UNITED STATES
CIVILIAN BOARD OF CONTRACT APPEALS

MOTION TO DISMISS DENIED: December 21, 2015

CBCA 2872

AURORA, LLC,

Appellant,

v.

DEPARTMENT OF STATE,

Respondent.

Richard C. Johnson, Richard H. Snyder, and Edmund M. Amorosi of Smith Pachter McWhorter PLC, Vienna, VA; and Peter F. Garvin, III, Grant H. Willis, and Ryan P. McGovern of Jones Day, Washington, DC, counsel for Appellant.

John C. Sawyer, Thomas D. Dinackus, and Erin M. Kriynovich, Office of the Legal Adviser, Buildings and Acquisitions, Department of State, Rosslyn, VA, counsel for Respondent.

Before Board Judges **SOMERS**, **HYATT**, and **LESTER**.

HYATT, Board Judge.

Respondent, the Department of State, has filed a motion to dismiss for lack of jurisdiction this appeal of a contracting officer's decision to terminate for default a design-build contract it awarded to appellant, Aurora, LLC, for the construction of a consulate compound in Jeddah, Saudi Arabia. For the reasons stated, we deny the motion.

Background

Aurora and the State Department entered into contract number SAQMMA-07-C-0061, for the design and construction of a new consulate in Jeddah, Saudi Arabia, on July 18, 2007. Initially, Aurora contemplated bidding on the contract under a joint venture arrangement with First Kuwaiti Trading & Contracting, Inc. (First Kuwaiti). To comply with security clearance requirements, however, Aurora ultimately submitted a proposal under which it would be the prime contractor, with First Kuwaiti as its principal subcontractor.[1] In its capacity as subcontractor, First Kuwaiti was responsible for the majority of the contract's scope of work, including responding to various task orders and issuing letters of credit that were necessary to satisfy the contract's payment and performance bond obligations.

Aurora and First Kuwaiti began performance on the Jeddah contract on January 3, 2008. In a letter dated November 3, 2009, State expressed concern with Aurora's performance of the project and questioned its ability to complete construction within the twenty-eight month period scheduled under the contract. On February 17, 2010, State issued a cure notice to Aurora in which it raised the possibility that it would terminate the contract for default. Two months later, on April 15, 2010, the State Department followed up with a show cause letter, repeating previously identified performance concerns and signaling an intention to proceed with a termination for default. On May 5, 2010, the contracting officer officially notified Aurora that the Government was terminating the contract for default and intended to re-procure the remaining work. Negotiations between the parties ensued, and on October 5, 2010, Aurora and the State Department reached an agreement under which performance on the contract was suspended while the State Department monitored Aurora's progress on a separate contract for the construction of a consulate compound in Surabaya, Indonesia. Under the agreement, the contract for construction of the Jeddah consulate would be reinstated when the project in Surabaya was substantially complete. The agreement

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[1] In early 2006, Aurora, through its predecessor company, Grunley-Walsh, LLC, submitted a pre-qualification package to the State Department for upcoming United States embassy construction opportunities. That package proposed that a joint venture consisting of Aurora and First Kuwaiti would complete the project, with Aurora responsible for classified work and First Kuwaiti performing non-classified work. Because First Kuwaiti is a foreign entity, however, it was ineligible to hold the requisite security clearances needed for the two entities to compete for the contract as a joint venture. To work around this obstacle, on December 27, 2006, Aurora and First Kuwaiti executed a subcontract agreement under which Aurora would issue separate task orders for the performance of services and/or delivery of products necessary for the completion of several pending and upcoming projects.

established May 31, 2011, as the date by which the consulate in Surabaya was to be substantially complete.

Substantial completion of performance under the Surabaya contract was not achieved by May 31, 2011. On October 31, 2011, the contracting officer notified Aurora that it intended to terminate the Jeddah contract for default and to call in the line of credit furnished by First Kuwaiti for the Jeddah contract. On November 1, 2011, the contracting officer issued a decision terminating the contract for default. The contracting officer's decision referred to the terms of the October 2010 agreement, and the fact that substantial completion of the Surabaya consulate contract had not occurred by May 31, 2011, to justify the termination action. Negotiations between the parties continued, however, and on January 26, 2012, the contracting officer agreed to rescind his decision and reconsider the termination for default action. After reviewing further arguments presented by Aurora and First Kuwaiti, on March 30, 2012, the contracting officer issued a final decision terminating the contract for default. Upon termination of the Jeddah contract, the Government presented a demand in full on the $10.7 million performance line of credit provided by First Kuwaiti.

On June 26, 2012, the Board received a notice of appeal, captioned as "Aurora, LLC," and stating that "Aurora hereby appeals the State Department's March 30, 2012 notice of termination for default." The notice of appeal was signed by "[c]ounsel for First Kuwaiti Trading & Contracting, W.L.L., appealing in the name of Aurora, LLC." A notice of appearance was entered by counsel for First Kuwaiti, "appealing in the name of Aurora, LLC." Aurora did not have separate counsel enter a notice of appearance on its own behalf until January 20, 2015.

A complaint was filed in the appeal on December 14, 2012, seeking the following relief:

> 55. Aurora respectfully requests that the Board order [the State Department] to withdraw the termination for default on the Jeddah Contract and issue a termination for the Government's convenience.
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> 56. Aurora requests that the Board order [the State Department] to return the $10.7 million [the State Department] withdrew from [First Kuwaiti's] performance LOC [line of credit] on the Jeddah Contract. Aurora also requests the award of any and all additional costs associated with the Government's termination for convenience.

During the conduct of discovery, the Government inquired of First Kuwaiti's attorneys regarding First Kuwaiti's and Aurora's interest in the appeal and First Kuwaiti's authority

to litigate the appeal. The initial authorization of the appeal is reflected in an email exchange from June 26 to 27, 2012, between Aurora's president and counsel for First Kuwaiti. In that exchange, Aurora confirmed that it had "no objection to First Kuwaiti appealing the default termination of the Jeddah . . . Contract (SAQMMA-07-C-006) in the name of Aurora, with the proceeds of such appeal to be paid to First Kuwaiti." Aurora further stated its expectation that the details would be worked out in a separate agreement, and reserved the right to rescind the authorization should an agreement not be obtained.

A pass-through agreement executed by the parties and dated May 22, 2013, was provided to the Government on January 14, 2014. The agreement stated that "Prime and Subcontractor have already agreed, as confirmed by email dated June 26, 2012, that Prime would allow Subcontractor to appeal Owner's default termination on Contract SAQMMA-07-C-0061 in the name of Prime, with additional details to be set forth in a separate agreement."

The State Department requested further information concerning the referenced "separate agreement" in the pass-through agreement. In response, First Kuwaiti's counsel forwarded a copy of the email exchange from June 26-27, 2012, and stated that "the subsequently signed pass-through agreement is the 'separate agreement.' There is not another agreement."

On December 31, 2014, counsel for the Government received an email message from Aurora's counsel forwarding a letter sent by Aurora to First Kuwaiti. In that letter, Aurora asserted that the pass-through agreement provided to the Government was invalid due to problems with the terms of the agreement and issues with a separate, related agreement. The letter from Aurora to First Kuwaiti, dated December 23, 2014, stated grounds upon which Aurora believed the pass-through agreement to be invalid and unenforceable. On page five of the letter, Aurora stated:

> No valid sponsorship agreement exists and there is no prime contractor authorization of [First Kuwaiti's] appeal and claims to State other than the June 27, 2012 provisional authorization related to the Jeddah appeal only. That provisional authorization fails to include the essential terms of a valid sponsorship agreement and does not fully comport with the applicable CDA requirements.

On January 14, 2015, Aurora provided the Government with a copy of the June 27, 2012, email message and stated that it had sponsored the appeal through that email message. Aurora further explained that the email sponsorship was followed by a written pass-through agreement which was later determined to be unenforceable. Aurora confirmed that the email

message of June 27, 2012, was still valid and that the sponsorship was still in effect and would remain in effect while the parties negotiated a detailed, written sponsorship agreement. Counsel for Aurora has also entered a separate appearance in the appeal and confirmed Aurora's continued authorization of the appeal.

Discussion

The Government's motion to dismiss for lack of jurisdiction initially focused on the internal dispute existing between Aurora and First Kuwaiti respecting the terms of the side agreement and pass-through arrangements. The State Department construed this dispute to be tantamount to a repudiation of Aurora's agreement to permit First Kuwaiti to challenge the termination for default in its name. This lack of agreement over the terms of a pass-through arrangement, according to the State Department, divested First Kuwaiti of any entitlement to pursue this action in Aurora's name. Under established precedent governing the pass-through claims of subcontractors, in the absence of continued sponsorship, the State Department reasoned, the appeal must be dismissed.

The State Department's motion made the further argument that even if the Board were to find that Aurora has sponsored the appeal from the outset and continues to do so, the law pertaining to sponsorship of claims only extends to sponsorship of a subcontractor's own claim for monetary damages and does not permit a prime contractor to assign the prime contractor's right to appeal to a subcontractor. The Government asserted that the right to challenge a termination for default decision is solely that of the prime contractor and cannot be assigned to another party. Since, according to the State Department, First Kuwaiti was not directly harmed by the termination for default of Aurora's contract, it cannot be a proper party for sponsorship. Additionally, the Government maintains, First Kuwaiti's principal interest in the appeal is the recovery of its line of credit, which it provided in its capacity as a surety, not a subcontractor. To demonstrate the correctness of its position, the State Department points to the complaint, which seeks an award of the amount of $10,700,000 representing the proceeds of the letter of credit drawn upon by the Government after the termination of Aurora's contract.

Following the submission of responses by both Aurora and First Kuwaiti to the Government's motion, and a conference convened by the Board, the Government further refined its position in this regard, emphasizing its concerns about the improper "expansion" of the sponsorship case law to allow a subcontractor to proceed in the absence of its own claim, and recasting its objection to the arrangement as an improper attempt by Aurora to "assign" its own "claim" to First Kuwaiti under the guise of sponsorship, thus violating the prohibition against the assignment of claims.

The Contract Disputes Act (CDA), 41 U.S.C. §§ 7101-7109 (2012), prescribes the Board's jurisdiction to decide disputes arising under federal government contracts. Jurisdiction is a threshold matter, and where the Board lacks subject matter jurisdiction, it may not proceed to decide the merits of the case. *ARI University Heights, LP v. General Services Administration*, CBCA 4660, 15-1 BCA ¶ 36,085, at 176,188; *Safe Haven Enterprises, LLC v. Department of State*, CBCA 3871, et al., 15-1 BCA ¶ 35,928, at 175,603 (citing *England v. Swanson Group, Inc.*, 353 F.3d 1375, 1379 (Fed. Cir. 2004)); *McAllen Hospitals LP v. Department of Veterans Affairs*, CBCA 2774, et al., 14-1 BCA ¶ 35,758, at 174,969 (citing *Steel Co. v. Citizens for a Better Environment*, 523 U.S. 83, 94-95 (1998)). It is appellant's burden to establish subject matter jurisdiction by a preponderance of the evidence. *Safe Haven Enterprise*, 15-1 BCA at 175,603 (citing *Reynolds v. Army & Air Force Exchange Service*, 846 F.2d 746, 748 (Fed. Cir. 1988)).

The Monetary Claims Presented in the Complaint

Before addressing the State Department's principal jurisdictional arguments concerning the appeal of the termination action, we turn to Aurora's request for monetary relief in the complaint. In its complaint, Aurora has requested an award of $10.7 million in damages, representing the amount of money that State withdrew from First Kuwaiti's line of credit following the termination action, and "any and all additional costs associated with the Government's termination for convenience." The Board has recently addressed a similar situation involving a termination for default action:

> Before the Board can exercise jurisdiction over a contractor's request for monetary damages, the contractor must have submitted a written claim to the contracting officer for a decision. *Shaw Environmental, Inc. v. Department of Homeland Security*, CBCA 2177, et al., 13 BCA ¶ 35,188, at 172,667 (2012) (citing 41 U.S.C. §§ 7103(a), 7105(e)(1)(A)). There are three basic requirements for a valid CDA monetary claim: "(1) the contractor must submit the demand in writing to the contracting officer, (2) the contractor must submit the demand as a matter of right, and (3) the demand must include a sum certain." *H.L. Smith, Inc. v. Dalton*, 49 F.3d 1563, 1565 (Fed. Cir. 1995). "The CDA also requires that a claim indicate to the contracting officer that the contractor is requesting a final decision," although this request need not be explicit. *M. Maropakis Carpentry, Inc. v. United States*, 609 F.3d 1323, 1327 (Fed. Cir. 2010).

1-A Construction & Fire, LLP v. Department of Agriculture, CBCA 2693, 15-1 BCA ¶ 35,913 at 175,563-64, *appeal docketed*, No. 2015-1623 (Fed. Cir. May 4, 2015). Until

Aurora submits a written claim for monetary damages to the contracting officer for decision, and appeals an unfavorable decision, we lack jurisdiction to entertain its monetary demand.[2]

The Subcontractor/Sponsorship Issues

The State Department contends that the appeal should be dismissed because First Kuwaiti, as a subcontractor, is not the proper party to challenge the termination for default. The CDA expressly defines the term "contractor" to mean a party to a federal government contract other than the Federal Government. *Id.* at § 7101(7). The Court of Appeals for the Federal Circuit, noting that a waiver of sovereign immunity must be "strictly construed in favor of the sovereign," has held that "those who are not in privity of contract with the government cannot avail themselves of the CDA's appeal provisions." *Winter v. FloorPro, Inc.*, 570 F.3d 1367, 1370-71 (Fed. Cir. 2009). The Board has further elaborated that:

> The requisite privity of contract needed to permit an appeal under the CDA has generally been limited to prime contractors who have actually contracted with the Government. Attempts by other parties, such as subcontractors and sureties, to extend the concept of privity beyond the prime contractor have typically been rejected.

Eagle Peak Rock & Paving, Inc. v. Department of the Interior, CBCA 2770, 12-2 BCA ¶ 35,146, at 172,521 (citations omitted); *accord Security Enforcement Authority, Inc. v. Department of Homeland Security*, CBCA 3238, 14-1 BCA ¶ 35,725; *Magwood Services, Inc. v. Department of Transportation*, CBCA 3630, 14-1 BCA ¶ 35,605 at 174,413. At the same time, it is also well established that subcontractors may pursue claims against the Government under the proper sponsorship of, and in the name of, the prime contractor. *E.g.*,

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[2] As we pointed out in *1-A Construction*, even if we were to view Aurora's monetary request as a request for termination for convenience settlement costs that it could receive if the State Department's default termination were overturned, the mere conversion of the agency's default termination to a convenience termination would not automatically vest us with jurisdiction over Aurora's request for such costs. 15-1 BCA at 175,566 n.12 (citing *Swanson Group, Inc.*, ASBCA 52109, 04-1 BCA ¶ 32,603, at 161,324-25). Before we could consider any request for termination settlement costs, the contractor would still have to submit a termination settlement proposal to the agency, after which time the proposal would have to ripen into a claim. *Id.* (citing *James M. Ellett Construction Co. v. United States*, 93 F.3d 1537, 1543-44 (Fed. Cir. 1996)).

Cooley Constructors, Inc. v. General Services Administration, CBCA 3905, 15-1 BCA ¶ 36,001; *TAS Group, Inc. v. Department of Justice*, CBCA 52, 07-2 BCA ¶ 33,630.

Because the parties have used the nomenclature common to sponsored claims, they have framed their arguments to fit the case law in this area. The case law developed to address sponsorship arrangements in which a subcontractor wishes to pursue its own monetary claim has no practical application to the circumstances presented in this appeal, which at this time involves solely a challenge to the propriety of a default termination. This is because a default termination is a government claim. *Malone v. United States*, 849 F.2d 1441, 1443 (Fed. Cir. 1988); *Lisbon Contractors, Inc. v. United States*, 828 F.2d 759, 764-65 (Fed. Cir. 1987); *Paradise Pillow, Inc. v. General Services Administration*, CBCA 3562, slip op. at 7 (Oct. 27, 2015). Absent a separate claim, or claims, for equitable adjustment of the contract price or for convenience termination damages, the only relief available under an appeal of a default termination is the conversion of the default termination to one for the convenience of the Government. As such, there is no subcontractor monetary claim to sponsor.[3]

The lack of an independent subcontractor claim does not divest the Board of jurisdiction, however. We note that Aurora has met its burden to show that the arrangement with First Kuwaiti was properly authorized so as to establish that it did, indeed, timely appeal the contracting officer's decision. The appeal was filed in the name of Aurora, with Aurora's

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[3] This disposes of any argument, based on *Severin v. United States*, 99 Ct. Cl. 435 (1943), that Aurora is not liable to First Kuwaiti for damages, thus invalidating a sponsored appeal. We are mindful that monetary claims for both parties would likely follow should the Government fail to justify the default termination decision and the appeal is sustained. In addition, although technically there is no subcontractor claim to sponsor at this time, the overturning of the default termination is a necessary predicate to subsequent monetary claims likely to be asserted by both companies. Given the close collaboration of Aurora and First Kuwaiti in performing the contract until termination, moreover, it seems likely that the observations offered in *Erickson Air Crane Co. of Washington v. United States*, 731 F.2d 810 (Fed. Cir. 1984), would apply:

> [P]rime contractors often do allow subcontractors to prosecute claims in the prime's name when they perceive that the subcontractors really have more at stake in a claim and are therefore willing to work harder on its enforcement. Subcontractors may also be the only ones in full possession of the facts.

Id. at 813.

authorization. Aurora, as the prime contractor, clearly had, and has, standing to challenge the Government's decision to terminate the contract for default. We know of no legal ground to dismiss the matter simply because Aurora has, up until now, been willing to allow First Kuwaiti to assume the laboring oar on its behalf. It is still Aurora's appeal, and the Government is answerable only to Aurora.[4]

Similarly, the Government's concerns about an improper "assignment" of Aurora's rights in this matter are misplaced. The Assignment of Contracts Act, 41 U.S.C. § 6305 (2012), and the Assignment of Claims Act, 31 U.S.C. § 3727 (2012), are intended to prevent fraud, particularly the buying up of claims against the Government; to protect the Government from having to deal with multiple persons or strangers to the contract; and to eliminate conflicting demands for payment and chances of multiple litigation and liability. *See Merlin International, Inc. v. Department of Homeland Security*, CBCA 2570, 11-2 BCA ¶ 34,869, at 171,510. Aside from the fact that the claim here is that of the Government, none of the concerns underlying the prohibitions against assignment of claims and contracts exist when the proper party to pursue the appeal – in this case, Aurora – is before the Board. *Id.* (citing *Beaconwear Clothing Co. v. United States*, 355 F.2d 583, 591 (Ct. Cl. 1966)).

To conclude, the only issue before the Board is the propriety of the default termination. Since the proper party to appeal the contracting officer's decision has done so, there is no basis to dismiss this appeal on jurisdictional grounds.

Decision

The motion to dismiss is **DENIED**. Aurora's request for monetary damages is **DISMISSED FOR LACK OF JURISDICTION**.

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CATHERINE B. HYATT
Board Judge

[4] In this regard, we note that, as the Court commented in *Erickson Crane*, whatever their private arrangements, Aurora and First Kuwaiti are nonetheless treated as one party for the purposes of this appeal. They are expected to cooperate with each other such that there is no added burden to the tribunal in adjudicating this matter. 731 F.2d at 814.

We concur:

JERI KAYLENE SOMERS
Board Judge

HAROLD D. LESTER, JR.
Board Judge