



UNITED STATES
CIVILIAN BOARD OF CONTRACT APPEALS

DISMISSED FOR LACK OF JURISDICTION: June 22, 2010

CBCA 1894

BPI MANAGEMENT INC.,

Appellant,

v.

DEPARTMENT OF HOUSING AND URBAN DEVELOPMENT,

Respondent.

Patricia Whitney, President of BPI Management, Inc., Teaneck, NJ, appearing for Appellant.

William R. Taylor, Office of General Counsel, Department of Housing and Urban Development, Washington, DC, counsel for Respondent.

Before Board Judges **GILMORE**, **BORWICK**, and **WALTERS**.

GILMORE, Board Judge.

Appellant, BPI Management Inc. (BPI), is seeking to appeal the decision of Bethel Non-Profit Housing Corp. (Bethel) to terminate BPI's property management contract at the direction of the Director, Newark, New Jersey Multifamily Program Center, Department of Housing and Urban Development (HUD). BPI stated in its notice of appeal that Bethel terminated its contract on March 1, 2010.

After the appeal was docketed, HUD, on April 9, 2010, filed a motion to dismiss for lack of jurisdiction, on the grounds that (1) neither the Bethel/HUD contract nor the Bethel/BPI contract is a contract that falls within the ambit of the Contract Disputes Act of 1978, 41 U.S.C. §§ 601-613 (2006) (CDA), and (2) BPI does not have standing to bring a direct appeal under the CDA because it is not in privity of contract with HUD.

The Board authorized appellant to file a response to respondent's motion by May 4, 2010. The Board did not receive a response to the motion by May 4, 2010. The Board then called appellant's president twice, on May 4 and May 13, and left messages for appellant to correspond with the Board. Appellant did not do so. The Board then issued an order on May 19, 2010, directing appellant to show cause by June 4, 2010, why the appeal should not be dismissed for lack of jurisdiction. Again, appellant did not respond. We note that respondent, in its motion, advised the Board that it had conferred with appellant and that appellant opposes this motion. For purposes of ruling on the motion, we accept the facts as they are stated by HUD since they have not been disputed by appellant.

Background

In January 1973, a HUD-insured loan was made to Bethel for construction of a housing project in Asbury Park, New Jersey. In conjunction with this loan, Bethel and HUD entered into a regulatory agreement which, among other things, requires the property owner to maintain the mortgaged property in "good repair and condition." Under the regulatory agreement, Bethel can elect to either self-manage the property or hire a management company to do so. If a management company is hired, the regulatory agreement authorizes HUD to ask the property owner to terminate the management agreement if that company fails to comply with HUD requirements. Any management contract entered into between the property owner and a management company must be accompanied by a management certification signed by both parties that authorizes HUD to request the property owner to terminate the management contract for failure to comply with HUD's property maintenance requirements.

HUD also entered into housing assistance payments (HAP) contracts with Bethel to subsidize the rental payments of eligible families experiencing financial hardship. The HAP contracts also require Bethel to maintain the premises free from financial and physical deterioration.

On December 31, 2004, Bethel entered into a contract with BPI to manage the Asbury Park property it owns. This is the contract that Bethel terminated on March 1, 2010, at the direction of HUD, for failure to keep the property in the condition required by the regulatory

agreement, the Bethel/BPI management agreement, and the HAP agreements. BPI is seeking to appeal Bethel's termination of this contract before the Board under the CDA.

Discussion

The issue is whether appellant's contract with the owner of a HUD-assisted multifamily housing project falls within the mandates of the CDA, and hence the jurisdiction of the Board. Based on the record before us, we agree with respondent that the Board does not have jurisdiction under the CDA to adjudicate appellant's claim of wrongful termination by Bethel of its management contract.

The CDA confers jurisdiction on the boards of contract appeals to adjudicate claims arising from express or implied contracts entered into by executive agencies for the procurement of services and property, other than real property; the procurement of construction, alteration, repair, or maintenance of real property; or the disposal of personal property. 41 U.S.C. § 602(a). The facts show that appellant did not enter into a contract with HUD or any other government agency which would confer jurisdiction on this Board. Appellant entered into a management contract with Bethel to manage a housing project Bethel constructed with HUD's assistance. The fact that Bethel and BPI agreed in their management agreement that HUD had the authority to direct Bethel to terminate the management contract for failure to comply with certain HUD requirements does not establish privity of contract between BPI and HUD.

HUD is not a party to the Bethel/BPI contract. That contract is strictly between the property owner and BPI. Therefore, appellant, having no contractual relationship with HUD, cannot bring a direct appeal under the CDA. Additionally, a final decision of a government contracting officer is required under the CDA to confer jurisdiction on the Board. 41 U.S.C. § 607(d). Appellant has not identified a document in the record as representing a final decision of a contracting officer.

Once respondent has presented sufficient facts which bring into question the jurisdiction of the Board to hear the dispute, it is incumbent upon appellant to come forward with evidence establishing jurisdiction. Appellant bears the burden of establishing subject matter jurisdiction by a preponderance of the evidence. *McNutt v. General Motors Acceptance Corp.*, 298 U.S. 178, 189 (1936); *Reynolds v. Army and Air Force Exchange Service*, 846 F.2d 746, 748 (Fed. Cir. 1988). Here, the facts presented by respondent establish that there is no contractual relationship between appellant and HUD and, thus, no Board jurisdiction. Appellant has failed to come forward with evidence refuting that presented by respondent.

Decision

Therefore, this appeal is **DISMISSED FOR LACK OF JURISDICTION.**

BERYL S. GILMORE
Board Judge

We concur:

ANTHONY S. BORWICK
Board Judge

RICHARD C. WALTERS
Board Judge