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Civilian Board of Contract Appeals Takes Pragmatic View When Finding Jurisdiction Over A Sponsored-Subcontractor CDA Appeal

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In ***Cooley Constructors, Inc. v. GSA***, CBCA No. 3905 (June 8, 2005), the Civilian Board of Contract Appeals (CBCA) found that the substance of an appeal – not the form – is the prevailing consideration when analyzing whether the CBCA has jurisdiction to hear a sponsored-subcontractor appeal under the Contract Disputes Act (CDA). Consistent with the CDA, a subcontractor generally may only prosecute an appeal against the government if its appeal is "sponsored" by a contractor that is a party to the government contract (e.g., the prime contractor). If such an appeal is not properly sponsored, it could be dismissed for lack of jurisdiction.

In Cooley Constructors, after GSA issued an appealable final decision to the prime contractor related to the subcontractor's claim, the subcontractor decided to appeal to the CBCA in accordance with the sponsorship provision in the disputes clause of its subcontract with the prime contractor. However, the prime contractor technically did not initiate the appeal. Instead, the subcontractor filed a Notice of Appeal on its own stationery with the CBCA. Because the Notice of Appeal identified the prime contractor, the CBCA docketed the appeal in the name of the prime contractor. A month later, and upon GSA's urging, the prime contractor filed a Notice of Appearance in the appeal. Shortly thereafter, GSA argued that the CBCA lacked jurisdiction over the appeal because the Notice of Appeal was filed by he subcontractor and not the prime contractor.

Relying predominantly on a decision issued by the Armed Services Board of Contract Appeals (ASBCA), the CBCA plainly rejected GSA's technical argument. First, the CBCA found that 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" – even though it is not entirely clear from the decision if the Notice of Appeal specifically stated that the appeal was being made "in the name of the prime contractor." Second, the CBCA found that the "filing of the notice of appearance by [the prime contractor's] attorney affirmed the prior authorization by the prime contractor to the subcontractor to file the appeal." In other words, substance over form prevailed.

Despite the sensible approach taken here by the CBCA (and previously by the ASBCA), contractors still should be prepared to face similar jurisdictional challenges presented by agency counsel (before the Boards of Contract Appeals) and the Department of Justice (before the U.S. Court of Federal Claims). Subcontractors should not leave jurisdiction to chance as other judges may not view this issue quite as pragmatically as the judges inCooley Constructors – especially when the facts are not as compelling. A subcontractor should ensure that the prime contractor submits the Notice the Appeal clearly in the name of the prime contractor. (To that end, a subcontractor also should ensure that the disputes clause in its subcontract contains a sponsorship provision.) Such a simple action will help to avoid a jurisdictional dispute, and the costly litigation that can result.

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