

ARMED SERVICES BOARD OF CONTRACT APPEALS

Appeal of -- )  
 )  
Stan's Contracting, Inc. ) ASBCA No. 51475  
 )  
Under Contract No. F64605-96-C-0024 )

APPEARANCES FOR THE APPELLANT: Herman Braude, Esq.  
Gerson B. Kramer, Esq.  
Braude & Margulies, P.C.  
Washington, DC

APPEARANCES FOR THE GOVERNMENT: COL Alexander W. Purdue, USAF  
Chief Trial Attorney  
John R. Hart, Esq.  
Trial Attorney

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

The Government has filed a Motion To Dismiss averring the “[a]ppellant has no standing to pursue the sponsored appeal on behalf of its subcontractor.” The appellant has filed a response in opposition to the Government’s motion.

FINDINGS OF FACT  
FOR PURPOSES OF THE MOTION

1. On 28 August 1996 the Air Force awarded Contract No. F64605-96-C-0024 (contract) to the appellant, Stan’s Contracting, Inc. (SCI or appellant) at a contract price of \$1,693,300.00 for the removal of lead based epoxy coating from the interior and exterior, the repainting of the interior and exterior, and the repair of fuel tanks I, II and V located at Hickam AFB, Hawaii (R4, tab 1). On 16 October 1996 SCI, in anticipation of meeting the contract’s performance requirements, entered into a subcontract with Pacific Painting & Construction (PP&C), at a subcontract price of \$1,250,579.00, to remove and dispose of the lead based paint, to repaint the interior and exterior of the tanks, and to perform electrical work (Govt. br., ex. A).

2. On 8 January 1998 SCI informed the Government that it was sponsoring an equitable adjustment claim in the amount of \$685,513<sup>1</sup> for its subcontractor, PPC, stemming from alleged differing site conditions. The claim included prime contractor mark-ups for overhead and profit. SCI, certifying the claim, requested a contracting officer's final decision. (R4, tab 11)

3. On 24 April 1998 SCI appealed the CO's failure to issue a final decision on its claim for an equitable adjustment of \$685,513 (Br. corr. file).

4. On 17 August 1998 the contracting officer, P.S. Cunanan, and on 4 September 1998 the termination contracting officer (TCO), James K. Watanabe, issued final decisions notifying SCI's President, Mr. Warren T. Shioi, that the contract was terminated for default (R4, tabs 53, 76).

### POSITION OF THE PARTIES

The basic contention of the Government is that the Board lacks jurisdiction due to the dissolution of SCI's subcontractor, PP&C. The Government in support of its contention argues Mr. John Hines was the sole owner of PP&C as well as a Nevada corporation, West Coast Painting and Blasting (WCP&B); on 23 December 1994 Mr. John Hines established PP&C under a fictitious business name in San Diego, California; Mr. Hines did business under the fictitious name PP&C until 1999; in June 1999 Mr. Hines was indicted, in pertinent part, for using WCP&B and PP&C to evade taxation; on 8 November 1999 Mr. Hines filed for chapter 7 bankruptcy; and on 23 December 1999 Mr. Hines' registration to do business as PP&C expired (Govt. br. at 1-3). The Government contends that the expiration of PP&C's fictitious name filing on 23 December 1999 terminated Mr. Hines' ability to legally conduct business under that name; and that PP&C's ability to pursue this litigation, even if its status as a legitimate business is curable, does not survive its and Mr. Hines' chapter 7 discharge in bankruptcy (Govt. br. at 4).

The appellant, opposing the Government's motion, contends PP&C's corporate status is immaterial since they were not the party in privity with the Government; PP&C's bankruptcy is also immaterial; that SCI, the prime contractor and appellant in this appeal, is rightfully before the Board; that the appellant, SCI, has rightfully brought the appeal and has the burden of proving its case; and the Government's motion should be denied.

### DECISION

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<sup>1</sup> In a subsequent letter dated 16 January 1998 SCI stated its claim was \$685,509. We are unable to reconcile this \$4.00 difference but use the figure quoted in SCI's appeal letter (R4, tab 12; finding 3 *infra*).

There is no question, and the Government does not contend otherwise, that SCI was the prime contractor; that the appeal was filed at the Board by the SCI; and that SCI is validly before the Board. The issue we are asked to decide is whether the Board's jurisdiction over an appeal is controlled by the status of the subcontractor whose claim is being sponsored by the prime contractor.

It is black letter law that an appeal from a contracting officer decision, or the failure of the CO to issue a decision, by a person not a party to the contract must be dismissed for lack of privity of contract. *Technic Services, Inc.*, ASBCA No. 38411, 89-3 BCA ¶ 22,193 and cases cited. Clearly, PP&C could not appeal to the Board.

However, this does not mean that a subcontractor cannot submit a claim to the prime contractor for it has consistently been held that a subcontractor's claim may be sponsored by the prime contractor, the entity that has privity of contract with the Government. *See TPS, Inc.*, ASBCA No 52421, 01-1 BCA ¶ 31,375 at 154,917 and cases cited therein; FAR 44.203(c).

The Government has not cited a case,<sup>2</sup> and we are unaware of any case, holding that a validly filed appeal, which is primarily a subcontractor claim, is subject to dismissal based on the subcontractor's standing. The simple answer is that the Board's jurisdiction is dependent upon the status of the prime contractor and not on that of the subcontractor.

The Government's motion to dismiss is denied.

Dated: 3 August 2001

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ALLAN F. ELMORE  
Administrative Judge  
Armed Services Board  
of Contract Appeals

(Signatures continued)

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<sup>2</sup> Although the Government has cited a number of cases in its brief concerning the effect of bankruptcy proceedings, all can be distinguished on the basis that they deal with the parties who were in privity of contract with the Government.

I concur

I concur

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MARK N. STEMLER  
Administrative Judge  
Acting Chairman  
Armed Services Board  
of Contract Appeals

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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. 51475, Appeal of Stan's Contracting, Inc., rendered in conformance with the Board's Charter.

Dated:

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