

IN THE COURT OF COMMON PLEAS OF PHILADELPHIA COUNTY
FIRST JUDICIAL DISTRICT OF PENNSYLVANIA
CIVIL TRIAL DIVISION

EVANS SUPPLIERS AND COMMUNICATION CO., INC.,	: MARCH TERM, 2005
	: No. 0469
Plaintiff,	
v.	: (Commerce Program)
ELLIOTT-LEWIS CORPORATION and THE CITY OF PHILADELPHIA,	:
Defendants.	: Superior Court Docket No. 1660 EDA 2005

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OPINION

Albert W. Sheppard, Jr., J. July 27, 2005

This Opinion is submitted relative to plaintiff’s appeal of this court’s Orders of May 27, 2005 sustaining the respective Preliminary Objections of defendants, City of Philadelphia (“City”) and Elliott-Lewis Corporation (“Elliott-Lewis”), and dismissing plaintiff’s case. For the reasons discussed, the Orders should be affirmed.

BACKGROUND

Evans is a corporation supplying materials, equipment, and supplies to building and maintenance contractors. *See* Compl., ¶¶ 1, 5. Evans is a participant in the City’s Minority Business Enterprise Program (the “Program”), “which was created to ensure there would be anti-discrimination in bidding and contractual practices involving [City] contracts.” *Id.* at ¶ 7. The

Program requires that contractors submit a list of potential subcontractors on a City-funded project, state whether the subcontractors are disadvantaged business enterprises (i.e., whether the businesses are owned by minorities, women, or disabled persons), and what estimated dollar amount and percentage of the total contract will be given to that subcontractor. *Id.* at ¶ 9-11; Exhs. C, D.

Elliott-Lewis entered into a contract with the City to perform high-tech maintenance work at the Philadelphia International Airport (the “Contract”). *See id.* at ¶ 8. Elliott-Lewis listed Evans as a minority subcontractor in its bid for the Contract and stated that Evans would receive 2.39 per cent of the total amount of the Contract purchase orders from Elliott-Lewis. *See id.* at ¶¶ 10, 11, 15. As a result, Evans claims that it should have earned \$58,567.00 in total, but in actuality earned no more than \$1,978.00.¹ *See id.* at ¶¶ 16- 20.

Evans sued defendants for breach of the Contract and claimed that, since the Program required Elliott-Lewis to list Evans as a minority subcontractor in the Contract, Evans is a third party beneficiary of the Contract. The City and Elliott-Lewis filed Preliminary Objections, which the court sustained. As a result the claims against both defendants were dismissed. Evans now appeals.

DISCUSSION

Evans raises three issues on appeal: (1) whether this court was justified in granting defendants’ Preliminary Objections; (2) whether Evans, as a Program participant, was a third party beneficiary of the Contracts; and (3) whether defendants can exclude Evans’s claim relying upon Contract language that is contrary to the exhibits submitted in the bid process leading to the

¹ Evans claims that the total amount of the Contract (including amendments) was \$14,184,380.00 and that it would have made a 15 per cent profit on the 2.39 per cent of that amount. *See* Complaint at ¶¶ 14, 15, 19. However, the amount that Evans’ claims is not the same as the amount the court arrives at by applying the above percentages to the Contract total, that is \$51,064.00.

award of the Contract. *See* Civil Docketing Statement.

Preliminary Objections may be sustained only where it is clear and free from doubt, based on the allegations contained in the pleadings, that the plaintiff is unable to prove facts legally sufficient to establish its right to relief. *See Bourke v. Kazaras*, 746 A.2d 642, 643 (Pa. Super. 2000). Any doubt in granting a demurrer must be resolved in favor of the non-moving party. *See Pike Co. Hotels Corp. v. Marvin's Refrigeration, Inc.*, 262 Pa. Super. 126, 135, 396 A.2d 677, 682 (1978). In this case, there is no doubt that Evans lacks standing to enforce what it claims are the terms of the Contract between the City and Elliot-Lewis.

In order to establish that it is third party beneficiary of the Contract, Evans must satisfy a two prong test:

[A] party becomes a third party beneficiary only where both parties to the contract express an intention to benefit the third party in the contract itself, unless the circumstances are so compelling that recognition of the beneficiary's right is appropriate to effectuate the intention of the parties, and the performance satisfies an obligation of the promisee to pay money to the beneficiary or the circumstances indicate that the promisee intends to give the beneficiary the benefit of the promised performance.

Scarpitti v. Weborg, 530 Pa. 366, 372-73, 609 A.2d 147, 150-51 (1992). "The first part of the [above] test sets forth a standing requirement which leaves discretion with the court to determine whether recognition of third-party beneficiary status would be appropriate. The second part defines the two types of claimants who may be intended as third-party beneficiaries. If a party satisfies both parts of the test, a claim may be asserted under the contract." *Id.*, 530 Pa. at 371, 609 A.2d at 150. *See also Fizz v. Kurtz, Dowd & Nuss, Inc.*, 360 Pa. Super. 151, 154, 519 A.2d 1037, 1039 (1987) (it is up to the Court to determine "whether recognition of a beneficiary's right to performance is appropriate to effectuate the intention of the parties.")

In this case, the parties to the Contract explicitly disavowed an intention to create any

third party beneficiaries of the Contract. *See* City's Preliminary Objections, Exh. C, ¶ 15.5.²

The fact that Elliot-Lewis also promised the City in the Contract that it would honor the City's anti-discrimination policy is not inconsistent with the clause stating that no third party beneficiaries are created. And so, the Contract is **not** ambiguous as claimed by Evans.³ *See id.* at ¶ 14.4. In addition, there is no indication that the City (the promisee) had any obligation to pay money to Evans, nor that the City intended to give Evans the benefit of Elliot-Lewis' performance of the Contract.

The City's and Elliot-Lewis' clear intent in naming the minority subcontractors, including Evans, under the Contract was to adhere to applicable law, which benefits disadvantaged business enterprises in general. There was no intent to benefit Evans in particular. The City is the only party that has standing to bring a claim against Elliot-Lewis for any breach of the Program requirements and the Contract.

CONCLUSION

For the reasons discussed, the City's and Elliott-Lewis' Preliminary Objections were properly sustained, and Evans' claims against them were properly dismissed. This court's Orders should be affirmed.

BY THE COURT,

ALBERT W. SHEPPARD, JR., J.

² Normally the court would not look beyond the Complaint when deciding Preliminary Objections in the nature of a demurrer. However, where, as here, the plaintiff failed to attach to its Complaint a copy of the operative Contract upon which it relies for its claims, the court properly considered the terms of that Contract that was proffered by the defendants in connection with their Preliminary Objections. *See* Pa. R. Civ. P. 1019(i).

³ A contract is ambiguous when its conditions are susceptible to more than one interpretation or meaning. *See Wyatt v. Phillips*, 2004 WL 51693, *6 (Phila. Com. Pl. Jan. 12, 2004). There is only one reasonable interpretation of the Contract here, which simply requires compliance with applicable law and refuses to create third party beneficiaries.