at 1*). The certificates themselves related to import/export requirements. As for the CBD notice, it was posted 21 May 1998, after RAM issued the PO. Assuming this notice was relevant, it referred to RAM as a "Department of the Army Prime Contractor" who was seeking "vendors as subcontractors" and the point of contact was RAM personnel.

Turning to the jurisdictional requirement for a contracting officer's decision on a claim, a termination for default is a Government claim. *See Malone v. United States*, 849 F.2d 1441, 1443 (Fed. Cir. 1988). The CDA requires that all claims by the Government against a contractor "shall be the subject of a decision by the contracting officer." 41 U.S.C. § 605(a). Here, there is no decision by a contracting officer. There is only a termination for default by the prime contractor's buyer. Hence, there is no jurisdiction for that reason as well. *See Improved Petroleum Recovery, Inc.*, EBCA Nos. 348-1-86, 349-1-86, 87-1 BCA ¶ 19,431. Vertol relies upon *L. O. Warner, Inc.*, EBCA No. 351-2-86, 88-2 BCA ¶ 20,596. In *L. O. Warner* the Board determined that it had jurisdiction of the appeal in a decision reported at 86-3 BCA ¶ 19,207. The opinion there indicates that, unlike the situation in the appeal before us, the appeal was taken from a final decision by a contracting officer upholding the prime contractor's termination of the subcontract for default (86-3 BCA at 97,141). There are other unique features in Department of Energy appeals such as *L. O. Warner, Inc.*, which render them distinguishable and which it is unnecessary to address here.

CONCLUSION

The Government's motion to dismiss for lack of jurisdiction is granted. Appellant's cross motion is denied. The appeal is dismissed.

Dated: 11 July 2000

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

I concur

I concur

MARK N. STEMLER
Administrative Judge
Acting 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. 52064, Appeal of Vertol Systems Company, Inc., rendered in conformance with the Board's Charter.

Dated:

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