UNITED STATES
CIVILIAN BOARD OF CONTRACT APPEALS

MOTION TO DISMISS FOR LACK OF JURISDICTION DENIED: March 10, 2015

CBCA 2294

AMERICOM GOVERNMENT SERVICES,

Appellant,

v.

GENERAL SERVICES ADMINISTRATION,

Respondent.

Thomas L. McGovern, III and Brendan M. Lill of Hogan Lovells US LLP, Washington, DC, counsel for Appellant.

Jennifer L. Howard, Office of General Counsel, General Services Administration, Washington, DC, counsel for Respondent.

Before Board Judges **POLLACK**, **GOODMAN**, and **SHERIDAN**.

POLLACK, Board Judge.

The General Services Administration (GSA) has filed a motion to dismiss for lack of jurisdiction on the remaining issue left in this appeal. In our ruling of August 13, 2014, on the parties' cross motions for summary relief, we ruled in favor of GSA on two matters and against it on another. *Americom Government Services, Inc. v. General Services Administration*, CBCA 2294, 14-1 BCA ¶ 35,687. We determined in this case, involving a dispute over payment for satellite services, that appellant could not prove there was an express contract, nor could appellant establish an implied contract that was approved or ratified by the contracting officer or another official with contracting authority. We, however, also ruled that while appellant could not prove the existence of an implied-in-fact

contract based upon acceptance by an authorized contracting official, it could still proceed on the theory that there was a contract based upon institutional ratification.

In this new motion, GSA asserts that we have no jurisdiction to adjudicate the remaining issue as to whether a contract was created through institutional ratification. GSA also chooses in its filing to re-argue factual matters that have already been dealt with in our earlier ruling. We do not re-address those factual matters in this ruling. For purposes of background, we refer the reader to our findings in the earlier ruling.

GSA contends that by our determining in the earlier ruling that appellant could not establish either an express or implied-in-fact contract for procurement of the licenses, we negated any possible basis for appellant to pursue relief through institutional ratification. Put another way, GSA contends that since the Board ruled that there was no express or implied-in-fact contract, we must be basing our jurisdiction over the institutional ratification on a contract implied-in-law. A contract implied-in-law is a contract where duties are imposed which are deemed to have arisen by operation of law and not by agreement of the parties. That is in contrast to a contract implied-in-fact, which is a contract based upon a meeting of the minds. *See Hercules, Inc. v. United States*, 516 U.S. 417, 423 (1996); *Garrett v. United States*, 78 Fed. Cl. 668 (2007). It is black letter law that we have no jurisdiction over implied-in-law contracts. *City of El Centro v. United States*, 922 F.2d 816, 823 (Fed. Cir. 1990); *Angel Menendez Environmental Services, Inc. v. Department of Veterans Affairs*, CBCA 19864, et al., 08-1 BCA ¶ 33,731 (2007). However, in this matter we have never found or even suggested the existence of implied-in-law contract, and the facts would not support such a conclusion. Rather, any reasonable reading of our ruling provides that a contract based upon institutional ratification is a form of an implied-in-fact contract. The cases we cited in our earlier ruling as to institutional ratification discussed institutional ratification in the context of an implied-in-fact contract.

However, as we explained, a contract relying upon institutional ratification differs from the conventional procurement contract in that it does not require there to be some otherwise crucial elements. In our ruling we noted that the primary difference between a procurement contract created through institutional ratification and a conventional implied-in-fact contract is that a party asserting institutional ratification need not show that there was approval or ratification by an official with contracting authority. Under the institutional ratification theory, the Government, under limited circumstances, can be held liable on a contract which would not otherwise meet legal requirements. Since the issue of authority could have been fatal to appellant, we focused on that. We did not need or choose to further amplify what, if any, other circumstances might support our finding of a contract based upon institutional ratification. What we did find was that in the limited circumstances of institutional ratification, approval or ratification can be by another official (one without

contracting authority), provided that such official meets the criteria set out in case law. In ruling as we did, we found, in taking all reasonable inferences in appellant's favor, that appellant had provided sufficient evidence to establish an implied-in-fact contract with the Government through institutional ratification. We not only found that appellant might establish the necessary ratification by a non-contracting official, but also, implicitly that appellant might establish other associated elements, such as government knowledge and consideration.

In our earlier ruling our determination that appellant could not establish an implied-in-fact contract was clearly aimed at the arguments relating to a contract requiring agreement by an official with contracting authority. We specifically differentiated that circumstance from a contract based upon institutional ratification. Nothing in our ruling even suggested that we were allowing the institutional ratification matter to proceed based upon a contract implied-in-law. In fact, one of the cases we cited specifically states that institutional ratification can create an implied-in-fact contract. Janowsky v. United States, 133 F.3d 888, 892 (Fed. Cir. 1998). GSA's motion to dismiss is denied.

Decision

We find no merit in the GSA motion. Respondent's **MOTION TO DISMISS FOR LACK IS JURISDICTION** is **DENIED**. The case is to move forward on the issue of institutional ratification.

HOWARD A. POLLACK
Board Judge

We concur:

ALLAN H. GOODMAN
Board Judge

PATRICIA J. SHERIDAN
Board Judge