ARMED SERVICES BOARD OF CONTRACT APPEALS

Appeal of --	)	
	)	
Ortiz Enterprises, Inc.	)	ASBCA No. 52049
	)	
Under Contract No. 00000-00-0-0000	)	

APPEARANCES FOR THE APPELLANT: Myer J. Lipson, Esq.
Claudia D. Roberts, Esq.
Lipson, Dallas & Weiser, PC
El Paso, TX

David B. Dempsey, Esq.
Scott N. Godes, Esq.
Piper Marbury Rudnick & Wolfe, LLP
Washington, DC

APPEARANCES FOR THE GOVERNMENT: COL Alexander W. Purdue, USAF
Chief Trial Attorney
Edwin R. Babbitt, Esq.
Trial Attorney

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

Respondent moves to dismiss this appeal for lack of jurisdiction on the grounds that the Government did not contract with Ortiz Enterprises, Inc. (OEI), and did not novate a contract to OEI. Appellant responded to the motion, and the Government replied thereto.

STATEMENT OF FACTS (SOF) FOR PURPOSES OF THE MOTION

1. A B-1B aircraft crashed at the Coal Mine Ranch near Van Horn, Texas, in 1992 (R4, tabs 1, 8). On or about 20 May 1998, Mr. John Lencyk, Vice President of M.E.E., Inc. (MEE), was contacted by Ronald Miller, contracting officer (CO) at Dyess Air Force Base (DAFB), Texas, and asked to provide a bid to clean up the site of a B-1 crash (am. comp. & ans., ¶ 5; ex. G-1 (Miller affid.) at ¶¶ 1, 2; Lencyk affid. at ¶ 2).

2. Mr. Richard Ortiz, President and CEO of MEE, agreed to negotiate a sole source contract with the Air Force to clean up the Coal Mine Ranch crash site (am. comp. & ans., ¶ 8; R4, tab 7).

3. On 27 May 1998 Messrs. Ortiz and Lencyk met with CO Miller, MAJ Floyd R. Ball, Deputy Chief of Base Engineering, Larry Webb, Project Engineer, and Don Pitts, Natural Resources Director, of DAFB. Extensive discussions ensued regarding the clean-up. Mr. Ortiz stated that because of liability and insurance issues, it would be necessary to form another company, which could be named Ortiz Enterprises, Inc., to perform the work. (Am. comp. & ans., ¶ 9; ex. G-1 at ¶ 2; Lencyk affid. at ¶¶ 5, 6)

4. An on-site visit was conducted on 25-26 June 1998 with Messrs. Miller, Ball, Webb and Pitts of DAFB. Extensive discussions and negotiations ensued in order to determine the most efficient and effective way to accomplish the clean-up. (Am. comp. & ans., ¶ 10; R4, tab 4; ex. G-1 at ¶ 2)

5. On 13 July 1998 Mr. Ortiz submitted a $306,847 proposal to CO Miller on "M.E.E., Inc. 10041 Carnegie, El Paso Texas" letterhead for the B-1 clean-up (R4, tab 5).

6. Respondent's internal 20 July 1998 "B-1B Cleanup Estimate" included "Administrative Fees (New Corporation) $10,000" (app. resp., attach. 1).

7. On 3 August 1998 Mr. Ortiz submitted a revised proposal to CO Miller on the letterhead of "M.E.E., Inc. Defense Services . . . 10041 Carnegie, El Paso Texas," describing the nature and concept of the clean-up operation, and proposing a $259,577.65 price (am. comp. & ans., ¶ 12; R4, tab 7).

8. On 7 August 1998: (a) a DAFB internal "e.mail" from MAJ Ball with copies to the CO and others stated:

> We have finally consumated [sic] a deal to cleanup the site south of Van Horn, Texas. The contractor is Richard Ortiz of El Paso who owns M.E.E. . . . . The price is $259k.

(b) DAFB's letter to the Coal Mine Ranch stated that respondent was "closing the deal on contracting with Richard Ortiz, 10041 Carnegie, El Paso, Texas, to clean up the B-1B crash site"; and (c) DAFB generated a $259,577.65 purchase request (R4, tabs 8-10).

9. On 12 August 1998 CO Miller provided Mr. Ortiz with the location "where you need to go and register you [sic] company before any awards [sic] can be made" (ex. A-A).

10. On 13 August 1998 the State of Texas issued a "Certificate of Incorporation" to "Ortiz Enterprises, Inc." (ex. A-B).

11. On or about 21 August 1998 the CO orally agreed to Mr. Ortiz' material terms as the basis for a proposed contract (am. comp. & ans., ¶¶ 13, 15). Material terms included the "price and the method and time for performance." On 21 August 1998 CO Miller told Mr. Ortiz that the Government intended award a contract on 24 August 1998, "after [he] had prepared and obtained approval of a justification document for award of a sole source contract," and requested Mr. Ortiz to travel from El Paso to DAFB "on 24 August 1998 for signature of the anticipated contract." (Ex. G-1 at ¶ 2)

12. An undated and unsigned "Justification for Other Than Full and Open Competition" on the basis of "unusual and compelling urgency" under 10 U.S.C. § 2304(c)(2) was prepared on or about 21 August 1998 for the signature of CO Miller and DAFB's "Competition Advocate," *inter alia*. That justification stated: "The Government received a proposal from Mr. Ortiz in the amount of $259,577.85 . . . Ortiz Enterprises has been selected to perform this effort to clean up the [B-1B] crash site" and "[a] synopsis of proposed contract actions was not completed after market research revealed that there was no expectation of receiving bids from other sources and in conjunction with FAR 5.201 and FAR 5.202(a)(2)." (R4, tabs 14, 15)

13. That justification subsequently was rejected by the Air Force, and no (written) contract was awarded (ex. G-1, Miller affidavit, at ¶ 2). Respondent decided to purchase competitively the B-1 aircraft crash clean-up services, and contracted with Anderson Columbia Environmental, Inc. (am. comp. & ans., ¶¶ 17, 19).

14. CO Miller stated that MEE did not submit any written request or supporting information to recognize OEI as successor in interest to any alleged contract, he made no determination whether to recognize OEI as such a successor, and no Standard Form 30, Modification of Contract, incorporating any novation agreement was prepared, executed or distributed in accordance with FAR Subpart 42.12 (ex. G-1 at ¶ 3).

15. OEI's 8 October 1998 letter to CO Miller submitted a claim alleging that immediately after accepting Mr. Ortiz' proposal to clean up the B-1 aircraft cash site and agreeing on price at some time after 3 August 1998, "Mr. Miller agreed and authorized [OEI] to be substituted as contractor" and "after substantial negotiations and revisions of various proposals," CO Miller entered into a "contract (express or implied-in-fact)" with OEI for $259,579.00. OEI's certified claim for $195,248 sought to recover OEI's alleged costs of: (a) meetings, site visits, proposal preparation and submission, blocking time for "Bear Aviation," and formation of a new company from 20 May to 24 August 1998 (subtotal of $105,848); (b) a "Second Site Visit," preparation of bidder's representations and certifications, contract analysis and document preparation, and "insurance setup" from 28 September to 5 October 1998 (subtotal of $79,400); and (c) "attorneys' fees incurred to date" (subtotal of $10,000). (R4, tab 17)

16. The CO's 23 November 1998 letter to OEI stated that in the absence of a contract to provide a basis for its claim, it was inappropriate to issue a final decision on OEI's 8 October 1998 letter (R4, tab 18). OEI appealed to the ASBCA on 22 February 1999 (R4, tab 20).

17. OEI's complaint defined "Ortiz" as "Ortiz Enterprises, Inc." and alleged that CO Miller "accepted Ortiz's proposal and agreed on a price of $259,529" which "created a contract (express or implied in fact) between Dyess A.F.B. and Ortiz," and "[i]mmediately after Mr. Miller accepted the proposal and agreed on the terms, Mr. Miller agreed and authorized Ortiz to be substituted as contractor" (am. comp. at ¶¶ 13, 14).

18. Respondent's answer denied that CO Miller had authority to enter into a contract with Ortiz other than in writing and that the Air Force had a contract with Ortiz (am. ans. at ¶¶ 13, 17, 21).

DECISION

In their pleadings, appellant alleged, and respondent denied, that CO Miller accepted OEI's proposal, agreed on a $259,529 price, and thus created a "contract (express or implied in fact)" (SOF ¶¶ 17-18). Respondent moves to dismiss on the ground that, for lack of a novation to OEI as MEE's successor in interest, respondent has no privity with OEI as a "contractor" within CDA § 601(4), and so the Board has no jurisdiction of this appeal. The novation issue is irrelevant. The real issue is whether Richard Ortiz or OEI had an implied-in-fact contract with respondent.

To determine whether we have jurisdiction in a case of an alleged implied-in-fact contract, we in effect rule on the merits of the appeal as we would on a motion for summary judgment. *See Reynolds Shipyard Corp.*, ASBCA No. 37281, 90-1 BCA ¶ 22,254 at 111,827; *Choe-Kelly, Inc.*, ASBCA No. 43481, 92-2 BCA ¶ 24,910 at 124,221 (where an implied-in-fact contract has been alleged, jurisdiction is intertwined with determining the merits of the allegation. The ASBCA has jurisdiction to entertain the appeal, at least to the point of establishing the existence of an implied contract. A Government motion to dismiss for lack of jurisdiction would cut off that claim in the same manner as a motion for summary judgment); *Balboa Systems Co., Inc.*, ASBCA No. 39400, 91-2 BCA ¶ 23,715 at 118,702 (Government motion based on contention of no implied-in-fact contract, is more accurately one for summary judgment, and so resolved).

Summary judgment is appropriate when there is no genuine issue of material fact and the movant is entitled to judgment as a matter of law. *See Mingus Constructors, Inc. v. United States*, 812 F.2d 1387, 1390 (Fed. Cir. 1987). To establish an implied-in-fact contract as a matter of law it is necessary to show (1) the same mutuality of intent and lack of ambiguity in offer and acceptance as for an express contract, which may be

inferred from the conduct of the parties in light of the surrounding circumstances, and (2) authority to bind the Government in the representative of the Government whose alleged conduct the inferred meeting of the minds resulted. *See Reynolds, supra*, 90-1 BCA at 111,829.

The parties do not genuinely dispute the material facts of Ortiz' 3 August 1998, $259,577.65 offer and the oral agreement of Richard Ortiz and CO Miller on or about 21 August 1998 on the price, method and time for clean-up of the B-1 crash site (SOF ¶¶ 7, 11). However, the record is silent with respect to whether respondent prepared an express contract for Ortiz or OEI to sign; whether agency regulations, *e.g.*, FAR § 6.304(a)(1), Air Force Supplement Part 5306, "Competition Requirements," required review and approval of the sole source justification by "a higher approving level" than the CO, such as DAFB's Director of Contract Operations and Competition Advocate; whether CO Miller really signed the sole source justification; and whether $259,577 was within the monetary limit of CO Miller's warrant in August 1998. Moreover, drawing all reasonable inferences in favor of appellant as the nonmovant, there are genuine issues of material fact relating to whether the parties reached an implied-in-fact contract for start-up costs. *See OAO Corp. v. United States*, 17 Cl. Ct. 91, 100-03 (1989).

Accordingly, on the present record we conclude that respondent is not entitled to judgment as a matter of law. We deny the motion to dismiss the appeal.

Dated: 30 October 2000

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

(Signatures continued)

I concur

I concur

MARK N. STEMPLER
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. 52049, Appeal of Ortiz Enterprises, Inc., rendered in conformance with the Board's Charter.

Dated:

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