UNITED STATES
CIVILIAN BOARD OF CONTRACT APPEALS

MOTION TO DISMISS DENIED: August 11, 2016

CBCA 4947

ACADEMY PARTNERS, INC., dba ACADEMY TECHNOLOGY,

Appellant,

v.

DEPARTMENT OF LABOR,

Respondent.

Timothy B. Hyland of Harris, St. Laurent & Chaudhry LLP, Reston, VA, counsel for Appellant.

David R. Koeppel and Colin W. O'Sullivan, Office of the Solicitor, Department of Labor, Washington, DC, counsel for Respondent.

Before Board Judges **DANIELS** (Chairman), **SHERIDAN**, and **KULLBERG**.

KULLBERG, Board Judge.

Respondent, the Department of Labor (DOL), has moved to dismiss this appeal for lack of jurisdiction or, in the alternative, for failure to state a claim on which relief may be granted. Appellant, Academy Partners, Inc., dba Academy Technology (API), alleges that it entered into either an oral or implied-in-fact contract with DOL to perform maintenance services on computer servers after the base period of the order for such services had ended. For the reasons stated below, the motion is denied.

Background

On June 30, 2011, DOL's contracting officer (CO) awarded to API order number DOLB119A32018 (order) to provide maintenance service on computer servers located at the Job Corps Data Center in Austin, Texas, and the Maine Technical Assistance Center in Limestone, Maine. The order had a base period, June 30, 2011, to March 31, 2012, and two option periods, April 1, 2012, to March 31, 2013, and April 1, 2013, to March 31, 2014.

The parties do not dispute that DOL did not exercise the options under the order. API, however, contends that it continued to perform maintenance services under the order after the base period had ended, and on October 20, 2014, API submitted to DOL's CO its certified claim in the amount of $195,387.40. In its claim, API contended the following:

> The Contract provided for the Contractor to provide maintenance services for a base year ending March 31, 2012 and 2 option years. The Contractor provided all necessary services per the Contract during the base year and into the subsequent option years. As the base year ended and the first option year commenced, [DOL] did not issue a renewal to exercise the option, but [DOL] employees requested the Contractor to continue to provide the maintenance services under the Contract and promised that, in return, [DOL] would issue renewals of the options to complete the 2 option years. [DOL] failed to issue any of the option renewals. At some point, [DOL] informed the Contractor that it had reneged on its promise and would not be renewing and would issue or [had] issued a new contract to another party.
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> . . . .
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> 1. [DOL] entered into an oral contract to issue renewal options until completion of the 3 year period, assuming available funds, which were available, in return for the Contractor's continued performance beyond the end of the base year, which performance the Contractor continued to perform until it determined that [DOL] was not exercising the option and had or would let a contract for the services to another party. As a result, [DOL] is in breach of contract for failure to issue the renewals as promised.
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> 2. [DOL] is in breach of an implied in fact contract to renew the Contract in return for the agreed performance of the Contractor in continuing to provide maintenance services in reliance on the promises and actions of [DOL] officials which, by the statements and actions of the [DOL] officials, amounted to a promise to issue renewals to the end of the 3 year period, assuming

> available funds, which were available, in return for the Contractor continuing to perform at the end of the base year and thereafter.

API calculated the amount of its claim as "$97,693.70 times two [the cost of each option year], for a total of $195,387.40."

By letter dated August 21, 2015, API filed its appeal with the Board and represented that the CO had not issued a timely decision regarding its claim. On October 26, 2015, the CO issued a decision denying API's claim. In its complaint, which was dated December 21, 2015, API alleged that "[DOL] entered into an oral, implied-in-fact contract to issue renewal options through completion of the 3 year period, assuming the availability of funds (which were in fact available), in return for the Contractor's continued performance beyond the end of the base year." On March 11, 2016, DOL submitted to the Board its motion to dismiss the appeal for "lack of subject matter jurisdiction or, alternatively, for failure to state a claim upon which relief may be granted." API filed its response to the motion, and DOL filed its reply to API's response.

Discussion

We address, first, DOL's contention that the Board lacks subject matter jurisdiction to hear this appeal under the Contract Disputes Act (CDA), 41 U.S.C. §§ 7101-7109 (2012). This Board has recognized that even though an appellant "bear[s] the burden to establish that jurisdiction exists, 'in passing on a motion to dismiss . . . on the ground of lack of jurisdiction over the subject matter the allegations of the complaint should be construed favorably to the pleader.'" *801 Market Street Holdings, L.P. v. General Services Administration*, CBCA 425, 08-1 BCA ¶ 33,853, at 167,566 (quoting *Scheuer v. Rhodes*, 416 U.S. 232, 236 (1974)). "[S]ubject matter jurisdiction under the CDA 'applies to any express or implied contract . . . made by an executive agency for – (1) the procurement of property, other than real property in being; (2) the procurement of services; (3) the procurement of construction, alteration, repair or maintenance of real property; or (4) the disposal of personal property.'" *Omni Pinnacle, L.L.C. v. Department of Agriculture*, CBCA 2452, 12-2 BCA ¶ 35,118, at 172,440 (quoting 41 U.S.C. § 7102(a)). "Under the Federal Acquisition Regulation (FAR) a 'contract' is defined to be 'a mutually binding legal relationship obligating the seller to furnish the supplies or services (including construction) and the buyer to pay for them.'" *Id.* at 172,440-41 (quoting 48 CFR 2.101 (2011) (FAR 2.101)).

In its claim and complaint, API describes its contract with DOL for continued services after the base period ended as either an "oral contract," "implied-in-fact contract," or an "oral, implied-in-fact contract." It is well established that "[t]he general requirements for a binding contract with the United States are identical for both express and implied contracts."

Trauma Service Group v. United States, 104 F.3d 1321, 1325 (Fed. Cir. 1997). "An implied-in-fact contract is founded upon a meeting of the minds and is 'inferred, as a fact, from the conduct of the parties showing, in light of the surrounding circumstances, their tacit understanding.'" *Southwestern Security Services, Inc. v. Department of Homeland Security*, CBCA 1264, 09-2 BCA ¶ 34,139, at 168,778 (quoting *Hercules, Inc. v. United States*, 516 U.S. 417, 424 (1996) (quoting *Baltimore & Ohio Railroad Co. v. United States*, 261 U.S. 592, 597 (1923)). An enforceable oral contract requires "documentary evidence show[ing] that 'a final agreement was reached and what its terms were.'" *Guilltone Properties, Inc.*, HUD BCA 02-C-103-C4, 06-1 BCA ¶ 33,249, at 164,787 (quoting *Essex Electro Engineers, Inc.*, ASBCA 30118, et al., 88-1 BCA ¶ 20,440, at 103,369). An enforceable oral contract is an oral express contract. *See Kinzley v. United States*, 661 F.2d 187, 190 n.2 (Ct. Cl. 1981). The documentary evidence necessary to prove the existence of an oral express contract need not include a formal contract. *Id*. at 191.

At issue is whether API has sufficiently alleged the existence of a contract with DOL for continued service under the order after the base period had ended. In *Engage Learning, Inc. v. Salazar*, 660 F.3d 1346 (Fed. Cir. 2011), the Court of Appeals for the Federal Circuit (CAFC) held that "a plaintiff need only allege the existence of a contract to establish the Board's jurisdiction under the CDA 'relative to' an express or implied contract with an executive agency." *Id*. at 1353. "[T]he determination of whether or not a contract in fact exists is not jurisdictional; it is a decision on the merits." *Id*. at 1355. The CAFC held that there was subject matter jurisdiction to hear an appeal in which the appellant alleged that it performed additional work under amendments to a requisition and the question of whether the requisition had been properly amended to pay appellant for that additional work was not jurisdictional, but rather, an issue to be decided on the merits. *Id*.

In this case, API alleges that it continued to perform services under the order after the base period had ended. Although API has mixed the terminology of implied-in-fact and oral contracts, the Board construes API's claim and complaint as alleging an implied-in-fact contract with DOL, and API's use of the term oral contract suggests, possibly, an alternate theory of an enforceable oral contract with DOL. API's allegations of a contract are, therefore, sufficient for the purpose of establishing subject matter jurisdiction. No further inquiry as to the merits of whether API can prove the existence of either type of contract is required for the purpose of ruling on DOL's motion to dismiss for lack of subject matter jurisdiction.

DOL argues that the Board lacks subject matter jurisdiction in this appeal because "API's allegations do not include (1) the identity of the government official with whom API allegedly orally contracted; (2) a factual basis for concluding that such official had the authority to bind the United States in oral contract; (3) the date the alleged contract was

entered; (4) the date of the oral offer; or (5) the date of the acceptance of the oral offer." In *Omni Pinnacle, L.L.C.*, the Board recognized that the appellant's allegation of the existence of an implied-in-fact contract was sufficient to establish jurisdiction, and the question of whether such a contract did exist was "a matter to be addressed on a fully developed record after [the appellant] has had an opportunity to conduct discovery with respect to whether the alleged contract would qualify as a CDA procurement." 12-2 BCA at 172,442. It is sufficient that API has alleged the existence of a contract with DOL for purposes of establishing jurisdiction, and it is not necessary, as DOL suggests, that API make factual allegations as to the identity or conduct of either API's or DOL's employees. Those are facts that pertain to the merits of the appeal and not to jurisdiction.

In the alternative, DOL requests that the Board dismiss API's appeal "for failure to state a claim upon which relief may be granted." Citing a well-established line of legal authority, this Board has recognized the following:

> As a general rule, a motion to dismiss for failure to state a claim is viewed with disfavor and should rarely be granted. Therefore, the question is whether in the light most favorable to plaintiff and with every doubt resolved in plaintiff's behalf, the complaint states any claim for relief. [It] . . . should be denied "unless it appears beyond a doubt that the plaintiff can prove no set of facts in support of his claim which would entitle him to relief."

Sage Western Investments v. General Services Administration, CBCA 1680, 09-2 BCA ¶ 34,297, at 169,418-19 (quoting *GEM Engineering Co. v. Department of Commerce*, GSBCA 13566-COM, 97-1 BCA ¶ 28,637, at 142,980-81 (1996) (quoting *Balboa Insurance Co. v. United States*, 3 Cl. Ct. 543, 545 (1983) (quoting *Conley v. Gibson*, 355 U.S. 41, 45-46 (1957)). "Appellant is therefore free to plead alternative and even inconsistent theories of recovery . . . ." *Id*. at 169,419.

In its appeal, API claims breach of contract damages for providing server maintenance services under either an implied-in-fact contract or, possibly, an enforceable oral contract with DOL after base period of the order had ended. This Board has recognized that a contractor can allege the existence of a contract with the Government for the continued performance of an expired contract when the Government fails to timely exercise an option. *See DekaTron Corp. v. Department of Labor*, CBCA 4428, 16-1 BCA ¶ 36,259, at 176,892 (citing *SecTek, Inc. v. Department of Homeland Security*, CBCA 1095, 09-1 BCA ¶ 34,137, at 168,771). API has alleged that it had such a contract with DOL to continue performing server maintenance services under the order after the base period had ended. Whether API is alleging one or possibly two different theories of recovery, which

would include either an implied-in-fact contract or an enforceable oral contract, the Board finds that API has alleged a claim for which relief may be granted.

DOL argues that the Board should dismiss this appeal for failure to state a claim because API has not "averred each of the elements of a valid contract between the parties, such as any factual allegations upon which to establish DOL's actual authority to enter into an oral, implied-in-fact contract." In *Engage Learning*, however, the CAFC recognized that once the Board determines it has jurisdiction it "may assess–without resolving any factual disputes–whether the claim is one upon which it can grant relief." 660 F.3d at 1356. As discussed above, API has sufficiently alleged the existence of a contract with DOL. The Board's inquiry with regard to DOL's motion to dismiss for failure to state a claim is limited to accepting as true the facts alleged by API. DOL, consequently, errs in urging the Board to make findings of fact contrary to those alleged by API.

Additionally, DOL argues that "no DOL official possesses the authority to retroactively 'renew' an expired contract via an untimely option exercise[, and] . . . [a]ny such attempt would violate competition requirements." This Board has recognized that its "jurisdiction . . . is under the CDA, and the Board 'lack[s] jurisdiction over allegations of irregularities in the selection process.'" *DekaTron Corp.*, 16-1 BCA at 176,892 (quoting *IMS Engineers-Architects, P.C.*, ASBCA 53471, 06-1 BCA ¶ 33,231, at 164,672). Accordingly, the issue of whether any of DOL's employees failed to comply with competition requirements is not within the Board's jurisdiction under the CDA.

Decision

The motion is **DENIED**.

H. CHUCK KULLBERG
Board Judge

We concur:

STEPHEN M. DANIELS
Board Judge

PATRICIA J. SHERIDAN
Board Judge