ARMED SERVICES BOARD OF CONTRACT APPEALS

Appeals of -	)	
	)	
Erik Robinson d/b/a The Artwork Factory	)	ASBCA Nos. 63727, 63809
	)	
Under Contract No. 7235-0005-23 *et al.*	)	

APPEARANCE FOR THE APPELLANT: Mr. Erik D. Robinson
Managing Director

APPEARANCES FOR THE GOVERNMENT: Dana J. Chase, Esq.
Army Chief Trial Attorney
LTC William T. Wicks, JA
LTC P. Daniel DiPaola, JA
LTC Anthony V. Lenze, JA
MAJ Sana H. Daniell, JA
MAJ Josh C. Dickinson, JA
Trial Attorneys

OPINION BY ADMINISTRATIVE JUDGE MELNICK DENYING APPELLANT'S MOTION FOR PARTIAL SUMMARY JUDGMENT AND GRANTING THE GOVERNMENT'S CROSS MOTION FOR SUMMARY JUDGMENT

Mr. Erik Robinson, d/b/a The Artwork Factory, appearing pro se, has been a product concessionaire for the Army & Air Force Exchange Service (Exchange or AAFES). He claims that in addition to express short-term concession contracts awarded to him by the Exchange he was also party to an implied-in-fact contract that promised him both short-term and long-term arrangements, along with physical access to vacant Exchange stores, in return for which he abandoned certain legal action against the Exchange. He claims the government breached its promise, entitling him to $17.9 million in damages. Mr. Robinson seeks partial summary judgment and the government cross-moves for full summary judgment. We conclude Mr. Robinson has failed to establish all the elements of an implied-in-fact contract and that the alleged contract is precluded by express contracts that are not unrelated. We grant summary judgment to the government and deny Mr. Robinson's motion.

STATEMENT OF FACTS FOR PURPOSES OF THE MOTIONS

The following facts have not been disputed. Between 2013 and 2016, while operating from Prague, Mr. Robinson approached the Exchange's Merchandising Directorate (MD) about obtaining a purchasing agreement to carry home decor products in its main stores worldwide. However, Mr. Robinson's logistical and licensing problems led the Exchange to conclude that it was impractical to place his materials in the main stores, so it declined to enter into an agreement. (Callow decl. ¶¶ 2-4; McKinley decl. ¶¶ 4, 6-8)[1] Though Mr. Robinson reached out periodically to the MD, the exchange never executed a written agreement with him to sell in its main stores (Callow decl. ¶ 11; McKinley decl. ¶¶ 6, 10-11).

On July 23, 2016, Mr. Robinson submitted what has been referred to as an unfair trade practices complaint to the Exchange. In it, he complained that after the Exchange identified him to another vendor for potential collaboration, and he had provided sensitive information and product samples, he was denied the opportunity to sell in the exchanges in favor of the collaborator. (App. supp. R4, tab 1) On October 25, 2016, the Exchange responded that the complaint had been reviewed by senior management and appropriate action was taken. This constituted the closing response from the Office of the Inspector General. (App. supp. R4, tab 12) In a November 3 response, Mr. Robinson said he was prepared to move past asserting blame and looked forward to providing goods and services to the military (app. supp. R4, tab 13). The Exchange's reply directed Mr. Robinson to Mr. Chris Burton, a division vice president, for future business (*id.*).

On November 21, 2016, Mr. Robinson introduced himself to Mr. Burton by email. Mr. Robinson described the unfair trade practices investigation, noting his understanding that the investigation was concluded and appropriate measures had already been taken. He then indicated he was reaching out to obtain vendor status. (R4, tab 64)

In late 2016, MD referred Mr. Robinson to the Exchange's Services and Food Directorate (SFD) to explore possible concession agreements (Callow decl. ¶ 9). SFD offers short-term commodity contracts (STAs) signed by the General Manager of the installation as the designated contracting officer. Under an STA, a concessionaire sells products in kiosks or open spaces in the central shopping center or may be allowed to occupy vacant storefronts. Separately, the Exchange offers long-term roving contracts executed by a contracting officer to travel to different installations for scheduled sales events. Finally, the Exchange offers long-term concession agreements through solicitations conducted by contracting officers where specific storefronts are assigned. (Chandler decl. ¶ 6)

On December 22, 2016, Mr. Robinson notified SFD that he greatly appreciated the possible opportunity to provide concessions (app. supp. R4, tab 308). On January 17, 2017, Exchange personnel met with Mr. Robinson, examined his products, and decided to proceed with a short-term agreement to ascertain customer reaction to his products at the KMCC Exchange at Ramstein Air Base (R4, tab 50). On April 11,

[1] The cited declarations were included with the government's motion.

2017, Mr. Robinson and the Exchange executed a written STA wherein the Exchange contracted with Mr. Robinson to perform as a concessionaire at KMCC selling products on various dates in 2017. The agreement was a short-term concession contract. It did not grant any long-term or storefront rights. The parties executed additional STAs in 2018, 2019, 2020, 2021, 2022, and 2023, retaining him for identified dates in those years. The form agreements pronounced that they represented the entire agreement of the parties and that changes or amendments may not be recognized by the Exchange unless in writing and incorporated by reference into the contract by the contracting officer.[2] (R4, tab 40)

Relevant here is Army Regulation 215-8/DAFI 34-211(I), Army and Air Force Exchange Service Operations, which prescribes policies for providing exchange services to Army and Air Force activities worldwide (gov't. mot. ex. 5 at i). Section 9-1(b) mandates that "[e]ach contractual relationship will be documented, in writing, on a prescribed AAFES form" (*id.* at 36). Similarly, EOP 65-1, Exchange Procurement Policy, establishes uniform procurement instructions for the Exchange (gov't mot. ex. 7 at 1-1). It delegates contracting officer authority to various positions based upon the nature of the transactions but requires contracting officers to sign all contractual documents (*id.* at 2-1 through 2-3).

The record contains a certified claim submitted on behalf of Mr. Robinson, dated July 10, 2023, alleging breach of contract by the Exchange (R4, tab 38). That claim was denied by the contracting officer on September 8, 2023 (R4, tab 2). Mr. Robinson filed an appeal here on September 28, 2023, which was docketed as ASBCA No. 63727. The record also contains an essentially identical contracting officer's final decision dated December 29, 2023 (R4, tab 39). It purports to decide another claim submitted October 30, 2023. The parties have not cited that claim to us and we have not identified it in the record. Mr. Robinson appealed that decision on January 17, 2024, and it was docketed as ASBCA No. 63809. The appeals have been consolidated.

DECISION

Mr. Robinson contends that the parties' late 2016 discussions led to more than the written STAs for his concession services. Instead, he says the parties entered an implied-in-fact contract to settle his unfair trade practices complaint. According to him, this agreement entailed his first providing short-term concession services as a "source test," followed by the Exchange granting him long-term main store supplier listings and storefront placements, regardless of the test results. He says he suspended

[2] The copy of the 2023 STA included in the Rule 4 file is executed on the same form as the others but omits the pages containing the referenced clauses (R4, tab 40 at 271).

his pursuit of legal action in return for these promises. (App. mot. at 2-3) Mr. Robinson argues the Exchange breached the implied-in-fact contract by failing to provide long-term arrangements and storefront placements. He maintains the breach was also demonstrated by the Exchange's award of long-term contracts and storefronts disproportionately to non-African American vendors with lower sales and shorter tenure than him. He claims the breach has deprived him of $17,400,000 in income. (*Id.* at 3)

An implied-in-fact contract is "founded upon a meeting of the minds, which, although not embodied in an express contract, is inferred, as a fact, from conduct of the parties showing, in the light of the surrounding circumstances, their tacit understanding." *City of Cincinnati v. United States*, 153 F.3d 1375, 1377 (Fed. Cir. 1998) (quoting *Baltimore & Ohio R.R. Co. v. United States*, 261 U.S. 592, 597 (1923)). The elements of an implied-in-fact contract that must be proven by the claimant are mutuality of intent, consideration, and lack of ambiguity in offer and acceptance. Also, the government representative that is purported to have bound it must have had actual authority to do so. *City of Cincinnati*, 153 F.3d at 1377; *Tele-Consultants, Inc.*, ASBCA No. 58129, 15-1 BCA ¶ 35,880 at 175,410. An additional applicable principle is that "the existence of an express contract precludes the existence of an implied-in-fact contract dealing with the same subject matter, unless the implied contract is entirely unrelated to the express contract." *Bank of Guam v. United States*, 578 F.3d 1318, 1329 (Fed. Cir. 2009) (quoting *Schism v. United States*, 316 F.3d 1259, 1278 (Fed. Cir. 2002) (en banc)); *Algonac Mfg. Co. v. United States*, 428 F.2d 1241, 1255 (Ct. Cl. 1970) ("[A]s a general rule, there can be no implied contract where there is an express contract between the parties covering the same subject.").

Summary judgment should be granted when it has been shown there are no genuine issues of material fact and the moving party is entitled to judgment as a matter of law. *Celotex Corp. v. Catrett*, 477 U.S. 317, 322 (1986). Summary judgment should be granted against a party that "fails to make a showing sufficient to establish the existence of an element essential to that party's case, and on which that party will bear the burden of proof at trial" because "failure of proof concerning an essential element of the nonmoving party's case necessarily renders all other facts immaterial." *Id.* at 322-23.

The government contends the record fails to demonstrate mutuality of intent to enter the implied-in-fact contract Mr. Robinson alleges, and indeed we find the evidence dubious. We have studied the materials Mr. Robinson cites and cannot find any evidence of communications or conduct by the Exchange showing an intent to establish an arrangement obligating Mr. Robinson to relinquish further legal proceedings regarding his unfair trade practices complaint in return for the promises he claims to have received. The best we can find is a January 12, 2023 complaint, presumably submitted to the Exchange by Mr. Robinson and provided to us by the government, where he alleged that in 2016 two Exchange officials proposed he abandon his trade practice complaint in return for granting him short-term, roving vending opportunities at various locations, followed by an evaluation about more widespread distribution of his products in the Exchange's main stores (R4, tab 43 at 297). The complaint does not say the government promised the long-term placements to which he now claims to be entitled. Also, because the document is hearsay, it is not clear Mr. Robinson can rely upon it for its truth. *See* FED. R. CIV. P. 56(c)(2). He did not testify to these facts by affidavit or declaration. Nevertheless, we primarily focus our ruling upon the absence of authority by the Exchange personnel to enter an unwritten contract with Mr. Robinson, as well as the fact that the implied-in-fact contract he alleges relates to the same subject matter as the express STAs, which do not make the promises he seeks to enforce.

The government is not bound by the acts of agents outside the scope of their actual authority, and contractors dealing with the government take the risk of accurately ascertaining the limits of that authority even if government agents are unaware of it. *Tele-Consultants,* 15-1 BCA ¶ 35,880 at 175,411-12 (citing *Fed. Crop Ins. Corp. v. Merrill*, 332 U.S. 380, 384 (1947); *Harbert/Lummus Agrifuels Projects v. United States*, 142 F.3d 1429, 1432 (Fed. Cir. 1998)). The government contends the Exchange lacks the authority to enter contracts that are not in writing. To defeat summary judgment, Mr. Robinson must provide evidence showing the Exchange can enter the unwritten contract he alleges. He has failed to do so. Indeed, the record shows the opposite. As noted, Army Regulation 215-8/DAFI 34-211(I), Army and Air Force Exchange Service Operations, prescribes policies for providing exchange services to Army and Air Force activities worldwide (gov't. mot. ex. 5 at i). Section 9-1(b) mandates that "[e]ach contractual relationship will be documented, in writing, on a prescribed AAFES form" (*id.* at 36). Similarly, EOP 65-1, Exchange Procurement Policy, establishes uniform procurement instructions for the Exchange (gov't mot. ex. 7 at 1-1). It delegates contracting officer authority to various positions based upon the nature of the transactions but requires all contracting officers to sign contractual documents (*id.* at 2-1 through 2-3). These governing rules, requiring the Exchange's contracts to be documented in writing and signed by someone with contracting officer authority, dictate that Exchange personnel were incapable of entering into an unwritten contractual commitment promising Mr. Robinson long-term sales arrangements.

The terms of Mr. Robinson's alleged implied-in-fact contract also pertain to existing express contracts that are not unrelated. Mr. Robinson claims the contract entitles him to both short-term concessions and long-term arrangements with storefront placements. However, starting in 2017, Mr. Robinson and the Exchange executed the series of express, written STAs only granting him short-term concession rights on various dates between 2017 and 2023. Each STA expressly represents the entire agreement of the parties and changes or amendments may not be recognized by the Exchange unless in writing and incorporated by reference into the contract. These express, limited, short-term concession agreements deal with the same subject matter that Mr. Robinson alleges was encompassed within the alleged implied-in-fact contract, which he says granted short-term concessions followed by long-term arrangements. Accordingly, they preclude the existence of the implied-in-fact contract he claims to have been awarded. *See Schism*, 316 F.3d at 1278 (observing that alleged implied-in-fact contract made by military recruiters for full lifetime medical care is foreclosed by the terms of their subsequent express enlistment agreements that did not provide such benefits). Mr. Robinson's implied-in-fact contract allegations are insufficiently supported and fail as a matter of law. Accordingly, we reject his claim for breach of contract.

CONCLUSION

The government's motion for summary judgment is granted and Mr. Robinson's partial motion for summary judgment is denied. The appeals are dismissed.

Dated: August 19, 2026

MARK A. MELNICK
Administrative Judge
Armed Services Board
of Contract Appeals

I concur

J. REID PROUTY
Administrative Judge
Acting Chairman
Armed Services Board
of Contract Appeals

I concur

DAVID D'ALESSANDRIS
Administrative Judge
Acting 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 Nos. 63727, 63809, Appeals of Erik Robinson d/b/a The Artwork Factory, rendered in conformance with the Board's Charter.

Dated: August 20, 2026

PAULLA K. GATES-LEWIS
Recorder, Armed Services
Board of Contract Appeals