ARMED SERVICES BOARD OF CONTRACT APPEALS

Appeal of --	)	
	)	
FloorPro, Inc.	)	ASBCA No. 54143
	)	
Under Contract No. N62467-02-M-2013	)	

APPEARANCE FOR THE APPELLANT: James S. DelSordo, Esq.
Manassas, VA

APPEARANCES FOR THE GOVERNMENT: Fred A. Phelps, Esq.
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OPINION BY ADMINISTRATIVE JUDGE VAN BROEKHOVEN

Appellant appeals the deemed denial of its claim in the amount of $42,000.00. According to appellant, it performed the work under a subcontract with G. M. & W. Construction and had not been paid for its performance of the subcontract. The Government moved to dismiss the appeal for lack of jurisdiction.

STATEMENTS OF FACT FOR PURPOSES OF THE MOTION

1. On 6 February 2002, the Government awarded Purchase Order No. N62467-02-M-2013[1] to G. M. & W. Construction Corp (also cited as G. M. & W.). For the total amount of $42,000, G. M. & W. Construction Corp. was required to install floor coating at warehouse bays on the Marine Corps Logistics Base (MCLB), Albany, Georgia. (R4, tabs 1, 3) Block 16 of the purchase order referenced a quote from G. M. & W., dated 4 February 2002, and stated that the contractor hereby accepted the offer represented by the purchase order subject to the terms and conditions set forth therein, and provided a place for the contractor's name and signature indicating such acceptance. The purchase order in the appeal record does not contain any such signature indicating the contractor's acceptance of the order. By letter dated 6 February 2002, the contracting officer informed G. M. & W. Construction that the Government accepted its offer of 4 February 2002 in the amount of $42,000.00 for the subject purchase order, which order dated 6 February 2002, provided that the completion date would be

[1] Although the docket has the Contract No. as N62467-020-M-2013, the actual Contract No. is in the style of the case.

22 March 2002 (R4, tab 3). Notwithstanding the reference in Block 16 of the order to an offer and the reference in the contracting officer's letter of 6 February 2002 to the Government's acceptance of G. M. & W. Construction Corp's offer, the evidentiary record does not contain any copy of such an offer. There was nothing on the face of the purchase order that indicated that this was a subcontract under the Small Business Administration 8(a) program in which a contract had been awarded to the SBA.

2. According to appellant's complaint and opposition to the Government's request that appellant show cause as to why the appeal should not be dismissed for lack of jurisdiction, the Government contacted appellant requesting it to submit a quote for the installation of flooring coating in a warehouse at MCLB though G. M. & W. Construction because the contract was reserved for a minority-owned business and G. M. & W. Construction was a minority-owned business. In its complaint, appellant stated that it was an experienced installer and servicer of flooring systems, and that it was not a minority-owned business. Appellant stated that it submitted its price quote to the Government through G. M. & W. Construction and that the Government accepted appellant's price quote. Appellant then entered into a subcontract agreement with G. M. & W. Construction. The Government has not disputed these allegations in its request for the show cause and its motion to dismiss. Except with respect to the Government's letter to G. M. & W. accepting the offer in the amount of $42,000.00 (R4, tab 3), the appeal file does not contain any record of appellant's price quotation and the subcontract between G. M. & W. Construction and the appellant. By letter dated 8 March 2002, the contracting officer informed G. M. & W. Construction that the Government had taken possession of work completed under the subject contract and that there were no construction deficiencies noted at the final inspection (R4, tab 4).

3. The purchase order contained certain clauses incorporated by reference, including FAR 52.219-12, SPECIAL 8(a) SUBCONTRACT CONDITIONS (FEB 1990) and FAR 52.219-17, SECTION 8(a) AWARD (DEC 1996). The SPECIAL 8(a) SUBCONTRACT CONDITIONS clause set forth in FAR 52.219-12 provided, in pertinent part, that the Small Business Administration (SBA) had entered into a contract with the identified contracting agency for supplies and services described therein, and that the identified subcontractor will, for and on behalf of the SBA, fulfill and perform all the requirements of the identified contract for the consideration stated therein. This clause further provided that the subcontractor would not subcontract the performance of the subcontract to any lower tier subcontractor without the prior written approval of the SBA and the contracting officer. This clause also provided that:

> Payments, including any progress payments under this subcontract, will be made directly to the subcontractor by the [named contracting agency].

The SECTION 8(a) AWARD clause contained a similar provision with regard to direct payments to the subcontractor from the contracting agency and a similar limitation against further subcontracting performance of the contract to any lower tier subcontractor without the prior written approval of the SBA and the cognizant contracting officer. This clause further contained a provision that allowed the subcontractor awarded a subcontract under the agency's contract with the SBA to appeal from decisions of the cognizant contracting officer under the DISPUTES clause of the subcontract.

4. In addition to the forgoing clauses incorporated by reference, the purchase order contained a number of clauses relevant to this appeal, some of which were incorporated by reference and some that were incorporated by full text, including FAR 52.232-1 PAYMENTS (APR 1984); FAR 52.233-1 DISPUTES (DEC 1998); FAR 52.219-11 SPECIAL 8(a) CONTRACT CONDITIONS (FEB 1990); and DFARS 252.219-7009 SECTION 8(a) DIRECT AWARD (JUN 1998). The PAYMENTS clause provided that the Government would pay the contractor upon the submission of proper invoices or vouchers. The DISPUTES clause provided that the contract was subject to the Contract Disputes Act of 1978, as amended, and that all disputes arising under or relating to the contract shall be resolved under this clause. The SECTION 8(a) DIRECT AWARD clause provided:

> (a) This contract is issued as a direct award between the contracting officer and the 8(a) Contractor pursuant to the Memorandum of Understanding dated May 6, 1998, between the Small Business Administration (SBA) and the Department of Defense. Accordingly, the SBA is not a party to this contract. SBA does retain responsibility for 8(a) certification, for 8(a) eligibility determinations and related issues, and for providing counseling and assistance to the 8(a) Contractor under the 8(a) Program. . . .
>
> . . . .
>
> (c) The Contractor agrees that - -
>
> . . . .
>
> (2) It will not subcontract the performance of any requirements of this contract without the prior written approval of the SBA and the Contracting Officer.

(R4, tab 1 at 11) There is no record in the appeal file that the contracting officer approved any subcontract between G. M. & W. Construction and appellant.

5. The contract incorporated by reference FAR 52.232-33, PAYMENT BY ELECTRONIC FUNDS TRANSFER – CENTRAL CONTRACTOR REGISTRATION (May 1999) (R4, tab 1 at 8). This contract provision incorporating the clause provided that the clause applied when the payment would be made by electronic fund transfer (EFT) "and the payment office uses the Central Contractor Registration (CCR) as its source of EFT information." The contract included the DFARS 252.204-7004 REQUIRED CENTRAL CONTRACTOR REGISTRATION (NOV 2001) clause which provided, in pertinent part, that by the submission of the offer, the offeror acknowledged the requirement that a prospective awardee must be registered in the CCR data base prior to award, during performance, and through final payment (R4, tab 1 at 10 to 11). The PAYMENT BY ELECTRONIC FUNDS TRANSFER – CENTRAL CONTRACTOR REGISTRATION clause provided that all payments by the government under the contract "shall be made by electronic funds transfer (EFT)" except as provided in paragraph (a)(2) of the clause. Paragraphs (a) and (f) provided, in pertinent part, that:

> (2) In the event the Government is unable to release one or more payments by EFT, the contractor agrees to either - -
>
> (i) Accept payment by check or some other mutually agreeable method of payment; or
>
> (ii) Request the Government to extend the payment due date until such time as the Government can make payment by EFT . . . .
>
> . . . .
>
> (f) Liability for uncompleted or erroneous transfers. (1) If an uncompleted or erroneous transfer occurs because the Government used the Contractor's EFT information incorrectly, the Government remains responsible for - -
>
> (i) Making a correct payment;
>
> (ii) Paying any prompt payment penalty due; and
>
> (iii) Recovering any erroneously directed funds.

6. According to appellant, it completed contract work in February 2002 (compl., ¶ A.5). The Government accepted the work in early March 2002 (R4, tab 4). Appellant sent G. M. & W. an invoice in the amount of $37,500 for the completed work on 6 March

2002 (Gov't mot., ex. 2; R4, tab 6). On, or about 4 April 2002, G. M. & W. submitted its request for payment from the Government in an amount that included the amount owed appellant (compl., ¶ A.6; R4, tab 5). By message dated 17 April 2002, appellant confirmed a telephone conversation earlier that day with the contracting officer in which appellant informed the contracting officer that G. M. & W. had not paid appellant for the work and had not returned appellant's telephone calls (R4, tab 6). Appellant stated that it was looking to the Government to guarantee payment for appellant's work and that the contracting officer had advised appellant that it would take necessary steps to insure that appellant received payment, including issuance of a two-party check. (compl., ¶¶ A.7, A.8; R4, tab 6)

7. On 22 April 2002, the contracting officer called G. M. & W. concerning the lack of payment to appellant and, according to the contracting officer, was informed by G. M. & W. that there were claims against the company and that it did not know whether funds deposited into its account would be available to pay appellant (Gov't mot., ex. 6). The contracting officer and the president of G. M. & W., therefore, discussed various ways to make payment to appellant and the subcontractor, and agreed to execute a bilateral modification that would permit the issuance of a two-party check payable to both appellant and G. M. & W., rather than following the electronic payment method as provided in the contract. Accordingly, the parties executed Modification No. P00001 on 22 April 2002, which, according to its terms, was a supplemental agreement entered into pursuant to the authority of the mutual agreement between the Government and G. M. & W. Construction Corp. (R4, tab 2) The modification provided, in part, "This modification is issued for DFAS Kansas City to cut a two party check (Hard Copy) to the contractors listed below:" G. M. & W. Contracting and FloorPro, Inc., with the check to be remitted to FloorPro, Inc., at its address (R4, tab 2). The modification also contained a "CONTRACTOR'S STATEMENT OF RELEASE" which provided that acceptance of the modification by the contractor constituted an accord and satisfaction and represented payment in full for both time and money and for all costs, impact effect, and for delays and disruptions arising out of, or incidental to, the work as revised. (R4, tab 2)

8. By letter dated 18 July 2002, the contracting officer informed appellant that: "DFAS [Defense Finance and Accounting Service] Kansas City ignored our modification and did not issue a two-party check as the modification had directed" (R4, tab 9).

9. Appellant wrote the Commander, Southern Division, Naval Facilities Engineering Command, Charleston, South Carolina, concerning the non-payment by G. M. & W. for appellant's performance of the work under the subject contract and that the contracting officer's response to appellant's previous requests for payment did not satisfy appellant. According to appellant, it had received assurances from the Government that it would receive payment by a joint check for its work, and then was told less than 24 hours prior to payment by DFAS Kansas City that a joint check would not be issued and that "payment would be wired direct [sic] into the account of GM &

W" and that such action was irresponsible on the part of the Government since everyone knew that G. M. & W. was not paying its suppliers and subcontractors. (R4, tab 11)

10. By letter dated 9 August 2002, the commander of the Southern Division, Naval Facilities Engineering Command responded to appellant's request for assistance confirming that G. M. & W. had been paid in full on the subject contract. Therefore, the commander advised appellant that since the Government did not have privity of contract with appellant, or any other subcontractor, any recourse appellant might have "must be obtained from GM & W through the civil court system." (R4, tab 12)

11. Appellant submitted what purported to be a claim to the contracting officer on 5 December 2002 (Gov't mot., ex. 3). The claim, in the amount of $42,000 for the performance of the work under the contract for which appellant had not been paid, also contained a request for a contracting officer's final decision. The contracting officer responded on 17 December 2002 stating that the government did not have a contract with appellant, and that, therefore, "there was no requirement for the government to honor your request for a Final Decision." (Gov't mot., ex. 4) Appellant, on 27 March 2002, filed this appeal from a deemed denial of its claim and request for final decision.

DECISION

As indicated above in the Statements of Fact for Purposes of the Motion, except as we specifically refer to the record, our statements of fact are based on undisputed allegations in appellant's complaint. The Government has not answered any of the allegations in appellant's complaint but instead filed the instant motion. When evaluating a motion to dismiss for lack of jurisdiction, the allegations in the complaint should be construed favorably to the pleader. *Scheuer v. Rhodes*, 416 U.S. 232, 236 (1974). To that end, we must accept as true the facts alleged in the complaint. *Reynolds v. Army and Air Force Exchange Service*, 846 F.2d 746, 747 (Fed. Cir. 1988); *W.R. Cooper General Contractor, Inc. v. United States*, 843 F.2d 1362, 1364 (Fed. Cir. 1988). Thus, as stated by the Supreme Court in *Scheuer v. Rhodes*, 416 U.S. at 236, the central issue in evaluating such a motion "is not whether a plaintiff will ultimately prevail but whether the claimant is entitled to offer evidence to support the claims." Appellant has the burden of establishing jurisdiction. *Reynolds v. Army and Air Force Exchange Service*, 846 F.2d at 748. Dismissal is appropriate only if "it is beyond doubt that the plaintiff can prove no set of facts which would entitle him to relief." *Hamlet v. United States*, 873 F.2d 1414, 1416 (Fed. Cir. 1989).

The Government initially requested an Order requiring appellant to show cause why the appeal should not be dismissed for lack of jurisdiction, and in response to appellant's opposition to the Government's request for a show cause order, moved to dismiss the appeal. Appellant asserts that it has privity of contract with the Government and that the Board has jurisdiction because appellant has either an express contract or

implied contractual relationship with the Government through the issuance of contract Modification No. P00001. According to appellant, it does not just have a cause of action against G. M. & W. Construction in state or federal court; rather it has enforceable rights under the contract that may be resolved by the Board. Thus, appellant merely seeks to enforce the terms of Modification No. P00001.

In its response to appellant's opposition to its original request, and its motion to dismiss the appeal for lack of jurisdiction, the Government does not dispute any of the factual allegations asserted by appellant. Rather, the Government argues that under the Contract Disputes Act of 1978 (CDA), 41 U.S.C. §§ 601-613, only contractors, and not subcontractors, have the right to appeal to a Board of Contract Appeals.

The Act covers "[a]ll claims by a contractor against the government relating to a contract . . . ." 41 U.S.C. § 605(a) (2002). The Act defines "contractor" as a party to a Government contract other than the Government. 41 U.S.C. § 601(4) *See also, Fireman's Fund Insurance Co. v. England*, 313 F.3d 1344, 1350 (Fed. Cir. 2002); *United Pacific Insurance Co.*, ASBCA No. 53051, 01-2 BCA ¶ 31,527 at 155,638. It has long been the established rule that, subject to certain limited exceptions, a subcontractor cannot bring a direct appeal against the Government. As held by the Court of Claims in *Putnam Mills Corp. v. United* States, 202 Ct. Cl. 1, 4, 479 F.2d 1334, 1337 (1973):

> It is clear that, unless the plaintiff can provide evidence of the existence of some type of contract between it and the United States, it cannot, as a subcontractor, recover directly from the United States for amounts owed to it by the prime.

Therefore, according to *United States v. Johnson Controls, Inc.*, 713 F.2d 1541, 1550-51 (Fed. Cir. 1983), "the no-privity rule [quoted above from *Putnam Mills Corp. v. United* States] is synonymous with a finding that there is no express or implied contract between the government and a subcontractor," which is the "concept of privity mirrored in the CDA, 41 U.S.C. § 602 . . . and the Tucker Act, 28 U.S.C. § 1491, *amended by* the Federal Courts Improvement Act of 1982." Thus, in most instances, the Board does not hear subcontractor appeals unless they are sponsored by prime contractors. *Technic Services, Inc.*, ASBCA No. 38411, 89-3 BCA ¶ 22,193.

Although the SPECIAL 8(a) SUBCONTRACT CONDITIONS and SECTION 8(a) AWARD clauses referred to certain subcontractor rights, as the SECTION 8(a) DIRECT AWARD clause makes clear, the use of the term subcontractor in the former two clauses refers to the 8(a) contractor awarded the subcontract under the agency contract with the SBA. The SPECIAL 8(a) SUBCONTRACT CONDITIONS clause stated that the SBA had entered into a contract with the identified contracting agency and identified subcontractor for the performance of all the requirements of the identified contract. The SECTION 8(a) AWARD clause authorized such a subcontractor to make direct appeals from the cognizant

contracting officer's final decision under the DISPUTES clause of the contract. However, since the award of the instant purchase order was made directly to G. M. & W. Construction as provided in SECTION 8(a) DIRECT AWARD clause, the authority granted for direct appeals from 8(a) subcontractors in the SECTION 8(a) AWARD clause does not apply to appellant.

There is no evidence in the record that the prime contractor, G. M. & W., sponsored this appeal. Indeed, since G. M. & W. has been paid, it would not have a claim against the Government under this contract, and therefore, absent exceptional circumstances as discussed below, appellant's claim would be against G. M. & W. Construction, for the amount G. M. & W. Construction owed appellant under their contract. *See* ARNAVAS, GOVERNMENT CONTRACT GUIDEBOOK at §§ 25-4, 25-5 (3rd ed. 2001); *Ashton-Mardian Co.,* ASBCA No. 7912, 1963 BCA ¶ 3836.

Direct subcontractor appeals have been allowed only in such "rare, exceptional cases" as when the prime contractor acts as a purchasing agent for the Government or when the contract documents indicate that the Government intended to allow direct subcontractor appeals. *United States v. Johnson Controls, Inc.*, 713 F.2d at 1551; *Westinghouse Electric Supply Company*, ASBCA Nos. 44350, 44351, 93-3 BCA ¶ 26,132 at 129,898. *See also, D & H Distributing Company v. United States*, 102 F.3d 542 (Fed. Cir. 1996).

In *United States v. Johnson Controls, Inc., supra*, the Court discussed the essential requirements for the application of agency theory as an exception to the privity rule to support a direct appeal from a subcontractor to the Board without prime contractor sponsorship. Citing *Kern-Limerick, Inc. v. Scurlock*, 347 U.S. 110 (1954), and *Western Union Telegraph Co. v. United States*, 66 Ct. Cl. 38 (1928), the Court of Appeals for the Federal Circuit held that there were three factors that must be relied upon for a finding of privity based upon an agency theory: (1) the prime contractor must have been acting as a purchasing agent for the Government; (2) the agency relationship between the prime contractor and the Government must be established by clear contractual consent; and (3) the contract must state that the Government would be directly liable to the vendors or "subcontractor" for the purchase price. The Court also identified four factors which it said led the Court to the conclusion that the contract did not authorize a direct appeal from the subcontractor: (1) the Government and the subcontractor, Johnson Controls, never entered into a direct contractual relationship; (2) the "ABC" clause,[2] contained in both the prime contract and the subcontract, specifically disclaimed a contractual

[2] The "ABC" clause provided that the contractual relationship shall exist only between the parties, *i.e.*, the Government and the prime contractor, Turner Construction Co., and between Turner and the subcontractor, and that it was not intended to develop a relationship either contractually, administratively, operationally, or in any manner between the Government and any subcontractor.

relationship between the Government and Johnson Controls; (3) the prime contractor, Turner Construction, was required to obtain a Miller Act payment bond, which provided a recourse by the subcontractor other than a direct appeal; and (4) there was no provision in any of the contract documents that clearly authorized a direct appeal by a subcontractor. *United States v. Johnson Controls, Inc.*, 713 F.2d at 1552-53.

Assuming appellant is correct in its assertion that the Government solicited its bid for this project, and directed appellant to submit its bid through the 8(a) prime contractor, assertions not contradicted by the Government, nevertheless, there is no evidence that the Government and appellant entered into a contractual relationship. We have not found any clause, such as the "ABC" clause in *Johnson Controls, Inc.*, which expressly and specifically disclaimed any contractual relationship between the Government and appellant subcontractor. None of the special 8(a) clauses in the contract specifically disclaimed any contractual relationship between the Government and appellant subcontractor. There was no contract clause applying the Miller Act to this contract that provided recourse by the subcontractor other than a direct appeal. There was no clause that clearly authorized appellant, as a subcontractor, the right of direct appeal, although the SPECIAL 8(a) SUBCONTRACT CONDITIONS clause provided that the SBA agreed that the subcontractor awarded a subcontract thereunder shall have the right of appeal from decisions of the contracting officer under the DISPUTES clause. However, the subcontractor referred to in this clause was the subcontractor under a contract to be awarded the SBA under the 8(a) program, not a subcontractor awarded a subcontract by the prime contractor in a direct award between the contracting officer and the 8(a) contractor.

Appellant relies on Modification No. P00001 to argue that it received and maintained substantive, enforceable, express rights under that modification, either on the basis of an express contract or implied-in-fact contract.[3] According to appellant, this modification evidenced a mutual intent between the Government and appellant that the Government would issue a two-party check to appellant and G. M. & W. Construction; that the consideration for this agreement was appellant's relinquishment of appellant's then intent to sue G. M. & W. Construction or to bring suit against the Government under the CDA via the sponsorship of G. M. & W.; and that the modification was clear and unambiguous with respect to stating the terms of the offer and acceptance between the parties. While these might express the elements of an express or implied contract, neither these allegations nor the record as presently constituted before the Board satisfy the

[3] In this regard, appellant also argues that it is entitled to recovery on the basis of unjust enrichment or *quantum meruit*. In this regard, appellant's argument is somewhat confusing with respect to whether it is asserting a theory of implied-in-law or theory of implied-in-fact as the basis for its recovery, although the main force of its argument is that it is entitled to recover on the basis of an implied-in-fact contract.

requirements of the rule for the application of agency theory as an exception to the privity rule to support a direct appeal from a subcontractor to the Board without prime contractor sponsorship.

Appellant has alleged that the Government contacted appellant and requested a price quote for the installation of flooring coating to be submitted through G. M. & W. Construction because the contract was reserved for minority-owned business. Although this allegation may be suggestive of a possible agency relationship between the Government and the prime contractor, it falls short of showing that the prime contractor was acting as a purchasing agent of the Government and that this alleged agency was established by clear contractual consent. There is nothing in the contract between the Government and G. M. & W. Construction that tends to establish that the prime contractor was acting as a purchasing agent for the Government. Indeed, quite the contrary. The Government expressly awarded the instant contract to G. M. & W. Construction as an "8(a) Contractor pursuant to the Memorandum of Understanding" between the Small Business Administration and the Department of Defense. Moreover, the contract clause, SECTION 8(a) DIRECT AWARD (JUN 1998) provided that the prime contractor would not subcontract the performance of any requirement of the contract without the prior written approval of the SBA and the contracting officer. Appellant has not pointed to anything, and we see nothing, in the record or the contract between the Government and G. M. & W. Construction that provides "clear contractual consent" to the establishment of an agency relationship between G. M. & W. Construction and the Government, that indicates G. M. & W. Construction was acting as a purchasing agent for the Government, and that the Government would be directly liable to appellant for the purchase price. *Johnson Controls, Inc.*, 713 F.2d at 1551.

Appellant's main contention is that it obtained "contractual rights and privileges" through Modification No. P00001. Specifically, appellant argues that the Government promised to issue a two-party check and that appellant provided consideration for that promise by agreeing to the release in the modification. On that basis, appellant says that it may assert, in this forum, a claim based on the Government's failure to issue a check to appellant.

We are not persuaded that Modification No. P00001 satisfied the privity requirements for our jurisdiction under the Contract Disputes Act, as discussed above. Notwithstanding the apparent clear language in the modification regarding how payment was to be made, there was nothing in this modification indicating that the Government intended to allow a direct subcontractor appeal as required by *United States v. Johnson Controls, Inc., supra*. Moreover, appellant fairs no better under its unjust enrichment and *quantum meruit* theories. With respect to appellant's implied-in-fact theory as the basis for our jurisdiction of a direct appeal from appellant subcontractor, the alleged facts upon which appellant relies for its asserted implied-in-fact contract are the same facts upon which it bases its express contract right to appeal directly to the Board. *Cf., Aeronca,*

Inc., ASBCA No. 51927, 03-2 BCA ¶ 32,261 at 159,587. Modification No. P00001 to the express contract between the Government and G. M. & W. explicitly dealt with issuance of a two-party check to be remitted to appellant. That precludes the existence of an implied-in-fact contract on the same subject. *Atlas Corp. v. United States*, 895 F.2d 745, 754-55 (Fed. Cir. 1990), *cert. denied*, 498 U.S. 811 (1990). An implied-in-fact contract is based upon "a meeting of the minds, which, although not embodied in an express contract, is inferred, as a fact, from conduct of the parties showing, in the light of the surrounding circumstances, their tacit understanding." *Maher v. United States*, 314 F.3d 600, 606 (Fed. Cir. 2002), *cert. denied*, __ U.S. __, 124 S. Ct. 133 (2003). Although such a contract can be inferred from the parties' conduct, "the required elements for contract formation – 'a mutual intent to contract including an offer, an acceptance, and consideration' – are the same for express and implied-in-fact contracts." *Id.* Therefore, to the extent that appellant asserts jurisdiction under an implied-in-fact contract, the facts surrounding its alleged formation and details of its content are also unproven. On the other hand, to the extent appellant asserts that we have jurisdiction to grant *quantum meruit* relief under an alleged implied-in-law contract, we are also without jurisdiction. *Coastal Corp. v. United States*, 713 F.2d 728 (Fed. Cir. 1983).

Neither party has called to our attention the Court of Appeals decision in *D & H Distributing Company v. United States*, 102 F.3d 542 (Fed. Cir. 1996). However, since appellant relies on Modification No. P00001 as the basis for its alleged standing to appeal the contracting officer's deemed denial of appellant's purported claim, we address the question of whether or not that decision provides an exception to the privity rule for jurisdiction under the Contract Disputes Act for direct subcontractor appeals in the rare, exceptional cases identified in *United States v. Johnson Controls, Inc.*, 713 F.2d at 1551, *supra*. In *D & H Distributing Company v. United States*, the prime contractor and subcontractor negotiated a joint payment agreement under which D & H would provide credit to the prime contractor and supply the goods to the Government as called for under the contract, and under which all checks issued under the contract would be made payable jointly to the prime contractor and D & H. The prime contractor requested the Government to have the formal assignment on the contract so that both prime contractor and D & H would be designated joint payees. The Government did not execute the joint payment agreement. Rather, the contracting officer issued a modification to the contract in accordance with the prime contractor's letter, providing that: "Remittance to be assigned to CIM Corp. [the prime contractor] . . . and D & H Distributing." Following the issuance of this modification, D & H delivered the goods to the Government. Contrary to the terms of this modification, the Government issued the check in the name of the prime contractor only and did not designate D & H as joint payee. The prime contractor's debt in the approximate amount of $40,000 to D & H remained unpaid and the prime contractor ceased operating without assets to discharge its debt. D & H filed suit against the United States in the Court of Federal Claims alleging that it had entered into an implied-in-fact contract with the United States or that it was a third party

beneficiary. The Court of Federal Claims rejected both theories and directed that the complaint be dismissed.

The Court of Appeals held that D & H enjoyed the status of a third-party beneficiary with respect to the payment clause of the modified contract and was entitled to enforce that clause against the government. Citing various treatises on contract law, the Court held that:

> In the case of a contract in which the promisee provides goods or services to the promisor, it has long been settled that a clause providing for the promisor to pay the proceeds of the contract to a third party is enforceable by the third party where the payment is intended to satisfy a present or future liability of the promisee to the third party. The third party beneficiary in that situation has traditionally been referred to as a "creditor beneficiary" and has been accorded full rights to sue under the original contract.

D & H Distributing Company v. United States, 102 F.3d at 546-47. The Court held that the same principle would apply if the payment clause provided that a portion of the contract payments would be paid to the promisee and a portion to the third party. Thus, according to the Court, "[t]he entire purpose of the joint payment clause was to provide protection for D & H by giving it a right to control the disbursement of the contract proceeds and thereby ensure that its invoice to [the prime contractor] would be paid." The Court further held that the same result would obtain, giving D & H the status of an assignee, where the Government was placed on notice, holding that the Government would be liable to the assignee if it made payments to the assignor rather than to the assignee in accordance with the terms of the assignment. Accordingly, the Court reversed the judgment of the Court of Federal Claims and remanded the appeal for further proceedings on D & H's complaint.

The Circuit Court's opinion in *D & H Distributing Company v. United States* does not reference either the Contract Disputes Act or the Tucker Act, as amended by the Federal Courts Improvement Act of 1982. Moreover, inasmuch as the judgment or order of the Court of Federal Claims dismissing the complaint is unpublished and unavailable, we have been unable to determine the basis for its jurisdiction. Nevertheless, as we quoted above from *United States v. Johnson Controls, Inc.*, 713 F.2d at 1550-51, the privity doctrine that precludes direct suits or appeals by subcontractors is mirrored in both Tucker Act and the CDA. Therefore, whether the action brought by *D & H Distributing Company* in the Court of Federal Claims was under the Tucker Act or CDA, we hold that the jurisdictional precedence of the Circuit Court's decision in *D & H Distributing Company v. United States* is applicable to any proceeding before this Board

provided there exists the factual basis for the rare, exceptional case under which a direct appeal would be authorized as the exception to the no-privity rule.

As the court in *Schuerman v. United States*, 30 Fed. Cl. 420, 427 (1994), suggests, upholding jurisdiction over claims brought by third-party beneficiaries, may be settled law, but there has been a common thread in the case law that states that "[t]hird-party beneficiary law has been plagued by uncertainties, doctrinal and conceptual difficulties, and confusion. . . ." The confusion and uncertainty relate to the standard or standards for meeting the third-party beneficiary test. The Court of Appeals agreed with the analysis and determination in *Schuerman v. United States* that the appropriate test for intended third-party beneficiary status included only the first prong of the two prong test previously announced by the Court of Federal Claims in *Baudier Marine Electronics v. United States*, 6 Cl. Ct. 246, 249 (1984). Therefore, the Court held that all that was required to establish third-party beneficiary status was that the contract must "reflect the express or implied intention of the parties to benefit the third-party." *Montana v. United States*, 124 F.3d 1269, 1273 (Fed. Cir. 1997), quoting *Schuerman v. United States*, 30 Fed. Cl. at 433. Thus, the intended beneficiary need not be specifically or individually identified in the contract, but must fall within a class clearly intended to be benefited thereby. "One way to ascertain such intent is to ask whether the beneficiary would be reasonable in relying on the promise as manifesting an intention to confer a right on him." *Montana v. United States*, 124 F.3d at 1273. *See also*, RESTATEMENT (SECOND) OF CONTRACTS § 302(1) cmt. d (1981).

In the instant appeal, as in *D & H Distributing Company v. United States*, 102 F.3d 542, *supra*, the payment provision in the contract modification made it clear that the contract, as modified, reflected the express or implied intention of the parties to benefit the third-party. Indeed, in evaluating the contract modification to determine if it expressly or impliedly was intended to benefit appellant, we have carefully distinguished between incidental and indirect beneficiaries on the one hand, and direct beneficiaries on the other, and hold that appellant was a direct beneficiary and as such, is entitled to third-party beneficiary status for the purpose of holding we have jurisdiction to hear the appeal. *Schuerman v. United States*, 30 Fed. Cl. at 433. In fact, in its motion to dismiss for lack of jurisdiction, the Government conceded in its attachments that the modification was for the specific benefit of appellant and no one else. Moreover, although the second prong of the *Baudier* test is not required for the determination of whether or not the appellant has the status of a third-party beneficiary for our jurisdiction in this direct appeal, the contract modification at issue here does give appellant a direct right to compensation or right to enforce this right against the Government. *Montana v. United States*, 124 F.3d at 1273.

As we have stated above, the PAYMENT BY ELECTRONIC FUNDS TRANSFER -CENTRAL CONTRACTOR REGISTRATION clause provided for payment by EFT on this contract, except as set forth in paragraph (a)(2) of the clause. We hold that there was

nothing in that clause that would prevent jurisdiction in this direct subcontractor appeal based on the third-party beneficiary exception to the privity rule.

Accordingly, we hold that we have jurisdiction under the Contract Disputes Act of 1978, as amended, to hear this appeal, and deny the Government's motion to dismiss the appeal for lack of jurisdiction. The Government is hereby directed to file an answer in this appeal within 30 days of receipt of this decision.

Dated: 30 March 2004

ROLLIN A. VAN BROEKHOVEN
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. 54143, Appeal of FloorPro, Inc., rendered in conformance with the Board's Charter.

Dated:

DAVID V. HOUPE
Acting Recorder, Armed Services
Board of Contract Appeals