



UNITED STATES
CIVILIAN BOARD OF CONTRACT APPEALS

MOTION TO DISMISS FOR LACK OF JURISDICTION DENIED:
June 8, 2015

CBCA 3905

COOLEY CONSTRUCTORS, INC.,

Appellant,

v.

GENERAL SERVICES ADMINISTRATION,

Respondent.

Anton J. Rupert of Crowe & Dunlevy, Oklahoma City, OK, counsel for Appellant.

Elyssa Tanenbaum, Office of General Counsel, General Services Administration, Washington, DC, counsel for Respondent.

Before Board Judges **SOMERS**, **STERN**, and **GOODMAN**.

GOODMAN, Board Judge.

This appeal, filed in the name of the contractor, Cooley Constructors Inc. (Cooley or appellant), was from a final decision by the contracting officer of respondent, the General Services Administration (GSA). Respondent has filed a motion to dismiss the appeal for lack of jurisdiction because the appeal was filed by the subcontractor, Delaware Elevators, Inc. (Delaware or subcontractor), rather than the contractor, as required by the Contract Disputes Act (CDA), 41 U.S.C. §§ 7101-7109 (2012).

Factual Background

On March 8, 2012, appellant and respondent entered into contract no. GS-02P-12-PW-C-0002 for the renovation of two elevators at the James F. Hanley Federal Building in Syracuse, New York (the contract). Cooley entered into a subcontract with Delaware for some of the contract work.

On March 7, 2014, Cooley submitted a request for equitable adjustment (REA), a claim pursuant to the CDA, to respondent, that stated in relevant part:

This letter is to submit a request for equitable adjustment on behalf of our subcontractor, Delaware Elevator. . . .

The total amount of this request is for equitable adjustment with subcontractor costs including our profit and bond is \$63,154. We are also requesting 135 days be added to the contract

On March 19, 2014, the GSA contracting officer issued an appealable final decision denying the REA.

On April 9, 2014, Cooley's vice president of construction management wrote a letter to Delaware's president, which read in relevant part:

Pursuant to your request, we submitted the attached request for equitable adjustment to the Government on your behalf. Please be advised that the Government has officially denied your request and has provided the attached explanation from the Government's design team as its reasoning behind its decision.

If you disagree with the Government's decision, you have two options:

1. We agree to permit you to file an appeal to the Federal Board of Contract Appeals within 90 days of the Government's decision which was dated 19 March 2014. The appeal would have to be filed on or before 17 June 2014.

Cooley's letter also referenced the Disputes clause in the subcontract, which read:

6.3. Claims relating to the Owner. The Subcontractor agrees to make all claims for which the owner is or may be liable in the manner and within the time limits provided in the Contract Documents for like claims by the

Contractor against the owner in sufficient time for the Contractor to make such claims against the Owner in accordance with the Contract Documents. . . .

On June 12, 2014 Delaware's chief financial officer (CFO) filed a notice of appeal at this Board on Delaware stationery. His signature is the only signature to appear on the notice of appeal. He is neither an attorney nor an officer of Cooley. As the notice of appeal stated that Cooley was the prime contractor, the appeal was docketed in the name of the contractor. Thereafter, two notices of appearance were filed on behalf of appellant, by Delaware's CFO and by Delaware's contract specialist.

On July 16, 2014, respondent's counsel wrote a letter to the Board, which noted that the appeal had been brought by the prime contractor, Cooley, on behalf of its subcontractor, Delaware, but the two notices of appearance had been filed by individuals that were employees of the subcontractor, not officers or Cooley or attorneys. Accordingly, respondent's counsel stated: "GSA respectfully requests that the Board order Cooley, in accordance with CBCA Rule 5^[1], to [file a notice of appearance of] one of its officers or an attorney."

Thereafter, the Board issued an order dated July 22, 2014, directing appellant to comply with CBCA Rule 5.

On August 26, 2014, Anton J. Rupert, an attorney, filed a notice of appearance as counsel for Cooley. Respondent then filed a motion to dismiss the appeal for lack of jurisdiction, and appellant has filed its response, as discussed below.

Discussion

Respondent's motion to dismiss asserts that the Board must dismiss this appeal for lack of jurisdiction, because the notice of appeal as filed by a representative of the subcontractor was not filed by the contractor, was therefore defective, and could not later be remedied by the contractor's attorney filing a notice of appearance. Appellant's counsel responds that the circumstances support jurisdiction, as the contractor authorized the subcontractor to file the notice of appeal, the notice of appeal was filed in the name of the contractor, and his subsequent notice of appearance complied with CBCA Rule 5.

¹ CBCA Rule 5 (48 CFR 6101.5 (2014)) reads in relevant part: "Any appellant, petitioner, or applicant may appear before the Board by an attorney-at-law licensed to practice in a state, commonwealth, or territory of the United States, or in the District of Columbia. . . . [A] corporation, trust, or association may appear by one of its officers."

While the specific fact scenario of this appeal has not been addressed by this Board², we find the decision in *Holmes & Narver Services, Inc.*, ASBCA 51155, 00-2 BCA ¶ 30,972, persuasive and dispositive of the issues raised. In that case, the prime contractor submitted its subcontractor's claim to the contracting officer and received an appealable decision denying the claim. The subcontract contained a disputes provision similar to the one in this appeal that allowed the subcontractor to have the subcontractor prosecute its claim in the name of the prime contractor. The prime contractor advised the subcontractor that the prime contractor would pursue the subcontractor's claim if the subcontractor requested. However, unlike in the instant appeal, the subcontractor filed a notice of appeal in its own name. Thereafter, the prime contractor filed an amendment to the notice of appeal, asking that the name of the case be changed to that of the prime contractor, and the prime contractor had an attorney enter an appearance on its behalf, noting that the prime was sponsoring the subcontractor's claim. Respondent moved for dismissal for lack of jurisdiction, alleging that the filing of the amended notice of appeal and notice of appearance by the prime contractor occurred after the expiration of the ninety-day appeal period, and therefore such "retroactive sponsorship" was ineffective to give the board jurisdiction over the appeal. The ASBCA denied the motion to dismiss, finding that the circumstances supported sponsorship of the subcontractor's appeal by the prime contractor. That board stated:

It is well settled that the Board has jurisdiction over appeals from contracting officer's decisions on claims in which a subcontractor is the real party in interest only if pursued under the sponsorship of the prime contractor. . . . [S]ponsorship and authority can be inferred when the prime contractor subsequently ratifies the filing of that appeal and "consistently cooperates" in the presentation of the claim even if the prime contractor did not specifically

² Respondent cites two decisions of this Board that are factually distinguishable. In *KK&L Administration Inc. v. Department of the Interior*, CBCA 2802, 12-2 BCA ¶ 35,180, there was no credible evidence that the prime contractor had authorized the subcontractor to file the appeal, and there was no subsequent entry of appearance by an attorney for the prime contractor. In *Affiliated Western, Inc. v. Department of Veterans Affairs*, CBCA 3877, 14-1 BCA ¶ 35,670, the subcontractor filed an appeal from a deemed denial of a claim without any evidence that the prime contractor had authorized the filing of the appeal. When the prime contractor filed an amended notice of appeal submitted by an attorney, the Board dismissed the prior appeal and docketed the amended notice of appeal as a new appeal, finding jurisdiction over the prime contractor's appeal.

authorize the subcontractor to file the appeal prior to the expiration of the appeal period. *See, e.g., Algernon Blair Industrial Contractors, Inc.*, ASBCA No. 25277, 83-2 BCA ¶ 16,737; *Taysom Construction Company*, ASBCA No. 41016, 91-2 BCA ¶ 23,710.

00-2 BCA at 152,850-51.

In the instant appeal, the circumstances are even more favorable to appellant than those in *Holmes & Narver Services, Inc.*, as the prime contractor authorized an appeal by the subcontractor, after which the subcontractor proceeded to file a notice of appeal in the name of the prime contractor. The filing of the notice of appearance by appellant's attorney affirmed the prior authorization by the prime contractor to the subcontractor to file the appeal, rather than ratifying an act that previously lacked authorization. We find that the Board has jurisdiction over the appeal and deny respondent's motion to dismiss. *See also J.E. McAmis, Inc.*, ASBCA 54455, et al., 04-2 BCA ¶ 32,746; *Batteast Construction Co.*, ASBCA 30452, et al., 89-3 BCA ¶ 21,933.

Decision

Respondent's motion to dismiss for lack of jurisdiction is **DENIED**.

ALLAN H. GOODMAN
Board Judge

We concur:

JERI KAYLENE SOMERS
Board Judge

JAMES L. STERN
Board Judge