
Appeal of: :
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JANUS CORPORATION, : HUDBCA No. 97-B-101-C1
: :
Appellant :
: :
_____ :

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RULING ON GOVERNMENT'S MOTION TO DISMISS APPEAL

Positions Of The Parties

On October 21, 1996, the Board received and docketed the present appeal by Janus Corporation (Janus). By Order dated October 24, 1996, the Board, noting Janus' apparent status as a subcontractor to a contract between HUD and Republic Realty Services, Inc. (Republic), ordered Janus to submit a brief supporting its contention that the Board has jurisdiction to hear its appeal. Janus filed its brief on November 26, 1996 and on December 26, 1996, the Government filed a motion to dismiss this appeal.

Janus contends that jurisdiction to hear this case is vested with the Board because: (1) Republic is not a prime contractor; (2) HUD consented to a grant of jurisdiction to the Board; and (3) Janus has an implied-in-fact contract with the United States Department of Housing and Urban Development (HUD). The Government contends that the Board lacks jurisdiction to hear this case because: (1) no contract exists between HUD and Janus, either express or implied; (2) there has been no contracting officer's final decision on Janus' appeal which would give rise to certain appellate rights under the Contract Disputes Act of 1978 (CDA), 41 U.S.C. §§601-613; (3) there has been no assignment of authority from the Secretary of HUD to the Board to hear this matter; and (4) Republic was not the Government's procurement agent such that privity of contract exists between Janus and HUD which would define Janus as a contractor under the ODA and authorize Janus to exercise the appellate rights set forth under the CDA.

Discussion

Janus' arguments on all three contentions must fail for the reasons set forth below. First, it is clear that Republic is a prime contractor with HUD, as stated in both the prime contract and Janus' subcontract. HUD entered into contract number 121-91-3019 with Republic for project management services for HUD-owned or Mortgagee-In-Possession projects within specific California

counties. (Govt. Exh. 1, §B). Subsequently, as authorized by the prime contract, Republic awarded a subcontract to Janus for asbestos abatement for one of the HUD projects. (Govt. Exh. 1, p. 2 ¶4, §C.1.6; App. Exh. 1.) The position of Republic as the prime contractor with HUD, and Janus as Republic's subcontractor, was also clearly set forth in the subcontract, which stated, in pertinent part:

This solicitation/contract is distributed for solicitation by Republic. Republic is the prime contractor for the U.S. Department of H.U.D. All questions, correspondence, etc., shall be directed to Republic, as all solicitations/contracts, etc., will be between Republic and the Contractor.

(App. Exh. 1, §H-9, p. 99.)

In light of the clear contract and subcontract provisions, Janus' contention that Republic was not a prime contractor with HUD has no merit.

Janus', argument that it has the right to a direct appeal to the Board under the CDA is also improper. Section 3(a) only applies to a contract entered into by an executive agency. HUD is not a party to Janus' subcontract with Republic. As a general rule, the prime contractor must bring the appeal, in the name of the prime, on behalf of the subcontractor for CDA jurisdiction to attach to a subcontractor's claim. Erickson Air Crane Co. of Washington, Inc. v. United States, 731 F.2d 810 (Fed. Cir. 1984). Direct subcontractor appeals have been permitted only in rare, exceptional cases such as when the prime contract or agency regulations clearly permit direct subcontractor appeals. Arcon, Inc., ASBCA No. 44572-664, 93-1 BCA ¶25,557 at 127,291, quoting United States v. Johnson Controls, 713 F.2d 1541 (Fed. Cir. 1983). Janus cites to no HUD regulations which permit subcontractor appeals, and the prime contract between HUD and Republic contains no provision for subcontractor appeals.

Janus, however, argues that HUD consented to a grant of jurisdiction to the Board, based upon the provisions of a "disputes clause" contained in the subcontract. Janus contends that because HUD approved the overall subcontract, HUD consented to jurisdiction such that Janus was authorized to bring suit in its own name before the Board. The referenced subcontract clause provides as follows:

b. "Claim" as used in this clause, means a written demand or written section by one of the contracting parties seeking, as a matter of right, the payment of money in a sum certain, the adjustment of interpretation of contract terms, or other relief arising, under or related to the contract. A claim by the Consultant shall be made in writing and submitted to the Contracting Officer for a written decision. The Contractor shall provide vouchers, invoices¹ or other supporting documents to show the Contractor's basis for the claim. The Contracting Officer's decision shall be final unless the Contractor's (sic) appeals or files a suit as provided in the Act.

(App. Exh. 1, §H-4, p. 94.)

Janus' interpretation of the referenced subcontract clause as providing for a direct subcontractor appeal is not reasonable when read together with the rest of the subcontract as well as the jurisdictional limitations of the CDA. The foregoing clause is so poorly drafted that, when taken in context and construing the terms of the subcontract as a whole, the clause cannot stand as a proper disputes clause.

First, the term "contractor," as used throughout the subcontract, refers to Janus. (App. Exh. 1, §C-5, ¶1.1, p. 13). However, the term, "consultant," is not defined in the subcontract, and it is unclear whether the term refers to Republic or to some consultant hired by Republic. It is unlikely that it refers to Republic since, throughout the subcontract, Republic consistently refers to itself by name. Since any CDA appeal would have to be brought in Republic's name rather than that of some third party consultant, the patent inconsistencies and ambiguity of subparagraph (b) necessarily render this provision unenforceable.

One of the most basic tenets of Government contract law mandates that a contract is to be interpreted as a whole and contract terms must be harmoniously construed to give a reasonable meaning to all contract provisions. Hol-Gar Manufacturing Co. v. United States, 351 F.2d 972 (Ct. Cl. 1965). Since the disputes clause set forth by subparagraph (b) is unenforceable, the standard disputes clause incorporated by reference in the subcontract provisions must be interpreted as in effect and controlling. The subcontract incorporated by reference FAR clause 52.233-1 Disputes (Apr 1984) -Alternate I (Apr 1984), which clearly requires any claim to be submitted by the prime contractor. (App. Exh. 1, §I-1, p. 103). To further clarify the roles of Republic and Janus, with respect to the FAR clauses, the subcontract states:

This Subcontract is placed under a prime contract with the U.S. Government and therefore, the following Federal Acquisition Regulation (FAR) Clauses are hereby incorporated in and made a part of this Subcontract with the same force and effect as if set forth in full text. . . . Where appearing, the terms, "Government" and "Contracting Officer" shall be construed to mean "Republic," except where such terms are used in a manner which clearly contemplate the Government in a role not as a party to this Subcontract.

(App. Exh. 1, §I-1, p. 103.)

It is thus clear that, under the terms of the effective disputes clause, Janus' only right to submission of a claim to HUD is via sponsorship by Republic. This conclusion is buttressed by FAR 44.203(b) (3), which prohibits contracting officers from consenting to subcontracts obligating the contracting officer to deal directly with the subcontractor. Additionally, FAR 44.203(c) states:

(c) Contracting officers should not refuse consent to a subcontract merely because it contains a clause giving the subcontractor the right of indirect appeal to an agency board of contract appeals if the subcontractor is affected by a dispute between the Government and the prime contractor. Indirect appeal means assertion by the subcontractor of the prime contractor's right to appeal or the prosecution of an appeal by the prime contractor on the

subcontractor's behalf. . . . The clause may not attempt to obligate the contracting officer or the appeals board to decide questions that do not arise between the Government and the prime contractor or that are not cognizable under the clause at 52.233-1, Disputes.

Accordingly, Janus' attempt to read the conferral of a right of direct appeal under the terms of the subcontract must fail in the absence of an explicit sponsorship of Janus by Republic. There is no evidence of such sponsorship here.

Janus' final argument is that the Janus subcontract should be interpreted to be an implied-in-fact contract with HUD. However, there is nothing in the pleadings which would establish jurisdiction before the Board in this dispute under the principle of an implied-in-fact contract. The CDA authorizes federal agency boards of contract appeals to exercise jurisdiction over express and implied-in-fact contracts. 41 U.S.C. §602(a). An implied-in-fact contract, although based upon the conduct of the parties, has the same requirements of offer, acceptance and consideration as an express contract. Finche v. United States, 675 F.2d 289 (Ct. Cl. 1970); Algonac Mfg. Co. v. United States, 428 F.2d 1241 (Ct. Cl. 1970)

In the instant case, Janus fails to meet the established requirements necessary to create an implied-in-fact contract between itself and HUD. Janus has presented no evidence of any intent on the part of HUD to contract directly with Janus. Instead, what is evident is HUD's express contract with Republic and HUD's approval of Republic's subcontract with Janus. That subcontract expressly states that Republic is the prime contractor with HUD.

One of the key requisites to an implied-in-fact contract is that a Government official, with actual authority to contract on the Government's behalf, must have authorized any implied-in-fact contract. West State, Inc., ASBCA No. 47971, 95-1 BCA ¶47,971 (1995) . Here, Janus does not allege that it ever communicated directly with any HUD official with the power to authorize or ratify a contract with Janus. The fact that HUD's contracting officer approved the subcontract does not satisfy the explicit requirements necessary to create an implied-in-fact contract between HUD and Janus. In fact, FAR 44.203(a) states that the contracting officer's consent to a subcontract or approval of the contractor's purchasing system does not constitute a determination of the acceptability of the subcontract terms unless the consent or approval specifically specifies such. Janus' claim of an implied-in-fact contract fails for these reasons. Industrial Piping, Inc., HUD BCA No. 95-G-121-C5, 96-2 BCA ¶28,554 (1996).

Conclusion

For the reasons set forth above, we conclude that this Board has no jurisdiction over this controversy. The Government's motion to dismiss is **GRANTED**. This appeal is dismissed for want of jurisdiction.

Lynn J. Bush
Administrative Judge

Concur:

David T. Anderson
Administrative Judge

Jean S. Cooper
Administrative Judge

March 26, 1997