ARMED SERVICES BOARD OF CONTRACT APPEALS

Appeal of --	)	
	)	
Holmes & Narver Services, Inc.	)	ASBCA No. 51155
	)	
Under Contract No. F48608-96-C-0007	)	

APPEARANCES FOR THE APPELLANT: Gary J. Hill, Esq.
Timothy J. Trager, Esq.
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Santa Barbara, CA

APPEARANCES FOR THE GOVERNMENT: COL John M. Abbott, USAF
Chief Trial Attorney
Robert P. Balcerek, Esq
Trial Attorney

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

This appeal arises from a construction contract between Holmes & Narver Services, Inc. (H&N) and the Government. H&N submitted a claim on behalf of a subcontractor, R. P. Richards, Inc. (Richards), for added costs attributed to alleged dimensional errors in the contract plans and specifications. Following the denial of H&N's claim, Richards filed a notice of appeal with the Board. We docketed the appeal in the name of H&N. The Government moves to dismiss this appeal due to lack of sponsorship by the prime contractor within the 90-day appeal period to this Board. We deny the motion.

FINDINGS OF FACT

1. In February of 1996, the Department of the Air Force (Government) awarded a fixed price contract, No. F48608-96-C-0007, to H&N for construction of housing units at F. E. Warren Air Force Base, Wyoming. The contract included FAR 52.233-1 DISPUTES (MAR 1994). (R4, tab 1) In May of 1996, H&N entered into a subcontract with Richards for the provision of utilities, and heating and ventilation (Complaint at ¶ 6). Clause 20(b) of the subcontract includes this language:

> If the prime contract contains a "Disputes" provision, whereby claims may be resolved under an administrative procedure or by arbitration then CONTRACTOR agrees to present to its prime contract customer all claims and demands of SUBCONTRACTOR originally derived or resulting from acts of the prime contract customer that are not disposed of by agreement.

(Appellant's Opposition to Motion to Dismiss for Lack of Jurisdiction (App. Opp.), ex. 1 at E-7) This clause also states that the prime contractor may authorize its subcontractor to proceed in the subcontractor's own name in the Disputes process if the subcontractor is the real party in interest *(id.).*

2. After Richards' discovery of alleged dimensional errors on the contract plans and specifications, Richards submitted a request for an equitable adjustment for the added costs through H&N, the prime contractor (R4, tab 7). H&N submitted the request, with documentation prepared by Richards, to the Government on 9 May 1997 (R4, tabs 8-10). The contracting officer in a letter dated 14 May 1997 denied the equitable adjustment request without final decision language (R4, tab 10). When H&N notified Richards that the Government denied the request (R4, tab 11), Richards asked H&N to resubmit the request to the contracting officer for reconsideration (R4, tab 12). By a letter dated 30 July 1997, H&N resubmitted the request under its name to the contracting officer, referencing the Richards' data and rationale for reconsideration (R4, tab 13).

3. By a letter dated 10 September 1997, the contracting officer issued a final decision to H&N denying the claim (R4, tab 14). By a letter of the same date, H&N advised Richards of the contracting officer's decision, stating "[p]lease advise us if you wish to pursue this matter further" (R4, tab 15).

4. Richards appealed the contracting officer's decision in its own name on 13 November 1997 attaching a copy of the final decision (R4, tab 16). The Board docketed the appeal under the name of H&N, designated it as ASBCA No. 51155 and sent a notice of docketing to Richards.

5. By a letter dated 9 December 1997, Richards advised H&N that it had appealed the final decision of the contracting officer to this Board (App. Opp., ex. 3). It included a draft complaint and substitution of appearance for H&N to have signed by one of its corporate officers and then forward to this Board.

6. H&N responded to Richards' request that H&N enter an appearance and file a complaint by stating in a letter dated 16 December 1997 that it would authorize Richards to undertake the appeal in its own name but would not permit H&N's name to be used

because Richards was the principal party in interest (Gov't Motion, att. 2). It specifically attempted to transfer to Richards the right to prosecute the appeal in its own name in accordance with the terms of the subcontract as follows:

> [P]ursuant to Paragraph 20 (b) of your company's subcontract with Homes & Narver Services, Inc. entitled "CLAIMS AND DISPUTES", Homes & Narver Services, Inc. hereby authorizes R. P. Richards, Inc. to proceed with this appeal under the prime contract "Disputes" provision in R. P. Richards, Inc's own name. R. P. Richards, Inc shall have full responsibility for such proceedings.

(Id.) The date of this letter is outside the 90-day appeal period to this Board.

7. On 16 December 1997, Richards filed with this Board an amendment to its Notice of Appeal asking that the name of the appellant be changed from H&N to Richards as well as a complaint in its own name.

8. On 17 December 1997, attorneys for H&N filed a Notice of Appearance on behalf of H&N (Gov't Motion, att. 3).

9. By a letter dated 6 February 1998, counsel for H&N informed the Board that H&N was sponsoring Richards' appeal in H&N's name (Gov't Motion, att. 6).

10. The Government then moved to dismiss the appeal for lack of jurisdiction.

DECISION

The Government argues that the Board lacks jurisdiction over the appeal because H&N did not sponsor Richards' appeal prior to the expiration of the 90-day appeal period. The Government contends that authorization, or sponsorship, did not exist prior to the 16 December 1997 letter from H&N to Richards. Retroactive sponsorship, it contends, is ineffective to give the Board jurisdiction over the appeal.

It is well settled that the Board has jurisdiction over appeals from contracting officer's decisions on claims in which a subcontractor is the real party in interest only if pursued under the sponsorship of the prime contractor. *See Foster Company of Greenville, Inc*., ASBCA No. 28955, 84-2 BCA ¶ 17,481 at 87,091 (citing *Erickson Air Crane Company of Washington, Inc. v. United States*, 731 F. 2d 810 (Fed. Cir. 1984)). Unless the Board finds sponsorship of the subcontractor's appeal by the prime contractor, we have no jurisdiction over the appeal. *Foster Company of Greenville, supra* at 87,091-92, *citing Big 4 Mechanical Contractors*, ASBCA No. 24604, 80-1 BCA ¶ 14,403.

However, sponsorship and authority can be inferred when the prime contractor subsequently ratifies the filing of that appeal and "consistently cooperates" in the presentation of the claim even if the prime contractor did not specifically authorize the subcontractor to file the appeal prior to the expiration of the appeal period. *See, e.g., Algernon Blair Industrial Contractors, Inc.*, ASBCA No. 25277, 83-2 BCA ¶ 16,737; *Taysom Construction Company*, ASBCA No. 41016, 91-2 BCA ¶ 23,710; *cf., Door Pro Systems, Inc.*, ASBCA No. 34114, 87-3 BCA ¶ 19,997 (belated sponsorship agreement without actual ratification ineffectual).

We conclude that there is sufficient evidence that the prime contractor both sponsored and authorized its subcontractor's claim and subsequent appeal. H&N submitted its equitable adjustment request to the contracting officer, in its own name, on Richards' behalf. At Richards' request, H&N requested reconsideration by the contracting officer of her denial of that equitable adjustment request, informed Richards of the subsequent affirmance of that decision by the contracting officer and asked how Richards wished to proceed. The record contains no indication that H&N ever withdrew its sponsorship of the claim or that it would not support an appeal by Richards. Rather, H&N authorized Richards' actions in the 16 December 1997 letter, entered an appearance on 17 December 1997, and gave official notice of sponsorship in the 6 February 1998 letter.

The Government contends that the "consistent cooperation" is not present in this appeal because for a short period of time H&N authorized Richards to prosecute the appeal in Richards' own name but refused to permit Richards to proceed in H&N's name (finding 6). Shortly thereafter, H&N apparently recognized that it was impossible for Richards to maintain the appeal in its own name, entered an appearance in the appeal, and specifically indicated that H&N would now sponsor the appeal in H&N's name (findings 7, 8).

None of these actions of H&N were inconsistent with its support of its subcontractor Richards' claim and appeal except for H&N's apparent mistaken belief that it could authorize Richards to prosecute the appeal without the use of H&N's name. We hold that the appeal was in the name of H&N even though H&N attempted to transfer the right to prosecute that appeal under the prime contract's Disputes clause to Richards, Richards filed the appeal in its own name, and H&N did not ratify its sponsorship of the appeal until after the expiration of the appeal period. *Cross Construction Company, Inc. v. United States*, 225 Ct. Cl. 616 (1980); *Taysom Construction Company, supra*. Under these authorities, these actions of H&N and Richards are not an impediment to jurisdiction.

The Government's motion to dismiss is denied.

Dated: 14 June 2000

JOHN I. COLDREN, III
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

EUNICE W. THOMAS
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. 51155, Appeal of Holmes & Narver Services, Inc., rendered in conformance with the Board's Charter.

Dated:

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