

ARMED SERVICES BOARD OF CONTRACT APPEALS

Appeal of --)
)
A. Montano Electrical Contractor) ASBCA No. 56951
)
Under Contract No. 000000-00-0-0000)

APPEARANCE FOR THE APPELLANT: Mr. Jose A. Montano
President

APPEARANCES FOR THE GOVERNMENT: Thomas H. Gourlay, Jr., Esq.
Engineer Chief Trial Attorney
David C. Brasfield, Jr., Esq.
Engineer Trial Attorney
U.S. Army Engineer District,
Mobile

OPINION BY ADMINISTRATIVE JUDGE PAGE
ON THE GOVERNMENT'S MOTION TO DISMISS
FOR LACK OF JURISDICTION

This appeal stems from a subcontractor request that the Board assist it in obtaining payment for work performed at a government installation. Following the filing of pleadings, the government moved to dismiss the appeal for lack of jurisdiction arguing that this subcontractor could not and did not submit a claim cognizable under the Contract Disputes Act (CDA), 41 U.S.C §§ 601-13. Appellant opposes the motion. For the reasons discussed below, we grant the motion.

STATEMENT OF FACTS (SOF) FOR PURPOSES OF THE MOTION

1. By letter dated 30 April 1999, the United States Army Corps of Engineers, Mobile District (USACE or the government), notified American Renovation & Construction Company (ARC) that it had been awarded Contract No. DACA01-99-C-0033 for design and construction of replacement family housing at Redstone Arsenal, Alabama, at a total cost of \$12,543,048 (R4, tab 2 at 1-4).¹

¹ Appellant supplemented the record with two binders filled with documents. We designate the first volume, received 13 August 2010, as "app. supp. R4, vol. 1" and the second volume, receipt acknowledged by the Board on 9 September 2010, as "app. supp. R4, vol. 2."

2. Following award of the contract to ARC, A. Montano Electrical Contractor (Montano, appellant or the subcontractor) entered into a subcontract with ARC to do electrical work on the project at an agreed upon price of \$1,234,000, later modified by change orders to \$1,580,678.11 (R4, tab 3 at 5, 20).

3. In January 2002, ARC defaulted on its contract with the government (R4, tab 11). Subsequently its surety, St. Paul Mercury Insurance Company (St. Paul or surety), took over and completed the contract with Soltek Pacific (Soltek) as completion contractor (R4, tab 3 at 20, tab 14 at 1). Montano evidently continued to perform subcontracting work on the project (R4, tab 3 at 5, 20, tab 4 at 55). There is nothing in the record, nor does appellant allege, that Montano contracted with the government for work at Redstone Arsenal for which Montano seeks payment (*see* R4, *passim*; compl. and answer ¶ 1).

4. St. Paul received a claim from Montano on 23 December 2003 (app. supp. R4, vol. 1, tab 2). Montano stated therein that it had furnished services as a subcontractor to ARC on the Redstone Arsenal, AL family housing project and that it was due \$520,303.43 (*id.* at 2-3). We find no reference in Montano's claim to the surety to any claim against the government, nor was the claim certified as contemplated by the CDA. Although the contractor's 2 December 2003 facsimile cover sheet indicates that a copy of Montano's claim against the surety was furnished to the USACE resident engineer for the Redstone Arsenal project (*id.* at 1), the attached claim was not made against the government and did not request a contracting officer's final decision. (*Id.* at 2-19)

5. Montano was notified by letter dated 27 January 2004 by counsel for St. Paul that its claim submitted in connection with work performed for ARC at Redstone Arsenal was rejected (R4, tab 3 at 19-24).

6. Appellant sought the assistance of the government in obtaining relief from the surety for losses allegedly suffered on the Redstone Arsenal project. On 5 April 2004, Montano wrote the contracting officer to follow up a 2 April 2004 conversation, and enclosed a copy of Montano's 23 December 2003 claim against St. Paul and a calculation of the amount the subcontractor regarded as due. (App. supp. R4, vol. 2, tab 1 at 1, 21-23, 19) Montano also provided the contracting officer with copies of letters dated 2 April 2004 that it had written to various public officials about its dilemma (*id.* at 2-22). Montano acknowledged in these letters that "the procurement regulations may not specify the form and content" of its requests for relief since Montano "did not have privities of contract with" USACE (*see, e.g., id.* at 3).

7. The contracting officer responded to Montano on 30 April 2004 to confirm a telephone conversation of that date. He said that he had reviewed all the information provided by appellant, explained that the Miller Act governed Montano's remedies, and advised that the government had provided Montano with information concerning the Act. The contracting officer stated that he had "no legal or contractual authority to direct

American Renovation to pay you for work you performed under subcontract with them,” and lacked “authority to change existing laws concerning this situation as you suggested.” The contracting officer noted that ARC had submitted a claim to the government through its surety, and that the contract was “not completely closed out at this time.” (App. supp. R4, vol. 2, tab 2)

8. By letter dated 30 June 2004, Montano submitted a certified claim to St. Paul in the amount of \$511,040.79 for alleged contract changes (R4, tab 4 at 1-2, 4). Montano asked that the surety either make immediate payment or sponsor the claim to USACE (*id.* at 1). The certification provided with the claim reads: “I certify that the claim is made in good faith that the supporting data are accurate and complete to the best of my knowledge and belief; that the amount requested accurately reflects the contract adjustment” (*id.* at 6). We find that Montano’s alleged claim had accrued by 30 June 2004 at the latest.

9. In August of 2004, Montano sought the government’s help in obtaining payment from St. Paul. Montano asked that the government send an enclosed letter prepared by Montano to the surety on Montano’s behalf. The proposed letter was addressed to the surety and did not request a contracting officer’s final decision. (R4, tab 5) Montano independently renewed its request to the surety for payment on 28 August 2004, and listed the contracting officer among recipients of copies of the letter (app. supp. R4, vol 1, tab 7).

10. By letter dated 8 September 2004, the contracting officer once more informed Montano that as a subcontractor, the Miller Act was its remedy for nonpayment by the prime contractor and that the United States was not a party to their dispute. The contracting officer declined to pursue the matter further. (R4, tab 7)

11. By letter dated 13 September 2009, Montano filed with the Board a request for “help in resolving the procurement fraud/Discrimination contract matter.” The Board treated the letter as a notice of appeal and docketed the appeal as ASBCA No. 56951. On 16 October 2009, Montano provided a “Summary of Facts” which the Board docketed as appellant’s complaint. The summary alleges that Montano provided electrical services to the government as a subcontractor on Contract No. DACA01-99-C-0033, but had “not received final payment in the amount of \$554,934.74.” (Compl. ¶ 1)

12. Montano also alleges that it requested a written contracting officer’s final decision on 23 December 2003 (compl. ¶ 6). Appellant did not provide any evidence of this request, nor does the record contain any support for this allegation (SOF ¶ 4). The record does not show (nor does appellant allege) that the prime or surety sponsored Montano’s claim to the government.

DECISION

The government's motion asks the Board to dismiss the appeal "for failure to state a claim upon which relief can be granted because appellant is not a 'contractor' under the Contract Disputes Act of 1978" (gov't mot. at 1). In the alternative, the government maintains that even if appellant were found to be a "contractor" within the meaning of the CDA, the appeal must be dismissed for lack of jurisdiction, as (1) Montano has never submitted a written claim to the contracting officer in accordance with 41 U.S.C. § 605(a) and (2) the events giving rise to the alleged claim occurred more than six years ago, and thus are time-barred also under 41 U.S.C. § 605(a) (gov't mot. at 10).

In its opposition, the *pro se* appellant does not dispute that it was a subcontractor on the project. However, Montano does dispute the government's allegation that it failed to submit its claim to the contracting officer within six years of accrual of the claim. (App. reply br. dated 28 August 2010 at 1)

In determining whether the Board has jurisdiction over the instant appeal, we conclude that Montano neither possessed legal capacity to directly file a CDA claim with the government, nor was a cognizable claim submitted to the contracting officer on its behalf by a party competent to do so.

The CDA at 41 U.S.C. § 601(4) explains that "the term 'contractor' means a party to a Government contract other than the Government..." The definitions of a claim found in the Federal Acquisition Regulation (FAR) at both Subpart 2.101 DEFINITIONS and 52.233-1(c) DISPUTES, state that a claim "means a written demand...by one of the *contracting parties*..." (emphasis supplied).

In an appeal involving a subcontractor that submitted a claim to a contracting officer for a final decision, the Board held that "[o]ur 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.'" *Rahil Exports*, ASBCA No. 56832, 10-1 BCA ¶ 34,355 at 169,646, citing *Technic Services, Inc.*, ASBCA No. 38411, 89-3 BCA ¶ 22,193 at 111,651. The ASBCA cautioned in *Rahil* that "[b]ecause the CDA is a statute that waives sovereign immunity, it must be strictly construed." *Id.* at 169,647. Montano was not a party to Contract No. DACA01-99-C-0033 (SOF ¶¶ 2-3), and thus cannot directly bring suit under the CDA against the government. Because Montano has not shown that either the prime or the surety sponsored its claim (SOF ¶ 12), the Board is without jurisdiction over appellant's claim which arose from its role as a subcontractor. *Walsky Construction Co.*, ASBCA No. 52772, 01-2 BCA ¶ 31,557 at 155,856 citing *United States v. Johnson Controls, Inc.*, 713 F.2d 1541 (Fed. Cir. 1983).

CONCLUSION

Montano “bears the burden of proving by a preponderance of the evidence that we have jurisdiction under the CDA to consider its appeal.” *D & F Marketing, Inc.*, ASBCA No. 56043, 09-1 BCA ¶ 34,108 at 168,664, citing *Thai Hai*, ASBCA No. 53375, 02-2 BCA ¶ 31,971 at 157,920. It has failed to meet that requirement. We have considered the parties’ pleadings and documents in the record, as well as all contentions advanced by the parties in their briefs. For the reasons stated above, the government’s motion to dismiss the appeal for lack of jurisdiction is granted.

Dated: 27 October 2010

REBA PAGE
Administrative Judge
Armed Services Board
of Contract Appeals

I concur

I concur

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

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. 56951, Appeal of A. Montano Electrical Contractor, rendered in conformance with the Board's Charter.

Dated:

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