ARMED SERVICES BOARD OF CONTRACT APPEALS

Appeal of --	)	
	)	
Eurovan Movers, S.A.	)	ASBCA No. 53302
	)	
Under Contract No. 000000-00-0-0000	)	

APPEARANCE FOR THE APPELLANT: Thomas L. McGovern, III, Esq.
Hogan & Hartson L.L.P.
Washington, DC

APPEARANCES FOR THE GOVERNMENT: COL Michael R. Neds, JA
Chief Trial Attorney
MAJ Robert W. Clark, JA
Trial Attorney

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

Eurovan Movers, S.A. (Eurovan), took this appeal from the contracting officer's (CO) refusal to issue a final decision on its July 2000 certified claim. Eurovan alleged that Government directions to provide services and supplies for the transportation of household goods and unaccompanied baggage of Government personnel in Panama created an implied-in-fact contract with Eurovan. Respondent moves to dismiss on the ground that the ASBCA has no jurisdiction of this claim because, pursuant to 31 U.S.C. § 3726 and implementing regulations, the General Services Administration (GSA) has exclusive jurisdiction of claims under Government Bills of Lading, as were involved herein, and there was no implied-in-fact contract.

STATEMENT OF FACTS (SOF) FOR PURPOSES OF THE MOTION

1. The Military Traffic Management Command (MTMC) manages the Defense Department's (DoD) Personal Property Shipment and Storage Program (SR4, tab 84 at 1-2).

2. International Through Government Bills of Lading (ITGBL) are used for international shipment to, from, or between overseas areas of personal property, household goods and unaccompanied baggage (PP) by commercial surface or air carriers (SR4, tab 85 at 18).

3. To transport DoD PP, a carrier must agree to the terms of MTMC's Tender of Service (TOS) and must provide MTMC with Letters of Intent (LOI) for each geographic

area in which it wishes to participate (SR4, tab 84 at 2-1, 2-2, app. A; tab 85 at 4). A LOI designates the carrier's agent who will pick-up and deliver or ship, PP for the carrier in a geographic area (R4, tabs 3, 4).

4. A Personal Property Shipping Office (PPSO) selects a carrier from MTMC's list of approved carriers and rates for stated geographical areas (SR4, tab 84 at 2, 2-5 to 2-8). A Government Bill of Lading-Privately Owned Personal Property (GBL), Standard Forms (SF) 1203 and 1205, are issued to the carrier, and SF 1204 to the carrier's agent (41 C.F.R. § 101-41.302-2(c)). A carrier must present a properly certified Public Voucher for Transportation Charges, attached to the GBL, to the appropriate Government finance office for payment after completing the shipment. 41 C.F.R. § 101-41.302-3(a).

5. In 1992 A Olympic Forwarder, Inc. (Olympic), and in 1998 Emerald City International Corp. (Emerald), filed TOSs as carriers to transport PP to and from the Republic of Panama (R4, tabs 2, 5). The LOIs of Olympic and Emerald identified Eurovan Movers, S.A., as their local agent in Panama (R4, tabs 3, 4).

6. From March to September 1999, the PPSO at Fort Clayton, Panama, issued to Olympic and Emerald about 225 GBLs (SF 1203) which named Olympic or Emerald as "transportation company" with "Eurovan" in parentheses (R4, tab 1), and provided:

> This bill of lading is governed by the regulations . . . published in Title 41, Part 101-41 of the [CFR]. . . .
>
> All parties to this bill of lading (carriers, agents, freight forwarders, and others), recognizing that this shipment is made under the auspices of the United States Government, agree to forgo any liens that may arise from any cause whatsoever and not to detain or impound this shipment for any reason.

(SR4, tab 84 at 11-20) The latter GBL provision is in the 1995 Edition "Agency Agreement" form certifying the existence of agreements between carriers and agents. The Government is not a party to an Agency Agreement. (SR4, tab 85, Form 21)

7. Under its agency agreements with Olympic and Emerald:

> Eurovan provided services and materials for the packing, storage, and shipping of [PP] belonging to U.S. military personnel stationed in the Republic of Panama. . . . All shipping/transportation related services in Panama . . . was [sic] performed by Eurovan.

(Perez decl., ¶ 3) Olympic and Emerald, not the Government, paid Eurovan (Perez decl., ¶¶ 4, 6-7).

8. From 18 June through 29 October 1999, Eurovan repeatedly notified Fort Clayton and MTMC officials that beginning in March 1999 it had experienced problems in receiving payments from Olympic and Emerald (R4, tabs 9, 32, 36; Perez decl. ¶¶ 6-7, 9-11, 14-17, exs. A, D-F).

9. On 14 October 1999, Eurovan notified Olympic, Emerald, Ft. Clayton and MTMC that, due to its unpaid invoices, Eurovan would terminate its relationship with the shippers on 18 October 1999, and would hold shipments and provide no services until all pending invoices were paid (Perez decl., ¶ 13, ex. C).

10. On 18 October 1999, the Government became aware of and concerned about the shipments Eurovan was holding (R4, tab 15).

11. The 20 October 1999 letter of James Winfrey, Ft. Clayton's Director of Logistics, to Eurovan stated:

> Olympic [and] Emerald . . . have indicated that they have terminated bookings through your agency. As a result of those carriers not accepting any further bookings from Panama, the Transportation Office has decided to cancel your services as a local agent, effective immediately.

(R4, tab 17)

12. On 20-21 October 1999, MTMC contracted with carriers Advance Container Transit, Inc. and HC & D Forwarders, which would use "MASA" and "MEGA" as local agents, to move 122 PP shipments held by Eurovan (R4, tabs 19-22, 24).

13. On 25 October 1999, Olympic and Emerald agreed with Eurovan that the carriers "will pay" by weekly installments their "indebtedness to Eurovan," which "will immediately move forward all [Olympic and Emerald] shipments currently held" and "advise Ft. Clayton and . . . MTMC of this agreement" (R4, tab 27).

14. On 26 October 1999, the Government and Eurovan agreed that Eurovan would release 142 shipments from its warehouse to the new carriers on 27 October 1999, "[p]ayment for initial packing will be between Eurovan and new agent" and Ft. Clayton was to have "QC inspectors" at Eurovan's warehouse. Eurovan told MTMC that Eurovan had 41 additional shipments and requested instructions as to which local agents the shipments were to be released. (R4, tabs 29, 32, 34)

15. On 4 November 1999, the Government agreed to transport the remaining 142 shipments of household goods and 41 shipments of unaccompanied baggage using Transportation International (TI) as the carrier, Eurovan as TI's local agent, and a new GBL for each shipment (SR4, tabs 89, 92). By 7 December 1999, 181 shipments of PP from Eurovan to TI were completed (R4, tab 92).

16. On 31 July 2000, Eurovan submitted a certified claim to MTMC for $674,571.81, alleging that implied-in-fact contracts had arisen between the Government and Eurovan under which Eurovan resumed services based on the Government's assurance that it would resolve Eurovan's payment problems with Olympic and Emerald, and Eurovan provided additional services and supplies at Government request and direction. Eurovan claimed $551,933.26 for unpaid services Eurovan provided to Olympic and Emerald and invoiced from May to October 1999; $57,336.40 for services provided at the direction of Government officials from April to mid-October 1999; and $65,302.15 for services provided to the United States from mid-October to 4 December 1999. (R4, tab 72)

17. MTMC's 12 December 2000 response to Eurovan stated that its claim for transportation services was not "a recognizable claim under the Contract Disputes Act" (CDA), but rather fell under 31 U.S.C. § 3726 and was within the exclusive jurisdiction of the General Services Administration, and the Government's interactions with Eurovan did not result in an implied-in-fact contract. MTMC denied Eurovan's request for payment and stated that the response was not a CO's final decision under the CDA. (R4, tab 79) Eurovan appealed to the Board on 9 March 2001 on the basis of a deemed denial of its claim, which appeal we docketed as ASBCA No. 53302.

18. On 18 December 2001, Olga Perez, Eurovan's president, declared that, at the Government's direction, Eurovan performed the following tasks not required by GBLs issued to Olympic, Emerald or TI: resume shipping services and release shipments (¶¶ 14-15, 20-21); secure materials for and fabricate lift vans (¶ 10); release Olympic and Emerald shipments to new carriers (¶¶ 23, 25); coordinate shipment processing with new carriers (¶ 23); and receive Government-owned equipment and personnel at Eurovan (¶ 24).

19. The record does not contain any Agency Agreement between Eurovan and Olympic, Emerald or TI specifying the tasks Eurovan was required to perform with respect to GBLs issued to those carriers, including what, if any, obligations Eurovan had with respect to GBL shipments in its possession when a carrier terminated its agency relationship with Eurovan.

20. Between 18 June and 5 November 1999 Eurovan's representatives met or corresponded with Arthur Myke, Chief of Transportation Division, Theater Support Brigade, Ft. Clayton; LCDR James Andreano, MTMC HQ; Edward Brown, MTMC Deployment Support Command (DSC), Ft. Eustis, VA; James Gilmore, MTMC DSC; LCOL Gerd Wilheim, Ft. Clayton; MAJ Todd Robbins, 955th Army Transportation Company, Ft.

Clayton; James Winfrey, Director of Logistics, Theater Support Brigade, Ft. Clayton; Frederick McDonald, Inspector, Ft. Clayton; Edgar Pixley, Inspector, Ft. Clayton; Tania Diaz, Ft. Clayton; James Johnson, MTMC HQ; Lou Ann Bernard, Legal Department, Ft. Clayton; Clea Esthimiadas, Legal Department, Ft. Clayton; and Janet Kaminski, Legal Department, MTMC (Perez decl., ¶¶ 7, 10-12, 15-21, 27). Respondent expressly denied that MAJ Robbins, Mr. Winfrey and Ms. Bernard were contracting officers (CO) (mot., ¶ 22). Correspondence to, from, or mentioning each of the foregoing Government employees, except inspectors McDonald and Pixley, shows that none of them was a CO or had contracting authority (R4, tabs 19, 21-34, 36-61, 70, 88-90; exs. A, B, D-J).

21. Appellant submitted no evidence that any of the foregoing 14 persons was a CO; that any warranted CO knew of and ratified the actions of Robbins, Winfrey or Bernard; that any CO authorized or assigned Robbins, Winfrey or Bernard to negotiate an agreement with Eurovan; or that Robbins, Winfrey or Bernard had authority to approve an MTMC commitment. Ms. Perez' declaration states nothing about the express or implied contracting authority of any of the 14 individuals who allegedly instructed or directed Eurovan.

DECISION

I.

Respondent moves to dismiss Eurovan's claim for lack of CDA jurisdiction. In adjudicating a motion to dismiss for lack of subject matter jurisdiction, a court must accept as true, and construe in a light most favorable to the non-movant, only *undisputed* factual allegations. When such a motion challenges the truth of alleged jurisdictional facts, the court may consider relevant evidence beyond the pleadings to resolve disputed facts. *Cedars-Sinai Medical Center v. Watkins*, 11 F.3d 1573, 1583-84 (Fed. Cir. 1993), *cert. denied*, 512 U.S. 1235 (1994); *Reynolds v. Army and Air Force Exchange Service*, 846 F.2d 746, 747 (Fed. Cir. 1988). We have applied these same rules to such motions before the ASBCA. *See E.M. Scott & Associates*, ASBCA No. 45869, 94-3 BCA ¶ 27,059 at 134,837.

The jurisdictional application of the CDA and § 322 of the Transportation Act of 1940, 31 U.S.C.§ 3726, to disputes or claims arising under GBL contracts has been delineated in recent decisions of the Court of Appeals for the Federal Circuit and this Board. In *Dalton v. Sherwood Van Lines, Inc.*, 50 F.3d 1014, 1019-20 (Fed. Cir. 1995), the court held that the ASBCA lacked CDA jurisdiction of a common carrier's claim for refund of monies set off for Navy service members' property damaged during transport solely under GBLs for transportation services. In *Jean Kultau GmbH & Co. KG*, ASBCA No. 45949, 97-1 BCA ¶ 28,894, we dismissed the appeal for lack of CDA jurisdiction of an agent's claim for money unpaid by the insolvent carrier under 43 GBLs. We ruled that there was no evidence that any of the 43 GBLs was treated as an implied-in-fact contract,

over which, we said in dictum, the Board would have jurisdiction. 97-1 BCA at 144,070-71. Based on the foregoing jurisdictional rules, Eurovan has the burden of proving its jurisdictional contention that the services it provided under the alleged implied contracts were not required by GBLs.

Eurovan's declarant states that resuming shipping services, securing materials for and fabricating lift vans, releasing Olympic and Emerald shipments to new carriers, coordinating shipments with new carriers, and receiving Government-owned equipment and personnel at Eurovan were not required by Eurovan's Agency Agreements with Olympic, Emerald or TI (SOF ¶18). This appeal record does not contain any Agency Agreement between Eurovan and Olympic, Emerald or TI specifying the tasks Eurovan was required to perform with respect to GBLs issued to those carriers, including what, if any, obligations Eurovan had with respect to GBL shipments in its possession when a carrier terminated its agency relationship with Eurovan (SOF ¶ 19). A conclusory declaration is not sufficient to support CDA jurisdiction. *See Cedars-Sinai*, 11 F.3d at 1584-85 (conclusory statements do not provide the necessary factual basis to support jurisdiction). Therefore, Eurovan has not substantiated that the tasks described by its declarant were not required by its Agency Agreements with respect to such GBLs.

II.

Even if we were to assume, *arguendo*, that Eurovan's unsubstantiated declaration regarding work not required by its Agency Agreements with Olympic, Emerald and TI established that its claim was not encompassed by § 322 of the Transportation Act of 1940, Eurovan would fare no better. Eurovan has the burden to establish that this Board has jurisdiction of this appeal under the Contract Disputes Act, *see KVOS, Inc. v. Associated Press*, 299 U.S. 269, 278 (1936) (when defendant moved to dismiss challenging pleadings alleging district court jurisdiction of claim exceeding $3,000, plaintiff had burden to prove jurisdiction); and with respect to the existence of an implied-in-fact contract, *see MTD Transcribing Service*, ASBCA No. 53104, 01-1 BCA ¶ 31,304 at 154,539 (appellant had burden of proving jurisdiction when Government moved to dismiss appeal alleging implied-in-fact contract).

Eurovan asserts that although the Government has styled its motion as a motion to dismiss, its submission of proposed findings of fact makes the motion more akin to one for summary judgment (opp. at 1). It is apparent from our SOF that the material facts required to determine whether the implied-in-fact contract Eurovan alleges came into existence, and whether the actions Eurovan undertook allegedly at the direction of Government representatives were required by, or outside, the GBLs and Eurovan's Agency Agreements with Olympic, Emerald and TI, are intertwined. If a decision on a jurisdictional issue requires a ruling on the merits of a case, the jurisdictional decision should await a determination of the merits either by summary judgment or at trial. 5A CHARLES ALAN WRIGHT & ARTHUR R. MILLER, FEDERAL PRACTICE AND PROCEDURE § 1350 at 235 (2d ed.

1990); *Sierra Club v. Shell Oil Co.*, 817 F.2d 1169 (5th Cir. 1987), *cert. denied*, 484 U.S. 985 (1987).

Generally, summary judgment on an issue is appropriate if there are no disputed material facts with respect to one or more essential elements thereof, and movant is entitled to judgment as a matter of law thereon. Here, Eurovan, the non-moving party, has the burden of persuasion on the issue of the implied-in-fact contract. Thus, movant (respondent) may satisfy its burden of persuasion by submitting affirmative evidence to negate, or may demonstrate a complete failure of proof to establish, an essential element of Eurovan's claim. We must, of course, draw all reasonable inferences in favor of Eurovan. *See Celotex Corp. v. Catrett*, 477 U.S. 317, 322-23, 331-32 (1986); *Dairyland Power Cooperative v. United States*, 16 F.3d 1197, 1202 (Fed. Cir. 1994). In the absence of an ASBCA rule regarding summary judgment, we look to the Federal Rules of Civil Procedure. Rule 56(e) provides in pertinent part:

> When a motion for summary judgment is made and supported as provided in this rule, an adverse party may not rest upon the mere allegations or denials of the adverse party's pleading, but the adverse party's response, by affidavits or as otherwise provided in this rule, must set forth specific facts showing that there is a genuine issue for trial. If the adverse party does not so respond, summary judgment, if appropriate, shall be entered against the adverse party.

The elements of proof of an implied-in-fact contract are: 1) mutuality of intent to contract; 2) consideration; 3) lack of ambiguity in offer and acceptance; and 4) when the United States is a party, the Government representative whose conduct is relied upon must have actual authority to bind the Government in contract. The party alleging an implied-in-fact contract must show that the Government representative had requisite contracting authority. *See City of El Centro v. United States*, 922 F.2d 816, 820 (Fed. Cir. 1990), *cert. denied*, 501 U.S. 1230 (1991).

Eurovan argues that:

> On information and belief, one or more of the MTMC officials who assured Eurovan it would receive payment must have had express authority to bind the Government. Even if this were not the case, they likely had inherent or implied authority to contract by virtue of the fact that their assignment to negotiate with Eurovan necessarily entailed negotiating an agreement with a contractor. . . . Moreover, . . . it is inconceivable that an MTMC official with authority to contract

> was not aware of, and did not approve of, the content of the negotiations with Eurovan . . . .
>
> The circumstances of this case also indicate that the agreement between Eurovan and the Government was ratified by the Government through "institutional ratification."

(App. opp. at 21-22)

Eurovan met or corresponded with 14 U.S. Government personnel from 18 June to 5 November 1999. Correspondence to, from, or mentioning each of those 14 Government employees, except inspectors McDonald and Pixley, shows that none was a CO or had contracting authority. We are not willing to infer that persons with positions of "inspector" or "legal department" or with no other position description than "MTMC" or "Fort Clayton" had a CO's warrant. Respondent expressly denied that MAJ Todd Robbins, 955th Army Transportation Company, Ft. Clayton; James Winfrey, Director of Logistics, Theater Support Brigade, Ft. Clayton; and Lou Ann Bernard, Legal Department, Ft. Clayton, were COs. (SOF ¶ 20)

Eurovan submitted no evidence that any of the foregoing 14 persons was a CO; that any warranted CO knew of and ratified the actions of Robbins, Winfrey or Bernard; that any CO authorized or assigned Robbins, Winfrey or Bernard to negotiate an agreement with Eurovan; or that Robbins, Winfrey or Bernard had authority to approve an MTMC commitment. Eurovan's lawyers' arguments about the inherent or implied authority of MTMC officials are based on "information and belief." Ms. Perez' declaration states nothing about the express or implied contracting authority of any of the 14 individuals who allegedly instructed or directed Eurovan. (SOF ¶ 21) A non-moving party must submit more than mere speculation or conjecture, *see Wilson v. IBM Corp*., 62 F.3d 237, 241 (8th Cir. 1995), or conclusory allegations in affidavits, *see Zayre Corp. v. S. M. & R. Co., Inc.*, 882 F.2d 1145, 1148 (7th Cir. 1989).

We hold that Eurovan has failed to establish the fourth element of proof of an implied-in-fact contract. We grant respondent's motion to dismiss for lack of jurisdiction.

Dated: 17 April 2002

DAVID W. JAMES, JR.
Administrative Judge
Armed Services Board
of Contract Appeals

I concur

MARK N. STEMPLER
Administrative Judge
Acting Chairman
Armed Services Board
of Contract Appeals

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. 53302, Appeal of Eurovan Movers, S.A., rendered in conformance with the Board's Charter.

Dated:

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