

IN THE UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF OREGON

KAREN SHARR; ET AL.,	)	Civil No. 02-1513-JO
	)	
Plaintiffs,	)	
	)	
v.	)	<u>OPINION AND ORDER</u>
	)	
NCS PEARSON, INC.,	)	
	)	
Defendant.	)	

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JONES, Judge:

Defendant NCS Pearson ("Pearson") moves to dismiss (# 218) plaintiffs' Third Party/Breach of Contract claim on a jurisdictional ground pursuant to Fed.R.Civ.P. 12(b)(1). For the reasons stated below, I GRANT Defendant's motion to dismiss.

BACKGROUND

As the parties have been engaged for over two years in this matter and are familiar with the record, I briefly restate the case background as summarized in an earlier order:

Plaintiffs in this action are former airport security screeners at Portland International Airport alleging discrimination in job testing by the federal government's human resources contractor, NCS Pearson. At summary judgment, plaintiffs' claims against the government were dismissed as well as certain claims against NCS Pearson, leaving only Title VII discrimination, ADA, and ADEA claims against NCS Pearson as an employment agency.

Order, 12/17/2004, 2. Plaintiffs subsequently amended their complaint by adding three state claims against Pearson. I dismissed *sua sponte* two of those claims - defamation and intentional interference with economic relations. On plaintiffs' motion, I reinstated the intentional interference claim. Pearson now moves to dismiss the state claim for third-party beneficiary breach of contract on jurisdictional grounds.

ARGUMENTS

Plaintiffs assert in their Fifth Amended Complaint that they are third-party beneficiaries to Pearson's contract with the Transportation Security Administration ("TSA"), Solicitation No. DTTS59-02-R-00440 ("TSA Contract"). Plaintiffs allege that the TSA Contract created a duty for Pearson to provide an incumbent preference in the screening process to plaintiffs and that Pearson failed to provide that preference through competent testing in breach of the TSA Contract. Plaintiffs' Fifth Amended Complaint, 7 (¶¶ 25-28).

Pearson, in turn, argues that if plaintiffs are third-party beneficiaries then they must step into the shoes of TSA as a party to the TSA Contract and thereby become bound by its terms. A dispute clause incorporated into the TSA Contract states that "all disputes arising under or relating to this contract shall be resolved under" the Contract Disputes Act of 1978 (the "CDA"), 41 U.S.C. §§ 601-613, via submission of the claim to the contracting officer with appeal available to an agency board of appeals or the Court of Federal Claims. See Fed. Acq. Reg. ("FAR") 52.233-1(a); Declaration of Courtney C. Dippel, Exhibit #1, 21 (incorporating the December 1998 version of FAR 52.233-1 into the TSA Contract).

Pearson asserts that the CDA as incorporated into the TSA Contract is the exclusive procedure for remedy of contractual disputes such as plaintiffs' third-party breach of contract

claim. The CDA "applies to any express or implied contract * * * entered into by an executive agency" with a contractor. 41 U.S.C. 602(a); see also 41 U.S.C. 605 (setting out the procedural rights of the contractor and executive agency). If the CDA applies to plaintiffs, then this court's jurisdiction would be lost and they would need to submit their breach of contract claim to the government contracting officer. Therefore, Pearson moves to dismiss plaintiffs' third-party breach claim from the present action in the District of Oregon for improper jurisdiction.

Plaintiffs, in turn, argue that the CDA contemplates only claims between the government and its contractor. See 41 U.S.C. 605(a) ("All claims **by a contractor against the government** relating to a contract shall be in writing and shall be submitted to the contracting officer for a decision. All claims **by the government against a contractor** relating to a contract shall be the subject of a decision by the contracting officer.") (emphasis added). A dispute between private parties is not within the scope of the CDA or the appellate jurisdiction of the Court of Federal Claims which hears claims where the federal government is a party.

STANDARD OF REVIEW

A party may contest a court's jurisdiction to hear a claim by moving to dismiss for lack of jurisdiction under Rule 12(b)(1). See Fed.R.Civ.P. 12(b)(1). The non-movant has the burden to show that jurisdiction is proper. See Tosco Corp. v. Communities for a Better Env't, 236 F.3d 495, 499 (9th Cir. 2001). "A Rule 12(b)(1) jurisdictional attack may be facial or factual." Safe Air v. Meyer, 373 F.3d 1035, 1039 (9th Cir. 2004) (citing White v. Lee, 227 F.3d 1214, 1242 (9th Cir. 2000)). For a factual attack, "the challenger disputes the truth of the allegations that, by themselves, would otherwise invoke federal jurisdiction" by submitting evidence or affidavits with a Rule 12(b)(1) motion. Id. "Once the moving party has converted the motion to dismiss

into a factual motion by presenting affidavits or other evidence properly brought before the court, the party opposing the motion must furnish affidavits or other evidence necessary to satisfy its burden of establishing subject matter jurisdiction.'" Id. (quoting Savage v. Glendale Union High Sch., 343 F.3d 1036, 1039 n.2 (9th Cir. 2003)). The court may consider the additional evidence submitted in making its decision. Id.

ANALYSIS

The third-party beneficiary breach of contract claim arises by the plaintiffs standing in the place of the government to sue the contractor, Pearson. Both parties acknowledge the absence of case law concerning private party disputes of a federal contract under the CDA, except for the statutory scheme for subcontractors' claims against prime federal contractors. Thus, the case law that addresses CDA claims against or by the federal government or that discusses the statutory definition of "contractor" for jurisdictional purposes is not helpful to resolving the question of whether the CDA applies to a third-party beneficiary asserting a government contract claim against a contractor. See 41 U.S.C. 601(4) ("the term 'contractor' means a party to a Government contract other than the Government.").

Based on the copy of the TSA Contract submitted with Pearson's Motion to Dismiss, I find that the CDA's Disputes clause was incorporated into the TSA Contract. In as much as plaintiffs allege that they are intended third-party beneficiaries of the TSA Contract, they are subject to the requirements binding on the contracting parties, "subject to certain public policy exceptions." Stratosphere Litig. L.L.C. v. Grand Casinos, Inc., 298 F.3d 1137, 1146 (9th Cir. 2002). Plaintiffs argue for an exception from the rule because the CDA applies to disputes involving the federal government, and not a third party dispute with a federal contractor.

However, the CDA applies all contract claims made "by one of the **contracting parties** seeking, as a matter of right, the payment of money in a sum certain, the adjustment or interpretation of contract terms, or other relief arising under or **relating to the contract.**" FAR 52.233-1(c) (definition of "claim") (emphasis added). TSA would have been required to proceed under the CDA if it had sought to compel Pearson to carry-out plaintiffs' alleged incumbent preference in the TSA Contract. Similarly, plaintiffs' contract claim - again, stepping into the shoes of the TSA as a contracting party - clearly relates to Pearson's performance under the TSA Contract. Therefore, the CDA applies to plaintiffs' breach of contract claim.

Plaintiffs' contract claim is not properly before this court under the CDA. Therefore, I GRANT Defendant's Motion To Dismiss (# 218) Plaintiffs' Breach Of Contract Claim.

DATED this 14th day of February, 2005.

/s/ Robert E. Jones
ROBERT E. JONES
U.S. District Judge