

ARMED SERVICES BOARD OF CONTRACT APPEALS

Appeal of -- )  
 )  
Factek, LLC ) ASBCA No. 55345  
 )  
Under Contract No. 0000-00-0000 )

APPEARANCE FOR THE APPELLANT: Mr. Michael Dmytrasz  
Technology Director

APPEARANCES FOR THE GOVERNMENT: Thomas H. Gourlay, Jr., Esq.  
Engineer Chief Trial Attorney  
Catherine E. Barnum, Esq.  
Engineer Trial Attorney  
U.S. Army Engineer District, Omaha

OPINION BY ADMINISTRATIVE JUDGE YOUNGER  
ON ORDER TO SHOW CAUSE AND MOTION TO DISMISS

In this appeal seeking additional compensation under an alleged services contract, the government has moved to dismiss for lack of jurisdiction “with [p]rejudice,” contending that the underlying claim does not arise out of an express or implied-in-fact contract. Appellant’s chief arguments appear to be that a bid that it submitted was accepted and became an express services contract, or, alternatively, that the parties intended to enter into a contract for work that appellant performed but for which it was not paid. We dismiss the appeal for lack of jurisdiction.

FINDINGS OF FACT FOR PURPOSES OF THE MOTION

1. By date of 12 May 1997, the government awarded Contract No. DACA45-97-D-0016 to EMC Engineers, Inc. (EMC). Under this architect-engineer contract, EMC was required to design, install, and test a system to monitor and control the fire detection system, as well as the equipment for the lighting, heating, ventilation and air conditioning system, at Defense Finance and Accounting Service (DFAS) Building 444, near Denver, CO. (R4, tab 5 at 1, 3) EMC’s contract was an indefinite delivery-type with a one-year base period and two one-year option periods (*id.* at 3). Effective 20 April 1998, respondent exercised the first option year under the contract (*id.* at 5). By date of 26 March 1999, respondent issued Delivery Order No. 0011, the last such order, with a “completion date of 30 September 1999” (*id.* at 20, 22).

2. It appears that EMC subcontracted certain work to Factek, LLC (Factek or appellant) during the term of EMC's contract with the Corps. Factek was formed in 1998. By date of 7 August 1998, Factek filed Articles of Organization with the Nevada secretary of state, who issued Factek a Limited-Liability Company Charter on the same date. (Letter from Michael Dymtrasz, Technology Director, Factek, LLC to Recorder (dtd. 15 Feb. 2006, rec'd 14 July 2006)).

3. By letter dated 9 August 1999, Factek submitted a proposal in the amount of \$240,617.65 to Kevin Pace, a Corps program manager, for labor and parts regarding "the ongoing project to evaluate the LonWorks Technology while installing the building automation system" during "the time period from 1 October 1999 through 3 June 2000" (complaint (compl.) at 6). While Factek alleges that this proposal led to a later solicitation (*see* finding 5) (compl. at 3), we find it otherwise irrelevant to the appeal.

4. The record contains Factek's Invoices Nos. 1028 through 1040 that it submitted between 23 September 1999 and 25 February 2000 for purchases of supplies and services related to Building 444 (R4, tab 7). Two of these invoices are in dispute in the motion papers:

(a) Invoice No. 1030 dated 23 September 1999, which was addressed to DFAS in the amount of \$2,250.00 for an "Ademco Access Control Starter Kit" and two "Door Strike Operators" in the amount of \$156.00 (R4, tab 7 at 3); and

(b) Invoice No. 1032 dated 23 September 1999, which was addressed to EMC in the amount of \$18,489.20 for "[w]ork for the month of September per delivery Order #11 (\$92,446.00 / 5)," as well as for a \$100 "[p]hone card charge" for the same month and under the same delivery order (R4, tab 7 at 5).

5. By date of 1 November 1999, the Corps issued solicitation No. DACW45-00-T-0006 (solicitation 0006) for the installation of a baseboard heating control system, an upgrade of the control system for air handling units, and an access control system for mechanical room doors in Building 444 (R4, tab 8 at 1-2). Solicitation 0006 was issued on a standard form 1448 (10-95), "SOLICITATION/CONTRACT/ORDER FOR COMMERCIAL ITEMS" (*id.* at 1). *See* FAR 53.301-1449. While solicitation 0006 was issued to Factek and two other firms, only Factek responded, submitting a quotation by date of 8 November 1999 for \$98,558, which amount exceeded the government estimate of \$85,000 (R4, tab 9 at 1, tab 26 at 1).

6. We find no triable issue regarding whether the Corps awarded a contract on the basis of solicitation 0006 (R4, tab 31 at 1). Factek alleges in its complaint that, as a result of its response to solicitation 0006, Factek "was notified by phone by Neil Herman, the contracting officer, that [its] bid was successful and a contract would be awarded pending

the receipt of funds from DFAS. [Mr. Herman] notified Kevin Pace [*see* finding 8(b)] of this at the same time.” (Compl. at 3) The Corps has submitted an uncontroverted declaration from Mr. Herman attesting, and we find, that:

Mr. Pace informed me that DFAS had not provided the Omaha District with sufficient funds for this project [at the \$98,558 level of Factek’s bid], so the Omaha District could not award a Purchase Order. I do not recall whether Mr. Pace or I contacted FACTEK regarding the decision not to award a Purchase Order at this time. I did not indicate to Mr. Dmytrasz [Factek’s principal] that the Omaha District would award this quotation later, when it received money from DFAS. There was no further action taken on this Scope of Work.

(R4, tab 31 at 1) Respondent has also tendered an uncontroverted declaration from Mr. Pace, attesting, and we further find, that “[a]t no time” did he “represent to Mr. Dmytrasz or FACTEK that an express contract was awarded as a result of RFQ No. DACW45-00-T-0006” (R4, tab 32 at 1).

7. The record contains three purchase orders relating to Building 444 that the Corps awarded to Factek between March and November 2000. We find no triable issue regarding whether each of these purchase orders was paid in the amount invoiced (R4, tab 13 at 21, tab 14 at 29, tab 10 at 44). We further find no triable evidence regarding whether Factek submitted any claim on these invoices, or whether any of these purchase orders was for work that Factek alleges that it was performing from October 1999 to mid-February 2000. The purchase orders are:

(a) Purchase Order No. DACA45-00-P-0109, effective 24 March 2000, for \$20,912, to upgrade the energy management control system (R4, tab 13 at 1, 2);

(b) Purchase Order No. DACA45-00-P-0160, dated 20 June 2000, for \$99,884, to reconnect a heating and climate control system (R4, tab 14 at 1, 9, 16); and

(c) Purchase Order No. DACA45-01-P-0018, effective 21 November 2000, for \$34,929, to hard wire and make operational the Proportional Integrated Control System (PICS) (R4, tab 10 at 1, 5, 19).

8. The Corps has submitted uncontroverted declarations from Messrs. Herman and Pace (*see* finding 6), as well as from Frank Steve McCormick, a retired DFAS employee. These declarants attest, *inter alia*, and we find, that:

(a) Mr. Herman was a contract specialist for the Corps, not a contracting officer, does not have a contracting officer's warrant, and, in the relevant period, *viz.*, "[i]n 1999 – 2000, . . . was authorized to issue Visa Checks with a per check limit of \$2,500.00" (R4, tab 31 at 1). While he did not award an express contract (*see* finding 6), he also did not, at any time during the relevant period:

b. direct or encourage Mr. Dmytrasz or any other FACTEK representative to work without an express contract with the Federal Government;

c. have knowledge that Mr. Dmytrasz or any other FACTEK employee performed work without an express contract . . . ;

d. promise Mr. Dmytrasz or any other FACTEK representative that a future contract would be awarded to reimburse FACTEK for work performed prior to the issuance of an express contract.

(R4, tab 31 at 2)

(b) Mr. Pace was a project manager for the Corps and "do[es] not now, nor have I ever possessed, Contracting Officer authority or any other authority to bind the Government to any express contract" (R4, tab 32 at 2). He also did not represent to Mr. Dmytrasz that an express contract would be awarded as a result of solicitation 0006, and did not direct or encourage Factek to work without an express contract or represent that a future contract would be forthcoming (*id.* at 1-2).

(c) Mr. McCormick, who is alleged to have been "[c]hief contracting officer" (compl. at 14), was a project manager for DFAS and was "not a contracting officer" (R4, tab 29).

9. By letter dated 4 June 2003, appellant submitted a certified claim seeking \$118,890.81 in "funds due to Factek for the time period covering October 1999 and into February 2000" under a "negotiated contract which awarded Factek \$18,589.20 for each months [sic] service" (R4, tab 23 at 2-3). No contracting officer's final decision was issued regarding the claim. Instead, by letter dated 16 October 2003, the district counsel of the Corps' Omaha District asserted that, "[b]ecause the claim does not arise out of an express or implied-in-fact contract with the Government, the Contract Disputes Act . . . does not apply to it and the issuance of a Contracting Officer's Final Decision . . . would be inappropriate" (R4, tab 35 at 2). He also opined that the claim was without merit (*id.*). Factek brought this appeal on 8 February 2006.

10. In its complaint, Factek alleged entitlement “[f]or services performed during the period of 1 October 1999 through 15 February 2000,” for an amount that was said to be “at the rate established between the [Corps’] (Kevin Pace), DFAS personnel, and [Mr. Dmytrasz] for the same services in the prior year. The compensation received by FACTEK for the prior time period was at \$18529.20 per month.” (Compl. at 2) Factek further alleged that it was told that its bid in response to solicitation 0006 “was successful” and that a contract would be awarded “pending the receipt of funds from DFAS.” (*id.* at 3). Factek also alleged that its Invoice No. 1032 (*see* finding 4(b)) “substantiate[d] this claim” (compl. at 2). Factek also alleged that its Invoice No. 1030 (*see* finding 4(a)) “tie[d] together” with its proposal (*see* finding 3), and with solicitation 0006, to establish government intent for Factek “to continue working in October [1999] and on” (compl. at 3).

11. Publicly available records reflect that the Nevada secretary of state issued a Limited-Liability Company Charter to Factek on 7 August 1998 and that Factek’s Articles of Organization were filed on the same date. The secretary of state’s records also show that Factek’s status as a domestic limited liability company was “Revoked on 9/1/2002” (*see* order dtd. 15 June 2006).

12. In its motion papers in this appeal, Factek has asserted with regard to the alleged contract between it and the government that:

[T]he involvement of a government representative who had the actual authority to bind the government is harder to confirm since this individual never sat in the meetings at which the project was proposed, nor did this individual ever attend any of the meetings covering system expansion, nor did this person ever attend any of the meetings [regarding] project extension.

(Factek’s 24 April 2006 brief (app. br.) at 5) We find that “this individual” is not identified in the motion papers or elsewhere in the record.

## DECISION

### A. *Order to Show Cause*

In considering the Corps’ motion to dismiss, it appeared that the existing record revealed apparent questions regarding Factek’s capacity to pursue a claim. By order dated 15 June 2006, we advised Factek that publicly available records indicated that appellant had been organized in Nevada. In turn, these records reflected that Factek’s

status as a domestic limited liability company was “Revoked on 9/1/2002” (finding 11). We accordingly ordered Factek to demonstrate that it has the capacity to pursue the present claim. We also stayed further proceedings on the Corps’ motion to dismiss pending disposition of the order to show cause (order dtd. 28 July 2006).

The premise of the order to show cause was that, “[a]s a general matter, we would look to the laws under which a domestic legal entity was organized to determine the powers it possessed, including those that may have survived its dissolution.” *Rosinka Joint Venture*, ASBCA No. 48143, 97-1 BCA ¶ 28,653 at 143,138, *appeal dismissed*, 113 F.3d 1256 (Fed. Cir. 1997) (applying Russian Federation law). *See also Defense Systems Corp.*, ASBCA Nos. 44131R *et al.*, 98-1 BCA ¶ 29,627 at 146,828 (applying Nevada law to determine corporate contractor’s standing). Inasmuch as Factek’s charter was both issued and revoked in Nevada (findings 2, 11), the question is whether Factek could pursue this appeal under that state’s laws.

For certain purposes, Nevada’s statutory scheme for limited liability companies equates charter revocation and dissolution. NEV. REV. STAT. § 86.274.5 (2004) provides that “[i]f the charter of a limited-liability company is revoked and the right to transact business is forfeited, . . . the same proceedings may be had with respect to its property and assets as apply to the dissolution of a limited-liability company pursuant to NRS 86.505.” In turn, NEV. REV. STAT. § 86.505 (2004) permits a dissolved limited liability company to pursue “any remedy or cause of action available to or against it . . . commenced within 2 years after the date of the dissolution.” The dissolved company cannot continue doing business during this period, but “continues as a company for the purpose of prosecuting . . . suits, actions, proceedings and claims of any kind or nature” (*id.*).

While Factek’s status as a Nevada limited liability company was “[r]evoked on 9/1/2002” (finding 11), it submitted its certified claim by letter dated 4 June 2003 (finding 9), which was within the two-year window afforded by NEV. REV. STAT. § 86.505 (2004). Although this appeal was not filed until February 2006 (finding 9), it constitutes a continuation of the process initiated by the original claim, *see* 41 U.S.C. §§ 605, 606. If presented with this issue, it appears that the Nevada courts would conclude that the appeal falls within the time limits in section 86.505. We accordingly vacate our previous stay order and consider the merits of the motion to dismiss.

#### B. *Motion to Dismiss*

The Corps advances two straightforward arguments in its motion to dismiss for lack of jurisdiction: first, Factek’s bid in response to solicitation 0006 (*see* finding 5) did not result in an express contract; and second, Factek cannot prove that it had an implied-in-fact contract (Respondent’s Brief In Support of Its Motion to Dismiss for

Lack of Jurisdiction (resp. br.) at 11-14). For its part, Factek has filed lengthy letter briefs in opposition to the motion. Factek argues in substance that its bid was accepted and became an express contract, or, alternatively, that the parties intended to enter into a contract for work that Factek performed but for which it was not paid.

The Corps has moved to dismiss “with [p]rejudice” (resp. br. at 14). “We have treated motions to dismiss, made on the grounds that an alleged contract with the Government did not exist, where we in effect rule on the merits of the appeal, as summary judgment motions.” *Thai Hai*, ASBCA No. 53375, 02-2 BCA ¶ 31,971 at 157,920, *recons. denied*, 03-1 BCA ¶ 32,130, *aff’d*, 83 Fed. Appx. 226 (Fed. Cir. 2003). Treating the motion as one for summary judgment, “[o]ur task is not to resolve factual disputes, but to ascertain whether material disputes of fact—triable issues—are present.” *John C. Grimberg Co.*, ASBCA No. 51693, 99-2 BCA ¶ 30,572 at 150,969.

After considering the motion papers and the record, we conclude that the motion must be granted and the appeal dismissed for lack of jurisdiction. “The burden of proof is on appellant as the party seeking to establish jurisdiction.” *Total Procurement Service, Inc.*, ASBCA No. 53258, 01-2 BCA ¶ 31,436 at 155,237; *see also RMS Technology, Inc.*, ASBCA No. 50954, 00-1 BCA ¶ 30,763 at 151,927 (holding that former manager of dissolved corporation had failed to establish jurisdictional fact that he was an officer authorized to bring appeal).

Appellant has failed to meet its burden and establish a material dispute of fact regarding jurisdiction. It is familiar that our jurisdiction under the Contract Disputes Act, 41 U.S.C. § 601 *et seq.*, extends only to express or implied-in-fact contracts. *Thai Hai, supra*, 02-2 BCA at 157,922 (dismissing appeal for lack of jurisdiction in absence of evidence of either express or implied-in-fact contract). To establish that it had an express contract, Factek must show “a mutual intent to contract, including an offer, an acceptance and consideration.” *Trauma Service Group v. United States*, 104 F.3d 1321, 1325 (Fed. Cir. 1997); *CareFirst BlueCross BlueShield*, ASBCA Nos. 52849 *et al.*, 05-2 BCA ¶ 32,998 at 163,580 (same).

The record before us fails to establish any triable issue regarding whether there was an express contract as alleged. To be sure, the three purchase orders awarded to Factek (*see* finding 7) were express contracts. Nonetheless, they were all awarded after the period alleged in the claim and the complaint (*id.*) and, in any event, there is no evidence that Factek submitted any claim related to them (*id.*).

Otherwise, the closest that Factek comes to raising a triable issue regarding an express contract lies in its allegation that its bid in response to solicitation 0006 was accepted (*see* finding 10). While solicitation 0006 was issued within the October 1999 through February 2000 period alleged in both the claim and the complaint (findings 5, 9,

10), we have found, from the uncontroverted declarations of the relevant Corps personnel, no triable issue regarding whether a contract resulted (finding 6). Mr. Herman, who is central to Factek's allegations (*see id.*), was a contract specialist, rather than a contracting officer, and his authority was limited to Visa check purchases with a per check limit of \$2,500 (finding 8(a)). Apart from these considerations, there is the irreducible fact that, in all its prolix submissions, Factek has never produced a document constituting the express "negotiated contract which awarded Factek \$18,589.20 for each months [sic] service," as alleged in the claim (finding 9) and repeated in substance in the complaint (finding 10).

The case for an implied-in-fact contract is no stronger. To establish that it had such a contract, Factek must show the same general elements as are necessary for an express contract. *Trauma Service Group, supra*, 104 F.3d at 1325. "An implied-in-fact contract is one founded upon a meeting of the minds and is inferred, as a fact, from the conduct of the parties showing, in the light of the surrounding circumstances, their tacit understanding." *Night Vision Corp. v. United States*, 469 F.3d 1369, 1375 (Fed. Cir. 2006), *petition for cert. filed*, No. 06-1156 (U.S. Feb. 16, 2007) (internal quotations omitted). In establishing an implied-in-fact contract, an element that Factek must also show is "actual authority on the part of the government's representative to bind the government." *Id.* (affirming dismissal of an action for breach of alleged follow-on production contract because, *inter alia*, of "the failure to show that the Air Force officials who allegedly promised a Phase III contract had the authority to make that commitment").

The declarations of Messrs. Herman and Pace (findings 6, 8(a), 8(b)) preclude a conclusion that there was any "tacit understanding" from which the requisite meeting of the minds could be inferred, *Night Vision, supra*, 469 F.3d at 1375, regarding the scope of work in solicitation 0006 (see finding 6). Similarly, Mr. Herman's unequivocal statements in his declaration that he did not direct or encourage Factek to work without a contract, or promise that one would be awarded in the future (finding 8(a)) is corroborated by Mr. Pace (finding 8(b)), the other principal Corps representative in Factek's narrative. Both declarations are uncontroverted by anything other than assertions from Factek (finding 8), which are insufficient to raise a triable issue.

The invoices that Factek stresses fail to raise an issue regarding "a mutual intent to contract," *Trauma Service Group, supra*, 104 F.3d at 1325, and are no more than the bills that they purport to be. Thus, Factek's Invoice No. 1032, which allegedly substantiates the claim (finding 10), is addressed to EMC (*see* findings 1, 2), not to the government, and contains no term looking to payment for any period beyond "the month of September" 1999 (finding 4(b)). In addition, Factek's Invoice No. 1030 undeniably demonstrates that Factek purchased the identified equipment for Building 444 in September 1999 (finding 4(a)). It does not, however, speak to Factek's allegation of a

broader intent “to allow us to continue the necessary research and development effort while the contract was being negotiated and worked through the system” (app. br. at 25).

Apart from these considerations, Factek has failed to raise a triable issue regarding the requisite element of authority. Factek’s admission in the motion papers that “the involvement of a government representative who had the actual authority to bind the government is harder to confirm” (finding 12) understates the reality that Factek “does not even identify the official who allegedly made the promises,” *Night Vision, supra*, 469 F.3d at 1375, or his or her level of authority. In this latter regard, we have found that Messrs. Herman, Pace and McCormick did not have the levels of authority alleged (findings 8(a)-(c)).

CONCLUSION

The appeal is dismissed for lack of jurisdiction.

Dated: 23 April 2007

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ALEXANDER YOUNGER  
Administrative Judge  
Armed Services Board  
of Contract Appeals

I concur

I concur

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

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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. 55345, Appeal of Factek, LLC, rendered in conformance with the Board's Charter.

Dated:

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CATHERINE A. STANTON  
Recorder, Armed Services  
Board of Contract Appeals