

ARMED SERVICES BOARD OF CONTRACT APPEALS

Appeal of --)
)
Kamran Zaland Supplies and Services) ASBCA No. 61339
)
Under Contract No. W91B4L-09-P-0288)

APPEARANCE FOR THE APPELLANT: Mr. Abdul Sattar
President

APPEARANCES FOR THE GOVERNMENT: Raymond M. Saunders, Esq.
Army Chief Trial Attorney
CPT Jeremy D. Burkhart, JA
Trial Attorney

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

Appellant contends we possess jurisdiction to entertain its appeal because, shortly after the government terminated its supply contract for convenience, it sent the contracting officer (CO) an invoice seeking monies owed it for supplying bunk beds, twin mattresses and wall lockers and (when several months passed without receiving payment) it submitted a "certified" claim in an amount identical to the invoice, which the CO failed to address in a final decision. In support of these jurisdictional assertions, the appellant has submitted to the Board copies of its invoice, certified claim, and various emails exchanged with government contracting personnel. The government contends that we lack jurisdiction over the appeal because a CO did not receive the appellant's invoice or claim and did not generate or sign the DD Form 250 or various emails appellant supplied the Board. The government asks us to conclude the documents submitted in support of jurisdiction are not authentic, i.e., fraudulent.

STATEMENT OF FACTS FOR PURPOSES OF THE MOTION

On March 3, 2009, appellant, Kamran Zaland Supplies and Services (known as KZCC) received from CO Andy K. Loving a contract, No. W91B4L-09-P-0288, in the sum of \$1,361,000.00 to supply bunk beds, twin mattresses, and wall lockers to Kandahar Regional Contracting Center at Kandahar Air Field, Afghanistan (gov't mot., ex. 1 at 1-2; app. opp'n, unnumbered exs. (signed claim letter, invoice & DD Form 250); gov't reply, ex. 1). The contract stated that a "minimum of 2,500 Bunk Beds, 5,500 Mattresses, and 2,000 Wall Lockers [were] due no later than 15 Mar 09 . . . Remaining quantities [were]

due no later than 30 Mar 09.” However, “[a]dditional quantities will be accepted if available sooner” (App. sur-reply, ex. 5 at 4. 12)

By email dated March 18, 2009, three days after the initial delivery deadline, CO Austin DeRose requested KZCC sign an “attached contract cancellation and return it to me as soon as possible.” CO DeRose added, “once you sign the termination i will send the dd250 form for the delivered items of this contract” [sic]. (App. opp’n, ex. 1) According to KZCC, the government cancelled its contract for convenience because:

After delivering most of the items of the contract we could not deliver some items due to security threat and[,] for security reasons, after that our contract was terminated.

(App. Notice of Appeal) The attached contract cancellation or termination was in the form of a contract modification (No. P00001). It stated simply “[t]he purpose of this modification is to terminate the Contractor for Convenience IAW FAR 52.212-4(1)” and this “termination hereby deobligates funds in the amount of \$1,361,000.00.” (Gov’t mot., ex. 1)

According to the government, the contract modification was executed on its behalf on March 17, 2009, by CO Austin DeRose. The CO’s signature, however, bears little resemblance to the signature which the CO states in a declaration is a “digital copy” of his signature or his signature appearing on the declaration executed January 10, 2018. (*Compare* app. opp’n, ex. 6 *with* gov’t reply, ex. 2 at 2 and gov’t mot., ex. 1 at 1) The modification appears to have been executed on behalf of KZCC on March 19, 2009, by Aqel Khan, Director, (*compare* gov’t mot., ex. 1 at 1 *with* gov’t reply, ex. 1 at 1).

Five days after CO DeRose’s email, on March 23, 2009, Aqel Khan of KZCC sent him an email stating that he had attached the “invoice and DD250 form” for the contract and the CO should let KZCC know if he has any questions (app. opp’n, ex. 2). According to an email dated March 25, 2009, CO DeRose advised KZCC “I have received your invoice and dd250 form for the payment” and “i will let you know once we process the invoice” (app. opp’n, ex. 3).

The KZCC invoice dated March 22, 2009, was as follows:

<u>ITEM NO.</u>	<u>DESCRIPTION</u>	<u>QUANTITY</u>	<u>UNIT PRICE</u>	<u>AMOUNT</u>
0001	Bunk Beds	5,000	\$85	\$425,000.00
0002	Wall Lockers	3,422	\$72	\$246,384.00
0003	Twin Mattress	11,000	\$49	\$539,000.00
0004	Shipping	1	\$1,000	<u>\$1,000.00</u>
				\$1,211,384.00

Information identical to that set forth in the invoice appeared on the DD Form 250, Material Inspection and Receiving Report dated March 21, 2009, which was submitted to the Board by KZCC, and appears to have been executed on behalf of Kandahar Regional Contracting Center with respect to both acceptance and receipt by Austin DeRose, SrA, USAF. (App. opp'n, unnumbered exs.)

On March 28, 2009, Aqel Kahn of KZCC advised CO DeRose by email that "we are still waiting for your response about our invoice for contract # W91B4L-09-P-0288." According to an email submitted to the Board, CO DeRose replied on March 30, 2009, that "I haven't heard anything from the finance [sic] for the invoice process yet, they are still working to process the invoice for payment." (App. opp'n, ex. 4) KZCC asserts it sent further "emails from 8th April and 20th May 2009 but no response was received from CO SrA Austin DeRose" regarding payment of the invoice (app. 2nd sur-reply at 6).

Because (1) CO DeRose was not replying to its further emails, (2) no apparent action had been taken upon its contract invoice, and (3) KZCC was told it should submit to MAJ Jerel Grimes, a CO at Kandahar Regional Contracting Center, a formal claim for issuance of a final decision, on July 15, 2009, KZCC appears to have submitted a claim to CO Grimes in the amount of the invoice for issuance of a final decision. The president of KZCC certified that claim, which included a copy of the invoice submitted to CO DeRose and DD Form 250. (App. sur-reply at 1, 6; app. opp'n, ex. 5(1), unnumbered exs.) According to an email dated July 16, 2009, MAJ Jerel R. Grimes advised KZCC "[y]our claim is received and decision will be made within due date" (app. opp'n, ex. 5(2)).

During the next eight years, KZCC contacted numerous government contracting officials regarding payment of its invoice and, on various occasions resubmitted its invoice to government officials. Among the government officials it communicated with were LTJG Michael Quinto, CO, Kandhar Airfield, USN CENTCOM Contracting Command (November 2010) (app. 2nd sur-reply, ex.1); TSgt Mandie Lee, CO, USAF CENTCOM Contracting Command (November 2010) (app. 2nd sur-reply, ex. 2); Yasin Husainy, Cultural Advisor, Regional Contracting Center (RCC), Kandahar Airfield, CENTCOM Contracting Command (March 2011) (app. 2nd sur-reply, exs. 3(1), (2)); Noorullah Habib, Cultural Advisor, RCC, Kandahar Airfield, CENTCOM Contracting Command (May 2011) (app. 2nd sur-reply, ex. 4); Lee R. Lamarre, SrA, USAF, CENTCOM Joint Theater Support Contracting Command (C-JTSCC) (August 2012) (app. 2nd sur-reply, ex. 5); Stangul Aziz, AFG Admin Tech, C-JTSCC, and Darrell Thornburgh, SrA USA RCC Contracting Specialist, Regional Contracting Center, Kandahar Airfield (December 2012) (app. 2nd sur-reply, ex. 6); CAPT Brenda M. Snyder, Camp Phoenix, Kabul, C-JTSCC (August 2013) (app. 2nd sur-reply, ex. 7); CO Jason R. Malak, RCC – Qatar (October 2015) (app. 2nd sur-reply, ex. 8); MAJ Rory C. Foster, CO, RCC-A/ECC-A (April 2017) (app. 2nd sur-reply, ex. 9); Nancy DeBo, Contract Specialist, Field Support Contracting Division, Army Contracting Command – Rock Island, IL (May 2017) (app. 2nd sur-reply, ex 9(1)); SFC Ontario Flowers, RCC-Qatar (June 2017) (app. 2nd sur-reply, ex. 11(1)-(4));

MAJ David Garrison, 408 CONTR Support BGE (US) (June 2017) (app. 2nd sur-reply, ex. 11(5)-(10); and MAJ Daniel Howser, US Army ECC-A (US) (July 2017) (app. 2nd sur-reply, ex. 12(1)-(4)).

By email dated September 2, 2017, KZCC advised CO Celeste R. Hobert, Army Contracting Command-Rock Island that “we have contacted many KO on different occasions but no one is willing to help or solve our issue.” KZCC added that it was “requesting you to look into” our “pen[d]ing invoice issue.” (App. opp’n, ex. 6(1)) After receiving two follow-up emails from KZCC, by email dated September 7, 2017, CO Hobert told KZCC that “[n]o payment is due as this contract was a total cost termination” (app. opp’n, ex. 6(2)). KZCC sent CO Hobert four additional emails, stating it was not paid for what it delivered and on many occasions it had been told its invoice was “in process for payment” (app. opp’n, ex. 6(2)-(4)). After KZCC did not receive any further response from CO Hobert, it filed this appeal with the Board on September 20, 2017, on the grounds no decision had been made on its claim with respect to its invoice (app. opp’n at 3-4).

On October 16, 2017, after the filing of a three-sentence complaint, the Army moved to dismiss KZCC’s appeal for lack of jurisdiction and suspend further proceedings pending resolution of its motion. The three-page motion stated “there is not a cognizable claim and a [CO’s] final decision on the claim before the Board,” which are both predicates for the Board to exercise its jurisdiction under the Contract Disputes Act of 1978, 41 U.S.C. §§ 7101-09. According to the Army, “[a] review of the government’s files revealed no record that appellant has submitted a claim to the Army regarding the Contract” (gov’t mot. at 3, citing mot. ex. 3 [sic], an affidavit of CO Hobert stating that she had “not received” a claim from KZCC for any specific amount and “all I have is the Modification that terminated the Contract for Convenience . . . and the recent emails that [KZCC] sent [her] in September 2017” (gov’t mot., ex. 4). The Army appended to its motion to dismiss a copy of CO Hobert’s affidavit, KZCC’s September 2017 emails to CO Hobert, and the convenience termination modification (gov’t mot., exs. 1-4).

KZCC filed its four-page opposition to the Army’s motion to dismiss for lack of jurisdiction on October 25, 2017, asserting that it had submitted a claim for payment of its invoice to a CO for final decision on July 15, 2009, the CO failed to issue a final decision on that claim within a reasonable time, and it was respectfully requesting the Board to proceed with its appeal. Appended to KZCC’s opposition was a copy of the invoice KZCC asserted it originally submitted to CO DeRose, emails it asserted were exchanged with CO DeRose, the July 15, 2009 certified claim that KZCC asserted it submitted to CO Grimes, and CO Grimes’ email responding that the claim had been received and a “decision will be made within due date” that KZCC asserted it had received from CO Grimes (app. opp’n, exs. 1-5, unnumbered exs.).

Based upon our receipt from KZCC of a certified claim submitted to CO Grimes on July 15, 2009, and a failure of the government to file a reply to KZCC's opposition, we issued an order directing the Army to state if it wished to withdraw its motion to dismiss premised upon lack of submission of a certified claim or if it was challenging the authenticity of the documents appellant appended to its opposition. In its January 2018 reply, the Army asserted "that the documents appellant appended to its opposition to the government's motion are not authentic and do not establish that appellant previously filed a claim under the Contract," and therefore the "government does not wish to withdraw its motion to dismiss" the appeal for lack of subject matter jurisdiction (gov't reply at 1). Appended to the Army's reply was a declaration by Austin M. DeRose, a Senior Airman (SrA) while in Afghanistan. now a technical sergeant, U.S. Air Force Reserve, stating in part:

2. From February 2009 to August 2009, I served as a Contracting Officer at the Kandahar Regional Contracting Center, Kandahar Air Field, Afghanistan (KAF-RCC). I remember Aqel Khan from [KZCC] quite well and I remember issuing a contract award to his company for bunk beds and other miscellaneous furniture items on 3 March 2009. . . .
4. During my time as Contracting Officer at KAF-RCC, KZCC never filed a claim with me regarding Contract No. W91B4L-09-P-0288.

. . . .
7. . . . Exhibits 1-5 [to appellant's opposition] are fake emails that I never sent nor received. I had never before seen the document "KZCC Claim," dated 15 July 2009, and allegedly signed by Abdul Sattar. I note that I was a [CO] at the Kandahar Regional Contracting Center, Kandahar Air Field, Afghanistan from February 2009 to August 2009. If that claim had actually been filed with KAF-RCC on 15 July 2009, which it was not, I absolutely would have seen it. It is my impression and belief that "INVOICE" is also a fake document. I never received this document during my time at KAF-RCC. . . .
8. Lastly, "DD250" is a false and/or forged document. . . . I never signed this document, nor any document like it. In fact, it appears clear that this is a fraudulent, digitally copied signature because it is identical in both blocks 21(b)

and 22 of "DD250." Moreover, I would never have signed a DD 250 in my role as [CO]. Signature of the DD250 was the responsibility of the receiving entity, of which I was not a part.

(Gov't reply, ex. 4 at 1-2)

In a Sur-Reply submitted by KZCC during January 2018, KZCC asserts CO Austin DeRose states in his declaration that he issued the contract to KZCC, but that it was CO Andy Loving who awarded KZCC the contract. KZCC further asserts that CO DeRose states in his declaration that he would never have signed the DD 250 form here because such a signature was the responsibility of the "receiving entity" of which he was not a part, but the receiving entity for KZCC's contract was Kandahar Regional Contracting Center of which CO DeRose was a part in March 2009. KZCC maintains in its Sur-Reply that: it sent its July 15, 2009, certified claim to MAJ Jerel Grimes, a CO at Kandahar Regional Contracting Center, because CO DeRose was no longer responding to its emails; CO Grimes sent it an email from an email address used by MAJ Grimes stating the claim it had submitted had been received and a decision would issue; its claim and the email sent in response from MAJ Grimes are "authentic;" it therefore satisfied the "CDA requirements of 41 U.S.C. § 7103"; and the Board has subject matter jurisdiction to entertain its appeal. (App. sur-reply at 1-4)

In March of 2018, the Army submitted to us a sur-reply to the sur-reply filed by KZCC. While acknowledging in its sur-reply that CO Andy Loving awarded the contract to KZCC and that CO Austin DeRose issued the termination of the contract for the convenience of the government, it asserts that it "is illogical to believe" KZCC would have sent a claim to another CO, Jerel Grimes. According to the Army, the allegation that a KZCC claim was submitted to CO Grimes is "nonsensical." (Army sur-reply at 5-6; Army reply, ex. 1)

Attached to the Army Sur-reply was a declaration by CO Jerel Grimes, now a lieutenant colonel serving as Commander, 928th Contracting Battalion, Regional Contracting Office, Bavaria, Germany, stating in relevant part:

2. From May 2009 to August 2009 I served as Contracting Officer at the Kandahar Regional Contracting Center, Kandahar Air Field, Afghanistan ("KAF-RCC"). Specifically, I worked in the construction division. From September 2009 to May 2010 I served as the Deputy RCC Chief at the Heart Regional Contracting Center, Camp Stone, Heart, Afghanistan. I have no memory of any dealings with persons named Aqel Khan or Abdul Sattar

or any company called Kamran Zaland Supplies and Services (“KZCC”). . . .

3. . . . [Army counsel] emailed me Contract No. W91B41-09-P-0288 (“Contract”). I was not the Contracting Officer on this Contract. I had no involvement with this Contract, neither at award nor at termination. KZCC never filed a claim with me regarding this Contract.

. . . .

4. . . . I also reviewed . . . the email provided by Aqel Khan to the board
5. . . . The words attributed to me in that email are “Sir, Your claim is received and decision will be made within due date. Please contact me with any questions.” This is not the way I write. It is not even proper English. I would not have responded by using those words if Aqel Khan had actually sent me a claim (which he did not). Rather if this claim had actually been sent to me I would not have accepted it. Instead I would have told Mr. Khan to send it to the contracting officer assigned to that contract, which was not me.
6. . . . I have never seen the document “KZCC Claim,” dated 15 July 2009, signed by Abdul Sattar, before. I am certain that I never received it. I note that I was a Contracting Officer in the *Construction* division for KAF-RCC. I dealt only with construction contracts. I had no involvement with contracts for supplies or services. This fact further convinces me that the alleged email exchange between me and Aqel Khan is a complete fabrication. [Emphasis in original]
7. During all my time as a Contracting Officer, including my time in 2009-2010 with KAF-RCC and Herat-RCC, I have always kept diligent records of all of the contracts that I work on. I have no records of this contract nor anything involving KZCC. That fact, along with all of the other points made above, leads me to conclude that Aqel Khan and KZCC never filed a claim with me, nor contacted me in any manner.

KZCC submitted a second sur-reply to the Board in April 2018, again asserting that we possess jurisdiction to hear its appeal because it submitted its claim to CO Grimes in July 2009 (app. 2d sur-reply at 1, 6). In its sur-reply, KZCC asserts that the declarations filed by CO Hobert and CO DeRose are “untrue.” It contends that CO Hobert’s declaration failed to reference relevant emails (*id.* at 5). With respect to the declaration of CO DeRose, KZCC contends that he stated he was not the point of contract or part of the receiving party for its contract, but the gate memo KZCC received on March 3, 2009 (and submitted to the ASBCA with its first sur-reply) expressly states he was the “POINT OF CONTACT RESPONSIBLE FOR INSPECTION & ACCEPTANCE (DD 250)” and “POINT OF CONTACT AT FINAL DESTINATION” (*id.*; app. sur-reply, ex. 1).

While KZCC criticizes the declarations of COs Hobert and DeRose in its second sur-reply, it makes no assertions regarding the declaration of CO Grimes filed more than a month before submission of the second sur-reply. Instead, most of its second sur-reply is devoted to listing KZCC’s numerous communications with government personnel regarding the monies it believes are due. (App. 2nd sur-reply at 2-4, 6-7) Appended to the second sur-reply by KZCC were copies of various communications KZCC had with government personnel from 2009 through 2017 regarding its unpaid invoice (app. 2nd sur-reply, exs. 1-12).

DECISION

The Army asserts that we lack subject matter jurisdiction to entertain KZCC’s appeal. According to the Army, KZCC never submitted its claim to a CO for issuance of a final decision, a prerequisite for our exercise of jurisdiction over the claim.

Motions to dismiss for lack of subject matter jurisdiction generally are filed in one of two formats: “facial attacks” or “factual attacks.” A “facial attack” on subject matter jurisdiction questions the sufficiency of pleading, and requires the trial tribunal only to examine if the appellant has alleged a sufficient basis for there to be subject matter jurisdiction. In reviewing such an attack, for purposes of the motion, the trial tribunal accepts the facts alleged to be true (usually taken from the complaint, but sometimes augmented by an explanatory affidavit), draws all reasonable inferences from them in favor of the complainant, and rules accordingly on the jurisdictional challenge. *Garcia v. Copenhagen, Bell & Assocs., M.D.’s*, 104 F.3d 1256, 1260-61 (11th Cir. 1997); *Cedars-Sinai Medical Center v. Watkins*, 11 F.3d 1573, 1583 (Fed. Cir. 1993), *cert. denied*, 512 U.S. 1235 (1994); *Ohio Nat’l Life Ins. Co. v. United States*, 922 F.2d 320 (6th Cir. 1990); *Reynolds v. Army & Air Force Exchange Service*, 846 F.2d 746, 747 (Fed. Cir. 1988); FED. R. CIV. P. 12(b)(1); *see Barrett v. Lombardi*, 239 F.3d 23, 30–31 (1st Cir. 2001) (assuming truth of uncontested facts set forth in an explanatory affidavit).

A “factual attack” on subject matter jurisdiction, in contrast, challenges the existence of jurisdiction in fact irrespective of allegations set forth. The allegations therefore are not presumed true, and matters such as testimony and affidavits can be considered. Where a party contests the accuracy (rather than sufficiency) of the jurisdictional facts asserted and proffers materials of evidentiary quality in support of that position, in resolving a motion to dismiss, the trial tribunal must make findings of fact addressing the merits of the jurisdictional claim, weighing the conflicting evidence to arrive at the factual determination whether subject matter jurisdiction exists or does not exist. In making such findings, it is well-established the trial tribunal enjoys broad authority to order discovery, consider extrinsic evidence, and conduct evidentiary hearings deemed necessary to determine the trial tribunal’s jurisdiction. *Valentin v. Hospital Bella Vista*, 254 F.3d 358, 364 (1st Cir. 2001); *Garcia*, 104 F.3d at 1261; *Cedars-Sinai Medical Center v. Watkins*, 11 F.3d at 1584-85; *Ohio Nat’l Life*, 922 F.2d at 325; *Reynolds*, 846 F.2d at 747; *Indium Corp. of America v. Semi-Alloys, Inc.*, 781 F.2d 879, 884 (Fed. Cir. 1985), *cert denied*, 479 U.S. 820 (1986); *Williamson v. Tucker*, 645 F.2d 404, 413 (5th Cir. 1981), *cert. denied*, 454 U.S. 897 (1981).

In this appeal, the Army’s motion to dismiss constitutes a “factual attack” upon the assertion by KZCC of the existence of subject matter jurisdiction. The Army is not attacking the sufficiency of the allegations made by KZCC but the existence in fact of subject matter jurisdiction, irrespective of allegations set forth. *See Ameresco Solutions, Inc.*, ASBCA Nos. 56824, 56867, 11-1 BCA ¶ 34.705 at 170,905; *Atherton Construction, Inc.*, ASBCA No. 56040, 08-2 BCA ¶ 34.011 at 168,190-91; *Dreadnought Marine, Inc.*, ASBCA No. 45055, 95-2 BCA ¶ 27.650 at 137.826.

After KZCC submitted to us the July 15, 2009 certified claim it asserts it submitted to CO Jerel R. Grimes, and a July 16, 2009 email KZCC asserts it received from CO Grimes stating the July 15 claim had been received and a “decision will be made within due date,” the Army challenged the “authenticity” of both documents that KZCC submitted by contending that the documents were fraudulent. In support of this contention, the Army proffered a declaration from CO Austin DeRose stating: he served as a CO at the Kandahar Regional Contracting Center, Kandahar Air Field, Afghanistan, from February 2009 to August 2009; during his time at Kandahar, KZCC never filed a claim “with him” regarding Contract No. W91B4L-09-P-0288; and, if the July 15 claim submitted to us had actually been filed with the Kandahar Regional Contracting Center he “absolutely would have seen it.”

When subject-matter jurisdiction is challenged under Rule 12(b)(1), as here, evidentiary matter may be presented to the trial tribunal by affidavit or otherwise. *Kamen v. AT&T Co.*, 791 F.2d 1006, 1010-11 (2nd Cir. 1986); *Exchange Nat’l Bank of Chicago v. Touche Ross & Co.*, 544 F.2d 1126, 1130-31 (2nd Cir. 1976); FED. R. CIV. P. 12(b)(1). A motion that includes evidentiary material outside the pleadings such as the declaration here is properly converted to a motion for summary judgment only if it is made under

FED. R. CIV. P. 12(b)(6), failure to state a claim. While a FED. R. CIV. P. 12(b)(1) motion cannot be converted into a FED. R. CIV. P. Rule 56 summary judgment motion, FED. R. CIV. P. 56 is relevant to the jurisdictional challenge before us because the body of case law under Rule 56 offers guidance in considering evidence submitted outside of the pleadings. *Gordon v. Nat'l Youth Work Alliance*, 675 F.2d 356, 360-61 (D.C. Cir. 1982); *Exchange Nat'l. Bank*, 544 F.2d at 1131. Similar to motions for summary judgment, courts generally require materials submitted outside the pleadings with respect to lack of jurisdiction be "competent." See *Lawrence v. Dunbar*, 919 F.2d 1525, 1529-30 (11th Cir. 1990); *Kamen v. AT&T Co.*, 791 F.2d at 1011.

Declarations such as the one submitted here by CO DeRose, however, are not deemed to comprise competent evidence. First, the declaration was not based upon personal knowledge. The certified claim at issue was not submitted to CO DeRose, but to CO Grimes. CO Grimes, therefore, is the individual who should have personal knowledge of whether it was received by him or not. CO Grimes is also the person who should have personal knowledge of whether he sent to KZCC an email that acknowledged receipt by him of the certified claim. Rule 56(c) requires that affidavits in summary judgment motions be based on personal knowledge. FED. R. CIV. P. 56(c)(4). It has been held since *Automatic Radio Mfg. Co. v. Hazeltine Research, Inc.*, 339 U.S. 827, 831 (1950), that affidavits or declarations not based upon personal knowledge do not comply with Rule 56. Second, the assertions set forth in the declaration of CO DeRose are conclusory. According to the declaration he was a senior airman in the Air Force reserve completing a six-month tour at a large base in Kandahar, Afghanistan, during July 2009. The declaration of CO DeRose offers no basis for us to conclude he had knowledge of whether CO Grimes, a major in the Army, received the claim and sent an email confirming receipt of the claim. Rather, it simply contains the conclusory assertion that, if the July 15 claim submitted to us had actually been filed with the Kandahar Regional Contracting Center, he "absolutely would have seen it." No explanation or set of facts is offered by CO DeRose to support this assertion and none is readily apparent to us. Conclusory assertions set forth in a declaration are also insufficient under FED. R. CIV. P. 56. *Kamen*, 791 F.2d at 1011; *Luckett v. Bethlehem Steel Corp.*, 618 F.2d 1373, 1380 n. 7 (10th Cir. 1980); Fed. R. Civ. P. 56(c)(4) (declaration must set out facts that would be admissible in evidence); see *Cedars-Sinai Medical Center v. Watkins*, 11 F.3d at 1585. In sum, it would be improper for us to consider here "conclusory" statements and statements "not based on personal knowledge" in ruling on the Army's motion to dismiss for lack of subject matter jurisdiction. *Lawrence v. Dunbar*, 919 F.2d at 1530; *Kamen v. AT&T Co.*, 791 F.2d at 1011.

The declaration by CO Grimes executed two months after the declaration of CO DeRose, however, is based on first-hand knowledge. CO Grimes expressly states that he never received any claim from KZCC and never sent an email to Aqel Khan stating he had received such a claim. CO Grimes explains that the language set forth in the purported email response is "not the way he writes" and that, if he had received such

an email he would not have accepted it but told Mr. Khan to send it to the CO assigned to KZCC's contract, which was not him. CO Grimes explained he was a CO for construction contracts and KZCC's contract was not for construction but supplies and services. CO Grimes added that, during all his time serving as a CO, he has kept diligent records of all of the contracts he has worked on and he has no record of the contract at issue here or anything involving KZCC.

The declaration by MAJ (now LTC) Jerel Grimes sets forth sworn testimony based on first-hand knowledge. It is not conclusory, and sets forth an explanation for various aspects of the testimony, e.g., the email acknowledging receipt was not the way he writes and he was a CO who dealt with construction rather than supply and service contracts. The declaration by CO Grimes constitutes competent evidence on which a finding of fact by a tribunal can be based.

For us to have jurisdiction under the Contract Disputes Act, there must be a valid claim and a CO's final decision on that claim or a failure by the CO to issue a final decision within the prescribed period. *James M. Ellett Constr. Co. v. United States*, 93 F.3d 1537, 1541-42 (Fed. Cir. 1996); *Do-Well Machine Shop, Inc. v. United States*, 870 F.2d 637, 640 (Fed. Cir. 1989). Consequently, the controlling issue here is whether KZCC submitted a proper claim to CO Jerel R. Grimes and whether CO Grimes (or another CO) failed to issue a final decision upon that claim within the prescribed period.

We do not consider this jurisdictional issue to be intertwined with the merits of KZCC's claim for payment under the contract. *See, e.g., Lawrence v. Dunbar*, 919 F.2d at 1529 (decision on jurisdiction would not also effectively decide merits). Accordingly, we are free to determine the jurisdictional facts for this appeal at this stage of the proceedings. *See id.* at 1529 (citing *Eaton v. Dorchester Development, Inc.*, 692 F.2d 727, 734 (11th Cir. 1982)); *Rosales v. United States*, 824 F.2d 799, 803 (9th Cir. 1987); *accord Spruill v. Merit Systems Protection Board*, 978 F.2d 679, 686-89 (Fed. Cir. 1992).

It is well-established that KZCC, the party seeking exercise of our jurisdiction, bears the burden of showing that jurisdiction exists with respect to its appeal. *Cedars-Sinai*, 11 F.3d at 1583; *Rocovich v. United States*, 933 F.2d 991, 993 (Fed. Cir. 1991) (burden of establishing jurisdiction is upon party seeking exercise). KZCC has presented to us a claim purportedly submitted by it to CO Grimes and an email purportedly from CO Grimes acknowledging receipt of the claim. In all its various submissions to us, KZCC has maintained that the basis for us to exercise jurisdiction over its appeal is the claim that it purportedly submitted to CO Grimes. MAJ (now LTC) Grimes, however, has presented to us sworn testimony that he never received KZCC's purported claim and never would have addressed such a claim because he was a CO who dealt with construction contracts, not contracts for supplies. Moreover, he testified that the email acknowledging receipt by him of the claim was not the way he writes and not a communication by him. KZCC must establish jurisdiction by a preponderance of the evidence. It cannot do so here based on the

claim purportedly submitted to CO Grimes. We do not reach this conclusion based upon the Army's assertion KZCC contending it submitted a claim to a CO other than the one who terminated its contract is "illogical" or "nonsensical." It is not uncommon for us to see different COs acting on matters related to one contract, as evidenced by the fact CO Loving awarded KZCC's contract that was terminated by CO DeRose less than two weeks after award. Rather, we conclude here that the sworn testimony of LTC Grimes supports our finding that he never received the purported claim from KZCC.

Authority to entertain an appeal is a necessary condition to proper performance of the judicial function. Thus, when a fact-bound jurisdictional issue presents itself, a trial tribunal has broad authority to consider extrinsic evidence and determine its own jurisdiction. See *Valentin*, 254 F.3d at 363; *Williamson v. Tucker*, 645 F.2d at 412-13. We find based on the extrinsic evidence presented here that KZCC has not and cannot show by a preponderance of evidence that it submitted its claim dated July 15, 2009, to CO Grimes for issuance of a final decision.

CONCLUSION

We grant the Army's motion to dismiss for lack of subject matter jurisdiction and dismiss the appeal.

Dated: November 25, 2019



TERRENCE S. HARTMAN
Administrative Judge
Armed Services Board
of Contract Appeals

I concur



RICHARD SHACKLEFORD
Administrative Judge
Acting Chairman
Armed Services Board
of Contract Appeals

I concur



OWEN C. WILSON
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. 61339, Appeal of Kamran Zaland Supplies and Services, rendered in conformance with the Board's Charter.

Dated:

PAULLA K. GATES-LEWIS
Recorder, Armed Services
Board of Contract Appeals