

Board of Contract Appeals

General Services Administration
Washington, D.C. 20405

DISMISSED FOR LACK OF JURISDICTION: March 20, 2006

GSBCA 16817-EPA

DOUG WIGGS d/b/a SLOAN WELDING & CONSTRUCTION COMPANY,

Appellant,

v.

ENVIRONMENTAL PROTECTION AGENCY,

Respondent.

David L. Reinschmidt and Colby M Lessmann of Munger, Reinschmidt & Denne, L.L.P., Sioux City, IA, counsel for Appellant.

Kenneth R. Pakula, Office of General Counsel, Environmental Protection Agency, Washington, DC, counsel for Respondent.

Before Board Judges **DANIELS** (Chairman), **NEILL**, and **DeGRAFF**.

DANIELS, Board Judge.

The Environmental Protection Agency (EPA), respondent, moves the Board to dismiss for lack of jurisdiction an appeal filed by Doug Wiggs, doing business as Sloan Welding & Construction Company (Wiggs), from a decision issued by an EPA contracting officer. After considering Wiggs' opposition (labeled a "resistance"), we grant the motion and dismiss the appeal.

Background

The events relevant to this case occurred on a privately-owned parcel of land in Woodbury County, Iowa, which had previously been the Mid-America Tanning Site. The site was a former National Priorities List (NPL) Superfund site. It had been deleted from the NPL in 2004, but thereafter, the State of Iowa continued to monitor it. Motion to Dismiss (Motion) at 1; Appellant's Resistance to Motion to Dismiss (Resistance) at 1.

Wiggs was hired by Chad Gill, acting on behalf of the property owners, to move earth on the property in preparation for construction. Motion at 1-2; Resistance at 2. On Saturday, July 9, 2005, while working on the site, Wiggs discovered a discharge from a pipe of possibly hazardous chemicals. Wiggs operated his earth-moving equipment in an effort to contain the discharge. He and Mr. Gill also contacted governmental authorities, and on that same day, representatives of first the Iowa Department of Natural Resources (DNR) and later the EPA appeared at the site. Motion at 2; Resistance at 2. Wiggs considered that after the DNR representative arrived, he was working for the DNR, "with permission and authority by [the EPA representative] and the EPA." Resistance at 2.

The EPA representative returned to the site on Sunday, July 10, accompanied by an employee of an EPA Emergency Rapid Response Services contractor, Environmental Restoration, L.L.C. (ER). Wiggs inquired whether these individuals wanted him to remain on the site and continue performing earth-moving work to contain the discharge. They assented. Motion at 2-3; Resistance at 2-3. According to the EPA, the EPA representative advised [Wiggs] that EPA could not directly hire [Wiggs] and that [Wiggs] would have to speak directly to [ER], the prime contractor." Motion at 3. According to Wiggs, "As of 2:00 p.m. on July 10, 2005, Wiggs was working for ER with the EPA's agreement." Resistance at 3; *see also* Complaint, Attachment at 005 (Wiggs' log of his activities: "Then at 2:00 pm on 7-10-05 Sunday Doug went to work for Environmental Restoration.").

After completing his work, Wiggs submitted invoices for payment to both the DNR and ER. Motion at 3; Resistance at 3; Complaint, Attachment, *passim*. The Administrator of the DNR's Environmental Services Division responded that his agency "has no legal obligation to reimburse [Wiggs] for these expenses" because "the Department never contracted with [Wiggs] for any work conducted at the site." Motion, Attachment 2. ER and Wiggs conducted negotiations as to the value of Wiggs' services, but do not appear to have reached agreement on the amount of money ER would pay to Wiggs. Complaint, Attachment at 072-75, 078-82.

Wiggs also submitted invoices to the EPA. Motion at 4; Complaint at 11-12. On November 7, 2005, an EPA contracting officer responded, in a letter he characterized as his final decision:

I have determined that the EPA has no liability for payment of these charges. . . . [Y]ou stated this repair was authorized by [an employee of the] Iowa Department of Natural Resources. If you were doing this under her direction, you probably need to talk with her.

. . . .

It is my further understanding that you performed work as a subcontractor for EPA's prime contractor, Environmental Restoration[,] beginning on July 10th. Based on information I have, you have received or will receive compensation for all work performed at their direction.

Unless you can provide me with additional information or documentation which would demonstrate that you have a valid claim with the EPA, I am forced to deny this claim.

Complaint, Attachment at 076-77.

On February 3, 2006, Wiggs appealed this decision to the Board.

Discussion

Under the Contract Disputes Act of 1978, a board of contract appeals has "jurisdiction to decide any appeal from a decision of a contracting officer (1) relative to a contract made by its agency, and (2) relative to a contract made by any other agency when such agency . . . has designated the agency board to decide the appeal." 41 U.S.C. § 607(d) (2000). The EPA has designated this Board to decide appeals from decisions of its contracting officers.

The term "contract," as used in this statute, means "any express or implied contract . . . entered into by an executive agency" for any of four categories of items, one of which is "the procurement of services." 41 U.S.C. § 602(a). The term "executive agency" includes "an independent establishment" such as the EPA. *Id.* § 601(2) (referencing 5 U.S.C. § 104). There is nothing in the record to indicate, and Wiggs does not contend, that Wiggs performed the work in question under an express contract with the EPA. To place its appeal before the Board, therefore, Wiggs must convince us that the work was performed under an implied-in-fact contract with the agency. *See Hanlin v. United States*, 316 F.3d 1325, 1328, 1330 (Fed.

Cir. 2003) (“Plaintiff has the burden to prove the existence of an implied-in-fact contract”; “[Plaintiff] has the burden to show unambiguously each of the elements of an implied-in-fact contract”).

“An implied-in-fact contract is one ‘founded upon a meeting of minds, which, although not embodied in an express contract, is inferred, as a fact, from conduct of the parties showing, in the light of the surrounding circumstances, their tacit understanding.’” *Lewis v. United States*, 70 F.3d 597, 600 (Fed. Cir. 1995) (quoting *Baltimore & Ohio Railroad Co. v. United States*, 261 U.S. 592, 597 (1923)). “A binding implied-in-fact contract arises between a private party and the government upon proof by the person of: (1) mutuality of intent to contract; (2) consideration; (3) an unambiguous offer and acceptance[;] and (4) ‘actual authority’ on the part of the government’s representative to bind the government.” *Schism v. United States*, 316 F.3d 1259, 1278 (Fed. Cir. 2002) (en banc), cert. denied, 539 U.S. 910 (2003); see also *Flexfab, L.L.C. v. United States*, 424 F.3d 1254, 1265 (Fed. Cir. 2005).

Wiggs’ own characterization of the work he performed at the former Mid-America Tanning Site defeats any effort to establish an implied-in-fact contract between Wiggs and the EPA. Wiggs says that in addition to whatever he did for the property owner, he was first working for the DNR, an Iowa state agency, “with permission and authority by [the EPA representative] and the EPA,” and was later “working for ER” – a contractor to EPA – “with the EPA’s agreement.” In neither of these instances, according to Wiggs, was he actually working directly for the EPA.

The most that can be said for Wiggs’ relationship to the EPA is that while he was working for ER, he was a subcontractor. There is a “well-entrenched rule” of long standing, however, that with few exceptions, “a subcontractor cannot bring a direct appeal against the government” because it is not in privity with the Government. *United States v. Johnson Controls, Inc.*, 713 F.2d 1541, 1550 (Fed. Cir. 1983); see also *Erickson Air Crane Co. of Washington, Inc. v. United States*, 731 F.2d 810, 813 (Fed. Cir. 1984) (describing this principle as “a hornbook rule”). The three prominent exceptions to this rule are that a subcontractor may prosecute a claim (a) in the prime contractor’s name, with the prime contractor’s consent and cooperation (*Erickson Air Crane*, 731 F.2d at 813); (b) where the prime contractor was clearly acting as a purchasing agent for the Government and the contract stated that the Government would be directly liable to the vendors for the purchase price (*Johnson Controls*, 713 F.2d at 1551); and (c) where the contract reflects an intention to make the subcontractor a direct third-party beneficiary and the contracting officer was put on notice of the relationship between the prime contractor and the third-party beneficiary subcontractor (*Flexfab*, 424 F.3d at 1259, 1263). These exceptions are applied narrowly because the United States as a sovereign may not be sued without its consent and waivers of

sovereign immunity are strictly construed. *Flexfab*, 424 F.3d at 1263; *Erickson Air Crane*, 731 F.2d at 813; *Johnson Controls*, 713 F.2d at 1557. Wiggs does not attempt to squeeze within any of the exceptions.

Even if Wiggs could prove that he was working “with permission and authority by [the EPA representative] and the EPA,” or “with the EPA’s agreement,” that would not establish a contractual relationship between him and the EPA. In the principal decision enunciating the requirement for privity, *Johnson Controls*, the Court of Appeals for the Federal Circuit held that the facts that a subcontract was executed subject to Government approval, and that the Government retained a great deal of control over the actions of the prime contractor in its dealings with its subcontractors, did not make the subcontract a contract with the Government. 713 F.2d at 1543-44, 1552. There must be a “direct contractual relationship,” the court said, for a contract to exist. *Id.* at 1552-53. Similarly, the same court has held, a grant of benefits and subsequent oversight by an agency “is insufficient to establish a contractual obligation” between an entity and the agency. *Katz v. Cisneros*, 16 F.3d 1204, 1210 (Fed. Cir. 1994). “An agency’s performance of its regulatory or sovereign functions does not create contractual obligations. Something more is necessary.” *Cain v. United States*, 350 F.3d 1309, 1315 (Fed. Cir. 2003) (quoting *D & N Bank v. United States*, 331 F.3d 1374, 1378-79 (Fed. Cir. 2003)).

Decision

The EPA’s motion is granted. The appeal is **DISMISSED FOR LACK OF JURISDICTION**.

STEPHEN M. DANIELS
Board Judge

We concur:

EDWIN B. NEILL
Board Judge

MARTHA H. DeGRAFF
Board Judge