

ARMED SERVICES BOARD OF CONTRACT APPEALS

Appeals of --)
) ASBCA Nos. 56895, 56987, 56988,
) 56989, 56990, 56991,
Thorington Electrical and)
Construction Company) 56992, 56993, 56994,
) 56995, 56996, 56997,
Under Contract Nos. FA3300-06-C-0015)
FA3300-05-C-0015) 56998, 56999, 57000

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OPINION BY ADMINISTRATIVE JUDGE STEMLER ON
MOTIONS TO INTERVENE

These appeals arise from two construction contracts performed at Maxwell AFB, Alabama. Travelers Casualty and Surety Company of America (Travelers) submits that under principles of equitable subrogation, and an indemnity agreement with appellant, it has the right to intervene in these appeals. The government opposes the motions and has filed opposition briefs in each of the appeals. Appellant is silent on the motions.

STATEMENT OF FACTS FOR PURPOSES OF THE MOTION

On 28 September 2006 and 30 September 2005, the government awarded two contracts to appellant, Thorington Electrical and Construction Company (TECC or appellant). Both contracts were to be performed at Maxwell AFB. Contract No. FA3300-06-C-0015 dated 28 September 2006, was for the construction of a 10-lane bowling center with snack bar. The contract was awarded on behalf of the Air Force Services Agency. (ASBCA No. 56895 (56895), R4, tab 9) This contract was a non-enumerated, non-appropriated fund activity contract (*see* 41 U.S.C. § 602(a); 56895, R4, tab 1 at 21 of 40). Our jurisdiction is under the contract's Disputes clause:

2. DISPUTES (JAN 2005)

a. Except as otherwise provided in this contract, any dispute or claim concerning this contract which is not disposed of by agreement shall be decided by the Contracting Officer, who shall state his decision in writing and mail or otherwise furnish a copy of it to the Contractor. Within 30 days from the date of receipt of such copy, the Contractor may appeal by mailing or otherwise furnishing to the Contracting Officer a written appeal addressed to the Armed Services Board of Contract Appeals, and the decision of the Board shall be final and conclusive; provided that if no such appeal is filed, the decision of the Contracting Officer shall be final and conclusive. The Contractor shall be afforded an opportunity to be heard and to offer evidence in support of any appeal under this clause. Pending final decision on such a dispute, however, the Contractor shall proceed diligently with the performance of the contract and in accordance with the decision of the Contracting Officer unless directed to do otherwise by the Contracting Officer.

(56895, R4, tab 1 at 21 of 40)

The contract also contains the following Assignment clause:

6. ASSIGNMENT (JAN 2005) – The Contractor or its assignee's rights to be paid amounts due as a result of performance of this contract, may be assigned. No assignment by the Contractor, assigning its rights of delegating its obligations under this contract will be effective and binding on the NAFI until the written terms of the assignment have been approved in writing by the Contracting Officer.

(56895, R4, tab 1 at 22 of 40) There is no evidence of any approval of an assignment by the contracting officer.

Contract No. FA3300-05-C-0015 dated 30 September 2005, was for the construction of a new entry control facility (ASBCA Nos. 56987-57000 (56987-57000), R4, tab 1 at 1-4). Our jurisdiction over this contract and the appeals thereunder is under the Contract Disputes Act (41 U.S.C. §§ 601 *et seq.*).

Travelers issued performance and payment bonds in favor of the government on both the bowling center and the entry control facility contracts (Travelers' mot., ex. A ¶ 1, ex. A-1 ¶ 5, ex. A-2 ¶ 2).¹ Prior to the issuance of the bonds, TECC, Kelvin Thorington and Diane Thorington, separately and severally, executed a General Agreement of Indemnity (GAI) in favor of Travelers (Travelers' mot., ex. A ¶ 2, ex. A-1 ¶ 6, ex. A-2 ¶ 3). Under the terms of the GAI, TECC and the other indemnitors agreed, in the event of default, to transfer to Travelers all of their rights, title and interest to any contract funds on any bonded project (Travelers' mot., ex. A ¶ 3, ex. A-2-A ¶ 6).

During performance, Travelers received notice of claims for non-payment from laborers and material suppliers of TECC. Travelers determined that a number of the claims were meritorious and proceeded to discharge its obligation under the bonds by making payment on the claims. (Travelers' mot., ex. A ¶ 4, ex. A-1 ¶¶ 8, 9, ex. A-2 ¶¶ 4, 5, ex. A-3 ¶ 2) Travelers then sought indemnification from TECC and other indemnitors for these expenses. However, TECC and the other indemnitors did not honor the request and Travelers sought and obtained a judgment in its favor against TECC and the indemnitors in the amount of \$1,086,487.25 in the United States District Court for the Middle District of Alabama. (Travelers' mot., ex. A ¶¶ 6, 7, ex. A-1 ¶ 10, ex. A-2 ¶¶ 7, 8, ex. A-4)

Travelers has moved to intervene as a matter of right in these appeals on the basis that its judgment against the appellant together with the indemnity agreement executed by TECC, and under the theory of equitable subrogation, gives Travelers the right to assert, prosecute, compromise and settle any claims made and appealed by TECC (Travelers' mot. at 1, ex. A ¶¶ 9, 10).

On 5 February 2009, appellant submitted a claim to the contracting officer in the bowling alley contract (56895, R4, tab 15). On 25 March 2009, the contracting officer issued a final decision, denying the claim (56895, R4, tab 16).² On 31 July 2009, appellant filed a notice of appeal and the appeal was docketed as ASBCA No. 56895.

¹ Travelers' motion to intervene is supported by six exhibits (all except exhibit A are from Travelers' action against appellant in the U.S.D.C. for the M.D. of Alabama, N. Div. (Case No. 2:09-cv-0037-WKW)) which are cited as follows: Exhibit A is the complaint in intervention (Travelers' mot., ex. A). The complaint in intervention is supported by exhibit 1, a verified complaint (Travelers' mot., ex. A-1); exhibit 2, affidavit of Michael F. Burkhardt (Travelers' mot., ex. A-2) and its own exhibit A - the general agreement of indemnity (Travelers' mot., ex. A-2-A); exhibit 3, supplemental affidavit of Michael F. Burkhardt (Travelers' mot., ex. A-3); and, exhibit 4, a Judgment issued by the United States District Court for the Middle District of Alabama (Travelers' mot., ex. A-4).

² Neither party appeared to have recognized that the contract was not subject to the Contract Disputes Act.

On 28 April 2009, appellant submitted a document containing 14 claims to the contracting officer in the entry way contract (56987-57000, R4, tab 5U). On 14 August 2009, the contracting officer issued a final decision denying most of the claims and finding a net amount due appellant, but declining to release the funds (56987-57000, R4, tab 5V). On 13 November 2009, appellant filed a notice of appeal and the appealed claims were docketed as ASBCA Nos. 56987-57000.

The subject appeals are all based upon affirmative claims submitted by TECC to the contracting officer for a final decision (56895, R4, tabs 15-16; 56987-57000, R4, tabs 5U, 5V). There is no evidence that Travelers has entered into a takeover or other agreement with the government relating to the captioned contracts.

DECISION

ASBCA Nos. 56987-57000

The matter before us, while couched in terms of intervention³, is resolved by an examination of our jurisdiction with respect to Travelers. It is well settled that a surety, even one with an executed takeover agreement, cannot be considered the contractor for pre-takeover claims. *Fireman's Fund Insurance Co. v. England*, 313 F.3d 1344 (Fed. Cir. 2002), *aff'g Fireman's Fund Insurance Co.*, ASBCA No. 50657, 00-1 BCA ¶ 30,802, *aff'd on recon.*, 00-1 BCA ¶ 30,905. To be a party before us, a party other than the government must be the contractor. 41 U.S.C. § 601(4). Travelers has no contract with the government.

The GAI does not provide Travelers with any relief before the Board. Without an agreement by the CO, the anti-assignment statutes (41 U.S.C. § 15(a); 31 U.S.C. § 3727(a)(1), (b)) prevent the assignment of claims from TECC to Travelers from being effective. *Fireman's*, 313 F.3d at 1349-50.

As to Travelers' argument that it is a proper party under the principles of equitable subrogation, the law is equally settled. An action based on equitable subrogation is not available in the Boards of Contract Appeals. In order for the Boards to have jurisdiction

³ Both Travelers and the government recognize that our rules (48 C.F.R. Chap. 2, DFARS, Appendix A) do not provide for intervention. Nonetheless, in appropriate circumstances, where our rules do not address a matter, we commonly look to the Federal Rules of Civil Procedure for guidance. *See, e.g., AEON Group, LLC.*, ASBCA Nos. 56142, 56251, 09-2 BCA ¶ 34,263 at 169,290; *BAE Systems Information & Electronic Systems Integration, Inc.*, ASBCA No. 44832, 01-2 BCA ¶ 31,495 at 155,521. In this instance, however, there is no need to refer to the Federal Rules.

under the Contract Disputes Act, a claim by a party to the government contract must be before the Board. *Fireman's*, 313 F.3d at 1350-52; *United Pacific Insurance Co.*, ASBCA No. 53051, 03-2 BCA ¶ 32,267, *aff'd*, 380 F.3d 1352 (Fed. Cir. 2004).⁴

ASBCA No. 56895

As recited above, the contract involved in this appeal is not subject to the Contract Disputes Act. The answer to Traveler's motion to intervene is not any different from the motion in the Contract Disputes Act appeals. Our jurisdiction over this appeal is based on the contract's Disputes clause. That clause requires the contractor to be the party before us. There is no third party practice before the Board in non-CDA appeals. *Sentry Insurance*, ASBCA No. 21918, 77-2 BCA ¶ 12,721 (surety has no standing); *Gulf Apparel Corp.*, ASBCA No. 27784, 83-2 BCA ¶ 16,823 (no joinder at Board); *Safeway Moving & Storage Corp.*, ASBCA Nos. 12167, 12401, 68-1 BCA ¶ 6852 (no interpleader at Board). Moreover, the contract's Assignment clause makes appellant's assignment in the GAI ineffective against the government since the contracting officer never approved it in writing.

CONCLUSION

Since Travelers is not a contractor with respect to the claims present in these appeals, it is not a proper party. For the reasons discussed above, the motions to intervene are denied.

Dated: 16 July 2010

MARK N. STEMLER
Administrative Judge
Acting Chairman
Armed Services Board
of Contract Appeals

(Signatures continued)

⁴ In light of *Fireman's*, *Peerless Insurance Co.*, ASBCA No. 28887, 88-2 BCA ¶ 20,730, relied on by appellant to support its equitable subrogation argument, is no longer good law in this respect.

I concur

I concur

EUNICE W. THOMAS
Administrative Judge
Vice Chairman
Armed Services Board
of Contract Appeals

OWEN C. WILSON
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 Nos. 56895, 56987, 56988, 56989, 56990, 56991, 56992, 56993, 56994, 56995, 56996, 56997, 56998, 56999, 57000, Appeals of Thorington Electrical and Construction Company, rendered in conformance with the Board's Charter.

Dated:

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