ARMED SERVICES BOARD OF CONTRACT APPEALS

Appeal of --	)	
	)	
Rahil Exports	)	ASBCA No. 56832
	)	
Under Contract No. 000000-00-0-0000	)	

APPEARANCES FOR THE APPELLANT: Albert A. Chapar, Jr., Esq.
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APPEARANCES FOR THE GOVERNMENT: Craig S. Clarke, Esq.
Army Chief Trial Attorney
CPT Charles D. Halverson, JA
Trial Attorney

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

The government moves to dismiss the appeal for lack of jurisdiction on the basis that the appellant, Rahil Exports (Rahil), is a subcontractor with whom the government has no privity of contract. We grant the government's motion and dismiss the appeal for lack of jurisdiction.

STATEMENT OF FACTS (SOF) FOR PURPOSES OF THE MOTION

1. On 27 November 2007, the Army and Air Force Exchange Service (AAFES) began purchasing ladies apparel from Mirage Clothing Company, Inc. (Mirage). Ms. Sabrina Nicole, an account executive for Mirage, handled all written correspondence and orders from AAFES (R4, tabs 2 to 4; gov't mot. ¶ 1). The contracting officers responsible for procuring products from Mirage were Ms. Jennifer L. Stinchcomb and Ms. Jennifer Jameson. After products were viewed at Mirage's showroom in New York, NY, the AAFES contracting officers would communicate their product selections to Mirage, in this case by e-mail. Once the product selections were confirmed by Mirage, purchase orders were transmitted electronically from AAFES to Mirage. Mirage would then complete whatever actions were necessary to fulfill the contract, including finding manufacturing facilities. During the time at issue in this appeal, Mirage was performing under a "testing capacity." Therefore, AAFES had not

completed a signed retail agreement with Mirage. The resulting purchase orders during this time represent the contracts between AAFES and Mirage. It is not clear from the record whether Mirage ever had, or has, a signed retail agreement with AAFES. (R4, tab 5; Declaration of Jennifer Stinchcomb (Stinchcomb decl.), ¶¶ 1, 4, 5)

2. On 11 June 2008, in response to product selections that were conveyed to Mirage, Ms. Nicole sent Ms. Jameson an e-mail stating in part: "[p]lease note factories will not be determined until after orders have been submitted" (R4, tab 3). On 15 August 2008, Ms. Nicole e-mailed Ms. Jameson stating that Mirage had sent the orders overseas to manufacturing facilities that Mirage had worked with in the past. Kushal Corporation (Kushal) and Rahil, both located in India[1], had been chosen by Mirage to produce the goods. (R4, tab 4; app. supp. R4, tabs 7 to 10) Copies of e-mails between Mirage, Kushal, and Rahil indicate that as early as July 2008 Mirage allegedly had overdue amounts owing to Kushal and Rahil. The alleged overdue amounts were from June and July 2008 AAFES orders to Mirage, that Kushal and Rahil had fulfilled. In the e-mails, Mirage was promising to pay the overdue amounts. (App. supp. R4, tabs 3 to 5)

3. On 28 August 2008, AAFES issued Purchase Order 0010591313 (PO 1313) to Mirage. PO 1313 does not specify any manufacturing facilities. It included 11 line items for women's clothing at a gross order cost of $81,428. The shipping instructions were "Ship To APL Tirupur India." APL is AAFES' contracted carrier. The invoice and bill of lading was to be issued to "HQ Army & Air Force Exchange Service, PO Box 660261, Dallas TX 75266-0202." The deadline for deliveries of the goods by Mirage to the ship point was 16 November 2008. AAFES then had a deadline of 29 November 2008 for delivery of the goods from the distribution center at French Camp, California, to the proper exchanges. (R4, tab 5)

4. In September 2008, further e-mails were exchanged between Mirage, Kushal and Rahil. The e-mails indicate that Mirage still had not paid the alleged overdue amounts from the June and July 2008 production orders. Kushal and Rahil had started to threaten to hold back on shipments of items they were presently producing for Mirage under PO 1313 unless they were paid the overdue amounts. None of the e-mails presented by Rahil in appellant's Rule 4 supplement indicate that the manufacturers thought they were contracting directly with AAFES. (App. supp. R4, tabs 6 to 8)

[1] It is not clear from the record exactly how Kushal and Rahil operate in relation to each other, but they do have the same mailing address and telephone numbers (R4, tab 14). If the claim of Kushal and the claim of Rahil are combined (*see* SOF ¶ 8), they exceed the certification threshold of 41 U.S.C. § 605 (c)(1). In light of our disposition, we need not express an opinion in this matter.

5. On 27 October 2008, Mr. Parvez Budhwani, writing on behalf of Kushal and Rahil, sent an e-mail to Ms. Stinchcomb and Ms. Jameson regarding payment for the goods shipped by Kushal and Rahil on behalf of Mirage to AAFES during June and July 2008. Mr. Budhwani indicated that they were holding back on the PO 1313 shipment pending payment of $133,399.78 owed to Kushal and Rahil by Mirage. Mr. Budhwani requested that AAFES cease paying Mirage until Mirage paid Kushal and Rahil. Mr. Budhwani did not contend that Kushal and Rahil had a contract with AAFES. (R4, tab 6)

6. In late October 2008, a representative from Rahil spoke via telephone with Ms. Stinchcomb regarding the overdue payments from Mirage. Apparently, Ms. Stinchcomb informed the Rahil representative that the AAFES contract is with Mirage and therefore she could not discuss the contract. (R4, tab 17; app. supp. R4, tab 17) On 11 November 2008, Mr. Shaleen Bahadur of Kushal forwarded to Ms. Stinchcomb and Ms. Jameson an e-mail containing an attachment with cargo receipts from shipments made from Kushal on behalf of Mirage to AAFES between 20 June 2008 and 18 July 2008. (R4, tab 9)

7. On 14 November 2008, Mr. Budhwani and Mr. Bahadur sent separate e-mails to AAFES personnel again requesting that AAFES stop payment to Mirage because Mirage had not paid for the June and July shipments. Rahil's e-mails indicate it was still due $66,793.30 on three invoices all dated 10 July 2008. (R4, tabs 12, 13)

8. On 22 December 2008, counsel e-mailed an uncertified claim to Ms. Stinchcomb requesting payment to Kushal in the amount of $62,567.52, and Rahil in the amount of $66,793.30 for June and July 2008 shipments. (R4, tab 17) On 22 January 2009, Mirage provided documentation to Ms. Stinchcomb showing that Mirage had paid the outstanding amount due to Kushal. The documentation did not address whether amounts allegedly owed to Rahil had been paid. (R4, tab 19)

9. In response to the 22 December 2008 claim, the contracting officer issued a 19 February 2009 final decision denying the claim in its entirety because AAFES has no contractual relationship with either Rahil or Kushal. In addition, the contracting officer pointed out that Kushal appeared to have received payment from Mirage. (R4, tab 20) The Board docketed Rahil's 14 May 2009 timely notice of appeal as ASBCA No. 56832. Only the portion representing Rahil's claim has been appealed. Rahil asserts that it still has not received payment for certain shipments totaling $66,793.30. (R4, tab 20; Bd. corr. file, ltr. dtd. 14 May 2009)

10. Rahil provides, as exhibit A to its complaint, three commercial invoices dated 10 July 2008 listing Rahil as the shipper and manufacturer. Mirage was listed in the "[o]n account of" box. One invoice was for 8248 pieces for delivery to California at a

total cost of $53,167.50. Two other invoices dated 10 July 2008 are included. These invoices reflect 1280 pieces went to Germany at a cost of $8,169.50; and 852 pieces went to Japan at a cost of $5,456.30.[2] The APL cargo receipts for these shipments, all dated 26 July 2008, listed Rahil as the seller and AAFES as the Buyer. (Compl., ex. A) Each invoice lists related AAFES PO numbers. The 75 listed POs all list Mirage as the contractor. (Bd. corr. file, ltr. dtd. 14 December 2009)

DECISION

The government moves to dismiss this appeal for lack of jurisdiction on the grounds that Rahil is a subcontractor and therefore lacks privity of contract with AAFES. Rahil responds that the Board has jurisdiction because AAFES expressly contracted with Rahil through Mirage which was acting as an agent for AAFES or in the alternative, AAFES formed an implied-in-fact contract with Rahil.

Our jurisdiction stems from the Contract Disputes Act of 1978 (CDA), as amended, 41 U.S.C. §§ 601-613, which "gives the right to appeal to a Board of Contract Appeals to contractors only and not to subcontractors." *Technic Services, Inc*., ASBCA No. 38411, 89-3 BCA ¶ 22,193 at 111,651. Furthermore, the CDA applies to contracts of non-appropriated fund activities such as AAFES described in 28 U.S.C. § 1491(a)(1). 41 U.S.C. § 602(a). The CDA defines "contractor" as "a party to a Government contract other than the Government." 41 U.S.C. § 601(4). In light of this statutory limitation of the CDA's scope, those not in privity of contract with the government cannot avail themselves of the appeal provisions. Because the CDA is a statute that waives sovereign immunity, it must be strictly construed. *Winter v. FloorPro*, 570 F.3d 1367, 1370 (Fed. Cir. 2009).

Subcontractors are generally not in privity of contract with the government. However, an exception to this rule may arise when an agency relationship between the government and the prime contractor is established by the terms of the prime contract. *United States v. Johnson Controls,* 713 F.2d 1541 (Fed. Cir. 1983), is the controlling authority on this issue. The Court stated that the three "crucial factors" in finding privity based upon an agency theory were that the prime contractor was:

> (1) acting as a *purchasing* agent for the government, (2) the agency relationship between the government and the prime contractor was established by clear contractual consent, and (3) the contract stated that the government would be directly liable to the vendors for the purchase price.

[2] The total of the three invoices is $66,793.30, the amount Rahil now claims.

Id. at 1551. As to the first two elements of proof, the POs did not state that Mirage was acting as a purchasing agent or establish an agency relationship between Mirage and AAFES. As to the third element, the purchase orders did not state that AAFES would be directly liable to Rahil. Rahil points to the commercial invoices, submitted with exhibit A to the complaint, as proof of Rahil's understanding that Mirage was acting as a government agent. In particular, Rahil contends that because the invoices cite Rahil as the supplier and AAFES as the buyer, there is a direct relationship between the two. These invoices are not contracts and have no evidential value as to proof of a contractual relationship between the parties. The invoices were established by Rahil to document the amount and cost of goods and the delivery procedures. They do not evidence any direct liability of AAFES for the purchase prices of the goods.

As an alternative to the agency theory, Rahil contends that the government has benefitted by the goods provided by Rahil under the doctrine of *quantum meruit.* The term *quantum meruit*, which means "as much as he merited," applies to recovery on any implied-in-fact contract for goods or services. *United States v. Amdahl Corp*., 786 F.2d 387, 393 n.6 (Fed. Cir. 1986). The CDA only applies to "express or implied contract[s]...entered into by an executive agency" 41 U.S.C. § 602(a). Unless there is an implied-in-fact contract, "the Board has no authority to award appellant recovery for benefits received by the Government under the equitable doctrine of *quantum meruit*." *Eaton Corp.,* ASBCA No. 38386, 91-1 BCA ¶ 23,398 at 117,403. An implied-in-fact contract requires proof of (1) mutuality of intent, (2) consideration, (3) an unambiguous offer and acceptance, and (4) "actual authority" on the part of the government representative. *City of Cincinnati v. United States*, 153 F.3d 1375, 1377 (Fed. Cir. 1998). The requirements for an implied-in-fact contract are the same as for an express contract; only the nature of the evidence differs. An implied-in-fact contract is founded upon a meeting of the minds and is "inferred, as a fact, from conduct of the parties showing, in the light of the surrounding circumstances, their tacit understanding." *Balt. & Ohio R.R. v. United States*, 261 U.S. 592, 597 (1923).

Rahil has the burden to prove the existence of an implied-in-fact contract. *Pac. Gas & Elec. v. United States*, 3 Cl. Ct. 329, 339 (1983), *aff'd*, 738 F.2d 452 (Fed. Cir. 1984) (table). Rahil has not pointed to any conduct or evidence to establish the requisite understanding and agreement from which we can infer a meeting of the minds between Rahil and AAFES. Once again, Rahil argues that the shipping documents that indicate the goods shipped directly from Rahil to AAFES reflect a meeting of the minds between AAFES and Rahil, and that receipt of these goods by AAFES ratified the agreement. For the same reasons stated above, Rahil's argument is untenable. Rahil has failed to meet its burden of proof. Moreover, it is clear that throughout this transaction, Rahil has looked to Mirage, not AAFES for payment, until Mirage allegedly repeatedly failed to pay.

CONCLUSION

The government's motion is granted. The appeal is dismissed for lack of jurisdiction.

Dated: 11 January 2010

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 concur

RICHARD SHACKLEFORD
Administrative Judge
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. 56832, Appeal of Rahil Exports, rendered in conformance with the Board's Charter.

Dated:

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