



UNITED STATES
CIVILIAN BOARD OF CONTRACT APPEALS

DISMISSED FOR LACK OF JURISDICTION: June 30, 2009

CBCA 1388

EDWARD W. SCOTT ELECTRIC CO., INC.,

Appellant,

v.

DEPARTMENT OF VETERANS AFFAIRS,

Respondent.

Barry Nelson, Chief Estimator of Edward W. Scott Electric Co., Inc., San Francisco, CA, appearing for Appellant.

Stacey North Willis, Charlma J. Quarles, and Phillipa L. Anderson, Office of the General Counsel, Department of Veterans Affairs, Washington, DC, counsel for Respondent.

Before Board Judges **DANIELS** (Chairman), **STERN**, and **HYATT**.

DANIELS, Board Judge.

The Department of Veterans Affairs (VA) awarded to S. J. Amoroso Construction Co., Inc. (Amoroso) a contract for construction at the VA Medical Center in San Francisco, California. Amoroso subcontracted the electrical work for this project to Edward W. Scott Electric Co., Inc. (Scott).

Scott believes that the contract permitted installation of HCF (health care facility) cable for the branch lighting and power circuits, and Scott intended to install this kind of cable for those purposes. VA directed Scott to install EMT (electrical metallic tubing) cable instead of HCF cable, and Scott complied. Scott sent to Amoroso a claim for the additional

costs resulting from this direction. After attempting without success to negotiate with VA a resolution of the matter, Amoroso submitted a certified claim to the agency's contracting officer. The contracting officer denied the claim on the ground that the contract requires installation of EMT cable for the purposes at issue. Scott then filed with this Board an appeal of the contracting officer's decision.

The Board noted that the appeal was filed by a subcontractor, not a contractor, and ordered the appellant to show cause why the case should not be dismissed for lack of jurisdiction. No response was filed.

Discussion

The Contract Disputes Act of 1978 (CDA) permits a "contractor" to appeal a contracting officer's decision to the appropriate board of contract appeals. 41 U.S.C. § 606 (2006). "[T]he term 'contractor,'" as used in this Act, "means a party to a Government contract other than the Government." *Id.* § 601(4). Scott was not a contractor to VA in this instance; it was a subcontractor to Amoroso, the party to the contract other than the Government.

As the Court of Appeals for the Federal Circuit has recently reiterated, a waiver of sovereign immunity, such as is contained in the Contract Disputes Act, must be strictly construed in favor of the sovereign. *Winter v. Floorpro, Inc.*, No. 2008-1407, slip op. at 6 (Fed. Cir. June 26, 2009) (citing *Orff v. United States*, 545 U.S. 596, 601-02 (2005), and *Cosmic Construction Co. v. United States*, 697 F.2d 1389, 1390 (Fed. Cir. 1982)). Consequently, "those who are not in privity of contract with the government cannot avail themselves of the CDA's appeal provisions." *Winter*, slip op. at 6; *see also id.* at 8. A subcontractor is considered to be in privity of contract with the Government only when the prime contractor is acting, per its contract, as the Government's agent. *Id.* at 7 n.3 (citing *United States v. Johnson Controls, Inc.*, 713 F.2d 1541, 1551 (Fed. Cir. 1983)).

Because this appeal was filed by Scott, a subcontractor, and the contract between Amoroso, the prime contractor, and VA did not make Amoroso VA's agent, the Board has no jurisdiction to consider the case.

We note that after the appeal was filed, Amoroso wrote to the Board, "[Amoroso] is hereby authorizing [the Scott] notice of appeal." This letter was filed 127 days after Amoroso received the contracting officer's decision. Even if Amoroso's letter is deemed to be a constructive sponsorship of the appeal, it was filed too late to vest jurisdiction in the Board. An appeal which is filed more than ninety days after the date of a contractor's receipt

of a contracting officer's decision must be dismissed. *Cosmic Construction*, 697 F.2d at 1390 (citing 41 U.S.C. § 606).

Decision

The appeal is **DISMISSED FOR LACK OF JURISDICTION.**

STEPHEN M. DANIELS
Board Judge

We concur:

JAMES L. STERN
Board Judge

CATHERINE B. HYATT
Board Judge