ARMED SERVICES BOARD OF CONTRACT APPEALS

Appeal of --	)	
	)	
AIT Worldwide Logistics, Inc.	)	ASBCA No. 54763
	)	
Under Contract No. 0000-000-000	)	

APPEARANCES FOR THE APPELLANT: Jennifer A. Kerkhoff, Esq.
Michael J. Gardner, Esq.
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Washington, DC

APPEARANCES FOR THE GOVERNMENT: COL Samuel J. Rob, JA
Chief Trial Attorney
CPT Peter G. Hartman, JA
Trial Attorney

OPINION BY ADMINISTRATIVE JUDGE VAN BROEKHOVEN
ON GOVERNMENT'S MOTION TO DISMISS FOR LACK OF JURISDICTION

Appellant timely appealed to this Board the contracting officer's decision denying its claim for $30,825.00 arising out of its provision of flatbed trucks allegedly pursuant to a request from Johnson Controls World Services. Following the filing of the pleadings, the government filed a motion to dismiss for lack of jurisdiction contending that there was no privity of contract between appellant and the government, and that there was no implied-in-fact contract under which the Board would have jurisdiction. Appellant opposed the government's motion arguing that an implied-in-fact contract existed between the parties. By order dated 29 July 2005, the Board directed the parties to address the implications of the *Inter-Coastal Xpress, Inc. v. United States*, 296 F.3d 1357 (Fed. Cir. 2002), decision of the United States Court of Appeals for the Federal Circuit on the Board's jurisdiction in this appeal. The government amended its motion in response to the Board's order. Appellant did not respond to that order, notwithstanding a telephone call to appellant's representative to determine if appellant intended to respond to the order. For reasons set forth below, we dismiss the appeal as outside the jurisdiction of the Board.

STATEMENT OF FACTS FOR PURPOSES OF THE MOTION

1. On 1 May 2001, the government awarded Contract No. DABT60-01-C-0006 to Johnson Controls World Services (Johnson Controls). (R4, tab 13) According to the contract, Johnson Controls was required to provide all services, materials, supplies,

facilities, supervision, labor, and equipment, except as specified in the contract as Government-furnished, to perform public works and logistical functions at Fort Lee, Virginia. (R4, tab 13, Section C-1) There were two functional areas of responsibility, public works and logistics services. The public works services included building and structural maintenance, family housing maintenance, utility systems operations and maintenance, HVAC systems operation and maintenance, dining and laundry facility equipment and maintenance, grounds maintenance, surface area maintenance, and "U-DO-IT" services. The logistics functional services included installation transportation services, base supply services, and material maintenance. (*Id*.) The specific service of concern to this appeal is the logistics function of installation transportation services.

2. Under Section C-5, subsection 5.11.1, the contractor, Johnson Controls, was required to provide installation transportation service to authorized organizations and individuals. (R4, tab 13, Section C-5) Transportation services included operation of the motor pool, freight, and household goods movements, and unit move services. Subparagraph 5.11.2.1 provided that: "The Contractor shall also perform designated transportation services to include, but not limited to: personnel and cargo transport, personnel property movement, and Installation Transportation Office staff support activities." According to the government's contract with Johnson Controls, Johnson Controls was required to perform as liaison with the Military Traffic Management Command (MTMC) activities, and other identified organizations, and to be familiar with schedules, services, fares, equipment rates and contract, facilities of carriers, and transportation agreements affecting Fort Lee transportation requirements (*id*.).

3. Subsection 5.11.6 set forth the requirements regarding freight service. (R4, tab 13, Section C-5 at C-5.11-31 – 11-45) Subparagraph 5.11.6.1, provided in pertinent part:

> The Contractor shall provide freight services to include the operation of a Freight Receiving and Shipping Point and all administrative and managerial responsibilities associated with the process of inbound freight shipments, outbound freight shipments, unit moves, and shipping and receiving of hazardous materials. The Contractor shall prepare, process, document, and label freight for shipment and prepare GBLs/CBLs [Government Bills of Lading; Commercial Bills of Lading].

Subparagraph 5.11.6.4 required Johnson Controls to manage and operate the Freight Receiving and Shipping Point facility, and to perform all tasks required for the shipment and receipt of government freight via commercial transportation and the Defense

Transportation System (DTS) in accordance with Army Regulation (AR) 55-38, DOD 4500.32-R (MILSTAMP) volumes I and II, Title 49 of the Code of Federal Regulations (CFR), AR 55-4, and DTR (Defense Transportation Regulation) 4500.9-R. Title 49 of the CFR contains the regulations pertaining to transportation. Both subparagraphs 5.11.6.5 and 5.11.6.6 required Johnson Controls to coordinate, manage, process, inspect, and monitor inbound and outbound freight shipments via commercial transportation and DTS in accordance with DTR 4500.9-R, DOD 4500.32, and AR 5-9 AOR. With respect to outbound shipments, Johnson Controls was responsible for preparing and distributing the GBLs in accordance with DTR 4500.9-R, and for ensuring that all copies of the GBL and CBL were signed and dated by the carrier's representative (R4, tab 13 at C-5.11-40).

4. The contract provided, in subparagraph 5.11.6.6.10, that Johnson Controls was required to maintain the official tender of Freight Services files of approved carriers, and to assign freight shipments only to MTMC or AMC approved carriers within the CONUS (Continental United States) Freight Management System. In the case of volume movements from one origin point to a single destination exceeding 25 truckloads, Johnson Controls was required to submit Volume Movement Reports (VMR) to MTMC. (R4, tab 13, Section C-5, subparagraph 5.11.6.6.10.5) With respect to mobilization and deployment unit moves, Johnson Controls was required to provide input to Fort Lee Mobilization and Deployment plans, to prepare GBLs, to prepare and submit VMRs, and to obtain routings from MTMC area headquarters for all shipments associated with moving military movements in sufficient time to meet load out schedules (*id.* at C-5.11-44).

5. On Sunday, 23 March 2003, Johnson Controls contacted appellant, AIT Worldwide Logistics, a carrier based in Virginia Beach, Virginia, requesting 100 trucks to transport materials from Fort Lee to Jacksonville, Florida (compl. and answer, paragraph 8). On Monday, 24 March 2003, appellant dispatched approximately 35 trucks to Fort Lee and had arranged for another 15 trucks that could be sent to Fort Lee within a short period of time (compl. and answer, paragraph 10). Later that day, after a number of trucks were at Fort Lee and ready for loading, and after more trucks were en route, Johnson Controls advised appellant that the Army would not process the necessary bills of lading for appellant's trucks (compl. and answer, paragraph 11). According to appellant, Johnson Controls proceeded to load and dispatch 13 trucks provided by appellant (compl., paragraph 12). The government asserts that if the trucks were loaded and dispatched, they were not processed through the Global Freight Management (GFM) system, and that any trucks delivered by appellant were not in the GFM system (answer, paragraph 12). Appellant contends that the government ignores a critical fact in this respect, that is, that government employees with actual authority gave express authorization to Johnson Controls to use appellant, and/or ratified Johnson Controls' selection of appellant outside the normal GFM procedures (app. opp'n to mot. to dismiss at 4). Although the record is not developed to permit us to make any findings in this regard, for the reasons set forth in

our decision below, we do not need to find whether or not the government permitted Johnson Controls to operate outside the GFM system in this case.

6. On 9 April 2003, appellant wrote the Garrison Commander, Fort Lee, stating that Johnson Controls had contacted appellant regarding the provision of 100 flatbed trucks to move cargo from Fort Lee to Jacksonville, Florida (R4, tab 2). According to this letter, government officials at Fort Lee confirmed the requirement, although there were questions about whether appellant had submitted tenders, and if so, whether appellant was an approved carrier in the MTMC system. Nevertheless, according to appellant, and not disputed by the government, appellant had 35 trucks en route to Fort Lee, and had another 15 trucks waiting for dispatch. Notwithstanding the foregoing, appellant was told that the trucks would not be loaded and that appellant's services would not be used by the government for this shipment. However, the government used the 13 trucks appellant had arranged to provide, dealing directly with the other carrier rather than going through appellant. (R4, tab 2)

7. By letter dated 19 June 2003, appellant asserted a claim in the amount of $29,750.00 for the 35 trucks provided, and $1,075.00 as a fee for after hours emergency man hours (R4, tab 4). The contracting officer responded to appellant by letter dated 30 June 2003, stating that those with whom appellant had been dealing had no authority to contract for the government, and that since there was no contract, there was no basis for appellant's claim (R4, tab 6).

8. Counsel for appellant wrote the Military Surface Deployment and Distribution Command on 15 December 2003 complaining of the response appellant had received from Fort Lee and detailed the alleged factual basis for appellant's assertion of entitlement to $30,825 asserted to be due as compensation for providing the trucks to Fort Lee (R4, tab 7). The thrust of appellant's claim was that Johnson Controls, at the request of the Fort Lee Garrison Commander, requested 100 flatbed trucks to go from Fort Lee to Jacksonville, Florida. However, although appellant provided some of the trucks, Johnson Controls, as directed by the Installation Transportation Office, refused to load the trucks.

9. The Military Surface Deployment and Distribution Command responded to appellant on 29 January 2004 (R4, tab 8). According to this letter, headquarters had no responsibility for the contracting actions at Fort Lee. Accordingly, that headquarters forwarded the letter to Fort Lee's Office of the Staff Judge Advocate for appropriate response (R4, tab 8).

10. Appellant subsequently on 21 April 2004, submitted its claim with a Contract Disputes Act certification to the contracting officer, Fort Lee, Virginia (R4, tab 9). The contracting officer denied the claim on 29 June 2004 on the basis that Johnson Controls had no authority to contract on behalf of the government, and that there was no contract

between appellant and the government (R4, tab 10). This was issued as a contracting officer's final decision with the standard notice of right to appeal to the "agency board of contract appeals" within 90 days from the date of receipt of the final decision, or in the alternative, to bring an action directly in the "United States Court of Federal Claims" within 12 months of the date of receipt of the final decision (*id*.).

11. Appellant filed this purported appeal on 28 September 2004, alleging in its complaint that an implied-in-fact contract was awarded to it by the government for land shipping of supplies, via transport trucks, from Fort Lee, Virginia, to Jacksonville, Florida.

DECISION

In its answer to appellant's complaint, the government affirmatively requested the Board to dismiss the appeal with prejudice for lack of jurisdiction on the basis that there was no contract between appellant and the government. The government subsequently filed a motion to dismiss the appeal for lack of jurisdiction since there was no privity of contract between the government and appellant, and because Johnson Controls had not sponsored the claim and appeal.

By Order of the Board dated 29 July 2005, the Board noted that the government in briefing its motion to dismiss and appellant, in its reply thereto, had not addressed the impact, if any, of *Inter-Coastal Xpress, Inc. v. United States*, 296 F.3d 1357 (Fed. Cir. 2002), on the Board's jurisdiction to hear this appeal. Accordingly, the parties were given the opportunity to amend their respective briefs to address the impact of *Inter-Coastal Xpress, Inc. v. United States* here. Appellant did not avail itself of that opportunity and the government amended its motion by merely stating that the government did not believe that *Inter-Coastal Xpress, Inc. v. United States* had any relevance to the appeal because there was no contract between appellant and the government. The government then renewed its request that the Board dismiss the appeal with prejudice for lack of jurisdiction.

As stated by the Court in *Inter-Coastal Xpress, Inc. v. United States*, that Court held in *Dalton v. Sherwood Van Lines, Inc.*, 50 F.3d 1014 (Fed. Cir. 1995), that the Contract Disputes Act of 1978, 41 U.S.C. §§ 601, *et seq.* (CDA), did not apply to contracts for transportation services where the contract consisted solely of a Government Bill of Lading (GBL). The court held in *Dalton* that: (1) the statutory rule of construction that the more specific statute would trump the more general, that is, that Congress did not intend to have the general provisions of the later enacted CDA supplant the earlier transportation-specific provisions of the Transportation Act of 1940, as amended, 31 U.S.C. § 3726; (2) the practice in the industry showed that the CDA and its procedures for adjudicating disputes had not displaced the Transportation Act's older and

more specific procedures for adjudicating disputes over transportation charges; (3) that "GBL-based transactions with government agencies, unlike typical federal procurement contracts, constitute 'spot movements' – one-time arrangements for the movement of property from one place to another;" and (4) the Federal Acquisition Regulations expressly exempted transportation services obtained under a GBL from the Contract Disputes Act. *Inter-Coastal Xpress, Inc. v. United States*, 296 F.3d at 1363; *see also, Dalton v. Sherwood Van Lines*, 50 F.3d at 1017-19. Thus, as stated in *Dalton* at 1015, where the common carrier provided transportation services to the government agency under the Transportation Act of 1940, and a GBL served as the contract between the parties, claims arising in connection with that contract were not subject to the CDA, and the "Armed Services Board of Contract Appeals therefore did not have jurisdiction in these cases." However, as stated in *Dalton v. Sherwood Van Lines*:

> Our decision is a narrow one, limited to cases in which the government obtains transportation services from a common carrier pursuant to 49 U.S.C. § 10721 and in which the GBL constitutes the contract between the parties. *We do not address cases in which transportation services are obtained through other means, such as contracts for continuing transportation services over a period of time.* [Emphasis added]

Dalton v. Sherwood Van Lines, 50 F.3d at 1020.

In *Jean Kultau GmbH & Co., KG,* ASBCA No. 45949, 97-1 BCA ¶ 28,894, we addressed the scope of *Dalton v. Sherwood Van Lines, supra*, and specifically the above quoted language. An issue there, as here, was whether *Dalton* and its rationale regarding the jurisdiction of the Board applied to alleged implied-in-fact contracts. We held that an implied-in-fact contract, as alleged by the appellant there, did not involve the application of the Interstate Commerce Act (ICA), 49 U.S.C. § 11706(a), and the Transportation Act of 1940, and the application of the disputes resolution procedures set forth in 41 C.F.R. Part 101-41 (97-1 BCA at 144,070). Notwithstanding that, we held that there was no evidence that the appellant had treated the 43 Personal Property Government Bills of Lading (PPGBL) as implied-in-fact contracts rather that GBLs issued under the International Through Government Bills of Lading program. We, therefore, held that *Dalton v. Sherwood Van Lines* was controlling with regard to our jurisdiction and that the appellant had not established an exemption from the Transportation Act. *See also Eurovan Mover, S.A.*, ASBCA No. 53302, 02-1 BCA ¶ 31,843, in which we discussed the jurisdictional requirements of the CDA and the Transportation Act, and held that the appellant had not proved that there was an implied-in-fact contract, notwithstanding all its contacts with government personnel suggesting an "institutional ratification" of its

agreement with the government. Accordingly, we dismissed the Eurovan Mover appeal holding that we lacked jurisdiction.

The Court in *Inter-Coastal Xpress, Inc. v. United States*, *supra*, made clear what had been left unanswered by the above quoted language in *Dalton v. Sherwood Van Lines* regarding the narrowness of its decision being limited to cases in which the government obtained transportation services from a common carrier pursuant to the Transportation Act and in which the GBL constituted the contract between the parties. The Transportation Act is part of the ICA, initially enacted in 1887, and by its terms, applied to a "carrier providing transportation or service," 49 U.S.C. § 14705(a), including "Government transportation," who brings an "action to recover charges for transportation or service," and "payment of the rate for the transportation or service involved." Therefore, according to the Court:

> The statute draws no distinction between transportation services governed by a Government Bill of Lading on the one hand and a long-term contract on the other. It draws no distinction between a transportation-services contract requiring one delivery only, *e.g.*, a "spot movement," and one requiring all the deliveries an agency may need over an extended period of time. Nor does it leave any room for one to reasonably assert that Congress waived sovereign immunity for common carriers under both this statute as well as under the jurisdictional time period set forth in the Contract Disputes Act; . . . .

Inter-Coastal Xpress, Inc. v. United States, 296 F.3d at 1366. The Court further stated that "[a]n analysis of the administrative-dispute framework set up by the Transportation Act likewise compels the conclusion that [the Transportation Act] cover actions between a common carrier and the government for the payments owed on their agreement." *Id*. at 1367. The court drew a bright jurisdictional line between the jurisdiction vested in General Services Administration and the courts under the Transportation Act, 31 U.S.C. § 3726, on the one hand, and the jurisdiction vested in the Board under the CDA on the other, holding:

> In other words, the Act applies to "transportation claims" brought by a "carrier or freight-forwarder" that provided an agency with "transportation services." *See, e.g.*, 31 U.S.C. § 3726(b)(2). It too makes no distinction based on the number of deliveries, the complexity of the transportation agreement, whether an agreement resulted from the procurement process or instead from a "spot movement," or

> whether a GBL or tender agreement (or both) formed the parties' contract. In short, the unambiguous text of the ICA and its amendments, including the limitations period set forth therein, exclusively govern the jurisdictional time frame in which a common carrier must file a claim for charges against the government.

Inter-Coastal Xpress, Inc. v. United States, 296 F.3d at 1367. Accordingly, the "specific provisions of the ICA trump the general provisions of the CDA and govern disputes" concerning claims for transportation services. *Id*. at 1366.

We, therefore, hold that *Jean Kultau GmbH & Co., KG, supra,* and *Eurovan Mover, S.A., supra,* cannot be understood to provide an exemption for implied-in-fact contracts under the ICA or Transportation Act, as would vest jurisdiction in this Board over claims for transportations services, or disputes relating to charges under the ICA or Transportation Act. What is now clear under *Inter-Coastal Xpress, Inc. v. United States, supra,* is that this Board does not have jurisdiction to consider and determine appellant's entitlement, if any, to its alleged costs for providing the trucks, and for its fee for after hours emergency man hours, regardless of the theory on which it relies in asserting its claim.

Therefore, in light of the fact that this appeal involves a claim for transportation services, and the fact that the ICA, not the CDA, governs appellant's right to seek payment, we dismiss this appeal for lack of subject matter jurisdiction.

Dated: 5 April 2006

ROLLIN A. VAN BROEKHOVEN
Administrative Judge
Armed Services Board
of Contract Appeals

I concur

I concur

MARK N. STEMPLER
Administrative Judge
Acting Chairman

EUNICE W. THOMAS
Administrative Judge
Vice Chairman

Armed Services Board
of Contract Appeals

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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. 54763, Appeal of AIT Worldwide Logistics, Inc., rendered in conformance with the Board's Charter.

Dated:

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