Appeal of:	:	
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INDUSTRIAL PIPING, INC.,	:	HUDBCA No. 95-G-121-C5
	:	
Appellant	:	
	:	

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RULING ON GOVERNMENT'S MOTIONS TO DISMISS APPEAL
AND GOVERNMENT'S MOTION FOR SUMMARY JUDGMENT

On March 20, 1995, the Government filed a motion to dismiss this appeal and subsequently, on October 13, 1995, the Government filed a motion for a more definite statement and a second motion to dismiss. The motions to dismiss the appeal assert that Industrial Piping, Inc. (IPI) is a subcontractor whose claim is not sponsored by the prime contractor. As such, the Government contends this Board lacks jurisdiction under the Contract Disputes Act of 1978 (CDA), 41 U.S.C. §§ 601-613, to hear and decide this appeal. The Government further states that (1) there has been no contracting officer's final decision from which an appeal may be taken; (2) there is no assignment of this matter by the Secretary of the United States Department of Housing and Urban Development (HUD) pursuant to 24 C.F.R. § 20.4 (b) which would establish Board jurisdiction to hear the appeal; and (3) there is no provision in any contract, express or implied, which would confer jurisdiction on the Board. Appellant opposes the motions and argues that a HUD official gave verbal authorization for the work performed. On August 23, 1996, the Government filed a motion for summary judgment containing arguments which do not differ materially from those proffered in its motions to dismiss. In light of the Board's ruling on the motions to dismiss, it is unnecessary to address HUD's motion for summary judgment separately.

Findings of Undisputed Facts

1. On November 22, 1991, Diversified Realty Group (Diversified) was awarded a HUD contract for management services for a HUD-owned multifamily project, Ginger Ridge Apartments (GRA). (Appeal File (AF), Tab 2.1.) The initial contract period was for a two-year term and was subsequently extended through November 21, 1995. (AF, Tabs 2.2 through 2.6.) Sections B-2, ¶4 and C-2, ¶1.6.1 of the contract provided that Diversified's authority to make direct purchases was limited to $25,000 without the written permission of the contracting officer. Diversified was instructed to establish and maintain a purchasing system acceptable to the contracting officer for the tracking and documentation of subcontracts (Contract section C-3, ¶1.6.3.)

2. Diversified authorized IPI to supply and install new boilers at GRA. (AF, Tab 3.27) Although each individual order by Diversified for IPI's services was under $25,000, Diversified's records reflected payments from Diversified to IPI for boiler work in amounts totalling more than $100,000 from November 6, 1991 through May 28, 1992. (AF, Tabs 3.27, 4.1.) All work performed by IPI at GRA was done via oral agreement between IPI and Diversified, without written contracts or purchase orders. (Respondent Appeal, dated Feb. 6, 1995, at 1; IPI letter to HUDBCA dated June 26, 1995 at 4; IPI letter to HUDBCA dated June 17, 1996 at 3.) IPI's president admits that he never spoke with the HUD contracting officer to receive approval to perform work or to receive a purchase order. (IPI letter to HUDBCA dated June 17, 1996 at 3.)

3. During all times relevant, Sheila Cameron was the multifamily realty specialist at the HUD Chicago Office Multifamily Property Disposition Branch who serviced Diversified's contract at GRA. (AF, Tab 2.1, p. 67; Tab 3.2, p. 1; Tab 3.3, p. 1; Tab 3.15, p. 1.) Leon Bennett was Diversified's on-site maintenance superintendent at GRA. (AF, Tab 3.3, p. 1; Tab 3.12, p. 1; Tab 3.29; Tab. 3.30, pp. 2-3.) Phil McDade was Diversified's chief engineer at the GRA project. (Joint Stipulation of Fact #2.)

4. Pursuant to a new delegation of authority, issued by the Secretary of HUD, effective August 24, 1992, certificates of appointment as contracting officers of all HUD Chicago housing program staff (including multifamily realty specialists) were revoked. (AF, Tab 3.7; 57 Fed. Reg. 11962-64, April 8, 1992. The property disposition contracting function was transferred from the Chicago Office Multifamily Property Disposition Branch to the HUD Chicago Office Contracting Division as a result of the change in delegation of authority. (AF. Tab 3.7; 57 Fed. Reg. 11962-64, April 8, 1992.) In accordance with this redelegation of authority, as of August 24, 1992, only an authorized HUD official in the Chicago Contracting Office would have the authority to enter into a contract with IPI.

5. It was IPI's belief that Sheila Cameron had given Phil McDade verbal approval on September 11, 1992, for IPI to install three boilers at GRA. IPI further believed that Phil McDade passed this message on to Leon Bennett, who, in turn, informed IPI's president that approval for performance of the job had been granted. (IPI Complaint dated Sept. 8, 1995, end. 8; IPI letter to HUDBCA dated Nov. 6, 1995; IPI letter to HUDBCA dated June 17, 1996, p. 1.) Statements actually made by Cameron and McDade are in dispute. (AF, Tab 3.31; Joint Stipulation of Fact #3; IPI Complaint, dated Sept. 8, 1995, end. 10.)

6. On September 18, 1992, three sectional boilers, jackets, burners, and controls were placed, unconnected, in the boiler rooms at GRA by IPI. (IPI Complaint dated Sept. 8, 1995, p. 2; Joint Stipulation of Fact #1.) On or about December 1, 1992, IPI removed the boilers and subsequently returned them to the supplier. (Joint Stipulation of Fact #1.)

7. Diversified's site manager at GRA, Jenefer Ford, stated that McDade denied telling Bennett that Cameron had given approval for installation of the three boilers. Ford informed IPI's president that because she could not verify any conversation between McDade and Cameron, Diversified would not support IPI's efforts to request payment and/or restock charges based on a verbal commitment unknown to Diversified and that IPI would have to address its payment concerns directly to HUD. (IPI Complaint, dated Sept. 8, 1995, end. 10.)

8. IPI forwarded invoice no. 4081, dated January 15, 1993, to Frank Slezak, regional contracting officer, HUD Chicago Regional Office, for IPI's claimed

costs of labor ($1,160.00), restocking ($7,155.37), cost-estimating ($560.00), and lost profit ($14,000.00), totalling $22,875.37. (AF, Tab 3.25, p. 3.) Documentation submitted by IPI and HUD does not establish when this invoice was originally sent or when it was initially received by HUD.

9. By letter dated December 6, 1993, received by Slezak on December 13, 1993, IPI demanded payment of its invoice amount, and included a copy of the invoice as an attachment to the letter. (AF, Tab 3.25.) On December 20, 1993, Slezak issued an initial denial of IPI's claim. (AF, Tab 3.27.) At the behest of IPI, further review and investigation of IPI's claim were undertaken by HUD. However, by letter dated June 4, 1993, Slezak issued a final denial of IPI's claim, stating that: (1) IPI lacked an enforceable written contract with HUD; (2) there was no proof that IPI was given authorization by HUD to install the boilers; and (3) HUD is not bound by the unauthorized acts of its employees or contractors. (AF, Tabs 3.28, 3.32.) The contracting officer did not characterize his denial of IPI's claim as a final decision of a HUD contracting officer under the Contract Disputes Act (CDA), 41 U.S.C. §605. (AF, Tabs 1, 3.32.)

Discussion

With certain exceptions not relevant here, the HUD Board of Contract Appeals derives its jurisdiction to resolve contract disputes from the CDA, 41 U.S.C. §§ 601-613. The CDA, under section 3(a) , grants the Board jurisdiction over cases involving:

> [A]ny express or implied contract entered into 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 real property.

This Board also has the authority to decide other matters which are assigned to it by the Secretary of HUD under 24 C.F.R. § 20.4. However, there has been no secretarial assignment of jurisdiction in the present action.

It is well established that, under ordinary Government prime contracts, subcontractors do not have standing to sue the Government under the CDA. Erickson Air Crane Co. of Washington, Inc. v. United States, 731 F.2d 810 (Fed. Cir. 1984); United States v. Johnson Controls, Inc., 713 F. 2d 1541 (Fed. Cir. 1983); Peerless Ins. Co., ASBCA No. 28887, 88-2 BCA ¶ 20,730 (1988). In Technic Services. Inc., ASBCA No. 33411, 89-3 BCA ¶ 22,193 (1989), the Armed Services Board of Contract Appeals (ASBCA) held that a subcontractor, acting in the capacity of a subcontractor, was jurisdictionally barred from appealing a final contracting officer's decision. The ASBCA went on to state that "[t]he [CDA] gives the right to appeal to a Board of Contract Appeals to contractors only and not to subcontractors." Id. at 111,651.

The CDA defines a contractor as "[all party to a Government contract other than the Government." 41 U.S.C. § 601 (4). Here, the contract was between HUD and Diversified. IPI did not enter into a direct contractual relationship with HUD and there is no evidence to show any type of direct or indirect contractual agreement between HUD and IPI. Direct subcontractor appeals have only been permitted 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, supra at 1556. The prime contract between HUD and Diversified contains no provision for subcontractor appeals and IPI cites no HUD regulations which permit subcontractor appeals.

In the present case, IPI is in the position of a subcontractor with a claim which has been denied sponsorship by the prime contractor, Diversified. Under these circumstances, there is no privity of contract between IPI and the Government which would allow IPI to file suit against HUD in the absence of the prime contractor's consent to and sponsorship of IPI's claim. See Erickson Air Crane Co., supra at 814; Ovid Neal, HUDBCA No. 90-4328-Cl, 91-2 BCA ¶ 223,947 (1991); John C. Thompson, HUDBCA No. 79-427-C45, 80-2 BCA ¶ 14,722 (1980). Since the Government consents to be sued only by those with whom it has privity of contract, United States v. Johnson Controls, supra, IPI lacks standing to bring suit against HUD.

IPI asserts that oral instructions received by its president should serve as the basis for the formation of an implied-in-fact contract with HUD. However, given even the most favorable view of IPI's contentions, there is nothing in the pleadings which would indicate jurisdiction under the principle of an implied-in-fact contract. The CDA gives the Board jurisdiction over express or 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 Mfcr. Co. v. United States, 428 F.2d 1241 (Ct. Cl. 1970); West State, Inc., ASDCA No. 47971, 95-1 BCA ¶ 47,971 (1995). Here, we find no persuasive evidence that the conduct of the parties, under the circumstances of this case, established the requisites necessary to create an implied-in-fact contract.

In addition to the above-stated requirements, the Government official named as the authorizing Government agent must have actual authority to contract on the Government's behalf. Lack of authority is an absolute bar to an implied-in-fact contract, regardless of the degree of encouragement or even acceptance of completed work by the Government employees involved. West State, Inc., 95-1 BCA at 137,459. IPI, in this case, does not allege that it ever communicated directly with any HUD official with the power to authorize or ratify IPI's performance. Instead, IPI states that it relied upon the oral representations of a Diversified employee (Bennett) who stated that another Diversified employee (McDade) had been given approval by a HUD official (Cameron). Even if IPI's president had communicated directly with Cameron, IPI would have fared no better with respect to prevailing on its claim for compensation since Cameron lacked the legal authority to contractually bind HUD. IPI has failed to show that the work which forms the basis for its claim was authorized by any HUD official with contracting authority. Therefore, we find that IPI has failed to prove that an implied-in-fact contract existed between IPI and HUD.

Conclusion

IPI is an unsponsored subcontractor and, as such, has no standing to bring an appeal before this the Board. Furthermore, IPI has failed to show that any contract, express or implied-in-fact, existed between IPI and HUD which might entitle IPI to exercise certain appellate rights as set forth in the CDA.

Accordingly, there is no basis under the CDA for the Board to exercise jurisdiction over this controversy. HUD's motions to dismiss and motion for summary judgment are **GRANTED** for the reasons stated herein. This appeal is dismissed for want of jurisdiction.

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Lynn J. Bush
Administrative Judge

Concur:

_____
David T. Anderson
Administrative Judge

_____
Jean S. Cooper
Administrative Judge

September 16, 1996