

ARMED SERVICES BOARD OF CONTRACT APPEALS

Appeal of --)
)
MTD Transcribing Service) ASBCA No. 53104
)
Under Contract No. 00-0000-00-0-0000)

APPEARANCE FOR THE APPELLANT: Ms. JoAnn H. Bassin
Owner

APPEARANCES FOR THE GOVERNMENT: COL Michael R. Neds, JA
Chief Trial Attorney
MAJ John B. Alumbaugh, JA
Trial Attorney

OPINION BY ADMINISTRATIVE JUDGE DICUS
ON RESPONDENT'S MOTION TO DISMISS FOR LACK OF JURISDICTION

This appeal is taken from the deemed denial of MTD Transcribing Service's (MTD or appellant) claim for \$10,000. The claim arose from the cancellation of an Equal Employment Opportunity Commission (EEOC) hearing at Fort Belvoir, Virginia. Respondent has moved to Dismiss for Lack of Jurisdiction, alleging that no contract was ever formed. Appellant has elected to proceed under Board Rule 12.3. We grant the motion.

FINDINGS OF FACT

The following facts are solely for the purpose of resolving the motion.

1. Appellant was contacted by telephone on 20 October 1998 by Fort Belvoir, Virginia, employees Patricia Ash, EEO Office, and Andrew Lopez, Labor Counselor, Staff Judge Advocate Office (SJA), who advised that MTD had been selected to provide court reporting and transcription services on 8-10 February 1999, at Fort A.P. Hill, Virginia. Logistical and travel services were arranged through Ronnie Hodges of Fort A.P. Hill. (Complaint and Answer) Ms. Ash, Mr. Lopez and Mr. Hodges are not warranted contracting officers (R4, tab 36). Mr. Hodges is a certifying officer for credit card (IMPAC card) purchases of up to \$2,500 for four activities at Fort A.P. Hill. If the purchase is for more than \$2,500 a purchase request must be issued. (Hodges deposition) There is no evidence that discussions with any of the three involved rates and payment, although appellant had filed a fee schedule with the EEO Office at Fort Belvoir in 1997 and updated it thereafter (Hopke declaration (dec.)). On a 1999 invoice, appellant's fees were shown as \$35 per hour and \$4.75 per transcript page (*id.*, ex. 1).

2. A 2 February 1999 letter to MTD signed by Janet Corbin, who is neither a contracting officer nor authorized credit card user, provided as follows:

Reference conversation with you, the Fort Belvoir Equal Employment Opportunity Office requests court reporter services for February 8, 9, and 10, 1999, for Hearing [sic] into the discrimination complaint of Mr. Ross Jackson. Services less than \$2500.00 are to be paid by credit card. Listed below is the point of contact for the credit card and other additional information you will need on this complaint:

POINT OF CONTACT FOR CREDIT CARD:

Ms. Lisa E. Skinner

....

Upon completion of your invoice, please submit the original to Ms. Skinner, with a copy provided to this office for our records.

(R4, tabs 7, 36, 38) The letter did not establish rates. However, based on \$35 per hour and \$4.75 per transcript page (finding 1), appellant's total charges for a three day hearing likely would have exceeded \$2,500. The hearing was postponed on Friday, 5 February 1999 at 3:15 p.m. and there is no evidence that appellant performed any services in connection with it. Appellant neither responded to the 2 February 1999 letter in writing nor presented an invoice for a cancellation/postponement fee. (Complaint and Answer) We find from the listing of Ms. Skinner as point of contact for credit card transactions that she had authority to approve credit card charges of up to \$2,500 at Fort A.P. Hill. There is no evidence Ms. Skinner was ever contacted regarding payment or otherwise. There is also no evidence that Mr. Hodges had credit card authority with respect to the Fort A.P. Hill activity to which Mr. Jackson's complaint related.

3. Appellant regularly dealt with Ms. Corbin (Hopke dec.). Ms. Corbin is an EEO specialist at Fort Belvoir. Her primary duty is processing EEO complaints. Ms. Corbin typed the 2 February 1999 letter. She has not been involved in billing and payment, and funding for Fort A. P. Hill hearings would be through that base. An individual at Fort A. P. Hill sent her the credit card information in the letter. From Ms. Corbin's description of her duties, we find she occupies a position that is not at an executive or management level, and that contracting authority is not integral to her duties. (Corbin dec.)

4. By letter of 3 August 1999 MTD informed Ms. Corbin, with respect to another canceled EEOC hearing, that MTD's policy is to charge \$450 for the first day of a canceled proceeding and \$150 per day for each additional day (R4, tab 16).

5. Appellant was notified by the EEOC Administrative Law Judge that the hearing on Mr. Jackson's complaint had been rescheduled for 4-5 April 2000 at Fort Belvoir. Thereafter, on 21 March 2000, appellant was notified by CPT Mohlenrich of Fort Belvoir that the hearing had been again rescheduled for 17-19 April 2000. It was subsequently extended to include 24 April 2000. (Complaint and Answer) CPT Mohlenrich is not a contracting officer (R4, tab 36).

6. On Friday, 14 April 2000 at 4:00 p.m. appellant was notified that settlement negotiations were underway and that appellant would be called if the case was settled. Appellant was informed through later telephone calls that negotiations were continuing. At 4:00 p.m. on Sunday, 16 April 2000, appellant was informed by CPT Mohlenrich that court reporting services would not be required on 17 April 2000. If no settlement was reached the hearing would convene on 18 April 2000, and continue on 24 and 25 April 2000. At 4:55 p.m. on Monday, 17 April 2000, appellant was informed that the case had settled and court reporting services would not be needed. (Complaint and Answer) There is no evidence that any court reporting services were rendered in conjunction with the canceled hearing.

7. On 18 April 2000 appellant submitted invoice No. 360 in the lump sum amount of \$10,000 for cancellation of court reporting services for 17-19, 24-25 April 2000 and a letter of explanation to Bruce Hopkins, Deputy to the Commander, Fort A.P. Hill. Invoice No. 360 stated in the "Terms" block "IMPAC Card." Mr. Hopkins is not a contracting officer. (R4, tabs 13, 14, 36). Mr. Hopkins negotiates EEO cases, has settlement authority in EEO cases, and can commit funds for that purpose. Mr. Hopkins told Mr. Hodges to attempt settlement with MTD with a maximum settlement amount of \$3,000. An unsuccessful attempt at settlement was made by Mr. Hodges (Hodges dec.). Thereafter, appellant was advised to contact Susan Staats, a contracting officer at Fort Belvoir (Hodges dec., ex. 4). On 21 April 2000 a letter was sent to Ms. Staats laying out appellant's view of the facts and asserting a claim for \$10,000 for cancellation of reporting services with less than 24 hours notice (R4, tab 15).

8. Mr. Hodges was contacted by Cynthia Lee, the acting director of the relevant contracting office at Fort Belvoir, on 5 June 2000. Ms. Lee was seeking information as to Mr. Hodges' version of the events at issue (Hodges dec., ex. 4). Mr. Hodges responded on 6 June 2000, explaining events and commenting "my supervisor has not denied payment but has referred the matter to SJA, Ft. Belvoir, to see if we are liable for the full amount." (*Id.* at ex. 5).

9. On 4 August 2000 Mr. Hodges, in Mr. Hopkins' absence and at his request, sent a letter to MTD granting the claim in the amount of \$1,575, as follows:

8 February 1999	-	cancellation fee based on transaction prior to 3 August 1999 letter	\$225
17-18 April 2000	-	cancellation fee based on \$450 first day charge per 3 August 1999 letter	900
19, 24-25 April 2000-	-	cancellation fee based on \$150 extra days charge per 3 August 1999 letter	400

The letter stated that endorsement of the enclosed check constituted a full settlement and waiver of MTD's request for payment. It was forwarded to the Directorate of Resource Management for payment of the \$1,575. (R4, tab 24; Hodges dec.) The check was handwritten and signed by Barbara Byrd, Director of Resources Management (R4, tabs 25, 30). There is no evidence as to whether Ms. Byrd is a contracting officer.

10. By letter of 12 August 2000 to Mr. Hodges appellant, while not returning the check, rejected the settlement of \$1,575. In that letter appellant identifies the 2 February 1999 letter (finding 2) as the "vehicle" of contractual obligation. (R4, tab 26) An appeal was filed by letter of 23 October 2000.

11. According to Ms. Staats, with respect to the court reporting services at issue, no contracting authority in the Military District of Washington Acquisition Center, which acquires installations' support services, has ratified any alleged agreements or actions between MTD and respondent (R4, tab 39).

12. Except as appellant relies on the 2 February 1999 letter as the written contract on which this claim is based, appellant has not identified an express contract for the services at issue. Appellant was specifically advised by the Board that if a written contract existed it should be submitted for the record (9 January 2001 letter documenting telephone conference). As no such document has been submitted, we conclude no such contract exists.

DECISION

Respondent argues that no express or implied-in-fact contract ever came into being and that no ratification took place. The central theme of respondent's arguments is that no one with contracting authority committed the Government to a contractual obligation for the services at issue. According to respondent, without a contract we have no jurisdiction. The burden of proof is on appellant. *Do-Well Machine Shop v. United States*, 870 F.2d 637, 639 (Fed. Cir. 1989).

As respondent argues, our jurisdiction if any arises under the Contract Disputes Act (CDA), 41 U.S.C. §§ 601-613, as amended. The CDA applies to, and our jurisdiction arises under, express or implied contracts. Implied contracts under the CDA are those implied-in-fact, not contracts implied-in-law. *Beacon Corporation and Seaboard Surety Company*, ASBCA No. 51353, 00-2 BCA ¶ 31,113.¹

The contracting procedures that are evidenced in this record leaves much to be desired. Unfortunately for appellant, *Federal Crop Insurance Corp. v. Merrill*, 332 U.S. 380 (1947), is still the law of the land, and, while some exceptions have been carved out, under that decision parties doing business with the United States take the risk that the Government personnel they deal with have authority to bind the Government. They are also charged with knowledge of the United States Statutes at Large and those regulations, such as the Federal Acquisition Regulation (FAR), which are published in the Federal Register. Appellant relies on the 2 February 1999 letter (finding 2) as the writing which created a contractual obligation. However, that letter was signed by an EEO specialist without contracting or credit card authority and there was no written acceptance by appellant. At most the 2 February 1999 letter is an offer in an amount not to exceed \$2,500, with Ms. Skinner named as “point of contact.” The record is devoid of any evidence that Ms. Skinner promised payment or was ever contacted. As noted, there was no written acceptance and there was no substantial performance. Indeed, if appellant believed the Government was contractually obligated, its action did not manifest that belief, as it did not invoice for a cancellation fee. This is inadequate to constitute an express contract. *Total Medical Management, Inc. v. United States*, 104 F.3d 1314 (Fed. Cir. 1997), *cert. denied*, 522, U.S. 857 (1997). We note, further, that the claim is for costs attributable not to the February 1999 hearing, but to the April 2000 hearing. As the site of the hearing changed from Fort A. P. Hill to Fort Belvoir, we cannot find that Ms. Skinner had authority to approve payments for services not to exceed \$2,500 at that installation. Since the claim does not include any costs for the February cancellation, we do not have jurisdiction over a claim arising from cancellation of the February 1999 hearing.

We next address whether an implied contract arose. An implied contract with the Government requires 1) a mutual intent to contract; 2) consideration; 3) lack of ambiguity in offer and acceptance; and 4) a Government representative with actual authority to bind the Government. *City of El Centro v. United States*, 922 F.2d 816, 820 (Fed. Cir. 1990) *cert. denied*, 501 U.S. 1230 (1991). According to appellant, the original contact was from Ms. Ash, an employee of the EEO office and Mr. Lopez, an SJA attorney, informing MTD of its selection to perform the court reporting services at issue. Mr. Hodges assisted with logistical arrangements. As there is no evidence of a discussion about rates or payment with any of the three, we cannot conclude that there was no ambiguity in offer and acceptance. There is also no evidence to support a finding that Ms. Ash, Mr. Hodges or Mr.

¹ Use of the term “implied contract” shall hereinafter be construed as “implied-in-fact” contract.

Lopez had contracting authority other than Mr. Hodges' limited credit card authority. Thus, at least two elements of an implied contract were not present. *Pat Barkley Court Reporters v. United States*, 4 Cl. Ct. 572 (1984). We hold that no implied contract came into being through Ms. Ash, Mr. Lopez or Mr. Hodges.

CPT Mohlenrich is another Government employee involved in events leading to cancellation of the hearing. His participation was limited to rescheduling and canceling the hearing. There is no basis from his limited contacts with appellant to conclude that an implied contract arose from their discussions.

With regard to Ms. Corbin, assuming, *arguendo*, that the other elements of an implied contract were part of her discussions with appellant, the fourth element of an implied contract is missing as she lacked authority to contract or pay by credit card. *City of El Centro, supra*. However, the Court has said, in *H. Landau & Company v. United States*, 886 F.2d 322 (Fed. Cir. 1989), that *implied* actual authority is sufficient to bind the Government. Such authority must be an integral part of the duties assigned to the Government employee who created the obligation. *Id.* at 324. In *Landau* the Court remanded the case because the United States Claims Court had not considered the issue of implicit authority. *Id.* Accordingly, we consider whether Ms. Corbin had implied authority to bind the Government. Ms. Corbin's primary duty is processing EEO complaints. She typed the 2 February 1999 letter. From Ms. Corbin's description of her job we believe that her position in the organization is not at a management level. We note that the Court has held that even a contracting officer did not have implicit authority to bind the Government to an oral contract where his delegation of authority required his prior written approval of such actions. *Harbert/Lummus Agrifuels Projects. v. United States*, 142 F.3d 1429 (Fed. Cir. 1998) *cert. denied*, 525 U.S. 1177 (1999). We have rejected an argument of implicit authority where a procurement assistant was involved, finding the authority was not integral to her duties. *Anchor/Darling Valve Company*, ASBCA No. 46109, 95-1 BCA ¶ 27,595. We cannot, therefore, conclude from this record that authority to bind the Government was integral to the duties Ms. Corbin performed. We hold that Ms. Corbin did not have implied actual authority to bind the Government. Moreover, the 2 February 1999 letter informed appellant that another person, Ms. Skinner, was "Point of Contact" for credit card payments, and appellant expected to be paid by credit card (finding 2, 7). We hold Ms. Corbin did not have implicit authority to bind the Government and that no implied-in-fact contract was formed.

We come next to the question of whether respondent ratified the transaction between it and appellant. The FAR sets out specific criteria for ratification at FAR 1.602-3, which include a benefit obtained by the Government and a ratifying official with authority to enter into a contractual commitment. Under *Federal Crop Insurance Corp. v. Merrill, supra*, appellant is charged with knowledge of the FAR. The record establishes that no one within the Military District of Washington Acquisition Center ratified the transaction at issue (finding 11). Mr. Hopkins and Mr. Hodges took steps to settle the dispute, but they

cannot ratify the transaction as neither of them has contracting authority (finding 1, 7).² In this regard, we find *Harbert/Lummus Agrifuels Projects. v. United States, supra*, instructive. In that case, the Deputy Director of the Department of Energy's Office of Alcohol Fuels, in the presence of the contracting officer, offered not to withdraw a loan guarantee for a construction project in exchange for the subcontractor completing the project. The Deputy Director did not have contracting authority and the contracting officer remained silent. The subcontractor continued performance and brought suit when the Department stopped funding. The Court rejected the subcontractor's argument that a ratification had occurred, *inter alia*, because ratification must be based on a demonstrated acceptance of the contract by the authorized official. *Id.* at 1434. Here, also, there has been no demonstrated acceptance by anyone with contracting authority. To the contrary, we have evidence that no one with contracting authority ratified the transaction (finding 11).

Finally, there is the question of "institutional ratification," a term used by the Court in *City of El Centro, supra*. The Court used the term to describe its earlier holding in *Silverman v. United States*, 679 F.2d 865 (Ct. Cl. 1982). In *Silverman* a court reporter/subcontractor was assured by a senior agency official, who was not a contracting officer but had authority to approve vouchers for payment, that the court reporter/subcontractor would be paid if he continued to provide services in an important trial. The senior official thereafter approved payment and caused a check to be issued. The Court found the agency had ratified the senior official's promise and a contract arose when the agency accepted and used the transcripts. *Id.* In distinguishing this holding in *City of El Centro, supra*, the Court placed great emphasis on the fact that the official who made the promise in *Silverman* had authority to approve vouchers for payment. In this appeal, there is no one with authority to approve vouchers for payment who made a promise of payment to appellant, and no delivery of court reporting services.

Respondent's motion is granted. The appeal is dismissed.

Dated: 22 February 2001

CARROLL C. DICUS, JR.
Administrative Judge
Armed Services Board
of Contract Appeals

² We express no opinion as to whether a binding settlement arose.

I concur

EUNICE W. THOMAS
Administrative Judge
Vice Chairman
Armed Services Board
of Contract Appeals

I certify that the foregoing is a true copy of the Opinion and Decision of the Armed Services Board of Contract Appeals in ASBCA No. 53104, Appeal of MTD Transcribing Service, rendered in conformance with the Board's Charter.

Dated:

EDWARD S. ADAMKEWICZ
Recorder, Armed Services
Board of Contract Appeals