



UNITED STATES
CIVILIAN BOARD OF CONTRACT APPEALS

DISMISSED FOR LACK OF JURISDICTION: September 22, 2009

CBCA 1235

WACKENHUT INTERNATIONAL, INC.,

Appellant,

v.

DEPARTMENT OF STATE,

Respondent.

Craig S. King and Richard J. Webber of Arent Fox LLP, Washington, DC; and Martha R. Mora of Avila Rodriguez Hernandez Mena & Ferri LLP, Coral Gables, FL, counsel for Appellant.

Dennis J. Gallagher, Office of the Legal Adviser, Buildings and Acquisitions, Department of State, Rosslyn, VA, counsel for Respondent.

Before Board Judges **SOMERS**, **HYATT**, and **VERGILIO**.

Opinion for the Board by Board Judge **HYATT**. Board Judge **VERGILIO** dissents.

HYATT, Board Judge.

Wackenhut International, Inc., appellant, has appealed a contracting officer's decision denying its claim for reimbursement of severance payments made to security guards under a contract to provide security guard services to the State Department, respondent, at designated locations in Greece. The State Department has filed a motion to dismiss this appeal for lack of jurisdiction. For the reasons stated herein, we grant the motion.

Background

This appeal arises from a contract for the provision of security guard services to various State Department locations in Greece, including the United States Embassy in Athens and the United States Consulate in Thessaloniki. The contractor performed three consecutive contracts spanning the period from 1989 to 2006. Appellant seeks reimbursement of severance payments made under the first follow-on contract, number SGR100-96-C-0001, which was in effect from January 1995 until June 2001. Appeal File, Exhibit 1.

The subject contract was awarded to a joint venture composed of Wackenhut International, Inc. and Wackenhut Security Hellas, S.A. (Hellas), which was created for the purpose of obtaining and performing contracts for the provision of guard services to respondent. The contractor is denominated variously as “Wackenhut Hellas/Wackenhut Intl. Inc.,” “Wackenhut International, Inc./Wackenhut Security Hellas S.A.,” or “Wackenhut Hellas/Wackenhut Int’l, Inc.” on the subject contract and modifications thereto.

The claim, made on behalf of Wackenhut International, Inc., was submitted to the contracting officer by letter dated January 10, 2008. The letter was prepared and signed by appellant’s outside counsel in Florida, who stated that the letter was written “in our capacity as legal counsel for Wackenhut, International, Inc.” The amount claimed exceeded \$100,000. At the conclusion of the claim letter is the following paragraph:

Pursuant to 41 U.S.C. 605(c)(1) Wackenhut hereby certifies that this claim is made in good faith, that the supporting data is accurate and complete to the best of its knowledge and belief, and that the amount requested accurately reflects the severance payments for which Wackenhut believes the Government must reimburse it pursuant to the subject contract.

Appeal File, Exhibit 32. The claim and certification were signed by Wackenhut International’s outside counsel.

When Wackenhut International filed its amended complaint in this appeal, it included a certification signed by Wackenhut International’s President:

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 for which the contractor

believes the Government is liable, and that I am duly authorized to certify the claim on behalf of the Contractor.

The appeal was filed solely in the name of Wackenhut International. Neither the joint venture partner, nor the joint venture itself, was included or added as a party to the appeal. Subsequently, the same claim was submitted by the joint venture to the contracting officer for decision. When the claim was not decided within sixty days, the joint venture filed an appeal of its deemed denial at the Board. That appeal has been docketed as CBCA 1604.

The State Department moved to dismiss CBCA 1235 for lack of jurisdiction, challenging the failure to pursue the appeal in the name of the joint venture and the validity of the certification by outside counsel. In its opposition to the State Department's motion, Wackenhut International explains that, to perform contract number SG100-96-C-0001 and its predecessor and successor contracts, S-218-FA-2980 and SGR100-01-C-0560, it established Wackenhut Security Hellas, S.A. (Wackenhut Hellas) together with Greek nationals and then entered into a joint venture agreement with that entity, in which Wackenhut International held a fifty-one percent ownership share. Each time an offer to perform services for a follow-on contract was submitted, the joint venture agreement was renewed. Appellant has included a copy of the most recent agreement, signed on March 1, 2000, with its opposition. Among other things, this agreement provides that "in the event [Wackenhut Security Hellas] elects to withdraw from this relationship during the terms of the Contract, [Wackenhut International] agrees to solely assume all responsibilities for continuation of required services under the contract."

Wackenhut International also points out that pursuant to State Department Regulations, embassy contracts must meet certain qualifications if they are to receive credit for being "qualified United States joint venture persons." The relevant requirement states:

By signing this proposal, the U.S. person co-venturer agrees to be individually responsible for performance of the contract, notwithstanding the terms of any joint venture agreement.

Further, the regulation requires that the joint venture agree to the following condition:

To be acceptable, all members of a joint venture must be jointly and severally liable for full performance and the resolution of matters arising out of the contract.

48 CFR 652.237-73 (2004).¹

The contracting officer denied Wackenhut International's claim. In addition to submitting a revised certification with the complaint, appellant, in response to the State Department's concern about whether the proper party was bringing the appeal, has provided a written authorization, dated February 10, 2009, from the officers of Wackenhut Security Hellas, to confirm Wackenhut International's authority to bring the subject appeal:

I hereby confirm that Wackenhut Security Hellas, S.A. (n/k/a G4S Holding SA) has authorized and continues to authorize, Wackenhut International, Inc. to pursue the claim of the Wackenhut Security Hellas/Wackenhut International, Inc. JV for severance in CBCA No. 1235 in the name of Wackenhut International, Inc. and to take all necessary actions in furtherance thereof, and in conjunction with, that claim and litigation.

Discussion

The State Department poses three alternative challenges to the Board's jurisdiction. First, it maintains that the certification of the claim by outside counsel was fatally defective and not susceptible to being cured. Second, it points out that the claim was presented to the contracting officer, and the appeal pursued, solely in the name of Wackenhut International, rather than by the joint venture itself. Third, respondent contends that Wackenhut International was required to join its co-venturer as an indispensable party to the litigation. We need only address the State Department's second point, as it is controlling here.

The Board's jurisdiction derives from the Contract Disputes Act (CDA), 41 U.S.C. §§ 601-613 (2006). The CDA provides that "all claims by a contractor against the government relating to a contract shall be in writing and shall be submitted to the contracting officer for a decision." *Id.* § 605(a). Additionally, "[f]or claims of more than \$100,000, the contractor shall certify that the claim is made in good faith, that the supporting data are accurate and complete to the best of his knowledge and belief, that the amount requested accurately reflects the contract adjustment for which the contractor believes the government is liable, and that the person certifying is duly authorized to certify the claim on behalf of the

¹ Although Wackenhut International states that it was contractually bound by this State Department regulation, which makes U.S. co-venturers liable for performance and also makes the joint venture members jointly and severally liable for full performance, the referenced regulation was issued in 2004, several years after performance under the contract in issue had ended.

contractor.” *Id.* § 605(c)(1). Finally, the CDA defines a “contractor” as “a party to a Government contract other than the Government.” *Id.* § 601(4). These provisions express a fundamental principle of government contract law: “The government consents to be sued only by those with whom it has privity of contract.” *Erickson Air Crane Co. v. United States*, 731 F.2d 810, 813 (Fed. Cir. 1984). Thus, ordinarily only the contractor awarded the contract may pursue an appeal. *See Admiralty Construction, Inc. v. Dalton*, 156 F.3d 1217, 1220 (Fed. Cir. 1998) (“[O]nly a single ‘contractor’ [is] eligible to appeal a contracting officer’s final decision.”); *accord Key Federal Finance v. General Services Administration*, CBCA 411, et al., 07-1 BCA ¶ 33,555, at 166,184.

Respondent points out that the claim filed by Wackenhut International fails to meet the express criteria of the Act -- that the claim be submitted to the contracting officer by the contractor and appealed by the contractor. Wackenhut International is not the contractor and is not in privity of contract with the Government. As such, State argues, Wackenhut International lacks standing to bring this appeal and the Board lacks jurisdiction to entertain it.

Wackenhut International endeavors to circumvent this rule by arguing that the joint venture is composed of Wackenhut International, the majority member, and Wackenhut Security Hellas, a second company established by and partly owned by Wackenhut International. Wackenhut Security Hellas has authorized appellant to pursue the claim in the name of Wackenhut International. Wackenhut International has agreed to be individually responsible for performance of the contract. Thus, Wackenhut International reasons that it is the real party in interest, and should be permitted to proceed with this appeal.

The argument that the “real party in interest,” when not the contractor, should be permitted to pursue a direct appeal under the CDA has rarely prospered. Waivers of sovereign immunity are strictly construed. *Orff v. United States*, 545 U.S. 596, 601-02 (1996); *United States v. Mitchell*, 445 U.S. 535, 538 (1980). This precept applies to the CDA, which is a statute waiving sovereign immunity. *Winter v. FloorPro*, 570 F.3d 1367, 1370 (Fed. Cir. 2009); *Cosmic Construction Co v. United States*, 697 F.2d 1389, 1390 (Fed. Cir. 1982).²

² Accordingly, the requisite privity of contract needed to permit an appeal under the CDA has generally been limited to prime contractors who have actually contracted with the Government. Attempts by other parties, such as subcontractors and sureties, to extend the concept of privity beyond the prime contractor are generally rejected. *See, e.g., Admiralty Construction, Inc. v. Dalton*, 156 F.3d 1217, 1220-21 (Fed Cir. 1998); *Edward*

In arguing that Wackenhut International should be allowed to bring the claim directly because it has been authorized by Wackenhut Security Hellas to do so, appellant confuses the status of contractor, as defined in the CDA, with that of the individual person or co-venturer authorized to pursue a joint venture's claim. Joint venture partners are not generally eligible to pursue claims in their own right, however, rather than as members of the joint venture. *Boeing Co.*, ASBCA 39314, et al., 90-2 BCA ¶ 22,769, is a case in point. There, the contractor was a joint venture consisting of a division of The Boeing Company and Bell Helicopter Textron, Inc. Since the claim affected only Boeing, Boeing filed the appeal in its name. Bell authorized Boeing to pursue the claim on its own behalf. Nonetheless, the board recognized that the contractor was still the joint venture and the appeal had to be brought by the contractor:

The general rule in this connection is that an individual co-venturer may not sue in his own name to enforce a liability owed a joint venture. *See Pine Products Corp. v. United States*, 15 Cl. Ct. 11 (1988) and cases cited therein.

90-2 BCA at 114,293. The board in *Boeing* dismissed the claim brought by Boeing in its own right and retained the duplicate appeal that had been brought in the name of the joint venture. The Court of Federal Claims has applied the same analysis. *Brother's Cleaning Service, Inc. v. United States*, 38 Fed. Cl. 106, 108 (1997) (although a joint venture can only act through its individual constituents, it "has an independent existence, and it is the only legal entity with whom the Government is in privity").

Here, Wackenhut Security Hellas was the actual employer of the guards with the obligation to pay severance payments. Although Wackenhut Hellas, the co-venturer, may authorize Wackenhut International to represent the interests of the joint venture, *see, e.g., American Export Group International Services, Inc./Zublin Delaware, Inc.*, ASBCA 42616, 93-1 BCA ¶ 25,373, at 126,364 (1992), it may not substitute Wackenhut International as the contractor. *Cf. United Pacific Insurance Co. v. Roche*, 380 F.3d 1352, 1356-57 (Fed. Cir. 2004) (The jurisdiction of a board of contract appeals "is defined by the Contract Disputes Act. Parties cannot by agreement confer upon a tribunal jurisdiction which it otherwise would not have.").

To conclude, the subject appeal must be pursued by the contractor itself, which is the joint venture. Since we lack jurisdiction to entertain the claim as brought, we must grant the

W. Scott Electric Co. v. Department of Veterans Affairs, CBCA 1388, 09-2 BCA ¶ 34,181.

Government's motion to dismiss CBCA 1235.³ Accordingly, we need not address the other grounds for dismissal that were raised by the State Department.

Decision

The State Department's motion to dismiss this appeal for lack of jurisdiction is **GRANTED**.

CATHERINE B. HYATT
Board Judge

I concur:

JERI KAYLENE SOMERS
Board Judge

VERGILIO, Board Judge, dissenting.

For the award of contract S-GR100-96-C-0001, Standard Form 33, Solicitation, Offer and Award, identifies the offeror as "Wackenhut Hellas/Wackenhut Intl. Inc." and the award date as July 11, 1995. By letter dated January 10, 2008, outside legal counsel for Wackenhut International, Inc. (WII) submitted to the contracting officer what she styled a Contract Disputes Act certified claim for severance reimbursement. The certification statement specifies that pursuant to statute, 41 U.S.C. § 605(c)(1), "Wackenhut hereby certifies that this claim is made in good faith, that the supporting data is accurate and complete to the best

³ As noted above, a new claim and certification, executed on behalf of the joint venture, was filed with the contracting officer and the joint venture has appealed the deemed denial of that claim. That appeal is docketed as CBCA 1604. The pleadings and documents filed in CBCA 1235 shall be transferred to CBCA 1604 and deemed to have been filed in that appeal, unless the parties request otherwise.

of its knowledge and belief, and that the amount requested accurately reflects the severance payments for which Wackenhut believes the Government must reimburse it pursuant to the subject contract.” Outside legal counsel to WII signed the letter with the certification.

I assume that the award was made to a joint venture. WII has provided a joint venture agreement between Wackenhut Security Hellas S.A. and WII entered into as of March 1, 2001, on its face not pertinent to the contract in dispute. While this appeal has been pending at this Board, WII has provided statements from the president and the vice president of its joint venture partner specifying that the joint venture partner has authorized, and continues to authorize, WII to pursue the claim in the appeal in the name of WII. Further, explicit certifications have been filed and the appeal resubmitted in the name of the joint venture.

The Government moves for dismissal for lack of jurisdiction, raising three alternative bases: (1) the claim was not certified as required by the Contract Disputes Act when presented to the contracting officer; (2) the claim was not presented by or on behalf of the joint venture (the contracting party); and (3) WII has failed to join an indispensable party, the joint venture partner, to whom the Government refers as the actual employer of the guards and the real party in interest with respect to the alleged severance payments.

The Contract Disputes Act, as amended and applicable, provides: “A defect in the certification of a claim shall not deprive a court or an agency board of contract appeals of jurisdiction over that claim. Prior to the entry of a final judgment by a court or a decision by an agency board of contract appeals, the court or agency board shall require a defective certification to be corrected.” 41 U.S.C. § 605(d) (2006). Implementing regulations state that defective certifications include those which are not executed by a person duly authorized to bind the contractor with respect to the claim; in contrast, a failure to certify shall not be deemed a defective certification. 48 CFR 33.201 (1996).

The claim was certified when presented to the contracting officer. The certification by outside counsel is defective, but not absent, as explained in *DeMarco Durzo Development Co. v. United States*, 69 Fed. Cl. 262, 270 (2005). Pursuant to statute, the defective certification does not deprive the Board of jurisdiction over the claim. By subsequent submissions, the defective certification has been corrected at this time. The Government’s first stated basis to dismiss for lack of jurisdiction is not supported by the facts and law.

The claim was presented to the contracting officer by and in the name of WII with a reference to the contract number. The claim makes no direct reference to the joint venture as the contractor or as the claimant. However, WII was authorized to act on behalf of the joint venture and its joint venture partner, as indicated in the subsequent submissions.

Neither party has placed in the record a joint venture agreement that was applicable to the contract in dispute. Thus, because the terms of an applicable agreement could address the authority of WII, WII has not established jurisdiction nor has the Government established a lack of jurisdiction. However, the Federal Circuit has stated that the “general rule is that each member of a joint venture has the authority to act for and bind the enterprise, absent agreement to the contrary[.]” *Sadelmi Joint Venture v. Dalton*, 5 F.3d 510, 513-14 (Fed. Cir. 1993). Without a basis to depart from that general rule, and given the express subsequent statements, here undisputed, that WII could act on behalf of the joint venture, the claim was brought on behalf of the joint venture. I do not view the naming of only WII as the claimant under the contract to make the claim invalid. Thus, the Government has not supported its second and third bases to dismiss for lack of jurisdiction. A statement in *Sadelmi* is equally applicable here: “Indeed, these cases illustrate the ‘wasteful and esoteric litigation’ that was deplored by Congress in enacting remedial legislation.” 5 F.3d at 514.

JOSEPH A. VERGILIO
Board Judge