ARMED SERVICES BOARD OF CONTRACT APPEALS

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

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OPINION BY ADMINISTRATIVE JUDGE VAN BROEKHOVEN
ON APPELLANT'S MOTION FOR SUMMARY JUDGMENT

Appellant timely appealed the deemed denial of its claim in the amount of $42,000. In *FloorPro, Inc.*, ASBCA No. 54143, 04-1 BCA ¶ 32,571, we held, on the government's motion to dismiss, that we had jurisdiction under the Contract Disputes Act of 1978, as amended to hear the appeal, and denied the government's motion to dismiss. Relying on *D & H Distributing Company v. United States,* 102 F.3d 542 (Fed. Cir. 1996), we held that appellant enjoyed the status of a third-party beneficiary with respect to the payment clause of the modified contract, and that there was nothing in the PAYMENT BY ELECTRONIC FUNDS TRANSFER – CENTRAL CONTRACTOR REGISTRATION clause that would prevent jurisdiction in this direct subcontractor appeal based on the third-party beneficiary exception to the privity rule. Familiarity with our earlier decision in this appeal is presumed.

Following our issuance of the decision, within 30 days, the government filed its answer, together with asserted affirmative defenses. First, the government repeated its earlier argument in its motion to dismiss that there was a lack of jurisdiction based on failure of privity of contract and standing to assert a claim. The government did not file any motion for reconsideration of our earlier decision. Therefore, we consider this affirmative defense and the government's opposition to appellant's motion as its motion

for reconsideration. Second, the government asserts accord and satisfaction. Third, the government asserts release and waiver. In this regard, the government asserted that appellant's claim under the subject contract is barred based on the final release and certification of payments to suppliers and subcontractors submitted by the contractor in conjunction with the final payment.

Thereafter, the government filed an amended answer because the government was concerned that the Board's decision on the government's motion to dismiss set an important jurisdictional precedent regarding third-party beneficiaries, and "[o]ut of an abundance of caution, the Government is amending its Answer with Affirmative Defenses to clarify and add affirmative defenses to this appeal."

Appellant subsequently submitted a Motion for Summary Judgment, which the government opposed, and which is now before us. The thrust of appellant's motion was that the Board had already ruled on the jurisdictional issue, that the government admitted that appellant was the intended beneficiary of the relevant contract modification obligating the Department of Navy to pay the claimed amount to appellant, and that there was no genuine issue of material fact with respect to appellant's entitlement. The government opposed appellant's motion on the bases that there are material facts in dispute, that appellant had not met its burden of establishing the absence of any genuine issue of material fact, and that it was entitled to judgment as a matter of law. The government specifically contended that there is a dispute regarding the parties' intentions with respect to the execution of Modification No. (Mod. No.) P00001 to the purchase order.

FINDINGS 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 Corporation (also cited as G. M. & W.). For the total amount of $42,000, G. M. & W. was required to install floor coating at warehouse bays on the Marine Corps Logistics Base (MCLB), Albany, Georgia. (R4, tabs 1, 3) The purchase order was a direct award between the government and the 8(a) contractor pursuant to a Memorandum of Understanding between the Small Business Administration (SBA) and the Department of Defense.

2. The purchase order contained a number of clauses relevant to this appeal, including FAR 52.232-1 PAYMENTS (APR 1984) and FAR 52.233-1 DISPUTES (DEC 1998). The PAYMENTS clause provided that the Government would pay the contractor upon the submission of proper invoices or vouchers. The DISPUTES clause

[1] Although the docket has the contract number as N62467-020-M-2013, the actual contract number is as shown in the style of the decision.

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. (R4, tab 1 at 7) Additionally, the purchase order contained the FAR 52.219-11 clause, SPECIAL 8(a) CONTRACT CONDITIONS (FEB 1990), which provided in paragraph (d) that the SBA agreed "That payments to be made under any subcontract awarded under this contract [the SBA contract] will be made directly to the subcontractor by the Marine Corps Logistics Base [MCLB], Albany, Ga." The DFARS 252.219-7009 clause, SECTION 8(A) DIRECT AWARD (JUN 1998), provided in paragraph (c)(2) that the contractor agreed that it would not subcontract the performance of any of the requirements of the contract without the prior written approval of the SBA and the contracting officer.

3. The subject purchase order incorporated by reference FAR 52.232-33, PAYMENT BY ELECTRONIC FUNDS TRANSFER -- CENTRAL CONTRACTOR REGISTRATION (MAY 1999) (R4, tab 1 at 8). This clause applied when 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. According to the clause, payment was to be made by electronic fund transfer except as provided in paragraph (a)(2) of the clause. Paragraphs (a)(2) and (f)(1) of the clause provided:

> (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 EFF information incorrectly, the Government remains responsible for –
>
> (i) Making correct payment;
>
> (ii) Paying any prompt payment penalty due; and

(iii) Recovering any erroneously directed funds.

4. In our earlier decision on the government's motion to dismiss, we found that:

> 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 through 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. . . . The Government has not disputed these allegations in its request for the show cause and motion to dismiss.

FloorPro, Inc., ASBCA No. 54143, 04-1 BCA at 161,177. Subsequent to our issuance of our decision, the government filed its answer and assertion of affirmative defenses and its amended answer with affirmative defenses. In its answer, the government denied the allegations contained in appellant's complaint regarding the alleged contacts between MCLB and appellant prior to the award of the purchase order to G. M. & W. Construction. Except for this denial in the government's answer, the government has not specifically rebutted the facts supporting our finding in the earlier decision. According to a sworn declaration by the contracting officer, he provided the names and contact information of at least two potential subcontractors for the flooring work, one of which was appellant. However, the contracting officer further stated that at the time of contract award, he did not know that appellant was to be the subcontractor performing the work. (Gov't opp'n to mot., attach. 3) There is nothing, however, in this sworn declaration by the contracting officer that he was affirming anything other than his personal involvement in the contact and that rebutted appellant's assertion that it was contacted by government personnel prior to submitting its quote to G. M. & W.

5. Appellant alleges that on 24 January 2002, it submitted its price quotation to the government through G. M. & W. Construction, which was accepted by the government (compl. ¶¶ 3, 4). As we found in our earlier decision on the government's motion, the government did not dispute this assertion in its request for show cause and motion to dismiss. *FloorPro, Inc.*, ASBCA No. 54143, 04-1 BCA at 161,177.

Nevertheless, the government in its amended answer denied these assertions. The appeal file does not contain a copy of appellant's alleged price quotation to the government through G. M. & W., although the award amount of the purchase order is consistent with the amount alleged by appellant to have been proposed for the work.

6. On 11 February 2002, appellant entered into a subcontract with G. M. & W. to perform the work under the contract (app. Proposed Finding of Fact (PFF) No. 2; gov't opp'n to mot. at 2, § II, and attach. 4). The record contains a copy of this subcontract as attachment 4 to the government's opposition to appellant's motion for summary judgment. The total amount for appellant's subcontract was $37,500.00. Moreover, the record establishes that appellant performed all the contract work required under the purchase order. Appellant began performance on 13 February 2002 and completed performance on or before 27 February 2002 (compl. ¶ 5; answer ¶ 5; mot. for summary judgment at PFF 3; gov't resp. to mot. ¶ II). By letter dated 8 March 2002, the contracting officer informed G. M. & W. 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).

7. Appellant alleged in its proposed findings of fact that it submitted its invoice to G. M. & W. on 6 March 2002 for the work performed under the contract, citing R4, tab 6. The government alleged that this was not a material fact for the purposes of appellant's motion because it does not affect the outcome. The government agreed that appellant submitted such an invoice to G. M. & W., but asserts that the copy of the invoice contained in R4, tab 6 does not show an amount in the price column, although an email of 17 April 2002 to the contracting officer, confirming a telephone conversation on that day, included the invoice, and stated that the invoice was in the amount of $37,500.00, which amount had not been paid by G. M. & W. to appellant. (App. PFF No. 4; gov't PFF No. 4) The record is unclear whether the amount alleged to be due reflected on the invoice was absent due to the reproduction of the R4 documents by the government, or the printing by the government of the email from appellant when received by the government on 17 April 2002. Nevertheless, the government attached the invoice with the amount of $37,500.00 clearly stated as an attachment to its opposition to appellant's motion. We find that there is no dispute as to the amount of the invoice, and as to whether it was received by the government in addition to its receipt by G. M. & W.

8. During the period of 29 March 2002 to 17 April 2002, appellant attempted to ascertain from G. M. & W. the status of payment to appellant under the contract (app. PFF No. 7). The government disputes appellant's assertion, both because it is not a material fact that would affect the outcome, and because, according to the government, the documents cited by appellant do not support the assertion (gov't opp'n at 3). While the government is correct that the cited documents in the appeal file do not specifically support appellant's assertion as contemporary evidence, they do support a finding, as

found in our earlier decision on the government's motion to dismiss the appeal, that appellant had attempted to determine the status of payment under the contract, and that appellant had informed the government, both by telephone and by facsimile transmission on 17 April 2002 that it had not been paid by G. M. & W. for the work performed under the contract (*see also* R4, tab 6).

9. Appellant sent G. M. & W. an invoice dated 6 March 2002 in the amount of $37,500 for the completed work. (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 electronic 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). According to the contracting officer, the government received the invoice from G. M. & W. in the amount of $42,000 on 16 April, and that he certified the invoice for payment on 22 April 2002, but that he had no control over the payment procedures followed by the Defense Finance and Accounting Office. (Gov't opp'n to mot., ex. 3)

10. On 22 April 2002, the contracting officer called G. M. & W. about the lack of payment to appellant. G. M. & W. informed him that there were claims against the company, and that G. M. & W. did not know whether funds deposited into the company account would be available to pay appellant. (Gov't opp'n to mot., ex. 6) As a result, the contracting officer and the representative from G. M. & W. discussed alternative ways to make payment to appellant. They agreed to execute a bilateral contract modification "in hope that the Defense Finance and Accounting Service (DFAS) would issue a hard-copy, two-party check to both G. M. & W. and FloorPro rather than following the established electronic payment method already in place under the contract." (*Id.*)

11. Accordingly, the parties executed Mod. No. P00001 on 22 April 2002, which stated that: "THIS MODIFICATION IS ISSUED FOR A TWO PARTY CHECK (UNFO)." (R4, tab 2) Block 14 of the modification, DESCRIPTION OF MODIFICATION, provided that it was issued for DFAS Kansas City to issue a two-party check (hard copy) to the contractors listed below: G. M. & W. Construction and FloorPro, Inc., with the check to be mailed to FloorPro, Inc., at P.O. Box 11999, Louisville, KY 40251. The modification also contained a "CONTRACTOR'S STATEMENT OF RELEASE" which provided that "acceptance of this modification by the contractor constitutes an accord and satisfaction and represents 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 herein revised." (R4, tab 2) Although this modification was clear in what it provided with respect to the payment for appellant's services by issuing a two-party check to be mailed directly to appellant, according to the contracting officer's sworn declaration, the parties to the purchase order, G. M. & W. and the government, did not intend to make appellant a third-party beneficiary of the purchase order (gov't opp'n to mot., ex. 3).

12. 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). By letter dated 9 August 2002, the government confirmed that G. M. & W. had been paid in full on the subject purchase order and 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 G. M & W. (R4, tab 12)

13. According to appellant's complaint and proposed findings of fact, appellant has never been paid the amount specified in Mod. No. P00001 (compl. ¶ 12; app. PFF No. 12, citing R4, tabs 8-12). The government, in its amended answer, denied this allegation on the basis that there was a lack of information sufficient to form a belief as to the truth of the matters asserted, notwithstanding the trail of correspondence in the Rule 4 file which supported appellant's assertion (amend. answer, ¶ 12). The government further, in its response to appellant's motion, disputed the assertion as not supported by the documents cited, and further asserted that there were no declarations or statements to support the assertion that appellant has not been paid. There is nothing in the record that rebuts appellant's assertion that it has not been paid for the work it performed under the subject contract. Indeed, the record supports the conclusion that appellant has not been paid by either G. M. & W., the prime contractor, or the government under Mod. No. P00001.

14. Appellant submitted a claim in the amount of $42,000 to the contracting officer on 5 December 2002 along with a request for a contracting officer's final decision (gov't mot., ex. 3). The contracting officer responded, by letter dated 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)

15. On 27 March 2003, appellant filed an appeal from a deemed denial of its claim and request for final decision. In response, the government moved to dismiss for lack of jurisdiction arguing that appellant lacked privity of contract with the government and therefore the Board did not have jurisdiction over the appeal. By decision dated 30 March 2004, the Board determined that the payment provision in Mod. No. P00001 made it clear that the purchase order, as modified, reflected the express or implied

intention of the parties to benefit appellant as a third-party. Therefore, the Board held that it has jurisdiction under the Contract Disputes Act of 1978, as amended, to hear this appeal, and denied the government's motion to dismiss for lack of jurisdiction. The Board directed the government to submit an answer to appellant's complaint.

16. In response to the government's answer, appellant submitted a motion for summary judgment. The government has responded to appellant's motion.

DECISION

As we stated above, the government's opposition to appellant's motion is simply its stated opposition to our earlier decision, and is little more than a motion for reconsideration formulated as a response to appellant's motion for summary judgment, and the government's affirmative statement of disputed facts. Lest there be any mistake in this regard in the appeal of the $42,000.00 claim, the government moved to dismiss the appeal, arguing that the Board had no jurisdiction because appellant had neither an express contract with the government, nor did it have an implied contract. The government essentially re-argued the privity argument which it had used throughout appellant's attempt to obtain payment for the services it performed in corresponding with appellant and in declining to provide assistance or to issue a contracting officer's final decision to appellant's claim and request for a final decision. The government further argued that when the subcontractor sought help in getting payment from G. M. & W. Construction, the government and G. M. & W. together attempted to find a solution that would facilitate payment of the subcontract amount to the subcontractor. The solution to which the government and G. M. & W. agreed was the issuance of Mod. No. P00001 would allow DFAS to issue a check to both G. M. & W. and appellant. According to the government,

> The Government was under no obligation to issue Modification P00001. The fact that it did so does not elevate the status of the subcontractor to the status of a contractor, nor does it make the subcontractor party to the contract.

(Gov't resp. to opp'n to req. for show cause order and mot. to dismiss for lack of juris. at 4)

In our earlier decision, *FloorPro, Inc.,* ASBCA No. 54143, 04-1 BCA ¶ 32,571, we noted that our statements of fact were based on the undisputed allegations in appellant's complaint. Nevertheless, our decision was based on our analysis of Mod. No. P00001. We held, first, that we were not persuaded that Mod. No. P00001 satisfied the privity requirement for our jurisdiction under the Contract Disputes Act as we had discussed earlier in that decision. We, therefore, held that:

> 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* [713 F.2d 1541, 1550-51 (Fed. Cir. 1983)].

FloorPro, Inc., ASBCA No. 54143, 04-1 BCA at 161,182. However, we further held that:

> In the instant appeal, as in *D & H Distributing Company v. United States*, 102 F.3d 542 [(Fed. Cir. 1996)], *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.

Id. at 161,184.

The government argued in its response to the motion that the Board had not ruled that appellant was a third-party beneficiary for purposes of entitlement. Citing *Comsat General Corporation*, DOT CAB No. 1226, 83-2 BCA ¶ 16,870 at 83,902, the government argued that "[a]bsent the specific intention to make FloorPro a direct, intended third-party beneficiary, and to confer the right to sue the Government under the Disputes clause of the contract, FloorPro does not meet the standard of third-party beneficiary for purposes of *entitlement"* (gov't resp. at 8). The government further argued that it received no benefit from the issuance of the modification; that the modification was simply issued as a means to pay the contractor, and thereby facilitate the prime contractor's payment to FloorPro.

The government's reliance on *Comsat General Corporation,* DOT CAB No. 1226, 83-2 BCA ¶ 16,870 is misplaced, and the DOT CAB decision is inapposite to the facts

and issues presented in the instant appeal. First, the appeal there arose out of a Memorandum of Understanding between the United States Department of Transportation, Federal Aviation Administration (FAA), the European Space Research Organisation (ESRO), and the Government of Canada on a joint program for experimentation and evaluation using aeronautical satellite capability between those entities. According to the Memorandum of Understanding, the FAA was to make appropriate leasing arrangements with an unspecified U.S. company for its share of the capability. The Memorandum provided a disputes resolution process under which, disputes arising under the Memorandum would be referred to the three signatory parties, and if unresolved, to be submitted to arbitration as agreed to between the signatories. Other disputes arising out of the application of the Memorandum were to be submitted to the FAA Administrator and the Director General of ESRO, and if unresolved, to be submitted to arbitration as agreed to by the FAA Administrator and ESRO Director General. Second, the issue there was whether the DOT CAB had jurisdiction over an appeal from Comsat under a contract, and specifically, whether there was an express or implied-in-fact contract between the appellant, Comsat, and the FAA. However, pertinent to the present appeal was the Board's discussion of whether the Memorandum of Understanding between the signatory parties created a third-party beneficiary contract pursuant to which ESRO and the FAA were obligated to award a lease to the firm ultimately selected by ESRO which turned out to be Comsat. The Board held that it did not, in part for the reasons asserted by the government in the instant appeal. The Board, nevertheless, deferred ruling on the question of whether or not there was an implied-in-fact contract or circumstances rendering application of the doctrine of equitable estoppel to be appropriate until there was a hearing to establish the facts necessary to the Board's jurisdiction under one of these two theories.

The government, however, in opposing appellant's motion for summary judgment did not address *D & H Distributing Company v. United States,* 102 F.3d 542 (Fed. Cir. 1996), *supra,* on which we relied in connection with our decision on the government's motion to dismiss the instant appeal for lack of jurisdiction. Moreover, the government ignores our discussion of *United States v. Johnson Controls, Inc.,* 713 F.2d 1541 (Fed. Cir. 1983); *Montana v. United States,* 124 F.3d 1269 (Fed. Cir. 1997); *Schuerman v. United States,* 30 Fed. Cl. 420, 427 (1994); and *Baudier Marine Electronics v. United States,* 6 Cl. Ct. 246 (1984), with respect to privity and third-party beneficiary law. As we said in our earlier decision, the Court of Appeals in *Montana v. United States,* 124 F.3d at 1273, held that it agreed with the Court of Federal Claims holding in *Schuerman* that the appropriate test for third-party beneficiary status "includes only the first prong of the *Baudier* test, that the contract must 'reflect the express or implied intention of the parties to benefit the third-party.'"

In moving for summary judgment, appellant must demonstrate that there is no genuine issue as to any material fact and that it is entitled to judgment as a matter of law.

Mingus Constructors, Inc v. United States, 812 F.2d 1387, 1390 (Fed. Cir. 1987). The government in turn must establish that there is a genuine issue of material fact as to whether the government is obligated to pay appellant's claim.

Appellant argued that the Board had already determined that FloorPro was a direct third-party beneficiary of the contract and that there were no materials facts in dispute regarding the government's obligation to pay appellant's claim, especially given the government's execution of Mod. No. P00001. The government, on the other hand, contended that it was not the government's intent to make FloorPro a third-party beneficiary of the contract when it executed Mod. No. P00001, nor did it intend to nullify the contract between G. M. & W. and FloorPro. The government also argued that appellant had failed to support its motion with affidavits or declarations or competent evidence to establish absence of a dispute and therefore its motion should be denied. Finally, the government asserted that it has already complied with the payment provisions of the contract by paying G. M. & W.'s invoice on 17 June 2002.

The government's initial contention that it was not the government's intent, when it executed Mod. No. P00001, to make FloorPro a third-party beneficiary or to nullify the contract between FloorPro and G. M. & W., is misdirected. Regardless of what the government now argues about its intent, we already held in our earlier decision, *FloorPro, Inc*., ASBCA No. 54143, 4-1 BCA ¶ 32,571, that FloorPro is a third-party beneficiary of the contract and as such had a "direct right to compensation or to enforce this right against the government," citing *Montana v. United States*, 124 F.3d 1269, 1273 (Fed. Cir. 1997). We found that there existed the factual basis for the rare, exceptional case under which a direct appeal is authorized under the no privity rule. *See D & H Distributing Company v. United States*, 102 F.3d 542 (Fed. Cir. 1996).

The government also argued that it has already complied with the payment provisions of the contract when it paid G. M. & W. directly, especially in light of the final contract release and certification of payment to suppliers and subcontractors that was signed along with G. M. & W.'s invoice. According to the government, its direct payment to G. M. & W. is not material as it does not go to the question of whether appellant, as third-party beneficiary, has been paid by the government. Nevertheless, the government is disingenuous in this assertion since it was well-aware of the financial status of G. M. & W. when it negotiated and signed Mod. No. P00001 to facilitate payment to appellant.

Appellant stated in both its complaint and in its motion for summary judgment that it had not been paid anything on its invoice. The government in its answer denied this allegation for lack of information sufficient to form a belief as to the truth of the assertion of non-payment, and asserted in its opposition to appellant's motion that because

FloorPro has failed to support its motion with affidavits or testimony as to whether it has received payment from G. M. & W., its motion should be denied.

As set forth above, the Board has held that FloorPro gained contractual rights and privileges as a third-party beneficiary to the contract performed by appellant. The record is clear that the government never paid appellant in accordance with contract Mod. No. P00001 and that there is no allegation by the government or evidence to rebut appellant's assertion that G. M. & W. has not paid appellant either. There are no material facts in genuine dispute with respect to the G. M. & W. subcontract to appellant, the completion and acceptance of appellant's performance of the work required by the purchase order, the circumstances giving rise to Mod. No. P00001, the language of that modification, and the fact that the government never issued a two-party check to appellant and G. M. & W., mailed to appellant, as required by that modification.

Indeed, the government only asserted that neither G. M. & W. nor the government intended to confer third-party beneficiary status and that this lack of intent is a material fact in dispute. We are not persuaded that the alleged subjective intent of either the government or G. M. & W. is a material fact as to a genuine issue in this appeal. Rather, we look to the language of the contract modification to determine if the modification conferred on appellant the status of third-party beneficiary. We held that it did in our earlier decision, *FloorPro, Inc.,* ASBCA No. 54143, 04-1 BCA ¶ 32,571.

Since we issued our initial decision on the government's motion to dismiss, the Court of Appeals for the Federal Circuit had the occasion to reevaluate its third-party beneficiary analysis in *D & H Distributing Company v. United States,* 102 F.3d 542 (Fed. Cir. 1996), *supra,* on which we relied, in *Flexfab, L.L.C. v. United States,* 424 F.3d 1254 (Fed. Cir. 2005). *See also, Flexfab, L.L.C v. United States,* 62 Fed. Cl. 139 (2004). In reaffirming its holdings in *D & H Distributing Company v. United States,* and *Montana v. United States,* 124 F.3d 1269, *supra,* that the appropriate test for third-party beneficiary status was the first prong of the *Baudier Marine Electronics v. United States,* 6 Cl. Ct. 246, *supra,* test, namely, 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 at 1273, the Court, nevertheless denied Flexfab's status as third-party beneficiary because the payments were to be made, pursuant to a contract modification, to a bank account that was associated with Flexfab's escrow account and because the contracting officer did not know that the contract modification was in any way connected to that escrow account. Although this arrangement had been negotiated by one of the government's small business specialists, Flexfab argued on appeal from a decision by the United States Court of Federal Claims that the lack of authority of the small business specialist to obligate the government was not relevant because the parties did not dispute that the contract between the 8(a) prime contractor and the government was itself authorized by the government, that the knowledge of the small business specialist that the escrow account was specified

in the contract modification was intended to ensure payment to Flexfab, and was sufficient to make Flexfab the intended third-party beneficiary under the contract. The Court rejected this argument, stating that:

> Though we previously have held that the modification of the remittance clause to give a subcontractor control over payments from the government qualifies the subcontractor as an intended third-party beneficiary, that rule of law is subject to the principle that only those with authority to contract on the government's behalf can exhibit the necessary intent to give the subcontractor such control. *See D & H Distrib. Co. v. United States*, 102 F.3d 542, 544, 546-47 (Fed. Cir. 1996).

Flexfab, L.L.C. v. United States, 424 F.3d at 1262, *supra*. Thus,

> [F]or third-party beneficiary status to lie, the contracting officer must be put on notice, by either the contract language or the attending circumstances, of the relationship between the prime contractor and the third party subcontractor so that an intent to benefit the third party is fairly attributable to the contracting officer.

Id. at 1263. That was not the case, since the contracting officer did not know that the contract modification was associated with Flexfab's escrow account.

In rejecting this argument, the Court referred to a prior unpublished decision of the United States Court of Federal Claims in a lawsuit by Flexfab against the United States. *Flexfab, Inc. v. United States*, No. 94-974 (Fed. Cl. Feb. 8, 1996) ("*Flexfab Decision*"). Flexfab had supplied parts to the government under an arrangement that was designed to insure Flexfab's continued performance as a subcontractor to an 8(a) subcontractor when the prime 8(a) subcontractor became delinquent in making payments as required by its subcontract with Flexfab. As in *Flexfab, L.L.C. v. United States*, 424 F.3d 1254 *supra*, the contract had been modified in such a way as to permit the mailing of the future contract payments to an escrow account held by both the 8(a) contractor and the subcontractor. This arrangement had been negotiated in a three-way negotiation which included the 8(a) contractor, the subcontractor, and the government contract specialist. Flexfab initially requested that it be made "payee" under the contract. The government refused, and agreed instead to modify the prime contract designating Flexfab as the "mailee" for all future payments. The prime 8(a) subcontractor provided authority to Flexfab to endorse the checks received from the government, and Flexfab agreed to deliver the remaining shipments directly to the government. The Court then in *Flexfab, L.L.C. v. United States*, 424 F.3d 1254, 1263, said:

> Borrowing from the Court of Federal Claims's 1996 *Flexfab Decision*, we agree with the proposition that when a government agent with authority to contract on the government's behalf knows of a condition precedent to a third-party's performance as a sub-contractor, such as receipt of payment directly from the government, and specifically modifies the prime contract so as to ensure the third party's continued performance, the agent and by implication the government itself necessarily intends to benefit the third party. That intent gives rise to standing as a third-party beneficiary to enforce the prime contract.

This language raises the question here as to the effect of a post-performance contract modification providing for direct payment to the subcontractor, where there is no condition precedent, such as direct payment to the subcontractor, for the continued performance by the subcontractor. Although the government here does not address the *Flexfab* decisions, it does so by implication, arguing in its response to appellant's motion that "the Government must receive something of value in exchange for the execution [of] a contract," and that "there is no consideration flowing to the Government for Modification P00001." (Gov't opp'n at 8)

The government's argument in this regard is misplaced. Although the Court in *Flexfab* stated that third-party beneficiary status lies where the contracting officer knows that there is a condition precedent to a third party's performance, such as direct payment by the government, and specifically modifies the prime contract to provide for such payment, that language was fact specific to the earlier Court of Federal Claims decision in its "*Flexfab Decision*." There was no such limitation specified by the Court of Appeals in *Flexfab, L.L.C. v. United States*, 424 F.3d 1254, *supra*, when it reaffirmed the rule set forth in *D & H Distributing Company v. United States*, 102 F.3d 542, *supra*. Indeed, in *D & H Distributing Company v. United States*, at 546-547, the Court held that:

> Although the parties debate the scope of third party beneficiary principles as applied to government contracts, it is not necessary to explore the outer bounds of third party beneficiary rights in order to resolve this case. 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.

See 4 CORBIN ON CONTRACTS § 787 (1951); 2 WILLISTON ON CONTRACTS §§ 361-64 (Walter H. E. Jaeger ed. 3d ed. (1959)); and RESTATEMENT (SECOND) OF CONTRACTS § 302 (1981), *inter alia* cited by the Court in *D & H Distributing Company*. Moreover, the contract modification in the instant appeal under which payment was to be made by a two-party check to appellant and G. M. & W. Construction, to be mailed to appellant's address, was supported by consideration, *i.e.*, G. M. & W. Construction relinquished its right to be the sole payee receiving payment directly from the government, and the government promising to fulfill its obligation to make direct payment to G. M. & W. Construction by executing a two-party check to be mailed to appellant, G. M. & W. Construction's subcontractor that performed the work, thereby satisfying the present liability of G. M. & W. Construction to appellant.

As noted by the Court in *Flexfab, L.L.C. v. United States*, 424 F.3d 1254, 1263-64, *supra*, the third-party beneficiary rule takes on particular import in cases, such as the present appeal, in which the government awarded the contract to G. M. & W. Construction under the SBA's section 8(a) program. According to 13 C.F.R. § 124.510, in order to assist in the business development of participants in the 8(a) program, the 8(a) contractor must perform a certain percentage of the work required by the contract with its own employees. The percentages are set out in 13 C.F.R. § 125.6, in this case, 50 percent. As the record reflects, appellant performed all the contract work required under this contract, and it appears that G. M. & W. Construction was merely a front for the contract work, and did not perform the required percentage of work with its own employees. Under these circumstances, transparency in dealings among the 8(a) contractor, its subcontractors, and the government contracting officers would avoid the type of misunderstanding regarding appellant's entitlement, if any, to payment for the services it performed. We hold that what may have been unclear under the terms of the 8(a) contract regarding payment for the services was made clear when the contracting officer and the 8(a) contractor executed Mod. No. P00001 providing for payment by check to appellant and G. M. & W. Construction, such check to be mailed to appellant's place of business.

We, therefore, hold that the language in Mod. No. P00001 satisfied the test for third-party beneficiary set out in *Montana v. United States*, 124 F.3d 1269, *supra*; *D & H Distributing Company v. United States*, 102 F.3d 542, *supra*; and *Schuerman v. United States*, 30 Fed. Cl. 420, *supra*, namely, that it reflected the express or implied intention of the parties to benefit FloorPro by providing direct payment to FloorPro.

Accordingly, we hold that appellant has established that there are no material facts in genuine dispute and that it is entitled to judgment as a matter of law. We, therefore, grant appellant's motion for summary judgment and sustain the appeal in the amount of $37,500.00, plus interest in accordance with the Contract Disputes Act, as amended. In its complaint, appellant seeks recovery of attorney's fees and expenses. Such a request is premature since appellant has not filed an application for attorneys' fees and expenses in accordance with the Equal Access to Justice Act.

Dated: 27 June 2007

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:

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