UNITED STATES
CIVILIAN BOARD OF CONTRACT APPEALS

DISMISSED FOR LACK OF JURISDICTION: February 15, 2011

CBCA 2192

MANAGEMENT STRATEGIES, INC.,

Appellant,

v.

DEPARTMENT OF HOUSING AND URBAN DEVELOPMENT,

Respondent.

Mahesh Reddy, Vice President of Management Strategies, Inc., Monroe, CT, appearing for Appellant.

Brenda D. Joseph-Chambers, Office of General Counsel, Department of Housing and Urban Development, Washington, DC, counsel for Respondent.

Before Board Judges **GILMORE**, **POLLACK**, and **SHERIDAN**.

SHERIDAN, Board Judge.

Respondent, the Department of Housing and Urban Development (HUD), moves to dismiss this appeal for lack of jurisdiction because the purported appellant, Management Strategies, Inc. (MSI), lacks privity to bring a suit as a prime contractor under the Contract Disputes Act of 1978 (CDA), 41 U.S.C. §§ 601-613 (2006).[1] The contract was awarded by West Haven Housing Authority (WHHA), the public housing authority for the City of West

[1] The CDA was recodified as positive law at 41 U.S.C. §§ 7101-7109 (as codified by Pub. L. No. 111-350, 124 Stat. 3677, 3816-3826 (2011). The language in the sections cited as pertinent to this decision remained substantively the same as the recodified sections.

Haven, Connecticut. MSI opposes the motion, maintaining that, because the project in issue received federal funds under the American Recovery and Reinvestment Act of 2009 (ARRA), Pub. L. No. 111-5, 123 Stat. 115 (2009), and was subject to federal executive agency oversight and regulations, WHHA is a federal government agency. The Board finds that it has no jurisdiction over this appeal because the contract with MSI did not have an executive agency, as defined by the CDA, as a party. Accordingly, we dismiss this appeal for lack of jurisdiction.

Background

On March 5, 2010, WHHA awarded MSI contract CT29-1B to perform facade improvements for Morrissey Manor, Inc., a public housing facility. WHHA ordered MSI to perform certain work which MSI alleges was outside the scope of the contract. Arguing a change to the contract, MSI sought an additional $17,733.76 for the alleged change on August 24, 2010. On August 30, 2010, Michael Siwek, the Executive Director of WHHA, wrote MSI stating that WHHA did not consider the work to be a change to the contract. Mr. Siwek directed MSI to "proceed and perform the work in a diligent manner to complete the project in the specified time."

MSI submitted an appeal to the Civilian Board of Contract Appeals (CBCA) on November 23, 2010, and the appeal was duly docketed as CBCA 2192.

Discussion

Respondent has raised the issue of whether this Board possesses subject matter jurisdiction to entertain this appeal by arguing that appellant has not identified an express or implied contract entered into by an executive agency. 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, 747 (Fed. Cir. 1988); *Opportunities for the Aging Housing Corp. v. Department of Housing and Urban Development,* CBCA 1501, 10-1 BCA ¶ 34,311, at 169,488 (2009).

For purposes of application of the CDA, the term "executive agency" means "an executive department as defined in section 101 of title 5 [or the United States Code], an independent establishment as defined by section 104 of title 5 (except that it shall not include the Government Accountability Office), a military department as defined by section 102 of title 5, and a wholly owned Government corporation as defined by section 9101 (3) of title 31." 41 U.S.C. § 601(2). The term "contractor" means a party to a Government contract other than the Government. 41 U.S.C. § 601(4).

The Board's jurisdiction arises from section 3(a) of the CDA, which provides, in pertinent part:

> Unless otherwise specified herein, this chapter applies to any 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 personal property.

41 U.S.C. § 602(a).

Appellant asserts that this contract falls within the Board's jurisdiction because WHHA "is a government agency formed by the local government and supported financially and technically by HUD."

The Board recently discussed the scope of its jurisdiction in a claim arising out of a management contract with a non-profit HUD-assisted housing corporation. *BPI Management Inc. v. Department of Housing and Urban Development*, CBCA 1894, 10-2 BCA ¶ 34,495. In dismissing that appeal for lack of jurisdiction we noted:

> 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 [a non-profit housing corporation] to manage a housing project [that the non-profit housing corporation] constructed with HUD's assistance. The fact that [the non-profit housing corporation and appellant] agreed . . . that HUD had the authority to direct [the non-profit housing corporation] to terminate the management contract for failure to comply with certain HUD requirements does not establish privity of contract between [the appellant] and HUD.

> HUD is not a party to the . . . contract. That contract is strictly between the [the non-profit housing corporation] and [the appellant]. Therefore, appellant, having no contractual relationship with HUD, cannot bring a direct appeal under the CDA.

Id. at 170,142; *see also Giljoy Technology, Inc. v. Department of Housing and Urban Development*, CBCA 1988, 10-2 BCA ¶ 34,552.

In a similar case involving a public housing authority, the HUD Board of Contract Appeals, one of our predecessor boards, stated:

> Contracts or grants of assistance between HUD and a public housing authority do not confer CDA jurisdiction in the Board over contracts between a housing authority and a third party that are financed in whole or in part by financial assistance from HUD. *Blanco-Mora Enterprises, Inc.*, HUD BCA 94-G-136-C5, 94-3 BCA ¶ 26,974; *Ovid Neal*, HUD BCA 90-4328-C1, 91-2 BCA ¶ 23,947; *G & S Homes Development Co.*, HUD BCA 87-2405-C6, 87-2406-C7, 88-2 BCA ¶ 20,822; *Kurtis R. Mayer and Pamela Mayer, d.b.a. Mayer Built Homes*, HUD BCA 83-823-C20, 84-2 BCA¶ 17,494.

All Seasons Construction, Inc., HUD BCA 01-C-100-C1, 01-2 BCA ¶ 31,497, at 155,559.

There is no Board jurisdiction over this appeal. Appellant has failed to sustain its burden of establishing that WHHA is an executive agency, or, alternatively, that it entered into an express or implied contract with an executive agency, specifically, HUD. That a public housing authority received federal funds does not establish the requisite privity with an executive agency to establish Board jurisdiction.

Decision

This appeal is **DISMISSED** for lack of jurisdiction.

PATRICIA J. SHERIDAN
Board Judge

We concur:

BERYL S. GILMORE
Board Judge

HOWARD A. POLLACK
Board Judge