



UNITED STATES
CIVILIAN BOARD OF CONTRACT APPEALS

DENIED: April 18, 2007

CBCA 135

CALIFORNIA BUSINESS TELEPHONES,

Appellant,

v.

DEPARTMENT OF AGRICULTURE,

Respondent.

Duncan A. Cameron, Owner of California Business Telephones, West Sacramento, CA, appearing for Appellant.

Elin M. Dugan, Office of the General Counsel, Department of Agriculture, Washington, DC, counsel for Respondent.

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

VERGILIO, Board Judge.

By letter dated September 20, 2006, California Business Telephones (CBT or contractor) submitted a notice of appeal involving actions of the Department of Agriculture, Food Safety and Inspection Service (Government). The contractor seeks payment based on a \$14,432.88 invoice for equipment and services said to have been rendered in addition to the items in the underlying contract. The contracting officer issued a determination stating that the amount would not be paid because the Government did not authorize the purchase of the additional items; the determination requests that the contractor schedule a day to uninstall and remove all equipment installed without Government authorization. In this matter at the Board, the contractor specifies that the dispute arises from oral agreements, made between its owner and the Government point of contact (a program analyst; that is, someone other than the contract specialist and the contracting officer), for equipment and services that were not specified in the written contract.

The Board has jurisdiction over this timely-filed appeal pursuant to the Contract Disputes Act of 1978, 41 U.S.C. §§ 601-613, as amended (CDA). The parties have submitted the appeal file (with supplements), complaint, and answer. The parties have each moved for summary judgment (treated by this Board as requests for summary relief), asserting that undisputed facts demonstrate entitlement to relief; each opposes the contrary motion. The Board makes findings of fact based upon the existing record and the requirement that all significant doubt over factual issues must be resolved in favor of the party opposing each motion for summary relief.

In seeking summary relief, the Government relies upon a contractual provision that states that the contract can be modified only by written agreement of the parties. Without a written modification, the Government contends that it is entitled to summary relief because there is no contractual basis for recovery. Moreover, given the contractor's assertion that it reached oral agreements with the Government's point of contact, the Government asserts that the individual lacked authority to modify the contract as requested by the contractor. Accordingly, the Government seeks summary relief because there is neither a written modification nor any agreement with a Government employee authorized to alter the contract.

The contractor seeks relief based upon what it describes as oral assurances from the Government point of contact who portrayed herself as an authorized representative to act for the Government. Further, the contractor contends that because the Government still retains the equipment installed in addition to that in the written contract and has benefitted from the additional labor, the Government is obligated to reimburse the contractor for the additional equipment and efforts.

The undisputed facts demonstrate that the contractor seeks reimbursement for equipment, materials, and efforts not included in the line items of a written contract between the parties. The Government did not modify the contract in writing. Individuals with the authority to modify the contract for the Government did not consent to the modifications proposed by the contractor or authorize the work performed in excess of the written contract. Assuming the statements of the contractor to be true, with respect to the alleged discussions and agreements between the contractor and the program analyst, the contractor relied upon representations of a Government employee who lacked the authority to modify the contract to accomplish the changes sought by the contractor. Those assumed representations and agreements do not bind the Government. The contractor performed the extra-contractual work at its own risk. Without the consent of an authorized Government employee, no enforceable contract modification arose. The lack of authority also defeats the contractor's theories of relief based upon estoppel and an implied-in-fact contract. The Government is not obligated to modify the contract or accept the additional items.

The Board grants the Government's motion for summary relief, denies the contractor's motion for summary relief, and denies this appeal.

Findings of Fact

The Contract

1. A contracting officer signed and had issued to CBT a standard form 1449, solicitation/contract/order for commercial items, with an "effective date" and "date signed" of February 2, 2006, and with the "award of contract" box marked. The form specifies that the contract is issued by and to be administered by USDA (Department of Agriculture), FSIS (Food Safety and Inspection Service), ASD (Administrative Services Division), Acquisitions, Beltsville, Maryland, with delivery to the Western Lab in Alameda, California. The "contractor/offeree" is CBT. The document has a contract number, GS35F0369K, and an order number, AG-3A94-D-06-0108; it specifies that the "contractor shall provide Vodavi Infinite XTS Communications System in accordance with the attached statement of work and California Business Telephone[']s quote #2050015."¹ The identified "quote" is not part of the existing record (unless it is the "client invoice" dated January 25, 2006, Finding 4, below, which has 6's in place of the 5's in the number); the existing record does not specify the method of procurement, or whether or how quotations or offers were requested. Exhibit C at 50 (all exhibits are in the Appeal File).

2. The standard form document describes seventeen line items for delivery or performance. Among them is one for 12 speaker telephones, item IN3015-71, at \$265 each, and one for 43 speaker telephones, item IN3012-71, at \$205 each. The final item, installation labor, at a lump sum price of \$2795, details the work as installation, programming, testing, training, programming changes, and a warranty. The total award amount is \$24,897.76. The document states that the "contract/purchase order incorporates by reference FAR 52.212-4. FAR 52.212-5 is attached." The box that would indicate that the contractor is required to sign the document is unchecked; there is no signature for the contractor. The statement of work identifies points of contact for the Government within the laboratory where installation

¹ The contract number identifies a General Services Administration (GSA) Federal Supply Service schedule contract. CBT is not the contractor that held the schedule contract, which further states that installation is outside the scope of the contract. Although the GSA contract identifies CBT as an authorized dealer in Vodavi equipment, these parties apparently did not utilize that prime contractor or contract for obtaining this equipment or services. Exhibit D at 73-75, 79 (¶ 2), 95. Of relevance in this proceeding, at this stage, is that the contracting officer signed the contract/order and CBT installed the equipment.

is to occur; the individual and alternate are identified by name and telephone number, not title. Neither name is that of the contracting officer. Exhibit C at 50-64.

3. The FAR clause incorporated by reference, Contract Terms and Conditions--Commercial Items (SEP 2005), 48 CFR 52.212-4 (2005), states in pertinent part:

(c) *Changes.* Changes in the terms and conditions of this contract may be made only by written agreement of the parties.

(d) *Disputes.* This contract is subject to the Contract Disputes Act of 1978, as amended (41 U.S.C. 601-613). Failure of the parties to this contract to reach agreement on any request for equitable adjustment, claim, appeal or action arising under or relating to this contract shall be a dispute to be resolved in accordance with the clause at FAR 52.233-1, Disputes, which is incorporated herein by reference. The Contractor shall proceed diligently with performance of this contract, pending final resolution of any dispute arising under the contract.

(e) *Definitions.* The clause at FAR 52.202-1, Definitions, is incorporated by reference.

Exhibit C at 70. The phrase “contracting officer” is defined in the incorporated provision to mean “a person with the authority to enter into, administer, and/or terminate contracts and make related determinations and findings. The term includes certain authorized representatives of the contracting officer acting within the limits of their authority as delegated by the contracting officer.” 48 CFR 2.101, 52.202-1 (2005).

4. On February 3, 2006, the contract specialist (with an address in Beltsville, Maryland) sent an e-mail message to the contractor. The stated subject is award. The message states that attached files are for the delivery order of the telephone system. Exhibit C at 65.² Also on that date, the Government point of contact (a program analyst) forwarded a copy of the delivery order to the contractor. The e-mail message states, in part:

² It is undisputed in the record that the referenced e-mail messages were sent and received. The Board is mindful that every statement in e-mail messages may not be accurate, and does not rely on them for that purpose. However, the exchanges assist in establishing a framework for the communications that were occurring relating to the contract and dispute.

Finally, the contract has been awarded! I'm assuming you already received a copy of this agreement but here it is for you just in case it hasn't reached your desk yet. Will you please email a copy of the add-on quote so that I can start the process for the additional approval and funding. Julian [the contract specialist] has assured me the add-on will be a breeze and should not be time consuming to complete. I really don't know how that's going to work and whether or not we need to wait for the add-on to clear the approval chain before we start with the work on the initial contract. As soon as I receive your quote, I'll make some calls to Washington and get things started. From there we should be able to get an estimate of when actual installation will occur. Thanks for your patience and working with us on this project.

Exhibit B at 43. In correspondence in the record with the contractor, the point of contact refers to herself by name only or with the title of program analyst; she does not refer to herself as a contracting officer or as anything other than a program analyst. Exhibit B at 7-8, 15, 32, 43-44. In contrast, in correspondence in the record with the contractor, the contract specialist consistently refers to himself as a contract specialist. Exhibit B at 29-30, 32-33, 35-36, 39, 45, 49, 65, 66.

Additional Equipment and Labor

5. In an e-mail message dated Monday, February 6, 2006, the program analyst provided the contract specialist with the contractor's "quote for the additional equipment and labor costs we need to add to the existing Vodavi telephone system contract." The referenced "quote" is on the contractor's stationery, with the caption "Client Invoice," a date of 1/25/2006, and an invoice number, 2060017. Under "terms" is "due on recei[pt]" and under "service date" is 2/1/2006. There are three line items containing the following information:

QTY	DESCRIPTION	TOTAL
8	speakerphones, IN3015-71, \$260 each	\$2080.00
2	speakerphones, IN3012-71, \$205 each	410.00
1	basic labor: labor to install & program additional phones, station ports & voicemail boxes	3370.00
	TOTAL	\$5860.00

The sheet specifies, "The above noted work was requested and accepted as satisfactorily performed subject to the following: 1) Payment. Payment is due immediately upon receipt of this invoice[.]" Exhibit B at 1-2. The contractor also presented the Government with a

similar document, invoice 2060016, with the same date, terms, service date, and conditions, but with seventeen line items totaling \$24,897.76. The seventeen items and prices are those in the contract. Exhibits B at 23-24, C at 50-57. As of February 1, 2006, no product was delivered or installed.

6. On Monday, February 6, 2006, the program analyst provided to the contract specialist the quote for the additional items with the request that he inform her as soon as possible as to how to proceed with the add-on, as she was seeking to have the modification complete by February 14, the intended date of installation. Exhibit B at 1. That same day, the contract specialist replied to the program analyst, stating that he did not see a problem with modifying the contract, although he could not guarantee that the modification would be finalized by February 14. He sought information regarding the labor requirements, noting that the proposed cost of labor in the modification is greater than the labor cost in the contract. Further, he writes, "Under no circumstances, other than a written or verbal approval from [the contracting officer], should the contractor do any work towards the second quote until we have the funding approved in IAS." Exhibit B at 3. Within the agency, communications continued as approval was sought for the additional acquisition, and the contract specialist continued to seek an explanation from the contractor that might justify the proposed labor charge. Exhibit B at 4-5.

7. On February 15, the contract specialist sent an e-mail message to the program analyst informing her that a waiver is needed for the additional work, a process that could take up to four weeks. Therein, the contract specialist suggested completing the work for the first installation as planned. By early afternoon of the same day, the program analyst sent an e-mail message to the contract specialist stating that the contractor had arrived and "they are going to go ahead with the work and equipment on the contract you awarded. I am also working on the second requisition and request for the waiver approval." Exhibit B at 6.

8. On a contractor dispatch ticket dated February 15, 2006, dispatch notes state that the work relates to the installation of the telephone system. It specifies for day one, February 15, 2006, the equipment left in the possession of the Government. In addition to cabinets and miscellaneous materials, the equipment includes six telephones of item 3012-71, twenty telephones of item 3015-71, and two specific modules and software. The identified equipment is not in excess of the seventeen line items in the contract. Exhibits B at 9; C at 50-57.

9. Installation occurred over the following weeks. In an e-mail message sent on Monday, March 20, 2006, the contractor informed the program analyst:

I finally spoke with [the contract specialist] on Friday. I now have an acceptable and understandable course of action, in regards to submitting invoices and receiving payment for the same.

....

... You and I have spoken at length on several occasions, regarding all of the additional work. All of which requires additional charges b[e] submitted. All of which should have been left undone, until pricing estimates were created by our office and sent to [the contract specialist] for approval. This would have meant that ... at least a third of your facility would have zero communications. I am not comfortable, at all, installing 13,000 to 14,000 dollars worth of additional equipment and labor, without authorization, simply because I know I am doing what is necessary for your facility, and that I may never be paid for it. Under these circumstances, I would appreciate a little more patience and cooperation.

Exhibit B at 15-16. The Government did not sign a contractor dispatch ticket dated March 21, 2006, on which the contractor sought to obtain authorization and acceptance of all work pertaining to the original contract, as well as all additions totaling approximately \$15,000. Exhibit B at 18.

10. The program analyst and the contractor's owner continued to communicate regarding the contractor's attempts to be paid for work performed, both under the contract and for additional work. On March 29, 2006, the contractor sent an e-mail message, including an invoice, to the program analyst. The message states:

The attached invoice includes everything. The equipment pricing is normal retail. These prices will help to reduce some of the losses we took from the original quote in 2004. There is no need for another credit card purchase. I suppose that we need to request approval for this to be done, etc.

Exhibit B at 25. A "client invoice" (invoice 2060053) dated March 29, 2006, states "due on recei[pt,]" with a service date of 3/29/2006. With the following information, the invoice lists fifteen line items, totaling \$14,432.88:

QTY	DESCRIPTION	TOTAL
1	station board at \$696	\$ 696.00
8	speakerphones, 3015-71, \$419 each	3352.00
11	speakerphones, 3012-71, \$351 each	3861.00

11	wall mount kits, \$18.95 each	208.45
1	adapter at \$335.88	335.88
480	voice cables, \$.19 each	91.20
13	terminal jacks, \$5.95 each	77.35
1	cross connect, hardware, etc.	15.00
4	Bogen wall speakers, \$89 each	356.00
1	basic labor: for 19 phones--install & program, type designation sheets, program voicemail boxes; training add'l staff	1075.00
8	basic labor: site review & assessment (3 technicians 8 hours each), \$95 each	760.00
1	basic labor: install new cables to support additional phones	1980.00
1	basic labor: remove wall mounts previous system; install new screws and mounts	360.00
1	basic labor: paging system, test existing amplifier, test every speaker in lab building, replace four speakers	380.00
9	travel labor: 3 technicians, 3 trips, 4 hours each = 36 man hours traveling, \$95 each	855.00
	TOTAL	\$14,432.88

Exhibit B at 26-28.

11. As indicated in an e-mail message sent on April 11, 2006, to the contract specialist, the contractor lacks documentation to support the assertion that the Government ordered the items on the invoice; the contractor indicated that it relied upon verbal communications. In the message, the contractor informed the contract specialist:

I don't care how things look or seem. I also understand how these matters are supposed to proceed, however, when someone 'screws up' the scope of the work, as badly as it was on this project, it would be unconscionable to stop the installation half way through and wait for further approvals. We did not make the [sic] any decisions to move forward with additional equipment and work without being told to do so. If there is a problem with procedures, we will not be the party to be blamed for them.

Exhibit B at 30.

12. In an e-mail message of May 10, 2006, the program analyst informed the contractor that the Government intends to return items not included in the contract. Exhibit B at 32. The contractor responded by e-mail the following day, inquiring if an option other than return exists, as the contractor is not accepting the return of equipment that was installed and used. Exhibit B at 34.

13. Before resolving the contractor's request for payment, the contract specialist inquired specifically about written approval for the items. When the contractor provided no evidence of written approval, the contract specialist sought information regarding when items were ordered and installed, and the work completed. Exhibit B at 41-45. For example, an e-mail message sent on May 23, 2006, by the contract specialist informed the contractor:

We [the contract specialist, contracting officer, and a senior contracts officer] need to know more information about the second invoice in order to proceed with payment. We need to know the circumstances surrounding the quote, request, authorization to do the installation and an explanation of the various line items on the invoice. Without this information, we will have to return the invoice to you until we have sufficient information to make payment.

Exhibit B at 36. In an e-mail message of July 26, 2006, the contractor stated that "additional equipment" was installed at the same time that the "original equipment" was installed, and that the items were ordered verbally by the program analyst. Exhibit B at 45-47.

14. In its statement of undisputed facts, the Government avers that the contracting officer who signed the contract retired on July 31, 2006, and that the contract specialist, who possessed a warrant as a contracting officer, succeeded her as the contracting officer on this contract. The contractor does not dispute these assertions. The Board concludes that the contract specialist was the contracting officer on this contract as of August 1, 2006.

15. In an e-mail message dated August 2, 2006, addressed to the contract specialist the contractor stated:

The additional equipment, material and labor, was verbally ordered by [the program analyst] on February the 15th, 2006. I have a signed work order that shows acceptance of work on the first day, equipment left on the site, approval of equipment to be ordered and left on site for completion of system installation on the 21st of February. All installation work of originally ordered and subsequently ordered equipment was completed on Friday February 24, 2006.

Any trips after this date were related to programming changes. Programming changes are free for a certain period of time after the original installation. We would be very happy to 're-start the clock' on these free programming changes, once the final invoice has been paid.

Exhibit B at 48. The only work order dated February 15 in the record is that discussed in Finding 9; all identified equipment falls within the scope of the seventeen line items of the contract. The reference in that work order to February 21, 2006, states: "Equipment Left in USDA-FSIS possession: - balance of all equipment ordered." Not only does the document not identify specifically what that equipment may be, but also that date remained in the future at the time the dispatch ticket was presented. Exhibit B at 9. The February 15 document does not reflect Government authorization or acceptance of any items not included in the seventeen line items of the written agreement.

16. By letter dated August 10, 2006, the contract specialist (i.e., the contracting officer) responded in writing to the contractor's invoice of March 29, 2006. The letter specifies that the program office asserted that neither verbal nor written approval was given. Only a price quote had been requested. In response to the request for a quote, the contractor provided "client invoices" for proposed equipment and labor. Further, the letter states:

After review, it has been determined that the Government did not authorize the purchase of any additional equipment beyond the original contracted amount of \$24,897.76. Your invoice in the amount of \$14,432.88 is being returned. You are asked to please contact the undersigned contracting specialist to schedule a day and time to uninstall and remove all of the equipment that was not authorized to be installed at the Government facility. All documentation of the manufacturer's warranty for the approved equipment must be provided to this office no later than 30 days from the date of this letter.

Exhibit B at 49.

17. By letter dated September 20, 2006, the contractor filed a timely appeal with a predecessor to this Board. The contractor states that the basis of the dispute:

has resulted from oral agreements made for equipment and services that were beyond the original contracted agreement and were made between [the contractor's owner] and [the program analyst] who was designated as the point of contact and who portrayed herself to be an authorizing representative of USDA Food and Safety Inspection Service Department of Alameda, California. It was during the installation process of the contracted work #

GS35F0369K that the oral agreements outside of this written contract, were made between [the two individuals] for the additional equipment and services.

Exhibit A. In the notice of appeal, the contractor states the belief that payment for the services performed “was not rendered because [the program analyst] had not taken the proper steps to secure authorization for the additional services and equipment already rendered.” Exhibit A.

Discussion

Each party has moved for summary relief based upon the existing record. The contractor claims entitlement to relief based upon alleged oral agreements with the program analyst; in support, the contractor uses the terms estoppel and implied-in-fact contract. The Government contends that the contractor is not entitled to relief because there is no bilateral written modification and because the contractor alleges that it entered into the requested modification with an individual who lacked authority to so bind the Government.

Summary Relief

With a motion for summary relief, the moving party bears the burden of establishing the absence of any genuine issue of material fact to resolve its request; all significant doubt over factual issues must be resolved in favor of the party opposing summary relief. At the summary relief stage, the Board may not make determinations about the credibility of witnesses or the weight of the evidence. *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 249 (1986). However, it is also true that “the party opposing summary judgment must show an evidentiary conflict on the record; mere denials or conclusory statements are not sufficient.” *Mingus Constructors, Inc. v. United States*, 812 F.2d 1387, 1390-91 (Fed. Cir. 1987) (citations omitted). To preclude the entry of summary relief, the non-movant must make a showing sufficient to establish the existence of every element essential to the case, and on which the non-movant has the burden of proof at trial. *Celotex Corp. v. Catrett*, 477 U.S. 317, 322-23 (1986). When a motion is made and supported as required in Federal Rule of Civil Procedure 56(a), the adverse party may not rest upon the mere allegations or denial in its pleadings, but must set forth specific facts showing there is a genuine issue for trial. Fed. R. Civ. P. 56(e); *Celotex*, 477 U.S. at 324; *InterFreight Transport Systems, Inc. v. Department of Agriculture*, CBCA 129 (Mar. 14, 2007).

The Contract

The contracting officer had issued and CBT received the document marked award of contract. Findings 1, 4. The numbering on the document is not controlling in resolving the

matters in dispute. It is not material if the contract came into existence with the signature of the contracting officer or the performance by the contractor. A contract arose between the parties under the terms and conditions proffered by the Government within the document for the specific line items at a firm, fixed price.³

In its submission regarding summary relief, the contractor at times disavows the contract. The statement that FAR 52.212-4 is “incorporated by reference” means that the clause (its terms and conditions) is part of the contract, although the actual clause need not be physically attached to the contract or purchase order. The contract does not state that the clause is attached. Therefore, the contractor unavailingly asserts that the clause “was never attached to the Contract as is stated on the Contract nor was Contractor given any knowledge that this [clause] was a term and a condition of the contract[.]” Contractor Opposition at 2-4. The document puts the contractor on express notice of the terms and conditions that constitute the contract.

Contrary to the implications suggested by its invoices and dispatch tickets, Findings 5, 9, 10, the contractor could not unilaterally create a contract with the Government or modify the contract to add equipment, material, or labor and related charges. The fixed-price contract had specific line items and pricing. This contractual vehicle specifies the terms and conditions under which the contractor was to perform as well as the obligations of the Government. The contract cannot be read as an invitation for the contractor to provide equipment or labor in addition to the line items and simply thereby obligate the Government to provide compensation at rates the contractor deems appropriate.

Authority to Bind the Government

The principle is well established that the Government can only be bound by those with authorization to bind it. The Federal Circuit has quoted the Supreme Court, “[A]nyone entering into an arrangement with the Government takes the risk of having accurately ascertained that he who purports to act for the Government stays within the bounds of his authority[.]” *Federal Crop Insurance Corp. v. Merrill*, 332 U.S. 380, 384 (1947), and opined that the Court’s admonition:

³ The contracting officer references a “quote” from CBT. It is unclear if a quote or offer was submitted. A quotation is not an offer. However, given the performance by CBT, for purposes of resolving the matters before the Board, a contract arose based upon the Government-proffered terms and conditions with CBT’s actions. 48 CFR 13.004 (2005).

is firmly grounded in the public policy goal of protecting the public treasury from depletion by claims brought pursuant to unauthorized government contracts. The United States government employs millions of civilian employees. “Clearly, federal expenditures would be wholly uncontrollable if Government employees could, of their own volition, enter into contracts obliging the United States.”

Flexfab, L.L.C. v. United States, 424 F.3d 1254, 1260 (Fed. Cir. 2005) (citations omitted).

The contractor seeks relief based upon alleged oral agreements made between the program analyst and the contractor. The contractor states in its complaint that the program analyst “was designated as the point of contact and acted as an authorizing representative of USDA Food and Safety Inspection Service Department of Alameda, California during the installation process of the awarded contract[.]” Complaint at 2. In the answer, the Government admits that the individual was designated as the point of contact and is, and was during the installation process, employed in Alameda, California. The Government denies the remaining allegations. Answer at 1. In seeking summary relief, regarding the invoice for additional payment, the Government contends that the program analyst lacked the authority to modify the contract, either verbally or in writing. Government Motion at 7. The contractor has not responded to the assertion, or attempted to disavow its understanding, as expressed in the notice of appeal, that the program analyst had not secured authorization for the additional services and equipment, Finding 17. The contractor does not present evidence sufficient to create a question of fact that reasonably could lead one to conclude that the program analyst had authority to enter into the contract modification proposed by the contractor.

The Board can assume that, to the contractor, the program analyst *acted* as an authorized agent of the Government. This appearance does not equate to the program analyst *being* an authorized agent. The contractor does not intimate that the program analyst was authorized to expand the scope of the contract as requested by the contractor. The Government, not the contractor, is in the position to know and verify the authority (or lack or limit thereof) that the program analyst possessed. The Board has found, and the contractor has pointed to, nothing in the record that would support a reasonable conclusion that the program analyst was authorized to effectuate the contractor-proposed modification. Nothing at this stage of proceedings suggests that a delegation of authority had been given to the program analyst. The contract specifies that the office administering the contract is located in Maryland, a location remote from the program analyst. The program analyst and the contract specialist corresponded regarding the limits of the authority of the program analyst. Even assuming that those limitations of authority were not expressly revealed to the contractor, that lack of communication does not vest the program analyst with legal authority

she did not possess. The Board concludes that the program analyst lacked the authority to enter into the contract modification proposed by the contractor.

What controls the resolution of this dispute is the fact that no Government employee with authority to modify the contract as requested authorized the modification.⁴ The contractor installed equipment and expended labor without authorization to do so. Neither the contracting officer nor the contract specialist authorized work in addition to the written contract. Findings 13, 17. As a result, the contractor-proposed modification cannot be read into the contract. The contract remains as written, unmodified.

Matters Raised by the Contractor

Referencing the doctrines of promissory and equitable estoppel, as well as implied-in-fact contracts, the contractor maintains that it is entitled to summary relief as a matter of law.

Regarding estoppel, the contractor contends that the program analyst and the contract specialist:

knew the truth of the Contract agreed to and should be precluded both at law and in equity from denying or asserting the contrary of any material fact which by their words, conduct and intention, induced CBT, who was excusably ignorant of the true facts and who had a right to rely upon the words and conduct to believe and act upon them as a consequence reasonably to be anticipated, changed its position in such a way that it would suffer injury if such denial or contrary assertion was allowed. It would be unconscionable to allow FSIS to resile [sic].

⁴ The Board does not resolve the Government's allegation that the lack of a written bilateral modification alone is dispositive of the dispute, *Mil-Spec Contractors, Inc. v. United States*, 835 F.2d 865, 868-69 (Fed. Cir. 1987) (various distinctions "do not undercut the basic principle enunciated in *SCM* that an oral modification of a written contract, which may be modified only by bilateral written agreement, is ineffective"); *SCM Corp. v. United States*, 595 F.2d 595, 598 (Ct. Cl. 1979) ("Oral understandings which contemplate the finalization of the legal obligations in a written form are not contracts in themselves. . . . We note that this case does not squarely present the question of the enforceability of oral contracts with the Government."). Instead, the Board focuses upon the other aspect of the Government's motion, namely that the contractor relies upon alleged agreements with an individual who lacked authority to bind the Government to the proposed modification.

Contractor Opposition at 5.

This Board lacks authority to resolve disputes premised upon a theory of promissory estoppel. *P.J. Dick, Inc. v. General Services Administration*, CBCA 461 (Mar. 23, 2007). To prevail under a theory of equitable estoppel against the Government, the contractor must demonstrate in addition to general elements of such estoppel, the actual authority of the individual upon whose conduct it relied, and some form of “affirmative misconduct” by that individual. *Rumsfeld v. United Technologies Corp.*, 315 F.3d 1361, 1377 (Fed. Cir. 2003); *Zacharin v. United States*, 213 F.3d 1366, 1371 (Fed. Cir. 2000).

The conduct of the program analyst is not pertinent to the inquiry because of her lack of authority to modify the contract as the contractor requests. The contractor has suggested no affirmative misconduct by the contract specialist or contracting officer that could have induced the contractor to install equipment and materials in addition to those in the written contract.

Moreover, one of the basic elements of estoppel requires the contractor to show that it was not aware of the true facts. The contractor was aware that authorization had not been obtained for its extra-contractual actions as of March 20 and 21 (before work was complete). Finding 9. With its submission of the invoice in dispute, the contractor informed the program analyst, “I suppose that we need to request approval for this to be done, etc.[.]” thereby conveying an understanding that approval had not been obtained at that time. Finding 10. The contractor has not presented evidence sufficient to create a question of fact as to its knowledge or awareness at the time of installation. The contractor has not made a showing sufficient to sustain its theory of estoppel at the summary judgment stage.

In order to establish the existence of a binding implied-in-fact contract, a party “must show: (1) mutuality of intent to contract; (2) consideration; (3) an unambiguous offer and acceptance; and (4) *actual authority on the part of the government’s representative to bind the government*. *Schism v. United States*, 316 F.3d 1259, 1278 (Fed. Cir. 2002) (*en banc*).” *Flexfab*, 424 F.3d at 1265. Moreover:

The elements of an implied-in-fact contract are the same as those of an oral express contract. One of the elements Night Vision was required to show was “actual authority on the part of the government’s representative to bind the government.”

Night Vision Corp. v. United States, 469 F.3d 1369, 1375 (Fed. Cir. 2006) (citations omitted); *petition for cert. filed*, 75 U.S.L.W. 3474 (U.S. Feb. 16, 2007) (No. 06-1156). At this summary relief stage, the Board has determined that the program analyst lacked actual

authority to bind the Government to the contractor-proposed modification. Without this critical element, an implied-in-fact contract did not arise. Also, as evidenced by the contractor's varying pricing for equipment and labor, and the express statements of the contract specialist disapproving the pricing without support, an unambiguous offer and acceptance never occurred. Findings 2, 5-6, 10.

The contractor raises specific grounds in opposing the Government's motion for summary relief and in seeking summary relief. The contractor's disputes with the Government's characterization of the issues, facts, and law do not impede or alter the resolution of the motions and this appeal.

Decision

The Board denies the contractor's motion for summary relief and grants the Government's motion for summary relief. Accordingly, the Board **DENIES** the appeal.

JOSEPH A. VERGILIO
Board Judge

We concur:

CANDIDA S. STEEL
Board Judge

H. CHUCK KULLBERG
Board Judge