



UNITED STATES
CIVILIAN BOARD OF CONTRACT APPEALS

DISMISSED FOR LACK OF JURISDICTION: January 14, 2015

CBCA 4111

CAPITOL CONSTRUCTION, INC.,

Appellant,

v.

DEPARTMENT OF HOUSING AND URBAN DEVELOPMENT,

Respondent.

Jeffrey L. Byroade, President of Capitol Construction, Inc., Windber, PA, appearing for Appellant.

William R. Taylor and Julie Kelley Cannatti, Office of the General Counsel, Department of Housing and Urban Development, Washington, DC, counsel for Respondent.

Before Board Judges **STERN**, **KULLBERG**, and **ZISCHKAU**.

KULLBERG, Board Judge.

Respondent, the Department of Housing and Urban Development (HUD), has requested that the Board dismiss this appeal for lack of jurisdiction. Appellant, Capitol Construction, Inc. (CCI), brought this appeal after the denial of its claim under a contract with the County of Blair Redevelopment and Housing Authorities (COBRAH) in Hollidaysburg, Pennsylvania. The Board finds that it has no jurisdiction in this appeal because no executive agency of the Federal Government was a party to any contract with CCI that is at issue in this appeal. Accordingly, we dismiss this appeal for lack of jurisdiction.

Facts

On February 6, 2014, CCI and COBRAH executed contract 14-1 (contract) for kitchen counter top replacement in apartment units at a HUD-financed housing project. The contract between COBRAH and CCI incorporated a set of HUD clauses for public housing construction contracts. The definitions section in the HUD clauses defined a contracting officer (CO) as a person delegated by the public housing authority (PHA) to “enter into, administer, and/or terminate this contract and designated as such in writing to the Contractor.” The disputes clause in the HUD clauses provided that claims were to be submitted to the CO, and appeals of the CO’s decision were to be submitted “to a higher level in the PHA in accordance with the PHA’s policy and procedures.”

Funding for the contract was provided to COBRAH from HUD under an annual contributions contract (ACC). HUD provided COBRAH with funding for the ACC for the 2014 fiscal year under a capital funds program amendment, which was executed on May 13, 2014. CCI was not a party to the ACC.

On or about March 24, 2014, CCI commenced work, but the CO ordered CCI to stop work on April 1, 2014. Work resumed on July 8, 2014. CCI then submitted a request for a change order to COBRAH for the cost of delay, and by letter dated July 30, 2014, COBRAH denied CCI’s request. Subsequently, CCI filed its appeal with the Board on September 5, 2014. On September 30, 2014, HUD filed a motion to dismiss this appeal for lack of jurisdiction.

Discussion

HUD contends that the Board lacks jurisdiction to hear this appeal because “the subject of this appeal is not a contract for the procurement of property or services by a federal governmental agency, but instead this appeal pertains to a contract between a [PHA] and a service contractor to perform construction work to a public housing development owned and maintained by the relevant PHA.” Respondent’s Motion to Dismiss at 3. This Board has recognized that an appellant “bear[s] the burden of establishing subject matter jurisdiction by a preponderance of the evidence.” *Opportunities for the Aging Housing Corp. v. Department of Housing & Urban Development*, CBCA 1501, 10-1 BCA ¶ 34,311, at 169,488 (2009). Under the Contract Disputes (CDA), 41 U.S.C. §§ 7101-7109 (2012), a contractor is defined as “a party to a Federal Government contract other than the Federal Government.” *Id.* § 7101(7). An executive agency is defined under the CDA as follows:

- (A) an executive department as defined in section 101 of title 5;

- (B) a military department as defined in section 102 of title 5;
- (C) an independent establishment as defined by section 104 of title 5 . . . ; and
- (D) a wholly owned Government corporation as defined in section 9101(3) of title 31.”

Id. § 7101(8).

The dispute in this appeal is between CCI and COBRAH, which is a PHA. A PHA is not an executive agency of the Federal Government, and a dispute between a contractor and a PHA, consequently, is not within the jurisdiction of this Board. *See Management Strategies, Inc. v. Department of Housing & Urban Development*, CBCA 2192, 11-1 BCA ¶ 34,683, at 170,835; *Opportunities for the Aging Housing Corp.*, 10-1 BCA at 169,489. Accordingly, this Board has no jurisdiction over the dispute between CCI and COBRAH.

HUD, the respondent in this appeal, provided COBRAH with funding under an ACC, but such funding did not create a contractual relationship with CCI. The CDA states the following in pertinent part:

Unless otherwise specifically provided in this chapter, this chapter applies to any express or implied contract . . . made by an executive agency for—

- (1) the procurement of property, other than real property in being;
- (2) the procurement of services;
- (3) the procurement of construction, alteration, repair or maintenance of real property; or,
- (4) the disposal of personal property.

41 U.S.C. § 7102(a). It is well established that HUD’s funding of a PHA through an ACC is not a contract under the CDA, and such funding does not create a contractual relationship between HUD and those companies that contract with a PHA. *New Era Construction v. United States*, 890 F.2d 1152, 1155 (Fed. Cir. 1989), *aff’g New Era Construction*, HUD BCA

88-3406-C6, 89-1 BCA ¶ 21,376 (1988); *Giljoy Technology, Inc. v. Department of Housing & Urban Development*, CBCA 1988, 10-2 BCA ¶ 34,552. In this appeal, HUD only provided funding for COBRAH to enter into contracts related to housing projects under the terms of an ACC. HUD, consequently, did not become party to any contract over which the Board would have jurisdiction in this appeal.

Decision

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

H. CHUCK KULLBERG
Board Judge

We concur:

JAMES L. STERN
Board Judge

JONATHAN D. ZISCHKAU
Board Judge