



UNITED STATES  
CIVILIAN BOARD OF CONTRACT APPEALS

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DISMISSED FOR FAILURE TO STATE A CLAIM: June 4, 2018

CBCA 6055

SERVITODO LLC,

Appellant,

v.

SMALL BUSINESS ADMINISTRATION,

Respondent.

William J. Acuff, Management Officer of ServiTodo LLC, Chuckey, TN, appearing for Appellant.

Meagan K. Guerzon, Office of General Counsel, Small Business Administration, Washington, DC, counsel for Respondent.

Before Board Judges **SOMERS** (Chair), **HYATT**, and **O'ROURKE**.

**SOMERS**, Board Judge.

ServiTodo LLC (ServiTodo) received four contracts under section 8(a) of the Small Business Act, 15 U.S.C. § 637(a) (2012), through a partnership arrangement between the Department of Health and Human Services (HHS) and the Small Business Administration (SBA). HHS sought services; SBA arranged for ServiTodo to perform the services. ServiTodo filed multiple appeals claiming that HHS breached these contracts. After receiving \$1,150,000 under a settlement agreement to resolve those appeals, ServiTodo, believing that it had underestimated the total amount of damages, filed another claim against HHS. When we determined that the settlement agreement barred recovery of additional damages from HHS, *see ServiTodo v. Department of Health and Human Services*, CBCA

5524, 17-1 BCA ¶ 36,672, Servitodo filed an identical claim against SBA. This is the claim before us.

SBA has filed a motion to dismiss for failure to state a claim because appellant entered into a global settlement agreement that released all claims under the contracts at issue here. For the reasons set forth below, we grant the motion.

### Background

#### I. SBA 8(a) Program

In October 2012, SBA entered into a partnership agreement with HHS. This arrangement arose under section 8(a) of the Small Business Act, 15 U.S.C. § 637(a), which authorizes SBA to enter into procurement contracts with other federal agencies and to subcontract performance of these contracts to socially and economically disadvantaged small businesses. *See* Pub. L. No. 85-536, § 8(a), 72 Stat. 384, 389 (1958) (codified as amended at 15 U.S.C. § 637(a) (2012)).<sup>1</sup> The agreement states, among other things, that SBA

delegates to the U.S. Department of Health and Human Services for re-delegation to all warranted U.S. Department of Health and Human Services' contracting officers its authority under section 8(a)(1)(A) of the Act to enter into 8(a) prime contracts, and its authority under section 8(a)(1)(B) of the Act to arrange for the performance of such procurement contracts by eligible 8(a) Participants. In accordance with 13 CFR 123.501(a), SBA delegates its 8(a) contract execution function. SBA remains the prime contractor on all 8(a) contracts and the 8(a) Participant remains the SBA's subcontractor.

The agreement also provides that HHS's contracting officer may "make direct award of a contract to the 8(a) Participant, but only after the requirement has been offered to and accepted by the SBA."

In accordance with the regulations, HHS submitted "offering letters" to SBA seeking administrative, professional, and managerial consulting services to be performed at HHS's

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<sup>1</sup> SBA assigns requirement numbers to contracts for tracking purposes after SBA has accepted a procuring agency's requirement into the 8(a) program. Here, contract no. 200-200-2011-39879 is tracked by requirement no. 0405-11-103744. Contract no. 200-2011-41281 is tracked by requirement no. 0405-11-103876. These requirements are not separate contracts.

Center for Disease Control and Prevention (CDC).<sup>2</sup> SBA accepted the offers “on behalf of ServiTodo, LLC.” HHS subsequently awarded several contracts to ServiTodo (contract nos. 200-2011-412181, 200-2011-39879, 200-2012-M-51078, and 200-2011-F-38848).

## II. ServiTodo’s Previous Appeals

Before filing the current appeal, ServiTodo filed eight appeals (CBCA 4777, 4820, 4910, 4911, 4933, 4979, 5065, and 5524) related to claims arising from one or all of the four contracts awarded to ServiTodo. HHS and ServiTodo settled the first seven appeals.<sup>3</sup> The settlement agreement, dated March 3, 2016, provided in pertinent part:

3. ServiTodo LLC agrees that this Settlement Agreement is a complete and final settlement of all present and pending requests for equitable adjustment, claims, and CBCA Appeals . . . and all future requests for equitable adjustments, claims, CBCA appeals, actions in the Court of Federal Claims, and any other forum, related in any way to Contract Nos. 200-2011-412181, 200-2011-39879, 200-2012-M-51078 and 200-2011-F-38848.

4. ServiTodo LLC agrees that this Settlement Agreement operates as a complete Contractor Release of any and all claims against HHS, CDC, and its Agents, Officers, and Employees, pertaining in any way to Contract Nos. 200-2011-412181, 200-2011-39879, 200-2012-M-51078 and 200-2011-F-38848.

The Government paid ServiTodo the sum of \$1,150,000, in settlement.

In CBCA 5524, ServiTodo’s eighth appeal, appellant sought additional damages totalling \$10,691,408.94. ServiTodo claimed that the settlement agreement did not bar recovery of these additional damages, because the agreement did not contemplate the contractor’s indirect costs and profit rates. Notwithstanding, the Board denied CBCA 5524 because the “clear and unambiguous language in the settlement agreement encompass[ed]

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<sup>2</sup> An agency submits an “offering letter” to SBA defining the work to be performed. 13 CFR 124.502(c) (2017). SBA accepts the proposal into the 8(a) program for award to an 8(a) small business. *Id.* 124.504. SBA delegates contract administration for these 8(a) contracts, either through the use of special clauses in the 8(a) contract documents, or by a separate agreement with the procuring activity. *Id.* 124.51.

<sup>3</sup> The settlement agreement, referenced in the complaint and answer, became part of the public record when it was subsequently filed with the Board as an attachment to the motion to dismiss in *ServiTodo*, 17-1 BCA at 178,563, 178,571 n.3.

the claim” that was the subject of the appeal, and therefore released the claim. *ServiTodo LLC*, 17-1 BCA at 178,571.

After investigating possible other avenues of appeal, ServiTodo filed a certified claim with the SBA on December 28, 2017, seeking the same amount of damages, \$10,691,408.94, that it had sought in CBCA 5524. ServiTodo’s theory is that, notwithstanding the settlement with HHS, SBA remains liable for these alleged breaches. ServiTodo contends that while the partnership agreement with HHS delegates much of its 8(a) contract administration duties to HHS, “it does not allocate the risks of events or circumstances that occur during the performance of 8(a) contracts from SBA to HHS, nor is appellant a party to the partnership agreement.”

When SBA did not issue a decision, ServiTodo appealed on a “deemed denied” basis.

### Discussion

We grant the motion to dismiss because we conclude that the facts alleged in the complaint, with reasonable inferences drawn in ServiTodo’s favor, do not “support a facially ‘plausible’ claim to relief.” *TranBen, Ltd. v. Department of Transportation*, CBCA 5448, 17-1 BCA ¶ 36,635 at 178,429 (quoting *Cambridge v. United States*, 558 F.3d 1331, 1335 (Fed. Cir. 2009) (quoting *Bell Atlantic Corp. v. Twombly*, 550 U.S. 544, 557 (2007))).

As noted above, the parties entered into a global settlement agreement after participating in alternative dispute resolution proceedings with a Board judge serving as an ADR neutral. The settlement agreement identified the same four contracts at issue in this case. The agreement served as “a complete contractor release of any and all claims against HHS, CDC, and its agents, officers, and employees, pertaining in any way to [the CDC contracts].” Upon presentation of the executed agreement, the Board entered judgment on April 1, 2016, dismissing the appeals with prejudice. *See ServiTodo LLC*, 17-1 BCA at 178,564.

In *Information Systems & Networks Corp. v. United States*, 68 Fed. Cl. 336 (2005), a case not unlike this, the court examined a settlement agreement between the procuring agency and an 8(a) contractor. The settlement agreement provided for the release of “any and all claims and any other matters arising under or related to the prime contract.” *Id.* at 344. The Government argued that the release language barred the contractor from filing a second action against SBA under the same contracts. The court agreed. Describing the relationship between SBA, the contracting agency, and the 8(a) contractor, the court stated:

It is critical to recognize that SBA's role in the section 8(a) program is not that of an actual contractor, but instead, as a provider of "technical and managerial support to a section 8(a) contractor in the performance of a subcontract." *Harris Systems [International, Inc. v. United States]*, 5 Cl. Ct. [253,] at 256 (citing 15 U.S.C. § 637(a)(7)). Indeed, "in all . . . contracts funneled through the SBA, the work [is] to be performed by the nominal subcontract, which, for all practical purposes, [is] the real contractor." *Brother's Cleaning Serv., Inc. v. United States*, 38 Fed. Cl. 106, 107 (1997).

68 Fed. Cl. at 345. The court continued:

The nominal prime contracting parties are the SBA and the [procuring agency]. It is well-understood, however, that the real party in interest in a Section 8(a) contract is the minority small business. The regulations make this clear.

*Id.* (citations omitted). The court concluded that the settlement agreement barred the contractor from filing a separate action against SBA. We reach the same conclusion here.

ServiTodo argues that the partnership agreement, which states that SBA remains the prime contractor on all 8(a) contract awards, entitles ServiTodo to bring a claim directly against SBA. We disagree. The existence of the partnership agreement does not make SBA the real party in interest. Courts and boards examining similar circumstances have uniformly found that the "tripartite" contracts require that the 8(a) contractor file contract claims with the procuring agency, not SBA, which acts in a "mentorial or consultative" capacity. *See Philadelphia Regent Builders v. United States*, 634 F.2d 569, 573 (Ct. Cl. 1980) (holding the Veterans Administration properly terminated the 8(a) contractor, the court noted that "the SBA did not intend to, nor did it establish the administrative organization for invoking the default clause itself"); *Decorama Painting, Inc.*, ASBCA 25299, 81-1 BCA ¶ 14,992 (SBA acts as agent to bring agency and 8(a) contractor together); *Small Business Administration (Mills Enterprises, Inc)*, AGBCA 76-165, 77-2 BCA ¶ 12,657 (discusses the unique relationship between SBA, the contracting agency, and the 8(a) contractor); *R&R Construction Co.*, VABCA 1101, 74-2 BCA ¶ 10,857, at 51,633 (in 8(a) contract arrangement, "SBA is contemplated as acting only in a mentorial or consultative capacity, without responsibility for or participation in the actual administration of the contract").

Here, SBA acted as an agent, bringing the agency and the 8(a) contractor together.<sup>4</sup> The settlement agreement expressly “operate[d] as a complete Contractor Release of any and all claims against HHS, CDC, and its Agents, Officers, and Employees.” We find that the settlement agreement between ServiTodo and HHS released all claims arising under the CDC contracts, including any potential claims against SBA.

### III. No Jurisdiction To Extend 8(a) Certification

On the final page of its claim, ServiTodo requests “that the SBA be ordered to extend its certification for the 8(a) program for an amount of time equal to that between the publication of the false and derogatory CPARS performance data and its correction in March 2016.” SBA has not addressed this request in its motions.

Nonetheless, we note that under the CDA, we do not have the authority to grant injunctive relief or order specific performance. *See YRT Enterprises LLC v. Department of Justice*, CBCA 5701, 17-1 BCA ¶ 36,809, at 179-405-06; *Eyak Technology, LLC v. Department of Homeland Security*, CBCA 1975, 10-2 BCA ¶ 34,538, at 170,340 (“The Board does not have jurisdiction to order specific performance or grant injunctive relief.”). We cannot order the agency to take the action requested.

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<sup>4</sup> Nor can ServiTodo enforce the partnership agreement as a third party beneficiary. “In order to prove third party beneficiary status, a party must demonstrate that the contract not only reflects the express or implied intention to benefit the party, but that it reflects an intention to benefit the party directly.” *Glass v. United States*, 258 F.3d 1349, 1354 (Fed. Cir. 2001). The partnership agreement does not identify ServiTodo by name, nor does it reflect an intention to benefit ServiTodo directly.

Decision

SBA's motion to dismiss for failure to state a claim is granted and the appeal is **DISMISSED**.<sup>5</sup>

*Jeri Kaylene Somers*

JERI KAYLENE SOMERS

Board Judge

We concur:

*Catherine B. Hyatt*

CATHERINE B. HYATT

Board Judge

*Kathleen J. O'Rourke*

KATHLEEN J. O'ROURKE

Board Judge

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<sup>5</sup> SBA also moves to dismiss for lack of jurisdiction on the grounds that “SBA is not the appropriate respondent for ServiTodo’s appeal because: (1) SBA did not award, fund, or administer any of the contracts at issue; and (2) SBA did not provide an SBA Contracting Officer’s (CO) final decision regarding this claim.” We decline to decide these issues here. “While we are generally obligated to resolve jurisdictional challenges first, Supreme Court precedent only requires federal courts to answer questions concerning their Article III jurisdiction—not necessarily their statutory jurisdiction—before reaching other dispositive issues. *Minesen Co. v. McHugh*, 671 F.3d 1332, 1337 (Fed. Cir. 2012) (citing *Steel Co. v. Citizens for a Better Environment*, 523 U.S. 83, 95-97 (1998)). Although the question as to whether we possess jurisdiction to entertain claims against the SBA under these circumstances is legitimate, we “reserve [this potentially] difficult question[] of . . . jurisdiction when the case alternatively could be resolved on the merits in favor of the same party.” *Id.* (quoting *Steel Co.*, 523 U.S. at 111).