

PRIVITY AND WHY YOU NEED IT

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The doctrine of sovereign immunity makes the United States, as the sovereign, immune from suit unless it consents to be sued. *United States v. Thompson*, 98 U. S. 486 (1878); *United States v. Shaw* 309 U. S. 495 (1940). The government consents to be sued only by those with whom it has privity of contract. *Erickson Air Crane Co. v. United States*, 731 F.2d 810, 813 (Fed.Cir.1984). The effect of finding privity of contract between a party and the United States is to find a waiver of sovereign immunity. *Cienega Gardens v. United States*, 194 F.3d 1231, 1239 (Fed.Cir.1998).

But what is privity? Privity is a direct legal relationship. Privity of contract is defined as "that connection or relationship which exists between two or more contracting parties." Black's Law Dictionary 1079 (5th ed. 1979).

The United States Court of Federal Claims (and the Boards of Contract Appeal as well) have limited jurisdiction. They can only entertain claims where the United States has waived its sovereign immunity. The Tucker Act, 28 U.S.C. 1491 and the Contract Disputes Act, 41 U.S.C. § 7102, confer jurisdiction upon the Court of Federal Claims and the Boards of Contract Appeal and waive sovereign immunity on certain claims. The Contract Disputes Act states that it "applies to any express or implied contract ... entered into by an executive agency ...", while the Tucker Act says the Court of Federal Claims has jurisdiction over any claim against the United States founded ... upon any express or implied contract with the United States"

The Contract Disputes Act defines "contractor" as the party to a Government contract other than the Government. 41 U.S.C. § 7101(7). That party is the entity in contractual privity with the Government, and, except for unusual circumstances or special factors, is normally the prime contractor. *United States v. Johnson Controls, Inc.*, 713 F.2d 1541, 1551, 1557 (Fed. Cir. 1983).

Therefore, in order to sue the United States, you normally must be the prime contractor, and be in privity with the Government. In *Estes Express Lines v. United States*, No. 11-597C (Fed. Cl. Jan 15, 2013), plaintiff Estes lost because it was not in privity with the United States, and therefore the Claims Court had no jurisdiction.

Estes was an interstate motor carrier who had received a subcontract from Salem Logistics, Inc. Salem had received a prime contract from the Marine Corps Community Services (part of the Marine Corps Exchange), and it contracted with Estes to carry various shipments. When Salem refused to pay amounts Estes deemed owed for bills of lading, Estes sued Salem and the United States, claiming that Salem was the "government's agent."

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The Court made short work of Estes. “There was no direct privity of contract between Estes and the U.S. It was Salem and not Estes Express, that had a contractual relationship with the Marine Corps; Estes Express’ contractual relationship was with Salem only, as a subcontractor.” Nothing in the bills of lading contracted this, and the government was not a party to the bills of lading. Furthermore, the government contract with Salem stated that “Salem shall not represent itself to be an agent or representative of the Marine Corps or any other agency or instrumentality of the United States.”

As a result the Court had no jurisdiction and the case was dismissed.

TIPS: Especially if you are a subcontractor, not in direct privity with the Government, be sure you have a valid theory of why you have privity and the Courts or Boards have jurisdiction over any action you bring before them.