

ARMED SERVICES BOARD OF CONTRACT APPEALS

Appeal of --)
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MAC International FZE) ASBCA No. 56355
)
Under Contract No. W194NS-04-D-0117)

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

This appeal arises from a MAC International FZE (MAC or appellant) claim against the United States government for reimbursement under a contract between MAC and the Coalition Provisional Authority (CPA) in Iraq. In the claim MAC sought: (1) that part of the contract price that had not been paid, plus interest under the Prompt Payment Act (PPA), 31 U.S.C. §§ 3901-3907, under delivery orders (DOs) 8 and 9, that had been funded with Development Fund for Iraq (DFI) funds; and (2) PPA interest based on allegedly late payments made under 16 additional DOs that had referenced United States government appropriated funds. The part of the claim involving DOs 8 and 9 was the subject of a government motion for partial summary judgment or, in the alternative, to dismiss for lack of jurisdiction. The Board granted the government's motion and dismissed that claim, finding that it did not have jurisdiction to hear disputes relating to DOs 8 and 9. *MAC International FZE*, ASBCA No. 56355, 10-2 BCA ¶ 34,591 ("*MAC I*"). Familiarity with the earlier decision is assumed.

MAC appealed our earlier decision to the United States Court of Appeals for the Federal Circuit. The appeal was voluntarily dismissed in May 2012. We then requested the parties brief whether the Board had jurisdiction to consider the remainder of the claim involving the PPA interest sought under the 16 DOs. The government has filed a motion to dismiss the remainder of the appeal for lack of subject matter jurisdiction and appellant has opposed the motion. The parties have fully briefed the matter and rely upon the

record previously submitted in support of *MAC I*. We incorporate in this decision pertinent findings made in *MAC I*. The government's motion is granted.

STATEMENT OF FACTS (SOF) FOR PURPOSES OF THE MOTION

1. The CPA was created by coalition partners in 2003 under the laws and usages of war and was recognized by the United Nations Security Council as "a temporary entity formed under applicable international law by the coalition partners as occupying powers under unified command." *MAC I*, SOF ¶¶ 1-4. More than ten countries, including the United States and the United Kingdom, contributed significant amounts of money, personnel and various other resources to support the operation of the CPA. *MAC I*, SOF ¶¶ 5, 6. One of the many contributions of support to the CPA made by the U.S. government was the assignment of U.S. Army personnel to provide program management and acquisition support to the CPA and any successor entity. At the time the contract at issue was awarded, the Army performed these functions in support of the CPA within the CPA Contracting Activity which was specifically referenced in the contract as the responsible office. *MAC I*, SOF ¶¶ 7, 15. The CPA created the Program Review Board (PRB) to, among other things, recommend the obligation and disbursement of funds contributed to the CPA for and on behalf of the Iraqi people. Membership of the PRB was comprised of 20 officials including officials representing the CPA, United States, United Kingdom, Australia and various international financial organizations and Iraqi ministry officials. The funds authorized for disbursement by the PRB included U.S. government appropriated monies contributed to the CPA and various Iraqi-sourced funds. *MAC I*, SOF ¶ 8. The CPA issued contracts obligating Iraqi funds and U.S. government appropriated funds that had been contributed in support of the CPA. Only CPA contracting officers were authorized to issue contracts on behalf of the CPA. Even though individuals may have been contracting officers for coalition countries, they could not award CPA contracts unless they received specific delegated authority to do so from the CPA Head of Contracting or a designee. *MAC I*, SOF ¶ 10.

2. On 24 April 2004 the CPA awarded indefinite delivery/indefinite quantity (IDIQ) Contract No. W914NS-04-D-0117 to MAC. No other contracting party was identified in the contract. Under the contract, appellant was to deliver various General Motors vehicles in Iraq for a not-to-exceed amount of \$122,213,569.00 pursuant to the terms of specific DOs. The contract contained no funding information; funding for each particular DO was referenced in that DO. In total, MAC delivered 7,602 vehicles under the DOs issued under the contract. *MAC I*, SOF ¶¶ 14-16. The 16 DOs now at issue are:

DO No.	Issuing Contracting Office	Date Issued
1-2	CPA Contracting Activity	24 Apr 2004
3	CPA Contracting Activity	12 May 2004

4	CPA Contracting Activity	18 May 2004
6	CPA Contracting Activity	11 Jun 2004
7	CPA Contracting Activity	12 Jun 2004
11-12	CPA Contracting Activity	23 Jun 2004
13	PCO ¹ Contracting Activity	8 Jul 2004
14	PCO Contracting Activity	18 Jul 2004
15	PCO Contracting Activity	Bef. 2 Apr 2005 ²
16	PCO Contracting Activity	8 Jul 2004
17	PCO Contracting Activity	24 Jul 2004
18	PCO Contracting Activity ³	26 Jul 2004
20	PCO Contracting Activity	2 Jan 2005
21	JCC-I/A ¹	11 Aug 2005

(R4, tabs 4, 8, 12, 15, 22, 25, 46, 49, 51, 55, 58, 60, 64, 70, 76, 80) The address of the contracting office referenced as issuing each of the DOs to MAC remained the same regardless of the name of the contracting activity that issued any particular DO. *Id.* All of the DOs now at issue contained, in Block 25 of Form SF1449, U.S. government appropriated fund cites. *MAC I*, SOF ¶ 17. It is undisputed that MAC was paid for the vehicles delivered under these 16 DOs.

3. On 28 June 2004, the CPA was dissolved and all authorities, responsibilities, and obligations were transferred to the Interim Iraqi Government (IIG) with whom the United States then established diplomatic relations. *MAC I*, SOF ¶¶ 21, 22. The CPA's 28 June 2004 Order Number 100, TRANSITION OF LAWS, REGULATIONS,

¹ See SOF ¶ 3 below.

² The record does not contain the DO; however the Material Inspection and Receiving Reports for DO 15 show that MAC first shipped vehicles under that DO on 2 April 2005 (R4, tab 58).

³ DO 18 states on its face that the issuing contracting activity is the CPA Contracting Activity. However, since the effective date of the DO is after the dissolution of the CPA, the issuing office had to be the PCO Contracting Activity. (R4, tab 70)

ORDERS, AND DIRECTIVES ISSUED BY THE COALITION PROVISIONAL AUTHORITY, provided:

This Order makes appropriate revisions to laws, regulations, orders, memoranda, instructions and directives issued by the CPA to facilitate an orderly transfer of full governing authority to the Iraqi Interim Government on 30 June 2004. The Order seeks to ensure that the Iraqi Interim Government and all subsequent Iraqi governments inherit full responsibility for these laws, regulations, orders, memoranda, instructions and directives so that their implementation after the transfer of full governing authority may reflect the expectations of the Iraqi people, as determined by a fully empowered and sovereign Iraqi Government. This is the final Order of the CPA, which will dissolve on 30 June 2004, after the transfer of full governing authority to the Iraqi Interim Government.

<http://www.iraqcoalition.org>.

MAC I, SOF ¶ 22. There is no evidence that any obligation of the CPA was transferred from the CPA to anyone other than the IIG. Upon the dissolution of the CPA, the IIG delegated to the Project and Contracting Office (PCO) the responsibility of overseeing the expenditure of U.S. government appropriated funds contributed in support of Iraqi reconstruction. *Id.* In October 2004, the Joint Contracting Command-Iraq/Afghanistan (JCC-I/A) was established to provide contracting support for (1) Iraqi reconstruction begun under the CPA and continued by the IIG and (2) Operation Enduring Freedom military efforts in Iraq and Afghanistan. *MAC I*, SOF ¶ 23. Pursuant to specific delegation of contracting authority by the IIG, the PCO and then the JCC-I/A supplied continuing contracting support through 31 December 2007 for CPA contracts that were in existence as of the 28 June 2004 dissolution of the CPA and which were transferred to the IIG upon dissolution. *MAC I*, SOF ¶¶ 23, 26. The contract now at issue was one of those contracts.

4. On 14 February 2008, approximately six weeks after the 31 December 2007 expiration of IIG's delegation of authority to the JCC-I/A to handle contracting matters on the IIG's behalf, MAC submitted a certified claim for \$5,598,129.52 to the JCC-I/A. In the portion of the claim now remaining before us, MAC sought PPA interest in the amount of \$653,629.52 for vehicles delivered under 16 DOs (nos. 1-4, 6, 7, 11-18, 20, 21) for which it had been paid, but allegedly later than required by the PPA. *MAC I*, SOF ¶ 25. The JCC-I/A advised that it no longer had any contracting authority as the

delegation of such from the IIG had expired; MAC filed this appeal from the “deemed denial” of its claim. *MAC I*, SOF ¶¶ 26, 27.

DECISION

The sole issue remaining before us in this appeal is the PPA interest sought by appellant under 16 DOs that referenced U.S. government appropriated funds contributed to the CPA for Iraqi reconstruction. The government has moved to dismiss this remaining part of the appeal for lack of subject matter jurisdiction (gov’t mot. at 1-4).⁴

Appellant opposes the government’s motion and, first, argues that the government did not previously challenge the Board’s jurisdiction to hear the dispute involving the 16 DOs now before us (app. opp’n at 6-7). The existence of our jurisdiction can be challenged at any time and cannot be conferred by consent, estoppel, or waiver. *See, e.g., Brazos Electric Power Cooperative, Inc. v. United States*, 144 F.3d 784, 788 (Fed. Cir. 1998); *Diggs v. Department of Housing and Urban Development*, 670 F.3d 1353, 1355 (Fed. Cir. 2011).

Appellant’s primary argument in opposition to the government’s motion is:

Contracting authority over the 16, non-DFI funded Delivery Orders never transferred to the IIG. These Delivery Orders are U.S. contracts issued by U.S. Contracting Officers using U.S. money for the benefit of the U.S. Government. When the CPA dissolved, the U.S. Government served as the contracting activity and exercised authority over the 16 Delivery Orders.

(App. opp’n at 7) MAC further argues that the governmental contracting party after the dissolution of the CPA was the PCO and not the IIG, so the Board’s earlier decision that no executive agency was involved does not apply and we have jurisdiction under the Contract Disputes Act (CDA), 41 U.S.C. §§ 7101-7109.⁵ More particularly, MAC argues that, unlike the situation in our earlier decision which involved the DFI funds, only U.S. appropriated funds were used in the 16 DOs now at issue and, for that reason, MAC argues that liabilities under the DOs were not transferred to the IIG, but were liabilities of

⁴ The government also argues the merits of appellant’s claim to PPA interest (gov’t mot. at 4-5). Given our resolution of the jurisdictional argument, we need not address the substantive issues.

⁵ We note that this argument would seem to apply only to the DOs 13-18, 20, and 21 which were issued after the PCO (and later the JCC-I/A) became the contracting activity. DOs 1-4, 6, 7, 11, and 12 were issued by the CPA.

the U.S. government. (App. opp'n at 7-11) As discussed below, the record does not support MAC's position.

The contract under which the DOs now before us were issued was a contract between the CPA, an international entity, and MAC. The U.S. government was never a party to the contract nor to any of the DOs. *MAC I*, 10-2 BCA ¶ 34,591 at 170,515-17. The U.S. government's role in the contracting process (through the CPA Contracting Activity, PCO and JCC-I/A) was solely as the specific delegate of the CPA until its dissolution on 28 June 2004 and, after the dissolution of the CPA, by specific delegation by the IIG. MAC argues that the 16 DOs now at issue were U.S. government contracts and that, after dissolution of the CPA, they were obligations of the U.S. government and did not transfer to the IIG (app. opp'n at 7). However, the DOs issued under the CPA contract, to which the U.S. government was never a party, obligated the same contracting party as the contract itself: the CPA and, by virtue of CPA Order Number 100, any successor entities such as the IIG. And, since the U.S. government was never a party to the contract or the DOs, it could not be the obligated party after dissolution of the CPA.

MAC's arguments focus on the presence of U.S. government personnel, funds, contracting forms, etc. in the contracting process as if they were dispositive evidence that, despite the express terms of the contract and the DOs to the contrary, the U.S. government and not the CPA and IIG was the contracting party. As we stated in *MAC I*:

On the basis of the foregoing, it is apparent to us that the CPA was an international entity and was not an entity of any of the member nations of the CPA, including the U.S. government. We find the district court's logic in *DRC I*⁶ in this regard persuasive:

[T]here is no dispute that the CPA was not established by Congress. Instead, as described in a letter to the United Nations, the CPA was an entity created by the United States, United Kingdom, and its Coalition partners "acting under existing command and control arrangements through the Commander of Coalition Forces." Moreover, the United Nations recognized the CPA, not as an instrumentality of the United States, but as an entity through which the Coalition nations acted "as occupying powers under unified command." UNSCR 1483. And while the substantial majority of

⁶ *United States of America ex rel. DRC, Inc. v. Custer Battles, LLC*, 376 F. Supp. 2d 617 (E.D. Va. 2005), *rev'd in part on other grounds and remanded*, 562 F.3d 295 (4th Cir. 2009).

the CPA staff was comprised of United States employees, a significant portion - 13% - hailed from other Coalition partners. Thus, the CPA may also be described as an international body formed by the implicit, multilateral consent of its Coalition partners, which would not be subject to the specific laws of its member states.... Given the fluid nature of the conflict in Iraq and the challenges of establishing a new government in a war zone, it is not surprising that the organization of the CPA appears at times to have been ad hoc and to have relied heavily on the resources of its largest contributing member. Thus it would seem that, like NATO or any other international organization created by the multilateral consent of multiple member nations, whether by treaty or otherwise, the CPA is not an instrumentality of each of its members [sic] states, distinctly subject to the laws of all of its members, but a wholly distinct entity that exercises power through a structure agreed to by its member states and that is subject to the laws of war and to its own laws and regulations.

DRC I, 376 F. Supp. 2d at 650....

....

...And, indeed, the result of that analysis is clear-although the CPA was principally controlled and funded by the U.S., this degree of control did not rise to the level of exclusive control required to qualify as an instrumentality of the U.S. government. *See Rainwater*, 356 U.S. at 592-94, 78 S. Ct. 946. In fact, the evidence clearly establishes that it was created through and governed by multinational consent....

DRC II,^[7] 444 F. Supp. 2d at 688-89.

MAC I, 10-2 BCA ¶ 34,591 at 170,516-17.

⁷ *United States of America ex rel. DRC, Inc. v. Custer Battles, LLC*, 444 F. Supp. 2d 678 (E.D. Va. 2005), *rev'd in part on other grounds and remanded*, 562 F.3d 295 (4th Cir. 2009).

While our earlier decision necessarily addressed itself to DOs 8 and 9, which were funded with DFI funds, the existence of our jurisdiction is not changed by the fact that the 16 DOs at issue in the remainder of the appeal contained U.S. government appropriated fund cites. As we held in *MAC I*:

We find the U.S. government's role in the CPA, as reflected in the record before us and in existing case law, to be entirely consistent with its role as a coalition partner who made very significant contributions of money, personnel and expertise.¹¹ The use by the government of its various agencies, including the Department of Defense and Department of State, among others, as part of the United States' contribution is entirely consistent with its role as a coalition partner in the CPA. The government's appointment of the Army to have lead responsibility to provide support to the CPA in the areas of contract awards, administration and financial management is also entirely consistent with its role as a coalition partner. This conclusion is further supported by the express delegation of authority by the IIG for continued contract administration by the Army through the PMO, PCO and JCC-I/A after the dissolution of the CPA.

The government did not become the CPA (nor did the CPA become the government) by virtue of the government's use and contribution of its resources in its role as a coalition partner. And we do not find it surprising, nor at all inappropriate, that the government would want U.S. government-led oversight of the significant contribution of appropriated funds it had made to the CPA. Further, the government's resources were not the only significant contributions made by coalition partners to the CPA. More than ten other coalition partners and nations also contributed money, personnel and expertise. This is all consistent with the CPA's status as an international entity and consistent with the government's status as one of many coalition partners. To hold otherwise would be to ignore or nullify the significant contributions of the multi-national coalition partners other than the U.S. government and we decline to do so.

In our view, therefore, the CPA was an international entity and not a [U.S.] government entity. As a result, the CPA is not an executive agency for purposes of the CDA and

there is no basis for jurisdiction to consider this appeal under the CDA....

....

¹¹ The fact that the government (DoD, Army, Department of State, etc.) paid the wages and salaries of the government personnel while they worked in support of the CPA (including Administrator Bremer) is entirely consistent with it making a contribution of those wages and salaries in its role as a coalition partner.

MAC I, 10-2 BCA ¶ 34,591 at 170,517-18, 170,520 (citations omitted).

Further operating against the existence of jurisdiction over MAC's claim for PPA interest is the requirement that a dispute under the PPA must be asserted in a claim under the CDA. 31 U.S.C. § 3907; *Randolph and Co.*, ASBCA No. 52953 *et al.*, 03-1 BCA ¶ 32,080 at 158,586. As we quoted above and discussed at length in *MAC I*, the CDA is not applicable to the contract between the CPA and MAC nor, by extension, the DOs issued under that contract. *MAC I*, 10-2 BCA ¶ 34,591 at 170,515-18.

We have previously held that extensive involvement by the U.S. government in the form of personnel, contract forms, oversight and even funding is insufficient to establish CDA jurisdiction where the government was not a party to the contract. *See, e.g., CDK Contracting Co.*, ASBCA No. 44997, 93-3 BCA ¶ 26,068. As the Court of Federal Claims held recently, and specifically as it relates to CPA contracts and U.S. government support of the CPA:

[E]ven extensive involvement by the United States in administering the...contract cannot overcome the lack of privity of contract between the [contractor] and [the government].... Even extensive, de facto control of the contract cannot create a contract where no privity exists.

Laudes Corp. v. United States, 86 Fed. Cl. 152, 165 (2009).

MAC I, 10-2 BCA ¶ 34,591 at 170,516.

CONCLUSION

For the foregoing reasons, we do not have jurisdiction to decide the merits of the remainder of ASBCA No. 56355 and grant the government's motion to dismiss for lack of subject matter jurisdiction.

Dated: 23 April 2013



DIANA S. DICKINSON
Administrative Judge
Armed Services Board
of Contract Appeals

I concur



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

I concur



JACK DELMAN
Administrative Judge
Acting 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. 56355, Appeal of MAC International FZE, rendered in conformance with the Board's Charter.

Dated:

JEFFREY D. GARDIN
Recorder, Armed Services
Board of Contract Appeals