ARMED SERVICES BOARD OF CONTRACT APPEALS

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| Appeal of -- | ) | |
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| E. L. Hamm & Associates, Inc. | ) | ASBCA No. 48600 |
| | ) | |
| Under Contract No. N62470-94-D-4445 | ) | |

APPEARANCE FOR THE APPELLANT: Mr. Robert N. Davis
Vice President

APPEARANCES FOR THE GOVERNMENT: Fred A. Phelps, Esq.
Associate General Counsel
Audrey J. Van Dyke, Esq.
Associate Counsel (Litigation)
Naval Facilities Engineering Command
Washington, DC

OPINION BY ADMINISTRATIVE JUDGE TING

E. L. Hamm & Associates, Inc. (Hamm or contractor) appealed from a contracting officer's (CO) decision denying its claim for the cost of a fence it installed to replace the one it saw at a pre-bid site visit. Hamm contends that the fence should have been furnished as a part of the government-furnished facilities under its contract. Only entitlement is before us. We deny the appeal.

FINDINGS OF FACT

1. On 14 October 1993, the Navy, through its Public Works Center in Norfolk, Virginia, awarded Contract No. N62470-94-D-4445 to Hamm. The contract was for full management and maintenance of all Navy housing assets described in the contract and other real property as well as equipment, systems, and household appliances. The contract was of a combined firm fixed-price and indefinite quantity service type. The total contract price was $4,941,256.03. (R4, tab 1)

2. Section C.3 of the contract, GOVERNMENT FURNISHED FACILITIES, EQUIPMENT, MATERIALS AND SERVICES, provides, in part:

> a. Government Furnished Facilities. Building CA-12 (See Attachment J-C2).

(R4, tab 1 at C-5)

3. Attachment J-C2, GOVERNMENT FURNISHED FACILITIES, provides, in part, as follows:

> The Government will provide an Administration, Shop and Storage building for the Contractor to use during the term of the contract. This building is located in the Camp Allen area. The Contractor may also utilize the concrete pad adjacent to Building CA-12. Any temporary facilities as well as any improvements, alterations, including minor changes to the facilities or grounds, is subject to review and approval by the Contracting Officer. Building CA-12 will be made available to the Contractor 15 calendar days prior to start date of the contract. It shall be the responsibility of the Contractor to maintain Building CA-12 to include keeping it clean and orderly at no expense to the Government. . . .

(R4, tab 1 at J-C2-1)

4. The contract contains FAR 52.245-4 GOVERNMENT-FURNISHED PROPERTY (SHORT FORM) (APR 1984), which states, in part:

> (a) The Government shall deliver to the Contractor, at the time and locations stated in this contract, the Government-furnished property described in the Schedule or specifications. If that property, suitable for its intended use, is not delivered to the Contractor, the Contracting Officer shall equitably adjust affected provisions of this contract in accordance with the Changes clauses. . . .

(R4, tab 1 at I-22)

5. Paragraph L.11 of the solicitation, FAR 52.237-1 SITE VISIT (APR 1984), provides:

> Offerors or quoters are urged and expected to inspect the site where services are to be performed and to satisfy themselves regarding all general and local conditions that may affect the cost of contract performance, to the extent that the information is reasonably obtainable. In no event shall failure to inspect the site constitute grounds for a claim after contract award.

(R4, tab 1, Amend. 0001 at L-5)

6. Prior to submitting its technical proposal, William Sewell (Sewell) visited the site on behalf of Hamm. At building CA-12, he saw a concrete pad abutting the building. He also saw an 8-foot chain link fence with barbed wire on top surrounding the concrete pad on three sides with a portion of Building CA-12 constituting the fourth side. The fence was anchored in concrete. (Tr. 16-18, 28)

7. During the site visit, the government representative did not mention anything about the fence. Nor did anyone on the tour inquire about the fence. (Tr. 30, 35-36) There was no specific mention in the solicitation that the fence would be provided as a Government-furnished facility or as a part of such a facility (tr. 35). Sewell assumed at the time that the fence was a part of the Government-furnished facilities (tr. 30). As a consequence of what Sewell saw during the site visit, Hamm did not provide for the cost of a fence in its proposal (tr. 9, 31). Since the fence was embedded in concrete and had every indication of being a permanent part of the concrete pad at Building CA-12, we find that Hamm reasonably concluded that the fence was a part of the government-furnished facilities it was to receive. Sewell testified that had he known the fence was not going to be provided, he would have included the cost of the fence in Hamm's proposal (tr. 31). The Government evaluated Hamm's proposal and did not question the lack of a fence (tr. 19).

8. Section H.12 a., CONTRACTOR EMPLOYEES, of the contract required "The Contractor shall provide to the Contracting Officer the name(s) of responsible supervisory person(s) authorized to act for the Contractor" (R4, tab 1 at H-5). Linda R. Hazzard (Hazzard) was the Government's contract administrator (tr. 49-50). It was Hazzard' s standard practice at all her pre-start meetings to inquire who had authority to act for the contractor (tr. 51). When this question was raised at the pre-start meeting, Paul Brown, Hamm's General Manager, and Roy Marks (Marks) raised their hands (tr. 51). Although Hazzard testified that she had no recollection that Joachim G. Heckert (Heckert) raised his hand, she acknowledged that Heckert's name was not provided to her as someone who had authority to act for Hamm (tr. 62, 64).

9. As it turned out, the fence that Sewell saw during his pre-bid site visit did not belong to the Government but to the then incumbent contractor, J&J Maintenance Services (J&J). Apparently, the Government had customarily allowed contractors to install their own fences at Building CA-12, and allowed them to remove their fences at the conclusion of their contracts (R4, tab 5 at 2). Prior to vacating the premises, J&J asked to take the fence. Hazzard checked with the Public Works Center attorney who advised that J&J should be permitted to take the fence on the condition that it take it "lock, stock, and barrel," and refill the holes at the footings after the fence was removed. (Tr. 61) Prior to J&J's request, Hazzard did not know that the fence belonged to J&J (tr. 62).

10. When Hamm showed up for work on 1 April 1994, "the fence was gone." In removing the fence, J&J had "cut the posts off at ground level, because the posts were

imbedded in concrete." (Tr. 20) Two weeks after it started work, Hamm saw an "imminent need for the fence." It raised the issue verbally with the Government. The Government took the position that it was Hamm's "responsibility to get a fence, and they [the Government] will not pay for it." (Tr. 20-21)

11. In a letter dated 29 April 1994 to the contract administrator (Hazzard), written on E. L. Hamm & Associates letterhead, Heckert, who was Hamm's quality control safety manager (tr. 22) wrote:

> Forwarded herewith for your review, comment and approval is a sketch of the security fence we propose to install around the hardstand adjacent to Building CA-12. This fence is necessary for the security of our vehicles and equipment in support of Contract N62470-90-C-4455 [sic]. Upon receipt of your approval work will proceed at no cost to the government.

(R4, tab 4) The enclosed sketch contained at its upper right hand corner the note "CONTACT: ROY MARKS" (R4, tab 4). Hazzard testified that she read the letter to mean that Hamm was waiving its right to be paid for the fence (tr. 77). We find the Government reasonably inferred that Heckert was transmitting the sketch and offering to install the fence at no cost on behalf of those with authority at Hamm.

12. According to Robert N. Davis (Davis), Hamm's Vice President and Contracts Manager, Heckert "did not have the authority to make changes to the terms and conditions of the contract, nor did he have the authority to give up our right to a claim." According to Davis, Hamm's corporate staff did not know that Heckert had submitted the sketch of the replacement fence. Davis testified what Heckert really meant was that Hamm would proceed without cost to avoid "getting wrapped up in a legal discussion," and that Heckert was "just trying to get approval for a fence design, so that he could proceed without having to worry, later, about objections from the Navy, about acceptability." (Tr. 22) Heckert did not testify. With respect to the statement in its letter that "[u]pon receipt of your approval [of the sketch] work [presumably installation of the fence] will proceed at no cost to the government," Hamm did not furnish a credible explanation that it did not mean what it plainly said.

13. Since the contract required that any temporary facilities and improvements be approved by the Government, Hazzard forwarded the fence sketch to Mr. Bob Flannigan (Flannigan) of the base housing office for approval. Flannigan verbally approved the fence on 4 May 1994. (Tr. 53; R4, tab 4) On the same day, Hazzard verbally notified Marks of the approval (tr. 53). Marks, who had authority to act for Hamm, did not testify. We presume that he was aware of the contents of Heckert's 29 April 1994 letter. There is no evidence that he changed or in any manner objected to the no-cost proposal Heckert submitted when Hazzard notified him that the fence sketch had been approved.

14. The fence at Building CA-12 was among the topics the parties discussed at a meeting held on 24 June 1994. By this time, Hamm had already installed the fence. There is no evidence that, prior to its installation, the Government was told that it would be charged for the fence. In a letter dated 7 June 1994 to the CO, Hamm stated:

> . . . E. L. HAMM did not include the cost of a fence in our price, but have had a new fence installed at a cost to us of about $5,000 in order to protect our resources stored at the Government provided facilities. . . . Since we were not a party to previous agreements with contractors by the Navy at this installation, there is no way we could have reached any conclusion other than that the Government would provide the fence which was on-site during the proposal site visits. The Navy had an obligation to disclose to bidders that the fence was owned by the previous contractor and would be removed. While the Navy has raised an issue of ownership of the fence, particularly if the Navy pays for the fence, the facts remains that E. L. HAMM had to install a fence at its own expense when we had every right to expect the fence seen during the site visit to be there after award.

(R4, tab 5) Based on testimony in the record, we find that had the Government been told that it would be liable for the cost of the fence, the Government could have had its own forces install the fence, negotiated with Hamm or another contractor to put up the fence, or decided not to have the fence installed at all (leaving Hamm to its remedies under the contract). According to Hazzard, by the time she was notified that the fence had been installed, none of these options was available to her. (Tr. 58) When Hamm completed the contract, it asked the Government what to do with the fence. The Government directed Hamm to remove the fence. (Tr. 70-71)

15. By letter dated 23 June 1994, Hamm submitted a claim for $5,210 for "the installation of a fence at Camp Allen, building CA-12" (R4, tab 7). In a decision issued on 17 February 1995, the CO denied the claim. He took the position that the Government made no mention of ownership of the chain-link fence during the pre-proposal site visit, and the contractor incorrectly assumed that the fence would be provided along with the building. Relying on Section C.3 and Attachment J-C2, the CO also took the position that the contract made no representation with respect to a fence. He contended that the contractor recognized this when it offered to proceed "at no cost to the Government." (R4, tab 9) Hamm timely appealed the CO's decision by notice dated 23 March 1995.

## DECISION

The fence that Hamm saw during its site visit did not belong to the Government. It belonged to J&J, the incumbent contractor. This fact should have been revealed to Hamm. Since the fence was embedded in concrete, and had every indication of being a permanent part of the concrete pad abutting Building CA-12, we have found that Hamm reasonably concluded that it was a part of the Government-furnished facilities it was entitled to receive even though neither the contract schedule or specifications mentioned the fence. The contractor is entitled to rely on the conditions affecting the work which it observed during site inspection. *See Chem-Tle Environmental Services, Inc.*, ASBCA No. 39620, 99-1 BCA ¶ 30,193 at 149,430. We conclude that when the Government failed to deliver the fence, Hamm was entitled to an equitable adjustment under the Changes clause, as provided by the GOVERNMENT-FURNISHED PROPERTY clause, FAR 52.245-4. *Cf. Thompson Ramo Wooldridge, Inc. v. United States*, 175 Ct. Cl. 527, 361 F.2d 222 (1966) (contractor entitled to equitable adjustment for Government-furnished property not suitable for its intended use).

The story does not end here, however. In this case, upon being told that it was the contractor's responsibility to get a fence and the Government would not pay for it, Heckert forwarded a sketch of a fence seeking approval and notified the Government that "Upon receipt of your approval work will proceed at no cost to the government." Although the government contract administrator was given to understand at the pre-start meeting that only Messrs. Brown and Marks had authority to act for the contractor, we have found that the Government reasonably inferred that Heckert was transmitting the sketch and offering to install the fence at no cost on behalf of those with authority at Hamm. We note that Heckert wrote the letter on E. L. Hamm & Associates letterhead. Furthermore, after the proposed fence was approved, Hazzard verbally notified Marks of the approval. There is no evidence that Marks, who had authority to act on behalf of the contractor, and who we presume to be aware of the contents of the contractor's 29 April 1994 letter, changed or otherwise objected to the no-cost proposal Heckert had submitted. Even if Marks was not aware of the contents of the 29 April 1994 letter, he should have known of it, at the time of acceptance of its terms. It is significant that Hazzard called Marks, not Heckert.

We conclude that Hamm waived its entitlement to an equitable adjustment when it agreed to put up the fence at no cost. "' Waiver' is often inexactly defined as ' the voluntary relinquishment of a known right.' When the waiver is reinforced by reliance, enforcement is often said to rest on 'estoppel.'" RESTATEMENT (SECOND) OF CONTRACTS § 84 cmt. b (1981). Estoppel by waiver is described in 31 C.J.S. *Estoppel and Waiver* § 121 (1996): "[W]here a person has, with knowledge of the facts, acted or conducted himself in a particular manner, or asserted a particular claim, title, or right, he cannot afterward assume a position inconsistent with such act, claim, or conduct to the prejudice of another who has acted in reliance on such conduct or representations." Here, Hamm by its 29 April 1994 letter induced the Government to allow Hamm to install the fence on the reasonable belief that Hamm had waived its right to equitable adjustment. As a result of Hamm's representation, the Government did not pursue other options which

might have been available to it. Applying the principle of estoppel by waiver, we conclude that Hamm is now barred from seeking an equitable adjustment for installing the fence. *See Universal Painting Corp.*, ASBCA No. 20536, 77-1 BCA ¶ 12,355 at 59,796 (relying on former section (§ 108) of C.J.S.). The result we reach here is also consistent with *Construction Foresite, Inc.*, ASBCA No. 42350, 93-1 BCA ¶ 25,515 at 127,069, where we held that an agreement to perform a no-cost field change was binding.

The dissent says that he was the only panel member to hear the evidence and observe the witnesses, implying that the rest of the panel is at a disadvantage in deciding this appeal. In this case, witnesses testified to what they believed were the facts surrounding the dispute, and no serious credibility issues have been raised. If there were evidence other than that we cite in the record that could have led the majority to a different conclusion, the dissent has not pointed out what it is.

The dissent points out that estoppel is an affirmative defense, and asserts that the Government has waived this defense when it failed affirmatively to plead it in its answer. Paragraph 6 of Hamm's complaint alleged that "He [referring to Hamm's assistant project manager Heckert] further indicated that our proceeding [with installation of the fence] would not cost the Government, but we fully expected the Government to pay us for the fence." The Government's answer to this sentence stated, "Affirmatively aver that it is unreasonable to state that installation of the fence will be at no cost to the Government, if at the same time there is an unstated expectation that the Government will reimburse such costs." Although the Government did not use the legal term "estoppel by waiver," its defense clearly made the point that Hamm cannot have it both ways. Its answer provided notice that its position was that it was not liable when Hamm installed the fence upon its representation that the fence would be installed at no cost. Moreover, the CO's decision was based, in part, on Hamm's offer to provide the fence at no cost. Additionally, Government counsel's opening statement at the hearing made the point that the Government did not pursue other options in reliance on Hamm's letter stating that the fence would be put up at no cost. We believe the issue of estoppel by waiver was squarely before the Board, and Hamm had every opportunity to meet it.

Although as a secondary defense, the Government has consistently denied the fence claim on the theory of waiver. During the hearing, the Government made a *prima facie* showing of offer, acceptance and detrimental reliance. The burden then shifted to Hamm. No countervailing proof by Hamm personnel involved in the transaction was presented.

## CONCLUSION

Because Hamm is estopped by waiver, we hold it is not entitled to an equitable adjustment for the fence it installed at Building CA-12.

Accordingly, this appeal is denied.

Dated: 2 January 2001

PETER D. TING
Administrative Judge
Armed Services Board
of Contract Appeals

I dissent (see separate opinion)

I concur

RONALD A. KIENLEN
Administrative Judge
Armed Services Board
of Contract Appeals

I concur

STEVEN L. REED
Administrative Judge
Armed Services Board
of Contract Appeals

I concur

MARK N. STEMPLER
Administrative Judge
Acting Chairman
Armed Services Board
of Contract Appeals

EUNICE W. THOMAS
Administrative Judge
Vice Chairman
Armed Services Board
of Contract Appeals

OPINION BY JUDGE KIENLEN, DISSENTING

The majority holds that the appellant is barred from recovery for the government's breach because of estoppel by waiver, 31 C.J.S. Estoppel and Waiver § 121 (1996), and because of a no-cost field change, *Construction Foresite, Inc.*, ASBCA No. 42350, 93-1 BCA ¶ 25,515 at 127,069. I was the only member of this panel to hear the evidence and observe the witnesses. I am compelled to dissent.

This case is not about estoppel by waiver as decided by the majority. Estoppel is an affirmative defense. *Foote Mineral Company v. United States*, 654 F.2d 81, 86 (Ct. Cl. 1981). Under Fed. R. Civ. P. 8(c) and ASBCA Rule 6(b) it must be set forth in the pleadings. This defense was not raised by the Government before trial. It was raised but fleetingly by the Government, and then only in its opening statement. No substantial credible evidence of estoppel by waiver was introduced at trial. In its brief the Government did not argue, and thus abandoned, the affirmative defense of estoppel.

Nor, is this case about a change in the drawings or specifications as a result of a change in field conditions. It is simply not a no-cost field change case, as argued by government counsel and accepted by the majority without discussion. *Construction Foresite, Inc.*, ASBCA No. 42350, 93-1 BCA ¶ 25,515 at 127,069, cited by Government counsel and the majority, is inapposite.

*The Dispute*

Instead, this case is about responsibility for providing the fence, or whether the Government breached the contract by failing to provide the existing fence at CA-12. It is clear that the Government was not opposed to appellant installing a fence for its security needs, indeed, J & J had such a fence which the Government allowed J & J to remove. On inquiry by the appellant, the Government rejected any responsibility for providing a fence. Because the Government refused to provide a fence, Mr. Heckert, who was in charge of appellant's safety and quality control program, sought written approval from the Government to install a fence nearly identical to the pre-existing fence, and indicated that work would proceed at no cost to the Government. Mr. Heckert was known to the Government not to have authority to bind the contractor. The Government reviewed the fence design and orally granted approval. The fence was installed.

The appellant filed a claim for the Government's breach of its duty to provide the fence. The Government issued a final decision denying the claim, stating that it never promised a fence and asserting that the appellant acknowledged as much when it wrote the letter stating it would proceed to install the fence at no cost. The relevant language in the final decision stated:

> Nothing in the subject contract indicates that the Government is responsible for providing a chain-link fence around the concrete pad located at Building CA-12. In fact, Section C.3 and Attachment J-C2 . . . . clearly states those facilities to be provided and provides bidders who may not have been available to attend the pre-proposal site visit with all information necessary to prepare a proposal with respect to facilities provided by the Government. No mention is made anywhere in the contract to a fence surrounding either the building or the concrete pad. Moreover, you recognized this fact. In your letter dated 29 April 1994, you forwarded plans for your fence installation to the Government for review. You specifically stated in this letter that the fence was necessary for the security of your vehicles and equipment and that you would proceed at no cost to the Government.

(R4, tab 9) The contractor filed its appeal. In its complaint the appellant alleged that the Government promised a fence, because the fence was shown attached to the CA-12 site during the site-visit. As damages, the appellant sought the cost of the replacement fence. In its answer the Government asserted as its only defense that it never promised a fence.

The parties went to trial on that issue. The appellant put on its case with the witnesses who made the site visit and prepared the contractor's bid. In its decision the majority agrees with the appellant, as do I, that the government's failure to provide the fence at CA-12 was a breach of the contract.[1] Having found in favor of the appellant, the majority goes off on its own theory and concludes that the appellant was barred from recovery because of estoppel by waiver.

*Estoppel - An Affirmative Defense*

According to the majority estoppel by waiver occurs when one party voluntarily relinquishes a known right and the other party relies on that waiver to its detriment. RESTATEMENT (SECOND) OF CONTRACTS § 84 cmt. b (1981); 31 C.J.S. Estoppel and Waiver § 121 (1996). Estoppel is an affirmative defense which attacks a party's legal right to bring a claim, as opposed to attacking the truth of the claim. Under Fed.R.Civ.P. 8(c) and ASBCA Rule 6(b) that affirmative defense must be timely set forth in the pleadings. 31 C.J.S. Estoppel and Waiver § 212 (1996); *Foote Mineral Company v. United States*, 654 F.2d 81, 86 (Ct. Cl. 1981), citing *Tom W. Carpenter Equip. Co. v. General Elec. Credit Corp*., 417 F.2d 988, 990 (10th Cir. 1969), citing 4 A.L.R.3d 361.

In this case the Government did not plead estoppel or any other affirmative defense. The appellant was not given notice of this defense. It did not have Mr. Heckert or Mr. Marks as a witness. Each would have been relevant in defending against this affirmative

defense. This *pro se* appellant[2] was harmed by not having notice that it was required to defend against the defense of estoppel by waiver. Moreover, an affirmative defense that is not timely pled, as it was not in this case, is deemed to have been waived. *See, Diversey Lever, Inc. v. Ecolab, Inc.*, 191 F.3d 1350, 1353 (Fed. Cir. 1999); 31 C.J.S. Estoppel and Waiver § 204 (1996).

The burden of proof is on the Government, as the party asserting the affirmative defense. *See, McGraw-Hill, Inc. v. United States*, 623 F.2d 700, 708 n.12 (Ct. Cl. 1980). The majority erroneously shifts the burden of proof to the appellant. The majority presumes that there was an authorized waiver, in the absence of clear and convincing proof that the waiver was not authorized; and, the majority presumes that the Government relied on the waiver and changed its position to its detriment, in the absence of clear and convincing proof that the Government did not rely to its detriment.

*Authorized Waiver*

A waiver is a relinquishment of a known right. In this case, the so called waiver came from an agent of the appellant. The Government has the burden of proving that the agent was authorized to act. 31 C.J.S. at 729-30 (1996); 3 C.J.S. Agency § 501 (1973). Waiver has been more fully described as follows:

> It has been stated that waiver is not generally or lightly presumed. There is also authority that waiver is never presumed; and in the absence of evidence clearly tending to establish waiver; it will not be presumed or implied contrary to the intention of parties whose rights would be injuriously affected, unless by his conduct the opposite party has been misled to his prejudice into the honest belief that such waiver was intended or consented to. A presumption of waiver cannot rest on a presumption that the right alleged to have been waived was known.
>
> The burden of proving waiver is on the party claiming or asserting it, or alleging and relying on it, or raising an issue as to it. So, such party must prove the facts on which he relies for the waiver, the fact that he acted in reasonable reliance upon it, the fact that he was misled and prejudiced, the intention to waive, and knowledge on the part of the party charged with the waiver.

31 C.J.S. Estoppel and Waiver § 213 (1996) (footnotes deleted).

The majority found a waiver. The decision hinges on the Heckert letter, especially Heckert's statement that upon approval of the fence design, "work will proceed at no cost

to the government." The majority finds this letter and the surrounding circumstances to be compelling evidence that "the Government reasonably inferred that Heckert was transmitting the sketch and offering to install the fence at no cost on behalf of those with authority at Hamm."

There is no substantial credible evidence to support that finding. On the contrary, there was direct testimony by the appellant that Mr. Heckert did not have any authority to waive the appellant's claim for the Government's fence breach. There is no credible evidence, and the majority cites to none, that the Heckert letter was an authorized waiver of the appellant's claim. Thus, the only remaining issue is whether the Government was "misled" into the honest belief that such waiver was intended. 31 C.J.S. Estoppel and Waiver § 213. It is necessary therefore to first determine what the Government believed.

Faced with specific evidence that Mr. Heckert was not authorized to waive the appellant's claim, the majority found that "Ms. Hazzard testified that she read the letter to mean that Hamm was waiving its right to be paid for the fence (tr. 77)." Ms. Hazzard did not testify as to how she read or understood that letter at the time she received it or at any time during contract performance. She did not testify that she thought Heckert was authorized to waive the appellant's claim. She did not testify that she thought Mr. Marks was waiving the appellant's claim. She did not testify that she thought "Hamm was waiving" its rights. The testimony cited by the majority is as follows:

> Q. [leading question by counsel] Does the [Heckert] letter that you are holding in any way indicate that the contractor is waiving a right for payment?
>
> A. Yes, he is stating that he will provide the fence at no cost.
>
> Q. Does he state, in there – well, okay, it speaks for itself.

(Tr. 77)

As counsel suggests, the letter speaks for itself. Ms. Hazzard's testimony provides no other information. She testifies as to how the letter reads. Her testimony is not at all remarkable for what she says. On the contrary, her testimony is remarkable for what she does not say. She does *not say* that *at the time she received the letter* she understood Mr. Heckert to be waiving appellant's claim; and, she does *not say* she thought Mr. Heckert was authorized by the appellant to waive claims. Faced with no evidence, the majority presumes that what she did not say is precisely what she thought.

Not only does the majority find that she thought what she did not think, they find that it was reasonable for her to think so. That is, the majority finds that it was "reasonable" to conclude that Heckert was acting on behalf of those with authority at Hamm. Assuming for

the sake of argument that she actually thought so, we need to ask what was it that would make such an inference on her part a reasonable one.

Well, perhaps if Mr. Heckert had told her that he "was acting at the direction of Mr. Hamm," it would have been reasonable for her to make that inference; but, Mr. Heckert did not tell her that. Perhaps if Mr. Heckert had been pointed out to her as someone with authority to make changes to the contract on behalf of the appellant; but, he had not been pointed out as someone with authority. On the contrary, Ms. Hazzard knew that Heckert was not authorized to bind the contractor. Because she knew that Heckert was not authorized to bind the contractor, any belief that this was an authorized waiver would be unreasonable. Faced with this contrary evidence, the majority nevertheless presumes that the inference was reasonable.

Moreover, when the above testimony is placed in context, it becomes evident that Ms. Hazzard never looked upon the letter as a contractual document containing a waiver of any right by the contractor. The question immediately preceding the cited testimony was also a leading question by Government counsel:

> Q. I have one follow-up area with Rule 4 tab 4, which is the April [Heckert] letter. You were asked several questions on cross examination about the authority of the person who signed that letter.
>
> Anywhere in that letter, did you get the indication that the contractor was waiving a contractual entitlement to be paid for the fence?
>
> A. No, because there were no contract provisions for us to pay for the fence.

(Tr. 76) It was apparent to me upon hearing and observing the witness that the Government's estoppel, waiver, and reliance theory had just evaporated with that answer. Ms. Hazzard was absolutely convinced that the Government had no obligation to provide, and the contractor had no right to expect, a government installed fence. She was asked in the past tense if she "did get" an indication of a waiver. She testified as to how she had viewed the letter. She had not viewed the letter as a waiver. She had not relied on it in granting approval to install the fence.

Returning again to the testimony at the trial, counsel had to try and save her reliance theory. She immediately asked the follow up question cited earlier – a leading question to which Ms. Hazzard could give an answer more favorable to counsel's theory. That question was: "Does the letter that you are holding in any way indicate that the contractor is waiving a right for payment?" This question is different. It is in the present tense. It does not ask what the witness thought when the letter was received. It asks how the letter reads on its face. But, as counsel must have understood, how the letter reads on its face is not enough

to carry the Government's burden to prove that it was misled into believing that there was an authorized waiver of the appellant's claim.

The majority's finding that "the Government reasonably inferred that Heckert was transmitting the sketch and offering to install the fence at no cost on behalf of those with authority at Hamm" is not supported by substantial evidence. In fact, the evidence contradicts that finding, because the Government knew that the writer of the letter was not authorized to waive appellant's claim, and because the Government did not think that the letter was a waiver.

*Adverse Inferences*

In the absence of any substantial credible evidence to support its fact finding, the majority relies on a series of adverse inferences. The first is the majority' s observation that Mr. Heckert did not testify. The majority draws no express conclusion from this fact, but notes that the appellant offered no credible explanation of the "no-cost" statement in Heckert's letter. The majority seems to draw an adverse inference from the mere fact that Mr. Heckert did not testify. While it is hornbook law that it is appropriate to draw adverse inferences from the failure of a witness to testify when the witness should have testified, there was no reason for Mr. Heckert to testify in this case. The issues of waiver and estoppel were never part of the dispute at the contracting level. They were never raised in the pleadings. The only issue was whether the Government was required to provide a fence at CA-12. Because the Heckert letter was never an issue prior to trial, there was no reason for Mr. Heckert to be present to testify. Thus, Mr. Heckert did not "fail" to testify. He was not called because his testimony was not relevant to the only issue to be tried. Thus there was no basis to draw adverse inferences from the fact that Mr. Heckert did not testify.

The second adverse inference is that implied because Mr. Hamm "did not furnish a credible explanation that it [Heckert's letter] did not mean what it plainly said." While I find that Mr. Hamm's testimony is a plausible explanation of Mr. Heckert's intent to obtain approval of the fence so that needed security would no longer be delayed, I agree that the letter plainly speaks for itself. However, the question here is not what the letter said, but whether the letter was an authorized waiver. It was not the appellant's responsibility to prove that it was not a waiver. It was the Government's responsibility to prove that it was. And, there is no substantial credible evidence that the Government even *thought* that the letter was an authorized waiver.

The third adverse inference is really two separate inferences related to Mr. Marks. The majority observed that Mr. Marks did not testify and then they "presume" that Marks was aware of the contents of the Heckert letter.[3] There is no evidence in this record of the appellant's normal business practice which would allow the majority to draw a factual inference that Marks knew of the contents of the Heckert letter. The only basis for making

the majority's presumption is the drawing of an adverse inference due to the fact that Mr. Marks did not testify.

However, the role of Mr. Marks was never an issue in this case. As noted above, the issue at the time the dispute arose, after it arose, when the contracting officer's final decision was issued, and in the pleadings before this Board, was whether the Government had promised a fence at CA-12. The appellant had witnesses relevant to that issue. They testified. Mr. Marks' testimony was not relevant to that issue. The appellant was not on notice that Mr. Marks' testimony was relevant. Since he had no reason to testify, there was no basis to draw adverse inferences from the fact that Mr. Marks did not testify.

The second adverse inference drawn with respect to Mr. Marks was the majority's finding that there was "no evidence that he [Mr. Marks] changed or in any manner objected to the no-cost proposal Heckert submitted when Hazzard notified him that the fence sketch had been approved."[4] The majority does not point to any factual evidence that Mr. Marks knew of the contents of the letter, nor do they point to any factual evidence that would suggest that Mr. Marks was on notice that he had any reason to reject the contents of the letter. As with the first inference relating to Mr. Marks, the appellant was not on notice that Mr. Marks' testimony was relevant. Since he had no reason to testify, there was no basis to draw adverse inferences from the fact that Mr. Marks did not testify.

Furthermore, there is no evidence that the Government was misled into thinking that Mr. Marks knew of the contents of the Heckert letter. Not only is there no evidence that the government was misled, there is no evidence that Ms. Hazzard, who did testify, or Mr. Flannigan, who did not testify, even *thought* that Mr. Marks knew of the contents of the Heckert letter. There is evidence that Ms. Hazzard knew that Heckert was not authorized to waive any claim for the appellant. There is also evidence that, in spite of the fact that she knew Heckert was not authorized to waive appellant's claim, she made no inquiry of Mr. Marks as to whether the appellant was waiving its claim. Any adverse inferences to be drawn from a failure to testify should be drawn against the party with the burden of proof and in possession of the evidence, if any, to support that burden.

If Ms. Hazzard thought that Mr. Marks knew about the letter, and if Ms. Hazzard thought that Mr. Marks approved the statement that the fence would be installed at no-cost, Ms. Hazzard was present, testified, and could have so testified. The fact that she did not, raises a presumption that she did not so think.

Nevertheless, the majority concludes that "it is significant that Hazzard called Marks [to give approval to build the fence], not Heckert." The majority does not tell us why it is significant. Perhaps it signifies that Ms. Hazzard called Mr. Marks because she knew that Mr. Marks had authority to bind the contractor and Heckert did not. Perhaps it signifies that Ms. Hazzard did not ask Mr. Marks if the contractor was waiving its fence claim because she did not care. Perhaps it merely signifies that Ms. Hazzard looked at the sketch

of the fence and noticed that Mr. Marks was the identified point of contract. What is clear is that there is no evidence that Ms. Hazzard found it significant, or if she did, she did not tell us how or why it was. In my view, what is controlling is whether one of the parties viewed an event as significant.

*Reliance*

The second element of estoppel is reliance. The only mention of reliance in the record is contained in the Government's opening argument. There is no evidence anywhere in the record that the Government relied on the unauthorized waiver in the Heckert letter.

If the Government had relied on the Heckert letter it would have been easy for Government counsel to have elicited such testimony from Government witnesses. Government counsel and the *pro se* appellant were granted significant leeway in asking leading questions. No question, leading or otherwise, was asked concerning any possible Government reliance. No written or other evidence of reliance by the Government was introduced. Neither the Government counsel nor the majority opinion cites to any evidence that the Government, in fact, ever relied on Mr. Heckert's statement that the installation would proceed at no cost to the Government. In fact, Government counsel, although she raised the issue of reliance in her opening argument, abandoned that position in her brief.

Nevertheless, the majority seemingly, finds that the Government changed its position in reliance on the waiver in the Heckert letter.[5] In the absence of any evidence of reliance, the majority merely finds that the Government *could have* had its own forces install the fence, *could have* negotiated with Hamm or another contractor to put up the fence, or *could have* decided not to have the fence installed at all (leaving Hamm to its remedies under the contract). Instead of finding that the Government actually relied on the letter and would have made another choice, the majority speculates that the Government *could have* relied and *could have* made another choice. The majority creates "could have relied" as a new legal standard, and asserts that appellant's installation of the fence at no cost precluded the Government from exercising one of those "could have" options.

In context, none of those speculative, theoretical choices was ever remotely likely. While there was testimony that the government had extra fencing that it could have installed, there was extensive testimony that the government did not like fences, had no use for them, and was taking down fences all over the installation (which is why the government had extra fencing). (E.g., tr. 90) The import of this testimony made it clear that the government would not have gratuitously taken on the task of putting up a fence it had no need for and did not want, just to take the unwanted fence back down again after the appellant was finished with it. The Government had the month of April during which it could have exercised those choices, but did not. The Government did not; not because it could not; but, because it would not.

It was the government's position at the time the dispute arose, at the time appellant submitted its claim, at the time the contracting officer issued the final decision, and at the pleading stage of this appeal, that the government did not promise a fence, that the government had no obligation to provide a fence, and that any fence was solely the responsibility of the appellant. There was no equivocation, no hint of uncertainty, no hint of second thoughts, in the testimony of the government's witnesses – the government had no obligation to provide a fence. Only someone with the advantage of not having heard the testimony could conclude that the government changed its position concerning the fence, in reliance on Mr. Heckert's statement that the fence would be installed at no cost to the government. The government's position never changed, the appellant could put up a fence, just as did J & J, but the government would not pay for it. That had been the government' s position for 29 days, and Mr. Heckert's letter did not change the Government's position.

*The Heckert Letter*

This letter, which the majority inexplicably finds compelling, was of monumental insignificance to the Government at the time it was received. Although the request for the approval of the fence was in writing, the Government did not reply in writing. The matter of the fence was not treated as a modification of the contract. The Government treated the entire matter informally, all internal and external communications were handled orally by the Government. Ms. Hazzard made no inquiry of Mr. Marks concerning the waiver, even though she knew that Heckert did not have authority to bind the contractor. The Government did not even offer testimony as to what it thought when it received the letter.

The letter was of little significance to Ms. Hazzard at the time she received the letter, because the Government did not care what the appellant thought or said about the fence, because the Government's position concerning the fence was fixed in concrete from the day before the contract, when it determined to let J & J remove the fence. It was the Government's position that the responsibility for providing such a fence was the sole responsibility of the appellant. As Ms. Hazzard testified, Heckert's letter was not a waiver of any contract right, "because there were no contract provisions for us to pay for the fence." (Tr. 76) The appellant was free to install a fence as long as it was appropriate, but the Government would not pay for it. The Government's position was communicated to the appellant's on site staff. It was clear to me, after hearing and observing the witnesses, that Ms. Hazzard did not, at any time during contract performance, rely on the letter as an authorized waiver of the appellant's claim. The phrase "proceed at no cost to the government" was not a waiver by the appellant, it was a statement of the Government' s position.

The majority's finding of reliance is based on speculation, conjecture, unwarranted presumptions, and the shifting of the Government's burden of proof to the appellant.

## CONCLUSION

The Government could easily have asserted the affirmative defense of estoppel by waiver in its answer, or at any time moved to amend its answer. It did not do so. It has waived that defense. The majority has not explained why it has decided this case on the basis of an affirmative defense that has been waived by the Government. The majority contends that the defense of estoppel by waiver "was squarely before the Board and Hamm had every opportunity to meet it." However, the lengthy exposition of that contention is evidence that it is not true. Moreover, even if the affirmative defense of estoppel by waiver had been raised in the pleadings, the Government still has the burden of proving that defense.

Since the evidence is overwhelming that Mr. Heckert did not have authority to waive the appellant's claim, it was up to the Government to establish that it was somehow misled into thinking that the Heckert letter was a waiver; and, that the Government relied on the waiver to its detriment. It would have been an easy matter for the Government, for example, in the person of Ms. Hazzard, to have testified that she thought that Mr. Heckert was authorized to waive the appellant's claim, that she thought Mr. Marks knew of Mr. Heckert's waiver, that she thought Mr. Marks approved of Mr. Heckert's waiver, or that the Government would have installed the fence on its own if the appellant had only said that they wanted the Government to do so. However, no such testimony was forth coming.

There was no *prima facie* case that the Government was misled, because there was no evidence that the Government actually thought that the Heckert letter was an authorized waiver of a contract right. In fact, to the contrary, Ms. Hazzard testified that she knew that the appellant had no contract right for the Government to pay for the fence.

The majority's concluding conclusory statement that "the Government made a *prima facie* showing of offer, acceptance and detrimental reliance," has not been shown to be, and is not, based on substantial evidence. The majority has not even discussed the issues of offer and acceptance; but, to the extent they might have, I merely point out that no consideration passed to the contractor for the alleged waiver of its fence claim. RESTATEMENT (SECOND) OF CONTRACTS § 176(1)(d) cmt. e, illus. 10, 11 (1979).

Finally, it is important to recognize that the appellant is the only injured party. The Government has not established that it was injured. "Could have" been injured is a long speculation away from "would have" been injured. Estoppel is an equitable remedy and the majority decision does not explain how the Government becomes the injured party in this case. Any injury to the Government flows from the Government's breach, and its misreading of the contract and its responsibilities flowing from the site visit.

However, assuming, *arguendo*, that Mr. Heckert was authorized to waive the fence claim, that Ms. Hazzard thought that Mr. Heckert was waiving the fence claim, that the Government believed there was merit to the contractor's claim, and that the Government

was going to install the fence at its own expense until it received Mr. Heckert's letter, the Government's reasonable reliance on that waiver could only extend to the amount by which the appellant's costs exceeded the cost which the Government would have incurred to provide the fence. The majority agrees that the Government was obligated to provide a fence. Thus, even on the majority's view of the case, the claim should not be entirely denied, but denied only to the extent of the Government's reasonable reliance.

For the reasons set forth above, I conclude that the majority opinion is wrong on the facts and wrong on the law.

RONALD A. KIENLEN
Administrative Judge
Armed Services Board
of Contract Appeals

NOTES

[1] Only entitlement was tried. Whether the equitable adjustment is more or less than the cost of the replacement fence is a quantum issue. The Government was not required to buy a fence, just provide an equitable adjustment for the costs reasonably incurred as a result of the Government not providing the fence.

[2] For a discussion of *pro se* issues, see my discussion in the Spring 1993 issue of The Clause, a publication of the Boards of Contract Appeals Bar Association.

[3] The apparent impact of this presumption is that Mr. Marks authorized Mr. Heckert to waive the appellant's claim.

[4] Apparently, here to, the impact of the inference is that Mr. Marks approved of the no-cost proposal.

[5] Specifically, the majority found that, "had the Government been told that it would be liable for the cost of the fence, the Government could have had its own forces install the fence, negotiated with Hamm or another contractor to put up the fence, or decided not to have the fence installed at all (leaving Hamm to its remedies under the contract)."

I certify that the foregoing is a true copy of the Opinion and Decision of the Armed Services Board of Contract Appeals in ASBCA No. 48600, Appeal of E. L. Hamm & Associates, Inc., rendered in conformance with the Board's Charter.

Dated:

EDWARD S. ADAMKEWICZ
Recorder, Armed Services
Board of Contract Appeals