

ARMED SERVICES BOARD OF CONTRACT APPEALS

Appeal of --)
Henry Stranahan) ASBCA No. 58392
Under Contract No. 000000-00-0-0000)

APPEARANCE FOR THE APPELLANT: Mr. Henry Stranahan
Owner

APPEARANCES FOR THE GOVERNMENT: Daniel K. Poling, Esq.
DLA Chief Trial Attorney
ChristinaLynn E. McCoy, Esq.
Trial Attorney

OPINION BY ADMINISTRATIVE JUDGE WILSON
ON THE GOVERNMENT'S MOTION TO DISMISS

The Defense Logistics Agency (DLA) filed a motion to dismiss the above-captioned appeal for lack of jurisdiction. Appellant, Henry Stranahan, owner of SGC Performance, Inc. (SGC), appeals a contractor debarment decision by the agency. The Board, by order dated 4 December 2012, directed appellant to show that this matter complies with the requirements of the Contract Disputes Act (CDA), 41 U.S.C. §§ 7101-7109, or show cause why the appeal should not be dismissed for lack of jurisdiction. Appellant responded, by letter dated 18 December 2012, asserting that it was appealing from a “decision of a Contracting Officer.” Specifically, appellant contended that he, as the owner of SGC, is a contractor, and the Special Assistant for Contracting Integrity (SACI)/debarment official, Mr. Walter Thomas, was a contracting officer (CO) within the definition of 41 U.S.C. § 7101(6)(A). As this appeal was from an unresolved dispute between a contractor and the CO, appellant contends that the Board has jurisdiction over the appeal. The government responded by filing the instant motion, contending that the Board lacks jurisdiction to review debarment decisions and the SACI is not a CO. For the reasons stated below, the government’s motion is granted.

STATEMENT OF FACTS (SOF) FOR PURPOSES OF THE MOTION

1. Pursuant to Department of Defense Federal Acquisition Regulation Supplement (DFARS) 209.403(1), the DLA SACI is the suspension and debarment official (SDO) for the agency. By letter dated 5 December 2011, Mr. Walter Thomas, Acting Deputy General Counsel, was appointed as the SACI to exercise his authority “as the DLA Suspending and Debarment Official” (gov’t mot., ex. 1). For ease of reference, this decision will refer to Mr. Thomas as the SDO.

2. On 3 February 2012, DLA Land and Maritime issued Purchase Order No. SPM7MC-12-M-2546 (PO No. 2546) to SGC for the purchase and delivery of eight gear clusters (gov't reply br., ex. 12). By letter dated 23 April 2012, the SDO notified SGC of the proposed debarment action. The notice also included a memorandum explaining the basis of the decision and the affiliated companies and individuals affected, including Henry Stranahan, owner of SGC. The basis for the proposed debarment was "a willful failure to perform in accordance with the terms of one or more contracts." (Gov't mot., ex. 2 at 23)

3. On 30 May 2012, Mr. Stranahan contacted Mr. Cary Bryant, CO for PO No. 2546, and stated the following: "The Government has initiated a proposed debarment... Please consider a unilateral withdrawal without cost to either the Contractor or the Government." The CO replied "SGC [P]erformance is allowed to continue performance under awards issued prior to your proposed debarment, provided that you ship before the due date." (Gov't reply br., ex. 13) By email dated 12 June 2012, Mr. Stranahan again requested that PO No. 2546 be "withdrawn without cost to either the Contractor or the Government, because a proposed debarment creates the impossibility of performance." On 20 June 2012, the parties executed Modification No. P00001 which cancelled the order at no cost to the contractor. (Gov't reply br., ex. 14 at 25, 27)

4. By letter dated 3 July 2012, the SDO issued his decision debarring Mr. Stranahan and his affiliated companies from government contracting for a period of three years (gov't mot., ex. 3). By letter dated 20 July 2012, Mr. Stranahan formally protested the "three year personal debarment from Government activity" to the SDO (gov't mot., ex. 4).

5. The SDO responded, by letter dated 28 September 2012, informing Mr. Stranahan that the debarment would remain in effect (gov't mot., ex. 6). Mr. Stranahan also sent a request to Brigadier General Darrell K. Williams, Commanding, DLA Land and Maritime, requesting support for review of his debarment (gov't mot., ex. 7). The request was referred to counsel, who determined that the inquiry had already been addressed in the SDO's 28 September 2012 decision to keep the debarment in place for the full three years (gov't mot., ex. 8). This process continued again and culminated with the SDO informing Mr. Stranahan, by letter dated 19 November 2012, that the "information currently before me is insufficient to reestablish [your] present responsibility." Accordingly, the SDO concluded that the debarment would remain in effect. (Gov't mot., ex. 10)

6. By letter dated 19 November 2012, Mr. Stranahan filed a notice of appeal with the Board, which was docketed on 23 November 2012 as ASBCA No. 58392. The notice reads as follows:

The Contractor hereby submits this appeal from a decision of a Contracting Officer.

A sincere effort was made to resolve the issue through alternative disputes consideration. Our government ignored those efforts.

7. The Board, by order dated 4 December 2012, directed appellant to show that this matter complies with the requirements of the CDA, or show cause why the appeal should not be dismissed for lack of jurisdiction. Appellant responded, by letter dated 18 December 2012, asserting that it was appealing from a "decision of a Contracting Officer." Specifically, appellant contended that he, as the owner of SGC, is a contractor, and the SDO acted as a CO within the definition of 41 U.S.C. § 7107 (sic, presumably 41 U.S.C. § 7101(6)). After debarment was imposed, the gear cluster PO No. 2546 "was terminated [at SGC and Mr. Stranahan's request] because of the impossibility of performance and the Contractor was prohibited from re-procurement of supplies." Debarment, he concludes, "was the direct causation for termination of an 'express' contract, giving rise to a claim of wrongful action against the Government." As this appeal was from an unresolved dispute between a contractor and DLA, Mr. Stranahan contends that the Board has jurisdiction over the appeal. (App. reply br. at 2)

8. In further support of its position, the government also provided a declaration of the SDO, Mr. Thomas, dated 18 January 2013, and states as follows:

1. I currently serve as an Associate General Counsel for Human Resources and Ethics for the Defense Logistics Agency (DLA) Headquarters (HQ). I have served in this position for twelve years.

2. On December 5, 2011, I was appointed by the DLA HQ General Counsel as the Special Assistant for Contracting Integrity (SACI).

3. The SACI is the agency suspension and debarment official (SDO).

4. Under my authority as SDO, I debarred Mr. Henry Shanahan [sic] individually, and his companies, SGC Performance, Inc. and Penn United Corporation, from contracting with the United States Government on July 3, 2012.

5. I am not a Contracting Officer, and have never been issued a Contracting Officer's warrant.

(Gov't mot., ex. 11) Mr. Stranahan offered no evidence to rebut this declaration. We find that, at all times relevant to this appeal, Mr. Thomas was not a CO.

DECISION

Mr. Stranahan contends that this "unresolved dispute" between a contractor and a CO falls within the jurisdiction of the Board. In the context of this appeal and the facts and circumstances surrounding its inception, this argument makes one fatal logical leap - that Mr. Thomas, the SDO, was in fact a CO. The government counters, *inter alia*, that he was not a CO, and the Board lacks jurisdiction to review this debarment decision. We find the government's arguments persuasive.

As promulgated by the CDA, the Board "has jurisdiction to decide any appeal from a decision of a contracting officer of the Department of Defense...relative to a contract made by that department or agency." 41 U.S.C. § 7105(e)(1)(A). The record clearly indicates that Mr. Thomas is the debarring official and not a CO (SOF ¶ 8). As Mr. Thomas was not a CO, the decision to debar Mr. Stranahan could not, by any stretch of the imagination, be considered a "contracting officer's final decision," the appeal from which the Board would have jurisdiction to decide. Moreover, Mr. Stranahan provided no persuasive evidence to support his erroneous contention.

Regardless of the conclusion that the SDO was not a CO, the Board does not have jurisdiction to review debarment decisions. *See Inter-Continental Equipment, Inc.*, ASBCA No. 38444, 90-1 BCA ¶ 22,501 at 112,956 (Board lacks authority to order or review actions which do not affect a contract that has already come into existence between the Government and a contractor).¹

¹ To the extent that Mr. Stranahan is contending that there existed a dispute between SGC and the CO under PO No. 2546, he has not shown that such unidentified dispute was the subject of a claim submitted to the CO, and therefore CDA jurisdiction cannot exist.

CONCLUSION

The appeal is dismissed for lack of jurisdiction.

Dated: 8 May 2013



OWEN C. WILSON
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



MARK A. MELNICK
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. 58392, Appeal of Henry Stranahan, rendered in conformance with the Board's Charter.

Dated:

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