



UNITED STATES
CIVILIAN BOARD OF CONTRACT APPEALS

DISMISSED FOR LACK OF JURISDICTION: March 24, 2014

CBCA 3238

SECURITY ENFORCEMENT AUTHORITY, INC.,

Appellant,

v.

DEPARTMENT OF HOMELAND SECURITY,

Respondent.

Gary Jeanty, President of Security Enforcement Authority, Inc., Miami, FL, appearing for Appellant.

Denise A. McLane, Office of General Counsel, Department of Homeland Security, Washington, DC, counsel for Respondent.

Before Board Judges **STERN**, **HYATT**, and **DRUMMOND**.

STERN, Board Judge.

Security Enforcement Authority, Inc. (SEA or appellant) appealed the denial by a contracting officer of the Department of Homeland Security (DHS or respondent) of SEA's claim of \$331,932.24. DHS has moved to dismiss the appeal for lack of jurisdiction.¹ The facts herein are taken from documents filed by the parties.

¹ The motion is styled as a motion to dismiss. The parties loosely refer to the motion as one to dismiss or for summary relief. We treat the motion as one to dismiss.

Background

Tarheel Specialties, Inc. (Tarheel) was awarded an order by DHS under a General Services Administration federal supply contract blanket purchase agreement. The contract was awarded for the benefit of DHS's Federal Protective Service (FPS) component. The contract required Tarheel to provide armed guard services to the FPS for the period from November 26, 2002, through November 24, 2007. On January 19, 2005, Tarheel awarded a subcontract to appellant to provide guard services to the FPS. The subcontract provided that the services were to be performed by SEA as an independent contractor and not as an agent of Tarheel. Tarheel agreed to pay SEA directly for services rendered under the subcontract. In May 2006 SEA stopped providing the guard services, allegedly because Tarheel stopped paying SEA in April 2006.

On December 4, 2007, Tarheel submitted a claim on behalf of SEA to DHS. This claim was one of five claims submitted to DHS on behalf of various subcontractors under Tarheel's contract with DHS. The claims were to recover amounts allegedly due the subcontractors for training, vacation, and holiday pay under the DHS - Tarheel contract. Tarheel claimed that SEA was due a total of \$35,148.46, \$26,111.13 of which was for training expenses. On January 7, 2008, DHS and Tarheel settled the training expense portion of the claim. On January 10, the DHS contracting officer denied the remaining portion of the claim, relating to vacation and holiday pay, on the basis that Tarheel had already been paid for these expenses. The decision was appealed to this Board by Tarheel on January 18, 2008.

DHS and Tarheel eventually settled the appeal, along with numerous other appeals that Tarheel had brought before the Board. The settlement agreement, filed with the Board on January 26, 2010, provided, in part,

The Contractor also agrees that it will not authorize any of its subcontractors under any orders/contracts involved in the cases in the caption to file a claim or appeal on its behalf or in its name, and will object to the prosecution of any such appeal in the Contractor's name based on any matter, whether known or unknown, arising under or in any way related to [the pending appeals.]

Appeal File, Exhibit 10.

This appeal arises out of SEA's claim for \$331,932.24, filed with the contracting officer on October 3, 2012, for amounts allegedly not paid SEA by Tarheel for services SEA rendered under its contract with Tarheel. SEA alleges,

In April of 2006, FPS stopped issuing payments for the duties being performed. SEA Inc. continued to fulfill those duties and continued paying all those in its employ performing duties under that contract. Over 60 employees and a total of over 34,000 hours were worked on Fema sites. [O]n May 26, 2006 SEA stopped performing duties under that contract.

Appeal File, Exhibit 3.

Discussion

DHS argues that the appeal should be dismissed because there is no privity of contract between it and SEA. DHS also claims that the claim is untimely as outside the statute of limitations and that the claim is barred by the settlement agreement executed between it and Tarheel. SEA submits that Tarheel acted as an agent of the Government and that it is therefore entitled to bring this claim directly against DHS.

The Contract Disputes Act of 1978 (CDA) permits a “contractor” to appeal a contracting officer’s decision to the Board. 41 U.S.C. § 7104(a) (Supp. IV 2011). The CDA defines a contractor as any party to a federal government contract other than the Federal Government. *Id.* § 7107(7).

A waiver of sovereign immunity is to be strictly construed. *Winter v. Floorpro, Inc.*, 570 F.3d 1367 (Fed. Cir. 2009). Those who are not in privity of contract with the Government cannot avail themselves of the CDA provisions and appeal to the Board. In *Toma West Management Corp. v. General Services Administration*, CBCA 2910, 14-1 BCA ¶ 35,515, we cited an earlier Board decision, *Eagle Peak Rock & Paving, Inc. v. Department of the Interior*, CBCA 2770, 12-2 BCA ¶ 35,146, and rejected an appeal by a company that was not the prime contractor under a government contract. In *Eagle Peak*, at 172,521, we stated,

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 have typically been rejected. See *Floorpro*, 570 F.3d at 1372-73; *Admiralty Construction, Inc. v. Dalton*, 156 F.3d 1217, 1220-21 (Fed. Cir. 1998); *United States v. Johnson Controls, Inc.*, 713 F.2d 1541, 1551 (Fed. Cir. 1983); *Cosmic Construction [Co. v. United States]*, 697 F.2d [1389,] at 1390 [(Fed. Cir. 1982)]; *Wackenhut International, Inc. v. Department of State*, CBCA 1235, 09-

2 BCA ¶ 34,255; *Edward W. Scott Electric Co. v. Department of Veterans Affairs*, CBCA 1388, 09-2 BCA ¶ 34,181.

Thus, a subcontractor may not directly bring an appeal to the Board.

Three exceptions to this rule have been recognized by the courts. One of our predecessor boards defined these exceptions as follows,

[A] subcontractor may prosecute a claim (a) in the prime contractor's name, with the prime contractor's consent and cooperation (*Erickson Air Crane [Co. of Washington v. United States*], 731 F.2d [810,] at 813 [(Fed. Cir. 1984)]; (b) where the prime contractor was clearly acting as a purchasing agent for the Government and the contract stated that the Government would be directly liable to the vendors for the purchase price ([*United States v. Johnson Controls* [, Inc.], 713 F.2d [1541,] at 1551 [(Fed. Cir. 1983])]; and (c) where the contract reflects an intention to make the subcontractor a direct third-party beneficiary and the contracting officer was put on notice of the relationship between the prime contractor and the third-party beneficiary subcontractor (*Flexfab[, L.L.C. v. United States*], 424 F.3d [1254] at 1259, 1263) [(Fed. Cir. 2005)].

Doug Wiggs v. Environmental Protection Agency, GSBCA 16817-EPA, 06-1 BCA ¶ 33,246, at 164,775.

Here, the prime contractor, Tarheel, did not prosecute the claim on behalf of SEA. Also, the contract between DHS and Tarheel did not state that the Government would be directly liable to SEA. Indeed, Tarheel paid SEA directly under the terms of the contract. There is nothing in the record indicating that Tarheel was acting as a purchasing agent for DHS. Finally, the contract here did not make SEA a third party beneficiary. The exceptions do not apply to the matter before us. There is no privity of contract between DHS and SEA. SEA is not a "contractor." SEA, a subcontractor, lacks standing to bring this appeal before the Board.² We therefore have no jurisdiction over the appeal.

² Given this conclusion we need not address other issues presented in this motion, including whether the previous settlement agreement bars this claim and whether SEA's claim is timely or was presented beyond the six year statute of limitations set forth in the CDA, 41 U.S.C. § 7103(a)(4)(a).

Decision

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

JAMES L. STERN
Board Judge

We concur:

CATHERINE B. HYATT
Board Judge

JEROME M. DRUMMOND
Board Judge