



UNITED STATES
CIVILIAN BOARD OF CONTRACT APPEALS

DENIED: November 16, 2021

CBCA 6951

VANGUARD BUSINESS SOLUTIONS,

Appellant,

v.

DEPARTMENT OF STATE,

Respondent.

Neal Brickman, Judith Goldsborough, and Jason A. Stewart of The Law Offices of Neal Brickman, P.C., New York, NY, counsel for Appellant.

Dennis Gallagher and Alexandra N. Wilson, Office of the Legal Adviser, Buildings and Acquisitions, Department of State, Washington, DC, counsel for Respondent.

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

CHADWICK, Board Judge.

Vanguard Business Solutions (Vanguard) timely appealed a denial by a Department of State (State) contracting officer of a certified claim for damages under an alleged contract for aircraft charter services. We previously denied a motion by State to dismiss the appeal for lack of jurisdiction. State now seeks summary judgment, arguing principally that there was no contract. We grant the motion and deny the appeal.

Background

State shows by record evidence that the pertinent facts are not genuinely in dispute.¹ The events at issue occurred within one week. On March 23, 2020, a State Department contracting officer at the United States Embassy in Islamabad, Pakistan, emailed to “Interested Offerors,” including Vanguard, a four-page invitation to offer by email “for the chartering of a passenger jet aircraft” to carry State employees and dependents from Islamabad and/or Karachi, Pakistan, to Washington, D.C., on approximately March 30, 2020. The attached statement of work stated in part, “The charter will make all required arrangements and permits [sic]” and “will assume and guarantee all flight-associated costs as part of their bid; the [Government] will not take responsibility for any flight-related costs.”

On March 24, Vanguard submitted a response titled, “Rough Order of Magnitude for Pricing and Availability” with a “proposed total” of \$1,183,201. Vanguard acknowledged and took no exception to the “ground rules” regarding permits and costs quoted above. In an email exchange on the same day with Vanguard’s owner and president, the State contracting officer—whose contracting warrant was limited to \$250,000—wrote, “I have also reached out to our DC-based Transportation office; we can only issue this contract under a Government Bill of Lading (GBL).² I’m still working out the process but I do not see this as any impediment.”

On March 25, the contracting officer emailed Vanguard, “I can say here we are done with other bids and we are going with yours. But you still need true [government] authority to back that up! The GBL was forwarded to Washington for their approval of funding.” (Paragraph break omitted.) Later that day, the contracting officer emailed Vanguard a letter stating in relevant part:

We have reviewed the proposal and correspondence with you to clarify several issues. . . . [W]e have selected your proposal as the most valid and most in line with our scope of work and specifications.

We are processing the administrative approvals that allow us to formally issue a contractual commitment. As always, this is subject to the availability of

¹ The documents discussed are indexed “by date and content” in the appeal file per Board Rule 4(b)(6) (48 CFR 6101.4(b)(6) (2020)).

² The regulations in effect defined a bill of lading as “a transportation document, used as a receipt of goods, as documentary evidence of title, for clearing customs, and generally used as a contract of carriage.” 48 CFR 47.001 (2019); *see* 41 CFR 102-117.25.

funds appropriated annually by the Congress of the United States of America. We fully expect this to be completed no later than Friday, March 27, 2020.

On March 26, the agency's Under Secretary for Management approved funding for the charter flight to be arranged by Vanguard for \$1,183,201, as offered. Upon being notified in Pakistan, the contracting officer sent Vanguard an email with the subject line, "Approval for Charter," stating in part: "I am pleased to inform you that you have been awarded the contract to provide an aircraft charter on April 1, 2020 The Department of State Under Secretary for Management approved your proposal for USD 1,183,201. This email will be followed with our fully approved Government Bill [o]f Lading, form SF-1103, later today, March 27."³ In a deposition, Vanguard's owner and president answered "No" when asked whether "an email [is] a formal contractual commitment issued by the United States Government." He further testified, "I understood that the contractual commitment was going to be issued in the form of a government bill of lading."

State never issued a bill of lading.⁴ Vanguard states that the contracting officer told Vanguard by telephone sometime after sending the March 27 email that a bill of lading was unnecessary. Vanguard cites deposition testimony of its owner, Saadat Laiq. He testified that the contracting officer told him "that the letter that I have received is good as gold, that is all that I needed . . . that he would be making payment to Vanguard from the U.S. Embassy . . . and that the payment would be coming directly from Islamabad and that I need not . . . be . . . concerned with . . . Washington, DC."

[Q] Did Mr. Haskett [the contracting officer] say the words to you "a government bill of lading is no longer necessary"?

A Yes, he said that.

Q Okay. And do you recall the date on which he told you that?

A I do not

Q Okay. And do you recall if Mr. Haskett told you that the government bill of lading would be unnecessary before or after he sent this email saying "this

³ It appears to have been March 26 in Washington, D.C., and March 27 in Pakistan when this email was sent.

⁴ Vanguard identifies this fact as one of two propounded by State that Vanguard "denies" as "factually inaccurate." Vanguard does not explain its denial or "cit[e] appeal file exhibits, admissions in pleadings, and/or evidence filed with the opposition" to support the denial. *See* Rule 8(f)(2). As noted, Vanguard alleges it was told "that a GBL would not be needed." Vanguard wrote in a March 2021 brief on jurisdiction, "[N]o GBL was in fact issued for this charter." We deem the fact not genuinely in dispute. The record shows that State internally approved a GBL dated March 29, 2020.

email will be followed with our fully approved government bill of lading form SF-1103 later today, March 27th”?

A After.

Q Okay. And do you have any written record of Mr. Haskett representing to you that a government bill of lading would be unnecessary?

A I do not.

Q Does this [March 27] email constitute the complete contract you believe you have with the Department of State?

A That, along with the agreement and promises made and the actions.

Q And when you say “agreements and promises made,” what are you referring to?

A The verbal agreements and promises and demonstrations thereof.

State does not admit that any such conversation about the bill of lading took place or that the contracting officer used the phrase “good as gold.”

On March 27, Vanguard emailed the contracting officer, “FYSA [for your situational awareness]: Charter is fully funded and we are moving with actions. Please stand by to receive artifacts.” The record includes extensive communications over the next two days between the parties about whether air carriers with whom Vanguard proposed to subcontract could meet State’s requirements. Both parties also document internal State communications, which we need not summarize, about the procedures for issuing a GBL.

On March 30, a State official in Washington, D.C., emailed Vanguard, “Thank you for your efforts however The Department of State has decided to go with another option for this requirement [sic].”

In July 2020, Vanguard, through counsel, sent the contracting officer a certified claim for \$1,735,489.34 in “damages” for the “government’s breach.” The contracting officer denied the claim in September 2020. Vanguard filed this appeal in October 2020.

The complaint alleges that State “contracted with Vanguard” for “emergency transportation” in March 2020. It has three counts, “Breach of Contract,” “Ratification,” and “Implied Contract.” We held in April 2021 that we have jurisdiction of the appeal based on “a non-frivolous claim for contractual relief [that] is broader than specific charges contested on specific shipments” which would be addressed under the Transportation Act of 1940. *Vanguard Business Solutions v. Department of State*, CBCA 6951, 21-1 BCA ¶ 37,838 (internal quotation marks omitted). After discovery, State seeks summary judgment on what State describes as “one breach of contract claim brought under several different theories,” arguing that no contract was formed, ratified, or performed.

Discussion

A party seeking summary judgment must show “it is entitled to judgment as a matter of law based on undisputed material facts.” Rule 8(f). A party opposing summary judgment need only show that “one or more” facts on which the moving party relies are “genuinely in dispute” and legally “material.” *Amini Innovation Corp. v. Anthony California, Inc.*, 439 F.3d 1365, 1368 (Fed. Cir. 2006). “Only disputes over facts that might affect the outcome” with reasonable inferences drawn in favor of the non-movant “will properly preclude the entry of summary judgment. Factual disputes that are irrelevant or unnecessary will not be counted.” *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 248 (1986); e.g., *Mission Support Alliance, LLC v. Department of Energy*, CBCA 6476 (Dec. 8, 2020) (“[I]t follows from our legal conclusion that any facts in dispute are immaterial.”).

We agree with State that all three counts of the complaint depend on the formation of a contract.⁵ “The 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). These are (1) mutuality of intent, (2) consideration, (3) an unambiguous offer and acceptance, and (4) actual authority on the part of the government representative. *Id.*; *Strawberry Hill, LLC v. General Services Administration*, CBCA 5149, 16-1 BCA ¶ 36,561. The element most obviously missing here is offer and acceptance, especially given the rule that “understandings which contemplate the finalization of the legal obligations in a written form are not contracts in themselves.” *SCM Corp. v. United States*, 595 F.2d 595, 598 (Ct. Cl. 1979), cited in *Meridian Global Consulting, LLC v. Department of Homeland Security*, CBCA 6906, 21-1 BCA ¶ 37,875.⁶

⁵ To the extent that Vanguard raises new theories such as “equitable estoppel” and “improper termination” in opposing State’s motion, they also presuppose a contract.

⁶ Vanguard argues that *United States v. Purcell Envelope Co.*, 249 U.S. 313 (1919), and *Dana Corp. v. United States*, 470 F.2d 1032 (Ct. Cl. 1972), establish that a “contract can be formed upon acceptance of an offer notwithstanding the parties’ intention to execute a formal document at a later time.” In those cases, however, the Government’s responses to offers were unconditional and “expressed an intent to be presently bound.” *Dana*, 470 F.2d at 1042; see *Danac, Inc.*, ASBCA 30227, et al., 90-3 BCA ¶ 23,246 (distinguishing *Purcell Envelope*).

State argues that it “did not manifest its assent to enter into a contract with Vanguard when [State] issued the March 2[7], 2020 email and clearly stated that a GBL . . . was to follow.” (Emphasis omitted.) We agree.⁷

In so holding, we need not and do not find the March 27 email unambiguous. Indeed, one possible reading of the email is the one advanced by Vanguard in its brief (albeit not by its owner in his deposition), that the charter contract already “ha[d] been awarded” on the offered terms and that State would issue a bill of lading for invoicing purposes. The contracting officer’s earlier statement that “we can only issue this contract under a Government Bill of Lading” tends to undercut that reading and support State’s position. Even so, a reader knowledgeable about the applicable transportation regulations might have wondered why State would issue a GBL for this passenger flight and what the GBL would cover. The regulations provide that agencies use bills of lading for “transportation of freight and household goods” and purchase “[t]ransportation of *people* through the purchase of transportation tickets.” 41 CFR 102-118.40 (2019) (emphasis added); *see id.*, 102-118.115 (“[An] agency is not required to use a GBL and must use commercial payment practices to the maximum extent possible. . . . [An] agency may use the GBL [forms] solely for international *shipments*.” (emphasis added)). Thus, another possible interpretation of the disputed email (at least out of the context of the earlier emails) is that State planned to issue a GBL for the passengers’ baggage.

The key problem for Vanguard, however, is that acceptance of an offer must be “unambiguous.” *Schism v. United States*, 316 F.3d 1259, 1278 (Fed. Cir. 2002) (en banc); *see Delco Electronics Corp. v. United States*, 12 Cl. Ct. 367, 370 (1987) (a positive response to an offer must be “an unconditional acceptance of all its terms”); *cf. Sperry Corp. v. United States*, 13 Cl. Ct. 453, 458 (1987) (finding that continuous acceptance of services knowing that payment was expected and without disclaiming intent to pay constituted implied acceptance). Vanguard urges us to apply the canons and methods that we use to construe ambiguous contracts to the task of deciding whether the parties formed a contract. We cannot do that. At worst for State and at best for Vanguard, State’s email suggested but arguably did not specify that the contract would be formed not by the email itself but upon issuance of a bill of lading. That is enough ambiguity to preclude finding unambiguous acceptance. “If the [parties’ positions] were reversed, the same reasoning would apply.” *JBG/Federal Center, L.L.C. v. General Services Administration*, CBCA 5506, et al., 18-1 BCA ¶ 37,019, *motion for reconsideration denied*, 18-1 BCA ¶ 37,087. Vanguard does not

⁷ State also argues that the contracting officer lacked authority to contract for the charter flight because his warrant was for less than the contract price. We cannot readily determine on this record, however, whether knowledge and/or approval of officials in Washington, D.C., could provide him the necessary contracting authority under State’s regulations in the context of urgent embassy travel. We need not resolve the issue.

persuade us by reasoning or case precedent that either Vanguard or the Government was bound contractually by the disputed email.

We further find no evidence that State “acted as if it had a contract” for the charter flight so as to manifest acceptance of a contract implied in fact. *Embarcadero Center, Ltd.*, GSBCA 8526, 89-1 BCA ¶ 21,362 (1988) (distinguishing, inter alia, *Comsat General Corp.*, DOT CAB 1226, 83-2 BCA ¶ 16,870); *see generally Hanlin v. United States*, 316 F.3d 1325, 1328 (Fed. Cir. 2003). Apart from the alleged statements by the contracting officer to Vanguard about the status of the GBL, State’s actions from March 27 to 30 were merely the actions one would expect from an agency still trying to finalize the award.

The factual dispute about what if anything the contracting officer told Vanguard orally about the need for a bill of lading, while genuine, is immaterial. We assume for purposes of State’s motion that the contracting officer said what Vanguard says he said. Yet oral assurances that the earlier email was as “good as gold” *and* that State would pay Vanguard from an embassy account rather than under a GBL obviously could not both be true. The email referred to a pending GBL. Such conflicting statements could not retroactively convert the email into an unconditional acceptance of Vanguard’s offer or create a new contract that was partly written and partly oral. The words we must assume the contracting officer said are vague or ambiguous rather than unmistakable words of acceptance on behalf of the agency. Vanguard urges us to focus on the “reasonableness” of its reliance on an expectation of a contract in light of the contracting officer’s alleged assurances, but such reliance could create contractual obligations only under a theory of promissory estoppel, which we lack jurisdiction to entertain. *See I-A Construction & Fire, LLP v. Department of Agriculture*, CBCA 2693, 15-1 BCA ¶ 35,913 (citing cases). We need not hold a hearing to resolve the dispute about the alleged oral statements because the dispute could not affect our decision under the governing contract law. *See, e.g., CSI Aviation, Inc. v. Department of Homeland Security*, CBCA 6292, et al., 21-1 BCA ¶ 37,769 (finding no grounds for a hearing to decide whether a document was clear beyond a reasonable doubt), *appeal docketed*, No. 21-1630 (Fed. Cir. Feb. 5, 2021).

Finally, we disagree with Vanguard that the record could support a finding that “[t]he acts of the D.C. officials who reviewed the bid and approved the funding . . . implicitly ratified the contract.” Ratification requires “demonstrated acceptance of [an unauthorized] contract. Silence in and of itself is not sufficient.” *Harbert/Lummus Agrifuels Projects v. United States*, 142 F.3d 1429, 1434 (Fed. Cir. 1998) (citation omitted). Here, as we have discussed, no one made an unauthorized commitment that State could ratify.

Furthermore, as far as the evidence shows, State officials in Washington took only the “steps . . . that the agency procedure require[d]” to issue a bill of lading. *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.”); *see Harbert/Lummus*, 142 F.3d at 1433 (“[A]gency procedures must be followed before a binding contract can be formed.”). State officials did not tacitly imply, merely by working on this urgent travel matter for a few days, that they were willing for State to “receiv[e] the benefits” of the charter flight at Vanguard’s expense absent a documented contract. *Janowsky v. United States*, 133 F.3d 888, 892 (Fed. Cir. 1998) (remanding for consideration of institutional ratification of an agreement to use a business in a law enforcement investigation). By contrast, the Government’s behavior in the cases that Vanguard cites was opportunistic. *E.g., Crowley Logistics, Inc. v. Department of Homeland Security*, CBCA 6188, et al., 20-1 BCA ¶ 37,579 (finding individual ratification where two agency officials “knew that” a contract modification “was executed by a contracting officer without a sufficient contracting warrant” yet allowed the work to proceed); *Americom Government Services, Inc. v. General Services Administration*, CBCA 2294, 16-1 BCA ¶ 36,320 (finding institutional knowledge and ratification of unauthorized receipt of satellite licenses).

In sum, Vanguard does not point to a genuine dispute of fact bearing on whether the parties formed a contract for the air charter services about which they communicated in the last week of March 2020.

Decision

We grant summary judgment and **DENY** the appeal.

Kyle Chadwick

KYLE CHADWICK
Board Judge

We concur:

Joseph A. Vergilio

JOSEPH A. VERGILIO
Board Judge

H. Chuck Kullberg

H. CHUCK KULLBERG
Board Judge