UNITED STATES CIVILIAN BOARD OF CONTRACT APPEALS

DISMISSED FOR LACK OF JURISDICTION: September 24, 2010

CBCA 1988

GILJOY TECHNOLOGY, INC.,

Appellant,

v.

DEPARTMENT OF HOUSING AND URBAN DEVELOPMENT,

Respondent.

Gilbert F. Cruz, President of Giljoy Technology, Inc., Houston, TX, appearing for Appellant.

Blythe I. Rodgers, Office of General Counsel, Department of Housing and Urban Development, Washington, DC, counsel for Respondent.

Before Board Judges **SOMERS**, **DRUMMOND**, and **KULLBERG**.

KULLBERG, Board Judge.

Respondent, the Department of Housing and Urban Development (HUD), has moved for dismissal in this appeal. Appellant, Giljoy Technology, Inc. (GTI), brought this appeal after the termination of two contracts with the City of Houston, Texas. The Board finds that it has no jurisdiction in this appeal because no executive agency of the Government was a party to any contract with GTI that is at issue in this appeal. Accordingly, we dismiss this appeal for lack of jurisdiction.

Facts

On October 2, 2009, and November 2, 2009, the City of Houston awarded to GTI a contract for the repair of a privately owned residence under the city's single family home rehabilitation (SFHR) program. Respondent's Motion to Dismiss, Exhibits 1, 2.[1] The dispute resolution section in both contracts provided for the appeal of disputes to the director of the city's Housing and Community Development Department (HCDD). *Id*. at 2, 12. Such appeals were to be resolved with a binding decision by means of either mediation or arbitration. *Id*. The applicable law section in both contracts stated that the contracts were subject "to all laws of the United States of America, the State of Texas, charter and ordinances of the City of Houston and all rules and regulations of any regulatory body or office having jurisdiction and in particular, without limitation, the federal regulations codified at Title 24, Code of Federal Regulations (CFR) Part 570 or 24 CFR Part 92." *Id*. at 15.

On February 26, 2010, the City of Houston terminated both contracts for cause. Exhibit 3. In a letter dated March 19, 2010, the city's legal department responded to GTI's March 9, 2010, complaint regarding the termination of the contracts, and GTI was advised that no payment for work would be made until after the costs of completing the contract had been paid. *Id*. Additionally, the legal department's letter advised GTI of its right to appeal to the HCDD director. *Id*. On August 9, 2010, GTI filed an appeal with this Board.

Discussion

Respondent contends that this Board lacks jurisdiction to hear this appeal, and GTI argues that the City of Houston has consented to this Board's jurisdiction. This Board has recognized that an appellant "bear[s] the burden of establishing subject matter jurisdiction by a preponderance of the evidence." *Opportunities for the Aging Housing Corp.*, CBCA 1501, 10-1 BCA ¶ 34,311, at 169,488 (2009). Section 3(a) of the Contract Disputes Act of 1978 (CDA), 41 U.S.C. §§ 610-613 (2006), states the following:

> Unless otherwise specifically provided herein, this chapter
> applies to any express or implied contract . . . entered into by an
> executive agency for–

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[1]   Unless otherwise noted, all exhibits cited in this decision were attached to the Government's motion.

(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.

Id. § 602(a). Under the CDA, an executive agency is "an executive department as defined in section 101 of title 5, an independent establishment as defined by section 104 of title 5 . . . , a military department . . . , [or] a wholly owned Government corporation." *Id*. § 601(2). The City of Houston is not an executive agency of the Government. Neither HUD nor any other executive agency of the Government is a party to GTI's contracts.[2] GTI's appeal does not involve a contract with an executive agency of the Government, and this Board, consequently, lacks jurisdiction in this appeal.

GTI argues that under the applicable law section of its contracts, the City of Houston consented to this Board's jurisdiction to conduct either a mediation or arbitration. The disputes section of GTI's contracts with the City of Houston stated that appeals were to be submitted to the director of the HCDD, and appeals would be resolved by means of either an arbitration or mediation in which a binding decision would be issued. GTI's contracts contain no provision for dispute resolution that would involve this Board. Nothing in the terms of GTI's contracts or the rest of the record supports GTI's assertion that the City of

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[2]   Section 12.02 of GTI's contracts makes reference to parts 92 and 570 of title 24 of the Code of Federal Regulations (CFR). Part 92 of title 24 relates to HUD's home investment partnerships program, and part 570 concerns community development block grants. 24 CFR 92.1, 570.1 (2009). Neither of those referenced parts in the CFR gives this Board jurisdiction over GTI's contracts. HUD states in its motion that the City of Houston received a HUD grant to fund GTI's contracts pursuant to parts 92 and 570 of title 24 of the CFR. Respondent's Motion to Dismiss at 7. HUD, however, argues correctly that this Board does not have jurisdiction in this appeal under those circumstances. It is well established "that the government's involvement in the financing and supervision of a contract between a public agency and a private contractor does not create a contract between the government and the contractor, for the breach of which the contractor may sue the government." *New Era Construction v. United States*, 890 F.2d 1152, 1155 (Fed. Cir. 1989), *aff'g New Era Construction*, HUD BCA 88-3406-C6, 89-1 BCA ¶ 21,376 (1988).

Houston has ever consented to the jurisdiction of this Board, and even if GTI were correct in its assertion, we have no authority to hear this appeal under the CDA.

Decision

The appeal is **DISMISSED FOR LACK OF JURISDICTION**.

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H. CHUCK KULLBERG
Board Judge

We concur:

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JERI K. SOMERS   JEROME M. DRUMMOND
Board Judge   Board Judge