

ARMED SERVICES BOARD OF CONTRACT APPEALS

Appeal of --)
)
D & F Marketing, Inc.) ASBCA No. 56043
)
Under Contract No. 000000-00-0-0000)

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OPINION BY ADMINISTRATIVE JUDGE DICKINSON
ON RESPONDENT'S MOTION FOR SUMMARY JUDGMENT

Appellant, D & F Marketing, Inc. d/b/a Diversified Foodservice Manufacturing (DFM), has appealed, pursuant to the Contract Disputes Act (CDA), 41 U.S.C. § 605, from the denial of its claim for the breach of an implied-in-fact contract with the Navy for certain frozen meals and meal components. The Navy has denied the existence of such a contract and filed a motion for summary judgment based on a lack of subject matter jurisdiction due to the absence of a contract between DFM and the Navy. The record for purposes of the motion consists of the Rule 4 file, DFM's supplemental Rule 4 file, a declaration of William C. Hashey and two declarations of CDR Thomas Dailey submitted as attachments to the Navy's motion for summary judgment and its reply to DFM's opposition to the motion, as well as supplemental documents and the declarations of Graham Felton and Jody Jones submitted as attachments to DFM's opposition to the motion.

STATEMENT OF FACTS (SOF) FOR PURPOSES OF THE MOTION

1. In March 2002 DFM was approached by a brokerage firm about providing food products for a “new initiative sponsored by NAVSUP [Naval Supply Systems Command] of the United States Navy.” As explained by then-LT William Hashey to DFM’s president, Graham Felton:

[T]he Navy was exploring strategies to reduce the cost of, and the labor required for, the Navy’s food service needs. This initiative involve[d] substituting prepared frozen meals and meal components for a part of the meals and meal components that are typically prepared entirely [from scratch] by the Navy. Lt. Hashey further explained that the frozen prepared food products required for these food service initiatives are made-to-order, produced according to the Navy’s precise specifications (“1NSN meal kits”^[1]). The Navy provides the specifications to the supplier of these 1NSN meal kits with the components of each meal, contents of each item, specified portion sizes, and packaging requirements, among other specifications.

(App. opp’n, ex. 1, Felton decl. ¶¶ 2-3) Discussions continued between LT Hashey and DFM through April/May 2002 and ultimately DFM was approved to be a supplier of 1NSN meal kits (app. opp’n, ex. 1, Felton decl. ¶¶ 4-5; R4, tabs 3-4). Tyson Foods was producing a similar frozen meal product but would not agree to produce the product in advance of orders from the PVs² (R4, tab 4 at 1; app. supp. R4, tab 49).

2. William C. Hashey was on active duty from July 2001 to 1 November 2004 as a Supply Corps Officer with the rank of LT assigned to NAVSUP, Mechanicsburg, PA, under the Director, Navy Food Service. His responsibilities included leading Navy-Wide Food Management Teams that provided training and assistance to Navy Food Service Operations ashore and afloat. He also led Task Force Excel which involved making quality assessments of subsistence prime vendors (*see* SOF ¶ 3) including those involved in the 1NSN prototype project. The record contains ample evidence of direct contact between LT Hashey and DFM on a variety of matters such as menu content, recipes and product availability (R4, tabs 1, 4; app. supp. R4, tab 27; app. opp’n, ex. 1, Felton decl.; app. opp’n, ex. 1, Jones decl.; *see also* SOF ¶ 4). LT Hashey was not a contracting officer and did not hold a contracting warrant; it is undisputed that he had no express authority to purchase or otherwise obtain supplies or services. (Gov’t mot. at 1-2 and exs. 1, 2; app. opp’n at 3) LCDR Thomas Dailey, Maritime Readiness Officer for the

¹ *See* app. supp. R4, tabs 14, 21, 58.

² *See* SOF ¶ 3.

United States Navy Commander Pacific Fleet, was one of the other Navy personnel with whom DFM had direct contact at times relevant to this appeal (*see* SOF ¶¶ 9, 11-12).

3. Defense Supply Center Philadelphia (DSC-P), a Defense Logistics Agency (DLA) organization, has contracting authority for DoD subsistence items utilizing the Subsistence Prime Vendor Program. Prime Vendors in the program are referred to as PVs. NAVSUP provides support to the Subsistence Prime Vendor Program in the form of food service policies and procedures. NAVSUP has no contracting authority for the Subsistence Prime Vendor Program. (R4, tab 7; gov't mot., ex. 2, Dailey decl. ¶¶ 4-6; app. opp'n, ex. 2, ¶ 2.2) NAVSUP Publication 486, Food Service Management, Figure 1-2, shows graphically that DLA and DSC-P are responsible for procurement of subsistence products and that the Navy and NAVSUP responsibilities do not include procurement (gov't mot. ex. 2, Dailey decl. at 3). Under DoD Directive 5101.10, effective September 27, 2004, DLA is the DoD Executive Agent with authority for the procurement of subsistence food and food-related items DoD-wide. Insofar as the record indicates, the Directive codified the existing DoD procurement practice for subsistence food and food-related items which the record shows had been in place at least as early as November 2002 (SOF ¶ 4). DFM described the procurement process for 1NSN food products as:

Navy ships occasionally sent their 1NSN orders to DSC-P who, in turn placed orders with other vendors. However, in many instances, the Navy vessel or installation, or NAVSUP, contacted DFM directly and then one of these parties contacted another vendor to inform the other vendor that it was required to receive or pick up from DFM and deliver 1NSN meal kits with other items it was delivering to a vessel or installation. [*citations omitted*] DFM and the Navy often discussed and agreed upon the ordering and delivery schedule for 1NSN meal kits before the other vendor was even contacted. [*citations omitted*]

(App. opp'n ¶ 6) The process described by DFM as to the involvement of "other vendors" is entirely consistent with the process described by the government: Navy ships or activities identified their needs for 1NSN frozen food products; these needs were conveyed to DSC-P either directly or indirectly through DFM and/or the PVs ("other vendors") (*see* quote above); DSC-P ordered the food products from PVs under DSC-P contracts/purchase orders; the PVs then ordered the food products from DFM (R4, tabs 4, 6; gov't mot. ¶ 6; gov't reply, ex. 1, Dailey decl. ¶ 4). The fact that there may have been direct contact between the Navy and DFM did not change the apparently undisputed fact that orders from DSC-P to the PVs and from the PVs to DFM were necessary before any 1NSN meal kits could be delivered. Illustrative of this process is an 8 January 2003

e-mail in which Bill Bordenca, DFM's broker (*see* SOF ¶ 1), explained to Navy MSCM Graef on board the U.S.S. Truman:

Attached you will find a slide show version of our catalog. After discussing what would be the best way for you to get the product, others on my team told me to simply have you identify the items you would like and for you to request them from your PV. Send me a copy of your request and we can work it from this end. If you have any questions pertaining to the preparation of the meals or anything regarding the meals please do not hesitate to communicate.

(App. supp. R4, tab 12) The catalog was referred to as the "EBREX catalog" (app. supp. R4, tab 11; *see also* app. supp. R4, tabs 12-13) or the "PV catalog" (app. supp. R4, tab 19). EBREX evidently was one of the PVs. Later, in a 12 February 2003 e-mail the necessity of the PV ordering process was again explained by Mr. Bordenca to MSCM Graef:

[DFM's Chef] Brian Toothill...has spoken to Harvey Payne from [PV] Lankford Sysco. Brian has completed and returned all required paper work sent by Lankford Sysco. We now await the purchase order from Ebrex, Harvey has told Brian that he can not place the order until he receives a PO from Ebrex.

As time is of the essence, if there is anything you can do to speed up the process of having this PO placed we would appreciate it.

(*Id.*) Clearly, DFM understood that the PV procurement process was integral to orders for the 1NSN meal kits (*see also* app. supp. R4, tabs 13, 19, 23, 26, 34, 37, 57; app. opp'n, ex. 11) There is no evidence that 1NSN products were ever supplied by DFM other than in response to orders from PVs (*see* app. supp. R4, tabs 12, 13, 19, 23, 26, 34, 38, 53, 57; app. opp'n, exs. 7, 11, 13).

4. DFM worked directly with LT Hashey and other Navy personnel on various aspects of the 1NSN meal kits such as catalog of products, menu, nutritional content, quality control, packaging, and schedule (*see, e.g.,* app. supp. R4, tabs 29-31, 33; app. opp'n, ex. 5). They also discussed pricing of meal kits (app. opp'n, ex. 1, Felton decl. ¶ 6) and the evidence indicates it was the price to be paid by the Navy ships and activities to the PVs (*see* app. supp. R4, tabs 10, 21, 23, 40-41, 57-58; app. opp'n, exs. 6, 12, 13). DFM received purchase orders from the PVs and dealt with the PVs regarding delivery of

the products (app. supp. R4, tabs 12, 34, 57; app. opp'n, ex. 1, Felton decl. ¶¶ 7, 14). The meal kits were produced on a dedicated production line that produced 250-500 cases of one particular meal kit per day, requiring 28-40³ business days to produce all the various meal kits. With the addition of the time required for delivery of raw materials to DFM and then delivery of meal kits to the PVs, DFM estimated a total production-to-delivery timeline of 75-80 days for 40 meal kits. (App. opp'n, ex. 1, Felton decl. ¶ 15) In order for the meal kits to be available for immediate delivery, it was necessary for DFM to produce each meal kit prior to purchase by the PVs (app. supp. R4, tab 49; app. opp'n, ex. 1, Felton decl. ¶¶ 14, 19, 22). DFM produced and delivered its first order of 1NSN products in November 2002. It continued to produce and deliver products through March 2004 in response to PV orders. (App. opp'n, ex. 1, Felton decl. ¶ 10; app. opp'n, ex. 1, Jones decl. ¶¶ 9-10)

5. Early in 2004 LT Hashey and DFM discussed DFM's participation as a supplier for a new food service initiative, the 21 Day Advanced Operational Menu (AOM). DFM refers to this as the "Pacific Initiative." According to DFM's Felton, "the Pacific Initiative was designed so that DFM would fill orders essentially as soon as they were submitted by the other vendors." (App. opp'n, ex. 1, Felton decl. ¶¶ 12, 14) The prototype or test of this initiative was originally to run for 12 weeks and is sometimes referred to in the record as the "12-week prototype." (Gov't mot. ¶ 8; app. opp'n ¶ 8)

6. On 24 May 2004 LT Hashey advised the Navy participants in the "21-DAY ADVANCED OPERATIONAL MENU prototype" of the ordering process:

Below is the list of NSN products that will encompass 50% of your cycle menu. In order to have your *Prime Vendor (PV)* support you to the extent we want them to, need your requirement of the product placed next to these items for the *PV's* order to support your command for the 30-day period of time. Attached you will find the 21 DAY AOM....

....

All items will be placed on your *PV* Catalog and you will not be required to maintain the initial quantities in your freezer, just to pull from those numbers to support you weekly....

....

³ The initial 1NSN initiative included 28 different meal kits and the 2004 21-day AOM added an additional 12 meal kits for a total of 40 (app. opp'n, ex. 1, Felton decl. ¶ 17).

The numbers you provide, will be a monthly requirement and will be the amount your *Prime Vendor* brings into stock to support you initially. I cannot over emphasize the importance of getting this correct to ensure there are no NIS issues in support of the Prototype!!...

(App. supp. R4, tab 23) (emphasis added) In e-mail correspondence between DFM and LT Hashey on this same date, DFM indicated its understanding that LT Hashey did not order INSN products but could possibly assist in having others place orders. DFM asked LT Hashey to: “HELP GET ME ORDERS THIS WEEK” (app. supp. R4, tab 24). This is consistent with DFM’s earlier communications with MSCM Graef in January/February 2003 (SOF ¶ 3). We find DFM’s bare allegations that the 21-Day AOM was not part of the PV program (app. opp’n at 4, 20, 28) to be unsupported by the record (*see also* SOF ¶ 4).

7. The total amount of product anticipated to be used for the 21-day AOM prototype was 11,562 cases (R4, tab 4; app. opp’n, ex. 1, Felton decl. ¶¶ 17, 19; app. opp’n, ex. 1, Jones decl. ¶ 17). DFM’s Felton claims “LT Hashey promised that [DFM] would not get stuck with any product.” LT Hashey agrees he promised DFM it would not get stuck with any of the 11,562 cases of product for the 12-week prototype, but that no promise was made as to any additional product. (R4, tab 4) All of the 11,562 cases were purchased by PVs; those cases are not at issue.

8. On 28 June 2004 LT Hashey advised DFM he was “pushing DSCP now to ensure the product is available” and DFM again requested “[g]et me orders and I will fill them. I cannot fill orders I do not have” (app. supp. R4, tab 25).

9. DFM alleges that on 26 July 2004 LT Hashey ordered it to produce an additional 40,000 cases of INSN product (1,000 cases per day for 40 different meal kits). In a conference call later that same day, DFM alleges LT Hashey agreed to production of a reduced quantity of 20,000 cases (app. supp. R4, tab 27). DFM’s Felton alleges that LT Hashey guaranteed during the conference call “that the Navy would purchase by the end of the year (2004) any INSN product that was not used during this Pacific Initiative” (app. supp. R4, tab 49; app. opp’n, ex. 1, Felton decl. ¶¶ 23-26, 30). An internal e-mail on the same date as the conference call expressed DFM Chef Toothill’s understanding that LT Hashey had no authority to order food because he “was corporate” and his belief that LCDR Dailey could “force orders” (app. supp. R4, tab 27). DFM’s Felton stated in his declaration:

Commander Dailey assured Chef Toothill that he was involved and supportive of Lt. Hashey’s work with the

Pacific Initiative. Commander Dailey also guaranteed that the Navy would continue to use the 1NSN meal kits until DFM's stock was diminished.

(App. opp'n, ex. 1, Felton decl. ¶ 27) For purposes of the motion only, the government agrees that LT Hashey "assured [DFM] that the Navy would continue to use the 1NSN product and would use and deplete the remaining inventory" (gov't mot. at 4). CDR Dailey's declaration filed after Mr. Felton's declaration does not dispute his allegation of a guarantee (*see* gov't reply, ex. 1).

10. Halfway through production of 20,000 cases of additional inventory (SOF ¶ 9), all orders abruptly stopped. DFM's Felton immediately stopped production and contacted LT Hashey. LT Hashey told DFM the initiative had been "temporarily suspended due to 'internal' issues that the Navy was working to resolve." (App. opp'n, ex. 1, Felton decl. ¶¶ 33-36, Jones decl. ¶¶ 24-27)

11. On 8 September 2004 LCDR Dailey advised captains and commanders:

FYI

The 21 DAY AOM prototype is on going till Oct 31, 2004. We are collecting data weekly from the ships and shore stations involved in the prototype and attacking each challenges [sic] as they occur from product availability, metric evolution and customer satisfaction/dissatisfaction. We have requested some product reengineering, by providing direct feed back to the Chef of the manufacturer so that their recipes can be re-worked. Leaving no lapse in time so that we as the customer will see their requirements met within a month or two. DFM who is the companies [sic] that produces our current 1 NSN product line is very attentive to all our needs and has no problem improving and changing the product mix to our desires. I've asked NAVSUP to look at portion size at both a cost factor and the impact to overall health and wellness.

(App. supp. R4, tab 30) As the Readiness Officer, LCDR Dailey's duties included being "the lead for the conception, development and prototype execution of the advanced operational menu developed to reduce food service preparation time ashore and afloat." LCDR Dailey did not have a contracting officer warrant and had no contracting authority to purchase or otherwise obtain supplies or services. (Gov't reply, ex. 1, Dailey decl. ¶ 2) Then-LCDR Dailey is now CDR Dailey, Director, Navy Food Service, at NAVSUP,

Mechanicsburg, PA. He has been in this position since May 2007. (Gov't mot., ex. 2, Dailey decl. ¶ 1)

12. On 29 September 2004 DFM's Chef Toothill advised DFM's Felton:

In conversation last evening with LCDR T Dailey, he assured me they would move out the inventory, while continuing to monitor and gather results/data from the current 1 NSN test. LCDR has contacted NAVSUP in PA for other outlet information and is requesting other platforms in ORF use products.

I will keep you advised as to when we will begin receiving orders.

We can not build further inventory until conclusion of test and we receive direction from NAVSUP regarding what kits we are to use and what is to be revised and what format we will use for packaging etc.

(App. supp. R4, tab 36; *see also* app. supp. R4, tabs 34 (listing DFM inventory in storage), 37; app. opp'n, ex. 1, Felton decl. ¶ 27)

13. In a 19 November 2004 e-mail Karen R. Aquino, DSC-P contracting officer, advised Navy and DSC-P personnel:

attached is a list of 1NSN leftover from the Navy test. Please circulate to your ships for purchase as we have to diminish this product from Sysco of Hampton Rds stock. Just a reminder that the Navy is liable for this product. Thanks for your help in this matter.

(App. opp'n, ex. 12 at 2) The attachment to the e-mail was a spreadsheet identified as "1NSN 10-26-04.xls." There is no evidence in the record that the spreadsheet contained anything other than a list of 1NSN product located at the PV SYSCO as stated by Ms. Aquino. Specifically, there is no evidence that the spreadsheet listed any 1NSN product in DFM's inventory. Sometime on or after 23 November 2004 an e-mail in the same e-mail history document as the quote just above was sent by an unidentified individual to DFM's Chef Toothill:

Mr. . [sic] Toothill,

As you can see from the attachment, we still have 829 cases inventory at the PV [SYSCO]. Our efforts first and foremost are to reduce the PV inventory and then attempt to reduce yours.

NAVSUP have extended the fixed price for another three months, the facilities have been encouraged to utilized [sic] the products to the maximum.

This is the absolute best efforts and I will keep you informed as the inventory reduces.

(App. opp'n, ex. 12 at 1)

14. DFM's Felton and Chef Toothill met with CDR Hansen, Supply Corps Director of Navy Food Service, and CDR Hartzell, Supply Corps Navy Food Service Operations Officer, "and other officials" in February 2005 (app. opp'n, ex. 1, Felton decl. ¶ 39). On 14 February 2005 Chef Toothill advised DFM's Felton that CDR Hansen and his team were working on a strategy to "begin moving [DFM's] inventory...one thing is they are going to give bigger financial incentives to move product" (app. supp. R4, tab 40).

15. On 3 March 2005 CDR Hansen, Director, Navy Food Service, advised DFM:

We have met and decided to run a sale for ninety days, April 1-June 30.... This will make the product lucrative to employee [sic] and should generate demand. At the end of ninety days we'll revert to the discounted fixed price we're at today. Meanwhile our friends at DLA have been moving product in a separate effort, recently moving \$300K from their Japan locations to the Marines. Initial indications suggest they may have taken a liking to the product.

We continue to market and will continue to assist you where possible.

(App. supp. R4, tab 41; app. opp'n, ex. 13; *see also*, app. opp'n, ex. 1, Felton decl. ¶ 41)

16. From June 2005 through January 2006, DFM filled orders for delivery of "a relatively small quantity" of existing product to the Naval base near Groton, CT (app. opp'n, ex. 1, Felton decl. ¶ 42; app. supp. R4, tab 54).

17. On 15 July 2005 CDR Hartzell, Naval Supply Systems Command Headquarters, Navy Food Service Operations Officer, advised DFM's Felton:

Mr. Felton, The Navy fully supports and encourages the utilization of the 1 NSN product line that your company produces throughout all Navy food service operations. We are moving forward to make the 1 NSN product line as an

integral part and the long term strategy of Navy Food Service Operations and will continue to see an increase in utilization volume throughout all regions. Navy Food Service Operations and Procurement Center fully supports [DFM] in the manufacturing and distribution of the 1 NSN product line to the Navy Subsistence Prime Vendors.

(App. supp. R4, tab 42)

18. On 29 July 2005 CDR Hansen advised DFM's Felton by e-mail of the status of the 1NSN product line:

We at Navy Food Service are committed to the ongoing partnership with [DFM] in the development and growth of the 1 NSN program while we expand implementation of 1 NSN-based food service operations. Our original concept was to utilize on board legacy Navy ships to support our leadership's desire to reduce shipboard labor and achieve maximum resource efficiency for the delivery of food. Unfortunately the prototype identified some shortcomings in our legacy ship design....

In the near term, we're operating the New London Submarine Base with 1 NSN as the primary product line, and anticipate expansion throughout the Northeast region. Expansion into the Northwest is projected before the end of the year.... I do want to emphasize that we consider DFM... a valued partner in [the] development of the "next generation" Navy food service. [I] look forward to the continued availability of the 1 NSN product line to the Subsistence Prime Vendors.

(App. supp. R4, tab 43) On 2 December 2005 CDR Hansen sent another e-mail to DFM's Felton, with a copy to CDR Hartzell, again reiterating the same information as his previous e-mail of 29 July 2005 with a few updates about the use of 1NSN product at ashore facilities. Once again CDR Hansen stated that "we look forward to the continued availability of the 1 NSN product line to the Subsistence Prime Vendors." (App. supp. R4, tab 46)

19. On 6 June 2006 DFM's Felton requested payment by the Navy of \$1,980,539.00 for "1NSN product which my company ordered at the direction of your command" and \$563,638.77 "for storage, finance charges, dumped product, sales, travel

and samples.” (R4, tabs 3, 8) The product referred to by DFM was 12,866 cases which represented the difference between what was manufactured and what the PV SYSCO had purchased. (R4, tab 4)

20. On 8 September 2006 the Navy Family Support office acknowledged receipt of DFM’s 6 June 2006 letter. “We are currently reviewing your allegations with the food service, contracting and legal technical subject matter experts at the Naval Supply Systems Command and Defense Supply Center Philadelphia.” The letter also “strongly encourage [sic]” DFM to work in the future with warranted contracting officers of the Navy or Defense Logistics Agency (DLA) “where matters of contractual obligation or direction are concerned.” (R4, tab 5; *see also* gov’t mot., ex. 2, Dailey decl.)

21. On 13 February 2007 the Deputy Commander for Contracting Management for the Naval Supply Systems Command (NAVSUP) acknowledged receipt of DFM’s 6 June 2006 request:

The Navy Family Support/Support Services Directorate with NAVSUP, the office to whom you addressed your correspondence, provides policies and procedures for Navy Food Service. NAVSUP does not contract for the necessary goods under the Department of Defense Subsistence Prime Vendor (SPV) Program. Rather, the Defense Supply Center Philadelphia (DSC-P) makes awards and provides post-award administration of contracts for the SPV Program. In your February 5, 2007 letter you ask for a “Contracting Officer’s Final Decision (COFD).” Only warranted Contracting Officers at DSC-P can render the requested COFD. As a sub-contractor, you should contact your Prime Vendor or DSC-P for further inquiries on this subject.

(R4, tab 7)

22. By letter dated 20 February 2007 DFM submitted its certified claim to Gina Vasquez, a DSC-P contracting officer, in the amount of \$3,046,587.46 (R4, tab 8).

23. On 8 March 2007 Ms. Vasquez denied DFM’s 20 February 2007 claim:

The Defense Supply Center of Philadelphia has never had a contract with DFM Marketing for 1NSN product. Any instruction on 1NSN product by DSCP would have been given to a Prime Vendor holding a contract with DSCP.

Therefore, I have no basis for approving any request for payment.

(R4, tab 9)

24. On 11 June 2007 DFM appealed to the Board alleging jurisdiction on the basis of an implied-in-fact contract with the Navy. After pleadings were complete, the parties agreed on a discovery schedule under which written discovery would be complete by 15 May 2008 and depositions would be complete by 15 September 2008, later extended to 27 February 2009. On 27 March 2008 the Navy filed its motion for summary judgment. By the time of the joint status report filed on 26 September 2008, the depositions of Hashey, Dailey, Hansen, Felton, and Toothill had been completed. In a joint status report to the Board dated 12 November 2008, the parties reported they were in the latter stages of the discovery process. On 26 January 2009 the parties were asked if either of them wished to supplement the record to be considered on the government motion for summary judgment. In a letter of the same date, the parties jointly declined to supplement the record and “jointly request[ed] the Board to rule on the Respondent’s Motion for Summary Judgment...relying on the record as it presently exists before the Board.”

DECISION

The Navy has moved for summary judgment on the ground that there was no contract between it and DFM and therefore no subject matter jurisdiction. The Navy further argues that DFM had no contracts, express or implied, with any government agency or activity because it was a subcontractor/supplier (gov’t mot. at 7). As we held in *Thai Hai*, ASBCA No. 53375, 02-2 BCA ¶ 31,971 at 157,920, *aff’d*, 82 Fed. Appx. 226 (Fed. Cir. 2003), the government’s motion is more akin to one for failure to state a claim upon which relief may be granted under FED. R. CIV. P. 12(b)(6) than a motion to dismiss for lack of subject matter jurisdiction. However, the Navy is correct that where, as here, matters outside the pleadings are presented and not excluded by the tribunal, we apply summary judgment standards to such a motion. *Id.* Here both parties have submitted considerable evidence outside the pleadings including documents and declaration testimony and both parties agree the appeal is ripe for decision on summary judgment on the present record (SOF ¶ 24).

The CDA grants us jurisdiction to decide appeals from decisions by COs “relative to a contract.” 41 U.S.C. § 607(d). DFM bears the burden of proving by a preponderance of the evidence that we have jurisdiction under the CDA to consider its appeal. *Thai Hai*, 02-2 BCA ¶ 31,971 at 157,920.

DFM alleges that jurisdiction is based on an implied-in-fact contract directly with the Navy (or DLA) for the purchase of 1NSN food products produced and stored in inventory but never ordered under the PV program (compl. at 2, 12). As we have previously held, where a contractor alleges jurisdiction on the basis of an implied-in-fact contract:

Our jurisdiction is intertwined with determining the merits of his allegations and we clearly have jurisdiction to determine whether the alleged contract exists. *See Choe-Kelly, Inc.*, ASBCA No. 43481, 92-2 BCA ¶ 24,910.

Thai Hai, 02-2 BCA ¶ 31,971 at 157,920; *see also Reynolds Shipyard Corp.*, ASBCA No. 37281, 90-1 BCA ¶ 22,254. If it is determined that no contract exists between DFM and the Navy, the Board lacks jurisdiction and the appeal must be dismissed.⁴

We evaluate the government's motion for summary judgment under the well-settled standard that summary judgment is properly granted only where the moving party has met its burden of establishing the absence of any genuine issue of material fact and the moving party is entitled to judgment as a matter of law. *Mingus Constructors, Inc. v. United States*, 812 F.2d 1387, 1390 (Fed. Cir. 1987). A material fact is one which may make a difference in the outcome of the case. *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 248 (1986). The non-moving party must set forth specific facts showing the existence of a genuine factual dispute; conclusory statements and bare assertions are insufficient. *Mingus*, 812 F.2d at 1390-91; *Pure Gold, Inc. v. Syntex (U.S.A.), Inc.*, 739 F.2d 624, 626-27 (Fed. Cir. 1984); *Celotex Corp. v. Catrett*, 477 U.S. 317, 322-23 (1986). While we are to draw all reasonable inferences in favor of DFM, the party opposing summary judgment, *Mingus*, 812 F.2d at 1390, "[w]here the record taken as a whole could not lead a rational trier of fact to find for the nonmoving party," summary judgment in favor of the moving party is appropriate. *Matshushita Electric Industrial Co. v. Zenith Radio Corp.*, 475 U.S. 574, 587 (1986).

On the record before us, it is undisputed that there were no express contracts for 1NSN product to which the Navy was a contracting party. All express 1NSN contracts were awarded by DSC-P, a DLA organization, to PVs. All express contracts or purchase

⁴ DFM also argues that subcontractors may sometimes recover under direct appeals based on "exceptions to the no-privity rule" (app. opp'n at 30-34). *See United States v. Johnson Controls, Inc.*, 713 F.2d 1541 (Fed. Cir. 1983); *Stan's Contracting Inc.*, ASBCA No. 51475, 01-2 BCA ¶ 31,556. We have considered DFM's legal arguments concerning certain subcontractor privity of contract exceptions and find them unpersuasive.

orders for 1NSN product to which DFM was a party were between DFM and PVs. (SOF ¶¶ 3, 4, 6, 8, 13, 17-19, 21, 23)

In order to establish the existence of an implied-in-fact contract with the Navy, it is DFM's burden to prove: (1) mutuality of intent to contract; (2) consideration; (3) lack of ambiguity in offer and acceptance; and, (4) the government representative whose conduct is relied upon must have actual authority to bind the government in contract. *Lewis v. United States*, 70 F.3d 597, 600 (Fed. Cir. 1995); *City of El Centro v. United States*, 922 F.2d 816, 820 (Fed. Cir. 1990).

In order for the government to prevail on its summary judgment motion, it must demonstrate that, with respect to at least one of these four elements, there are no material facts in dispute and that it is entitled to judgment in its favor as a matter of law. It is then incumbent upon DFM to produce specific evidence showing the existence of disputed material facts; argument, speculation and bare assertion will not suffice. Failure to establish the existence of material facts in dispute as to even one element is fatal to DFM's opposition to the motion for summary judgment.

The government has alleged the absence of material facts in dispute as to the fourth element on the basis of evidence that neither LT Hashey nor LCDR Dailey had contracting officer warrants and therefore neither had authority to bind the Navy to any order for 1NSN meal kits. It is therefore incumbent upon DFM to come forward with evidence demonstrating the existence of disputed material facts as to whether a government representative had authority to bind the Navy in contract for 1NSN products. We assume for purposes of deciding the motion for summary judgment that LT Hashey and LCDR Dailey made the guarantees alleged by DFM's Felton (SOF ¶ 9).

DFM does not dispute that LT Hashey had no express authority to bind the Navy in contract, however DFM argues that CDR Dailey did have express authority to bind the government. DFM also argues that both LT Hashey and CDR Dailey had implied actual authority to bind the government. (App. opp'n at 3) DFM further argues in the alternative that the alleged agreements made by LT Hashey and CDR Dailey were ratified "either by others within the Government who had authority to bind or through institutional ratification" (app. opp'n at 4). We address each of these theories in turn.

a. Express Actual Authority

The government presents the sworn declarations of then-LT Hashey and CDR Dailey as evidence that neither of them were contracting officers nor otherwise authorized to contract on behalf of the Navy, arguing that the lack of such authority makes DFM's proof of the fourth element impossible. The record demonstrates that DFM understood that LT Hashey did not have authority to order from DFM (SOF ¶¶ 6,

9) and DFM has provided evidence of its belief that then-LCDR Dailey had authority to “force orders” (SOF ¶ 9). Rather than presenting evidence of express actual authority, DFM relies instead on argument and speculation. DFM has therefore failed to establish the existence of disputed material facts as to express actual authority to bind the Navy in contract.

b. Implied Actual Authority

In *Reliable Disposal Company, Inc.*, ASBCA No. 40100, 91-2 BCA ¶ 23,895 at 119,717, it was held that under certain limited circumstances government personnel may be found to have implied actual authority.

Admittedly, the operations officer did not have a contracting officer’s warrant. However, this does not end the inquiry. Although apparent authority will not bind the Government, it has been recognized that actual authority may be implied from the circumstances. *H. Landau & Co. v. United States...*, 886 F.2d 322, 324 (Fed. Cir. 1989); *H.F. Allen Orchards v. United States*, 749 F.2d 1571, 1575 (Fed. Cir. 1984, *cert. denied*, 474 U.S. 818, 106 S.Ct. 64, 88 L.Ed. 52 (1985)). In limited circumstances, authority has been implied when considered an “integral part of the specific duties” assigned to the employee. See *DOT Systems, Inc.*, DOTCAB No. 1208, 82-2 BCA ¶ 15,816 at 78,386, citing *Urban Pathfinders, Inc.*, ASBCA No. 23134, 79-1 BCA ¶ 13,709 and *Contractors Equipment Rental Co.*, ASBCA No. 13052, 70-1 BCA ¶ 8183; *Precision Products*, ASBCA No. 25280, 82-2 BCA ¶ 15,981. The determination obviously depends on the particular facts surrounding each transaction.

DFM argues that LT Hashey and LCDR Dailey had implied actual authority that bound the government to agreements made by them relative to the 1NSN meal kit initiatives. However, DFM has provided no specific evidence to support its argument.

Under the established Subsistence Prime Vendor Program in existence from at least November 2002, DSC-P was responsible for procurement of food and food-related items. The Navy was responsible for food service policy and procedures, but had no authority to purchase subsistence food items. (SOF ¶¶ 3-4, 6, 8, 13, 17-19, 21, 23) DoD Directive 5101.10, which codified existing practice, designated DLA as DoD’s Executive Agent for the procurement of subsistence food and food-related items with no procurement authority for any of the military departments, including the Navy. This is corroborated by NAVSUP Publication 486. (SOF ¶ 3) Given that the Department of the

Navy and NAVSUP had no authority to contract for 1NSN meal kits, it would be impossible for LT Hashey or LCDR Dailey to have authority, actual or implied, to bind the Navy in contract for them.

c. Ratification

DFM further argues that, even if then-LT Hashey and LCDR Dailey did not have express or implied actual authority to bind the government, the alleged agreements made between either or both of them and DFM were ratified by superior Navy officials or DSC-P with the authority and actual or constructive knowledge of the unauthorized acts (app. opp'n at 2, 26). *See generally Winter v. CATH-dr/Balti Joint Venture*, 497 F.3d 1339, 1347 (Fed. Cir. 2007); *Harbert/Lummus Agrifuels Projects v. United States*, 142 F.3d 1429, 1433 (Fed. Cir. 1998), *cert. denied*, 525 U.S. 1177 (1999).

As we have already held above, under the established Subsistence Prime Vendor Program, DoD Directive 5101.10 and NAVSUP Publication 486 (SOF ¶¶ 3-4), no one in the Navy had authority to enter into a contract for food or food-related subsistence items such as those under the 1NSN program. It follows then that no one in the Navy could have the requisite authority to ratify any agreements made by LT Hashey or LCDR Dailey. As only DLA and DSC-P had the authority under DoD Directive 5101.10 to order food and to do so through the PV program, any ratification of alleged agreements by LT Hashey and/or LCDR Dailey would have to be accomplished by DLA or DSC-P personnel. DFM has offered evidence of a DSC-P contracting officer stating in an internal e-mail that the Navy was liable for a list of PV inventory which DFM seems to imply included its own inventory as evidence of ratification. However, as we have already found (SOF ¶ 13), DFM has failed to produce any evidence that the spreadsheet referred to by the contracting officer contained anything other than what she specifically stated was a list of 1NSN product located at the PV SYSCO. Further, there is no evidence, nor even an allegation by DFM, that the contracting officer who wrote the e-mail knew anything in November 2004 about any agreements between LT Hashey, LCDR Dailey and DFM which would be necessary to a ratification. Even further operating against the occurrence of a ratification by DSC-P, on 8 March 2007, after reviewing all information presented by DFM in its certified claim including the alleged agreements between it and LT Hashey and others, a DSC-P contracting officer denied DFM's claim for the 1NSN product at issue on the basis that no contract existed (SOF ¶¶ 22-23). The actions of neither contracting officer meet the requirements of a ratification. DFM has offered no evidence sufficient to raise a triable fact that anyone else in DSC-P or DLA had sufficient knowledge and authority to support a ratification.

d. Institutional Ratification

DFM has alleged that, even if there was no specific ratification by an authorized official, an institutional ratification by the Navy occurred (app. opp'n at 25-26). In order to prove an institutional ratification, DFM must show that the government sought and received the benefit of an unauthorized contract. *Janowsky v. United States*, 133 F.3d 888, 891-92 (Fed. Cir. 1998). A key element of institutional ratification is knowledge of all the facts related to the unauthorized action by officials who are empowered to ratify agreements. *City of El Centro*, 922 F.2d at 821; *Gary v. United States*, 67 Fed. Cl. 202, 217 (2005).

DFM alleges that "the Navy" sought and received the benefits of DFM's production of 1NSN meal kits in excess of those ordered by PVs (app. opp'n at 25-26). As we have already held, the Navy had no authority to order subsistence food items such as the 1NSN meal kits. Without such authority, no Navy personnel could possibly meet the definition of an official empowered to ratify agreements. Further, since the inventory for which DFM seeks payment was at all times in storage, the Navy never received, nor has DFM alleged the Navy received, any of the 12,866 cases of 1NSN items at issue. The only benefit to the Navy alleged by DFM is the readiness to immediately fulfill orders by the PVs. But DFM has never alleged nor offered any evidence there was an agreement to pay DFM for readiness. The agreements alleged to have been made by LT Hashey and LCDR Dailey were to order meal kits and to pay for meal kits delivered. Therefore, we do not believe the benefit alleged by DFM is sufficient to support an institutional ratification. Accordingly, DFM has failed to show how, when or by whose authority the Navy received a benefit from the inventory at issue. DFM has, therefore, failed to demonstrate genuine disputed facts in support of its allegation of institutional ratification.

CONCLUSION

As a matter of law, looking at the record in the light most favorable to DFM and drawing all inferences in its favor, DFM has failed to establish the existence of disputed material facts as to the fourth element of authority necessary to establish the existence of an implied-in-fact contract with the Navy.

We therefore grant the government's motion for summary judgment and dismiss the appeal with prejudice.

Dated: 9 March 2009

DIANA S. DICKINSON

Administrative Judge
Armed Services Board
of Contract Appeals

I concur

I concur

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

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. 56043, Appeal of D & F Marketing, Inc., rendered in conformance with the Board's Charter.

Dated:

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