



UNITED STATES
CIVILIAN BOARD OF CONTRACT APPEALS

DISMISSED FOR LACK OF JURISDICTION: February 28, 2020

CBCA 6600

RASHID EL MALIK,

Appellant,

v.

DEPARTMENT OF VETERANS AFFAIRS,

Respondent.

Rashid El Malik, pro se, Palos Verdes Estate, CA.

Laetitia Coleman and Mary A. Mitchell, Office of General Counsel, Department of Veterans Affairs, Houston, TX, counsel for Respondent.

Before Board Judges **SOMERS** (Chair), **GOODMAN**, and **LESTER**.

SOMERS, Board Judge.

Mr. Rashid El Malik, a self-represented litigant, seeks to enforce a contract between the Department of Veterans Affairs (VA) and Moderno, Inc. (Moderno), based upon his status as a third-party beneficiary.¹ During a status conference, we raised the issue of whether appellant could bring this action as a third-party beneficiary under the Contract

¹ Mr. El Malik requests that the contractor be required to fully perform the contract, that the VA provide him a time line for completion, that the VA pay him for costs allegedly resulting from contractor or Government caused delay, and that appellant be paid attorney fees incurred for the preparation of his claim.

Disputes Act (CDA), 41 U.S.C. §§ 7101-7109 (2012). At our request, the parties submitted position papers with supporting arguments. After considering the arguments presented, we conclude that we lack jurisdiction to entertain Mr. El Malik's claim. Accordingly, we dismiss the claim.

Background²

Under statute and regulations, the VA provides grants to service disabled veterans intended to improve their quality of life and enable them to live independently in their own homes. *See, e.g.*, 38 U.S.C. § 3120 ("Program of independent living services and assistance"). These programs provide independent living services and assistance in various geographic regions of the United States "to a veteran who has a serious employment handicap resulting in substantial part from a service-connected disability." The VA contracts for these services.

Mr. El Malik is the direct beneficiary of this program. Mr. El Malik received two grants, one in 2014, and the second in 2017, to rehabilitate his home. After the first contractor failed to complete the work, the VA agreed to seek a new contractor to finish the work. Once Mr. El Malik's grants had been depleted, in order to complete the work, the VA entered him into a different VA program, which required that he sign a rehabilitation plan. He did so on September 11, 2017. The document setting out the rehabilitation plan required:

The Veteran will meet all VA regulations, and provide regular reports of progress to the Case Manager There will be no modifications to the contract. The Veteran may not pay for or request upgraded materials, nor change the configuration of the project. Delays of the process by the Veteran may lead to discontinuance of services.

To implement the rehabilitation plan, the VA issued a solicitation seeking a contractor to perform work "to improve the Appellant's living conditions and allow safe emergency egress to and from the home." Moderno submitted a proposal and received the contract award on May 30, 2018. The contract included a performance work statement (PWS) detailing the planned modifications to Mr. El Malik's residence. The VA's contracting officer and Moderno's representative signed the contract. Mr. El Malik did not sign the contract.

² We draw these facts primarily from appellant's claim, notice of appeal, brief, and the exhibits appended to his brief. We note that Cheryl E. Adams, Esq., prepared Mr. El Malik's claim, which was submitted to the contracting officer on June 18, 2019.

In his amended claim, Mr. El Malik alleges that the contract work has been poorly performed, and he provides numerous examples of the problems he has encountered as a result. Mr. El Malik asserts that he has made many attempts to get the Government to enforce the contract, to no avail. Mr. El Malik argues that because he is the intended beneficiary of the contract, he is entitled to enforce it before this Board. When the contracting officer failed to issue a final decision, Mr. El Malik appealed to us on a “deemed denial” basis.

Discussion

We find that we do not possess jurisdiction to hear Mr. El Malik’s claim. The CDA sets forth the Board’s jurisdiction to entertain appeals involving contract disputes. *See Jane Mobley Associates, Inc. v. General Services Administration*, CBCA 2878, 16-1 BCA ¶ 36,209, at 176,676 (“The CDA delineates the bounds of the Board’s jurisdiction over contract disputes. . . .”). Contract jurisdiction in the boards of contract appeals derives from, and is limited to claims that arise under, the CDA. *Maxima Corp.*, EBCA C-0206354, et al., 2003 WL 21254235 (May 12, 2003). “Jurisdiction is a threshold matter, and where the Board lacks subject matter jurisdiction, [it] may not proceed to decide the merits of the case.” *ARI University Heights, LP v. General Services Administration*, CBCA 4660, 15-1 BCA ¶ 36,085, at 176,185.

Only a “contractor” may appeal a contracting officer’s decision. 41 U.S.C. § 7104(a). The CDA defines a contractor as any party to a federal government contract other than the Federal Government. *Id.*, § 7107(7). This waiver of sovereign immunity must be strictly construed, *Winter v. Floorpro, Inc.*, 570 F.3d 1367, 1370 (Fed. Cir. 2009), and those who are not in privity of contract with the Government cannot avail themselves of the CDA provisions and appeal to the Board. “This includes subcontractors” and others that are third-party beneficiaries of the prime contract. *Id.* at 1371-72.

Mr. El Malik is not a contractor nor did he sign the contract. However, Mr. El Malik signed a rehabilitation plan as part of the program that set forth certain requirements, such as requiring him to provide regular progress reports of the work performed to the case manager. This, he argues, demonstrates that he is the intended beneficiary of the contract.

No one disputes that Mr. El Malik will benefit from the work performed under the contract, and, as such, could be considered a third party beneficiary. A “third-party beneficiary” is “[a] person who, though not a party to a contract, stands to benefit from the contract’s performance.” Black’s Law Dictionary 165 (8th ed. 2004), quoted in *Floorpro*, 570 F.3d at 1371-72. Even so, being a third-party beneficiary does not equate to being a

contractor. As we stated above, under the CDA, only a contractor may appeal a contracting officer's decision to a board of contract appeals.

This is not to say that a third-party beneficiary of a federal procurement contract lacks any recourse against the Government. Although such third-party beneficiaries cannot seek recourse under the CDA, they may be able to utilize their third-party beneficiary status to seek damages in the Court of Federal Claims under the Tucker Act, 28 U.S.C. § 1491. The Tucker Act provides the Court of Federal Claims with jurisdiction to "render judgment upon any claim against the United States founded . . . upon any express or implied contract with the United States." 28 U.S.C. § 1491(a)(1). Third-party beneficiaries of federal procurement contracts have been allowed to pursue their claims against the Government in that court under the auspices of the Tucker Act. *See Floorpro*, 570 F.3d at 1372 (interpreting a prior Federal Circuit decision, *D&H Distributing Co. v. United States*, 102 F.3d 542 (Fed. Cir. 1996), as basing jurisdiction of a third-party beneficiary claim in the Court of Federal Claims on the Tucker Act, not the CDA).

We conclude, therefore, that even with reasonable inferences drawn in Mr. El Malik's favor, the evidence does 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))).

Decision

For these reasons, we **DISMISS** the appeal for **LACK OF JURISDICTION**.

Jeri Kaylene Somers

JERI KAYLENE SOMERS

Board Judge

We concur:

Allan H. Goodman

ALLAN H. GOODMAN

Board Judge

Harold D. Lester, Jr.

HAROLD D. LESTER, JR.

Board Judge