UNITED STATES
CIVILIAN BOARD OF CONTRACT APPEALS

DISMISSED FOR FAILURE TO STATE A CLAIM: September 21, 2023

CBCA 7724

COBRA ACQUISITIONS, LLC,

Appellant,

v.

DEPARTMENT OF HOMELAND SECURITY,

Respondent.

Christopher D. Man, Bryant Gardner, Kyllan Gilmore, and Abbe David Lowell of Winston & Strawn LLC, Washington, DC, counsel for Appellant.

Matthew Lane, Federal Emergency Management Agency, Department of Homeland Security, Washington, DC, counsel for Respondent.

Before Board Judges **VERGILIO**, **SHERIDAN**, and **ZISCHKAU**.

Opinion for the Board by Board Judge **ZISCHKAU**. Board Judge **VERGILIO** concurs.

ZISCHKAU, Board Judge.

This appeal involves claims by appellant, Cobra Acquisitions, LLC (Cobra or appellant), seeking $379,099,508.71 from respondent, the Department of Homeland Security, Federal Emergency Management Agency (FEMA). The claims arise out of an alleged contract between FEMA and Cobra to pay for work Cobra performed to repair Puerto Rico's electrical grid in the aftermath of Hurricane Maria. FEMA has moved to dismiss the appeal for failure to state a claim upon which relief can be granted on the basis that there is no contract between Cobra and FEMA. We conclude that Cobra has failed to allege a federal

procurement contract over which we would have jurisdiction under the Contract Disputes Act (CDA), 41 U.S.C. §§ 7101–7109 (2018). Accordingly, we dismiss the appeal.

Background

In September 2017, Hurricane Maria made landfall in Puerto Rico cutting off all electricity on the island. In response, President Trump declared a regional disaster (FEMA-4339-DR) under the Stafford Act, 42 U.S.C. §§ 5121 et seq., which authorized FEMA to provide public assistance to the affected regions through disaster grants.

Pursuant to the disaster declaration, FEMA and Puerto Rico entered into an agreement for disaster assistance. 44 CFR 206.44 (2022). Under the agreement, FEMA agreed to provide federal assistance, and Puerto Rico agreed to be grantee for all assistance provided under the Stafford Act. Michael Byrne was designated by the President to be FEMA's Federal Coordinating Officer (FCO) in charge of coordinating all Federal activities in support of the territory.[1]

Following the execution of the FEMA-Puerto Rico agreement, the Puerto Rico Electric Power Authority (PREPA), the sole electric utility in Puerto Rico, submitted an official request for public assistance to fund the work to restore power to the island. On October 19, 2017, PREPA entered into a contract with Cobra to provide power restoration services. Cobra alleges that FEMA helped facilitate the PREPA-Cobra agreement. Complaint ¶¶ 11-14. The PREPA-Cobra agreement stated that "FEMA funds will be used to cover this contract" and "FEMA has reviewed and approved of this contract." *Id.* ¶ 14.

Cobra alleges that by December 2017, PREPA had breached the PREPA-Cobra agreement by failing to make over $174 million in payments. *Id.* ¶ 15. Cobra further alleges that its chief executive officer, Arty Straehla, met in December 2017 with FEMA's FCO to raise the issue of PREPA's payment failures and that if Cobra did not get paid, Cobra would have to stop work. *Id*. According to Mr. Straehla, Mr. Byrne guaranteed that if Cobra were to complete the work, FEMA would pay. *Id.* ¶ 16. Cobra states that based on that agreement, Cobra continued its work. Following this meeting, Mr. Byrne sent a letter dated December 23, 2017, to Jose Marrero, the Puerto Rico Governor's Authorized Representative, informing him that project worksheet 251 would soon be completed and the necessary funding would be obligated. Mr. Byrne raised Cobra's concerns about payment and stated that "Puerto Rico must provide an SF-270 draw down request to FEMA with validated,

[1] The FCO is the president's representative at the site of a disaster. The FCO's authority is set out in 42 U.S.C. § 5143.

supporting documentation within 1 day of the obligation of PW #251." Appellant's Notice of Appeal, Exhibit 1, Exhibit B. SF-270 here refers to the paperwork required for Puerto Rico to access the public assistance grant funding after it is set aside, indicating that Mr. Byrne was seeking to expedite Puerto Rico's drawing down of grant funds so that PREPA could pay Cobra and address the concerns raised by Mr. Straehla.

Cobra alleges that Mr. Byrne and FEMA's Deputy Regional Administrator for FEMA Region II, Dr. Ahsha Tribble, continually reaffirmed the guarantee made by Mr. Byrne at the December 2017 meeting with Mr. Straehla. Complaint ¶ 17. Between October 2017 and April 2019, PREPA paid Cobra a total of $1,094,989,404.78 of $1,474,088,913.50 invoiced on the project. In its claim, Cobra claims that PREPA failed to pay substantial amounts under their contract and that FEMA did not uphold its part of the bargain by ensuring that Cobra was paid in full.

On January 20, 2023, Cobra submitted a certified claim to FEMA seeking the remaining costs due under the project plus interest. On February 2, 2023, FEMA responded to Cobra's certified claim declining to issue a final decision on the basis that no contract existed between FEMA and Cobra. On March 31, 2023, Cobra filed its appeal with the Board, and, on April 25, 2023, FEMA moved to dismiss for failure to state a claim upon which relief can be granted on the basis that appellant has failed to allege a valid procurement contract.

Discussion

To survive a motion to dismiss for failure to state a claim upon which relief may be granted under Board Rule 8(e) (48 CFR 6101.8(e)), Cobra "must point to factual allegations that, if true, would state a claim to relief that is plausible on its face, when the Board draws all reasonable inferences in favor of the contractor." *UnitedHealthcare Insurance Company, Inc. v. Office of Personnel Management*, CBCA 7357, 23-1 BCA ¶ 38,375, at 186,419 (quoting *B.L. Harbert International, LLC v. General Services Administration*, CBCA 6300, et al., 19-1 BCA ¶ 37,335, at 181,569). Cobra's factual allegations need only be sufficient "to raise a right to relief above the speculative level." *Bell Atlantic Corp. v. Twombly*, 550 U.S. 544, 555 (2007). Ultimately, "the granting of a motion to dismiss for failure to state a claim upon which relief can be granted is appropriate when the facts asserted by the claimant do not entitle it to a legal remedy." *Kiewit-Turner, A Joint Venture v. Department of Veterans Affairs*, CBCA 3450, 14-1 BCA ¶ 35,705, at 174,846 (citing *Boyle v. United States*, 200 F.3d 1369, 1372 (Fed. Cir. 2000)).

The CDA limits the Board's jurisdiction to contracts with an executive agency for "(1) the procurement of property . . . ; (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. § 7102(a).

Cobra alleges four different bases of contractual rights in its complaint: (1) an express oral procurement contract for services between Cobra and FEMA; (2) an implied procurement contract for services between Cobra and FEMA; (3) an express procurement contract for services between Cobra and FEMA's alleged purchasing agent, PREPA; and (4) third-party beneficiary contractual rights of Cobra under the alleged arrangement where PREPA acted as FEMA's purchasing agent for disaster assistance. We conclude that Cobra has failed to state a claim upon which relief may be granted because it has failed to allege a CDA procurement contract over which we would have jurisdiction.

I. Express or Implied-in-Fact Procurement Contract for Services Between Cobra and FEMA

Cobra has pled in its complaint that when Cobra went to FEMA about a lack of payment on the project, FCO Byrne "guaranteed" that FEMA would ensure Cobra was fully compensated for unpaid and remaining work from the PREPA-Cobra contract if Cobra agreed to finish the work. Complaint ¶¶ 15-16. According to Mr. Straehla's notes from the meeting, Mr. Byrne guaranteed Cobra would get paid if it finished the work under the PREPA-Cobra contract. *Id.* Cobra states in its complaint that based on Mr. Byrne's guarantee of payment, Cobra accepted FEMA's guarantee and resumed its work.

Cobra asserts that it repeatedly went back to FEMA, stating that Cobra could not continue working without payment, and Mr. Byrne and Dr. Tribble continually reaffirmed FEMA's commitment to Cobra that FEMA would pay. *Id.* ¶¶ 16-18.

In analyzing a motion to dismiss for failure to state a claim, we need not adopt appellant's legal conclusions, *Twombly*, 550 U.S. at 555, but we must assume the veracity of well-pleaded facts. *Ashcroft v. Iqbal*, 556 U.S. 662, 679 (2009).

Taking Cobra's factual allegations as true, the actions of Mr. Byrne and Dr. Tribble might have caused the United States to enter into a suretyship in which the United States agreed to act as surety on the PREPA-Cobra contract.[2] *Balboa Insurance Co. v. United States*, 775 F.2d 1158, 1160 (Fed. Cir. 1985) ("A suretyship is the result of a three-party

[2] Although FEMA argues that Mr. Byrne and Dr. Tribble did not have actual authority to bind the United States, we need not discuss or decide this question to resolve the motion.

agreement, whereby one party (the surety) becomes liable for the principal's or obligor's debt or duty to the third party obligee.") (citing *United States v. United States Fidelity & Guaranty Co.*, 236 U.S. 512, 529-30 (1915)). Nevertheless, even if those actions created a suretyship, we would not have jurisdiction under the CDA over this suretyship arrangement as it is not a contract for "(1) the procurement of property . . . ; (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. § 7102(a). In addition, assuming FEMA was a party to the PREPA-Cobra contract through its suretyship, *see Balboa Insurance Co.*, 775 F.2d at 1160, we still would not have jurisdiction over any Cobra claim against FEMA because the PREPA-Cobra contract was not entered into by an executive agency. 41 U.S.C. § 7102(a); *see New Era Construction v. United States*, 890 F.2d 1152, 1157 (Fed. Cir. 1989) (contributions contract was not one for procurement by an executive agency (HUD) but rather was for the financing of a procurement by a nonfederal agency; the contributions contract was not designed to enable HUD to procure real property but to facilitate the procurement of such property by the nonfederal agency). As in *New Era*, the alleged "guarantee" by FEMA here was to facilitate the procurement of services by a nonfederal agency (PREPA).

We therefore must dismiss Cobra's complaint allegation that Mr. Byrne's guarantee created an express or implied contract because Cobra has failed to allege an express or implied contract over which we would have CDA jurisdiction.

II. Express Procurement Contract for Services Between FEMA's Alleged Agent, PREPA, and Cobra

Alternatively, Cobra argues that PREPA merely acted as a purchasing agent for FEMA when entering into the PREPA-Cobra contract, and therefore FEMA, as principal, should be held liable under the contract. While PREPA did enter into an express contract with Cobra, it did not do so as FEMA's agent, and to hold otherwise would be a misstatement of the grant process in which PREPA and FEMA participated.

The Supreme Court has held that under the Armed Services Procurement Act of 1947, contractors of the Federal Government may act as the Government's purchasing agents making the Government ultimately a party to the agreement. *Kern-Limerick Inc. v. Scurlock*, 347 U.S. 110 (1954). In these scenarios, the contracts specifically shift the economic burden of the purchases to the United States and identify the United States as purchaser, making the contractors purchasing agents for the government. *Id.* at 119-20. However, in other scenarios, where it was not made clear that the Government was the ultimate purchaser of the goods, the Supreme Court has held that the contractors were not acting as purchasing

agents for the Government. *Id.* at 118 (citing *State of Alabama v. King & Boozer*, 314 U.S. 1 (1941)).

The Stafford Act, unlike the Armed Services Procurement Act, does not cause this same automatic shift in the economic burden. At its core, FEMA's public assistance program is a two-tier program through which FEMA provides financial assistance through grants to states or territories (grantees), which in turn carry out work directly or process subgrants to other eligible public assistance applicants (subgrantees). While grantees and subgrantees may use contractors to assist them in carrying out public assistance awards, these contracts are *not* on behalf of FEMA nor is FEMA ultimately a party to the contracts.

Although FEMA enters into a binding contract under the public assistance program with the grantee, which sets out the commitments and procedures to secure grants for disaster assistance, *see* 44 CFR 206.44; *Columbus Regional Hospital v. United States*, 990 F.3d 1330, 1339-40 (Fed. Cir. 2021), FEMA does not authorize the grantee to act as a purchasing agent for FEMA nor does it shift the economic benefit of any work performed to FEMA. *See* 44 CFR 206.44(a). Ultimately, the work covered by the public assistance program benefits the grantee and the subgrantees.

Additionally, the fact that the PREPA-Cobra agreement stated that "FEMA funds will be used to cover this contract" and "FEMA has reviewed and approved of this contract" does not change the result. FEMA reviews contracts entered into by grantees and subgrantees solely for their compliance with procurement practices. *See* FEMA's Public Assistance Program and Policy Guide (June 2020) at 76. Further, the mere fact that a contract—to which the federal government is not a party—states FEMA will be providing public assistance funding for the contracted work does not make the grantee or subgrantee a purchasing agent of FEMA.

As Puerto Rico and PREPA were not acting as purchasing agents for FEMA when entering into the PREPA-Cobra contract, FEMA cannot be held liable under the PREPA-Cobra contract.

III. Third-Party Beneficiary Contractual Rights

Cobra alleges that FEMA and PREPA entered into agreements through which FEMA provided PREPA with disaster assistance, and that, as a third-party beneficiary under these contracts (i.e., the entity that would eventually receive the funds), Cobra should be able to assert third-party beneficiary rights under the FEMA-PREPA agreements. Complaint ¶¶ 63–68. Cobra links this argument to its earlier argument that PREPA was acting as FEMA's purchasing agent. As indicated above, FEMA provides public assistance to a

grantee—in this case Puerto Rico—which then distributes the assistance to subgrantees—here, PREPA. In this public assistance context, there is no contract between FEMA and PREPA. *See Columbus Regional Hospital*, 990 F.3d at 1342-46 (concluding that there was no express contract or implied-in-fact contract between the subgrantee and FEMA). As we discussed earlier, there is, however, a binding contract between Puerto Rico (the grantee) and FEMA, which sets out the commitments and procedures to secure grants for disaster assistance. *Id*. at 1339-40. However, PREPA was not a party to that contract and has no rights under that contract. *Id.* at 1343-44.

While the FEMA-Puerto Rico agreement is a binding contract, *see Columbus Regional Hospital*, 990 F.3d at 1340-41, it is a cooperative agreement between the Federal Government and a local government for use of grant funds. *See Omni Pinnacle, L.L.C. v. Department of Agriculture*, CBCA 2452, 12-2 BCA ¶ 35,118, at 172,440-41 (discussing the difference between a cooperative grant agreement and a procurement contract); *see also Nutritional Support, Inc.*, AGBCA 2002-141-1, 03-1 BCA ¶ 32,115, at 158,795 (2002). Nonetheless, the FEMA-Puerto-Rico agreement is not a procurement contract over which we have jurisdiction. Even in a case where the underlying agreement is a CDA procurement contract, we could not resolve a third-party beneficiary claim because we lack jurisdiction under the CDA to entertain such a claim. *See Rashid El Malik v. Department of Veterans Affairs*, CBCA 6600, 20-1 BCA ¶ 37,536, at 182,275 (holding that only a contractor may bring an action under the CDA); *Eagle Peak Rock & Paving, Inc. v. Department of the Interior*, CBCA 2770, 12-2 BCA ¶ 35,146, at 172,521-22. Accordingly, we must dismiss Cobra's third-party beneficiary claim.

Decision

We **GRANT** FEMA's motion to dismiss as Cobra has failed to state a claim upon which relief can be granted.

Jonathan D. Zischkau
JONATHAN D. ZISCHKAU
Board Judge

I concur:

Patricia J. Sheridan
PATRICIA J. SHERIDAN
Board Judge

VERGILIO, Board Judge, concurring.

I concur with the holding of the majority that appellant, Cobra Acquisitions, Inc. (Cobra), has failed to raise a claim for which the Board can provide relief. None of the various contracts (express oral; implied; express-purchasing agent; third-party beneficiary) said by Cobra to have arisen by actions of government officials reflect a procurement contract under the Contract Disputes Act (CDA), 41 U.S.C. §§ 7101-7109 (2018).

After a presidentially-declared disaster, Cobra performed emergency repairs in Puerto Rico under a contract with the Puerto Rico Electric Power Authority (PREPA) (the supplier of electricity that was owned by the Commonwealth of Puerto Rico). That work was to be funded under a public assistance grant issued by the Federal Emergency Management Agency (FEMA) with PREPA the applicant, and pursuant to the Stafford Act. 42 U.S.C. § 5121 et seq.; 44 CFR 206.44 (2022) (FEMA-State Agreements). FEMA was not a party to the PREPA-Cobra contract; FEMA was to provide funding to PREPA under the grant consistent with the Stafford Act. There is no entitlement to funding for all costs expended.

As detailed in its claim and complaint, Cobra performed and sought and received payment under the PREPA-Cobra contract, albeit receiving less payment than it sought. Cobra here contends that it entered into contracts with FEMA as evinced through actions of agency officials to guarantee payment to Cobra in return for Cobra's continued performance. Consistent with its claim, it seeks relief on various theories for breach of a procurement contract. One need not get into details here about the actual terms and conditions of any of the alleged contracts, which Cobra fails to address. PREPA, as the applicant, was not entitled to payment under the grants program, given the discretion FEMA was to exercise.

FEMA has styled its underlying motion as one seeking dismissal. It says at one point for lack of jurisdiction, but elsewhere, and consistent with its references to Board Rule 8(e) (48 CFR 6101.8(e)), it seeks dismissal for failure to state a claim upon which relief can be granted. It is undisputed that the Board "must presume that the facts are as alleged in the complaint, and make all reasonable inferences in favor of the plaintiff." *Cary v. United States*, 552 F.3d 1373, 1376 (Fed. Cir. 2009). To survive a motion to dismiss, "the complaint must contain 'sufficient factual matter, accepted as true, to state a claim to relief that is plausible on its face.'" *A & D Auto Sales, Inc. v. United States*, 748 F.3d 1142, 1157 (Fed. Cir. 2014) (quoting *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009) (secondary quotation marks and citation omitted)); *see Engage Learning, Inc. v. Salazar*, 660 F.3d 1346, 1353 (Fed. Cir. 2011) (in distinguishing a failure to establish jurisdiction from a failure to state a claim, the court noted for the latter failure: "It would be more accurate to conclude that the petitioner has failed to prove the necessary elements of a cause for which relief could be granted." (quoting *Spruill v. Merit Systems Protection Board*, 978 F.2d 679, 678 (Fed. Cir. 1992))).

Given the result here, one need not explore if the complaint states a claim that is plausible on its face.

What Cobra has failed to, and cannot, establish based upon the facts asserted is that an alleged contract, to guarantee payment or otherwise, is a procurement contract subject to the CDA, and that relief is available from this Board. By definitions found in the Federal Acquisition Regulation, 48 CFR 2.101, a procurement is an acquisition. An *acquisition* "means the acquiring by contract with appropriated funds of supplies or services (including construction) *by and for the use of the Federal Government* through purchase or lease, whether the supplies or services are already in existence or must be created, developed, demonstrated, and evaluated." (Emphasis added). A *contract* "means a mutually binding legal relationship obligating the seller to furnish the supplies or services (including construction) and the buyer to pay for them. . . . Contracts do not include grants and cooperative agreements covered by 31 U.S.C. § 6301, *et seq.*" Despite Cobra's assertions, FEMA did not utilize PREPA as a "purchasing agent" under the grant; FEMA was not purchasing anything under the Stafford Act, it provided public assistance via a grant to an applicant.

Consistent with the regulatory language, a "procurement contract" subject to the CDA must be a contract for "the acquisition by purchase, lease or barter, of property or services for the direct benefit or use of the Federal Government." *New Era Construction v. United States*, 890 F.2d 1152, 1157 (Fed. Cir. 1989). I do not read a subsequent case addressing jurisdiction to alter the analysis applicable to satisfying requirements for stating a potentially sustainable claim. *Parsons Evergreene, LLC v. Secretary of the Air Force*, 968 F.3d 1359 (Fed. Cir. 2020) (Court rejected reading the requirements of 31 U.S.C. § 6303 (direct benefit or use) as applicable to resolving jurisdictional question).

Because the Board cannot provide relief to Cobra under the alleged contracts that are not procurement contracts (they are not for the use or benefit of the United States or arise under a grants program as a grant), I would grant FEMA's motion.

Joseph A. Vergilio
JOSEPH A. VERGILIO
Board Judge