UNITED STATES
CIVILIAN BOARD OF CONTRACT APPEALS

MOTION TO DISMISS FOR LACK OF JURISDICTION DENIED: April 16, 2021

CBCA 6951

VANGUARD BUSINESS SOLUTIONS,

Appellant,

v.

DEPARTMENT OF STATE,

Respondent.

Neal Brickman and Judith Goldsborough 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.

In a matter of first impression for our Board, we must decide whether the contract that the appellant alleges it formed with the respondent agency (and which the agency denies ever came into being) is properly characterized as a procurement contract for transportation services subject to the Contract Disputes Act (CDA), 41 U.S.C. §§ 7101–7109 (2018). The agency maintains that we lack jurisdiction because the alleged instrument is a government bill of lading (GBL). As we explain, we deny the agency's motion to dismiss the appeal for lack of jurisdiction.

Background

For reasons explained below, we rely primarily on facts that the appellant, Vanguard Business Solutions (Vanguard), alleged in its certified claim to the respondent, Department of State (State or DOS). The cited correspondence is in the record.[1]

On March 23, 2020, a person identifying himself as a State Department contracting officer in Islamabad, Pakistan, emailed to "Interested Offerors" a four-page invitation to bid by email "for the chartering of a passenger jet aircraft" from Islamabad and Karachi, Pakistan, to Washington, D.C., on approximately March 30, 2020.

Vanguard submitted a bid. On March 25, the contracting officer emailed Vanguard a letter stating in relevant part that "we have selected your proposal" and "are processing the administrative approvals that allow us to formally issue a contractual commitment . . . . As always, this is subject to the availability of [appropriated] funds . . . ."

On March 26 in Pakistan, in response to further contacts by Vanguard, 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."

Vanguard alleges that in a telephone conversation on March 27, the contracting officer told Vanguard that the agreement to issue the GBL was "as good as gold" or "better than gold, as it is from the United States Government."

The parties corresponded for several more days about Vanguard's readiness to meet the State Department's requirements. On March 30, a person identified as the chief of the Supply Chain Management Branch, with a telephone number in the Washington, D.C., area code, wrote to 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 CDA claim for $1,735,489.34, which included the bid price, 9% annual interest, attorney fees, and $295,800.25 for "lost opportunity cost." The claim stated that Vanguard had a "contract to supply a Charter Aircraft" and sought "damages" for the "government's breach." The contracting officer denied the claim in September 2020, writing in part, "I never signed a

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[1] Appeal file exhibits are indexed "by date and content" as directed by Board Rule 4(b)(6) (48 CFR 6101.4(b)(6) (2019)).

brokerage agreement or other contract with [Vanguard], and never authorized [Vanguard] to incur any expenses on behalf of the Government."

Vanguard filed this appeal in October 2020. It attached to its notice of appeal a complaint containing three counts, "Breach of Contract," "Ratification," and "Implied Contract." In February 2021, the State Department, having answered the complaint, moved to dismiss the appeal for lack of jurisdiction. State argues that "[t]he service for which Appellant claims it had a contract was brokering a singular, charter flight for a specific date—the exact type of one-time purchase order appropriate for a GBL purchase, and suitable for [the] less formal administrative procedures of 31 U.S.C. § 3726 and 41 C.F.R. 102–118" rather than this CDA case. Vanguard opposes the motion, which is fully briefed.

Discussion

In addressing State's jurisdictional motion, we must examine what Vanguard *alleges*—not what we think Vanguard might be able to establish. "[T]he absence of a valid (as opposed to arguable) cause of action [would] not implicate subject-matter jurisdiction." *Steel Co. v. Citizens for a Better Environment*, 523 U.S. 83, 89 (1998); *see Alvarado Hospital, LLC v. Price*, 868 F.3d 983, 993 n.2 (Fed. Cir. 2017). As pertinent here, Vanguard must non-frivolously allege the existence of an agreement subject to the CDA. *See Engage Learning, Inc. v. Salazar*, 660 F.3d 1346, 1356 (Fed. Cir. 2011); *Avue Technologies Corp. v. Department of Health & Human Services*, CBCA 6360, 19-1 BCA ¶ 37,375; *McLeod Group, LLC v. United States*, 142 Fed. Cl. 558 (2019), *aff'd*, 840 Fed. App'x 525 (Fed. Cir. 2020).[2] The CDA applies to contracts of executive agencies for, among other things, "the procurement of services." 41 U.S.C. § 7102(a)(2).

Our analysis is framed by *Dalton v. Sherwood Van Lines, Inc.*, 50 F.3d 1014 (Fed. Cir. 1995). There, the Court of Appeals examined a statute and regulations predating the CDA and held "that when a common carrier provides transportation services to a government agency under the Transportation Act of 1940, and a government bill of lading serves as the contract between the parties, claims arising in connection with that contract are not subject to the Contract Disputes Act." *Id*. at 1015.

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[2] State argues that we may find "jurisdictional facts" and need not rely solely on Vanguard's allegations, citing *801 Market Street Holdings, L.P. v. General Services Administration*, CBCA 425, 08-1 BCA ¶ 33,853. That can be true if jurisdiction depends on the existence of a historical fact, but it is not true here. In *801 Market Street*, for example, we asked whether the contractor could ultimately be liable on pass-through claims by lower-tier contractors. Here, we are limited to asking whether Vanguard non-frivolously alleges a CDA contract. *See Engage Learning*, 660 F.3d at 1356.

The carrier in *Sherwood* moved household goods of military service members under bills of lading and later had a dispute with the Department of the Navy relating to claims by service members for damage to their goods. Although the Court noted that a GBL is a type of contract for transportation services and, therefore, might seem to be covered by the plain language of the CDA, the Court was "persuaded that Congress did not intend the Contract Disputes Act to apply to GBL-based transportation services of the sort at issue in these cases." *Sherwood*, 50 F.3d at 1017. Instead, in "cases in which the government obtains transportation services from a common carrier pursuant to 49 U.S.C. § 10721 and in which the GBL constitutes the contract between the parties," disputes are resolved under 31 U.S.C. § 3726 and its implementing regulations, rather than under the CDA. 50 F.3d at 1020.[3] The Court expressly did "not address cases in which transportation services are obtained through other means, such as contracts for continuing transportation services over a period of time." *Id*. Later, however, in *Inter-Coastal Xpress, Inc. v. United States*, 296 F.3d 1357 (Fed. Cir. 2002), a case involving claims under three-year tender contracts for moving and storage, the Court held that "if the action involves the amount of money owed on a contract for transportation services," the logic of *Sherwood* precludes CDA jurisdiction. *Id*. at 1372.

State argues that we lack jurisdiction under these precedents because "the alleged contract which is the basis for this entire dispute was a GBL for the purchase of transportation services." Vanguard, in response, denies that it has ever alleged "that a government bill of lading 'constituted the contract.'" Vanguard maintains that its claim is, instead, that "Vanguard had a contract to supply the charter after the government expressly stated that [Vanguard] had been awarded that contract and that the funds to pay for the charter had been approved."

Vanguard relies in large part on *A-1 Horton's Moving Service, Inc*., ASBCA 57750, 12-1 BCA ¶ 35,004, *reconsideration denied*, 12-2 BCA ¶ 35,124, in which our sibling board distinguished *Sherwood* and *Inter-Coastal Xpress* and ruled that the Transportation Act review scheme applies "narrowly to claims for [payment for] shipments, not to damages for breach of contract." State seeks to distinguish *A-1 Horton's* on the grounds that Vanguard "is alleging that Vanguard actually provided transportation services to DOS [and] submitted invoices to DOS, and [that] DOS breached the alleged contract by not paying Vanguard's invoices—the exact criteria," according to State, that the board in *A-1 Horton's* "identified [as] establishing the dispute was covered by 31 U.S.C. § 3726 instead of the CDA."

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[3] This Board reviews carrier claims under the Transportation Act, by authority delegated to us by the Administrator of General Services, after such claims are decided by the Audit Division of the General Services Administration. *See* 31 U.S.C.§ 3726(i)(1); 41 CFR 102-118.650 (2019). We could not exercise that authority in the current posture of this dispute. *See Platinum Services, Inc*., CBCA 5963-RATE (Nov. 29, 2018).

Our Board has not previously considered *A-1 Horton's* or the jurisdictional issue presented here. A predecessor board, without much explanation, decided a claim for Prompt Payment Act interest on a GBL invoice "under authority vested in us by 31 U.S.C. § 3726(i) and a delegation of authority from the Administrator of General Services, rather than under authority vested in us by the Contract Disputes Act." *American Vanpac Carriers, Inc.*, GSBCA 15967-RATE, 03-1 BCA ¶ 32,146.

The parties' arguments raise a further question, one not squarely addressed in their briefs—namely, where should we look for Vanguard's core allegations? Both parties quote Vanguard's complaint. A complaint initiates a court case and is ordinarily the key document for jurisdictional purposes in court. *E.g.*, *Columbus Regional Hospital v. United States*, 990 F.3d 1330, 1354 (Fed. Cir. 2021). "Before the Board," however, "because the notice of appeal rather than the complaint initiates a case, it is generally the notice of appeal, not the complaint, that establishes the bounds of jurisdiction." *Safe Haven Enterprises, LLC v. Department of State*, CBCA 3871, et al., 15-1 BCA ¶ 35,928 (internal quotation marks omitted); *see* Rule 2(a). Jurisdictional analyses under the CDA may also require us to assess the consistency among a "CDA claim, the agency decision, and the theories of relief argued in the appeal." *P.K. Management Group, Inc. v. Department of Housing & Urban Development*, CBCA 6185, 19-1 BCA ¶ 37,417, *aff'd*, 987 F.3d 1030 (Fed. Cir. 2021).

Accordingly, we focus on the language that Vanguard used in its July 2020 certified claim, which is the basis of its notice of appeal. *See Bass Transportation Services, LLC v. Department of Veterans Affairs*, CBCA 4995, 16-1 BCA ¶ 36,464 ("The Board gains jurisdiction under the CDA after a claim is presented to the contracting officer and is either decided or deemed denied, and the contractor files a timely appeal."). We do not review any particular words or theories of the complaint.[4]

The central allegation of Vanguard's certified claim is that State made a "formal contractual commitment" to Vanguard on March 26, 2020, when the contracting officer wrote, "[Y]ou have been awarded the contract to provide aircraft charter . . . ." This allegation supports a non-frivolous, "arguable . . . cause of action," *Steel Co.*, 523 U.S. at 89, for total breach of a CDA contract for transportation services. The elements of a contract—mutuality of intent, consideration, offer and acceptance, and actual government authority—are arguably alleged. *See Schism v. United States*, 316 F.3d 1259, 1278 (Fed. Cir. 2002) (en banc). Furthermore, the unperformed contract allegedly formed on March 26 was

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[4] As the appeal proceeds, Vanguard may pursue only the claim that it presented to the contracting officer. *See Lee's Ford Dock, Inc. v. Secretary of the Army*, 865 F.3d 1361, 1369 (Fed. Cir. 2017). We do not read State's motion as contending that Vanguard's complaint advances a "new" CDA claim that was not certified, and our decision here is without prejudice to any such contentions.

not a GBL, nor does Vanguard seek payment under a GBL. *Cf. Sherwood*, 50 F.3d at 1020 (the holding applies when "the GBL constitutes the contract between the parties"). Vanguard based the amount of its certified claim on the amount that Vanguard bid, not on the terms of a GBL that was never issued. We agree with the board in *A-Horton's* that, although we lack precedent "directly on point," we have CDA jurisdiction where, as here, a non-frivolous claim for contractual relief is "broader than specific charges contested on specific shipments." *A-1 Horton's*, 12-1 BCA ¶ 35,004 (citing *Gosselin World Wide Moving NV*, ASBCA 55365, 06-2 BCA ¶ 33,428 (taking jurisdiction of a prompt payment dispute under a transportation contract), and *Port Arthur Towing Co.*, ASBCA 37516, 89-3 BCA ¶ 22,004 (taking jurisdiction of a claim arising from suspension of a tender agreement)).

Like the board in *A-1 Horton's*, we see in *Inter-Coastal Xpress* some broad language that gives us pause—e.g., that the Transportation Act "govern[s] all actions for the charges or money owed on contracts for government transportation services." 296 F.3d at 1367. We agree with that board, however, that "[t]he crux of the decision in *Inter-Coastal Xpress*" was to clarify that the jurisdictional rule of *Sherwood* extends beyond disputes under specific GBLs to disputes under long-term agreements under which orders are placed and payments are made under GBLs. *A-1 Horton's*. "The court's holding is tied to this particularized situation." *Id*.; *see Inter-Coastal Xpress*, 296 F.3d at 1360 (describing the tender agreements); *see also In re Hounsfield*, 699 F.2d 1320, 1323 (Fed. Cir. 1983) ("Although some of the foregoing judicial statements standing alone could be read to support the principle the Board here applied, those statements must be read in the light of the facts of the cases, the precise issues to be resolved therein, and the courts' holdings."). We do not read *Inter-Coastal Xpress* as forbidding us from exercising CDA jurisdiction in this case, where Vanguard's breach claim does not seek "charges owed on" a performed contract administered via bill of lading. *Inter-Coastal Xpress,* 296 F.3d at 1366.

State argues that we lack jurisdiction because the contracting officer's agreement to issue a GBL "did not constitute a contract. The actual 'contract' in question here would have been a formal contract of carriage established by a GBL issued to Vanguard." This takes the analysis too far beyond the facts alleged by Vanguard and too deep into the merits. Vanguard's allegation that the March 26 email created a contract is not frivolous on its face. For now, that is all that is required. "Taking jurisdiction to consider non-frivolous allegations that an express or implied contract exists is different from actually determining whether or not such a contract exists." *A-l Horton's*, 12-2 BCA ¶ 35,124 (denying reconsideration). State further argues that, if Vanguard genuinely contends that it was awarded a procurement contract for charter services, Vanguard should be able to identify the type of contract from the options listed in the Federal Acquisition Regulation, 48 CFR part 16. Again, however, an absence of supporting detail does not render Vanguard's allegation of a contract frivolous at this stage.

State goes on in its reply brief to preview other arguments that State may raise again later, such as that Vanguard's claim actually invokes promissory estoppel. We need not address that argument on a jurisdictional motion, as the certified claim alleges the formation of a written contract and does not assert promissory estoppel. Our decision here does not take any merits arguments off the table.

Decision

We **DENY** State's motion to dismiss the appeal for lack of jurisdiction.

Kyle Chadwick
KYLE CHADWICK
Board Judge

We concur:

Joseph A. Vergilio
JOSEPH A. VERGILIO
Board Judge

H. Chuck Kullberg
H. CHUCK KULLBERG
Board Judge