

ARMED SERVICES BOARD OF CONTRACT APPEALS

Appeal of -- )  
 )  
Diamond Roofing Company, Inc. ) ASBCA No. 55847  
 )  
Under Contract No. W912PQ-04-C-0011 )

APPEARANCE FOR THE APPELLANT: Mr. Donald A. DeStefano  
President

APPEARANCES FOR THE GOVERNMENT: Craig S. Clarke, Esq.  
Acting Chief Trial Attorney  
MAJ Christopher L. Krafchek, JA  
Trial Attorney

OPINION BY ADMINISTRATIVE JUDGE FREEMAN  
UNDER RULE 12.3

Diamond Roofing Company, Inc. (Diamond), a subcontractor under the captioned prime contract, appeals the denial of its claim<sup>1</sup> requesting payment of \$92,297.09 for costs of work that it omitted from its subcontract bid (R4, tab 7 at 3-4, 6). Diamond has elected the Rule 12.3 accelerated procedure. The prime contractor party to Diamond's subcontract is Jemcoat, Inc. (Jemcoat) (compl. at 1). There is no evidence that Jemcoat either sponsored Diamond's claim to the contracting officer or is sponsoring Diamond's present appeal to this Board. With exceptions not claimed by Diamond here, we do not have jurisdiction over a subcontractor appeal that is not sponsored by the prime contractor party to the subcontract. *Alpine Computers, Inc.*, ASBCA No. 54659, 05-2 BCA ¶ 32,997 at 163,560-62.

On 20 July 2007 we ordered Diamond to show cause why the appeal should not be dismissed for lack of jurisdiction. Diamond has responded to the order and the government has replied to the response. Diamond's response alleges that:

At the time of Jemcoat's default termination Diamond's contract remained open and was transferred to Perini Management, the agent for the surety that is completing the work. Perini, acting as the prime contractor for the owner,

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<sup>1</sup> The claim was actually submitted as a "grievance," but the contracting officer considered it to be a claim and issued a decision under the Contract Disputes Act of 1978 (CDA), 41 U.S.C. §§ 601-611.

evidenced Diamond Roofing's just cause in their recommendation for the contracting officer to pay this claim. This request constitutes sponsorship of Diamond's claim.

(App. resp. at 1)

There is no evidence that the roofing subcontract between Jemcoat and Diamond was "transferred" to Perini or to Zurich American Insurance Company, the take-over surety, when Jemcoat's right to proceed with the work was terminated for default. Such transfer is not provided for in the FAR 52.249-10 DEFAULT (FIXED- PRICE CONSTRUCTION) (APR 1984) clause of the Jemcoat contract, nor in the January 2007 AGREEMENT between the government and Zurich for completion of the contract work by Zurich (R4, tab 1 at 23, tab 10). Absent a contractual relationship between Diamond and either Perini or Zurich, and none has been shown here, there is no basis for either Perini or Zurich sponsoring a "pass-through" claim of Diamond.

Diamond's assertion that Perini "evidenced Diamond Roofing's just cause in their recommendation for the contracting officer to pay this claim" is incorrect. Perini's transmittal of Diamond's "grievance" to the government did not recommend payment. It took a completely neutral stance. It stated: "Please review the attached and inform us of your decision regarding Diamond Roofing's request for additional money to perform work at Building 801." (R4, tab 7 at 5) In any event, there is no evidence of any statements or actions of Perini or Zurich indicating sponsorship of Diamond's appeal. Diamond's appeal was not transmitted through either Perini or Zurich, but made directly by Diamond to the Board.

The burden of establishing jurisdiction in a tribunal lies with the party seeking to invoke its jurisdiction. *Cedars-Sinai Medical Center v. Watkins*, 11 F.3d 1573, 1583 (Fed. Cir. 1993), *cert. denied*, 512 U.S. 1235 (1994). Diamond has failed to establish either (i) that its claim and appeal are sponsored by Jemcoat, the prime contractor party to its roofing subcontract, (ii) that either Perini or Zurich replaced Jemcoat as the prime contractor party to that subcontract, or (iii) that its un-sponsored appeal meets any of the exceptions to the sponsorship rule set forth in *Alpine Computers, Inc., supra*.

The appeal is dismissed for lack of jurisdiction.

Dated: 12 September 2007

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MONROE E. FREEMAN, JR.  
Administrative Judge  
Armed Services Board  
of Contract Appeals

I concur

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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. 55847, Appeal of Diamond Roofing Company, Inc., rendered in conformance with the Board's Charter.

Dated:

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