ARMED SERVICES BOARD OF CONTRACT APPEALS

Appeal of --	)	
	)	
Alpine Computers, Inc.	)	ASBCA No. 54659
	)	
Under Contract No. DASG62-02-C-0001	)	

APPEARANCE FOR THE APPELLANT: Michael F. Rieselman, Esq.
Los Angeles, CA

APPEARANCES FOR THE GOVERNMENT: Craig S. Clarke, Esq.
Acting Chief Trial Attorney
MAJ Gregg A. Engler, JA
Trial Attorney

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

This appeal involves a contract between the U.S. Army and Network Resource Services, Inc. (NRS). NRS subcontracted with Alpine Computers, Inc. (Alpine) to supply telecommunications equipment. Thereafter, Alpine submitted the underlying claim and took this appeal. NRS did not sponsor Alpine's claim. Respondent moved to dismiss the appeal for lack of jurisdiction. We grant the motion.

STATEMENT OF FACTS (SOF)

1. The U.S. Army Space Command awarded Contract No. DASG62-02-C-0001 (the contract) to NRS on 8 November 2001.[1] Under the contract, NRS was to assist the government in moving communication and automation data located in Colorado Springs, CO, to a new building on Peterson Air Force Base, CO. The contract was designated a "Time and Materials contract" and provided for labor and technical support (CLIN 0001), direct purchase of material (CLIN 0002) and data (CLIN 0003). (Ex. G-12 at 1-2, 16, Statement of Work (SOW) at 1-3)

2. The contracting officer (CO) who signed the contract described it as a time and materials, service contract. The Army Corps of Engineers had a construction contract with Swinerton Builders to construct the new Space Command building on Peterson

[1] NRS was an SBA 8(a) contractor. The contract was awarded not to SBA but to NRS, pursuant to the contract's DFARS 252.219-7009 SECTION 8(A) DIRECT AWARD (JUN 1998) clause.

AFB. NRS was not a party or subcontractor to that construction contract. (Ex. G-10 at 1)

3. The contract and its amendments did not contain or incorporate by reference any provision for notice to proceed to the contractor; any contract clause prescribed by FAR Subpart 36.5 for construction contracts (as set forth in FAR 52.236) and by FAR 28.102-3(a) and 28.103-4 for payment bonds in construction contracts and for other than construction contracts (as set forth in FAR 52.228-15, -16); any provision defining the government's relationship to subcontractors, except to the extent that its FAR 52.244-2 SUBCONTRACTS (AUG 1998), ALT. I (AUG 1998), clause required the CO's consent to some types of subcontracts, and further provided:

> (i) The Contractor shall give the [CO] immediate written notice of any action or suit filed and prompt notice of any claim made against the Contractor by any subcontractor or vendor that, in the opinion of the Contractor, may result in litigation related in any way to this contract, with respect to which the Contractor may be entitled to reimbursement from the Government.

The contract did not contain any requirement for the government to issue payment checks to NRS and Alpine jointly or to NRS for the benefit of Alpine; or any requirement for a Miller Act payment bond (which NRS did not obtain) (ex. G-10 at 3; G-12 to G-20; app. oppn. at 2-3).

4. CLIN 0002, "Direct Purchase of Material," provided for reimbursement to the contractor of its "actual costs plus applicable burdens" (ex. G-12 at 2). Under SOW ¶ 4.0, "Contractor's Tasks," was provided:

> 4.1 **Equipment Ordering**
> The contractor shall prepare delivery or purchase orders for government execution to order equipment specified in the technical solutions and the Installation Plan. The contractor shall specify those items that will be ordered directly by them and those items that will be ordered by the government. . . .
>
> 4.2 **Equipment Installation**
> The contractor shall plan, schedule, configure, install, and test all the communications, automation, and Visual Information (VI) devices, new and existing . . . as addressed in the technical solutions and the Installation Plan. The contractor

> shall ensure that all networks and end devices are fully interoperable and operational. . . .

(Ex. G-12, SOW at 3)

5. On 1 May 2002 the government approved NRS' "Request to Procure Parts" from Alpine, and on the same date NRS entered into Purchase Order No. YM-02-P0003 (subcontract) with Alpine to supply 21 items of telecommunications equipment in the amount of $26,892. The subcontract stated that the equipment was to be sent to the Army at its Colorado Springs location. It did not include or incorporate the FAR 52.233-1 DISPUTES (DEC 1998) clause incorporated in the prime contract, or attempt to obligate the CO or the ASBCA to decide questions that do not arise between the government and NRS (in contravention of the policy in FAR 44.203(c)). (Exs. A-6, G-8, G-12 at 15)

6. On 9 May 2002, NRS billed the government for labor and materials. NRS' invoice No. 0014 included $38,740.80 for material supplied, including the equipment NRS had ordered from Alpine. (Ex. G-7; gov't mot. at 2)

7. The government sent NRS invoice No. 0014 to the Defense Finance Accounting Service (DFAS) for payment (gov't mot. at 3). DFAS paid that invoice on 4 June 2002 (ex. G-3 at 2; gov't mot. at 3).

8. Alpine's telecommunications equipment was delivered to the government on 9 July 2002 at Peterson AFB (ex. G-4 at 2). Accompanying the equipment was a copy of the invoice Alpine had submitted to NRS with respect to the purchase order, which stated that the equipment was sold to NRS and was to be shipped to the government (ex. G-5; gov't mot. at 3). According to Alpine's declarant, Bradley Barney, Alpine's equipment required significant building alterations and substantial electrical wiring (Barney decl. at 2).

9. On 25 July 2002, the U.S. Criminal Investigations Command (CID) notified CO Mary L. Gorman, who executed the NRS contract and was Director of Contracting for the Army Space & Missile Defense Command (formerly designated the Army Space Command), that CID would initiate an investigation of NRS. On 15 August 2002, NRS' legal representative notified CO Gorman that CID had executed a search warrant at the NRS offices and seized the contract files and papers, and that NRS would cease performance of the contract as of that date. (Ex. G-1 at 2-3)

10. CO Gorman's 16 August 2002 letter notified NRS that the contract was terminated for default based upon an anticipatory repudiation, and directed NRS to terminate all subcontracts and to place no further subcontracts or orders (ex. G-22). On that same day and thereafter, NRS subcontractors, not including Alpine, informed CO

Gorman that NRS had not paid them. She told them that they were not in privity of contract with the government and suggested they seek legal advice. (Ex. G-1 at 3)

11. On 17 March 2004, Alpine submitted a claim to CO Gorman in the amount of $26,892 for the equipment shipped to the Army. The claim does not represent that NRS had sponsored it. The claim alleged, *inter alia*, that there was an implied-in-fact contract between Alpine and the government, or that Alpine was a third party beneficiary of NRS' prime contract with the government. The claim alleged that "Alpine delivered the order at Peterson [AFB] directly at 10:43 am on July 9, 2002. An 'S. McKee' signed for and accepted delivery. A copy of the receiving report is enclosed herewith for your review." (Ex. G-4)

12. At the Board's request, appellant submitted the foregoing "receiving report" on 9 May 2005. That document, called "FedEx Express Tracking Results Detail," was extracted by Alpine from a FedEx internet web-site on 19 August 2002. It states that a shipment by FedEx to Peterson AFB CO was delivered "07/09/2002 10:43" and was "Signed For By S.MCKEE."

13. CO Gorman's 30 March 2004 letter to Alpine's attorney stated that she did not consider Alpine's submission to be a valid claim under the Contract Disputes Act (CDA) because Alpine, as a subcontractor, did not have a contractual relationship with the government or standing to assert the claim to the CO, and the government had paid NRS for the equipment delivered by Alpine (ex. G-3).

14. On 22 June 2004 Alpine filed a notice of appeal with the ASBCA based upon the CO's deemed denial of its 17 March 2004 claim.

15. Appellant's president declared that it "would never have performed this [sub-] contract . . . had we not believed payment was guaranteed by a surety bond" (D. J. Barney decl. at 2). Appellant apparently made no effort to verify its belief by inquiring to NRS or by reviewing NRS' prime contract provisions.

DECISION

The burden of establishing jurisdiction in a tribunal lies with the party seeking to invoke its jurisdiction, here, the appellant. *Cedars-Sinai Medical Center v. Watkins*, 11 F.3d 1573, 1583 (Fed. Cir. 1993), *cert. denied*, 512 U.S. 1235 (1994). Respondent challenges the factual bases for the Board's jurisdiction of this appeal. Appellant argues that the facts it has alleged must be presumed to be true and viewed most favorably to Alpine. Such rules apply to a motion presenting a facial attack on the sufficiency of the opponent's pleadings, *Cedars-Sinai, supra*, 11 F.3d at 1583-84. Respondent does not attack appellant's 6 April 2005 complaint, but rather bases its motion on matters outside

the pleadings. Facts underlying the controverted jurisdictional allegations are subject to the Board's fact finding. *See E.M. Scott & Associates*, ASBCA No. 45869, 94-3 BCA ¶ 27,059 at 134,837.

Under the CDA, the Board has jurisdiction of appeals brought by a "contractor." *Fireman's Fund Insurance Co. v. England*, 313 F.3d 1344, 1350-51 (Fed. Cir. 2002). The CDA defines a "contractor" as "a party to a Government contract other than the Government." 41 U.S.C. § 601(4). Such definition excludes subcontractors who lack privity of contract with the government and whose claims are not sponsored by the prime contractor. *United States v. Johnson Controls, Inc.*, 713 F.2d 1541, 1550-51, 1556 (Fed. Cir. 1983).[2]

Appellant does not dispute that it was a subcontractor and NRS has not sponsored Alpine's claim (SOF, ¶¶ 5, 11; app. opp'n at 6). Appellant argues that this is one of the rare exceptions when a subcontractor may prosecute a CDA appeal, relying principally on *Johnson Controls*; *D&H Distributing Co. v. United States*, 102 F.3d 542 (Fed. Cir. 1996); and *FloorPro, Inc.*, ASBCA No. 54143, 04-1 BCA ¶ 32,571. *Johnson* analyzed two exceptions to the privity requirement: when the prime contractor was a purchasing agent for the government, and when the contract documents provide for a direct appeal by a subcontractor. 713 F.2d at 1551-55. *D&H* and *FloorPro* analyze privity arising from a third-party beneficiary's rights and from an implied-in-fact contract. We review appellant's arguments sequentially.

Purchasing Agent

To prevail on the purchasing agent theory, appellant must show that: (1) the prime contractor was acting as a purchasing agent for the government; (2) the agency relationship between the government and the prime was established by clear contractual consent; and (3) the contract stated that the government would be directly liable to the vendors for the purchase price. *See Johnson Controls*, 713 F.2d at 1551.

As to the first two elements of proof, the prime contract did not state that NRS was acting as the government's "purchasing agent," and it did not mention or establish an agency relationship between the Army and NRS (SOF, ¶¶ 3-4). The contract SOW, ¶ 4.1 provided:

> The contractor shall prepare delivery or purchase orders for government execution to order equipment specified in the

[2] Appellant argues that NRS "absconded with all the monies" and is unavailable to sponsor its claim (app. opp'n at 6). Why NRS has not sponsored Alpine's claim is immaterial to the Board's jurisdiction thereof.

> technical solutions and the Installation Plan. The contractor shall specify those items that will be ordered directly by them and those items that will be ordered by the government.

(SOF, ¶ 4) NRS did not specify that the government would order Alpine's 21 items of telecommunications equipment. Rather, NRS itself directly ordered those items from appellant (SOF ¶ 5). Thus, SOW ¶ 4.1 did not make NRS the Army's purchasing agent for the Alpine equipment. With respect to the third purchasing agent element, appellant has not pointed to, and the record does not contain, any prime contract provision that the government would be directly liable to subcontractors for the purchase price of their products. We hold that NRS was not a "purchasing agent" with respect to the material ordered from appellant.

Direct Appeal

In *Johnson Controls*, 713 F.2d at 1552-53, the court concluded that the prime and subcontract did not authorize a direct appeal by the subcontractor because: (1) the government and subcontractor never entered into a direct contractual relationship; (2) a clause contained in the prime and subcontract specifically disclaimed a contractual relationship between the government and the subcontractor; (3) the prime contractor was required to obtain a Miller Act payment bond, which provided recourse by the subcontractor other than a direct appeal; and (4) there was no contract provision that clearly authorized a direct appeal by the subcontractor.

With respect to elements (1) and (4), the Army and Alpine did not enter into a direct contractual relationship, and NRS' prime contract did not clearly authorize a direct appeal by any subcontractor. With respect to elements (2) and (3), the contract is silent with respect to a disclaimer of a government-subcontractor relationship, and the Miller Act did not require NRS to obtain a payment bond in the circumstances of its prime contract (SOF ¶¶ 3, 5). Elements (2) and (3) do not show that Alpine has a right of direct appeal to this Board, and elements (1) and (4) plainly show that Alpine was not in privity with the government. *See Floor-Pro*, 04-1 BCA at 161,181.

With respect to element (3), Alpine argues that the Miller Act required a payment bond for the NRS prime contract and respondent negligently failed to require NRS to obtain such bond. Under FAR 28.102 Performance and payment bonds . . . for construction contracts, ¶ 28.102-1(a) provides: "The Miller Act . . . requires performance and payment bonds for any construction contract exceeding $100,000. . . ." Under FAR 28.103 Performance and payment bonds for other than construction contracts, ¶ 28.103-1 provides:

> (a) Generally, agencies shall not require performance and payment bonds for other than construction contracts . . . .
>
> (b) The contractor shall furnish all bonds before receiving notice to proceed with the work.
>
> (c) No bond shall be required after the contract has been awarded if it was not specifically required in the contract, except as may be determined necessary for a contract modification.

The NRS contract was designated a time and materials contract that required labor and technical support and purchase of material (SOF, ¶ 1). The CO who executed the contract described it as a time and material, services contract (SOF, ¶ 2). The contract and its amendments did not require the CO to give notice to proceed, and did not contain or incorporate any contract clause prescribed by FAR Subpart 36.5 for construction contracts, and by FAR 28.102-3(a) or 28.103-4 for payment bonds in construction contracts or for other than construction contracts, or any requirement for a Miller Act payment bond.

Thus, the record does not support Alpine's contention that the contract was a construction contract that required NRS to obtain a Miller Act bonds, or show that the CO abused his discretion not to require a payment bond for this time and materials type contract. Nor are we persuaded that the allegation that Alpine's equipment required significant building alterations and substantial electrical wiring (SOF, ¶ 8) proved that NRS' services contract was actually a construction contract. Furthermore, the lack of a Miller Act payment bond is not, without more, determinative of a subcontractor's privity of contract under *Johnson Controls*. We hold that appellant had no right of direct appeal to the ASBCA.

Third Party Beneficiary

In *D&H Distributing*, 102 F.3d at 546-47, a prime contract was amended to provide that government payments were to be made to the prime contractor and its subcontractor jointly. The government ignored that amendment and paid the prime contractor alone. The court held that the subcontractor was a third-party beneficiary of the joint payment provision, and the Court of Federal Claims had jurisdiction of the subcontractor's suit to enforce it. In *FloorPro, Inc.*, when a prime contract modification expressly required the government "to cut a two party check" payable to the prime and subcontractor, with the check remitted to the subcontractor's address, we applied the third-party beneficiary rule in *D&H Distributing* to permit a direct subcontractor appeal. 04-1 BCA ¶ 32,571 at 161,179, 161,183-84.

Appellant argues that the "invoice" for Alpine's work "clearly states the payment billed is **for the benefit of Alpine Computers**" (app. br. at 8, citing ex. A-6, emphasis in original). It is immaterial that Alpine's invoice obviously contemplated NRS' payment for the benefit of Alpine. The critical fact is that there is no prime contract provision or modification providing for government payment to the prime and a subcontractor jointly (SOF, ¶ 3). We hold that appellant cannot appeal to this Board directly as a third party beneficiary under the governing legal authorities.

Implied Contract

Alpine argues that it had an implied contract with the government so as to establish privity of contract. Citing *City of El Centro v. United States*, 922 F.2d 816, 820 (Fed. Cir. 1990) and other precedents, the court in *Trauma Service Group v. United States*, 104 F.3d 1321, 1325 (Fed. Cir. 1997), stated that a party alleging an implied-in-fact contract "must show a mutual intent to contract including an offer, an acceptance, and consideration . . . . A contract with the United States also requires that the Government representative who entered or ratified the agreement had actual authority to bind the United States." This Board has jurisdiction to adjudicate a dispute relating to an implied-in-fact contract, if such were proven. *E.M. Scott & Associates, Inc.*, ASBCA No. 45869, 94-1 BCA ¶ 26,258 at 130,603.

Appellant argues that "important undisputed facts militate in favor of a finding of jurisdiction based upon implied contract" and asserts that the NRS contract reserved subcontractor approval and acceptance to the government, which "physically inspected and approved" Alpine for this subcontract (app. further resp. at 5-6). Such facts do not establish the foregoing elements of proof of an implied-in-fact contract. Since the prime contract required NRS to deliver the equipment to the government (SOF ¶¶ 1-2, 5), the government did not receive any added benefit or consideration for appellant's delivery of the equipment, which the government accepted (SOF ¶ 8, 11). *National Micrographics Systems, Inc. v. United States*, 38 Fed. Cl. 46, 51 (1997) (government's receipt of computer system shipped by subcontractor was no consideration for an implied-in-fact contract with the subcontractor, who was not paid by the insolvent prime contractor for the computer). Appellant's implied-in-fact contract argument is untenable.

Other Arguments

Alpine contends that the government hired an unqualified prime contractor, who defrauded Alpine of payment for the equipment it supplied. The Board has rejected assertions that a prime contractor's improper actions provide bases for jurisdiction over an unsponsored subcontractor claim. *Marine Contractors, Inc.*, ASBCA No. 54017, 03-1

BCA ¶ 32,240 at 159,425; *Coastal Drilling, Inc.*, ASBCA No. 54023, 03-1 BCA ¶ 32,241 at 159,427.

CONCLUSION

For the reasons stated above, Alpine has failed to sustain its burden of establishing jurisdiction of the ASBCA to entertain this appeal. We grant the government's motion and dismiss the appeal.

Dated: 22 June 2005

DAVID W. JAMES, 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. 54659, Appeal of Alpine Computers, Inc., rendered in conformance with the Board''s Charter.

Dated:

CATHERINE A. STANTON
Recorder, Armed Services
Board of Contract Appeals