

Appeal of:

United Rentals, Inc.,

Appellant

HUDBCA No. 03-D-100-C1

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**DECISION AND ORDER ON THE GOVERNMENT'S MOTION
FOR SUMMARY DISMISSAL**

The Federal Emergency Management Agency ("FEMA"), a part of the Emergency Preparedness and Recovery Directorate, Department of Homeland Security, moves to dismiss this appeal on the grounds that this Board lacks jurisdiction to hear this case under the Contract Disputes Act of 1978, 41 U.S.C. § 601 et seq., as amended ("CDA"). United Rentals, Inc. ("Appellant") filed a reply in opposition to this motion.

Background

1. By letter dated September 30, 2002, received by FEMA on October 2, 2002, Appellant claimed breach of contract damages in connection with the use of Appellant's property which was allegedly rented to the Arlington County Fire Department ("ACFD"), the Defense Protective Agency ("DPS"), and the Federal Bureau of

Investigation ("FBI") at the Pentagon on and after September 11, 2001. Appellant claimed \$31,017.35 for equipment it rented to the FBI and ACFD, and \$20,054.28 for equipment rented to the DPS, for a total claim of \$51,072.13. (Appeal File ("AF"), Exh. 1; FEMA's Motion For Summary Dismissal, hereafter "FEMA Mot.," Exh.1.)

2. Appellant's letter dated September 30, 2003 identified the ACFD and FBI as being in charge of the disaster relief effort at the Pentagon, and argued that pursuant to the Robert T. Stafford Disaster Relief and Emergency Assistance Act ("Stafford Act"), at 42 U.S.C. § 5149(b)(3), "FEMA is authorized to incur the obligations that were made on behalf of the [ACFD, DPS, and FBI] to [Appellant]" Id.
3. In a final written decision dated December 30, 2002, a FEMA contracting officer denied Appellant's claim finding that no contract existed between Appellant and FEMA. The contracting officer stated that at no time relevant to this case did "FEMA by or through any of its employees contract or attempt to contract with Appellant, . . . for the rental of tents, tables or other type of rental property." (AF, Exh. 2; FEMA Mot., Exh. 2.)
4. The contracting officer further stated in her final decision that FEMA had not authorized the FBI, DPS, or ACFD to contract on FEMA's behalf. She also stated that under the Stafford Act other federal, state, and local agencies "are not authorized to contract and send the contractor to FEMA for reimbursement," and determined that the Stafford Act did not provide a contractual basis for Appellant to pursue a claim against FEMA. The contracting officer determined that Appellant had "not filed a valid CDA claim" and denied any liability. Id.
5. Appellant filed a timely appeal with the Board which alleges that "[t]he ACFD, acting as the authorized agent of FEMA did contract with United for the rental of all of the equipment described on the invoices attached." Appellant's complaint does not allege that FEMA or a specific federal employee authorized by FEMA entered into an agreement, oral or written, with

Appellant for the rental equipment, nor is there any evidence of such authorization in the record. (Appellant's complaint, hereafter "App. comp.," ¶¶ 11 - 33.)

6. Appellant's complaint also states that the "FBI has now agreed to pay for the rental value of the DPS equipment and United expects receipt of \$20,054.38 for the equipment listed in the DPS statement of account and the invoices" (App. comp., ¶ 10.)
7. Alternatively, Appellant argues that it is entitled to compensation based upon the equitable doctrines of quantum meruit, unjust enrichment, and public policy. Id., ¶¶ 34 - 36.

Discussion

Appellant's complaint alleges that: (1) the ACFD is FEMA's authorized representative; (2) Appellant agreed to supply rental equipment for use at the Pentagon on and after September 11, 2001 based upon oral requests for individuals with the ACFD; (3) the ACFD, while paying for the equipment that it used through October 12, 2001, has refused to pay for equipment it rented and used after October 13, 2001; and (4) pursuant to 42 U.S.C. § 5149(b)(3), FEMA is liable for the obligations incurred by the ACFD. While Appellant's complaint states that the FBI agreed to pay for the rental value of Appellant's equipment to the DPS, the Board need not address the issue of the FBI's liability to Appellant because that issue does not relate to a contract between FEMA and Appellant over which this Board would have jurisdiction.

FEMA denies the existence of a contract with Appellant, argues that Appellant has failed to state a claim upon which relief can be granted, and argues that the contract alleged by Appellant is not an expressed or implied contract entered into by FEMA for the procurement of goods or services. Appellant alleges in its complaint and reply to FEMA's motion that the requirement for the existence of a contract is met because the ACFD was FEMA's authorized agent. Alternatively, Appellant argues that it is entitled to compensation based upon the equitable doctrines of quantum meruit, unjust enrichment, and public policy.

The burden is on Appellant to establish the Board's jurisdiction in this case. Industrial Piping, Inc., HUDBCA No. 95-G-121-C5, 96-2 BCA ¶ 28,554; Cedars-Sinai Medical Center v. Watkins, 11 F.3d 1573, 1584 (Fed. Cir. 1993). The CDA grants certain contractors the right of appeal to an agency board of contract appeals. The CDA applies to a variety of express and implied-in-fact contracts entered into by an executive agency and a contractor, which is defined as a party to a Government contract other than the Government. 41 U.S.C. §§ 601, 602; Industrial Piping, Inc. supra; Vertol Systems Company, Inc., ASBCA No. 52,064, 00-2 BCA ¶ 31,081; Environmental Chemical Corp., ASBCA No. 32,254, 03-1 BCA ¶ 32,254.

Whether the alleged contract is expressed or implied-in-fact, Appellant's burden is the same. Appellant must show: 1) mutuality of intent to contract; 2) consideration; 3) lack of ambiguity in offer and acceptance; and 4) involvement of a Government representative with actual authority. Janus Corporation supra; Hanlin v. United States, 316 F.3d 1325, 1328 (Fed. Cir. 2003); City of El Centro v. United States, 922 F.2d 816, 820 (Fed. Cir. 1990), cert. denied, 501 U.S. 1230 (1991). Lack of authority to contract on behalf of the Government is an absolute bar to an implied-in-fact contract, regardless of the degree of encouragement or even acceptance of completed work by the Government employees involved. See Industrial Piping, Inc. supra; Roy v. United States, 38 Fed.Cl. 184, 187-88 (1997).

Appellant does not allege that an express contract existed between Appellant and FEMA. Rather, Appellant cites to the Stafford Act as evidence that FEMA is liable to Appellant under the alleged contract. The Stafford Act authorizes Federal agencies performing disaster relief services to "incur obligations on behalf of the United States by contract or otherwise for . . . the rental, or hire of equipment, services, materials . . . in such amount as may be made available to it by the President." (FEMA Mot., p. 3; App. compl., ¶ 31.) However, we find that this statutory provision does not apply in the matter before us because Appellant has not shown that it was in privity of contract with FEMA or that FEMA, per se, authorized the use of Appellant's property. See United States v. Johnson Controls, Inc., 713 F.2d 1541 (Fed. Cir. 1983). While Appellant may have a cause of action against the ACFD, DPS, and FBI for its alleged damages, this Board is not the proper forum to adjudicate Appellant's action without a clear showing that Appellant had an express or implied contract with FEMA. 41 U.S.C. § 602(3)(a).

Whether Appellant believed the ACFD had authority to contract on FEMA's behalf is irrelevant; Appellant must assert facts that, if proven, show that the ACFD had actual authority to contract on FEMA's behalf in this matter. See Industrial Piping, Inc. supra; Janus Corporation supra. Appellant has failed to demonstrate such facts. Conclusory allegations do not provide the necessary factual basis to support jurisdiction. Janus Corporation supra. Appellant, in this case, has not shown that it ever communicated directly with any FEMA official with the power to authorize or ratify the alleged contract. Instead, Appellant alleges that it supplied rental equipment based upon conversations with employees from the ACFD, the DPS, and the FBI. Appellant has not identified individuals who allegedly were acting as FEMA's authorized representative, nor has Appellant identified individuals with authority to enter into a contract on behalf of FEMA. Appellant's argument about the authority of certain ACFD officials to contractually bind FEMA is spurious and lacks proof, and Appellant has failed to show that the alleged contract was authorized by a FEMA official with contracting authority. Lack of authority is an absolute bar to implied-in-fact contract. See Industrial Piping, Inc. supra. Therefore, we find that Appellant has failed to prove that an implied-in-fact contract existed between Appellant and FEMA.

Alternatively, Appellant asserts that it should be paid for the disputed services and that FEMA should not be unjustly enriched irrespective of whether the contract was with FEMA's authorized agent. Appellant also asserts that public policy requires that it be compensated for the disputed services. As such, Appellant's claim for monetary compensation in this context appears to be based upon the equitable doctrines of quantum meruit, unjust enrichment, and public policy. Appellant's argument here is, at best, a claim on a contract implied-in-law. In any event, this Board lacks jurisdiction to grant equitable relief based upon any theory of quantum meruit, a contract implied-in-law, or unjust enrichment. Cousins Contracting Inc., ASBCA No. 50382, 97-1 BCA ¶ 28,906; David Contractors, Inc., HUDBCA No. 87-2452-C15, 88-3 BCA ¶ 26,520.

Conclusion

We find that Appellant has failed to prove that it had an express or implied-in-fact contract with FEMA and that Appellant has failed to establish that it is entitled to relief under the provisions of the CDA. Consequently, FEMA's motion for summary

dismissal is **GRANTED**. This appeal is dismissed for want of jurisdiction.

Jerome M. Drummond
Administrative Judge

Concurring:

David T. Anderson
Administrative Judge

H. Chuck Kullberg
Administrative Judge

April 7, 2004