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 GOVERNMENT MOTION FOR RECONSIDERATION

The government filed a motion for reconsideration of our decision dated 27 June 2007, *FloorPro, Inc.*, ASBCA No. 54143, 07-2 BCA ¶ 33,615. This subcontractor appeal arose, as we found in our earlier decisions, because contrary to the terms of Modification No. P00001 to the contract between the government and the prime contractor, G. M. & W. Construction Corporation, the government paid the full amount of the purchase order directly to G. M. & W. Moreover, there is no record that G. M. & W sponsored appellant's appeal. Familiarity with that decision is presumed. The government asserts that the Board lacks jurisdiction to adjudicate appellant's third-party beneficiary claim, and even if the Board has jurisdiction to adjudicate appellant's claim, the Board's analysis of appellant's third-party beneficiary status is legally flawed. Appellant opposes the government motion, first on the asserted ground that the motion is untimely, and secondly, because the government has presented no new evidence or arguments. According to appellant, the government has merely reasserted its arguments concerning the Board's jurisdiction previously considered over three years ago, and that its arguments concerning more recent precedent were already addressed by the Board in its decision on the merits.

The basic issue presented by the government's motion is whether the law regarding third-party beneficiaries, as articulated by the Court of Appeals for the Federal Circuit, is limited to government contract cases litigated in the Court of Federal Claims under the Tucker Act, 28 U.S.C. § 1491, or whether it also applies to appeals under the Contract Disputes Act of 1978 (CDA), 41 U.S.C. §§ 601-613, as amended. Moreover, what is not clearly articulated by the government here, and missing from the Court's analysis in *JGB Enterprises, Inc. v. United States*, 63 Fed. Cl. 319 (2004), *aff'd*, 497 F.3d 1259 (Fed. Cir. 2007), is whether the jurisdictional distinction between the Tucker Act and the CDA with regard to third-party beneficiary access to the Court and the agency boards of contract appeals is based on paragraph (a)(2) of the Tucker Act rather than on paragraph (a)(1) of that Act, and if this makes a difference.

The jurisdictional issue addressed in the government's present motion for reconsideration was first addressed by the Board in its decision on the government's motion seeking dismissal of the appeal. *FloorPro, Inc.*, ASBCA No. 54143, 04-1 BCA ¶ 32,571. In the first instance, the government sought dismissal of this $42,000 appeal on the grounds that the Board had no jurisdiction because appellant lacked privity of contract with the government, arguing that under the CDA, only contractors have the right to appeal to an agency board of contract appeals. We agreed that Modification No. P00001 did not satisfy the privity requirements for our jurisdiction under the CDA in the sense of creating an express or implied contract between appellant and the government. Accordingly, we rejected appellant's arguments regarding our jurisdiction based on implied-in-fact contract and on *quantum meruit* theories. However, we held that we had jurisdiction on the basis that appellant had third-party beneficiary status under Modification No. P00001, which provided for direct payment by check to the prime contractor and appellant, with the check to be mailed to appellant's place of business. Our discussion of *D & H Distributing Co. v. United States*, 102 F.3d 542 (Fed. Cir. 1996), the principal basis for our decision, and of *Montana v. United States*, 124 F.3d 1269, 1273 (Fed. Cir. 1997), *Schuerman v. United States*, 30 Fed. Cl. 420, 427 (1994), and *Baudier Marine Electronics, Sales and Service, Inc. v. United States*, 6 Cl. Ct. 246, 249 (1984), as well as *United States v. Johnson Controls, Inc.*, 713 F.2d 1541, 1550-51 (Fed. Cir. 1983), addressed the principle of, and test for third-party beneficiaries' suits against the government, without regard to whether the action was brought under the CDA or Tucker Act. The government did not move for reconsideration of our decision on its motion to dismiss.

Appellant subsequently filed its motion for summary judgment, asserting that the Board had ruled that it had jurisdiction to hear the appeal, that the government admitted that appellant was the intended beneficiary of Modification No. P00001, that the government continued to maintain that there was no privity of contract between appellant and the government, and that appellant lacked sponsorship of the prime contractor. The government opposed appellant's motion, arguing that although the Board had ruled that

appellant had third-party beneficiary status for purpose of jurisdiction, the Board had not ruled that appellant was a third-party beneficiary for purposes of entitlement. The government, however, did not respond in its opposition to appellant's motion for summary judgment to our discussion of *D & H Distributing Co. v. United States, supra,* 102 F.3d 542 (Fed. Cir. 1996), the principal basis on which we relied in our earlier decision, and of *Montana v. United States, supra,* 124 F.3d 1269, 1273 (Fed. Cir. 1997), *Schuerman v. United States, supra,* 30 Fed. Cl. 420, 427 (1994), and *Baudier Marine Electronics, Sales and Service, Inc. v. United States, supra,* 6 Cl. Ct. 246, 249 (1984), as well as *United States v. Johnson Controls, Inc., supra,* 713 F.2d 1541, 1550-51 (Fed. Cir. 1983).

The government filed its motion for reconsideration on 23 July 2007. As we said in *HAM Investments, LLC,* ASBCA No. 55070, 07-1 BCA ¶ 33,552, at 166,163, we look to see if a motion for reconsideration is "based on newly discovered evidence, errors in our fact findings or legal theories which the Board failed to consider in formulating its original decision." Moreover, we do not generally afford the party seeking reconsideration the opportunity to reargue contentions which we already fully considered and rejected. We first note, that in its motion for reconsideration, the government fails to raise any new evidence or argument, not previously addressed by the Board in either its decision on the government's motion to dismiss the appeal on jurisdictional grounds, or in its decision on appellant's motion for summary judgment. Of course, a challenge to our jurisdiction may be made at any time, even on appeal to the Court of Appeals, and is not something which the government could waive by deficient pleading or argument. *United States v. Newport News Shipbuilding and Dry Dock Company*, 933 F.2d 996, 998, n.1 (Fed. Cir. 1991), citing *Bender v. Williamsport Area School District*, 475 U.S. 534, 541 (1986) and *United States v. Grumman Aerospace*, 927 F.2d 575, 580 (Fed. Cir. 1991). The thrust of the government's motion is its disagreement with the Board's interpretation of the case law cited above.

The government first asserts that our decision did not account for the statutory jurisdictional distinction between the CDA and the Tucker Act. In this regard, the government fails to account for our discussion of this distinction in our decision on its motion to dismiss. *FloorPro, Inc., supra,* 04-1 BCA at 161,183. Nevertheless, in support of its argument in this regard, the government cites *JGB Enterprises, Inc. v. United States, supra,* in which the Court of Federal Claims held that the subcontractor, JGB Enterprises, Inc., was a third-party beneficiary under one contract, SP0750-99-C-2508 (2508) awarded by the Defense Supply Center Columbus (DSCC) (Ohio), but was not a third-party beneficiary of a purchase order, SP0750-00-M-4191 (4191), also awarded by DSCC. The Court further held that the government improperly offset monies owed by the prime contractor against the payment due JGB on Contract No. 2508. In doing so, the Court held that it had jurisdiction under the Tucker Act, but not the CDA.

We did not in our earlier decisions discuss *JGB Enterprises, Inc. v. United States, supra*, because it post-dated our decision on the government's motion to dismiss the appeal for lack of jurisdiction, was not cited or argued by the government in its response to the appellant's motion for summary judgment, and because, in any event, the Board is not bound by decisions of the Court of Federal Claims, particularly those regarding its jurisdiction. In the meantime, the Court's decision in *JGB Enterprises, Inc. v. United States, supra*, has been affirmed by the Court of Appeals on grounds other than those relied on here by the government. The issue relating to whether or not the CDA extends jurisdiction to third party beneficiaries was not before the Court of Appeals. However, notwithstanding the lack of prior argument by the government, since the government's argument goes to the heart of our jurisdiction, we re-examine our earlier decisions in this appeal and in doing so, deem it appropriate to address the holding in *JGB Enterprises, Inc. v. United States, supra*, regarding our jurisdiction under the CDA here. Moreover, we also do so recognizing our earlier reliance on decisions of the Federal Circuit setting forth the tests for the application of the third-party beneficiary rule, did not specifically hold that the rule applied only to contract disputes litigated in the Court of Federal Claims under the Tucker Act, and not to disputes litigated under the CDA in either forum.

Citing *United States v. Johnson Controls, Inc., supra,* 713 F.2d 1541 (Fed. Cir. 1983), on appeal from our decision, *Johnson Controls, Inc.*, ASBCA No. 25714, 82-1 BCA ¶ 15,779, we acknowledged in our decision on the government's motion to dismiss in the instant appeal that direct subcontractor appeals have been allowed only in rare and exceptional cases. *FloorPro, Inc.*, *supra*, 04-1 BCA at 161,181. The Board held in *Johnson Controls, Inc.*, that there was privity of contract between Johnson Controls and the government, as it held in the companion cases, *Turner Construction Company (Bristol),* ASBCA No. 25171, 81-1 BCA ¶ 15,070, *recons. denied,* 81-2 BCA ¶ 15,186 and *Turner Construction Company (Industrotech),* ASBCA No. 25447 (unpublished), where the Board held that it had jurisdiction under the CDA to hear the direct subcontractor appeals. The basis for those holdings was that privity may result when the prime contractor acts as government agent to place subcontracts. The Board held that the provisions of the prime contract and of the subcontract were sufficient to create privity of contract between the government and the subcontractors. It did so based on its analyses of the contract requirements and relationship between the government and the prime contractor, between the prime contractor and subcontractors, and between the government and the subcontractors. Therefore, the Board held that the subcontractor was required to certify its claims under the CDA.

Both this Board and the Court in *Johnson Controls, Inc.* and *Turner Construction Company* appeals, addressed the Court of Claims decision in *Continental Illinois Nat. B. & T. Co. v. United States*, 112 Ct. Cl. 563, 81 F. Supp. 596 (1949), where the Court of

Claims, upon analysis of the terms of the contract between the government and the prime contractor, ruled:

> While the quoted provisions of the contract specifications come near to creating a privity of contract between the Government and the subcontractors, they are in our judgment not sufficient to do so and this court is therefore without jurisdiction under the Tucker Act to consider the claims brought by the plaintiff for the benefit of the subcontractors.

112 Ct. Cl. at 566. Following the analysis of the Court of Claims in *Continental Illinois Nat. B. & T. Co. v. United States*, we held in *Turner Construction Company (Bristol)*, ASBCA No. 25171, 81-1 BCA ¶ 15,070, *recons. denied*, 81-2 BCA ¶ 15,186, that the provisions of the contract went beyond the "border" of creating privity, and that there was privity of contract between the government and subcontractors, and that we, therefore, had jurisdiction. The Court of Appeals in *United States v. Johnson Controls, Inc., supra,* rejected that conclusion, holding that the Court in *Continental Illinois Nat. B. & T. Co. v. United States*, held that the provisions of the contract were not sufficient to create privity between the government and the subcontractors, and that, likewise, they were not so extraordinary as to mandate a finding of privity in the *Johnson Controls* appeal.

As in the instant appeal, the Court in *United States v. Johnson Controls, Inc.*, stated that the literal issue before the Court was "whether the subcontractor, Johnson, may directly sue the government under the CDA." *United States v. Johnson Controls, Inc., supra,* 713 F.2d at 1548. Quoting the language from section 2 of the CDA, the government argued that Johnson Controls could not be the "contractor" as defined in the Act because it did not execute the contract with the government, and thus could not be "a party to a government contract." The government also argued that because section 3 of the CDA states that the Act "applies to any express or implied contract . . . entered into by an executive agency," subcontracts under a prime contract between the government and a contractor are by definition not entered into by an executive agency. Further, the government argued that only the claims of contractors could be considered by the contracting officer under section 6 of the CDA, and that only a contractor or the government may appeal a contracting officer's decision under sections 7 and 10 of the CDA. In response to the government's arguments, the Court said:

> While we do not find it necessary to decide the correctness of the government's assertion that the language of the CDA was designed to bar all direct appeals by a subcontractor, we do think that the preceding discussion

> illuminates many of the considerations bearing on the privity of contract between the government and a subcontractor. Assuming for discussion purposes only, that the CDA left intact the pre-existing exceptions to a direct appeal by a subcontractor, an examination of these exceptions leads us to conclude that this case does not present the factors necessary to fall within any recognized exception to the well-entrenched rule that a subcontractor cannot bring a direct appeal against the government.

Id. at 1550. The Court then examined the judicial history of the privity doctrine in regard to subcontractor claims. The Court noted that the Supreme Court held in *Merritt v. United States*, 267 U.S. 338, 340-41 (1925) that the subcontractor plaintiff could not recover under the Tucker Act because it did not allege any contract, express or implied-in-fact by the government with the plaintiff subcontractor. The Court then noted that the Court of Claims had held in *Putman Mills Corp. v. United States*, 202 Ct. Cl. 1, 4 , 479 F.2d 1334, 1337 (1973) that unless a subcontractor plaintiff can provide evidence 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.

The Court of Appeals then summarized this examination of the "no-privity" rule in *United States v. Johnson Controls, Inc., supra*, 713 F.2d at 1550-51, as follows:

> Thus, the no-privity rule is synonymous with a finding that there is no express or implied contract between the government and the subcontractor. This concept of privity is mirrored in the CDA, 41 U.S.C. § 602 ("this chapter applies to any express or implied contract . . . entered into by an executive agency . . ."), and the Tucker Act, 28 U.S.C. § 1491, *amended by* the Federal Courts Improvement Act of 1982, Pub.L. No. 97-164, § 133(a), 96 Stat. 25, 39-40 ("The United States Claims Court shall have jurisdiction to render judgment upon any claim against the United States founded . . . upon any express or implied contract with the United States . . .").

(*See also, FloorPro, Inc.*, ASBCA No. 54143, 04-1 BCA, at 161,180, 161,183, in which we quoted the above holding from the Court's opinion in *Johnson Controls*, *supra*.) Indeed, in our decision on the government's motion to dismiss in the present appeal, we specifically noted that the Court in *D & H Distributing Co. v. United States*, *supra*, did not reference either the Tucker Act or the CDA as the basis for the third-party jurisdiction in the Court of Federal Claims. Rather, our decision merely affirmed that the no-privity

rule was mirrored in both the Tucker Act and the CDA as stated in *Johnson Controls, Inc.*

The Tucker Act, in 28 U.S.C. § 1491(a)(1), provides generally for jurisdiction in the Court of Federal Claims of certain classes of claims against the United States, including claims arising "upon any express or implied contract with the United States," and identifies contracts awarded by certain nonappropriated fund activities as being included within the class of express and implied contracts with the United States. Paragraph (a)(2) thereunder, provides, in pertinent part, that:

> The Court of Federal Claims shall have jurisdiction to render judgment upon any claim by or against, or dispute with, a **contractor** arising under section 10(a)(1) of the Contract Disputes Act of 1978, including a dispute concerning termination of a contract, rights in tangible or intangible property, compliance with cost accounting standards, and other nonmonetary disputes on which a decision of the contracting officer has been issued under section 6 of that Act. [Emphasis added]

Section 2 of the CDA, 41 U.S.C. § 601, sets forth the definitions used in the CDA, including the definition of the term, "contractor." Paragraph (4) states: "the term 'contractor' means a party to a Government contract other than the Government." Section 6 of the CDA, 41 U.S.C. § 605, requires, *inter alia*, that all claims by contractors against the government shall be in writing and submitted to the contracting officer for a decision. Similarly, all claims by the government against a contractor relating to a contract shall also be in writing. In either case, the contracting officer is required to issue the decision in writing and to mail or otherwise furnish a copy of the decision to the contractor, stating the reasons for the decision reached and informing the contractor of its rights as provided in the Act.

Section 7 of the Act, 41 U.S.C. § 606, provides for the right of the contractor to appeal an adverse decision, within ninety days from the date of receipt of the contracting officer decision, to any agency board of contract appeals as provided in section 8, 41 U.S.C. § 607. In defining the scope of the boards' jurisdiction, paragraph (d) of section 8 provides that:

> Each agency board shall have jurisdiction to decide any appeal from a decision of a contracting officer (1) relative to a contract made by its agency, and (2) relative to a contract made by any other agency when such agency or the Administrator has designated the agency board to decide the

> appeal. In exercising this jurisdiction, the agency board is authorized to grant any relief that would be available to a litigant asserting a contract claim in the United States Court of Federal Claims.

41 U.S.C. § 607(d).

Section 10(a) of the CDA, on the other hand, addresses actions brought by contractors in the Court of Federal Claims and in district courts, as follows:

> (1) Except as provided in paragraph (2), and in lieu of appealing the decision of the contracting officer under section 605 of this title to an agency board, a **contractor** may bring an action directly on the claim in the United States Court of Federal Claims, notwithstanding any contract provision, regulation, or rule of law to the contrary. [Emphasis added]

41 U.S.C. § 609(a). Paragraph (2) permits actions by contractors against the Tennessee Valley Authority to be filed only in the United States district court pursuant to section 1337 of title 27. Thus, both section 10(a) of the CDA and paragraph (a)(2) of the Tucker Act are consistent in defining the standing of a party to a contract with the government to appeal a contracting officer's final decision, or bring an action directly in the Court of Federal Claims on a claim in lieu of appealing the contracting officer's decision to an agency board of contract appeals.

The Tucker Act was revised by the additions from the CDA, and the 1982 and 1992 Amendments to the Tucker Act under Pub. L. 97-164, and specifically subsections (a)(2) and (a)(3), and under Pub. L. 102-572, section 907(b)(1). With these revisions, the concept of a mirrored rule of no-privity has lead to the largely accepted view that there exists concurrent jurisdiction in the agency boards of contract appeals and the Court of Federal Claims with respect to government contract claim disputes differentiated only by the time allowed for appeal or the bringing of an action.

The Court in *Johnson Controls, Inc.*, *supra*, noted a number of exceptions to the no-privity rule. However, the Court noted in a footnote that it was aware of no cases where a court had discussed the effect of the CDA on a direct subcontractor appeal, although it did state that both the ASBCA in *Turner Construction Company (Bristol)*, *supra,* and the EBCA in *A&B Foundry, Inc.*, EBCA No. 118-4-80, 81-1 BCA ¶ 15,161, had addressed the effect of the CDA on the agency exception to the no-privity rule. The Court characterized prime contractor "sponsorship" of subcontractor appeals and situations in which the prime contractor acts as agent of the government to place subcontracts as exceptions to the no-privity rule.

Although the plaintiff subcontractor in *D & H Distributing Co. v. United States*, *supra,* argued briefly that it had entered into an implied-in-fact contract with the government, its principal theory of liability, and thus, jurisdiction in the Court of Federal Claims, was that it was a third-party beneficiary as a result of the contract modification of the payment clause of the contract between the government and the prime contractor, under which both prime contractor and subcontractor, D & H, were joint payees. Since we analyzed this decision in both our decision on the government's motion to dismiss and in our decision on appellant's motion for summary judgment, we need not repeat what we have written previously.

Nevertheless, there are some observations we can make here. First, the factual situation regarding the modification of the payment clause in *D & H Distributing Co.* is not unlike the factual situation in the instant FloorPro appeal. Second, the government in *D & H Distributing Co.* characterized the modification to the payment clause as nothing more than a unilateral administrative change to the contract inasmuch as it did not contain the signature of the prime contractor. The Court rejected this argument because the modification was essentially a bilateral modification, issued and negotiated pursuant to the prime contractor's request. In the instant appeal, Modification No. P00001 was a bilateral modification executed by both the contracting officer and the prime contractor as a result of discussions between the contracting officer and the prime contractor regarding alternatives to ensure payment to appellant subcontractor. Third, the government argued that the modification should be viewed as an effort by the prime contractor and contracting officer to circumvent the statutory prohibition against assignment of claims, and of contracts (Assignment of Claims Act, 31 U.S.C. § 3727, 41 U.S.C. § 15), which the Court also rejected stating that even if the modification was regarded as an assignment, the contracting officer could waive the statutory prohibition, and in any event, it could not be dismissed as unenforceable on the asserted basis that it was beyond the authority of the contracting officer. Rather, the Court simply held that the modification of the payment clause provided the subcontractor the needed status of third-party beneficiary to enforce the clause against the government. Fourth, although the Court in *D & H Distributing Co.* did not discuss the relationship of its third-party beneficiary law under which a subcontractor could bring an action directly against the government to the no-privity rule, which according to this Court in *United States v. Johnson Controls, Inc., supra,* was mirrored in the Tucker Act and CDA, the clear implication of the decision in *D & H Distributing Co.* was that a third-party beneficiary right to enforce a modification in the prime contractor's payment clause was either an exception to the no-privity rule or that there was a factual basis for a finding of privity between the government and the subcontractor. Citing *Fireman's Fund Insurance Co. v. United States*, 909 F.2d 495, 499 n.* (Fed. Cir. 1990), the Court held that this presented a "particularly clear instance in which the third party beneficiary's interests, specifically protected by the contract, would be impaired if the beneficiary were not accorded the

right to obtain relief against the promisor in the event of a breach." *D & H Distributing Co. v. United States*, *supra*, at 547. Fifth, the Court held that the same result obtained if, as the government argued, the contract modification is regarded as not giving D & H the status of a third-party beneficiary, but as constituting an assignment of rights under the contract by the prime contractor to D & H. Accordingly, although D & H, as any assignee, could not be the "contractor" as defined in the act because it did not execute the contract with the government, and also could not be "a party to a government contract" because section 3 of the CDA states that the Act "applies to any express or implied contract . . . entered into by an executive agency," subcontracts under a prime contract between the government and a contractor are by definition not entered into by an executive agency, D & H, as any assignee has standing to pursue a direct action against the government.

In its motion for reconsideration in the instant appeal, the government argues that recent surety cases point to the analysis which the Board should have undertaken to resolve the jurisdictional question in this appeal. The government has not previously asserted this analogy in its prior submissions in connection with this appeal. Citing *Fireman's Fund Ins. Co. v. England*, 313 F.3d 1344, 1350 (Fed. Cir. 2002), *United Pacific Insurance Company*, ASBCA No. 53051, 03-2 BCA ¶ 32,267 at 159,622, *aff'd*, *United Pacific Insurance Co. v. Roche*, 380 F. 3d 1352 (Fed. Cir. 2004), and *Nova Casualty Company v. United States*, 69 Fed. Cl. 284 (2006), the government argues that a surety's equitable subrogation rights do not equate to standing under the CDA, and further, that the Court in *Nova* made a direct comparison between a surety's status and the subcontractor's status, which cannot under the CDA bring claims directly against the government. The government argues on the basis of its reading of *Nova* regarding the Court's discussion of the legislative history of the CDA that Congress intended for subcontractors to be specifically excluded from the provisions of the CDA despite the possibility of some inequities with respect to the treatment of subcontractor claims. We are not persuaded that either the language of the Act itself, or the interpretation of the selective portions of the legislative history necessarily direct us to this conclusion.

What is missing from this argument is any analysis of the distinction between a subcontractor's possible standing under the Tucker Act with respect to certain classes of action and the asserted lack of standing under the CDA with respect to the same classes of action. Further, what is also missing from the government's argument in this regard is an analysis of the alleged "inequities" to which the *Nova* Court alludes from the legislative history of the CDA and the fact that the asserted "inequities" in the instant appeal with respect to the treatment of appellant's claim here were specifically due to the government's actions; *i.e.*, initiating the contract modification of the payment clause to provide for direct payment by issuance of a two-party check to appellant and the prime contractor, and the government's failure to comply with its own obligations in accordance with the terms of the modified payment clause in this 8(a) contract. As we

said in our decision on appellant's motion for summary judgment, it appeared that this 8(a) contract awarded to G. M. & W. Construction was merely a front for the work to be performed by appellant and that under such conditions, transparency in the dealings between the government, the 8(a) prime contractor, and appellant would have avoided the type of inequities the government now seeks to impose on appellant. *FloorPro, Inc., supra,* 07-2 BCA at 166,482.

Moreover, as we noted above, the Federal Circuit in *D & H Distributing Co. v. United States*, *supra,* 102 F.3d at 547, specifically cited its earlier decision in *Fireman's Fund Insurance Co. v. United States*, *supra*. Athough these surety decisions, and other similar cases, addressed the definition of "contractor" in the CDA, the government's reliance on this analysis, which it contends should be applied by the Board to resolve the jurisdictional issue, is misplaced.

It is clear, for example, that sureties have long filed appeals in this Board, without the jurisdictional question barring recovery. *See, for example*, *Peerless Insurance Company*, ASBCA No. 28887, 88-2 BCA ¶ 20,730, where we address the question of standing of the surety to pursue contract claims before the Board, saying that "standing" "under both the Tucker Act and the Contract Disputes Act, is founded on privity of contract with the United States." We reasoned that the surety's standing to pursue liquidated claims under contract with the United States was on the basis of subrogation which had the effect of putting the surety in privity with the government. However, in *United Pacific Insurance Company*, *supra,* 03-2 BCA at 159,620, we questioned this holding of *Peerless Insurance,* on the basis that the United States Supreme Court had noted in *Department of the Army v. Blue Fox, Inc.*, 525 U.S. 255 (1999), that none of its earlier decisions in which sureties had been granted standing based on equitable subrogation involved waiver of sovereign immunity. As we said in *United Pacific Insurance Company*, *supra,* 03-2 BCA at 159,620, "[e]xcept for appeals arising directly from work under a takeover agreement where the surety is a contractor, our assumption of jurisdiction in appeals from performance bond sureties has generally been based on the principles of equitable subrogation," and citing *Peerless Insurance Co.*, *supra,* ASBCA No. 28887, we noted that "this Board had long accorded standing to sureties under the right of subrogation."

In *Fireman's Fund Insurance Company v. England*, *supra,* 313 F.3d 1344 (Fed. Cir. 2002), the Federal Circuit affirmed our dismissal of the pre-takeover claims asserted by the surety on the basis that the CDA did not cover these claims because Fireman's Fund was not a "contractor" and because under the Anti-Assignment Act, the General Indemnity Agreement, which purported to assign the contractor's claims arising out of the default termination, was invalid. *Fireman's Fund Insurance Company,* ASBCA No. 50657, 00-1 BCA ¶ 30802, *aff'd on recons.* 00-1 BCA ¶ 30905. After a brief description of the CDA, and specifically the jurisdictional language regarding appeals by

"contractors," the Court addressed the doctrine of equitable subrogation under which a surety that may take over contract performance or finances the completion of the defaulted contractor would be entitled to succeed to the contractual rights of a contractor against the government and why Fireman's Fund's reliance on those cases authorizing such suits was misplaced. Specifically, the Court stated that:

> We have [also] recognized, however, that there is a clear distinction between a surety's right to sue the United States under the doctrine of equitable subrogation and its attempt to assert a claim before a Board of Contract Appeals under the Disputes Act. As we have explained: "[i]n the context of a surety assuming the place of the contractor under the equitable subrogation doctrine, some language in *Balboa* [*Balboa Ins. Co. v. United States*, 775 F.2d 1158, 1160] alluded to contract-like relationships between the Government and its contractor's surety . . . . This dicta – proper in the context of an equitable subrogation case – does not extend to a surety's qualification as a 'contractor' under the CDA . . . . *Balboa* did not even consider jurisdiction for the Board."
>
> For the Board to have jurisdiction under the Disputes Act, the claim must be brought by "a contractor," which is defined a "a party to a government contract," and be one "relating to a contract." 41 U.S.C. §§ 601(4), 605(a), 606. Fireman's Fund does not come within these standards. It was not a party to any contract with the government prior to the takeover agreement it had with the government, and its pre-takeover claims did not arise under such a contract.

313 F.3d at 1351.

As stated by the Federal Circuit in *United Pacific Insurance Co. v. Roche*, 380 F.3d 1352, 1355-56 (Fed. Cir. 2004),

> *Fireman's Fund* thus stands for the proposition that for the Board to have jurisdiction under the Contract Disputes Act over a claim by a surety that entered into a takeover agreement with the United States, the claim must "arise under" a contract the surety had with the government prior to that agreement. For a claim to "arise under" such a contract,

> the operative facts upon which the claim is based must have occurred after the pre-takeover contract was executed.

In *United Pacific Insurance Co. v. Roche*, the only contract between the government and United was the takeover agreement. Except for one claim, all the claims asserted by United related to, and were dependent upon events that occurred before the takeover agreement and with respect to which United was not a "contractor." Accordingly, the Board had no jurisdiction with respect to those claims. However, United asserted a claim for the balance due on the contract upon satisfaction of its obligations under the takeover agreement. Although this claim stemmed from the construction contract, the claim for the balance due arose after the takeover agreement, and the Board had jurisdiction with respect to this claim, which it denied on the merits.

While there is some language in these surety cases on which one might argue that the lack of jurisdiction in subcontractor appeals is analogous to lack of jurisdiction in certain types of surety appeals, these analyses have not fully accounted for the distinctions between the types of claims that may be pursued, if at all, under third-party beneficiary principles, and those pursued under the applicable theories in the case of surety appeals. Thus, a surety would have a right of action against the government, both under the Tucker Act and under the CDA in the event that it had entered into a takeover agreement with the government, because the surety "would then be considered a 'contractor' under Section 2(4) of the CDA." *Nova Casualty Company v. United States*, 69 Fed. Cl. at 290. This right is based on privity of contract. However, that right would cover only those events that are post-takeover agreement events. If the surety is unable to rely on privity of contract under a takeover agreement, it has traditionally invoked jurisdiction under the doctrine of equitable subrogation. We have long accorded standing to sureties under the right of subrogation as we noted above. However, as we said in *United Pacific Insurance Company*, *supra*, ASBCA No. 53051, 03-2 BCA at 159,620-21, since the Federal Circuit's decision in *Fireman's Fund Insurance Company v. England, supra,* equitable subrogation does not equate to standing under the CDA. Therefore, whereas a surety may have standing under the Tucker Act by invoking the doctrine of equitable subrogation, it does not have standing under the CDA. "The surety's rights and obligations are not based on third-party beneficiary concepts, but on principles of suretyship law." *Nelson Construction Company v. United States*, 79 Fed. Cl. 81, 90 (2007), quoting *National Surety Corp. v. United States*, 118 F.3d 1542, 1545-46 (Fed. Cir. 1997). Thus, subject to certain exceptions as stated by the Federal Circuit in *United States v. Johnson Controls, Inc.*, *supra*, we believe that the settled law in this Circuit is as stated by the Court in *Nelson Construction Company v. United States*, at 92, when it addressed the contention of the subcontractor/indemnitor of the surety that subrogees of the prime contractor have standing to sue in the Court of Federal Claims, and that for jurisdictional purposes, the focus is on the claim, not the claimant:

> However, case law has long held that generally, privity of contract must exist between the party and the government; otherwise, sovereign immunity serves as a bar to claims against the government in the Court of Federal Claims. [Citations omitted] In cases where a party cannot rely upon privity of contract, a surety has standing to pursue recovery from the government in the Court of Federal Claims based upon the [non-contractual] doctrine of equitable subrogation.

Since the government is not a party to a general agreement of indemnity, and a purported assignment of claims thereunder would violate the Anti-Assignment Act, the surety would have no standing to appeal the contracting officer's final decision.

In addressing the question of our possible jurisdiction under the CDA of the surety's *pro tanto* discharge overpayment claim in *United Pacific Insurance Company*, *supra,* 03-2 BCA at 159,622, we held that whether or not subrogation rights were involved or whether the decrease in collateral (contract balance) available under the subrogation rights served merely as a measure of relief available, the overriding issue was whether the CDA waived sovereign immunity and provided jurisdiction to consider those rights. The takeover agreement between the surety and the government, which was executed as a modification to the original contract, provided, in pertinent part, that the surety expressly reserved all prior rights including, but not limited to, the government's overpayment to the contractor. The surety argued that this provision of the takeover agreement bridged the privity gap and gave the surety standing. We held, at 159,623, that:

> The difficulty with UPI's argument is that it reserved *prior* rights, and it had no prior rights. It was not a party to the original contract, had no rights arising from the bonded contract between the Air Force and Castle, no third-party beneficiary rights, and there was no implied-in-fact contract that arose from the bonds.

In so holding, we cited *Fireman's Fund Insurance Co. v. United States*, *supra,* 909 F.2d at 499-500, in which the Court, quoting *Balboa Insurance Company v. United States*, 775 F.2d 1158, 1160 (Fed. Cir. 1985), said "[a]lthough it is conceivable that under certain circumstances a surety could assert rights against the Government under the third-party beneficiary rule, or even as one in privity of contract with the Government," the record does not establish an independent contract or document in which the government undertook any obligation to the surety. The bonded contract was between the prime contractor and the government, and the payment and performance bonds were

between the prime contractor and the surety, although the government was identified as the intended third-party beneficiary of the performance bond. Therefore, while the bond required the contractor, Westech, to fulfill its contract with the government:

> [I]t does not similarly require the government to fulfill its obligations toward Westech, whether for the benefit of Fireman's Fund or any other party. Thus, Fireman's Fund is neither the intended third-party, nor the direct, beneficiary of any promise by the government, whether contained in the bonded contract or the performance bond.

Id. at 500. In the footnote in *Fireman's Fund Insurance Co. v. United States*, cited by the Court in *D & H Distributing Company v. United States*, *supra,* the Federal Circuit stated that rights asserted by the surety were unavailing because the government, had, as in the instant appeal before the Board, already paid the contractor what the surety sought. Therefore, the surety was required to establish that it had a right of its own against the government independent of the contractual rights of the contactor to which it succeeded, to recover the retainage already paid to the contractor. We believe that this is what FloorPro has done in the instant appeal. The right it seeks to vindicate in the instant appeal is the right of its own to direct payment of the contract amount due FloorPro under the terms of the contract modification, Modification No. P00001, for the work performed by FloorPro as a subcontractor to G. M. & W. Construction, pursuant to the government's request that FloorPro submit a price proposal to the government through G. M. & W. Construction for this work.

The Court of Federal Claims in *Nova Casualty Company v. United States*, 69 Fed. Cl. 284 (2006), addressed the jurisdictional distinction between what is granted in the Tucker Act and what is granted under the CDA, with respect to the waiver of sovereign immunity. The Tucker Act constitutes explicit consent for "any claim against the United States founded . . . upon any express or implied contract with the United States, or for liquidated or unliquidated damages in cases not sounding in tort,"

> Alone, however, the Tucker Act is insufficient to confer subject matter jurisdiction. The plaintiff must also identify a substantive right that is enforceable against the United States for money damages. . . . Should a court find that it lacks jurisdiction to decide a case on its merits, the court would be required either to dismiss the action as a matter of law, . . . or transfer it to another federal court that would have jurisdiction.

69 Fed. Cl. at 289. *See also, Nelson Construction Company v. United States,* 79 Fed. Cl. 81, 84-85 (2007). Thus, according to the Court, the CDA provided the basis for subject matter jurisdiction over certain contractually related claims because the CDA had been incorporated into the Tucker Act.

In *JGB Enterprises, Inc., v. United States, supra,* DSCC awarded contract 2508 and several other contracts and purchase order 1491 to Capital City. JGB was a manufacturer of hose assemblies and other products for military and commercial use. Beginning in 1998, DSCC set aside its requirement for hose assemblies previously supplied by JGB, for Capital City under the Small Business Act 8(a) program. Capital City was subsequently awarded sole-source contracts and purchase orders by DSCC to supply the hose assemblies manufactured by JGB and delivered directly to the government by JGB. The payment clause of contract 2508 provided for remittance to Capital City, and the inspection clause provided for inspection at origin, JGB, Liverpool, NY. By late October 1999, Capital City was indebted to JGB for over $362,000, and JGB became concerned that Capital City would not satisfy its debt. JGB, therefore, sought the contracting officer's help in resolving the nonpayment problem and informed the contracting officer that it would withhold further shipments pending resolution of the matter. The government small business specialist suggested a solution whereby Capital City and JGB would enter into an escrow agreement under which an escrow agent would receive funds directly from the government. Capital City and JGB entered into such an agreement under which an escrow agent was appointed and Capital City agreed to execute the necessary documents to ensure direct payment from the government to the escrow agent. Capital City requested the government to modify contract 2508 and purchase order 4191 to change the remittance address on the contract to an attorney in Syracuse, NY. The attorney would then distribute the appropriate amounts of payments to JGB. For reasons beyond this discussion, Capital City's request for a modification to the payment clause and request to assign payments to the attorney was rejected by the government.

Ultimately, the contracting officer modified the contract to provide remittance to JGB's bank account in Syracuse, NY. However, the Defense Financing and Accounting Service (DFAS) disbursing officer determined that it wanted to pay for the shipments under contract 2508 by check, and requested a further contract modification under which the check would be mailed to Capital City c/o the Chase Manhattan Bank in Syracuse. The contract was amended to so provide without notice to JGB.

Instead of wiring the money to JGB's Chase Manhattan Bank account, DFAS issued a check to Capital City in care of Chase Manhattan Bank, Syracuse. The Bank officer informed JGB that she had received the check from the government under contract 2508. However, the government offset Capital City's indebtedness under the unrelated contract against the payment made to JGB. JGB filed suit seeking damages for

the unpaid invoices, exclusive of interest, on contract 2508 and purchase order 4191. The Court held that the setoff under contract 2508 against monies due JGB was improper and awarded judgment to JGB, excluding the pre-judgment interest asserted in the claim. The Court also denied recovery under purchase order 4191.

JGB asserted jurisdiction pursuant to the CDA and Tucker Act. In addressing its jurisdiction, the Court of Federal Claims stated that:

> The Tucker Act confers jurisdiction on the Court of Federal Claims "to render judgment upon any claim against the United States founded either upon the Constitution, or any Act of Congress or any regulation of an executive department, or upon any express or implied contract with the United States . . . ." 28 U.S.C. § 1491(a)(1). . . . *United States v. Johnson Controls, Inc.*, 713 F.2d 1541, 1551 (Fed. Cir. 1983). It is settled law in this circuit, however, that an intended third-party beneficiary of a government contract may sue under the Tucker Act. *Flexfab, LLC v. United States*, 62 Fed. Cl. 139, 144-45 (2004); . . .

63 Fed. Cl. at 330. The CDA jurisdictional issue arose because JGB sought pre-judgment interest on its claim in the face of the basic rule that interest "is not payable on claims or on judgments against the United States in the absence of express provision for payment, in the contract or statute." *Id*. As a result, the Court stated that because JGB sought pre-judgment interest on its claim, the Court must address the more complicated question whether a third-party beneficiary can bring a claim under the CDA.

The Court of Federal Claims noted that in this circuit, cases involving claims of third-party beneficiaries to government contracts "assume jurisdiction without explicitly discussing the statutory basis therefor." *JGB Enterprises, Inc. v. United States*, *supra*, 63 Fed. Cl. at 330. Moreover, according to the Court, the district courts have assumed jurisdiction under the CDA without recognizing that there were no cases directly addressing the issue of the standing of third-party beneficiaries under the CDA. *Id.* The Court similarly noted that we had interpreted *D & H Distributing, supra,* as conferring CDA jurisdiction over third-party claims, notwithstanding the fact that the basis for jurisdiction in *D & H Distributing* was the Tucker Act, not the CDA. Although the Federal Circuit was silent in *D & H Distributing* with respect to the jurisdictional basis of the claim brought in the Court of Federal Claims, there was nothing in the language of the Federal Circuit's decision in *D & H Distributing* that limited its holding concerning the application of the third-party beneficiary rule to those cases filed in the Court of Federal Claims under the Tucker Act. The Court of Federal Claims simply held that the Tucker Act provided jurisdiction in the Court of Federal Claims over any claims or

disputes with a contractor arising under section 10(a)(1) of the CDA on which the decision of the contracting officer was issued. 41 U.S.C. § 609(a)(1).

The Court then stated that the CDA provides that only a "contractor" may appeal the decision of the contracting officer. It construed the word, "contractor," in sections 2 and 6(a) of the CDA, 41 U.S.C. §§ 601(4) and 605(a), strictly to exclude a third-party beneficiary which, although an entity, was not a party to a contract, since the CDA defines the term contractor as "a party to a government contract other than the Government." 41 U.S.C. 601(4); *JGB Enterprises, Inc. v. United States, supra*, 63 Fed. Cl. at 331.

The Court, however, in *JGB Enterprises, Inc. v. United States, supra*, 63 Fed. Cl. at 331 held that "[t]hird-party beneficiaries of a contract to which the United States is a party may assert a claim against the United States in accordance with the law governing third-party claims." In so holding, the Court held:

> Applying the federal common law that governs the contracts of the United States, and taking note that a contract with the United States is to be construed and the rights and duties of the parties determined by application of the same principles of law as if the contract were between private individuals, the Court applies the principles of third-party beneficiary law as developed in the common law and explained by precedent.

Id. at 331. In its third-party beneficiary analysis of JGB's claims, the Court distinguished the situation between contract 2508, in which there was notice to the contracting officer regarding JGB's asserted claim for the unpaid invoices from Capital City and the amendment of the contract to provide for direct payment, and purchase order 4191, in which the contracting officer was never informed of the situation between JGB and Capital City, and where the requested modification to the payment clause did not mention JGB as a vendor or subcontractor.

Kawa v. United States, 77 Fed. Cl. 294 (2007), is a parallel case to *JGB Enterprises, Inc. v. United States, supra*. However, here the escrow agent that was to receive the disbursement under the contracts awarded to Capital City pursuant to the escrow agreement between Capital City and JGB to which we referred above brought the action in the Court of Federal Claims. The government contended that under the escrow agreement, plaintiff Kawa was not liable to either JGB or Capital City unless he received monies from the government, because he suffered no injury since he was required to forward any payment to JGB and Capital City. Kawa responded that it suffered injury because it did not receive physical possession of the check due him under Purchase Order

4191. Kawa also alleged third-party beneficiary status. The Court rejected the government's motion to dismiss on jurisdictional grounds, holding that the plaintiff had standing and that the Court had jurisdiction under the Tucker Act over the plaintiff's claim. Important to the instant appeal here, was the Court's discussion of its rationale for its determination that the plaintiff had standing and the jurisdiction of the Court. Although the Court recognized that the Tucker Act conferred upon the Court jurisdiction when "a party alleges an implied contract with the United States," the law is clear that a "well-pleaded allegation in the complaint is sufficient to overcome challenges to jurisdiction." *Id*, at 303, quoting *Trauma Service Group v. United States*, 104 F.3d 1321, 1325 (Fed. Cir. 1997). Thus, in the instant appeal, FloorPro alleged facts sufficient to overcome a jurisdictional challenge against an implied contract and third-party beneficiary claim, although we held in our decision on the government's motion to dismiss that Modification No. P00001 did not satisfy the privity requirement for our jurisdiction under the CDA in the sense of creating an express or implied contract between the government and FloorPro.

In *BLH, Inc. v. United States*, 13 Cl. Ct. 265 (1987), the United States Claims Court (the predecessor Court to the Court of Federal Claims) addressed the definition of the term "contractor" under the CDA. As the Court pointed out, since neither plaintiff in this action were signatories of the contract, "they cannont be considered 'contractors' *as the term is usually understood* [emphasis added]." *Id.* at 271. Citing *United States v. Johnson Controls, Inc., supra,* the Court then noted the well-established rule that a party is not entitled to maintain an action against the government unless it is in privity with the government, or that it "is a direct **third-party beneficiary** of the contract" *BLH, Inc. v. United States, supra,* 13 Cl. Ct at 271, emphasis added. Whereas privity is the relationship that exists between two or more contracting parties, which signifies and imposes certain obligations upon the contracting parties, and is essential to the maintenance of an action on a contract, it may be established by proof of either an express or implied-in-fact contract.

> Thus, in the absence of any contractual relationship between the remaining plaintiffs and the government, the court cannot treat Armour and Greyhound as contractors *unless they were direct* ***third-party beneficiaries*** *of the contract.*
>
> . . . . There must also be a showing that the contractual parties intended to allow shareholders to have such a relationship which would allow them to maintain a legal action on the contract. . . . In the instant case, there are no facts which would support this basis for privity of contract and hence, liability.

Id. at 272, emphasis added. What the Court seems to suggest here is that direct third-party beneficiary status is akin to privity of contract status, and as such would satisfy the criteria of being a contractor, just as would a party to an implied-in-fact contract, although neither were actual signatories to a contract document.

In distinguishing its jurisdiction under the Tucker Act and lack of jurisdiction under the CDA, the Court of Federal Claims in *JGB Enterprises, Inc. v. United States*, *supra*, 63 Fed. Cl. at 331, relied, in part, on the definition in BLACK'S LAW DICTIONARY (7th ed.) of third-party beneficiary. As the Court pointed out, according to BLACK'S LAW DICTIONARY 149 (emphasis added), "A third-party beneficiary is '[an entity that], who, *though not a party to a contract*, stands to benefit from the contract's performance.'" Therefore, according to the Court, "[b]ecause a third-party beneficiary is not a party to a contract, it is not a 'contractor' as defined in section 601 of the CDA, and JGB cannot assert a claim under the CDA." 63 Fed. Cl. at 331. As a result, even were JGB to prevail on the merits of its claims, the Court held that it did not have the authority to award it pre-judgment interest on the amount found to be due and owing JGB. However, we are not persuaded that this definition fits the situation in which the contract has been modified to provide express recognition of the subcontractor as having rights to enforce the contract, which we believe Modification No. P00001 did in the instant appeal. Furthermore, the contract modifications in *JGB Enterprises, Inc. v. United States*, were far less clear regarding required payment to JGB Enterprises than were the contract modifications to the payment clause in the *D & H Distributing* and the instant FloorPro appeal.

Moreover, while the Court's use of that particular definition from BLACK'S LAW DICTIONARY may accurately state a general definition for third-party beneficiaries, it clearly did not follow the rationale and use of the third-party beneficiary designation employed by the Federal Circuit in *D & H Distributing Co. v. United States*, *supra*, 102 F.3d at 546-47. As we discussed in our prior decisions in the instant appeal, the Federal Circuit, in describing the contours of third-party beneficiary rights, relied both on extant relevant third-party beneficiary precedent and on treatises, including 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, all of which define third-party beneficiary status in its more nuanced and complex scope. While we need not repeat what we wrote in our earlier decisions on this appeal, we merely point out here that we relied on the Federal Circuit's analysis in *D & H Distributing Co.*, on the more limited concept and definition of "creditor beneficiary" and "intended beneficiary," which more appropriately described the effect of Modification No. P00001 to the contract in the instant FloorPro appeal, and the similar modification of the Payment clause in *D & H Distributing Co. See also*, our earlier decision on appellant's motion for summary judgment where we quoted the Court's discussion of creditor/intended beneficiaries. *FloorPro, Inc.*, ASBCA No. 54143, 07-2 BCA at 166,481. Thus, in

WILLISTON ON CONTRACTS, § 381, *supra*, the commentator writes that "it is clear that the jurisdictions are few which do not allow a creditor [beneficiary] a direct action at law against the promisor" and indeed, "it is probable that only one jurisdiction still adheres to a relatively strict privity requirement." While the bases for this right to enforce the contract provisions may be expressed in different ways, many jurisdictions hold that the creditor's right to be derivative. *Id*. at 1022. Thus, BLACK'S LAW DICTIONARY 165 (8th ed.) defines "creditor beneficiary" as "[a] third-party beneficiary of a contract who is owed a debt that is to be satisfied by another party's performance under the contract." Similarly, the definition in BLACK'S LAW DICTIONARY 165 for "intended beneficiary" is "[a] third-party beneficiary who is intended to benefit from a contract and thus acquires rights under the contract as well as the ability to enforce the contract once those rights have vested." With respect to "direct beneficiary," the dictionary simply refers the reader to the entry for "intended beneficiary."

On appeal by the government to the Court of Appeals for the Federal Circuit, the Court affirmed the judgment of the Court of Federal Claims, *JGB Enterprises, Inc. v. United States*, *supra*, holding that the subcontractor, as third-party beneficiary, was entitled to payment without setoff. The only claim in issue and discussed by the Court of Appeals related to JGB's status as a third-party beneficiary under contract 2508 and whether that status protected the third-party beneficiary from the offset asserted by the government in that case. Accordingly, the Court of Appeals held that "in order to rightfully claim a setoff here since the claim against the government is not a derivative claim, the government must itself have a valid *claim* against the party subject to the setoff, JGB." *J.G.B. Enterprises v. United States*, *supra*, 497 F.3d at 1262. There was no appeal by the contractor regarding the denial of the CDA interest and the denial of its claim under purchase order 4191 by the Court of Federal Claims. Therefore, the jurisdictional issue with respect to the Court of Federal Claims' holding that the CDA did not provide for jurisdiction over third-party claims and disputes was not before the Court of Appeals.

The Court of Federal Claims in *JGB Enterprises, Inc. v. United States* questioned our determination of our jurisdiction under the CDA of third-party beneficiaries in our previous decision in *FloorPro, Inc.*, ASBCA No. 54143, 04-1 BCA ¶ 32,571. As we pointed out in our earlier decision, *FloorPro, Inc.*, ASBCA No. 54143, 04-1 BCA at 161,183, and confirmed in Court of Federal Claims decision in *JGB Enterprises, Inc. v. United States*, *supra*, 63 Fed. Cl. at 330, *D & H Distributing Co.*, *supra*, cases in this circuit involving claims of third-party beneficiaries assume jurisdiction without explicitly discussing the statutory basis for jurisdiction. Nevertheless, although these cases and other similar decisions of the Court of Federal Claims may involve interpretations of the Tucker Act, the primary jurisdictional statute for that Court, as stated by the Distict Court in *Hodgdon v. United States*, 919 F.Supp. 37, 39, note 2 (D. Me., 1996), "the Tucker Act cases are at least instructive on the issue in that many of the same principles of privity,

standing, and sovereign immunity are involved," citing *United States v. Johnson Controls*, *supra,* which we discussed in our earlier decisions.

In questioning our determination of our jurisdiction with respect to third-party beneficiary appeals, the Court of Federal Claims in *JGB Enterprises, Inc. v. United States*, *supra,* begins with the proposition that the CDA provides a contractor with the right to sue the government, and that as such, it is a waiver of sovereign immunity which must be strictly construed in favor of the government. The Court then states that the CDA provides that "only a 'contractor' may appeal the decision of a contracting officer." *Id.* at 331. Since the term "contractor" is defined in section 2 of the CDA, 41 U.S.C. § 601, and a third-party beneficiary is defined as an entity who or which is not a party to the contract according to BLACK'S LAW DICTIONARY, a third-party beneficiary cannot be a "contractor" as defined in the CDA. As we noted above, quoting from the CDA, the term "contractor" is used in section 6 with reference to claims made by contractors, in section 7 with regard to the right of appeals by contractors to agency boards of contract appeals, and in section 10(a), which provides the right of contractors to bring an action in the Court of Federal Claims in lieu of appealing the decision of the contracting officer to an agency board. Moreover, unlike section 8 of the CDA which defines the jurisdiction of the agency boards of contract appeals, paragraph (a)(2) of the Tucker Act, as we quoted it above, provides that the Court of Federal Claims has jurisdiction upon any claim or dispute against, or with a "contractor" arising out of section 10(a)(1) of the CDA. Section 8 of the CDA, as we quoted above, simply provides that each agency board shall have jurisdiction to decide any appeal from a decision of a contracting officer relative to a contract made by that agency or by any other agency. There is no similar reference to the term, "contractor." We see nothing in the Court's analysis of its CDA jurisdiction that would suggest that there is anything but concurrent jurisdiction in the agency boards of contract appeals and in the Court of Federal Claims with regard to appeals and disputes arising under express or implied contracts with the government, or that the no-privity rule is to be treated differently in the two statutes, and specifically between paragraph (a)(2) of the Tucker Act and section 8 of the CDA.

Absent from the Court of Appeals's decision in *D & H Distributing Co.*, *supra*, was any discussion concerning a specific connection between its analysis of third-party beneficiary law and the Tucker Act. Indeed, the subcontractor sought recovery on the basis of one of two theories: either that it had entered into an implied-in-fact contract; or that it was a third-party beneficiary of the contract between the government and the contractor. The Court of Federal Claims rejected both theories of D & H Distributing and dismissed the complaint. On appeal, the Court focused its analysis on two issues: whether the contract modification validly amended the contract, and whether the contract as amended gave D & H an enforceable right against the government in the event the government failed to comply with the modified payments clause requiring it to make

payments to the prime contractor and to D & H jointly. It answered both questions in the affirmative.

Although the Court of Federal Claims in *JGB Enterprises, Inc. v. United States*, *supra*, relied, in part, on BLACK'S LAW DICTIONARY and its definition of "third-party beneficiary," the Court of Appeals framed the question in *D & H Distributing Co. v. United States*, *supra*, for the purpose of determining whether or not an exception applies to the no privity rule based on its analysis of the applicable principles in the context of government contract law. First, the Court said that the third-party beneficiary issue presented two questions which required separate analysis, one of which was whether the contract, as amended, gave D & H an enforceable right against the government in the event the government failed to comply with the contract clause requiring it to make payment to D & H. *D & H Distributing Co. v. United States*, *supra*, 102 F.3d at 546. Thus, the "question was whether D & H, which was not a party to the contract, may enforce the provision of the modified contract requiring the government to make payments jointly to CIM and D & H." *Id*. Holding that D & H did enjoy the status of third-party beneficiary with respect to the payment clause of the modified contract, the Court of Appeals said:

> 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.

Id.

In its analysis of the status of D & H as a third-party beneficiary entitled to enforce the modified payment clause of the contract, the Court identified the rights of assignees to enforce the contract, and the rights of sureties to challenge government actions that jeopardized the rights of the surety, both of which were relevant to the privity rule. First, with respect to the rights of the assignee to enforce payment due from the government as a result of its breach of the terms of the assignment, the Court held that the government could be held liable on that obligation if it failed to make the payment as required by the assignment. However, as in the instant appeal, D & H was not a financial institution and therefore, any assignment would have been invalid under the Assignment of Claims Act, 31 U.S.C. § 3727, 41 U.S.C. § 15, which generally prohibits the assignment of claims other than to financial institutions under certain stated conditions. Although the Court in *D & H Distributing* did not specifically rule on this issue, it concluded that the result would have been the same as obtained with respect to its ruling on the third-party beneficiary issue, *i.e.*, the right of the subcontractor to enforce the modification to the payment clause providing for payment to the subcontractor. With respect to the rights of sureties, the Court stated that the government has often successfully invoked the rule

extending full creditor beneficiary rights to sue a promisor under a contract to which it is not a party to pay a debt owed by the promisee to the government to surety situations, particularly with respect to those cases in which the government was identified as an intended third-party beneficiary of a performance bond contract between the contractor and the surety. The Court then reasoned that:

> Consistent with this analysis, court decisions involving such joint payment agreements have characterized them as making the joint payee a third party beneficiary of the contract with right to sue the promisor for breach.

Id. at 547.

As we noted in our earlier decisions, according to *Montana v. United States*, *supra*, 124 F.3d 1269, 1273 (Fed. Cir. 1997), the appropriate test for intended third-party beneficiary status included only the first prong of the *Baudier* test (*Baudier Marine Electronics v. United States*, 6 Cl. Ct. 246, 249 (1984)), that is, that the contract must "reflect the express or implied intention of the parties to benefit the third-party." Appellant, FloorPro, Inc., met this test. We have found nothing in the decisions of the Court of Appeals, or in the decisions of the Court of Federal Claims which we are not bound to follow, that restricts this test to those cases in which subcontractors have appealed the final decisions of contracting officers to the Court of Federal Claims under section 10(a)(1) to the Court of Federal Claims, notwithstanding the fact that there is also a basis for jurisdiction in that Court under the Tucker Act. Rather, we believe that the term "contractor" in sections 2 and 7 of the CDA includes intended beneficiaries, such as appellant, in which the subcontractor is identified in the contract as entitled to receive the payment for the work performed by the subcontractor. The subcontractor, stands in the place of the prime 8(a) contractor, with the rights of enforcing the payment clause, which rights although derivative from the prime contractor's right to payment under the contact, are independently established by FloorPro pursuant to the contract modification, and as such may be regarded as the contractor with the right of appeal.

In *Nelson Construction Company v. United States*, *supra*, plaintiff Nelson Construction Company was a subcontractor under a prime contract awarded to Lemhi Environmental Diversified, a Native American (8)(a) contractor, to perform work on Idaho State Highway 21. Nelson also served as indemnitor of Travelers Casualty and Surety Company, that provided the performance and payment bonding for Lemhi. The Court dismissed Nelson's claims based on equitable subrogation, however, held that it had jurisdiction over its third-party beneficiary status. We believe that the holding and rationale of the Court is consistent with our prior decisions in the instant appeal. While we recognize that this suit was brought in the Court of Federal Claims under the Tucker Act, the language and rationale is consistent with *United States v. Johnson Controls, Inc.*,

supra, 713 F.2d at 1550-51, a CDA case, and *D & H Distributing Co. v. United States, supra,* 102 F.3d at 546-48, which we followed in our earlier decisions. The Court said, with respect to Nelson's third-party beneficiary claim:

> Generally, the "government consents to be sued only by those with whom it has privity of contract." *Erickson Air Crane*, 731 F.2d at 813; *see also Anderson*, 344 F.3d at 1351 (stating that a plaintiff must be in privity with the United States to have standing to sue the sovereign on a contract claim). When a plaintiff's claim is founded upon a contract, the parties to that contract must be the plaintiff and defendant. [Citation omitted]
>
> However, when a plaintiff suing the government for breach of contract cannot establish privity with the United States, the plaintiff must establish that the claim falls within one of the exceptions to this rule in order for the complaint to withstand a jurisdictional challenge. *See . . . ; First Hartford Corp. Pension Plan v. United States*, 194 F.3d 1279, 1289 (Fed. Cir. 1999); . . . . The Federal Circuit in *First Hartford* held:
>
> > [Such exceptions include suits] by an intended third-party beneficiary, by a subcontractor by means of a pass-through suit when the prime contractor is liable to the subcontractor for the subcontractor' damages,[footnote omitted] and by a Miller Act surety for funds improperly disbursed to a prime contractor. However, the common thread that unites these exceptions is that the party standing outside of privity by contractual obligation stands in the shoes of a party within privity.
>
> 194 F.3d at 1289 . . . .

79 Fed. Cl. at 94-95. Quoting from *D & H Distributing Co. v. United States, supra,* 102 F.3d at 546-547, and noting its holding that a particular type of third-party beneficiary may be accorded full rights under the original contract, the Court in *Nelson Construction Company* held that:

> The third-party beneficiary status exception allows for a claim by an intended beneficiary of a government contract against the government as a party to the contract.

79 Fed. Cl. at 95. Moreover, we also recognize that *Nelson Construction Company* quoted with approval *First Hartford Corp. Pension Plan v. United States, supra,* which was a Tucker Act shareholders derivative suit in the Court of Federal Claims in which First Hartford raised a breach of contract claim against the government. Nevertheless, *Nelson Construction*, a Tucker Act case, distinguishes between "standing," which is accorded a party in privity in a government contract, and jurisdiction which, according to the Court, provides the substantive right of recovery.

The government has not directed our attention to any precedent in which we have made the distinction between standing and jurisdiction under the CDA. Although the holding of *Peerless Insurance Company, supra,* 88-2 BCA, may be questionable in light of more recent decisions regarding the rights of sureties to recover under the doctrine of equitable subrogation (*e.g., United Pacific Insurance Company, supra; United Pacific Insurance Co. v. Roche, supra; Fireman's Fund Insurance Company v. England, supra*), our discussion of standing is relevant. In addressing standing, we said:

> Standing to bring a contract suit in the federal courts, under both the Tucker Act and the Contract Disputes Act, is founded on privity of contract with the United States.

88-2 BCA at 104,738. Therefore, our understanding of standing under the CDA is consistent with the Court of Federal Claims discussion of standing in *Nelson Construction Company*. Accordingly, we hold that we have jurisdiction of third-party creditor, direct, and intended beneficiary claims under the limited facts of this appeal.

The government, secondly, contends that our analysis of third-party beneficiary status is flawed. The basic thrust of the government's argument in this regard is that it does not agree with our interpretations of *D & H Distributing Company v. United States, supra,* 102 F.3d 542, and *Flexfab, L.L.C. v. United States*, 424 F.3d 1254 (Fed. Cir. 2005), and *Flexfab, L.L.C. v. United States*, 62 Fed. Cl. 139 (2004). While the government does not, as we understand its argument, question the principles and analysis of third-party beneficiary law we addressed in our earlier decisions, the government now argues that these cases are distinguishable on the facts.

As set forth in our earlier decisions, we have noted those distinctions and how the analyses and principles upon which those decisions were based apply to the instant appeal. Indeed, in both our decision on the government's motion for dismissal of the appeal, and our decision on appellant's motion for summary judgment, we addressed the

specific factual distinctions to which the government now calls our attention. *See FloorPro, Inc.*, ASBCA No. 54143, 04-1 BCA, at 161,183-84, *FloorPro, Inc.*, ASBCA No. 54143, 07-2 BCA, at 166,480-81.

As the government points out in its motion here, there was a factual distinction in *JGB Enterprises, Inc. v. United States*, 63 Fed. Cl. 319 (2004), *aff'd*, 497 F.3d 1259 (Fed. Cir. 2007), between the Court's holding of the third-party beneficiary status of JGB Enterprises with respect to contract 2508 and the lack of such status with respect to purchase order 4191. In the instant appeal, as in *JGB Enterprises, Inc.*, the appellant had repeatedly contacted the contracting officer with respect to non-payment of its invoice by G. M. & W. Construction. Moreover, as we found in our decision on appellant's motion for summary judgment, the contracting officer and representatives of G. M. & W. Construction discussed the fact that should the government make payment to G. M. & W. Construction, the funds might not be available to pay FloorPro because of outstanding claims against G. M. & W. Construction. Accordingly, the contracting officer and the representatives of G. M. & W. Construction discussed alternative ways to make payment directly to appellant FloorPro, and agreed to a contract modification of the payment clause which provided for direct payment by a two-party check by the Defense Finance and Accounting Service to both G. M. & W. Construction and FloorPro, rather than following the established electronic payment method already in place in the contract. *FloorPro, Inc., supra,* 07-2 BCA at 166,476-77. The modification clearly expressed its intended purpose to provide for the government's issuance of a two-party check to be mailed to appellant, FloorPro. The contracting officer was clearly involved in the decision to modify the contract to benefit appellant and knew the reasons for such a modification.

Accordingly, having reconsidered our decision, we affirm it.

Dated: 8 February 2008

ROLLIN A. VAN BROEKHOVEN
Administrative Judge
Armed Services Board
of Contract Appeals

I concur

I concur in result (see separate opinion)

MARK N. STEMPLER

EUNICE W. THOMAS

Administrative Judge
Acting Chairman
Armed Services Board
of Contract Appeals

Administrative Judge
Vice Chairman
Armed Services Board
of Contract Appeals

OPINION CONCURRING IN RESULT
BY ADMINISTRATIVE JUDGE THOMAS

I concur in result. I agree that *JGB Enterprises, Inc. v. United States*, 63 Fed. Cl. 319 (2004), *aff'd on other grounds*, 497 F.3d 1259 (Fed. Cir. 2007), is not persuasive in its analysis of whether there is jurisdiction under the CDA of claims by third-party beneficiaries, at least with respect to a case such as this one where a bilateral modification provides for joint payment to the third-party beneficiary. I also agree with the opinion's analysis of *JGB Enterprises* on the merits. Beyond that, since we write on motion for reconsideration, I would simply affirm our prior decisions.

Dated: 8 February 2008

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