

RUSSELL B. CLOWER, JR.)	AGBCA No. 2000-140-1
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Appellant)	
)	
Representing the Appellant:)	
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Russell B. Clower, Jr.)	
P.O. Box 4221)	
Greenville, Mississippi 38704)	
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Representing the Government:)	
)	
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**RULING ON GOVERNMENT’S MOTION TO DISMISS
FOR LACK OF JURISDICTION**

July 20, 2000

Before HOURY, VERGILIO, and WESTBROOK, Administrative Judges.

Opinion for the Board by Administrative Judge WESTBROOK.

In his appeal, received at the Board March 16, 2000, Appellant, Russell B. Clower, Jr., of Greenville, Mississippi, stated that he wished “to appeal the way [his] house was built.” In our March 21, 2000 docketing letter, the Board noted the lack of evidence of a contract between Appellant and an agency of the U. S. Department of Agriculture (USDA). In addition, there was no indication of a Contracting Officer’s (CO’s) decision having been issued or requested. Appellant was afforded 30 days to provide evidence of a contract; that a claim had been filed with the CO; and that a decision had been issued or the passage of 60 days since the request for a decision. The requested information was not received at the Board within 30 days and thereafter the Board made several efforts to schedule a conference call with the parties. A telephonic conference was held June 7, 2000. The

Board raised the question whether it has jurisdiction to consider the matters raised by Appellant's notice of appeal. Appellant stated that he has a promissory note with Rural Development, an agency of USDA, pursuant to which his house is financed. The house was built by a contractor selected from a list provided by Rural Development. According to Appellant, he was required to select a contractor from the list. Both parties provided descriptions of the construction problems forming the basis for the merits of Appellant's claim.

The Board now has before it the Government's Motion to Dismiss for Lack of Jurisdiction (Motion). The Government asserts that Appellant has not provided evidence of a contract directly with USDA, or that a claim has been filed with the CO or that a CO's decision has been issued. Appellant has responded to the Motion, but has failed to provide evidence of a Contract Disputes Act (CDA) contract or a request for a CO decision.

The Agriculture Board of Contract Appeals (the Board) was established by the Secretary of Agriculture in accordance with the requirements of the CDA of 1978 (41 U.S.C. §§ 601-613) (7 C.F.R. § 24.1). Pursuant to the CDA, the Board has jurisdiction to determine appeals from CO decisions relating to express or implied contracts made by the USDA, agencies of the USDA, the Commodity Credit Corporation, and the Federal Crop Insurance Corporation (FCIC), for procurement of property, other than real property in being; procurement of services; procurement of construction, alteration, repair or maintenance of real property; and the disposal of real property.

FINDINGS OF FACT

1. The Board's CDA jurisdiction is as described above. Aside from the CDA jurisdiction, the Board also has certain FCIC jurisdiction; jurisdiction to hear and determine suspension and debarment issues; and jurisdiction in administrative determinations of liquidated damages under the Contract Work Hours Safety Standards Act. (7 C.F.R. § 24.4.)
2. Appellant executed a "deed of trust for Mississippi" August 25, 1997. The trustee was Minnie L. Stone, Community Development Manager of Washington County, Mississippi. The beneficiary was the United States of America acting through the Rural Housing Service, USDA (Lender). The deed of trust recited Appellant's indebtedness to the Lender under a promissory note in the amount of \$56,000 also executed August 25, 1997. (Unnumbered attachment to Appellant's June 12, 2000 letter to the Board.)
3. Appellant entered into a construction contract with Elite Builders August 29, 1997, for the construction of a dwelling at a cost of \$48,200. Herbert Clay executed the contract on behalf of Elite Builders. (Exhibit A to Motion.) The work was to start by September 15, 1997, and be completed by January 15, 1998. Elite Builders did not complete the project. On June 22, 1999, Appellant executed a construction contract with Topps Construction (Topps) to complete the house according to the original plans and specifications. Larry Wills executed the contract on behalf of Topps. (Exhibit B to Motion.)

4. Appellant has identified what he believes to be defects in the construction of the house (Appellant's letters of September 9, and December 30, 1999 to Topps; Appellant's letters of April 4 and May 3, 2000, to "Rural Housing"; and Appellant's letters of May 12, May 15, May 23, and June 12, 2000, to the Board).

DISCUSSION

The Board has jurisdiction as set out in 7 C.F.R. § 24.4 (Finding of Fact (FF) 1). Without question, this case does not involve the FCIC, suspension and debarment or Contract Work Hours Safety Standards Act issues, the Board's non-CDA areas of jurisdiction. The Board's CDA jurisdiction is limited to contracts for the procurement of tangible property or services (or disposal of real property). The agreement between Appellant and the Government is not a procurement contract. Rather, it provides security to the Government from the Appellant's possible default on the loan made to Appellant for the construction of a house. The Board has held that it lacked jurisdiction over an appeal arising out of a subordination agreement between a bank and the Farmers Home Administration because the agreement was not to procure property or services but to foster and support crop production by inducing the bank through the subordination agreement to lend money to a farmer. West Chester Savings Bank, AGBCA No. 83-278-1, 84-1 BCA ¶ 17,077. The loan agreement in the instant appeal had the purpose of facilitating home ownership in the rural area. The agreement does not constitute the procurement of goods or services.

In an analogous situation, the Court of Appeals for the Federal Circuit has held that a Department of Housing and Urban Development contract by which it exercised some involvement in the financing and supervision of a contract between a public agency and a private contractor did not create a contract between the Government and the contractor for the breach of which the contractor had a right to sue the Government. New Era Construction v. United States, 890 F.2d 1152 (Fed. Cir. 1989).

Here Appellant was a party to two contracts for construction (FF 3). The other party to each contract, however, was an entity other than the Government. Appellant has pointed to no grant of jurisdiction allowing the Board to adjudicate the construction defect issues of concern to Appellant. The parties in privity with Appellant through the construction contracts are not subject to the Board's jurisdiction. Whatever remedy Appellant may have against them is not in this forum.

RULING

The Government's Motion to Dismiss for Lack of Jurisdiction is granted.

ANNE W. WESTBROOK
Administrative Judge

Concurring:

EDWARD HOURY
Administrative Judge

JOSEPH A. VERGILIO
Administrative Judge

Issued at Washington, D.C.
July 20, 2000