UNITED STATES
CIVILIAN BOARD OF CONTRACT APPEALS

MOTION FOR RECONSIDERATION DENIED:
August 18, 2015

CBCA 3905

COOLEY CONSTRUCTORS, INC.,

Appellant,

v.

GENERAL SERVICES ADMINISTRATION,

Respondent.

Anton J. Rupert of Crowe & Dunlevy, P.C., Oklahoma City, OK, counsel for Appellant.

Elyssa Tanenbaum, Office of General Counsel, General Services Administration, Washington, DC, counsel for Respondent.

Before Board Judges **SOMERS**, **STERN**, and **GOODMAN**.

GOODMAN, Board Judge.

This appeal, filed in the name of the contractor, Cooley Constructors, Inc. (Cooley or appellant), was from a final decision by the contracting officer of respondent, the General Services Administration (GSA). Respondent filed a motion to dismiss the appeal for lack of jurisdiction, and we denied that motion in our decision dated June 8, 2015. Cooley *Constructors, Inc. v. General Services Administration*, CBCA 3905, 15-1 BCA ¶ 36,001. Respondent has filed a motion, pursuant to CBCA Rules 26 and 27, for reconsideration of and relief from that decision.

Background

In our previous decision, this Board held that there was jurisdiction over this appeal pursuant to the Contract Disputes Act (CDA), 41 U.S.C. §§ 7101-7109 (2012). The contractor had authorized the subcontractor to file the notice of appeal in the contractor's name, the notice of appeal was filed in the contractor's name, and appellant's attorney filed a subsequent notice of appearance which complied with CBCA Rule 5, 48 CFR 6101.5 (2014).[1] The filing of the notice of appearance by appellant's attorney affirmed the prior authorization by the prime contractor to the subcontractor to file the appeal in the name of the contractor. As these circumstances supported sponsorship of the subcontractor's appeal by the prime contractor, there was jurisdiction pursuant to the CDA.

Discussion

Respondent's motion asserts that this Board committed an error of law in its decision by improperly enlarging Congress's limited waiver of sovereign immunity and contravening Congress's expressed intent to preclude a subcontractor from having direct access to administrative remedies under the CDA. Respondent includes a discussion of legislative history of the CDA and case law upholding the proposition that only a contractor can be a party to an appeal, and a subcontractor can participate only if the contractor sponsors the subcontractor's claim against the Government. The facts of this appeal, as stated above, do not contravene the legislative history or case law cited.

In further support of its motion, respondent cites several decisions that are not applicable to the factual circumstances in this appeal, as the subcontractors in those cases filed the appeals in their own names and not in the names of the contractors.

In *United States v. Johnson Controls*, *Inc.*, 713 F.2d 1541 (Fed. Cir. 1983), cited by respondent, the Court held that the Armed Services Board of Contract Appeals (ASBCA) lacked jurisdiction over an appeal filed directly by a subcontractor in its own name, as a subcontractor was not a "contractor" pursuant to the CDA.

---

[1] Rule 5 provides, in part, that "[a]ny appellant . . . may appear before the Board by an attorney-at-law licensed to practice in a state, commonwealth, or territory of the United States, or in the District of Columbia."

Respondent also relies upon *Erickson Air Crane Co. of Washington, Inc. v. United States*, 731 F.2d 810 (Fed. Cir. 1984). The Court held that the Energy Board of Contract Appeals erred when it "used language implying that subcontractors were appellants. Counsel entered appearances for them and the board made awards to them." Id. at 813. In *Erickson*, the Court stated further:

> Notice is hereby given that in future contract cases in this court, only the prime contractor may be the appellant, absent, of course, special contract or regulatory provisions not here involved which, in some other cases, might confer standing on subcontractors or persons who normally would be deemed only subcontractors. . . . A party in interest whose relationship to the case is that of the ordinary subcontractor may prosecute its claims only through, and with the consent and cooperation of, the prime, and in the prime's name.

Id. at 814.

In our decision, we referred to decisions of the ASBCA in which the factual circumstances supported the conclusion that the contractor had, in fact, sponsored the subcontractor's claim, thus providing the Board with jurisdiction. In particular, we found persuasive the similar circumstances and reasoning in *Holmes & Narver Services, Inc.*, ASBCA 51155, 00-2 BCA ¶ 30,972.

In its motion for reconsideration, respondent stated:

> In these decisions, the ASBCA took an overreaching stance on jurisdiction over subcontractor appeals. The Board failed to recognize that, after these decisions, in 2009, the ASBCA was overruled by the Federal Circuit in [*Winter v.*] *FloorPro, Inc.*, 570 F.3d 1367 [(Fed. Cir. 2009)], on this stance.

Contrary to respondent's assertion, the court in *FloorPro* did not overrule the ASBCA decisions we cited. Rather, the issue involved was stated by the Court as follows:

> In this case, we are presented with the question of whether the Contract Disputes Act of 1978 . . . gives the Armed Services Board of Contract Appeals . . . jurisdiction over a claim against the government brought by a subcontractor that is a third-party beneficiary of a contract between the government and the prime contractor. For the reasons stated below, we hold that it does not.

570 F.3d at 1368.

In that case, FloorPro, a subcontractor, brought an appeal in its own name at the ASBCA, and that board found jurisdiction based upon the legal theory that the subcontractor was a third-party beneficiary of the prime contract. The Court reversed, holding that "those who are not in privity of contract with the government cannot avail themselves of the CDA's appeal provisions." 570 F.3d at 1371. The *FloorPro* decision did not, as respondent asserts, address the factual circumstances present here or in the ASBCA cases that we cited previously that support our earlier decision.

Respondent has not stated sufficient grounds for reconsideration of or relief from the Board's decision.

Decision

Respondent's motion is **DENIED**.

_____
ALLAN H. GOODMAN
Board Judge

We concur:

_____
JERI KAYLENE SOMERS
Board Judge

_____
JAMES L. STERN
Board Judge