January 30, 2003

In Re:

GettyOne Midwest, Inc.

Claimant

Claims Case No. 02092001

CLAIMS APPEALS BOARD DECISION

DIGEST

A government employee without contracting authority requested that a vendor provide him several stock photographic transparencies for review for possible use in a marketing display. The claimant vendor provided those transparencies and contends that when it transmitted them, it also enclosed a "delivery contract" providing, among other things, for a license fee of $825 for each transparency used and $1,500 in liquidated damages per transparency if the government failed to return it. The government acquired the rights for one transparency by purchase order. The vendor claims $87,000 in liquidated damages for 58 unreturned transparencies based on the "delivery contract." The government provided sufficient evidence to indicate that it returned the transparencies to the vendor. Even if the government had failed to do so, we cannot allow a claim for $1,500 for each unreturned transparency under the theory of *quantum meruit* or *quantum valebant* based on the unsigned and unratified "delivery contract." In such quasi-contractual claims, the claimant must demonstrate a tangible benefit that accrued to the government in accepting and not returning transparencies that it did not use. The value of a misplaced and unused transparency is speculative.

DECISION

GettyOne Midwest, Inc., a successor in interest to Mostryn Enterprises Ltd. d/b/a The Image Bank Chicago, submits a claimfor $87,000.00, plus interest, attorney fees and costs[(1)] arising from the operations of the Defense Logistics Information Service (DLIS), formerly Defense Logistics Services Center (DLSC), a field activity of the Defense Logistics Agency (DLA).[(2)] The claim alleges that The Image Bank provided 59 transparencies of graphic images that DLSC did not return. The images were made available to DLSC for review and purchase of a license to use (manipulate) individual images for a marketing display. A license for use of one of the transparencies was purchased for $825 on March 21,1996, by means of a government purchase order (DD Form 1155)[(4)] , but The Image Bank's successor alleges that neither this transparency, nor the remaining 58, were returned as required. The claimant bases the value of the unreturned transparencies on a liquidated damage provision in a disputed "delivery contract" which provides liquidated damages of $1,500 on each unreturned transparency.[(5)] The copy of this contract, provided by the claimant's attorney, is in the record but does not show a signature by a government representative.

The supervisory marketing specialist (supervisor) states that in 1995 the primary marketing specialist obtained a variety of books containing images from several companies. Her organization was looking for a suitable back drop image for a new marketing display. The supervisor also reviewed some of the books, but the primary marketing specialist ordered sample slides from The Image Bank. The supervisor states that she was not aware of the discussions that the primary marketing specialist had with The Image Bank's representatives. The primary marketing specialist and a second marketing specialist reviewed the images and selected one for use as indicated above.

The Image Bank did not provide image manipulation services, and that work was contracted out to another company. Ironically, DLSC's name was changed soon after the modified graphic was received, and so it was never used. A replacement was never procured. Since 1995 the Marketing Area's offices have been moved at least six times.

Nobody at DLSC seems to know exactly what happened to the unused transparencies. In a memorandum dated arch 21, 2002, the second marketing specialist wrote that she could clearly recall talking with her supervisor about the return of the transparencies sometime around Spring 1996; at the time, the primary marketing specialist was away on temporary duty and The Image Bank had been seeking the return of the transparencies. However, the second marketing specialist could not recall physically depositing them in the mail, although she did recall that The Image Bank discontinued its trace of the transparencies shortly thereafter. The supervisor further stated that the only slide ever found was the one that DLSC purchased. The others did not turn up during any of the Marketing Area's many moves, nor during a specific search for them in 1999.

The supervisor, who now works in another branch of DLSC, stated in an undated memorandum that she recalled discussing with the second marketing specialist the disposition of the purchased transparency and the need to return the rest. She presumed that the second marketing specialist returned the unused transparencies and indicates that the second marketing specialist was a reliable employee.

In his memorandum dated April 18, 2002, the primary marketing specialist (who is now employed by the Department of the Treasury) wrote that he was "near-certain" the transparencies were returned, stating, "I do know with clarity that they were placed for mailing from the DLSC marketing offices through its internal mail distribution system to the Image Bank between early to mid-1996." However, he also admitted that he did not know who mailed them, the means of shipment, or the name of the recipient at the Image Bank. He further stated that from mid-1996 until he left DLSC in August 1998, he received only one call from The Image Bank concerning the transparencies and that he explained that they had been returned some time earlier. During this period, he received solicitations from The Image Bank for additional photographic services, suggesting to him that DLSC remained a customer in good standing with that company. His understanding was that The Image Bank changed personnel during this period, but The Image Bank's representative denies this. He does not recall that anybody at DLSC received, held, or signed an Image Bank document involving the handling of the transparencies.

An internal DLSC memorandum dated June 17, 1999, by Bernard Solovey, Jr., Contracting Officer, Operational Contracting Branch, Defense Reutilization & Marketing Service (DRMS), DLA, Battle Creek, Michigan, stated that the second marketing specialist and the supervisor both believed that the transparencies had been returned. A follow-up memorandum by Mr. Solovey dated July 26, 1999, reported that the primary marketing specialist advised him that The Image Bank had assumed that the transparencies had been returned and that DLSC should not worry about them.

By letter dated May 5, 2000, Thomas M. Bowman, an attorney representing DLSC, effectively denied the Image Bank's claim on the grounds of these "unresolved factual issues:" (1) the government employees involved "are convinced" the transparencies were returned by first class mail sometime in 1996; (2) that only nine to 12 samples were involved, not 59; (3) the two DLSC employees involved did not recall seeing the document used by the claimant to established liability; and (4) since the samples were shipped to DLSC six months prior to the purchase of the used transparency, the July 23, 1997, Image Bank invoice for $88,500 is not sufficiently related to a government contract to fall within the jurisdiction of the Contract Disputes Act. DLSC's contracting officer did not ratify the delivery contract.

In an undated response, The Image Bank disputed all four grounds: (1) the 59 transparencies were not returned; (2) 59 transparencies were involved; (3) The Image Bank included the delivery contract with the sample slides: it was its

practice and policy to do so in every instance, it is "common sense" that "regular paperwork" would be involved in every instance, and the government employees' inability to recall it is not a sufficient basis to rebut "clear affirmative assertions" to the contrary; and (4) there is no basis for the government's position that there is insufficient relatedness between the 1997 Image Bank invoice and the purchase of rights for the one transparency.

In its September 19, 2002, administrative report to the Defense Office of Hearings and Appeals (DOHA), DLSC admits that in 1995 its primary marketing specialist ordered sample images from The Image Bank's stock collection for review. However, DLSC contends, among other things, that the marketing specialist and The Image Bank did not discuss terms and conditions governing use of the transparencies. The primary marketing specialist was not warranted as a contracting officer, and none of the employees involved had any authority (express or implied) to contract for this service. DLSC contends that nobody at The Image Bank mentioned the value of the transparencies or the liquidated damage amount, and nobody at DLSC ever agreed either verbally or in writing to the terms of the delivery contract. Nobody in DLSC recalls seeing a copy of the delivery contract prior to June 1999, when the claimant's attorney presented a demand for payment. Nobody in DLSC remembers any demand for payment prior to June 1999. It is the position of DLSC that the unused sample transparencies were returned to The Image Bank. The record indicates that the licensed transparency was returned in May 2002.

On November 25, 2002, claimant's attorney acknowledged return of the licensed transparency and amended the claim to $87,000 (from $88,500) for the 58 unreturned transparencies. Counsel contends that the DLSC allowed its personnel to utilize agency instrumentalities to procure a shipment of 59 transparencies for the purpose of reviewing them and selecting one or more for licensing. DLSC received the benefit of review of the transparencies but failed to return The Image Bank's property, in breach of the delivery agreement. Counsel argues that there is evidence that the delivery contract was definitely included in shipment of the transparencies, and provides the November 21, 2002, statement of Michael Jungert, the former Vice President and General Manager of Mostyn Enterprises.[(6)] Mr. Jungert supervised The Image Bank's account executive, the person who had direct contact with the primary marketing specialist. Counsel's position is that by implication, DLSC is deemed to have acquiesced and ratified this contract.[(7)]

Discussion

Our authority to grant relief in contractual disputes is limited to the relief, if any, available through the general claims statute, 31 U.S.C. § 3702. In this case, the only remedy available for our consideration is whether we may authorize reimbursement to the claimant under the equitable theories of *quantum meruit* or *quantum valebant*. [(8)] Generally, recovery may be implied in law under this quasi-contractual relief when the government would be unjustly enriched if it were allowed to keep goods without paying for them. *See* the Decision of the Comptroller General, B-184827, Dec. 9, 1975, 75-2 C.P.D. ¶ 381. We have no authority to consider the claimant's theory that the delivery contract should be implied based on acquiescence or estoppel.[(9)] The Claims Appeals Board directly settles this claim due to the novelty of the issue.

As indicated in 69 Comp. Gen. 13 (1989), there are four elements that the claimant must satisfy in order to recover under the theory of *quantum meruit*. First, the goods or services for which payment is sought would have been a permissible procurement had the proper procedures been followed. Second, the government must have received and accepted a benefit. Third, the claimant must have acted in good faith. And fourth, the amount paid must not exceed the reasonable value of the benefit. Additionally, we are bound by the agency's version of the factual events absent clear and convincing contrary evidence from the claimant. *See* 57 Comp. Gen. 415, 419 (1978).

The official position of DLSC is that its employees returned the unused transparencies. While the supporting evidence for this position is circumstantial, it is sufficient to support this factual finding. In sum, the supervisor told her employee to return the unused transparencies. While the employee does not specifically remember actually placing the transparencies in the mail, she does remember: The Image Bank's tracing calls; preparation of the transparencies for return; and a discussion of the return with her supervisor while the transparencies were co-located with materials about to be placed in the mail. The tracing calls suddenly ebbed just after this, and according to the primary marketing specialist, he received only one more tracing call between mid-1996 and his departure in August 1998. His response to

this last trace was that the transparencies had already been returned, and there is no indication that The Image Bank immediately disputed this assertion. Searches of the files after mid-1996 for the unused transparencies were unsuccessful. On the other side, the claimant relies solely on the November 21, 2002, statement of Mr. Jungert, who states that established procedures were followed in tracing the transparencies. But, Mr. Jungert provided no specific details, and he does not dispute the sudden reduction in tracing calls. No statement is offered by the account executive who had direct dealings with the primary marketing specialist. On balance, we are not prepared to say that the claimant overcame the DLSC's factual position by clear and convincing contrary evidence.

Alternatively, even if DLSC had not returned the transparencies, we would not allow the claim. The claimant failed to demonstrate that the government received and accepted any tangible benefit in retaining transparencies that it did not employ and would have misplaced. Loss to the claimant is not the measure of benefit to the government. In one quasi-contract claim where the government received and misplaced a duplicate shipment of videotapes, the Comptroller General held that there was no benefit to the government where there was no showing that the property was ever used or that the government otherwise derived a benefit. *See* B-221226, Feb. 6, 1986; *aff'd on reconsideration*, B-221226, Jul. 6, 1987. In the current case, if the government had used an additional transparency, there is objective evidence that it would have benefitted the agency by a value of $825, but we cannot reasonably conclude that the government benefitted in the amount of $1,500 per transparency by misplacing and not using the same transparency. Any benefit to the government in reviewing, then misplacing and not returning these transparencies, is, at best, speculative, especially since it appears that the claimant was still in a position to license the same transparencies to other parties.

DLSC also questions whether the claimant met two other elements for allowance of quasi-contractual claims. First, DLSC questions the good faith of the claimant in pursuing its trace of the transparencies. For example, if The Image Bank had a 30-day return policy for the unused transparencies, as claimed, there is no evidence it enforced it prior to the March 1996 purchase order. DLSC also notes that its employees were unaware of The Image Bank's July 23, 1997, invoice for liquidated damages for the unreturned images until after the 1999 claim. Second, DLSC argues that the procurement would not have been permissible because the terms of the delivery contract are inconsistent with the Federal Acquisition Regulations (FAR). Specifically, the Contract Disputes Act would have governed any dispute on the contract, not arbitration in Chicago pursuant to American Arbitration Association rules. Also, Federal law, not Illinois law, would have governed the contract.

We do not view the record to be sufficiently developed to address the good faith issue. Furthermore, we agree that the FAR and Federal law would have governed the type of contact attempted here, but we are not aware of any statute or regulation that would have prohibited a proper and authorized acquisition to obtain, review and return transparencies for potential licensing. In any event, we need not decide these issues because there is evidence that the transparencies were returned, and even if they had not been, the benefit to the government is speculative.

Conclusion

We disallow the claim.

Signed: Michael D. Hipple

_____

ichael D. Hipple
Chairman, Claims Appeals Board

Signed: Catherine M. Engstrom

Catherine M. Engstrom
ember, Claims Appeals Board

Signed: William S. Fields

William S. Fields
ember, Claims Appeals Board

1. GettyOne Midwest is represented by Mark H. Barinholtz, Esq., of Chicago, IL.

2. For clarity, we will refer to DLSC throughout this decision rather than DLIS or DLA.

3. A statement from the primary DLSC marketing specialist who obtained the transparencies indicates that his organization received three 8 X 11 plastic packets containing reproduced photographic slides that were not originals. He does not dispute the total number as 59 even though DLSC questions the exact number. A purchase order for the one image selected for purchase indicates that each slide was 35-mm.

4. Purchase order no. SP441096P0648, dated March 21, 1996, was issued in the amount of $825.00 for the purchase of the manipulation rights and use of the selected image (no. S1067-289 10024821 3230, Michael Shumate, photographer); it was to be blown up to 70" x 70" and altered to include DLSC's initials. The Image Bank issued invoice no. CHI 58030, March 29, 1996, charging $825.00 for the image's use, plus $22.50 for air courier service, for a total of $847.50. The invoice noted that all used images should be returned by April 30, 1996, and all unused images by October 27, 1995, six months *prior* to The Image Bank's own invoice.

5. This delivery contract is dated September 27, 1995, per request number 22821, and states that it is transmitting 59 transparencies at a charge of $22.50 for Federal Express priority delivery service. It states that there was a minimum service charge of $85 if no slides were selected for licensing and that if the slides were not returned by October 27, 1995, a $1.00 per day "holding fee" would be charged for each slide. It also states that a charge of $1,500.00 per slide would be charged for every lost or damaged transparency.

6. The following evidence is offered: Mr. Jungert's statement indicates that all shipments of transparencies contained this contract. This type of property would not have been shipped without paperwork. Counsel contends that the government supervisor's statement does not directly rebut Jungert's statement because she only states that she did not recall seeing the delivery contract. The primary marketing specialist stated that he did not receive the delivery contract, but he was supervised by another person.

7. Counsel offers the following: The delivery contract states that the recipient should "read this immediately." Included is express language indicating that retention of the enclosed transparencies means that the recipient agrees with all terms. It also states that if the recipient does not agree in whole or in part with any contractual term, the recipient should return the transparencies immediately. DLSC did not object; did not return any of the transparencies; and ratified the transaction by licensing one transparency and issuing payment for it.

8. Our authority to settle general claims is as follows: the General Accounting Office Act of 1996, Pub.L. No. 104-316, § 202(n)(4), 110 Stat. 3826, 3843-3844 (1996); OMB Director's Determination with Respect to Transfer of Functions Pursuant to Public Law 104-316 (December 17, 1996), Attachment A; Delegation of Authority by the Deputy Secretary of Defense to the General Counsel on March 5, 1999; and the Delegation of Authority by the General Counsel to DOHA on March 17, 1999.

9. To imply a contract, the official whose acts are being relied upon must be one with authority to bind the government contractually. An offeror or claimant is not justified in acting upon the strength of an official's apparent authority. *See* B-

189266, Mar. 29, 1978, 78-1 C.P.D. ¶ 240; and B-182730, Mar. 7, 1975, 75-1 C.P.D. ¶ 139. Moreover, anyone seeking to enter into a contractual arrangement with the government takes the risk of having accurately ascertained that he who purports to act for the government stays within his authority. *See also McNabb v. United States* , No. 00-143C, slip op. at 11 (Fed. Cl. Dec. 10, 2002). As the administrative report here notes, neither of the marketing specialists or the supervisor had authority to contract, and the claimant has not provided contrary evidence.