ARMED SERVICES BOARD OF CONTRACT APPEALS

Appeals of --	)	
	)	
RGW Communications, Inc.	)	
d/b/a Watson Cable Company	)	ASBCA Nos. 54495, 54557
	)	
Under Contract No. F09650-86-H-0001	)	

APPEARANCES FOR THE APPELLANT: Burt A. Braverman, Esq.
Maria T. Browne, Esq.
Timothy P. Tobin, Esq.
Cole, Raywid & Braverman, L.L.P.
Washington, DC

APPEARANCES FOR THE GOVERNMENT: COL Anthony P. Dattilo, USAF
Chief Trial Attorney
Mark H. Alexander, Esq.
Senior Trial Attorney

OPINION BY ADMINISTRATIVE JUDGE DICUS ON
GOVERNMENT'S MOTION TO DISMISS

These appeals involve an asserted contract between the government and appellant, RGW Communications, Inc. d/b/a Watson Cable Company (Watson or appellant), for cable television service on or near Robins Air Force Base (RAFB), Georgia. The government has moved to dismiss the appeals. We grant the government's motion.

FINDINGS OF FACT FOR PURPOSES OF THE MOTION

1. On 12 November 1985, the government entered into a cable television franchise agreement with CATV and Communication Service Company d/b/a Centerville Telecable (Centerville). The contract number was initially F09650-85-H-0001. (R4, tab 1)[1] The contract (Franchise Agreement) was made effective as of 1 October 1985 and was to extend for ten years (R4, tab 1 at 3). In December 1987, the government recognized a transfer of assets, including the contract at issue here, from Centerville to

[1] Documentary evidence has been submitted in the Rule 4 file, in appellant's supplemental Rule 4 file, as exhibits to the complaint, and as exhibits or attachments to the parties' briefs on the motion to dismiss. All of those documents will be considered part of the record in this appeal.

Watson. In the same modification, the government changed the contract number to F09650-86-H-0001. (R4, tab 1, Mod. No. P00002)

2. In the Franchise Agreement, Watson was given the exclusive right to enter RAFB, Warner Robins, Georgia "for the sole purpose" of providing cable television (CATV) services. The right of entry extended to construction, installation, and maintenance of facilities and equipment; use of specified government property; and the solicitation of subscribers (including appropriated fund activities, non-appropriated fund activities, and individual subscribers). (R4, tab 1, ¶ 1)

3. In paragraph 15.b., the contract stated that in the event the government terminated the contract for convenience after completion of the CATV facilities, and before the contract's expiration date of 30 September 1995, the government would pay Watson "the sum of $499,500.00 . . . less one 120th . . . of that amount for each month" the contract had been in effect prior to the date of termination. (R4, tab 1, ¶ 15)

4. The contract incorporated some Federal Acquisition Regulation (FAR) clauses including FAR 52.204-1, APPROVAL OF CONTRACT (JUL 1949) which was set out as follows:

> This contract will be subject to the written approval of the Secretary of the Air Force or his duly authorized representative and will not be binding until approved. (Applicable if contract exceeds $100,000)

(R4, tab 1 at 32)

5. The contract incorporated two versions of the Disputes clause, FAR 52.233-1. One was dated February 1983 and the other April 1984. (R4, tab 1 at 6, 32) Both versions state that the contract would be subject to the Contract Disputes Act (CDA), 41 U.S.C. §§ 601-613, as amended. They both provided for the submission of claims to the contracting officer, decisions on claims, and appeals "as provided in" the CDA. FAR 52.233-1(a), (f).[2]

6. Appellant installed a CATV system on RAFB. Watson provided CATV services to appropriated fund sites and non-appropriated fund sites on the base as well as to individual residents of the base (*see, e.g.*, app. supp. R4, tabs 13, 14; compl., exs. 32, 33).

[2] For the February 1983 version of the clause, we examined ASPR 7-103.12 dated 23 February 1983.

7. Although the contract gave appellant the exclusive right to supply CATV services on RAFB, Cox Cable Communications was later allowed to also provide such services on the base.[3] Watson filed a claim with the contracting officer and appealed its denial to the Board in ASBCA No. 48753. The matter was settled and the Board issued a consent judgment sustaining the appeal. (Compl., ¶ 9; ex. 5)

8. In November 1992, Watson sent the government a letter seeking renewal of the Franchise Agreement. The letter stated that appellant's request was being made in accordance with section 626(a) of the Cable Communications Policy Act of 1984, 47 U.S.C.A. § 546.[4] Watson said that it was ready to begin the renewal process and would wait for direction from the government. (R4, tab 2) The government acknowledged receipt of Watson's request in January 1993, and said that it would notify the RAFB Civil Engineering Office "to start drafting CATV requirements for our follow-on contract" (R4, tab 3).

9. In mid-1995, the government announced a conference to be held on 30 August 1995. The notice was sent to "PARTIES INTERESTED IN A NONEXCLUSIVE CABLE TELEVISION (CATV) FRANCHISE FOR ROBINS AIR FORCE BASE." Attendees would discuss the "SPECIFICATIONS AND REQUIREMENTS OF THE FRANCHISE AGREEMENT." The date set for the conference was less than three months before Watson's Franchise Agreement was to expire. (R4, tab 4)

10. A draft franchise agreement was sent along with the conference notice. Among other things, the draft agreement stated: that it would be awarded under 47 U.S.C. §§ 541, 545, or 546; that it would not be a government contract subject to the Federal Acquisition Regulation; and that, unless otherwise provided, FAR clauses were

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[3] Cox had been the exclusive provider on RAFB before the government entered into the 1985 Franchise Agreement with Watson. *Cox Cable Communications, Inc. v. United States*, 774 F. Supp. 633, 635 (M.D. Ga. 1991), *remanded by* 992 F.2d 1178 (11th Cir. 1993), *on remand to* 866 F. Supp. 553 (M.D. Ga. 1994). Following award of the Franchise Agreement to Watson, Cox filed suit and received a permanent injunction allowing it to remain on RAFB and compete for cable subscribers with Watson. *Id.*

[4] The Communications Act of 1934 was amended, with regard to cable television, by the Cable Communications Policy Act of 1984 and by the Cable Television Consumer Protection and Competition Act of 1992, among other statutes. *See generally*, 47 U.S.C.A. §§ 521-615(b). The Board will use "Cable Act" to refer to the federal statutes dealing with cable television unless a more precise description is warranted. References to specific sections in Title 47 of the United States Code in this opinion will be to their most current version unless otherwise indicated.

not applicable to the agreement. The term set out in the draft agreement was ten years. (R4, tab 4 at 3, 6)

11. Appellant responded to the draft franchise agreement in September 1995. Appellant first asserted that the government had not met the requirements of the Cable Act with regard to the renewal of the Franchise Agreement. Watson said that the government should have held a public proceeding to review appellant's performance, should have allowed appellant to submit a renewal proposal, and should have directed appellant to submit a proposal within sufficient time before expiration of the original ten-year term for careful consideration of the proposal. Watson also objected to the government's draft franchise agreement. Watson requested that the government commence a renewal proceeding under section 626(a)(1) of the Cable Act or waive such a proceeding and authorize appellant to submit a proposal under section 626(b)(1) of the Act. (R4, tab 5)

12. In late September 1995, the parties modified the contract to extend its term from 1 October 1995 through 31 March 1996. In a cover memorandum, the government stated that the extension would allow the parties "to better understand how and in what format negotiations should be conducted." (R4, tab 6)

13. In the 1996 National Defense Authorization Act, Congress authorized the Department of Defense to work with the private sector in providing military housing. Pub. L. No. 104-106, § 2801, 110 Stat. 544 (*codified at* 10 U.S.C. §§ 2871-2885). Section 823 of the same statute directed the chief judge of the United States Court of Federal Claims to submit an advisory opinion on the following questions:

> (1) Is it within the power of the executive branch to treat cable television franchise agreements for the construction, installation, or capital improvement of cable television systems at military installations of the Department of Defense as contracts under part 49 of the Federal Acquisition Regulation without violating title VI of the Communications Act of 1934 (47 U.S.C. 521 et seq.)?
>
> (2) If the answer to the question in paragraph (1) is in the affirmative, is the executive branch required by law to so treat such franchise agreements?

Pub. L. No. 104-106, § 823, 110 Stat. 399. In March 1996, the Court of Federal Claims found that it had jurisdiction to provide Congress with the requested opinion. *In re the Department of Defense Cable Television Franchise Agreements*, 35 Fed. Cl. 114 (1996).

14. The government published, in draft, Air Force Manual (AFM) 64-116 on 1 March 1996. The Manual was said to complement AFPD 64-1 and Air Force Instruction (AFI) 64-101. It set out "guidelines" and provided "a format for writing, negotiating, granting, renewing, and holding hearings regarding franchise agreements" for CATV services "consistent with the Cable Communications Policy Act of 1984, as amended by the Cable Television Consumer Protection and Competition Act of 1992 and the Telecommunications Act of 1996." The Manual included a model franchise agreement. (R4, tab 8, attach.) The government sent a copy of AFM 64-116 to Watson in July 1996 (R4, tab 8).[5]

15. On 5 March 1996, the government held a public meeting with Watson. Attendees from the public were invited to speak. Representatives from the government and from Watson later discussed "future base needs." The government emphasized the need for underground wiring, and Watson indicated that the timeframe to bury cable could be addressed in its proposal for a new franchise agreement. The government also stated that the "Cable Act of 1992" allowed for more than two cable franchise agreements so Watson might have competition in addition to Cox Cable. (Compl., ex. 16; R4, tab 17) In a statement made in August 2003, Robert G. Watson, Jr., said that, as a result of that meeting, appellant was led to believe that it had successfully fulfilled a portion of the franchise renewal process (R4, tab 17).

16. In late March 1996, the government again modified the contract to extend its term. This modification extended the term through 30 September 1996. In a cover memorandum to appellant's representatives dated 2 April 1996, a government contracting officer stated that AFI 64-101 and AFM 64-116 were not yet final and would "directly impact the content of any proposed franchise agreement." The contracting officer went on to say the following:

> . . . When the instruction and manual become final, we will resume our attempts to obtain a mutually satisfactory franchise agreement. At that time, we should know what format and terms the Air Staff has mandated that the bases use in completing the franchise process. Since we believe it is in the best interest of all parties to obtain a mutually satisfactory agreement, we will certainly be willing to consider any written comments you may have concerning the proposed process or even meet with you if that is more convenient.

[5] Tab 8 of the Rule 4 file contains a one-page 1 July 1996 cover memorandum and AFM 64-116. June 1994 versions of AFI 64-101 have been provided at app. supp. R4, tab 2 and as exhibit 8 to the complaint.

The extension to the existing franchise agreement was being provided to "avoid a break in coverage." (R4, tab 7)

17. As noted, the government sent AFM 64-116, which included a model franchise agreement, and AFI 64-101 to Watson on 1 July 1996. The contracting officer's cover memorandum stated that that the 30 August 1995 draft franchise agreement, that had been provided to Watson previously, had been overtaken by "events," and proposed that the parties "wipe the slate clean and begin again." The contracting officer asked appellant to review the regulations and submit any concerns it had concerning the language in the new model franchise agreement. Following receipt of Watson's comments, it was the government's intention to set up an informal meeting to discuss the concerns and to "proceed with negotiations to tailor the agreement to meet Robins[']s needs." (R4, tab 8)

18. On 11 July 1996, the Court of Federal Claims issued the opinion requested by Congress. *In re the Department of Defense Cable Television Franchise Agreements*, 36 Fed. Cl. 171 (1996). The opinion was written following briefing by private and government entities and a hearing. The court first ruled that the Department of Defense could treat cable franchise agreements as contracts without violating the Cable Act. The Cable Act did not preempt "local rules and regulations" not inconsistent with the Act. *Id.* at 174. The government entities argued that 47 U.S.C. § 555(a) and § 541(a)(2) would be violated if the government treated franchise agreements as contracts subject to part 49 of the FAR. The court said that part 49 remedies were outside the scope of the limitation on liability in 47 U.S.C. § 555a. *Id.* at 175. It went on to say that 47 U.S.C. § 541(a)(2), which dealt with access to public rights-of-way, had no bearing on what liability the government might have as a franchisor for termination of a franchise agreement. On the second question, the court said that the government was required to treat cable franchise agreements as contracts subject to the FAR. *Id.* at 176. The court read franchise agreements, together with the expected "follow-on" subscription agreements, as military acquisitions of services that obligated appropriated funds. And, when franchise agreements were terminated, cable operators were "entitled to termination for convenience costs for the unamortized and unreturned portion of their capital investments." *Id.* at 179.

19. During this time period, internal documents written by the contracting officer indicate that the government was concerned about the effect the Court of Federal Claims decision would have on the new cable regulations and on cable franchise agreements (compl., exs. 21, 22). In August 1996, the contracting officer received an e-mail from the government's Major Jerrell stating that the "worst case scenario" was continuation of cable service without a franchise agreement (compl., ex. 23).

20. By letter dated 25 July 1996, Watson submitted its comments on the new model franchise agreement to the contracting officer. Appellant began by noting the following: Watson was not abandoning its position that the renewal of its franchise agreement was governed by the Cable Act; and, the Court of Federal Claims had found that cable franchise agreements for military bases were contracts subject to the FAR. Appellant then set out comments on a number of the provisions of the model franchise agreement. (R4, tab 9) Watson says that its comments constituted its franchise renewal proposal (compl., ¶ 23).

21. The government sent a modification to appellant, in September 1996, that would have extended the term of the Franchise Agreement through 31 March 1997. Watson signed the modification, but it does not appear that it was signed by the government. (R4, tab 10)

22. On 13 September 1996, Science Applications International Corporation (SAIC) presented the government with its feasibility study relating to a potential partnership between the government and the private sector to provide housing for military personnel at RAFB (compl., ex. 25).

23. In response to the July 1996 Court of Federal Claims opinion, Congress enacted, on 23 September 1997, the following language in section 833 of the 1997 National Defense Authorization Act:

> (1) cable television franchise agreements for the construction, installation, or capital improvement of cable systems at military installations shall be considered contracts for purposes of the Federal Acquisition Regulation;
>
> (2) cable television operators are entitled to recovery of their investments at such installations to the extent authorized in part 49 of the Federal Acquisition Regulation; and
>
> (3) the appropriate official of the Department of Defense shall promptly issue a written notice of the termination for convenience of the Government of the contracts described in such advisory opinion and commence settlement negotiations pursuant to the requirements of part 49 of the Federal Acquisition Regulation.

Pub. L. No. 104-201, § 833, 110 Stat. 2616.

24. On 8 October 1996, Colonel William J. Evans, Jr., 78th Air Base Wing Commander, wrote a memorandum to Watson regarding the provision of CATV services on RAFB. Because of its significance, it is reproduced below with its one attachment:

> 1. I understand you have requested access to public rights-of-way and easements on the military installation known as Robins AFB, Georgia, for the purpose of conducting private commercial sales. Specifically, you wish to offer cable television services to potential subscribers resident on the base, including appropriated and nonappropriated fund activities and private individuals.
>
> 2. This base is a closed military installation.
>
> 3. I grant you permission to come onto this military installation so long as you comply with laws, regulations, and the installation rules. This grant is a nonexclusive permit/license to enter the installation and conduct commercial business at your own risk.
>
> 4. This grant is <u>not</u> an invitation or a contract. I am <u>not</u> asking or inviting you onto the base, but allowing you entry. On behalf of the government, I am <u>not</u> guaranteeing you success in your commercial endeavors. I am <u>not</u> guaranteeing that the government will subscribe to the cable television services. I am not guaranteeing that anyone on this base will subscribe to your services. I am expressly not guaranteeing that you will recover your capital costs of construction, installation, maintenance, replacement, upgrade, operation, or removal of any cable facilities you require or construct in order to carry out your private commercial enterprise[.]
>
> 5. If the government decides to subscribe to cable services for official business purposes, the government will solicit your participation in competition for a contract under the Federal Acquisition Regulation and supplements. Private subscriptions are a matter between you and the individual subscribers. By coming onto this installation, you demonstrate your understanding and acquiescence that private subscriptions are for the benefit of the private subscribers and yourself and that the government derives absolutely no benefit whatsoever from your private commercial sales.

6. It is my intention that this grant of access and license to do business will continue for one year or until closure, deactivation, or realignment of this military installation, whichever comes first. This grant may be terminated at any time if you fail to comply with laws, regulations, or rules governing access to the base and the nature of goods and services that may be offered for sale on this installation. The government has no desire to acquire a cable system or to gain title or ownership of any of your cable system or facilities.

7. No funds are obligated, committed, or promised by virtue of this grant.

8. If you do not agree with the terms and conditions of this grant, then you will not be permitted entry onto this military reservation.

. . . .

TEMPORARY TERMS AND CONDITIONS OF GRANT FOR OFFERING CABLE TELEVISION SERVICES ON ROBINS AIR FORCE BASE

Until new installation rules are developed and provided to you, you may continue to provide NONEXCLUSIVE cable television services on Robins Air Force Base under the same terms and conditions which were applicable to you under your previous franchise agreement **except such terms and conditions shall under no circumstances include any provision whatsoever for an exclusive franchise**. Additionally, you must comply with all federal laws and regulations pertaining to either military installations or the operations of cable television systems.

(R4, tab 11) (emphasis in original)

25. Watson contends that, as a commander with support functions, Colonel Evans had actual authority (express or implied) to enter into a contract for cable television services at RAFB. This is based on the following assertions. Colonel Evans was the only commander at RAFB in 1996. The 78th Air Base Wing (which was based at RAFB) Commander was to oversee base civil engineering, communications services, and other

important support functions such as morale, welfare, recreation and services. AFM 64-116 and AFI 64-101 stated that the support group commander was the franchising authority for installations within that person's command. (Compl., ¶¶ 34, 35) The government denies that Colonel Evans had contracting authority in the contracting officer's decision of 25 March 2004 (ASBCA No. 54557, notice of appeal, ex. 1).

26. Appellant responded to Colonel Evans' 8 October communication on 25 October 1996. Watson viewed the government's grant of access and a license to be a proposal for a one-year extension and said that it was not acceptable. Watson asserted that the proposal did not comply with the Communications Act of 1934, the FAR, or appellant's preexisting contractual rights. Among other things, appellant stated that the terms and conditions of its existing agreement could not be unilaterally subjected to changes and the proposed one-year term was inconsistent with 47 U.S.C. § 546. Watson said that it would not agree to the government's proposal, would not agree to a term of less than three years in order to meet the requirement for submitting a future renewal notice, requested that the government respond to the proposal appellant had made in its 25 July 1996 letter, offered to meet with the government to expedite the negotiation of a franchise renewal, and asked that the government officially extend the existing franchise until completion of renewal proceedings. (R4, tab 12)

27. Mr. Robert Watson, Sr. states in his affidavit that he believed the government had agreed to a ten-year renewal in April 1997 (app. opp'n, ex. 1, Watson aff., ¶ 10 (Watson aff.)). However, on 10 December 1997, Colonel Evans sent Watson a memorandum stating that the grant of access and license to do business dated 8 October 1996 was being renewed for another year beginning 8 October 1997 and continuing through 7 October 1998 (R4, tab 14).

28. Even though the government did not respond to appellant's renewal proposal and the final one-year "license" expired, according to appellant it continued (and continues) to own, operate, maintain and improve its cable television system at RAFB. According to appellant, that included: (1) working with a number of contracting officers, named in the complaint, to continue to provide cable service to appropriated and non-appropriated fund sites; (2) continuing to provide service to individual subscribers on RAFB; (3) investing in its cable system on RAFB to enhance its service by expanding bandwidth to provide high-speed internet and other two-way capabilities, as well as hiring and training employees and continuing to enter into distribution contracts with program networks; and, (4) installing, at the government's request, additional outlets on the Base. (Compl., ¶¶ 43-47, 49, 70, exs. 32, 33; app. supp. R4, tab 36; Watson aff., ¶¶ 7, 8, 11-14) Appellant says that it has continued to provide service and make investments at RAFB based on the understanding that Watson had received a renewal of its franchise for a ten-year term. It would not have been able to secure financing, it says, if it only had a one-year license. (Watson aff., ¶¶ 7, 14)

29. Mr. Watson says that during this time period, its personnel "repeatedly emphasized that Watson was operating under a renewed franchise" with the government. The government, according to appellant, did not dispute that Watson was operating under a "valid renewal franchise" until litigation arose between the parties. (Watson aff., ¶ 9)

30. At some point in late 1996 or early 1997, the government decided to privatize the housing area on RAFB known as West Robins (R4, tab 22 at 2; gov't mot. at 4).[6] The government issued a request for information in the Commerce Business Daily on 6 June 1997. The posting asked for "feedback, concepts, and ideas from industry on a proposed housing privatization project for active members of the armed services and their families stationed at Robins Air Force Base, GA." The notice did not provide any details on how the privatization would be accomplished. (R4, tab 13)

31. Appellant asserts that the government did not, during this time period, indicate that it would cede control of cable television operations to the private developer. Appellant states that it was told by the government and believed that the government would require the developer to honor Watson's Franchise Agreement (as renewed in appellant's view) and that appellant would continue to serve the privatized areas of RAFB. (Watson aff., ¶ 15; compl., ¶ 55) Appellant also relies on a letter dated 16 September 1998 to contracting officer Charlotte Halstead in which Mr. Watson refers Ms. Halstead to the 8 October 1996 memorandum (finding 24) as the basis for "a legal existing franchise Agreement with RAFB" (app. supp. R4, tab 28). We can find no evidence of a government reply. However, appellant accepted contracts for appropriated (1996-99, 2002-04) and non-appropriated funds work at RAFB (1996-99, 2002) that would have been covered under the original Franchise Agreement (R4, tab 1; compl., ¶ 43, exs. 32, 33). As the contracts were funded, we infer appellant was paid for the work. Except for "F09650," which designates only the installation where the work was performed, the contract numbers were different from the contract at issue, thereby signifying different years, type of instrument, etc. (*see* DFARS 704.2005; compl., exs. 32, 33).

32. It appears that the government issued a request for proposals on the privatization of West Robins in December 1998 (R4, tabs 15, 16, ¶ 1). Under the privatization plan, 370 of 670 housing units were to be demolished and replaced and the others were to be renovated. *RGW Communications, Inc. v. United States, et al.* (*RGW Communications*), No. 5:01-CV-302-4 (DF) slip op. at 3 (M.D. Ga. Nov. 15, 2002), *aff'd*, 92 Fed. Appx. 780 (11th Cir. 2004) (table) (a copy of the district court decision is

[6] According to the complaint, the West Robins area was also known as Robins West, Hillside, and the Chapman and Wherry housing. After privatization, the developer named the area Huntington Village. (Compl., ¶¶ 63, 64)

attached to the government's motion to dismiss). Ultimately, the government "signed a deal" with Hunt Building Corporation (Hunt) (R4, tab 22 at 2); *see also RGW Communications* at 3. On 7 September 2000, the government conveyed housing units, ancillary facilities, improvements, and utility systems in West Robins to Hunt. The government agreed to convey fee title to the land upon completion of the privatization construction. The land was leased to Hunt until the time of conveyance. The relationship between the government and Hunt was defined by several agreements including a Use Agreement and a Ground Lease Agreement. *RGW Communications* at 3.

33. The Use Agreement contains a restrictive covenant giving military personnel priority in renting vacant units. Under the Ground Lease Agreement, the property is subject to all prior outgrants (easements and rights of way), the government has a limited authority to issue new outgrants, and holders of present and future outgrants have reasonable rights of ingress and egress. Hunt was responsible for operation and maintenance of the utility systems. *RGW Communications* at 4. Hunt was also responsible for ensuring that services such as telephone and cable television were made available to residents (R4, tab 16, ¶ 2). Watson contends that the government also had the authority to approve material changes involving the community and material changes to tenant leases, to control rental rates, and to forbid conveyances of the property without government approval (compl., ¶ 60).

34. Appellant asserts that in making its deal with Hunt, the government did not require that Hunt honor Watson's Franchise Agreement (as renewed in appellant's view) for the provision of cable television services or Watson's rights under the Cable Act or even allow appellant to continue to serve the West Robins/Huntington Village area of RAFB (compl., ¶ 61).

35. Before the privatization of West Robins, Watson provided cable television service to its subscribers in that area through cable carried on utility poles and "dropped" to individual junction boxes on each housing unit. *RGW Communications* at 4. In furtherance of construction on the privatization project, Hunt had all cable, including Watson's, removed from housing units scheduled for demolition and renovation. *Id.* Appellant says that it voluntarily removed its cable at significant cost based on the belief that Hunt would be required to honor Watson's renewal franchise (Watson aff., ¶ 16; compl., ¶ 62). None of the cable that was removed has been reconnected. New housing units receive cable television service through underground utilities installed by Cox Cable. Appellant was not allowed to install an underground system. Renovated housing units continue to receive cable television service through aerial wires. *RGW Communications* at 4.

36. Hunt decided to take bids from cable television companies for the opportunity to provide cable service in Huntington Village. Hunt asked appellant to submit a bid.

Watson declined to do so saying that it believed that a bid was unnecessary because of its Franchise Agreement with the government. In April 2001, Hunt entered into an exclusive agreement with Cox Cable to serve Huntington Village. *RGW Communications* at 5. The agreement between Hunt and Cox prevented Watson from serving any of the new or renovated housing units in Huntington Village (compl., ¶ 65). Appellant says that it was not until Hunt entered into the exclusive contract with Cox that Watson realized that the government would not require Hunt to abide by Watson's asserted renewed Franchise Agreement under which it had the right to serve all of RAFB including West Robins (Watson aff., ¶ 17).

37. In response to an inquiry from appellant, the government, in May 2001, told Watson that any agreement regarding cable television service in Huntington Village was between Hunt and the cable provider or providers selected by Hunt. The government would not be a party to any transaction for utilities or other services as it would not retain an interest in the privatized property. The government would have no authority to authorize any company to provide cable service in Huntington Village. (R4, tab 16, ¶ 3)

38. In July 2001, Watson filed suit against the government, Hunt, and others in federal court in Georgia based on its exclusion from Huntington Village. *RGW Communications*, No. 5:01-CV-302-4 (DF) (M.D. Ga.). Appellant sought declaratory and injunctive relief alleging (1) conduct in violation of the First Amendment to the Constitution of the United States, (2) conduct in violation of the Fifth Amendment to the Constitution of the United States, (3) conduct in violation of the Cable Act, (4) tortious interference with contract relations, (5) trespass to personal and real property, and (6) deceptive trade practices. *See RGW Communications* at 1.

39. On summary judgment, the federal district court, in a November 2002 decision, granted defendants' motion for summary judgment on the First Amendment claims. The court found that Hunt was not a government actor and that there was no conduct by the governmental defendants that violated the First Amendment. *RGW Communications* at 7-13. Summary judgment for the defendants was also granted on the Cable Act claims. *Id.* at 14-18. As to the Fifth Amendment claims, the court said that Hunt's conduct did not constitute government action and that no government defendant participated directly in the decision to grant Cox exclusive access to Huntington Village. *Id.* at 19. To the extent that Watson was arguing that the government breached the terms of the franchise agreement by privatizing West Robins and allowing Hunt to enter into an exclusive agreement with Cox, the court would not have jurisdiction to hear such a claim. *Id.* at 19-23. The court then declined to exercise supplemental jurisdiction over Watson's state law claims. *Id.* at 24-25.

40. The federal district court's decision was affirmed without opinion by the United States Court of Appeals for the Eleventh Circuit. *RGW Communications, Inc. v. United States*, 92 Fed. Appx. 780 (11th Cir. 2004) (table).

41. Appellant submitted a certified claim under the CDA on 18 August 2003. Amended claims were filed in September and November 2003. The last amended claim was in the amount of $3,589,596. In its claim, Watson asserted that the government's actions gave rise to an implied-in-fact renewal of its Franchise Agreement on the same terms as the initial Franchise. Appellant said that the government breached the renewed Franchise Agreement when it privatized West Robins and allowed the developer, Hunt, to enter into an exclusive contract to provide cable television services to West Robins/Huntington Village. Appellant sought profits lost by its inability to serve subscribers in West Robins/Huntington Village, legal and other professional fees, and CDA interest. (R4, tabs 18, 19, 20)

42. Watson filed a deemed denial appeal dated 3 February 2004. That appeal was docketed as ASBCA No. 54495. The contracting officer issued a decision denying appellant's claim in March 2004 (R4, tab 22). Watson filed a protective appeal from the contracting officer's decision that was docketed as ASBCA No. 54557. The two appeals have been consolidated.

43. Appellant's complaint sets out five counts. In the first count, Watson asserts that it received an implied-in-fact, non-exclusive, ten-year renewal of its Franchise Agreement that extends to 31 March 2007. In the second count, Watson contends that the government should be equitably estopped from denying the existence of an implied-in-fact contract for renewal of the Franchise Agreement with appellant. Should the Board rule that there is no implied-in-fact contract between Watson and the government, Watson's third count says that it is entitled to compensation on the basis of *quantum meruit*. The fourth count alleges a constructive change to the alleged renewed Franchise Agreement based on a reduced number of subscribers over which to spread its fixed costs. Appellant contends that that resulted in an increase in the cost of its performance. Finally, in the fifth count, Watson says that the government's course of conduct constituted a bad faith breach of the contract.

44. In May 2004, the government filed a motion to dismiss the appeals asserting that the Board lacks subject matter jurisdiction. The motion has now been fully briefed.

DECISION

Based on Watson's submissions, we understand appellant to assert the positions set forth below. The initial Franchise Agreement was extended through 31 March 1997.[7] Thereafter, according to appellant, the parties entered into an implied-in-fact contract renewing the Franchise on the terms of the initial Franchise including a ten-year tenure and the ability to serve the West Robins area of RAFB. Watson says that the alleged renewed Franchise was breached when the government entered into the privatization agreement with Hunt and did not require Hunt to honor the alleged renewed Franchise. Appellant also says that the government's course of conduct, up to and including the failure to require Hunt to honor the alleged renewed Franchise Agreement, was a bad faith breach of the contract. Alternatively, appellant characterizes the government's failure as a constructive change to the alleged renewed Franchise.[8] In the complaint, appellant seeks lost profits from November 1998 (when the government began moving residents out of the housing units planned for privatization) through 31 March 2012 (which appears to assume a ten-year franchise from 31 March 1997 through 31 March 2007 and a subsequent five-year renewal). Appellant reserves the right to add damages for a second five-year renewal from 31 March 2012 through 31 March 2017.

The government has moved to dismiss these appeals in their entirety. We view each of the defenses asserted by the government as jurisdictional which, except as otherwise indicated below, raise only legal issues. We should note here that appellant asserts the existence of material facts that preclude dismissal. In essence, appellant contends that, because an implied-in-fact contract allegation is at the heart of its claim, the facts on jurisdiction and the merits are inextricably intertwined. Appellant thus asserts that the standards for summary judgment apply, and not the standards for dismissal appropriate where only subject matter jurisdiction is at issue. *See, e.g., Ortiz Enterprises, Inc.* ASBCA No. 52049, 01-1 BCA ¶ 31,155. We have reviewed the motion on that basis and have concluded there are undisputed material facts that present insurmountable obstacles to a finding that there was an implied-in-fact contract. These include the content of the October 1996 exchange of letters. As set forth below,

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[7] The original Franchise was initially extended to 31 March 1996 (finding 12). It was later extended to 30 September 1996 (finding 16). In September 1996, the government sent appellant a contract modification extending the Franchise to 31 March 1997. Appellant signed the modification and returned it to the government. It appears and we find, that the modification was not signed by the government. (Finding 21)

[8] Generally, a claim that can be remedied under a contract clause cannot be asserted as a breach of contract unless the contract clause provides only limited relief. *PAE International*, ASBCA No. 45314, 98-1 BCA ¶ 29,347 at 145,921.

appellant's other contentions (*quantum meruit*, equitable estoppel) are dependent upon the existence of a CDA contract. The same is true of appellant's bad faith and constructive change counts, both of which are dependent on the existence of a contract, and about which no more need be said. Accordingly, we grant the government's motion.

I. These Appeals are Not Barred by the CDA Statute of Limitations

In its reply brief, the government raises the CDA's six-year statute of limitations as a defense to these appeals. Section 605(a) of 41 U.S.C. provides that each "claim by a contractor against the government relating to a contract . . . shall be submitted within 6 years after the accrual of the claim."[9] The government says that Watson's claim accrued on 6 June 1997 when the notice of privatization was published in the Commerce Business Daily. Alternatively, the government asserts that the claim accrued at the expiration of the initial Franchise Agreement which it says was 30 September 1996. Using either accrual date, the government goes on, the 18 August 2003 claim was not filed within the six-year limitations period.[10]

The statute of limitations begins to run in contract claims against the government at the time of a breach. Thus, in *Franconia Associates v. United States*, 536 U.S. 129 (2002), a statute that took away borrowers' right to prepay loans was a repudiation that did not become a breach until the affected borrower tendered prepayment and the government refused to accept the payment. The Supreme Court thereby reversed a decision holding that the statute of limitations began to run with enactment of the statute. *See also Arakaki v. United States*, 62 Fed. Cl. 244, 254 (2004) ("In breach of contract actions, accrual generally occurs 'at the time of breach'").[11] There is no factual dispute that the government and Hunt Building Corporation entered into the privatization agreement involving the West Robins area of RAFB on 7 September 2000 (findings 32-34). Since Watson's claim is based on the failure of the government to require Hunt

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[9] This language was added to the CDA by the Federal Acquisition Streamlining Act of 1994 (FASA), Pub. L. No. 103-355, § 2351(a), 108 Stat. 3243, 3322. It applies to contracts "entered into . . . on or after" 1 October 1995. FASA, Pub. L. No. 103-355, § 10001(b), (3), 108 Stat. 3404; *see also*, FAR 33.206(a). The initial Franchise Agreement was entered into before 1 October 1995, but the instant appeal involves an alleged implied-in-fact contract that appellant says was entered into on or after 31 March 1997.

[10] As noted, amended claims were filed in September and November 2003 (finding 41).

[11] The FAR defines accrual of a government contract claim as "the date when all events, that fix the alleged liability of . . . the Government . . . and permit assertion of the claim, were known or should have been known." FAR 33.201. It goes on to say that some injury must have occurred for liability to be fixed, but monetary damages need not have been incurred. *Id.*

to honor its asserted renewed Franchise Agreement (whether characterized as a breach or a constructive change), we find, as a matter of law, that 7 September 2000 was the earliest date on which appellant's claim could have accrued. Thus, while appellant may possibly be barred from including in its claim specific elements of damages accruing more than six years prior to submission of its claim, its 18 August 2003 claim was timely.

Appellant's claim could not have accrued on the dates proposed by the government. The first date, 30 September 1996, relates to the original Franchise Agreement. It precedes the date on which Watson contends that the renewed Franchise Agreement, which is the basis for its claim, came into existence. A breach of, or constructive change to, the renewed Franchise Agreement could not have accrued before that Agreement was formed. The alternative date, 6 June 1997, was the date on which the government published a request for information in the Commerce Business Daily. At most, the publication gives notice that privatization of housing at RAFB had been "proposed." Further, it does not discuss the terms on which the proposed privatization would take place. (Finding 30) There is nothing in the request that could be interpreted as a breach of, or constructive change to, the renewed Franchise Agreement. It was, at best, an anticipatory repudiation that did not breach or change appellant's contract until the government consummated the privatization agreement. *Franconia Associates*, *supra*, at 142-43.

II. The Cable Act Does Not Preempt the Board's Jurisdiction

The government argues that appellant's claim is based on a renewal of its Franchise Agreement. And, since such renewals are governed by the Cable Act, the Board is preempted from addressing the claim. While we find, *infra*, as a matter of law, that we do not have jurisdiction, the Cable Act is not the obstacle.

Initially, the government's arguments were based on the notion that appellant was contending that its initial Franchise Agreement should have been renewed (gov't mot. at 28-30). Watson, however, clearly asserts that it has entered into an implied-in-fact contract for renewal of its Franchise Agreement (app. opp'n at 15). The government next said that appellant is not really claiming rights under a CDA contract but "franchise rights" under the Cable Act which precludes Board jurisdiction (gov't reply at 1-6). There is nothing in the Cable Act that prevents us from hearing these appeals.

In the first place, the decisions cited by the government appear to involve the preemption of state or local law by federal law. That is not the situation here. The government seeks to preempt application of the CDA by relying on the Cable Act. Where two federal statutes are involved, the law strongly disfavors preclusion of one by the other. *United States v. Sforza*, 326 F.3d 107, 111 (2d Cir. 2003). Absent a clearly expressed congressional intention to the contrary, a tribunal is to regard each as effective.

Id. In order to overcome the presumption against preclusion, the government must "demonstrate a clear congressional intent to preclude, or a positive repugnancy between the two" statutes. *Id.*

The government cites various provisions from, and the legislative history of, the Cable Act for the proposition that the Act was intended to provide a "comprehensive, overall national communications and cable policy and a framework for its operations" including national and uniform standards for granting and renewing cable franchises (gov't reply at 4-5). We acknowledge that as an accurate description of the purpose of Congress in enacting the Cable Act. At the same time, however, the government has not shown that that precludes the application of the CDA to cable franchise agreements with federal entities or that there is a positive repugnancy between the Cable Act and the CDA.

We note that the Cable Act was initially enacted on 30 October 1984. Pub. L. No. 98-549, 98 Stat. 2779. Except as expressly provided, it became effective 60 days later. *Id*, § 9(a). The initial Franchise Agreement between the government and Watson was signed almost a full year later on 12 November 1985 (finding 1). It incorporates by reference two different versions of the Disputes clause, February 1983 and April 1984. Both versions stated that the contract would be subject to the CDA and provided for appeals pursuant to the CDA. (Finding 5) Clearly, the government did not view application of the CDA to the 1985 Franchise Agreement as inconsistent with the 1984 Cable Act.

It is true that this appeal involves a claim that the initial Franchise Agreement was renewed in 1997 through an implied-in-fact contract. However, the government has not cited anything from, and we see nothing in, the present-day Cable Act that would appear to preclude the continued application of the CDA to a renewed Franchise Agreement or that makes the amended Cable Act repugnant to the CDA. Certainly, the government has not made such a showing.

To the extent that the preemption provision in the Cable Act, 47 U.S.C.A. § 556(c), applies, it would not change the result discussed above. This section states that, except as provided in § 557, "any provision of law of any State, political subdivision, or agency thereof, or franchising authority, or any provision of any franchise granted by such authority, which is inconsistent with [the Cable Act] shall be deemed to be preempted and superseded." Section 557 allows franchises in effect on the effective date of the Cable Act to stay in effect for their remaining terms. For the same reasons we found that the Cable Act did not preclude application of the CDA to a renewed Franchise Agreement and that the Cable Act was not repugnant to the CDA, we find that applying the CDA to the claimed renewed Franchise Agreement is not inconsistent with the Cable Act.

III. The Board Does Not Have Jurisdiction of Appellant's *Quantum Meruit* Claim Asserted as a Separate Cause of Action

Watson says that, in the event the Board finds that there was no implied-in-fact contract for renewal of the initial Franchise Agreement, it is entitled to compensation under a *quantum meruit* theory. We understand appellant to argue that even if there was no renewal contract, it has provided and continues to provide services that benefit the government. Because, however, it is now prevented from serving the West Robins area of RAFB, it has not received adequate consideration for those benefits.

In large part, appellant relies on the Federal Circuit's decision in *United States v. Amdahl Corp.*, 786 F.2d 387 (Fed. Cir. 1986). The case involved a challenge by a third party, Amdahl, to a contract between the government and the Federal Home Loan Mortgage Corporation (Freddie Mac) under which the government would purchase used computer equipment from Freddie Mac. The equipment was transferred to the government which made an initial payment of $1.2 million to Freddie Mac. In response to Amdahl's challenge, the General Services Board of Contract Appeals (GSBCA) ruled that the contract was illegal and that Freddie Mac was not allowed to retain the $1.2 million partial payment. On appeal, the Federal Circuit reversed that part of the GSBCA decision. It found that, in the circumstances of that case, the contractor might be entitled to the payment it had received from the government on a *quantum valebant* or *quantum meruit* basis. *Amdahl*, 786 F.2d at 395.

Although the *Amdahl* court said that recovery in *quantum meruit* was made "under an implied-in-fact contract," it appears that it was actually referring to *quantum meruit* as relief "of a quasi-contractual nature." *Id*. at 393. Recovery in *quantum meruit*, or quasi-contract, is generally considered to involve a contract implied-in-law rather than an implied-in-fact contract. *Perri v. United States*, 340 F.3d 1337, 1343 (Fed. Cir. 2003); *Chavez v. United States*, 18 Cl. Ct. 540, 547 (1989); *see also Trauma Service Group v. United States*, 104 F.3d 1321, 1327 (Fed. Cir. 1997) (receipt of services benefiting the government does not create an implied-in-fact contract to pay for them but involves a contract implied-in-law scenario). As a tribunal created pursuant to Article I of the Constitution (as opposed to an Article III tribunal), the Court of Federal Claims does not have jurisdiction over claims founded on implied-in-law contracts. *Chavez*, 18 Cl. Ct. at 547; *see also Perri*, 340 F.3d at 1343-44; *Trauma Service Group*, 104 F.3d at 1327. In *Perri* the Court noted it had in the past allowed recovery where goods and services had been provided pursuant to an express contract but the government refused to pay because the contract had been rendered invalid. However, in upholding the dismissal of the case by the Court of Federal Claims, the Court said "We know of no case, however . . . in which we, the Court of Claims, or the Court of Federal Claims has permitted quantum

meruit recovery in the absence of some contractual arrangement between the parties." *Id.* at 1344.

The Board, also not an Article III tribunal, has consistently ruled that it does not have jurisdiction to hear claims involving implied-in-law contracts. *United Pacific Insurance Co.*, ASBCA No. 53051, 03-2 BCA ¶ 32,267 at 159,623, *aff'd, United Pacific Insurance Co. v. Roche*, 380 F.3d 1352 (Fed. Cir. 2004); *Olympiareinigung GmbH*, ASBCA No. 47208, 95-1 BCA ¶ 27,535 at 137,215-16; *Eaton Corporation*, ASBCA No. 38386, 91-1 BCA ¶ 23,398 at 117,403. Since this aspect of appellant's complaint at paragraph 135 explicitly assumes that there is no implied-in-fact contract, we find it limited to the argument that it may recover in *quantum meruit* under an implied-in-law contract theory. As noted above, we do not have jurisdiction to hear such a claim. *Id.* This part of appellant's complaint is dismissed as a matter of law.[12]

IV. Implied-in-Fact Contract for Renewal of the Franchise Agreement

As noted, Watson contends that it and the government entered into an implied-in-fact contract renewing the original Franchise Agreement. In the alternative, appellant says that the government should be equitably estopped from denying the existence of a renewed Franchise Agreement. The government challenges both contentions.

A. The Government Cannot Be Equitably Estopped from Denying the Existence of an Implied-in-Fact Contract

With respect to equitable estoppel, appellant's position is that, whether or not an implied-in-fact contract actually exists, the government cannot now deny its existence. Essentially, Watson says that the government induced appellant to continue providing cable services knowing that appellant would not be allowed to continue to serve the West Robins area and then terminated renewal negotiations in order to avoid liability to appellant when the West Robins area was privatized.

1. Equitable Estoppel is Not Applicable in the Circumstances of this Appeal

[12] Appellant cites our decision in *Mitch Moshtaghi*, ASBCA No. 53711, 03-2 BCA ¶ 32,274 at 159,669, in which we stated that we had jurisdiction, among other things, of a count "seeking *quantum meruit* (implied-in-fact)." Appellant misreads our decision. The relevant count alleged "*quantum meruit*" in that there was an implied-in-fact promise. As indicated by the parenthetical, we held there was jurisdiction to the extent of the allegation of an implied-in-fact promise.

We find, as a matter of law, that appellant's reliance on equitable estoppel is unavailing. If Watson establishes the existence of an implied-in-fact contract, it would not need to rely on the argument that the government is estopped from denying such a contract. If appellant cannot prove an implied-in-fact contract, the facts alleged by Watson in support of equitable estoppel do not state a cause of action over which the Board has jurisdiction.

The Federal Circuit has held that equitable estoppel may not be applied against the government in the same way it is applied to private parties . *Zacharin v. United States*, 213 F.3d 1366, 1371 (Fed. Cir. 2000); *Rumsfeld v. United Technologies Corp.*, 315 F.3d 1361, 1377 (Fed. Cir. 2003), *cert. denied*, 540 U.S. 1012 (2003). Specifically, the court has noted that the government will not be estopped "on the same terms as any other litigant." *Zacharin*, 213 F.2d at 1371; *Rumsfeld*, 315 F.3d at 1377. We believe that principle applies here.

The CDA applies to "express or implied" contracts. *See* 41 U.S.C. § 602. The Board's CDA jurisdiction "depends upon the existence of an express or implied-in-fact contract." *Michael C. Donohoo*, ASBCA No. 51936, 99-2 BCA ¶ 30,470 at 150,524. For those reasons, we agree with the Claims Court decisions that have found the doctrine of equitable estoppel inapplicable where no contract had been established. *Pacific Gas & Electric Co. v. United States*, 3 Cl. Ct. 329, 340 (1983) ("No contract exists in this case upon which to invoke the doctrine of equitable estoppel."), *aff'd*, 738 F.2d 452 (Fed. Cir. 1984) (table); *New America Shipbuilders, Inc. v. United States*, 15 Cl. Ct. 141, 144 (1988) ("In this case, as there was no contract, equitable estoppel is inapplicable."), *aff'd on alternative grounds*, 871 F.2d 1077 (Fed. Cir. 1989). This is sometimes explained as prohibiting the use of estoppel to create a cause of action against the government which is called promissory estoppel (as opposed to using it as a defense which is termed equitable estoppel). *Jablon v. United States*, 657 F.2d 1064, 1069 (9th Cir. 1981).[13] We simply do not have jurisdiction to hear the assertion that the government is precluded from denying the existence of a contract that has not been proved.

[13] An obligation based upon promissory estoppel is a type of contract implied-in-law, *Pacific Gas*, 3 Cl. Ct. at 340; *New America Shipbuilders*, 15 Cl. Ct. at 144, and cannot be asserted against the government. *Id.*; *Jablon*, 657 F.2d at 1069-70; *Knaub v. United States*, 22 Cl. Ct. 268, 276 (1991). We discussed promissory estoppel in *United Pacific Insurance Company*, ASBCA Nos. 52419 *et al.*, 04-1 BCA ¶ 32,494 at 160,745, *aff'd*, 401 F.3d 1362 (Fed. Cir. 2005) in a "straw man" or "even if" fashion. That decision should not be construed as holding that promissory estoppel can be asserted against the government.

In support of the application of equitable estoppel, Watson relies heavily on *Manloading & Management Associates, Inc. v. United States*, 461 F.2d 1299 (Ct. Cl. 1972) and *Emeco Industries, Inc. v. United States*, 485 F.2d 652 (Ct. Cl. 1973). We do not find those decisions to be particularly helpful here. First of all, both decisions arose from suits filed in the Court of Claims. *Manloading*, 461 F.2d at 1301, *Emeco*, 485 F.2d at 654. Both were issued before passage of the Contract Disputes Act and cannot be considered instructive on the Board's jurisdiction under the CDA. *Manloading* deals with a solicitation that was amended before bids were submitted to provide for an automatic one-year renewal of the contract that was eventually awarded. *Manloading*, 461 F.2d at 1302-03. Therefore, there was a contract that included the renewal asserted by the original contractor. *Id.* Thus, *Manloading* is consistent with *Pacific Gas* and *New America Shipbuilders* which only allow the application of equitable estoppel where there is an existing contract.

In the *Emeco* decision our appellate court applied the doctrine in a matter arising from a Tucker Act suit filed originally in that court, *i.e.*, the United States Court of Claims. *Emeco*, 485 F.2d at 654. It was not an appeal from a board decision and it predated the CDA. Moroever, the jurisdiction of our appellate court, whether as the United States Court of Claims or as the United States Court of Appeals for the Federal Circuit, derives from Article III of the U.S. Constitution. *Seaboard Lumber Co. v. United States*, 903 F.2d 1560, 1565 (Fed. Cir. 1990). It is thus more inclusive than our CDA jurisdiction. For example, in *Coastal Corp. v. United States*, 713 F.2d 728 (Fed. Cir. 1983), the Court held that boards of contract appeals do not have jurisdiction over implied contracts to treat bidders fairly. Two years later in a suit brought under 28 U.S.C. § 1491(a)(3) (the Tucker Act), the Court held the United States Claims Court (now United States Court of Federal Claims) had such jurisdiction. *National Forge Co. v. United States*, 779 F.2d 665, 667 (Fed. Cir. 1985). Accordingly, we follow *Pacific Gas & Electric, supra*, and hold that for the Board to have jurisdiction, an express or implied-in-fact contract must exist before the doctrine of equitable estoppel can be applied.

Appellant cites a Board decision for the proposition that the Board has jurisdiction over an affirmative equitable estoppel claim (as opposed to equitable estoppel asserted for defensive purposes). *HTC Industries, Inc.*, ASBCA No. 40562, 93-1 BCA ¶ 25,560, *aff'd, HTC Industries, Inc. v. Aspin*, 22 F.3d 1103 (Fed. Cir. 1994) (table), *cert. denied*, 513 U.S. 868 (1994). In describing *HTC*, Watson states that the Board found "appellant's claims not to have met the equitable estoppel factors but [noted] that the allegations [were] 'within the confines of our CDA jurisdiction, in the nature of *claims* based upon an implied-in-fact contract or upon a waiver/estoppel theory'" (app. opp'n at 47, emphasis added by app.). The partial quotation relied upon by Watson misapprehends our decision in *HTC*. Looking both at the previous sentence and the entire sentence quoted from by appellant, we said the following:

> . . . These allegations relate not to the Government's failure to carry out the express written terms of the contract, but rather to an alleged new agreement which the Government either entered into with appellant, or should be precluded from denying. Therefore, we look at these allegations within the confines of our CDA jurisdiction, in the nature of claims based upon an implied in fact contract or upon a waiver/estoppel theory.

HTC Industries, 93-1 BCA at 127,310. The second sentence was limited to the non-controversial statement that we would examine HTC's allegations based on the jurisdictional parameters of the CDA. This is further evinced at 127,311 where we cite *JANA, Inc. v. United States*, 936 F.2d 1265, 1270 (Fed. Cir. 1991), *cert. denied*, 502 U.S. 1030 (1992), wherein the Court ruminates as to whether estoppel may ever be applied against the government.

2. Watson Has Not Shown a Triable Issue as to the Elements of Equitable Estoppel

Even assuming that appellant could assert equitable estoppel in the present circumstances, it has not established all of the elements of the theory. Those elements are: (1) the government must know the true facts; (2) the government must intend that its conduct be acted on or must so act that the contractor asserting the estoppel has a right to believe it so intended; (3) the contractor must be ignorant of the true facts; and, (4) the contractor must rely on the government's conduct to his injury. *JANA, Inc. v. United States*, 936 F.2d at 1270. Appellant must also show that the government employees on whose conduct it relied were acting within the scope of their authority. *Doe v. United States*, 48 Fed. Cl. 495, 505 (2000). Finally, appellant must show "some form of affirmative misconduct" by the government. *Zacharin*, 213 F.2d at 1371; *Rumsfeld*, 315 F.3d at 1377.

Appellant's burden of proof regarding the elements of equitable estoppel is a heavy one. *Doe*, 48 Fed. Cl. at 505. In addition, courts that have addressed the affirmative misconduct element have applied a "demanding definition." *Melrose Associates, L.P. v. United States*, 45 Fed. Cl. 56, 60 (1999), *aff'd*, 4 Fed. Appx. 936 (Fed. Cir. 2001). As stated, *supra*, we apply here the standards for summary judgment. While appellant is entitled to have reasonable inferences drawn in its favor, *Hughes Aircraft Co.*, ASBCA No. 30144, 90-2 BCA ¶ 22,847, it may not rest on that principle or on the pleadings where, as here, it has the burden of proof and the movant has presented evidence or pointed out the absence of evidence supporting the nonmovant. *Celotex Corp. v. Catrett*, 477 U.S. 317, 325 (1986). Appellant must support its position by

setting forth what specific evidence it could offer at trial. *Pure Gold, Inc. v. Syntex (U.S.A.), Inc.*, 739 F.2d 624, 626-27 (Fed. Cir. 1984). In determining whether the nonmovant's presentation establishes material factual disputes, we must apply the evidence standard that would be applied at trial. *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 250 (1986). In this instance, a showing of affirmative misconduct must overcome the presumption that the government has acted in good faith. That showing requires clear and convincing evidence. *Am-Pro Protective Agency, Inc. v. United States*, 281 F.3d 1234, 1240 (Fed. Cir. 2002). Appellant's job is made even more difficult because of the continuing rejection of the application of equitable estoppel against the government by the courts. *See, e.g., OPM v. Richmond*, 496 U.S. 414, 421 (1990). Moreover, where the record taken as a whole fails to lead a rational trier of fact to find for the nonmoving party, there is no genuine issue of material fact for trial. *Matsushita Electric Industrial Co. v. Zenith Radio Corp.*, 475 U.S. 574, 587 (1986).

As stated above, there is a presumption that the government acts in good faith. *DeMarco Durzo Development Co. v. United States*, 60 Fed. Cl. 632, 638 (2004). The Court of Federal Claims has said that inaction by the government did not rise to the level of affirmative misconduct. *Melrose*, 45 Fed. Cl. at 60. The *DeMarco* court dismissed a complaint that did not allege intentional deception by the government. Even a false statement has been found not to constitute affirmative misconduct because the proponent of equitable estoppel had not shown a "deliberate lie" or a "pattern of false promises." *Wertz v. United States*, 51 Fed. Cl. 443, 450 (2002) *citing Mukherjee v. INS*, 793 F.2d 1006, 1009 (9th Cir. 1986).

Watson makes two related arguments on this point. In its complaint, appellant says that the government engaged in affirmative misconduct "when, with knowledge that RAFB was being considered for downsizing and that RAFB itself was considering privatization, it unilaterally terminated federally mandated franchise renewal negotiations with Watson in order to avoid potential liability that might arise as a result of the Claims Court Report to Congress and resulting legislation, in the event of base closure, downsizing or privatization at RAFB." (Compl., ¶ 131) In its brief, Watson asserts the following as affirmative misconduct. "Despite its intention to enter into the Renewal Franchise and receive the benefits of Watson's continued long-term service to RAFB and Watson's continued competition with Cox, including low, competitive rates and increased services, the Air Force purposefully avoided entering into an express contract renewing Watson's franchise to evade the *Court of Federal Claims Report to Congress* and the 1997 NDAA." (App. opp'n at 47)

The specific action appellant complains of is the government's termination of franchise renewal negotiations, or, stated another way, its avoidance of an express contract for renewal of the franchise. Although the government did not enter into an express renewal with Watson, we cannot consider that failure to be affirmative

misconduct. The events taking place from 1995 through mid-1997, including the expiration of the initial Franchise Agreement, the decision to privatize part of RAFB, the Court of Federal Claims report on the treatment of cable franchise agreements on military installations, and the resulting Act of Congress on the same subject (findings 12-31), created an atmosphere of uncertainty for military bases that might be closed, downsized, or privatized. We do not see, in the "failure" cited by appellant, intentional deception or a pattern of false promises. The facts relied upon by appellant could not, with all reasonable inferences drawn to appellant's benefit, demonstrate with convincing clarity, that the government acted with affirmative misconduct. As a result Watson has failed to establish the threshold requirements for the doctrine of equitable estoppel or a genuine issue with respect thereto.

B. The Existence of an Implied-in-Fact Contract

The government asserts that we lack jurisdiction to hear this appeal. It says that the Board's CDA jurisdiction depends on the existence of a contract between the government and Watson and none has been shown. Appellant argues for jurisdiction by alleging an implied-in-fact contract between it and the government. The largest part of the parties' submissions dispute or support the existence of an implied-in-fact contract.

In order to establish an implied-in-fact contract, appellant must prove mutual intent to contract, lack of ambiguity in the offer and acceptance, consideration, and contracting authority in the government representative who is said to have entered into the agreement. *City of El Centro v. United States*, 922 F.2d 816, 820 (Fed. Cir. 1990), *cert. denied*, 501 U.S. 1230 (1991). Watson has the burden of proving subject-matter jurisdiction over its implied-in-fact contract claim. *Reynolds v. Army and Air Force Exchange Service*, 846 F.2d 746 (Fed. Cir. 1988).

Watson bases its implied-in-fact contract theory on the 8 October 1996 letter from Colonel Evans (finding 24). According to Watson, it was therein offered "a one-year license that incorporated the terms of the Initial Franchise. . . . Through that vehicle, the Air Force clearly intended to enter into a franchise, as a ***license*** is a ***franchise*** under federal law. *See* 47 U.S.C. § 522(9)." (App. opp'n at 29, emphasis in original) Watson's counsel responded in a 25 October 1996 letter that expressly recognized the 8 October 1996 letter was not a franchise renewal but a proposed one-year extension, to which it objected. That letter also sought expedited negotiations and an extension until renewal proceedings were completed. (Finding 26) Watson parses language from the attachment to the 8 October 1996 letter (finding 24) and combines it with the offer in the letter itself so as to make it appear there is an agreement on renewal (app. opp'n at 30). We think not. In fact, it seems clear that, to that point, there was no mutual assent. We find there is no genuine issue as to the lack of mutual assent.

Watson also quotes language from its 25 October 1996 letter to make it appear that Watson would only agree to continue providing cable services if the franchise agreement was renewed (app. opp'n at 31). Watson then argues that it continued to provide such services without objection from the government, thereby closing the implied-in-fact contract loop. Watson overlooks other language in its letter that actively sought an extension during renewal proceedings and argued for a 36-month extension to permit submission of a future renewal notice. Its argument also fails to factor in the letter of 10 December 1997 in which respondent purported to unilaterally extend to 7 October 1998 the grant of access set forth in its 8 October 1996 letter (finding 27). Nevertheless, Watson argues that by allowing it to continue to provide cable services at RAFB the government evinced its assent to renewal of the franchise (app. opp'n at 32).

It is not enough to allege in a complaint or argue on brief material facts in averring Board jurisdiction. The material facts or genuine disputes pertaining thereto, must be established through evidential submissions. *Cedars-Sinai Medical Center v. Watkins,* 11 F.3d 1573, 1583-84 (Fed. Cir. 1993). Watson's argument that, by allowing Watson to continue work on RAFB up to the present an implied-in-fact contract came into being, does not square with the evidence. For one thing, the only probative evidence of when the alleged implied-in-fact contract was formed is Mr. Watson's affidavit, wherein he asserts that he believed the contract was formed in April 1997 (finding 27). While he does not explain this further, that date corresponds with the 31 March 1997 end-date in the last signed modification extending Watson's Franchise Agreement (finding 21). We may reasonably infer, therefore, that Mr. Watson considered his Franchise Agreement to have been renewed in April 1997 when the modification ran out. Whether that is Mr. Watson's rationale, or whether there is another, unexplained and uninferable rationale, it does not stand scrutiny. For one thing, the government had extended Watson's access to October 1997 in the 8 October 1996 letter (finding 24). That access was thereafter extended to October 1998 (finding 27). For another, the 8 October 1996 letter informed Watson that agreeing with the terms of the letter was a condition to base access (finding 24). The argument that Watson, by continuing to work on-base, agreed with the government's terms is therefore just as strong as appellant's argument that the government's failure to deny access meant the government agreed with Watson's terms. To project mutual assent, or the existence of a material factual dispute as to mutual assent, from the content of the parties' letters and their actions is not something the Board is willing to do. Indeed, appellant has done no more than raise some "metaphysical doubt as to the material facts," a showing inadequate to forestall summary judgment. *Matsushita*, *supra,* at 586.

Our unwillingness to so project is also affected by the work that Watson performed during the period in question. It accepted contracts for provision of both appropriated and non-appropriated funds services at RAFB in 1996-99 and 2002-04. Clearly, these were new contracts, not part of the Franchise Agreement. (Finding 31)

We do not believe that Watson can reasonably and credibly argue that the government's conduct in letting it continue to work on base under new contracts led it to believe that the government had assented to a renewal of the Franchise Agreement when work on base was done under other contracts the government had awarded to Watson. In this regard, we note that in the complaint appellant states "upon information and belief, [F09650] is the key identifier for Watson's contract" (compl., ¶ 43). Appellant apparently thought the appearance of that number on the other contracts evinced a renewal. However, that number identifies the department/ agency office. *See* DFARS 204.7003. (Finding 31)

"Where [as here] the record taken as a whole, could not lead a rational trier of fact to find for [appellant] there is 'no genuine issue for trial.'" *Matsushita*, *supra*, at 487. We thus hold there was no mutual assent and no implied-in-fact contract. The government is entitled to judgment as a matter of law and we grant the government's motion. We conclude we do not have CDA jurisdiction.

V. Summary

Watson's claim is not barred by the CDA statute of limitations or preempted by the Cable Act. The government is not equitably estopped from denying the existence of a renewed Franchise Agreement with appellant. Appellant's contention of Board jurisdiction is not supported by persuasive evidence. We hold appellant has not proved the existence of an implied-in-fact contract for renewal of the Franchise Agreement. The appeals are dismissed for lack of jurisdiction. The government's motion to dismiss is granted.

Dated: 18 May 2005

CARROLL C. DICUS, JR.
Administrative Judge
Armed Services Board
of Contract Appeals

I concur

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

I concur

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

I certify that the foregoing is a true copy of the Opinion and Decision of the Armed Services Board of Contract Appeals in ASBCA Nos. 54495, 54557, Appeals of RGW Communications, Inc. d/b/a Watson Cable Company, rendered in conformance with the Board's Charter.

Dated:

CATHERINE A. STANTON
Recorder, Armed Services
Board of Contract Appeals