ARMED SERVICES BOARD OF CONTRACT APPEALS

Appeal of --	)	
	)	
Thomas & Sons Building Contractors, Inc.	)	ASBCA No. 51577
	)	
Under Contract No. F36629-93-C-0007	)	

APPEARANCE FOR THE APPELLANT: Mr. James H. Thomas
President

APPEARANCES FOR THE GOVERNMENT: COL Alexander W. Purdue, USAF
Chief Trial Attorney
Donald M. Yenovkian II, Esq.
Trial Attorney

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

This appeal is taken from the deemed denial of a claim arising from a termination for convenience. Respondent has moved for dismissal based on appellant' s untimely filing of the underlying claim, appellant' s alleged lack of privity and, as to a discrete portion of the claim, the Board' s lack of jurisdiction on wage determination issues. We grant the motion in part.

FINDINGS OF FACT
FOR THE PURPOSE OF RESOLVING THE MOTION

1. Contract F36629-93-C-0007 was awarded to appellant on 12 July 1993 for the fixed-price of $186,127. The contract called for the removal and replacement of the roofs on two buildings at respondent' s facility at Pittsburgh International Airport. The contract contained General Decision Number PA930001 establishing wage rates and fringe benefits for various trades, including roofers. Incorporated by reference were the following relevant clauses: FAR 52-222-6 DAVIS BACON ACT (NOV 1992), which requires the contractor to classify and pay workers in accordance with Department of Labor (DOL) wage determinations; FAR 52.222-14 DISPUTES CONCERNING LABOR STANDARDS (FEB 1988), which expressly denies Disputes clause jurisdiction and establishes DOL jurisdiction on labor standards issues; FAR 52.249-2 TERMINATION FOR CONVENIENCE OF THE GOVERNMENT (FIXED-PRICE)—ALTERNATE I (APR 1984), which requires settlement proposals to be filed within one year of termination unless extended in writing by the contracting officer; and FAR 52.249-10 DEFAULT (FIXED-PRICE CONSTRUCTION) (APR 1984). (R4, tab 1)

2. The contract was terminated for default on 15 October 1993 (R4, tab 4). A takeover agreement was executed between respondent and the surety, Westchester Fire Insurance Co. (Westchester), on 21 October 1993 (R4, tab 5). On 5 November 1993 a completion contract was entered into between Westchester and appellant (R4 supp., tab 54c).

3. By Modification No. P00010 (Mod 10), dated 11 October 1994, the termination for default was converted to a termination for convenience. Mod 10 provides in part:

> The contractor shall promptly, but not later than one year from the effective date of this termination, submit to the contract administration office a settlement proposal for the amount claimed because of the termination.

(R4, tab 11)

4. By letter of 9 August 1995 appellant was informed by DOL that an investigation of appellant' s performance of the contract revealed that appellant had misclassified and paid as laborers employees who functioned as roofers. Appellant requested and was granted a hearing. (R4 supp., tab 73a)

5. Appellant submitted a settlement proposal dated 12 September 1995 in which it claimed costs of $208,155. The proposed settlement was as follows:

Direct Labor	$115,767
Indirect Factory Expense	56,169
Other Costs	112,686
G&A	53,682
Total Costs	338,304
Profit	45,978
Total	384,282
Deduction for Invoiced Amounts	(186,127)
Total	198,155
Settlement Expenses	10,000
Proposed Settlement	$208,155

(R4, tab 65)

6. The settlement proposal was responded to in a 1 April 1996 letter offering appellant $6,826 if further documentation was provided (R4, tab 73). Appellant treated this as a deemed denial and filed suit in the amount of $208,155 in the United States

Court of Federal Claims (COFC) on 31 May 1996. The suit sought termination for convenience costs "as well as costs associated with the Government caused damages and delays[.]" (R4, tab 74) By stipulation of the parties, the COFC suit was dismissed without prejudice on 18 June 1997 pursuant to COFC Rule 41(a) (R4 supp., tab 74h).

7. On 11 February 1998 appellant filed a second settlement proposal, this time seeking $186,514, as follows:

Direct Labor	$112,967
Indirect Factory Expense	52,479
Other Costs	111,343
G&A	42,912
Total Costs	319,701
Profit	43,849
Total	363,550
Deduction for Invoiced Amounts	(186,127)
Total	177,423
Settlement Expenses	9,091
Proposed Settlement	$186,514

(R4, tab 75) By letter of 10 March 1998 the contracting officer responded to the settlement proposal. He informed appellant that unless additional "significant documentation" was submitted "further consideration [of the proposal] is unwarranted." (R4, tab 77) There is no evidence that the contracting officer extended the filing period for appellant' s termination settlement proposal.

8. By letter of 2 April 1998 appellant filed a claim comprised of three elements. Part one sought termination costs of $186,127 [sic, presumably should be $186.514] pursuant to the 11 February 1998 update of its settlement proposal, and included costs of completing the contract, which we construe to be costs incurred in performance of the subcontract. Part two sought $30,500 based on appellant' s contention that its failure to pay appropriate wages under the DOL Wage Determination was the contracting officer' s fault: "In essence, the Contracting Officer should have included only the roofer' s wage rate accompanied by a statement that prohibits the use of laborers." Part three of the claim sought contract withholdings of $18,918.54. The claim is accompanied by a copy of portions of appellant' s 12 September 1995 settlement proposal. The form has a FAX date of 7 September 1995 in the upper left hand corner and is in the amount of $208,155. The claim also attaches three copies of a 2 April 1998 invoice in the amount of $18,918.54. (R4, tab 80)

9. In a 27 May 1998 letter DOL requested that respondent withhold $33,298.93 from contract funds pending the outcome of DOL proceedings against appellant for

misclassification and improper payment of employees (R4, tab 87). Respondent has withheld approximately $24,000 from the contract (app. 17 May 2000 br. at 2).

10. By letter of 27 May 1998 appellant was informed by the contracting officer that a final decision would not be issued because, as a result of the takeover agreement with Westchester, appellant no longer had privity of contract with respondent (R4, tab 84). An appeal was filed by letter of 2 June 1998. Westchester has not sponsored the appeal in any respect.

11. Appellant was found to have misclassified and underpaid its employees in violation of the Davis-Bacon Act by a DOL administrative law judge (ALJ) in a 30 July 1998 DECISION AND ORDER. Respondent was ordered to turn over all sums withheld under the contract, to the extent of appellant' s liability. Appellant' s liability under the contract was found to be $27,079.07. Liability under a Navy contract was found to be $5,643.88. The decision recommended that appellant be debarred for three years. (R4, tab 89) DOL issued a FINAL DECISION and ORDER on 19 October 1999 in which it affirmed the ALJ' s decision and rejected appellant' s argument that the ASBCA, not DOL, was the forum with jurisdiction (R4, tab 90).

DECISION

Respondent has moved to dismiss the first part of appellant' s claim, *inter alia*, for lack of privity and because appellant elected to proceed in the COFC. As to parts two and three, respondent argues that the Board has no jurisdiction because DOL has been ceded exclusive jurisdiction for adjudication and enforcement of labor standards. As to part one, appellant argues that it is more expedient to proceed before the Board on all issues than to proceed in the COFC on the termination costs and before the Board on the labor standards and withholding issues. On parts two and three appellant argues that because the labor issues were never before the COFC and because the misclassification was a contract dispute and not an issue appropriate for adjudication by DOL, the Board has jurisdiction to proceed in this appeal.

In its original motion to dismiss, respondent challenged appellant' s right to proceed before the Board based on standing and privity issues. Appellant was the completion subcontractor, performing under the takeover agreement between respondent and Westchester (finding 2). Although Mod 10 converted the default termination to one for convenience and gave appellant renewed status as a prime contractor, during its performance as a subcontractor it was not in privity with respondent. The claim includes costs from the subcontract (finding 8). In the absence of prime contractor sponsorship, we do not have jurisdiction to consider any portion of appellant' s claim arising from its role as a subcontractor. *United States v. Johnson Controls, Inc.*, 713 F.2d 1541 (Fed. Cir. 1983). Insofar as part one of appellant' s claim includes costs incurred during its

performance under the subcontract with Westchester - *i.e.*, from the execution of the subcontract on 5 November 1993 to Mod 10 on 11 October 1994 - it is dismissed for lack of jurisdiction.

However, that is not the end of the matter. The conversion of the termination for default to a termination for convenience reinstated appellant as the prime contractor. As such, appellant was in privity with respondent and had the right to compensation, including reasonable profit, for work done as the prime. FAR 49.201. Indeed, we note that the contracting officer found appellant potentially entitled to $6,826 (finding 6). We would ordinarily have jurisdiction to consider disputes arising from appellant' s termination settlement proposal. However, appellant filed suit in the COFC in 1996 to recover termination costs (finding 6). That case was dismissed without prejudice by stipulation of the parties in 1997 under Rule 41(a) (*id.*). The claim underlying this appeal, although on the surface seeking a lesser amount, is based on the same proposal submitted in 1995 and on which the COFC suit was predicated (finding 8).

In *Bonneville Associates v. United States*, 43 F.3d 649 (Fed. Cir. 1994) the court held that once a contractor makes a binding election to proceed in one forum it cannot change its mind and pursue the claim in another forum unless the original forum lacked jurisdiction. *Id.* at 653. Where the action is pending in the first forum and that forum has not determined jurisdiction, an appeal is not ripe for dismissal under the Election Doctrine until the original forum determines its jurisdiction over the claim. *National Neighbors, Inc. v. United States*, 839 F.2d 1539 (Fed. Cir. 1988). Here, the action is no longer pending in the COFC, which dismissed it pursuant to COFC Rule 41(a). Notwithstanding the Election Doctrine, we conclude we have jurisdiction over so much of part one of appellant' s claim as does not arise from its performance as a subcontractor. This is because a dismissal under FED. R. CIV. P. 41(a) renders the proceedings a nullity, leaving the parties as if the action had not been filed. *Williams v. Clarke*, 82 F.3d 270, 273 (8th Cir. 1996); *cf. Bonneville Associates, Ltd. Partnership v. Barram*, 165 F.3d 1360 (Fed. Cir. 1999), *cert. denied*, 120 S.Ct. 40 (1999). COFC Rule 41(a) is that court' s implementation of FED. R. CIV. P. 41(a). We hold that the result of the dismissal in the COFC under its rule should be treated no differently than a similar dismissal in Federal District Court. We treat the dismissal by stipulation as leaving the parties with the same rights they would have been entitled to if appellant had not filed suit in the COFC. This results in removal of the impediment to our jurisdiction created by the Election Doctrine. We conclude we have jurisdiction over the portion of part one of appellant' s claim that remains after removal of the costs attributable to its performance as subcontractor under the completion contract.

As to the labor standards issue, part two of appellant' s claim, DOL found that appellant misclassified and underpaid its employees (finding 11). Appellant argues, *inter alia*, that the contract was ambiguous on wage rates and that, in any event, it

was the contracting officer' s responsibility to monitor performance and assure proper classification. As such, appellant avers, we have jurisdiction.[1] In *Emerald Maintenance, Inc. v. United States*, 925 F.2d 1425 (Fed. Cir. 1991), the court was confronted with similar facts and arguments.[2] In finding that the Board had properly declined jurisdiction, the court stated:

> However Emerald chooses to style its complaint, whether as a defective specification or a misrepresentation, the essence of its complaint relates to the wage rate it had to pay all workers doing roofing work, and the listing of job categories and wage rates in the contracts is surely one of the labor standards provisions. The dispute here thus "aris[es] out of" the labor standards provisions of the contracts, and the Disputes provisions require that it be resolved by Labor.

Id. at 1429. We conclude we do not have jurisdiction on part two of appellant' s claim.

Part three of appellant' s claim seeks release of withholdings. DOL ordered respondent to withhold an amount equal to respondent' s liability, which it had determined to be $27,079.07 (finding 11). Appellant asserts that respondent has withheld approximately $24,000 and claims entitlement to the contract withholdings (finding 9). However, the amount of the ALJ' s Order exceeds contract withholdings. As discussed above, the Board is not empowered to make a determination on appellant' s liability for violation of labor standards. DOL has authority to order respondent to withhold funds otherwise payable to offending contractors and, pursuant to 29 CFR § 4.187(a) "such withheld funds shall be transferred to the Department of Labor for disbursement to the underpaid employees on order of . . . an Administrative Law Judge[.]" We conclude that we are not empowered to intercede even if appellant would otherwise be entitled to the contract withholdings. The Board does not, therefore, have jurisdiction to consider appellant' s claim for contract withholdings. Respondent' s motion is granted as to part three of appellant' s claim.

Summary

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1 In appealing the ALJ' s decision at DOL, appellant limited its challenge to jurisdiction. The DOL FINAL DECISION rejected appellant' s arguments and decided the appeal (finding 11).

2 The contract in *Emerald* contained the same provisions on Davis-Bacon wage rates and "Disputes Concerning Labor Standards" as the contract at issue. *Emerald* at 1426, 1428 n. 2; *supra*, finding 1.

The appeal is dismissed for lack of jurisdiction as to parts two and three of appellant' s claim, and as to those elements of part one of appellant' s claim arising from its work as a subcontractor to Westchester in performance of the completion contract. As to elements of part one of its claim which arise from its performance as prime contractor under its contract with respondent, we take jurisdiction.

Dated: 31 August 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
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. 51577, Appeal of Thomas & Sons Building Contractors, Inc., rendered in conformance with the Board's Charter.

Dated:

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