ARMED SERVICES BOARD OF CONTRACT APPEALS

Appeal of --	)	
	)	
Tele-Consultants, Inc.	)	ASBCA No. 58129
	)	
Under Contract No. N00178-04-D-4003-N408	)	

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APPEARANCES FOR THE GOVERNMENT: Ronald J. Borro, Esq.
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Senior Trial Attorney

OPINION BY ADMINISTRATIVE JUDGE MELNICK ON THE GOVERNMENT'S MOTION TO DISMISS FOR LACK OF JURISDICTION

Tele-Consultants, Inc. (TCI) claims that it is contractually entitled to payment of invoices in the amount of $282,302 by the Department of the Navy for certain services it performed. The government has moved to dismiss the appeal for lack of jurisdiction, contending that the evidence fails to support the conclusion that it had any contractual obligations to TCI regarding those services. Because we possess jurisdiction over a properly presented claim premised upon an alleged contract, we deny the motion. We defer to a merits proceeding our ruling upon whether a contract was formed between TCI and the government.

STATEMENT OF FACTS FOR PURPOSES OF THE MOTION

TCI's complaint alleges the following:

1. On 15 June 2010, the Department of the Navy awarded to Advanced Solutions for Tomorrow, Inc. (ASFT) Contract No. N00178-04-D-4003-N408 for the performance of various technical tasks (compl., preamble, ¶ 4). The contract required ASFT to act as a purchasing agent for the Navy to procure some of the required services. Accordingly, on 1 October 2010, ASFT awarded a subcontract to TCI, requiring it to provide financial, logistical, and training services. (Compl. ¶¶ 6-7) TCI performed services under the subcontract at Navy facilities and under the purview of Navy personnel. Those services were accepted by both ASFT and the Navy. (Compl. ¶ 7)

2. On 15 February 2011, ASFT directed TCI to stop work under the subcontract because the Navy had suspended ASFT's performance under the prime contract (compl. ¶ 8). On 11 March 2011, the Navy terminated the prime contract with ASFT (compl. ¶ 10). At that time, TCI had prepared invoices for the services it had performed in the amount of $282,302 (compl. ¶ 11). ASFT ceased operating after a criminal complaint was issued against it in February 2011 (compl. ¶ 13).

3. ASFT failed to direct TCI to submit a termination settlement proposal, and the Navy made no attempt to resolve TCI's claims for payment (compl. ¶¶ 12, 14-15). TCI submitted its invoices to the Navy and sought an equitable adjustment from it. The requests were rejected. (Compl. ¶ 16) On 19 December 2011, TCI submitted a certified claim for $282,302 to the contracting officer, which was denied on 15 February 2012 (compl. ¶ 17). TCI also submitted a termination settlement proposal to the Navy but has received no response (compl. ¶ 18). TCI appealed to this Board on 11 May 2012.

DECISION

TCI's complaint contends that the prime contract required ASFT to function as a purchasing agent to procure specialized services for the government. It argues that ASFT's award of the subcontract to it was in satisfaction of that obligation. (Compl. ¶¶ 6-7) It maintains that the government was contractually obligated to it under that arrangement to pay TCI's invoices and breached that contract by failing to do so, and by failing to respond to the termination settlement proposal it submitted for those costs (compl. ¶¶ 19-39).

The government answered and filed a motion to dismiss for lack of jurisdiction. Citing *Cedars-Sinai Medical Center v. Watkins,* 11 F.3d 1573 (Fed. Cir. 1993), the government contends that, to establish jurisdiction, TCI must prove that the prime contract made ASFT the government's purchasing agent, or that TCI otherwise has entered into an implied-in-fact contract directly with the government. The government relies upon various materials from the Rule 4 file, and an affidavit, seeking our ruling that the evidence fails to support either possibility.

TCI's response to the government's motion appears to abandon the suggestion that the prime contract designates ASFT as the government's purchasing agent and that the government's liability arises from that alleged arrangement. Instead, it relies upon various Rule 4 materials and its own affidavit in support of a contention that it directly entered into an implied-in-fact contract with the government to perform the services for which it seeks payment. It cites *United States v. Amdahl Corp.*, 786 F.2d 387 (Fed. Cir. 1986), and *Eaton Corp.*, ASBCA No. 38386, 91-1 BCA ¶ 23,398 at 117,403, to support its contention that it is entitled to payment from the government for the services it provided under that contract under a theory of *quantum meruit.*

Contrary to the parties' briefs, we do not need to determine whether a contract was formed in order to exercise jurisdiction. Although *Cedars-Sinai Medical Center* does require a claimant to prove the facts necessary to establish jurisdiction, "a claimant 'need only allege the existence of a contract to establish the Board's jurisdiction under the CDA.'" *American General Trading & Contracting, WLL,* ASBCA No. 56758, 12-1 BCA ¶ 34,905 at 171,640 (quoting *Engage Learning, Inc. v. Salazar,* 660 F.3d 1346, 1353 (Fed. Cir. 2011)). It need not prove that either an express or an implied-in-fact contract exists. Whether such a contract was formed and breached goes to the merits of the appeal. *Engage Learning,* 660 F.3d at 1355.

Here, TCI originally alleged that the government became contractually obligated to it through ASFT's actions as its purchasing agent. Though its brief appears to retreat from the purchasing agent theory, it continues to allege that the facts support the formation of an implied-in-fact contract directly between it and the government for the services at issue. TCI claims a right to recovery under a theory of *quantum meruit.* Given TCI's contention here that it did indeed directly enter into an implied-in-fact contract with the government respecting the services at issue, we conclude we possess jurisdiction over this claim. Whether *quantum meruit* is an appropriate theory of recovery for failure to perform an obligation of an implied-in-fact contract goes to the merits of the claim.

The government's contention that the evidence fails to support the existence of a contract could be construed to actually seek summary judgment upon that issue. The government has relied upon various record materials to support that argument and TCI has responded in kind. Although both parties seem to contemplate that we will now rule upon whether an implied-in-fact contract was formed between TCI and the government, neither expressly requests summary judgment. Our precedent has historically rejected using the briefing of a jurisdictional motion to dismiss to rule upon the merits through summary judgment. *See Aries Marine Corp.,* ASBCA No. 37826, 90-1 BCA ¶ 22,484 at 112,846-47 (ruling it inappropriate to convert a motion to dismiss for lack of jurisdiction into a motion for summary judgment); *but see Thai Hai,* ASBCA No. 53375, 02-2 BCA ¶ 31,971 at 157,920-21 (considering the government's motion to dismiss as one for summary judgment where both parties treated it that way after discovery had been conducted), *aff'd,* 82 F. App'x 226 (Fed. Cir. 2003).

Recent amendments to the Federal Rules of Civil Procedure provide additional guidance upon that question. Rule 56(f)(3) permits a court to consider summary judgment on its own under certain circumstances. However, an important constraint upon that power is that we may not issue summary judgment upon the merits if there are any genuine issues of material fact. *Engage Learning,* 660 F.3d at 1355. Thus, Rule 56(f)(3) only permits a court to consider summary judgment on its own after giving notice and identifying for the parties material facts that may not be genuinely in dispute, and then allowing a reasonable opportunity to respond. At this juncture of the appeal,

the better approach is to leave it to the parties to address in the first instance whether they believe there are any genuine disputes of fact between them on any material issues. Thus, we defer ruling upon whether a contract was formed to an appropriate merits proceeding, whether it be a motion for summary judgment or after a hearing.

CONCLUSION

The motion to dismiss is denied.

Dated: 4 February 2013

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

I concur

MARK N. STEMPLER
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

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. 58129, Appeal of Tele-Consultants, Inc., rendered in conformance with the Board's Charter.

Dated:

JEFFREY D. GARDIN
Recorder, Armed Services
Board of Contract Appeals