ARMED SERVICES BOARD OF CONTRACT APPEALS

Appeal of --	)	
	)	
Hackney Group and	)	
Credit General Insurance Company	)	ASBCA No. 51453
	)	
Under Contract No. N62472-96-C-3237	)	

APPEARANCE FOR THE APPELLANT: Robert T. Carlton, Jr., Esq.
Ellsworth, Wiles, Carlton & Waldman, P.C.
Philadelphia, PA

APPEARANCES FOR THE GOVERNMENT: Arthur H. Hildebrandt, Esq.
Navy Chief Trial Attorney
Ellen C. Evans, Esq.
Trial Attorney
Engineering Field Activity Chesapeake
Washington, DC

OPINION BY ADMINISTRATIVE JUDGE DICUS
ON RESPONDENT'S MOTION TO DISMISS FOR LACK OF JURISDICTION

This appeal is taken from a contracting officer's decision terminating for default Contract No. N62472-96-C-3237. The Government contends that the appeal is in fact brought solely by the surety, Credit General Insurance Company (Credit General) without the contractor's participation, and should be dismissed because the surety lacks standing to pursue the appeal in its own right. We hold for the Government and dismiss the appeal.

FINDINGS OF FACT

1. Contract No. N62472-96-C-3237 (contract 37) was awarded by the Department of the Navy to the Hackney Group ("Hackney") in September 1996. Contract 37 required Hackney to perform various renovations to the Bachelor Officer Quarters at the Naval Air Engineering Center in Lakehurst, New Jersey, at a fixed price of $786,175. In bidding for contract 37, Hackney contracted with Credit General to furnish a payment bond and a performance bond for the full amount of the contract price. (R4, tab 1)

2. The Navy and Hackney originally agreed that performance of contract 37 would be completed on or before 19 August 1997 (R4, tab 4). After repeatedly extending this deadline at Hackney's request (*e.g.*, R4, tabs 9, 11), the Navy issued a 16 January 1998 contracting officer's decision terminating Hackney's contract for default. The decision cited Hackney's "failure to make progress" and "apparent abandonment" of the contract as justification for the decision to terminate. (R4, tabs 3, 27) Also on 16 January 1998 the Navy notified Credit General, as Hackney's surety, of the termination and asked Credit General to enter into an appropriate agreement for completion of contract 37 (R4, tab 26).

3. On 15 April 1998 a Notice of Appeal was filed on behalf of Hackney and Credit General. The appeal, docketed as ASBCA No. 51453, challenged the Navy's decision to terminate Hackney for default. There is no evidence that Hackney authorized, consented to, participated in, or cooperated with either the filing or the prosecution of the appeal. On 22 June 1998 the Navy filed a motion to dismiss for lack of jurisdiction.

4. On 26 August 1998, the Navy and Credit General entered into a takeover agreement. The agreement was executed by the parties as Contract No. N62472-98-C-0072 (contract 72). Hackney was not a party to contract 72. (Gov. br. dtd. 16 October 1998 at ex. 1)

5. Appellant asserts, and the Government does not dispute, that the terms of the suretyship agreement between Credit General and Hackney are set out in a written "Agreement of Indemnity" dated 23 August 1994, to which the Government was not a party. (App. br. dtd. 17 July 1998 at ex. 1) Article 4 of that Indemnity Agreement - which purports to effect an assignment of claims arising out of any contract to which Credit General acted as surety to Hackney - provides in pertinent part that:

> The CONTRACTOR, and the Indemnitors as their interests may appear in Sections (B) and (F) of this paragraph, hereby assign, transfer and set over to SURETY the rights and property described hereafter, as collateral, to secure any and all obligations in this Agreement and any other indebtedness or liabilities of the CONTRACTOR to the SURETY, whether heretofore or hereafter incurred:
>
> (A) All the rights of the CONTRACTOR in, and arising in any manner out of the CONTRACT;
>
> . . . .

> (D) All the rights, title and interest of the CONTRACTOR in and to any actions, causes of action, claims or demands whatsoever which the CONTRACTOR may have or acquire against any party to the CONTRACT, or actions, causes of action, claims or demands arising out of or in connection with any CONTRACT including but not limited to those against obligees on bonds, design professionals, subcontractors, laborers or materialmen or any person furnishing or agreeing to furnish or supply labor, material, supplies, machinery, tools, inventory or other equipment in connection with or on account of any CONTRACT and against any surety or sureties of any obligee, subcontractor, laborer, or materialmen;
>
> (E) All monies retained and any and all monies that may be due or hereafter become due on account of any CONTRACT, bonded or unbonded;
>
> . . . .
>
> The assignments shall become effective as of the effective date of each BOND executed by SURETY.

Article 6 of the Indemnity Agreement, entitled PROSECUTION OF CLAIMS, further provided that:

> SURETY shall have the full and exclusive right, in its name or in the name of the CONTRACTOR, but not the obligation, to prosecute, compromise, release or otherwise resolve any of the claims, causes of action or other rights assigned to SURETY in the fourth paragraph above, entitled ASSIGNMENT, upon such terms as SURETY, in its sole discretion, shall deem appropriate.

Article 23, POWER OF ATTORNEY, provided that:

> [t]he CONTRACTOR and Indemnitors hereby irrevocably nominate, constitute, appoint and designate the SURETY, through its authorized representative(s), as their attorney-in-fact with the right, but not the obligation, to exercise all of the rights of the CONTRACTOR and Indemnitors assigned, transferred and set over to SURETY in this Agreement, and in

> the name of the CONTRACTOR and indemnitors to make, execute, and deliver any and all additional or other assignments, documents, or papers, checks, drafts, warrants or other instruments made or issued in payment of any obligation to which SURETY has the right to receipt of payment pursuant to this Agreement deemed necessary and proper by the SURETY in order to give full effect not only to the intent and meaning of the within assignments, but also to the full protection intended to be herein given to the SURETY under all other provisions of this Agreement. The CONTRACTOR and Indemnitors hereby ratify and confirm all acts and actions taken and done by SURETY as such attorney-in-fact.

6. Appellant asserts it has paid $30,146.34 under its payment bond (app. br. dtd. 17 July 1998 at 4). However, there is no evidence of such payment, when it was made or whether laborers and materialmen were fully paid. Likewise, there is no evidence of Government consent to an assignment of claims arising from the default termination or any other claims that arose before the takeover agreement.

DECISION

The Navy has moved for dismissal on grounds that Credit General is the sole party in interest in this appeal, and that Credit General lacks standing to appeal Hackney's default termination because it is "a non-subrogated corporate surety, not in privity with the Government[.]" Government counsel contends that although the appeal was brought in the names of both Hackney and Credit General, Hackney has not authorized appellant's counsel to proceed on its behalf and does not intend to appeal the termination in its own right. Appellant's counsel has generally protested these representations as inaccurate. Appellant also asserts it has standing under an indemnity agreement and a takeover agreement.

Under the Contract Disputes Act (CDA), 41 U.S.C. §§ 601-613, as amended, the Board has jurisdiction over appeals involving parties to a Government contract other than the Government. *Fireman's Fund Insurance Company*, ASBCA No. 50657, 00-1 BCA ¶ 30,802. It is not disputed that Hackney fits that description. However, the Government asserts that Hackney has not authorized or given its consent or cooperation in the filing and prosecution of this appeal. In response, appellant's counsel states that the filing of this appeal is not the product of any specific authorization from Hackney but rather from the terms of the 1994 Indemnity Agreement executed by Hackney and Credit General (app. brs. dated 17 July 1998 and 3 December 1998). Indeed, in his two most recent submissions to the Board, appellant's counsel has styled himself simply as counsel to Credit General. The burden of proof is on appellant to establish jurisdiction, *Do-Well*

Machine Shop v. United States, 870 F.2d 637, 639 (Fed. Cir. 1989), and standing, *Maniere v. United States*, 31 Fed. Cl. 410 (1994). As there is no evidence that Hackney has authorized, consented to or participated in this appeal (finding 3), we conclude that Hackney is not a party.

Appellant's counsel argues that Hackney has authorized the appeal and Credit General has the right to proceed on Hackney's behalf under the indemnity agreement between Hackney and Credit General. The Government was not a party to the agreement (finding 5). We find appellant's argument unavailing. In *Admiralty Construction, Inc. by National American Insurance Company v. Dalton*, 156 F.3d 1217, 1222 (Fed. Cir. 1998), the Court held that we are lacking jurisdiction to enforce or construe such agreements. If we have no jurisdiction to interpret the indemnity agreement, we are not empowered to decide whether Credit General is authorized thereby to proceed in Hackney's stead. Appellant's argument is without merit.

We next consider whether Credit General may have established its own, independent standing to litigate the merits of Hackney's default termination under the Contract Disputes Act. We have consistently held that "[i]n order to bring a suit in the federal courts or boards of contract appeals under the Contract Disputes Act, the appellant must be in privity of contract with the Government." *Insurance Company of the West*, ASBCA No. 35253, 88-3 BCA ¶ 21,056 at 106,347, *citing Erickson Air Crane Co. of Washington, Inc. v. United States*, 731 F.2d 810, 813 (Fed. Cir. 1984). Credit General first argues that it is an equitable subrogee because it made payments of $30,146.34 under a payment bond. It has not submitted evidence in support of its assertion that it has made payments under its payment bond (finding 6). Assuming, *arguendo*, that it has, its rights, if any, relate to whatever "retained fund" there may be. *Security Insurance Co. of Hartford v. United States*, 428 F.2d 838 (Ct. Cl. 1970). Here, however, Credit General has failed to establish that laborers and materialmen were fully paid (finding 6), so the factual predicate to a share of any "retained fund" is missing. *United States Fidelity and Guarantee Co. v. United States*, 475 F.2d 1377 (Ct. Cl. 1973) Thus, Credit General has not established that it is an equitable subrogee under its Payment Bond.

Credit General has entered into a takeover agreement (finding 4), but the agreement was executed 2 months after the Notice of Appeal (*id.*). The accepted principle is that subject matter jurisdiction turns on the facts extant at the time of filing. *Keene Corp. v. United States*, 508 U.S. 200 (1993). As the takeover agreement had not come into existence when the appeal was filed, it cannot serve as a vehicle to provide subject matter jurisdiction.

SUMMARY

Credit General has failed to establish standing to pursue the appeal on its own and there is no evidence to establish that Hackney authorized, consented to, or participated in the prosecution of this appeal. Accordingly, the appeal is dismissed for lack of jurisdiction.

Dated: 16 May 2000

CARROLL C. DICUS, JR.
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. 51453, Appeal of Hackney Group and Credit General Insurance Company, rendered in conformance with the Board's Charter.

Dated:

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