UNITED STATES
CIVILIAN BOARD OF CONTRACT APPEALS

DISMISSED FOR LACK OF JURISDICTION: October 2, 2008

CBCA 1209

PRESIDIO COUNTY, TEXAS,

Appellant,

v.

GENERAL SERVICES ADMINISTRATION,

Respondent.

Roy B. Ferguson and Pene S. Ferguson of The Ferguson Lawfirm, Marfa, TX, counsel for Appellant.

James F. H. Scott, Office of General Counsel, General Services Administration, Washington, DC, counsel for Respondent.

Before Board Judges **VERGILIO**, **STEEL**, and **KULLBERG**.

VERGILIO, Board Judge.

On June 2, 2008, the Board received from Presidio County, Texas (County), a notice of appeal disputing a contracting officer's decision dated March 5, 2008. The County seeks to recover costs it expended for services in responding to a solicitation for offers issued by the General Services Administration (GSA). The solicitation was cancelled; the County did not receive the solicited contract award.

The Government moves for summary relief, asserting that the County is unable to establish its prima facie case that this dispute arises under a contract; without a contract, Board jurisdiction is lacking. In response and opposition, the County contends that contracts, oral and implied-in-fact, arose from assurances given by a GSA contracting officer, such that jurisdiction exists under the Contract Disputes Act of 1978, 41 U.S.C. §§ 601-613 (2000), as amended (CDA). The County supports its position with affidavits and documentary evidence; it has not indicated a need for discovery to respond to the motion. The County

contends that the GSA contracting officer orally offered, and the County accepted by performance, to reimburse the County for its expenditures in responding to the solicitation should no lease result. Further, the County contends that the Board must conclude that an implied-in-fact contract exists.

The County has failed to meet its burden of establishing a prima facie case that this dispute arises under a contract between it and GSA. The County responded to a solicitation that made it, not GSA, liable for proposal preparation costs. The record does not reveal the exchange of an unambiguous offer and acceptance by words or by actions that would alter the terms of the solicitation. The County makes no reference to explicit acceptance or other action that put GSA on notice that it would be liable for costs should the discussed lease not become a reality. Because there is an insufficient showing regarding the offer and acceptance of a contract and the intent of the parties, the Board need not determine if the contracting officer and the County were each authorized to enter the alleged contract, which remained oral and was not reduced to writing.

The Board grants the Government's motion. The matter is dismissed for lack of jurisdiction.

Findings of Fact[1]

1. In 2004 GSA sought to lease from the County property on which GSA would have a facility built for an Air Operations Project. The County opted not to pursue a lease of only property, as it preferred to build the facility and lease the property with the building. Pursuant to a solicitation for offers, 5TX0002, GSA and the County negotiated toward this end for a sole-source award. The County engaged various firms (surveyor, architect, and lawyer) to enable it to put together a lease proposal for a building that would accommodate the Federal Government. Those services were not freely provided to the County. The County made expenditures for some services prior to a meeting on June 3, 2005, attended by representatives for the Federal Government, County, and others. Exhibits A at 1-2, A-1, A-5 (unless stated, exhibits are attached to a County submission dated August 14, 2008). During the meeting, the County judge (the County's authorized representative), the County's

[1] Viewing the submissions in the light most favorable to the non-moving party, the Board makes factual findings for the purpose of resolving the motion for summary relief to dismiss the matter for lack of jurisdiction. The Government admits neither that the alleged conversations (said by the County to form the offer underlying a contract) occurred nor that the contracting officer and County judge were authorized to enter into the purported oral and implied-in-fact contracts.

counsel, or both, made known to a GSA contracting officer options the County was considering to fund its costs of formulating a lease proposal. As revealed in affidavits, a particular concern of the County was that its expenditures would not be recouped if a lease did not result.

2. In his affidavit, prepared in response to GSA's motion for summary relief, the County judge specifies the following, which begins with a discussion of the meeting in June:

> [The GSA contracting officer] appeared to be extremely experienced in projects such as these, and she made light of these concerns, saying that the initial costs would all be reimbursed out of the eventual bond issue, or, if for some reason the project just fell through, GSA would reimburse the County for the money it spent putting together the plans and designs. She was addressing me and [the County's counsel]. She understood our concern about the County taking a risk in this initial outlay; using county tax dollars, and needing to know that those dollars would not be eventually spent for GSA without any building being built. She said, in the sincerest way you can imagine, "we wouldn't do that to you." With that assurance from the contracting officer, I was comfortable going forward in the meeting to discuss specifics about the facilities.
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> The County began working with the architects and incurring other costs to try to obtain design documents immediately, on GSA's timeline, because GSA guaranteed that those costs would get paid. I signed a contract with [a professional architectural and engineering services firm] on July 6, 2005. The contract set a fee for [the firm], but did not specify how that fee would be paid. I had the authority to negotiate for and bind Presidio County in these contracts, given to me by the Presidio County Commissioner's Court.
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> I believed that the GSA offered to reimburse those initial costs of the County if the project was never built, in exchange for the County's agreement to move forward immediately on the SFO [solicitation for offers], and to produce plans and specifications at its cost. I felt no need to get any more detail about this issue, since [the GSA contracting officer's] statement was clear and simple. GSA's obligation would come into play only in the event that the project was not built. The County went forward with the professional contracts without pursuing special financing, which would have delayed the project.

Exhibit A at 2-3.

3. An affidavit from the County's counsel, prepared in response to GSA's motion for summary relief, provides her version of the events, substantively beginning with the meeting of June 3, 2005:

> The purpose of the meeting was to bring all potential parties to [the area] to discuss preliminary ideas for the project. The County had not yet signed any contracts or commitments for the project. [Named individuals] were present, in their capacities as contracting officers for the United States Government. The architectural firm that wanted to obtain a contract for designing the facility sent two representatives as well.
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> The first item discussed at that meeting was options for funding the project. Funding for construction would most likely come in the form of a bond issue, but I was unclear on what GSA was proposing for early design, and pre-award costs. The form Solicitation for Offers ("SFO") presented by [the GSA contracting officer] required preliminary designs and construction cost estimates (based upon those designs) to be submitted to GSA by the County. . . .
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> I do not recall whether I asked [the GSA contracting officer] for her input at this point, or whether she volunteered this information, but she stated that the initial costs would all be reimbursed out of the eventual bond issue, or, if for some reason the project just fell through, GSA would reimburse the County for the money it spent putting together the plans and designs. She assured me, on behalf of the GSA, "we wouldn't do that to you." She was sitting next to me at the time. I asked [the County judge], at that point, if he believed that the County could pay pre-design costs out of its general fund temporarily (without pursuing tax notes or other creative financing), until the bond issue passed. He felt that the County could afford to do so, within limits.
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> . . . .
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> In short, the GSA, through its contracting officer, offered in that first meeting, to reimburse the County for its initial costs if the project was never built, in exchange for the County's agreement to move forward immediately on the SFO, and produce plans and specifications at its cost. The County moved forward immediately. The benefit of this bargain to the County was a guarantee of reimbursal, without entering into some sort of debt-service arrangement at the expense of tax-payers. The benefit to GSA was in having the County (who owned the only suitable facility for GSA's needs) begin

> obtaining surveys, designs, and plans for GSA's project, **immediately,** and with no uncertainty about whether the Commissioner's Court would commit to the project.

Exhibit B at 1-2. A cancelled check and bills with services rendered prior to the meeting belie the statement that the County had not yet signed any contracts or made any commitments for the project. Finding 1.

4. With a cover letter dated May 2, 2006, the County provided GSA with an offer to lease space in response to the solicitation for offers. County Submission (June 23, 2008), Exhibit F.

5. In a letter dated November 7, 2006, to the GSA contracting officer, the counsel for the County wrote:

> When the proposal was submitted to you, you and I had a conversation about those expenditures and the problems that the County would face if problems at the federal level killed the project. You assured me that GSA would see that the county was reimbursed for those expenses if the project did not happen. Based on that representation, I allowed the county to continue to go forward and expend approximately $50,000.00 in architect, attorney, and financial advisor fees.

County Submission (June 23, 2008), Exhibit G. The County has offered no earlier writing as suggesting an agreement in which GSA would reimburse the County for funds expended. The Board assumes for purposes of resolving the pending motion that the reference to the proposal submission relates to the June 2005 meeting, not the actual submission of a written proposal in May 2006.

6. In a "claim," dated September 13, 2007, to a contracting officer (a different individual from the one attending the meeting in June 2005), the County sought $46,055.28, said to be the amounts of fees and expenses it expended relating to a solicitation indefinitely delayed. Exhibit B-5. These costs are reflected in bills by a land surveying firm (for specific field work), a real estate services firm, and counsel, and include a copy of a check issued on March 3, 2005, to (and cashed by) the real estate firm. Exhibit A-5. The contracting officer denied the claim in a letter dated March 5, 2008. The contracting officer specifies in the decision that the solicitation relating to the request for payment has been cancelled, and that costs expended in responding to a solicitation are costs of doing business, not reimbursable by the Federal Government when an award is not made. The solicitation did not make GSA liable for proposal preparation costs.

7. On June 2, 2008, the Board received from the County a notice of appeal. In the notice, the County states that no contract was awarded. Also, the County states that it would not have gone forward with preparing its offer without assurances from GSA that its costs would be reimbursed either out of the project funding, or from GSA itself if the project did not go forward. It states that it received those assurances. In response to GSA submissions and motions suggesting a lack of Board jurisdiction in the absence of a contract, the County asserts that this case involves oral contracts within the "express and implied contracts" category. The County has not sought discovery in order to more fully respond to the motions.

Discussion

In seeking summary relief, GSA moves to dismiss this matter for lack of subject matter jurisdiction, or, in the alternative, for failure to state a claim upon which relief can be granted. GSA contends that this matter can be disposed of at this stage because no contract, oral or implied-in-fact, arose between the parties; the alleged agreement was, at most, an unenforceable oral agreement. Without a contract, Board jurisdiction is lacking. In opposition, the County states that oral and implied-in-fact contracts arose between the parties when the GSA contracting officer promised to reimburse the County for its expenditures in preparing a proposal if no contract was awarded.

With a motion for summary relief, the moving party bears the burden of establishing the absence of any genuine issue of material fact; all significant doubt over factual issues must be resolved in favor of the party opposing summary relief. At the summary relief stage, the Board may not make determinations about the credibility of witnesses or the weight of the evidence. *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 249 (1986). However, "the party opposing summary judgment must show an evidentiary conflict on the record; mere denials or conclusory statements are not sufficient." *Mingus Constructors, Inc. v. United States*, 812 F.2d 1387, 1390-91 (Fed. Cir. 1987) (citations omitted). To preclude the entry of summary relief, the non-movant must make a showing sufficient to establish the existence of every element essential to the case, and on which the non-movant has the burden of proof at trial. *Celotex Corp. v. Catrett*, 477 U.S. 317, 322-23 (1986). When a motion is made and supported as required in Federal Rule of Civil Procedure 56(a), the adverse party may not rest upon the mere allegations or denial in its pleadings, but must set forth specific facts showing there is a genuine issue for trial. Fed. R. Civ. P. 56(e); *Celotex*, 477 U.S. at 324.

A signed, written contract expressly would convey an agreement of the parties. The County lacks a written contract with GSA for the services rendered. The County asserts that the Board has jurisdiction under the CDA because the claim arises under an oral contract that arose between the County and GSA. It contends that the oral contract is implied-in-fact,

based upon conversations during a meeting on June 3, 2005, at which a contracting officer for GSA and a County judge were the officials with the authority to bind their respective parties, and the subsequent actions of the parties. The County has provided affidavits and documentary evidence in support of its prima facie case to establish the existence of a contract. Because a claim must relate to a contract, 41 U.S.C. § 605(a), a valid contract (written, oral, or implied) is a prerequisite to the Board's jurisdiction over this dispute.

The County references oral and implied-in-fact contracts. It relies upon the similar factual assertions as it attempts to establish its case to avert adverse summary relief. The elements of an implied-in-fact contract are the same as those of an oral express contract. *Night Vision Corp. v. United States*, 469 F.3d 1369, 1375 (Fed. Cir. 2006); *City of Cincinnati v. United States*, 153 F.3d 1375, 1377 (Fed. Cir. 1998). The County must show: (1) mutuality of intent to contract; (2) consideration; (3) an unambiguous offer and acceptance; and (4) actual authority on the part of the Government's representative to bind the Government. *Schism v. United States*, 316 F.3d 1259, 1278 (Fed. Cir. 2002) (*en banc*); *Guilltone Properties, Inc.*, HUD BCA 02-C-103-C4, 06-1 BCA ¶ 33,249.

In viewing the record most favorably to the non-moving party, the Board concludes that the County has not demonstrated its prima facie case regarding the elements of a contract. The solicitation to which the County responded did not make GSA liable for the County's proposal preparation costs. The contracting officer did not amend the solicitation to provide for payment of proposal preparation costs. The County submitted its proposal without an amendment, such that the solicitation made the County liable for the costs it now seeks to recover. A mutual intent to be bound by oral terms has not been demonstrated. *New America Shipbuilders, Inc. v. United States*, 871 F.2d 1077, 1080 (Fed. Cir. 1989) ("Oral assurances do not produce a contract implied-in-fact until all the steps have been taken that the agency procedure requires; until then, there is no intent to be bound."). Nor has the County demonstrated that it is appropriate to imply an agreement given that the County responded to the solicitation, without an amendment of a payment provision. The alleged oral agreement does not prevail over the allocation in the solicitation to which the County responded. *Norman Herman v. United States*, 229 Ct. Cl. 475 (1981).

The County judge and counsel may well have interpreted the actions of the contracting officer as creating a contract; however, "we would not do that to you" does not translate into a binding offer in the given context. Even generously reading into the submissions a specific statement by the contracting officer that the Government would reimburse the County for all of its reasonable costs in submitting a proposal, there is no unambiguous acceptance asserted. The County prepared a proposal, but nowhere did it specify to the contracting officer that its actions were undertaken in reliance on the alleged offer. As the County judge avers, he obtained no further details when he had the County proceed with proposal preparation. He

never formally accepted the purported offer. Finding 2. The County responded to the solicitation for offers; an offer and acceptance apart from the terms of the solicitation are not indicated. This lack of offer and acceptance precludes an oral contract. An unambiguous offer and acceptance also are not plausible as arising from the circumstances detailed by the County. The alleged activities do not put the contracting officer on notice of having obligated funds of the Federal Government.

GSA contends that the contracting officer lacked the authority to enter into the alleged oral contract. GSA has not produced the contracting officer's warrant of contracting officer authority, a document that might dispositively resolve the issue of authority. *Harbert/Lummus Agrifuels Projects v. United States*, 142 F.3d 1429, 1432-33 (Fed. Cir. 1998). GSA references a statute of fraud provision of Texas law that GSA suggests precludes the County from entering into the purported oral or implied-in-fact contract that was not reduced to writing. However, the Board need not address or resolve these authority questions, given the failure of the County to establish (sufficiently to overcome the motion for summary relief) other necessary elements of a contract.

Decision

The matter is **DISMISSED FOR LACK OF JURISDICTION**.

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JOSEPH A. VERGILIO
Board Judge

We concur:

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CANDIDA S. STEEL
Board Judge

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H. CHUCK KULLBERG
Board Judge