ARMED SERVICES BOARD OF CONTRACT APPEALS

Appeal of --	)	
	)	
Corporate Systems Resources, Inc.	)	ASBCA No. 58398
	)	
Under Contract No. CQ-9205	)	

APPEARANCE FOR THE APPELLANT: Lloyd J. Jordan, Esq.
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Washington, DC

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Transit Authority

OPINION BY ADMINISTRATIVE JUDGE PAGE
ON THE WASHINGTON METROPOLITAN AREA TRANSIT AUTHORITY'S
MOTION TO DISMISS

Corporate Systems Resources, Inc. (CSR or appellant) contends that it is entitled to relief from a price adjustment initiated by the Washington Metropolitan Area Transit Authority (WMATA or Authority) relating to a WMATA contract with CSR's prime contractor, LTK Engineering Services (LTK). The Authority has filed a motion to dismiss the appeal. The motion is granted.

STATEMENT OF FACTS (SOF) FOR PURPOSES OF THE MOTION

1. CSR is incorporated and located in the District of Columbia. It is a small business that is certified as a Disadvantaged Business Enterprise (DBE) by WMATA. (Compl. ¶ 3)

2. WMATA is an interstate compact agency created by the District of Columbia, the State of Maryland, and the Commonwealth of Virginia. Congress approved the Washington Metropolitan Area Transit Regulation Compact (Compact) in 1960. Washington Metropolitan Area Transit Authority Compact, Pub. L. No. 86-794, 74 Stat. 1031 (1960) (amended 1966). Various parts of the Compact were later amended and the amendments

were approved by the signatories and Congress. WMATA operates a mass-transit system located in the Washington, DC metropolitan area. (Compl. ¶ 4)

3. Section 80 of the Compact is designated "Liability for Contracts and Torts." It provides as follows:

> The Authority shall be liable for its contracts and for its torts and those of its Directors, officers, employees and agent committed in the conduct of any proprietary function, in accordance with the law of the applicable Signatory (including rules on conflict of laws), but shall not be liable for any torts occurring in the performance of a governmental function. The exclusive remedy for such breach of contracts and torts for which the Authority shall be liable, as herein provided, shall be by suit against the Authority. Nothing contained in this Title shall be construed as a waiver by the District of Columbia, Maryland, Virginia and the counties and cities within the Zone of any immunity from suit.

D.C. Code § 9-1107.01 (2012).

4. Section 81 of the Compact, "Jurisdiction of Courts," states the following:

> The United States District Courts shall have original jurisdiction, concurrent with the Courts of Maryland, Virginia and the District of Columbia, of all actions brought by or against the Authority and to enforce subpoenas issued under this Title. Any such action initiated in a State or District of Columbia Court shall be removable to the appropriate United States District Court in the manner provided by Act of June 5, 1948, as amended (28 U.S.C. 1446).

D.C. Code § 9-1107.01 (2012).

5. LTK is incorporated in Pennsylvania (compl. ¶ 5).

6. On 22 June 2009, WMATA issued request for proposals (RFP) No. CQ-9205/GWF for Vehicle Engineering Consultant Services – Rail Car (R4, tab 2 at 30-224). More specifically, the Authority sought professional services "in support of programs associated with the procurement, rehabilitation, repair and maintenance of rail cars" for the WMATA rail system (*id.* at 50).

7. LTK submitted an offer under RFP No. CQ-9205/GWF (R4, tab 2 at 241-49), and the Authority awarded Contract No. CQ-9205 to LTK by letter dated 3 June 2010. The contract was between WMATA and LTK (*id.* at 14-16). CSR was not a party to the contract.

8. Section 2102.1 of the WMATA Procurement Procedures Manual (Manual) provided that, except in certain circumstances, supply and service contracts in an amount greater than $10,000 were to include a disputes clause (app. supp. R4, tab 1 at 32). As required by the Manual, General Provisions (GP) Clause No. 11, Disputes (Revised 11/22/00), in Contract No. CQ-9205 stated the following:

> a. Except as otherwise provided in this Contract, any dispute concerning a question of fact arising under or related to this Contract which is not disposed of by agreement shall be decided by the Contracting Officer, who shall reduce his/her decision to writing and mail or otherwise furnish a copy thereof to the Contractor. The decision of the Contracting Officer shall be final and conclusive unless, within thirty (30) calendar days from the date of receipt of such copy, the Contractor mails or otherwise furnishes to the Contracting Officer a written notice of appeal addressed to the Authority Board of Directors. Such notice would indicate that an appeal is intended and should reference the decision and contract number. The decision of the Board of Directors or its duly authorized representative for the determination of such appeals shall be final and conclusive unless in proceedings initiated by either party for review of such decision in a court of competent jurisdiction, the court determines the decision to have been fraudulent, or capricious, or arbitrary, or so grossly erroneous as necessarily to imply bad faith, or is not supported by substantial evidence. In connection with any appeal proceeding under this article, the Contractor, or the Authority, as the case may be, shall be afforded an opportunity to be heard and offer evidence in support of its appeal. Pending final decision of a dispute hereunder, the Contractor shall proceed diligently with the performance of the Contract and in accordance with the Contracting Officer's decision. The Armed Services Board of Contract Appeals is the authorized representative of the Board of Directors for finally deciding appeals to the same extent as could the Board of Directors.

b. This DISPUTES article does not preclude consideration of question of law in connection with decisions provided for in Section a. above. Nothing in the Contract, however, shall be construed as making final the decisions of the Board of Directors or its representative on a question of law.

(R4, tab 2 at 128)

9. In GP Clause No. 29, Price Reduction for Defective Cost or Pricing Data – Price Adjustments, the contract stated as follows:

a. This article shall become operative only with respect to any modification of this Contract which involves aggregate increases and/or decreases in costs plus applicable profits in excess of $100,000 unless the modification is priced on the basis of adequate competition, established catalog or market prices of commercial items sold in substantial quantities to the general public, or prices set by law or regulation. The right to price reduction under this article is limited to defects in data relating to such modification.

b. If any price, including profit, or fee, negotiated in connection with any price adjustment under this Contract was increased by any significant sums because:

(1) The Contractor furnished cost or pricing data which was not complete, accurate and current as certified in the Contractor's Certificate of Current Cost or Pricing Data;

(2) A subcontractor, pursuant to the articles of this Contract entitled SUBCONTRACTOR COST OR PRICING DATA or SUBCONTRACTOR COST OR PRICING DATA – PRICE ADJUSTMENTS or any subcontract clause therein required, furnished cost or pricing data which was not complete, accurate and current as certified in the subcontractor's Certificate of Current Cost or Pricing Data;

(3) A subcontractor or prospective subcontractor furnished cost or pricing data which was required to

be complete, accurate and current and to be submitted to support a subcontract cost estimate furnished by the Contractor but which was not complete, accurate and current as of the date certified in the Contractor's Certificate of Current Cost or Pricing Data; or

(4) The Contractor or a subcontractor or prospective subcontractor furnished any data, not within (1) or (3) above, which was not accurate, as submitted; the price shall be reduced accordingly and the Contract shall be modified in writing as may be necessary to reflect such reduction. However, any reduction in the Contract price due to defective subcontract data of a prospective subcontractor, when the subcontract was not subsequently awarded to such subcontractor, will be limited to the amount (plus applicable overhead and profit markup) by which the actual subcontract, or the actual cost to the Contractor, if there was no subcontract, was less than the prospective subcontract cost estimate submitted by the Contractor, provided that the actual subcontract price was not affected by defective cost or pricing data.

NOTE: Since the Contract is subject to reduction under this article by reason of defective cost or pricing data submitted in connection with certain subcontracts, it is expected that the Contractor may wish to include an article in each such subcontract, requiring the subcontractor to appropriately indemnify the Contractor. However, the inclusion of such an article and the terms thereof are matters for negotiation and agreement between the Contractor and the subcontractor and are not binding upon the Authority. It is also expected that any subcontractor subject to such indemnification will generally require substantially similar indemnification for defective cost or pricing data required to be submitted to his lower tier subcontractors.

(R4, tab 2 at 150-51) (Emphasis added)

10. GP Clause No. 30, Subcontractor Cost and Pricing Data – Price Adjustments provided the following:

a. Paragraphs b. and c. of this article shall become operative only with respect to any change or other modification made pursuant to one or more provisions of this Contract which involves a price adjustment in excess of $100,000. The requirements of this article shall be limited to such price adjustments.

b. The Contractor shall require subcontractors hereunder to submit cost or pricing data under the following circumstances:

(1) prior to award of any cost-reimbursement type, incentive, or price re-determinable subcontract;

(2) prior to the award of any subcontract the price of which is expected to exceed $100,000;

(3) prior to the pricing of any subcontract change or other modification for which the price adjustment is expected to exceed $100,000; except in the case of (2) or (3) where the price is based on adequate price competition, established catalog or market prices of commercial items sold in substantial quantities to the general public, or prices set by law or regulation.

c. The Contractor shall require subcontractors to certify that to the best of their knowledge and belief the cost and pricing data submitted under paragraph b. above is accurate, complete, and current as of the date of execution, which date shall be as close as possible to the date of agreement on the negotiated price of the Contract modification.

d. The Contractor shall insert the substance of this clause including this paragraph d. in each subcontract which exceeds $100,000.

(R4, tab 2 at 151-52)

11. In GP Clause No. 42, Subcontract Payments (January 2000), the contract stated as follows:

> a. The Contractor shall, under this contract, establish procedures to ensure timely payment of amounts due pursuant to the terms of their subcontracts. The Contractor shall pay each subcontractor for satisfactory performance of its contract, no later than ten (10) days from the date of the Contractor's receipt of payment from the Authority for work by that subcontractor. The Contractor shall also release, within ten (10) days of satisfactory completion of all work required by the subcontractor, any retention withheld from the subcontractor.
>
> b. The Contractor shall certify on each payment request to the Authority that payment has been or will be made to all subcontractors in accordance with paragraph a above. The Contractor shall notify the contracting officer or other delegated authority representative with each payment request, of any situation in which scheduled subcontractor payments have not been made.
>
> c. If a subcontractor alleges that the Contractor has failed to comply with this provision, the Contractor agrees to support any Authority investigation, and, if deemed appropriate by the Authority, to consent to remedial measures to ensure subcontractor payment that is due.
>
> d. The Contractor agrees that the Authority may provide appropriate information to interested subcontractors who want to determine the status of Authority payments to the Contractor.
>
> e. Nothing in this provision is intended to create a contractual obligation between the Authority and any subcontractor or to alter or affect traditional concepts of privity of contract between all parties.

(R4, tab 2 at 165) (Emphasis added)

12. Clause No. 25 of Contract No. CQ-9205's Special Provisions, Governing Law, stated the following: "This contract shall be deemed to be an agreement under and

shall be governed by the law of the District of Columbia, exclusive of its conflict of law principles, and the common law of the U.S. Federal contracts including precedents of the Federal Boards of Contract Appeals" (R4, tab 2 at 198).

13. Various of the contract's clauses provided that their terms were to be included in any subcontracts. An example of such clauses is the requirement that GP Clause No. 15, Contract Work Hours and Safety Standards Act – Overtime Compensation (01/15/04), subsections (1) and (4) overtime provisions also be included in subcontracts. (*See* R4, tab 2 at 137-38)

14. CSR entered into a subcontract with LTK under LTK's prime contract with WMATA, Contract No. CQ-9205. The subcontract was set out in a two-page letter agreement that was signed by LTK on 22 November 2011 and CSR on 5 January 2012. The letter agreement was effective from 1 November 2011 to 30 June 2012. Listed as an attachment to the letter agreement were the terms and conditions of the prime contract, and the prime contract was "made part of" the letter agreement. References in the prime contract to WMATA were "deemed to include LTK." The subcontract was between LTK and CSR. WMATA was not a party to the subcontract. (App. supp. R4, tab 11) References to the contractor in the complaint were to be interpreted to mean CSR (compl. ¶ 12).

15. Under the subcontract, CSR was to provide "procurement support to assist the Office of Procurement and Materials on Rail Vehicle & [Track and Structures/Systems Maintenance] projects." The subcontract stated that CSR would be compensated for services provided under individual task orders. Its burdened rates were subject to review by WMATA's audit group. CSR was to submit invoices and supporting documentation on a monthly basis. Payment by LTK would be made within ten calendar days after LTK was paid by WMATA. Payments by LTK to CSR were contingent on LTK receiving payment from WMATA. (App. supp. R4, tab 11)

16. CSR asserts that it provided required personnel and performed all of the terms of the contract (compl. ¶ 19). It states that it submitted invoices for payment on a monthly basis (*id.* ¶ 27).

17. Appellant says that its invoices "covering May 28, 2012 through September 30, 2012 remain unpaid." And, that before "filing its claim CSR had not been paid for work performed after April 1, 2012." (Compl. ¶ 28) CSR states that it pursued payment for its invoices (*id.* ¶ 29).

18. On 20 August 2012, LTK responded to CSR's inquiries about payment. LTK stated that it had not breached the CSR subcontract, and that: (1) WMATA, not LTK, had audited and adjusted CSR billing rates; and (2) WMATA was not reimbursing LTK for CSR invoices. (App. supp. R4, tabs 6, 9, 10; compl. ¶ 30)

19. A 10 February 2012 letter from a WMATA contract administrator to CSR enclosed a 13 December 2011 internal WMATA memorandum with the results of the application of "agreed-upon procedures (AUPs)" to FY 2011 rates that had been proposed by CSR as to Contract No. CQ-9205 (app. supp. R4, tab 3). Tabs 6 and 9 of appellant's supplemental Rule 4 file consist of what appear to be printouts from spreadsheets relating to appellant's FY 2012 allowable costs and rates (app. supp. R4, tabs 6, 9).

20. CSR submitted a claim to WMATA on 7 September 2012. Appellant indicated that it had been told by LTK that WMATA was withholding payment for work done and invoiced by CSR. The withholding was apparently based upon a determination by WMATA that CSR's billing rates were defective and had resulted in an overcharge. CSR asserted that it had not been paid since 1 April 2011 and was owed $189,211.50. Appellant was not aware, at the time, that WMATA had performed an agreed-upon procedure in determining that CSR's rates were defective. There was nothing in the contract or regulations, in appellant's view, that allowed LTK or the Authority to carry out a price AUP or make a retrospective price adjustment against CSR. CSR sought expedited review of its claim. (R4, tab 1)

21. WMATA did not issue a contracting officer's (CO's) final decision on appellant's claim (compl. ¶ 37).

22. On 23 November 2012, CSR filed a notice of appeal and complaint with the Board in reliance upon the Memorandum of Understanding (MOU) (*see* SOF ¶ 25), between the ASBCA and WMATA.

23. In Count I of the complaint, appellant says that a price adjustment was unwarranted because it did not meet the requirements of the price reduction clause and because CSR had not submitted pricing data. Count II asserts that WMATA's review of its rates was improper and not determinative. CSR contends, as to Count III, that the Authority failed to properly administer the contract. In Count IV, appellant argues that WMATA did not, as it should have, negotiate profit and cost data. Count V says that WMATA's determination of CSR's price and cost data was unreasonable. CSR insists, in Count VI, that the Authority's withholding of payments to appellant was wrongful. Through Count VII, CSR asserts that WMATA violated the contract by failing to render a decision on its claim. Finally, Count VIII argues that the Authority did not administer the contract in accordance with the requirements of the DBE program.

24. On 19 December 2012, the Authority filed a motion to dismiss for want of jurisdiction. The motion has been briefed.

25. In January 2001, the Board and WMATA entered into an MOU under which the ASBCA agreed to "provide a forum...for administrative resolution under Authority

contracts containing a 'Disputes' article for all appeals from final decisions of contracting officers issued under such contracts." Memorandum of Understanding between the ASBCA and WMATA (10 Jan. 2001, extended in October 2007).

DECISION

The Board has jurisdiction to hear appeals involving the Authority under and in accordance with the disputes clause in WMATA contracts. *Cubic Transportation Systems, Inc.*, ASBCA No. 57770, 12-2 BCA ¶ 35,063. WMATA has moved to dismiss the appeal arguing that CSR was a subcontractor, and not a party to a prime contract with WMATA. Therefore, WMATA says, appellant lacks privity of contract with the Authority and cannot appeal to the ASBCA under the disputes clause.

As proponent of a claim against WMATA, CSR has the burden of establishing jurisdiction. *Cf. Monument Realty LLC v. Washington Metropolitan Area Transit Authority*, 535 F. Supp. 2d 60, 67 (D.D.C. 2008); *Greenbelt Ventures, LLC v. Washington Metropolitan Area Transit Authority*, 2010 WL 3469957, at *3 (D. Md. Sept. 1, 2010), *on recon.*, 2011 WL 2175209 (D. Md. 2011), *aff'd*, 481 F. App'x 833 (4th Cir. 2012); *E.M. Scott & Associates*, ASBCA No. 45869, 94-3 BCA ¶ 27,059. Appellant does not contest that it was a subcontractor under LTK's prime contract with the Authority. It argues on various grounds that, despite its status as a subcontractor, it may avail itself of the prime contract's disputes clause. Appellant's arguments are not persuasive.

1. The Contract between WMATA and LTK

The disputes clause in the prime contract between the Authority and LTK reflected the agreement of those two parties that disputes "arising under or related to" that contract would be submitted to a WMATA CO for decision. A "Contractor" dissatisfied with a CO's decision would have the opportunity to submit an appeal to the Authority's Board of Directors. (SOF ¶ 8) Pursuant to a January 2001 MOU, the ASBCA acts as the WMATA Board's representative in deciding such appeals (SOF ¶¶ 8, 25). Our jurisdiction is predicated on the disputes clause in the agreement between these contracting parties. *Cubic Transportation*, 12-2 BCA ¶ 35,063; *KiSKA Construction Corp.-USA and Kajima Engineering and Construction, Inc.*, ASBCA Nos. 54613, 54614, 06-1 BCA ¶ 33,244, *on recon.*, 06-2 BCA ¶ 33,442. Because WMATA subcontractors lack privity of contract with the Authority, they cannot file claims under the disputes clause directly against WMATA. *Volpe Construction Co.*, ENG BCA No. 4457, 82-1 BCA ¶ 15,530; *Mergentime Corp. v. Washington Metropolitan Area Transportation Authority*, 2006 WL 416177, at *93 (D.D.C. Feb. 22, 2006).

Appellant asserts that the language of the prime contract, the subcontract, and the Manual demonstrates that its claim is within the scope of the prime contract disputes clause and that it is not only allowed to use the clause, but is obliged to do so. In making

this argument, CSR cites: the incorporation of the prime contract into the subcontract including the disputes clause and the subcontract payments clause; § 2102 of the Manual which required the inclusion of a disputes clause in certain contracts; § 1411 of the Manual which defined "Contractor" to include individuals that submit offers for, or are awarded an Authority contract "or a subcontract under a contract"; and a number of federal decisions. (App. opp'n at 5-11) Neither the documents nor the cited decisions support the proposition that CSR has the right to avail itself of rights conferred upon LTK as a consequence of its prime contract with WMATA.

Although § 2102 of the Manual obliges the inclusion of the disputes clause in certain WMATA contracts, that provision says nothing about a subcontractor's ability to appeal under the clause. Section 1411 includes a definition of "Contractor" that appears to encompass a subcontractor. We do not see, however, a connection between Chapter 21 of the Manual which deals with claims and litigations, and Chapter 14 which deals with contractor responsibility and debarment. In fact, the definition of "Contractor" in § 1411 is specifically limited to the use of that term "in this subpart" (app. supp. R4, tab 1 at 27).

Nor does CSR's argument about incorporation of the prime contract, including the disputes clause, into its subcontract with LTK bear out appellant's point. CSR was not a party to the prime contract and was not mentioned in the disputes clause (SOF ¶¶ 7, 8). The term "subcontractor" is not used in the disputes clause, and the clause does not provide for direct subcontractor appeals against either LTK or WMATA to the Board. The clause does not require that it be included in subcontracts as other clauses in the prime contract do. (SOF ¶¶ 8, 13) Although the subcontract incorporated the provisions of the prime contract, that was done by the parties to the subcontract, LTK and CSR, and there is no proof that WMATA was involved (SOF ¶ 14). Under these circumstances, we lack authority to hear CSR's appeal against WMATA. *Cf. Fenco-Polytron*, AEC BCA No. CA-171, 1965 WL 879, at *1 ("bare incorporation" of a disputes clause in a subcontract "did not impose any obligations on the Government"); *Remler Co.*, ASBCA No. 5295, 59-2 BCA ¶ 2336 (where the government did not authorize or ratify the inclusion of a disputes clause in a subcontract, the Board could not hear a direct appeal by the subcontractor).

Appellant's reliance on *Seal & Company, Inc. v. A.S. McGaughan Co.*, 907 F.2d 450 (4th Cir. 1990); *Maxum Foundations, Inc. v. Salus Corp.*, 779 F.2d 974 (4th Cir. 1985); and other decisions is misplaced as these may be factually distinguished (app. opp'n at 5, 8-10). In *Seal*, the issue of whether the subcontractor could proceed directly against WMATA was not at issue and was not addressed. *Seal*, 907 F.2d at 452-53. The court ruled in *Maxum* that a dispute resolution agreement in a prime contract had been incorporated into a subcontract, but the dispute in the case was between the prime contractor and the subcontractor. The court was not called on to, and did not, rule that a

subcontractor could force the owner into dispute resolution. None of the other cases relied upon by CSR in support of a direct suit against WMATA are relevant.

2. Argument that CSR is a Third-Party Beneficiary

Finally, CSR asserts that it is a third-party beneficiary of the prime contract, although the stated bases for that assertion are not well developed. Initially, appellant states, without explanation, that a "review of the Contract Documents" and the regulations in the WMATA Procurement Manual show that CSR was a third-party beneficiary of the prime contract (app. opp'n at 11). CSR also states that the subcontract's payment clause, which it says required the Authority to compel the contractor's compliance, conferred a "third-party benefi[t]" on appellant (*id.* at 7 n.4).

In order to find third-party beneficiary status, "the contract must reflect the express or implied intention of the [contracting] parties to benefit the third-party." *Sullivan v. United States*, 625 F.3d 1378, 1380 (Fed. Cir. 2010) (quoting *Montana v. United States*, 124 F.3d 1269, 1273 (Fed. Cir. 1997)). Third-party beneficiary status is an "exceptional privilege." *O. Ahlborg & Sons, Inc. v. United States*, 74 Fed. Cl. 178, 188 (2006), *appeal dismissed*, 219 F. App'x 992 (Fed. Cir. 2007). Purely incidental benefit, not contemplated by the parties, does not entitle a person or entity to enforce another's contract. *Sullivan*, 625 F.3d at 1380.

Nothing in the prime contract reflects an intention on the part of WMATA and LTK that CSR would be able to utilize the disputes clause against the Authority. The disputes clause itself gives no indication that it applies to anyone other than the parties to the prime contract (SOF ¶ 8). The subcontract payments clause, cited by appellant, requires certain things of the prime contractor when a subcontractor alleges that the contractor has failed to pay the subcontractor. It does not compel WMATA to do anything or even suggest that a subcontractor may appeal actions taken by the Authority. Further, the prime contract explicitly denies any intention to create a contractual obligation between WMATA and subcontractors. (SOF ¶ 11)[1] The other passages apparently relevant to CSR's claim, Clause Nos. 29 and 30 of its subcontract with LTK,

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[1] Appellant urges that *Shea-S&M Ball v. Massman-Kiewit-Early*, 606 F.2d 1245 (D.C. Cir. 1979), supports the contention that the subcontract payments clause made CSR a third-party beneficiary because that decision found a third-party beneficiary where WMATA had the contractual authority to force cooperation among abutting contractors (app. opp'n at 7 n.4). First, the plaintiff in that case was a party to a prime contract with WMATA and not a subcontractor. That decision turned in relevant part upon WMATA's duty to compel cooperation between its contractors in executing adjacent work. *Shea*, 606 F.2d at 1251. Second, as noted above, the subcontract payments clause in this appeal specifically disclaims any intention to benefit subcontractors.

are likewise devoid of anything showing that the parties meant to allow subcontractor appeals against WMATA (SOF ¶¶ 9, 10).[2] Nor is there anything in the record to support an argument that WMATA intended to extend this right to CSR.

CONCLUSION

For the reasons set forth above, WMATA's motion to dismiss for lack of jurisdiction is granted.[3]

Dated: 11 July 2013

REBA PAGE
Administrative Judge
Armed Services Board
of Contract Appeals

I concur

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

I concur

ALEXANDER YOUNGER
Administrative Judge
Acting Vice Chairman
Armed Services Board
of Contract Appeals

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[2] In support of its argument, CSR cites the Board's decision in *FloorPro, Inc.*, ASBCA No. 54143, 04-1 BCA ¶ 32,571 (app. opp'n at 11). As it concedes in a footnote, however, that decision was reversed by the Federal Circuit in *Winter v. FloorPro, Inc.*, 570 F.3d 1367 (Fed. Cir. 2009). Appellant also refers to *D & H Distributing Co. v. United States*, 102 F.3d 542 (Fed. Cir. 1997). *D & H* is distinguishable from the situation here because it involved a contract that had been modified to make the subcontractor a joint payee with the prime contractor. *Id.* at 544, 546-47.

[3] Although we have found that we do not have jurisdiction over CSR's claim as presented, we also note that Boards of Contract Appeals did hear subcontractor claims under prime contract disputes clauses where the prime contractor sponsored the claim and appeal. *See, e.g., Traylor Bros., Inc.*, ENG BCA No. 2641, 65-2 BCA ¶ 4968; *American Structures, Inc. & Mining Equipment Manufacturing Corp.*, ENG BCA No. 3410, 76-1 BCA ¶ 11,683 (involving WMATA). There is neither an assertion nor evidence that LTK sponsored CSR's claim or this appeal.

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. 58398, Appeal of Corporate Systems Resources, Inc., rendered in conformance with the Board's Charter.

Dated:

JEFFREY D. GARDIN
Recorder, Armed Services
Board of Contract Appeals