

ARMED SERVICES BOARD OF CONTRACT APPEALS

Appeal of --)
)
WorleyParsons International, Inc.) ASBCA No. 57930
)
Under Contract Nos. W9126G-04-D-0002)
W914NS-04-C-0002)

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OPINION BY ADMINISTRATIVE JUDGE MELNICK ON APPELLANT'S MOTION
TO DISMISS FOR LACK OF JURISDICTION

This is an appeal from a purported claim against WorleyParsons International, Inc.¹ The government seeks \$6,999,550 allegedly due for Cost Accounting Standards (CAS) violations. Because the government's claim is a nullity under the Contract Disputes Act, the appeal is dismissed for lack of jurisdiction.

STATEMENT OF FACTS (SOF) FOR PURPOSES OF THE MOTION

1. On 9 July 2003, the United States Army Corps of Engineers (Corps) issued a solicitation for contract proposals to provide repair and continuity of operation services for oil infrastructure in Iraq (R4, tab 1).

2. In early December 2003, Parsons Delaware, Inc. and Parsons Energy and Chemicals (E&C) International, Inc., executed an agreement establishing the Parsons Iraq Joint Venture (PIJV). They created PIJV to respond to the Corps' request for the infrastructure project proposal and to enter into and perform a contract for that purpose. (Bd. corr. ltr. dtd. 17 June 2013, ex. G-1 ("ex. G-1") at 1) Parsons E&C possessed an

¹ The appeal was originally erroneously docketed as Worley Parsons International, Inc., Joint Venture. The correct caption has been substituted.

85% interest in PIJV's assets, profits, and losses, and was the managing partner (ex. G-1 at 10, ex. G-2 at 7). Under the joint venture agreement, PIJV would not hire employees of its own. It would rely upon its partners to provide necessary personnel to perform the contract work. (Ex. G-1 at 10) The agreement contemplated that PIJV would execute subcontracts with its partners for their services (*id.* at 9, 14, 15). The partners would invoice PIJV for their costs in accordance with their accounting systems, government regulations, and their subcontracts. PIJV would then separately invoice the government, deposit resulting payments in its bank account, and issue checks to its partners. (*Id.* at 15) In the event a subsequent audit showed that government payments to PIJV required revision, the adjustments would be passed on to the partners (*id.* at 15-16). The agreement stated that PIJV would "be registered in the State of Delaware, but [PIJV], as a profit and loss sharing agreement for the Project, will not be a separate entity" (*id.* at 6). Finally, the agreement was to be "governed and interpreted in accordance with" Delaware law (*id.* at 21). The partners subsequently changed their names, with Parsons E&C becoming WorleyParsons International, Inc. (WPPI), and Parsons Delaware, Inc. becoming Parsons Global Services, Inc. (ex. G-2 at 8, 38).

3. On 16 January 2004, the Corps awarded Contract No. W9126G-04-D-0002 to PIJV (the PIJV contract). It was a cost plus award fee, indefinite delivery, indefinite quantity contract for services. (R4, tab 1) The contract included the FAR 52.230-2, COST ACCOUNTING STANDARDS (APR 1998) clause (*id.* at 14). Under that clause, PIJV was required to comply with the CAS, and agreed "to an adjustment of the contract price or cost allowance, as appropriate, if the Contractor or a subcontractor fails to comply with an applicable Cost Accounting Standard" (*id.* at 15). On 19 January 2004, PIJV executed subcontracts with its partners for the personnel, facilities, equipment, material, supplies, and services necessary to perform the prime contract (ex. G-2 at 8, 11).

4. On 23 March 2007, the Defense Contract Audit Agency (DCAA) issued an audit report concluding that WPPI was not in compliance with the CAS respecting its allocation of overhead (R4, tab 4). The report identified WPPI as a partner in PIJV, and PIJV as the party performing the PIJV contract (*id.* at 61). On 21 July 2008, PIJV and WPPI requested a contracting officer's determination regarding the alleged violations (R4, tab 6). The contracting officer issued a finding of noncompliance to PIJV on 13 May 2009 (R4, tab 7). WPPI and the government then engaged in further correspondence about the matter (R4, tabs 8-16, 19). On 2 July 2010, DCAA issued an audit report regarding a WPPI assessment of the cost impact of its alleged CAS noncompliance (R4, tab 20). Again, the report acknowledged that WPPI is a partner in PIJV, and that PIJV was the party performing the PIJV contract (*id.* at 123).

5. On 14 October 2011, the contracting officer issued a final decision against WPPI for amounts allegedly due to the government as a result of its alleged CAS noncompliance (R4, tab 36). The decision identifies two affected contracts. The first is the PIJV contract (*id.* at 200). The second is Contract No. W914NS-04-C-0002, which

was issued on 10 March 2004 by the “PENTAGON RENOVATION PROGRAM” on behalf of the Coalition Provisional Authority (CPA) and was awarded to the Iraq Power Alliance Joint Venture (IPAJV) for program management services (the IPAJV contract) (R4, tabs 2, 36 at 200). WPII is a partner in IPAJV (compl. ¶ 8). The decision concludes that the cost impact of WPII’s alleged CAS noncompliance is \$5,116,331 (R4, tab 36 at 203). It adds \$113,997 in allegedly excessive fees charged to the government resulting from the noncompliant practices, and \$1,769,222 in interest, for a total claim of \$6,999,550 (*id.* at 200-01, 203, 205). The decision notes that on 25 September 2009, the contracting officer implemented a 10 percent hold on all contract payments under the PIJV contract, which totaled \$78,447 (*id.* at 201).

6. On 12 January 2012, WPII, PIJV, and IPAJV appealed the government’s final decision to this Board.² WPII then filed a motion to dismiss the appeal for lack of jurisdiction, contending that the government’s claim was time barred by the Contract Disputes Act statute of limitations and therefore the Board lacks jurisdiction.³ During the briefing of that motion, the Board inquired, by order dated 20 May 2013, whether the government’s final decision against WPII was issued to the correct party, given that the contracts cited in the decision were awarded to PIJV and IPAJV. The Board also observed that the IPAJV contract was awarded on behalf of the CPA, presenting a question as to whether that contract was entered into by an executive agency, which is a condition of the Board’s jurisdiction under the Contract Disputes Act. In its response to the Board’s order, the government represented that the IPAJV contract was not awarded by an executive agency and also agreed that the contract is not subject to the CAS. The government conceded therefore that the contracting officer’s decision should not have included a government claim for costs attributable to that contract. The government argued that WPII was a party to the PIJV contract though, and therefore its claim against WPII respecting costs associated with that contract was proper.

7. WPII responded with a supplement to its motion to dismiss. It agreed that the IPAJV contract was with the CPA, and that the CPA was not an executive agency. It also argued that WPII was not a party to the PIJV contract. Accordingly, WPII sought dismissal of the entire appeal on the ground that the government had failed to properly assert a claim against WPII over which the Board could exercise jurisdiction.

² WPII is the only name on the caption since the contracting officer’s final decision was only directed to it.

³ Initially, the motion also sought dismissal based upon laches or equitable estoppel, but appellants’ reply clarified that they are not pursuing those arguments at this time.

DECISION

The Board's jurisdiction is dictated and governed by the Contract Disputes Act (CDA), 41 U.S.C. §§ 7101-7109, which is a waiver of sovereign immunity that must be strictly construed. *Winter v. FloorPro, Inc.*, 570 F.3d 1367, 1370 (Fed. Cir. 2009). The CDA imposes two requirements that are relevant here. First, the CDA only applies to express or implied contracts made by an executive agency of the government. 41 U.S.C. § 7102(a). Thus, the Board only entertains appeals under the CDA involving contracts entered into by executive agencies. *MAC International FZE*, ASBCA No. 56355, 10-2 BCA ¶ 34,591 at 170,515.

Second, the CDA imposes specific prerequisites to pursuing an appeal. In the case of a government claim such as this, the contracting officer must have issued a written decision "against a contractor relating to a contract." 41 U.S.C. § 7103(a)(3); *see also Admiralty Constr., Inc. v. Dalton*, 156 F.3d 1217, 1220 (Fed. Cir. 1998). A contractor may then appeal such a decision to this Board. 41 U.S.C. § 7104(a); *FloorPro*, 570 F.3d at 1369-71; *Admiralty Constr.*, 156 F.3d at 1220. The CDA defines a "contractor" to be "a party to a Federal Government contract other than the Federal Government." 41 U.S.C. § 7101(7).

The government's claim against WP II purportedly relates to the IPAJV contract and the PIJV contract, and was premised upon both contracts having been executed by WP II with executive agencies. We separately consider whether each component of the claim meets that test.

A. The IPAJV Contract

The parties now agree that the IPAJV contract was with the CPA. The CPA was an international coalition and not an executive agency within the meaning of the CDA. *MAC*, 10-2 BCA ¶ 34,591 at 170,518. Accordingly, the component of the government's claim arising from the IPAJV contract was a nullity under the CDA. The Board therefore lacks jurisdiction to entertain an appeal from the contracting officer's decision with respect to that contract.

B. The PIJV Contract

WP II is not the named contractor on the PIJV contract. PIJV is the named contractor, and WP II is a partner in PIJV. (SOF ¶¶ 2-3) However, the government contends that PIJV is not a separate contracting entity from WP II. It argues that PIJV is merely an agent of its partners that bound them as parties to the PIJV contract. Thus, the government says the component of its claim relating to the PIJV contract is properly against WP II and we possess jurisdiction over an appeal from the contracting officer's decision related to this contract. By advocating that its decision is proper, the

government is the proponent of our jurisdiction and bears the burden of proving that its prerequisites have been satisfied. *Raytheon Missile Sys.*, ASBCA No. 58011, 13 BCA ¶ 35,241. We conclude that it has not met that burden.

A joint venture is an association of partners established by contract to carry out a single business activity for joint profit. It is essentially a partnership created for a limited purpose. *Sadelmi Joint Venture v. Dalton*, 5 F.3d 510, 513 (Fed. Cir. 1993). Typically, a joint venture has an independent existence from its partners. See *Pine Prods. Corp. v. United States*, 945 F.2d 1555, 1560 (Fed. Cir. 1991). Thus, when the government contracts with a joint venture, the joint venture is the entity with whom the government is in privity of contract, not its partners. *Brother's Cleaning Serv., Inc. v. United States*, 38 Fed. Cl. 106, 108 (1997); see also *Pine Prods.*, 945 F.2d at 1561. Contrary to its contention here, the government has historically opposed efforts by joint venture partners to claim independent privity on their joint ventures' government contracts, and attempts by partners to assert claims in their own names upon such contracts have been dismissed. See *The Boeing Co.*, ASBCA No. 39314, 90-2 BCA ¶ 22,769 at 114,293; *The Boeing Co.*, ASBCA No. 36612, 89-1 BCA ¶ 21,421 at 107,958; *Brother's Cleaning Serv.*, 38 Fed. Cl. at 108; *Pine Prods. Corp. v. United States*, 15 Cl. Ct. 11, 14-15 (1988); *Wackenhut Int'l, Inc. v. Dept. of State*, CBCA No. 1235, 09-2 BCA ¶ 34,255 at 169,259-60.

The government incorrectly suggests that the Board held to the contrary in *Aries Marine Corp.*, ASBCA No. 37826, 90-1 BCA ¶ 22,484. In *Aries*, the government alleged that a subcontractor was a joint venture partner of a government contractor. The government tried to pursue a claim against the subcontractor on the theory that a joint venture partner is jointly and severally liable for the joint venture's debts. We found that the government had failed to prove that a joint venture existed and dismissed the appeal. Nor does *Intermark Managed Services, Inc.*, ASBCA Nos. 57654, 57655, 12-2 BCA ¶ 35,091, assist the government. There, we merely recognized that a joint venture's authorized partner may pursue an appeal on its behalf, acknowledging that the appeal would be in the joint venture's name. Neither *Aries* nor *Intermark* hold as a matter of law that a joint venture's partners are parties with the government to the joint venture's contract.⁴

⁴ It is true that joint venture partners, like the members of general partnerships, can be jointly and severally liable for a joint venture's obligations. *Pine Prods. Corp.*, 945 F.2d at 1560-61. However, the fact that the partners might be liable for the joint venture's debts does not establish that they meet the CDA definition of a contractor. See *FloorPro*, 570 F.3d at 1369-72 (dictating that the government's potential liability to the third-party beneficiary of a contract is irrelevant to whether the third-party meets the CDA definition of a contractor).

Nothing presented here causes us to reach a different conclusion. The government has provided no evidence showing that the parties to the PIJV contract manifested any intention that PIJV's partners be in privity with it. Indeed, the limited evidence the government has presented, such as its audit reports, reflects an understanding that PIJV, and not WPPI, was the contractor (SOF ¶ 4). We also disagree with the government's suggestion that the joint venture agreement establishing PIJV defined it to be legally identical to its partners. The government relies upon the agreement's language providing that, "as a profit and loss sharing agreement for the Project, [PIJV] will not be a separate entity" (SOF ¶ 2). However, under governing Delaware law, that agreement must be construed as a whole, giving effect to every provision when reasonably possible. *Norton v. K-Sea Transp. Partners, L.P.*, 67 A.3d 354, 360 (Del. 2013). The agreement also contemplates that, upon PIJV contracting with the government, it execute separate subcontracts with its partners for their individual services performing the prime contract work, which it did (SOF ¶¶ 2-3). Such subcontracts would only be necessary or possible if PIJV was legally distinct from its partners. WPPI could not be a subcontractor if it was already the prime contractor through PIJV. The partners' intent to distinguish PIJV from its partners is also reflected in the agreement's billing procedures, which required the partners to bill PIJV for their services, followed by PIJV separately billing the government (SOF ¶ 2). Thus, giving effect to the entire agreement, we conclude that, for contracting purposes, the partners intended PIJV to be legally separate and independent from them.

The government has not shown that WPPI was the contractor on the PIJV contract. Nor has the government shown that the government's decision was submitted to WPPI on behalf of the contractor. Thus, the government's attempt to pursue a claim against WPPI under that contract was not a "claim against a contractor relating to a contract" and is therefore a nullity under the CDA.

CONCLUSION

Because the government's claim is a nullity under the CDA, the appeal is dismissed for lack of jurisdiction.⁵

Dated: 20 December 2013



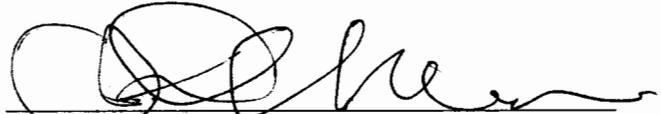
MARK A. MELNICK
Administrative Judge
Armed Services Board
of Contract Appeals

I concur



MARK N. STEMPLER
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 Order of Dismissal of the Armed Services Board of Contract Appeals in ASBCA No. 57930, Appeal of WorleyParsons International, Inc., rendered in conformance with the Board's Charter.

Dated:

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

⁵ Given our dismissal on these grounds we do not address whether the government's claim was timely.