

ARMED SERVICES BOARD OF CONTRACT APPEALS

Appeal of -- )  
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A-1 Horton's Moving Service, Inc. ) ASBCA No. 57750  
 )  
Under Contract No. 000000-00-0-0000 )

APPEARANCES FOR THE APPELLANT: Mark G. Jackson, Esq.  
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APPEARANCES FOR THE GOVERNMENT: Raymond M. Saunders, Esq.  
Army Chief Trial Attorney  
MAJ Andrew J. Smith, JA  
Trial Attorney

OPINION BY ADMINISTRATIVE JUDGE GRANT  
ON THE GOVERNMENT'S MOTION FOR RECONSIDERATION

The government has timely moved for reconsideration of the Board's decision of 6 April 2012, *A-1 Horton's Moving Service, Inc.*, ASBCA No. 57750, 12-1 BCA ¶ 35,004. In that decision, we found that the Board had jurisdiction under the Contract Disputes Act (CDA) to consider the breach of contract claim asserted by A-1 Horton's Moving Service, Inc. (A-1 Horton's) concerning transportation services contracts between the parties, rejecting the government's view that the claim was governed instead by the review procedures of the Transportation Act. Now the government challenges the Board's conclusion that the transportation rate agreements in question were contracts, arguing that they were not. The government asserts that although it "may have appeared to have conceded this issue," the matter should now be addressed, and jurisdiction denied for this reason by granting the motion for reconsideration. (Gov't mot. at 2-3) This issue, not previously raised by either party, has now been fully briefed in the context of this motion for reconsideration. For the reasons discussed below, we have jurisdiction to hear this appeal since A-1 Horton's claim and subsequent complaint adequately alleged the existence of contracts; proof of this remains for a later stage of the proceedings.

## DECISION

The government objects to any statement or conclusion in our original decision that express contracts were formed by annual rate solicitations issued by the Army's Surface Deployment and Distribution Command (SDDC) and A-1 Horton's response to them (gov't mot. at 1-3). The government had stated in the briefing on its original motion to dismiss that "[i]t is undisputed that Appellant's claim arises out of a series of transportation service contracts with the...(SDDC)" (gov't original reply br. at 1). However, because the government now asserts that it did not intend to concede this point and that the issue constitutes a separate jurisdictional challenge, we will review it on reconsideration solely to determine whether it alters our original conclusion that we have jurisdiction over this appeal.<sup>1</sup>

As is well known, the CDA gives the Board jurisdiction over express or implied contracts made by an executive agency for, among other things, the procurement of services. 41 U.S.C. § 7102(a)(2). Taking jurisdiction to consider non-frivolous allegations that an express or implied contract exists is different from actually *determining* whether or not such a contract exists. As the Federal Circuit recently held in *Engage Learning, Inc. v. Salazar*, 660 F.3d 1346, 1353 (Fed. Cir. 2011), "a plaintiff need only allege the existence of a contract to establish the Board's jurisdiction under the CDA 'relative to' an express or implied contract with an executive agency;" *American General Trading & Contracting, WLL*, ASBCA No. 56758, 12-1 BCA ¶ 34,905 at 171,640 (proof of the existence of a contract goes to the merits of the claim not to the Board's jurisdiction).

As noted in our original decision, A-1 Horton's filed a supplemental claim with the government on 2 February 2011 (supp. R4, tab 8; SOF ¶ 5). In its claim, A-1 Horton's alleged that it filed rates in response to SDDC rate solicitations, that those rates were accepted and certified by the government, and that contracts were formed as a result. Pursuant to those alleged contracts, A-1 Horton's asserts that "SDDC agreed to tender to Horton's shipments according to the terms of the rate filing solicitation and Horton's agreed to accept shipments tendered to it according to the rate filing solicitation." A-1 Horton's asserted that the government breached these alleged contracts and that A-1 Horton's suffered damages as a result. (Supp. R4, tab 8 at 3) The same allegations are set forth in A-1 Horton's complaint (compl. at 2).

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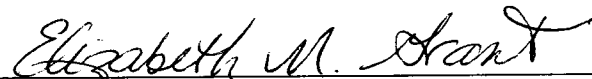
<sup>1</sup> We also note that the Board's statement that contracts were formed via SDDC's annual rate solicitations and A-1 Horton's response to them, which underlies the Board's later reference to express contracts, was part of our "STATEMENT OF FACTS (SOF) FOR PURPOSES OF THE MOTION," not a "Finding of Fact" on the merits.

A-1 Horton's allegation in its claim and subsequent complaint that a contract (or contracts) exists is adequate to establish jurisdiction. *Engage Learning*, 660 F.3d at 1354 ("Engage's allegations of a contract, either express or implied-in-fact,...suffice to establish the Board's jurisdiction"). Although the parties argue whether or not the cited circumstances legally created a contract, this is a matter for resolution independent from the motion for reconsideration concerning jurisdiction.


### CONCLUSION

Our original decision that the Board has jurisdiction is affirmed; the government's motion for reconsideration is denied. The decision is clarified to the extent that A-1 Horton's will have the opportunity to prove, and the government to contest, the existence of transportation services contracts as the appeal develops on the merits. We do not rule on A-1 Horton's motion to strike the affidavit of John E. Johnson, Jr., filed as part of the government's motion; we have no reason to consider the affidavit at this point as it bears on the merits, not on our jurisdiction.<sup>2</sup>

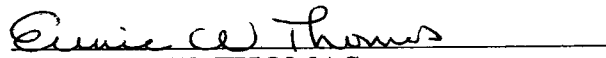
Dated: 13 August 2012

  
ELIZABETH M. GRANT  
Administrative Judge  
Armed Services Board  
of Contract Appeals

I concur

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

I concur

  
EUNICE W. THOMAS  
Administrative Judge  
Vice Chairman  
Armed Services Board  
of Contract Appeals

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<sup>2</sup>The government has requested a hearing pursuant to Rule 5 "to the extent that the Board determines that there are factual issues still left to be resolved in order to make a jurisdictional ruling" (gov't reply br. at 18). We have determined that there are no factual issues to be resolved in order to rule on jurisdiction.

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. 57750, Appeal of A-1 Horton's Moving Service, Inc., rendered in conformance with the Board's Charter.

Dated:

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