ARMED SERVICES BOARD OF CONTRACT APPEALS

Appeal of --	)	
	)	
Protecting the Homeland Innovations, LLC	)	ASBCA No. 58366
	)	
Under Contract No. FQ-12187	)	

APPEARANCE FOR THE APPELLANT: Peter F. Carr II, Esq.
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APPEARANCES FOR THE AUTHORITY: Kathryn Pett, Esq.
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Deputy General Counsel
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Washington Metropolitan Area
Transit Authority

OPINION BY ADMINISTRATIVE JUDGE HARTMAN
ON RESPONDENT'S MOTIONS TO DISMISS AND TO QUASH

Respondent, the Washington Metropolitan Area Transit Authority (WMATA), moves to dismiss Counts III ("Quantum Meruit/Unjust Enrichment") and IV ("Promissory Estoppel") of the complaint filed by appellant, Protecting the Homeland Innovations, LLC (PHI). WMATA asserts we lack jurisdiction to entertain those counts because they seek recovery, respectively, based upon theories of unjust enrichment and promissory estoppel when it is immune from "quasi-contractual claims." (Motion to Dismiss at 1-2) PHI contends Count III is based upon a theory of "implied contract," WMATA has waived its sovereign immunity with respect to its "contracts," and we therefore possess jurisdiction to entertain Count III. PHI, however, has not filed any response to WMATA's motion to dismiss Count IV. (Appellant's Opposition to Respondent's Motion to Dismiss Count III of the Complaint at 1-4)

WMATA also moves to quash a request for admissions served by PHI. WMATA contends: that this appeal is governed by the "ASBCA's Rules for cases not under the Contracts Disputes Act" (CDA), approved 15 July 1963, and revised 1 May 1969, and 1 September 1973; those rules require a party to apply to the Board for permission to serve a request for admission of specified facts; and such applications shall be reviewed and approved only to the extent and on such terms as the Board in its discretion considers to be consistent with the objective of securing just and inexpensive determination of appeals without unnecessary delay (Reply to Appellant's Opposition to WMATA's

Motion to Quash at 1-2). PHI responds it fails to understand how an unpublished Memorandum of Understanding between the Board and WMATA controls and precludes conduct of routine discovery when (a) the Board has published rules of procedure addressing discovery consistent with modern trial practice, (b) a recent Board decision held there was no distinction between WMATA and CDA contract claims, and (c) its request for admissions will assist in narrowing the issues in dispute, thereby facilitating prompt resolution of the appeal (Appellant's Sur-Reply to WMATA's Opposition to Motion to Quash at 1-2).

STATEMENT OF FACTS FOR PURPOSES OF THE MOTIONS

WMATA is an interstate compact agency, and an agency and instrumentality of the District of Columbia, State of Maryland, and Commonwealth of Virginia (Complaint (Compl.) ¶ 2, Answer ¶ 2). WMATA operates public transit systems that provide local and regional transit service to the Washington, DC metropolitan area (Compl. ¶ 5, Answer ¶ 5).

On 7 May 2012, WMATA issued Request for Proposal No. RFP-FQ-12187/RK (RFP) to provide "Terrorism Recognition Training" services for the Metro Transit Police Department's sworn personnel (Compl. ¶ 9, Answer ¶ 9). Two days later, on 9 May 2012, PHI submitted a proposal in response to the RFP in the amount of $1,117,500, which included a fee or profit of $432,914, and WMATA awarded service Contract No. FQ-12187 to PHI on 23 May 2012 (Compl. ¶¶ 17, 18, 19, 27, Answer ¶¶ 17, 18, 19, 27).

PHI commenced performance under the contract and taught its first class to WMATA personnel on 29 May 2012. PHI provided additional training to WMATA, submitted invoices for all training provided, and was paid approximately $514,973 by WMATA. PHI provided all services WMATA requested by the 30 June 2012 deadline and granted WMATA a license to use its proprietary training program materials and techniques, fully completing its scope of work under the contract. (Compl. ¶¶ 38, 39, 40, 42, 43, 44, 61, Answer ¶¶ 38, 39, 40, 42, 43, 44)

On 28 July 2012, after conducting an audit, WMATA informed PHI that WMATA's auditors had prepared a report stating that the total price to be paid to PHI should be $514,973, an amount more than $600,000 less than the sum PHI set forth in its proposal (Compl. ¶¶ 17, 18, 19, 52, Answer ¶¶ 17, 18, 19, 52). On 3 August 2012, PHI submitted a certified claim to WMATA's contracting officer (CO), contending WMATA "breached the Contract by failing or refusing to pay PHI the agreed upon firm fixed price Contract amount due and owing, despite PHI's full and complete performance under the Contract" (Compl. ¶¶ 55, 60, Answer ¶ 55).

On 24 October 2012, PHI filed a notice of appeal with this Board based on lack of issuance of a CO's decision on its claim (Compl. ¶¶ 57, 58, Answer ¶ 57). About one month later, PHI filed a five-count complaint with this Board. Count III of the complaint

asserted "PHI rendered valuable services and licensed valuable proprietary intellectual property to WMATA," "expected to be paid for its services and property," WMATA retained the benefit of the services and property rendered without full payment to PHI, WMATA thus was "unjustly enriched" to the detriment of PHI, and PHI is entitled to "payment from WMATA for the benefits PHI bestowed upon WMATA and for which WMATA retained without payment to PHI." (Compl. ¶¶ 72-78) Count IV of PHI's complaint asserted "WMATA promised to pay PHI $1,117,500 to induce PHI to render valuable services to and for the benefit of WMATA," PHI reasonably relied upon that promise to its detriment, and "WMATA is estopped from refusing to comply with the promise to pay PHI" (Compl. ¶¶ 79-85).

DECISION

I. Motion to Dismiss

The Constitution, U.S. CONST. art. I, § 8, cl. 17, grants Congress the power "[t]o exercise exclusive Legislation in all Cases whatsoever, over [the District of Columbia]." Pursuant to that power, in 1966, Congress "adopted and enacted" the WMATA Compact, Pub. L. No. 89-774, 80 Stat. 1324 (1966), and as required by U.S. CONST. art. I, § 10, cl. 3 ("[n]o State shall, without the Consent of Congress...enter into any Agreement or Compact with another State"), consented to the State of Maryland and Commonwealth of Virginia entering into the Compact. The Compact created WMATA to operate a mass transit system in the District, Northern Virginia and two Maryland counties to deal with the alleviation of present and future traffic congestion in the Washington, DC metropolitan area. *See* Pub. L. No. 89-774, 80 Stat. 1324; *Dant v. District of Columbia*, 829 F.2d 69, 71 (D.C. Cir. 1987); *Morris v. WMATA*, 781 F.2d 218, 219 (D.C. Cir. 1986).

As sovereign, the United States enjoys immunity from suit without its consent and the terms of its consent to be sued in any court define that court's jurisdiction to entertain the suit. *Hercules, Inc. v. United States*, 516 U.S. 417, 421 (1996); *United States v. Testan,* 424 U.S. 392, 399 (1976). Congress may also endow a government agency or instrumentality with governmental immunity from suit. *E.g.*, *Morris*, 781 F.2d at 222. Maryland and Virginia both possess immunity from suit pursuant to the eleventh amendment of the Constitution[1] and can confer that immunity upon instrumentalities of

[1] While the eleventh amendment, U.S. CONST. amend. XI ("[t]he judicial power of the United States shall not be construed to extend to any suit in law or equity, commenced or prosecuted against one of the United States by Citizens of another State, or by Citizens or Subjects of any Foreign State"), expressly refers only to suits against a state by citizens of another state, the Supreme Court "has consistently held that an unconsenting State is immune from suits brought in federal courts by her own citizens as well as by citizens of another State." *Edelman v. Jordan*, 415 U.S. 651, 662-63 (1974).

the state. *Id.* at 220; *Lizzi v. WMATA*, 255 F.3d 128, 132 (4th Cir. 2001), *cert. denied*, 534 U.S. 1081 (2002). In executing the WMATA Compact, the signatories each conferred their respective sovereign immunity upon WMATA. *Lizzi*, 255 F.3d at 132; *Dant*, 829 F.2d at 74; *Morris*, 781 F.2d at 219; *see Hess v. Port Auth. Trans-Hudson Corp.*, 513 U.S. 30, 49-50 (1994). In section 80 of the Compact, 80 Stat. 1350, they consented only to suits against WMATA "for its contracts and for its torts...committed in the conduct of any proprietary function, in accordance with the law of the applicable signatory." *Lizzi*, 255 F.3d at 133; *Morris*, 781 F.2d at 220-22.

The Supreme Court has held repeatedly that a sovereign's waiver of immunity of suits founded on "contract" does not extend to claims founded on contracts "implied in law." *E.g., Hercules, Inc.*, 516 U.S. at 423; *United States v. Mitchell*, 463 U.S. 206, 218 (1983); *Merritt v. United States*, 267 U.S. 338, 341 (1925). As Chief Justice Rehnquist explained in *Hercules*:

> The distinction between "implied in fact" and "implied in law," and the consequent limitation, is well established.... An agreement implied in fact is "founded upon a meeting of 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." By contrast, an agreement implied in law is a "fiction of law" where "a promise is imputed to perform a legal duty, as to repay money obtained by fraud or duress."

Id. at 423-24 (Citations omitted).

In Count IV of the complaint, PHI asserts WMATA promised PHI "$1,117,500 to induce [it] to render valuable services to and for the benefit of WMATA," PHI relied reasonably on the promise made and rendered valuable services, WMATA has failed to pay PHI the sum promised, and "WMATA is estopped from refusing to comply with the promise to pay PHI" (Compl. ¶¶ 80-85). PHI therefore is relying on promissory estoppel to create its right of recovery. *See Algonac Mfg. Co. v. United States*, 428 F.2d 1241, 1256 (Ct. Cl. 1970); *Biagioli v. United States*, 2 Cl. Ct. 304, 307-08 (1983). Obligations based upon promissory estoppel are founded on contracts implied in law and WMATA's sovereign immunity has not been waived with respect to contracts "implied in law." *See Hercules*, 516 U.S. at 423; *Lizzi*, 255 F.3d at 133; *Morris*, 781 F.2d at 220-22. We grant WMATA's motion to dismiss Count IV of the complaint for lack of jurisdiction.

In Count III of the complaint, PHI asserts it "rendered valuable services and licensed valuable proprietary intellectual property to WMATA arising under or related to the Contract" it was awarded by WMATA, "WMATA retained the benefit of the services and property rendered by PHI without full payment to PHI," and PHI is entitled to full payment from WMATA (Compl. ¶¶ 73, 76, 78). While PHI asserts WMATA was

"unjustly enriched" by retention of the benefit of the services and property PHI rendered (Compl. ¶ 77), it cites a "contract" with WMATA as the basis for its claim of recovery (Compl. ¶¶ 27, 72, 73). "[T]he law is clear that, [for us] to have jurisdiction, a valid contract must only be pleaded, not ultimately proven." *Total Medical Mgmt., Inc. v. United States*, 104 F.3d 1314, 1319 (Fed. Cir. 1997), *cert. denied*, 522 U.S. 857 (1997); *accord Engage Learning, Inc. v. Salazar*, 660 F.3d 1346, 1353 (Fed. Cir. 2011); *Lewis v. United States*, 70 F.3d 597, 602 (Fed. Cir. 1995); *Gould, Inc. v. United States*, 67 F.3d 925, 929-30 (Fed. Cir. 1995). Thus, on its face, complaint Count III is founded on an express or implied in fact contract over which WMATA's sovereign immunity has been waived. *See, e.g., Lizzi*, 255 F.3d at 133; *Total Medical Mgmt.*, 104 F.3d at 1319; *Morris*, 781 F.2d at 220-22.

While WMATA asserts in its Reply to PHI's Opposition to WMATA's Motion to Dismiss (WMATA Reply) that it paid the value of the services rendered ($514,973.31) and PHI's claim is seeking "excessive profit of $414,559 on direct costs of $702,941," PHI has made a non-frivolous assertion of a contract to perform services. WMATA does not dispute that it solicited proposals to perform, and awarded a contract to PHI, for the services PHI rendered. (Compl. ¶¶ 9, 17, 27, Answer ¶¶ 9, 17, 27) Its contentions that PHI's alleged contract is not for a "fixed-price" and PHI has been paid for services it rendered (WMATA Reply at 1; Answer ¶¶ 18, 25, 28, 34, 35, 41, 52) are a challenge to the "truth" of the allegations that a "fixed-price" contract was entered into for a sum greater than paid, rather than to the "sufficiency" of the allegation of a "contract." *See, e.g., Dongbuk R&U Eng'g Co., Ltd.*, ASBCA No. 58300, slip op. at 8 (13 August 2013); *Tele-Consultants, Inc.*, ASBCA No. 58129, 13 BCA ¶ 35,234 at 172,993. We may not resolve a challenge such as WMATA's under a motion to dismiss for lack of jurisdiction. Rather, we must do so under a motion for failure to "state a claim [on] which relief [can] be granted." *E.g., Total Medical Mgmt.*, 104 F.3d at 1319. Resolution of the latter requires we "assume jurisdiction" to decide whether the complaint contains allegations that, if proven, would be sufficient to entitle a party to relief, as well as to "determine issues of fact arising in the controversy." *See Gould, Inc.*, 67 F.3d at 929-30; *Spruill v. MSPB*, 978 F.2d 679, 688 (Fed. Cir. 1992); *Do-Well Mach. Shop, Inc. v. United States*, 870 F.2d 637, 639-40 (Fed. Cir. 1989).

In *KiSKA Constr. Corp.-USA & Kajima Eng'g & Constr., Inc., J.V.*, ASBCA Nos. 54163, 54614, 09-1 BCA ¶ 34,089, *aff'd*, 736 F. Supp. 2d 171, 186 (D.D.C. 2010), *aff'd*, 443 F. App'x 561 (D.C. Cir. 2011), WMATA contended this Board lacked jurisdiction to entertain a claim by a contractor seeking payment of the full amount due under a contract. This Board held otherwise. *Id.* at 168,562; *cf. Cubic Transportation Systems, Inc.*, ASBCA No. 57770, 12-2 BCA ¶ 35,063 at 172,234. We adhere to prior precedent and deny WMATA's motion to dismiss Count III for lack of jurisdiction.

II. Motion to Quash

While this Board possesses authority to resolve most appeals before it pursuant to statutory authority, *see* 41 U.S.C. § 7105(e)(1)(A) (Contract Disputes Act), it possesses authority to resolve appeals involving WMATA contracts only pursuant to the terms of those contracts and a January 2001 Memorandum of Understanding Between the Armed Services Board of Contract Appeals and the Washington Metropolitan Area Transit Authority and an October 2007 Extension of Memorandum. *See Cubic Transp.*, 12-2 BCA ¶ 35,063 at 172,234; *KiSKA Constr.*, 09-1 BCA ¶ 34,089 at 168,562; *see also KiSKA Constr. Corp.*, 736 F. Supp. 2d at 183-84; *Breda Transp., Inc. v. WMATA*, 164 F. Supp. 2d 677, 680 (D. Md. 2001) (scope of ASBCA's jurisdiction is "essentially a question of contract interpretation"). As the Supreme Court explained in *United States v. Utah Constr. & Mining Co.*, 384 U.S. 394, 404 n.6 (1966), parties are free to contract for dispute resolution procedures and are bound to exhaust such procedures unless "inadequate or unavailable." *Accord United States v. Grace & Sons, Inc.*, 384 U.S. 424, 430 (1966). Generally, the Disputes Clause set forth in a WMATA contract provides a contractor must submit its claims to a CO who, on request, issues a written Final Decision, that CO decision is reviewable by WMATA's Board of Directors or its authorized representative (currently the Armed Services Board of Contract Appeals), and the representative's decision (if adopted by WMATA's Board of Directors) is final and binding on the parties unless under section 81 of the WMATA Compact[2] a court applying the review standard set forth in the Clause, which essentially is the standard of review contained in the Wunderlich Act, Pub. L. No. 83-356, 68 Stat. 81 (1954), which was repealed as part of the recodification of Title 41, Pub. L. No. 111-350, 124 Stat. 3677, 3859 (4 Jan. 2011), finds that decision to be fraudulent or not supported by substantial evidence. *Seal & Co., Inc. v. A.S. McGaughan Co.*, 907 F.2d 450, 452 (4th Cir. 1990); *Granite-Groves v. WMATA*, 845 F.2d 330, 333 (D.C. Cir. 1988); *KiSKA Constr.*, 736 F. Supp. 2d at 183-84; *Breda Transp.*, 164 F. Supp. 2d at 680 & n.3; *Expressway Constr., Inc. v. WMATA*, 676 F. Supp. 16, 18 (D.D.C. 1987).

The Memorandum of Understanding between this Board and WMATA provides in relevant part:

> WHEREAS, beginning in 1971, the Corps of Engineers Board of Contract Appeals (ENG BCA), pursuant to a series of agreements, and resolution of the Authority's Board of Directors, served as the Board of Contract Appeals for appeals under the "Disputes" articles of WMATA contracts; and

[2]Section 81 of the WMATA Compact, 80 Stat. 1350, states: The United States District Courts shall have original jurisdiction, concurrent with the Courts of Maryland and Virginia, of all actions brought by or against [WMATA] and to enforce subpoenas issued under [this compact]. Any such action initiated in a State Court shall be removable to the appropriate United States District Court.

WHEREAS, on July 12, 2000, the ENG BCA was merged into the ASBCA; and

WHEREAS, both the Authority and the ASBCA are willing to continue the relationship whereby the ASBCA will adjudicate disputes under WMATA contracts.

NOW THEREFORE, the Authority and the ASBCA have reached the following stipulations and agreements:

1. The ASBCA shall provide a forum, together with all necessary services and facilities, for administrative resolution under Authority contracts containing a "Disputes" article for all appeals from final decisions of contracting officers issued under such contracts.

2. The ASBCA shall use its best efforts to resolve all appeals under Authority contracts within the time limits stipulated in its rules.

3. Unless otherwise agreed by all parties and the ASBCA, proceedings involving appeals under Authority contracts shall be conducted in the Washington metropolitan area in conformance with the ASBCA's rules for cases not under the Contracts Disputes Act, approved July 15, 1963, revised May 1, 1969, and September 1, 1973, as they may hereafter be amended by the ASBCA.

4. Opinions rendered by the ASBCA involving appeals under Authority contracts shall be accepted by the Authority as final and conclusive unless in an action in a court of competent jurisdiction, the court determines the opinion to have been fraudulent, or capricious, or arbitrary, or so grossly erroneous as necessarily to imply bad faith, or not supported by substantial evidence, or erroneous as a matter of law.

Rule 15 of the ASBCA's rules for cases not under the Contracts Disputes Act, last amended 1 September 1973, provides in pertinent part:

Interrogatories to Parties; Inspection of Documents; Admission of Facts – Under appropriate circumstances, but not as a matter of course, the Board will entertain applications for permission to serve written interrogatories upon the opposing

> party, applications for an order to produce and permit the inspection of designated documents, and applications for permission to serve upon the opposing party a request for the admission of specified facts. Such applications shall be reviewed and approved only to the extent and upon such terms as the Board in its discretion considers to be consistent with the objective of securing just and inexpensive determination of appeals without unnecessary delay, and essential to the proper pursuit of that objective in the particular case.

Since this Board possesses authority to resolve WMATA appeals pursuant to the terms of WMATA contracts and the 2001 WMATA Memorandum of Understanding with this Board, which states, unless otherwise agreed, proceedings involving appeals under WMATA contracts shall be conducted in conformance with the ASBCA's rules for cases not under the Contracts Disputes Act, approved July 1963 and last amended September 1973, the rules for cases not under the CDA presently govern this and other WMATA appeals before the Board. While PHI suggests our decision in *Cubic Transp.*, 12-2 BCA ¶ 35,063, held that a distinction no longer exists between CDA and WMATA appeals, our holding in that appeal in not as broad as PHI suggests. In *Cubic*, we merely held that WMATA's revision of its disputes article to include the words "or related to" incorporated into its contracts language similar to that utilized in the CDA to provide authority for us to resolve "breach" of contract claims in CDA appeals and similarly authorized us to resolve contract breach claims in WMATA appeals. *Id.* at 172,234. As we do here, we relied in *Cubic* upon the terms of the parties' contract, not the CDA, to determine our authority. In fact, we expressly stated in *Cubic* that our ruling "does not mean that the CDA applies to WMATA's contracts." *Id.* Accordingly, current appeals under WMATA contracts shall be conducted in conformance with the ASBCA's rules for cases not under the CDA.

In its request for admissions served previously, PHI asked WMATA to make 22 admissions concerning its RFP, PHI's proposal, WMATA's "contract" with PHI, PHI's completion of WMATA contract work, WMATA's Office of Inspector General audit and the basis for WMATA asserting that there was a 10% maximum limit on contract profit. All of the requests set forth are relevant to whether PHI was paid in full in accordance with its WMATA contract. At this juncture, we have one party (PHI) contending that it possessed a "fixed-price" contract it fully performed without complete payment and another (WMATA) contending PHI did not possess such a contract. We do not know the basis for either party's assertions because all that currently is before us is a complaint, answer and motion to dismiss two counts for lack of jurisdiction. If WMATA has a legal basis to move to dismiss the appeal for failure to state a claim or for summary judgment that will show there is no reason to address the issues for which discovery is sought, it is free to file such a motion and seek an order limiting or suspending discovery. Since it has not done so to date, there is no basis for us to conclude that the admissions PHI seeks will not further a just and inexpensive determination of the appeal without unnecessary

delay. We treat PHI's filings in opposition to WMATA's motion to quash as an "application" for service of the admissions under the non-CDA rules, grant such application, and order WMATA to respond to PHI's requests on or before 15 October 2013.

CONCLUSION

WMATA's motion to dismiss for lack of jurisdiction is granted in part. Count IV of the appeal is dismissed for lack of jurisdiction. The remainder of WMATA's motion to dismiss for lack of jurisdiction is denied.

WMATA's motion to quash is granted in part. WMATA's motion is correct that discovery here is governed by the ASBCA's rules for appeals not filed under the CDA, a party must obtain approval of an application to serve requests for admission under those rules, no such approval had been obtained by PHI to date, and therefore WMATA had no obligation to respond to the requests PHI served to date. We, however, treat PHI's filings in response to WMATA's motion to quash as an application to serve its request for 22 admissions served previously and grant the application. WMATA's response to PHI's admission requests shall be due on or before 15 October 2013.

Dated: 26 August 2013

TERRENCE S. HARTMAN
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

DAVID W. JAMES, JR.
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 No. 58366, Appeal of Protecting the Homeland Innovations, LLC, rendered in conformance with the Board's Charter.

Dated:

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