ARMED SERVICES BOARD OF CONTRACT APPEALS

Appeal of --	)	
	)	
P&C Placement Services, Inc.	)	ASBCA No. 54124
	)	
Under Contract No. F11623-00-C-0011	)	

APPEARANCE FOR THE APPELLANT: Thomas Rosenwein, Esq.
Gordon, Glickman, Flesch & Rosenwein
Chicago, IL

APPEARANCES FOR THE GOVERNMENT: COL Anthony P. Dattilo, USAF
Chief Trial Attorney
Thomas S. Marcey, Esq.
CAPT John G. Terra, USAF
Trial Attorneys

OPINION BY ADMINISTRATIVE JUDGE VAN BROEKHOVEN
UNDER RULE 11

Appellant timely appealed a contracting officer's final decision denying its claim for $25,000 arising out of an alleged breach of contract in connection with its asserted interference with appellant's provision of nursing services. Specifically, appellant's claim was for its placement fee for a specified nurse that was hired by the Medical Treatment Facility, Scott Air Force Base, Illinois. The parties have elected to submit the appeal on the record pursuant to Board Rule 11[*]. Only entitlement is before the Board.

FINDINGS OF FACT

1. On 29 June 2000, 375th Contracting Squadron, Scott Air Force Base, Illinois issued Contract No. F11623-00-C-0011, effective 1 July 2000, to appellant, an 8(a) contractor, for non-personal services for three registered nurses, two licensed practical nurses, one operating room registered nurse, and one recovery room registered nurse. (R4, vol. 1, tab 50). The contract was issued directly to the 8(a) contractor pursuant to the Memorandum of Understanding dated 6 May 1998 between the Small Business Administration (SBA) and the Department of Defense. The basic contract period was 1 July 2000 – 30 June 2001. The contract schedule provided for three additional one-

[*] Mr. Rosenwein is appellant's present counsel. Appellant's former counsel prepared its Rule 11 submissions.

year option periods for the same number and qualifications of nurses. The total contract award for the initial term was $445,429.80. The contract amounts for the option periods were $464,277.36, $483,318.48, and $503,154.00. The government exercised the first two options and extended the contract through 30 June 2003 (R4, vol. 1, tabs 51, 55). The contract schedule included "Notes" under the contract schedules for the base year and each option year that provided "backfill deductions" in specified amounts. Those were daily deductions applied to each Contract Line Item Number (CLIN) in the event appellant was unable to fill the requirement for the specified nursing staff during that day.

2. The scope of work in the contract performance work statement provided that appellant was to provide professional and licensed practical nursing personnel to furnish pre-admissions, same day procedures, same day surgery, operating room, and post anesthesiology care unit services required for government beneficiaries. (R4, vol. 1, tab 50, Attachment 1, at 2 of 19). Appellant was required to provide all labor, management, supervision, teaching, consultations, and reports, except as provided in the section. Appellant was required to provide a point of contact who was responsible for the performance of the work. There were no references to any possible requirement for appellant to submit time sheets to the government, either in conjunction with the submission of invoices or separately from the submission of invoices.

3. The contract contained a CONFLICT OF INTEREST clause that provided:

> The Contractor shall not employ any person who is an employee of the United States Government if the employment of that person would create a conflict of interest. The Contractor shall not employ any person who is an employee of the Department of the Air Force, either military or civilian, unless such person seeks and receives approval in accordance with DOD Directive 5500.7 and Air Force policy.

(R4, tab 50, attachment 1 at 3 of 19). There was no similar provision in the contract prohibiting the government's employment of appellant's employees or former employees.

4. Appellant maintained time sheets, recording the time its nurses worked on two separate documents: the "P&C Placement Services' Weekly Contract Nursing Report" (nursing report) and the "Weekly Time Record." (Gov't ex. D; R4, vol. 2, tab 80, vol. 3, tab 81, vol. 4, tab 82, vol. 5, tab 83, vol. 6, tab 84; app. supp. R4, tab A-2 at 3, ¶ 20) Each "Weekly Time Record" contained the name and identification number of the nurse, the day of the week and date, the times of day the work started and ended, and the total hours less the period for lunch. At the bottom of the form there was a place for the signatures of appellant's nurse or employee and of the government medical official or

employee at Scott Air Force Base Medical Treatment Facility (hospital). (R4, vols. 2-5, tabs 80-83; gov't ex. D; app. ex. A-2 at 3) There were "Terms and Conditions" stated on the reverse side of the Weekly Time Record. According to these "Terms and Conditions" set forth on the reverse side of the Weekly Time Record, "The client hereby agrees to the following terms and conditions:" which included three paragraphs. The first of these provided:

> Client agrees that during the term of this Agreement, and for a period of 24 months after the date of termination of this Agreement, or after introduction, whichever is longer, it will not directly solicit, employ or contract or sub-contract for therapy services with any of the Therapists or Agencies to whom Client has been introduced by P & C Placement Services, Inc. or for whom any such Therapist or Agencies has provided services in furtherance of this Agreement hereunder. If Client breaches this Section, Client shall pay to P & C Placement Services, Inc., the compensation that P & C Placement Services, Inc. would have earned if this Agreement had not been breached, as the only liquidated damages to P & C Placement Services, Inc.

5. There was no reference to the "Terms and Conditions" on the front side of the Weekly Time Record, nor was there any indication on the front side of the form that there was a reverse side. (R4, vols. 2-6, tabs 80-84). There was no entry on the Weekly Time Record for the contract number, or reference to the contract. There is no evidence in the record that the parties discussed or negotiated the "Terms and Conditions" contained on the reverse side of the Weekly Time Record in conjunction with the award of the contract. However, according to appellant's president, before appellant began performance on the contract, the government verified and approved every document, including the Weekly Time Report, used in the performance of the contract. (Appellant ex. A-2 at 4) Appellant specifically asserts that it submitted the "two-sided Weekly Time Record containing the industry standard terms" to the Contracting Officer's Technical Representative. We have been unable to find anything of a contemporary nature in the record that would establish the nature and extent, if any, of the government's approval of these "Terms and Conditions" as applicable to this contract.

6. Originally, the front page Weekly Time Records were signed by the nurse provided by appellant and the government's quality assurance evaluator (R4, vols. 2-6, tabs 80-84; gov't ex. D; app. ex. A-2 at 6). One copy was kept by the appellant's nurse employee and one copy kept by the hospital department in which appellant's nurse was assigned. At no time did any government contracting official or appellant management official sign this form. Appellant sent a copy of the front page of the Weekly Time

Record by facsimile transmission to the government, although the record is unclear as to the frequency of these transmissions. These facsimile transmissions did not contain the reverse side of the form with the "Terms and Conditions." Indeed, although the government had been provided a copy of the front page of the Weekly Time Record in June 2000 when appellant sent the first page by facsimile transmission to the contract administrator, it was not until January 2001 that the contract administrator saw the complete form (gov't ex. E). However, the contract administrator did not make a note of what was on the form and never had any discussions with anyone.

7. Appellant also submitted the Weekly Contract Nursing Reports which were used by the government as a means of tracking employee hours and verifying the hours indicated on the invoices for purposes of completing the DD Form 250 Material Inspection and Receiving Report for payment purposes (gov't ex. E). On, or about 23 January 2002, the government discontinued the practice of signing the Weekly Time Records (gov't ex. D).

8. Appellant's site manager or point of contact and the government's quality assurance evaluator reviewed and signed the Weekly Contract Nursing Reports (R4, vol. 1, tab 50 at 4a, vol. 2-5, tabs 80-84, gov't ex. D). The government's contract services monitor verified the hours indicated on the Weekly Contract Nursing Reports and determined whether or not there were any deductions for services not provided. (Gov't exs. D, E and F).

9. Problems arose in February and March 2002 during which time appellant was unable, or failed to provide the required nursing staff to the hospital in accordance with the contract (R4, vol. 1, tabs 29-32). The instant dispute focuses on appellant's alleged problems with one particular nurse, Ms. Patricia Dohogne. Because of the alleged repeated absences of, and alleged failure, on the part of this nurse to report to the hospital for duty, failure on the part of this nurse to heed the warnings and disciplinary actions, appellant suspended Ms. Dohogne and placed her on a 90-day probation (R4, vol. 1, tabs 31, 32). Ms. Dohogne subsequently resigned from appellant's employment effective 15 May 2002, and left her employment on or about 17 May 2002 (R4, vol. 1, tab 34 at 2; app. ex. A-2 at ¶ 39). We do not make any findings regarding any problems either appellant or the government medical facility may have had with Ms. Dohogne arising out of the employer/employee relationship of appellant and Ms. Dohogne, since the only issue before the Board is the merits of appellant's claim against the government for the $25,000 placement fee.

10. The government, in its brief, states that the Air Force advertised for two vacant registered nurse positions at Scott Air Force Base, one in the Family Practice Clinic, and the other in the Primary Care Clinic, between early April and late May 2002 (Gov't br. at 14). According to the government, neither of these positions had been

serviced by appellant on its contract. After the announcement, which was limited to current government employees and to Air Force active duty personnel, and subsequently opened to the public, Ms. Dohogne applied for, and was accepted for a nursing position in the Primary Care Clinic, effective 9 September 2002. Although the government, in its brief, cited the record for these factual statements, the cited portions of the record do not support the alleged facts, and we have been unable to find anything in the record upon which we are able to make findings in these regards. Notwithstanding, there is no dispute between the parties that the government hired Ms. Dohogne, effective 9 September 2002 (compl. ¶ 48; answer ¶ 48)

11. Some time in September 2002 appellant became aware that Scott Air Force Base Medical Treatment Facility, the hospital, had hired Ms. Dohogne for a position in the hospital (app. ex. A-2 at ¶ 40). Prior to that time, in May 2002, appellant was unable to fill certain nursing positions at the hospital. (R4, tab 34) While there is no dispute that Ms. Dohogne had been assigned by appellant under the contract to work in that hospital, there is no evidence that she continued to work in the same position to which she had been assigned prior to her resignation from appellant's employment.

12. Appellant, on 9 October 2002, submitted an invoice in the amount of $25,000 as a "Placement Fee of Patricia Dohogne." (R4, tab 39) In its cover letter, appellant complained about the hiring of Ms. Dohogne, alleged possible improprieties in the hiring process, and complained again about the ramifications of the "sleazy tactics" in which the hospital had engaged with respect to appellant. While there was no clear description in the cover letter of the "sleazy tactics" that the government had allegedly previously engaged in, the letter made clear appellant's complaint with respect to the government's hiring of Ms. Dohonge. Specifically, appellant asserted:

> Under no circumstances would a contract agency ever allow a former contract person to work directly for a client without proper consideration and/or compensation. Industry standards dictate that a client may not hire a former contract employee who has worked for that client within the last 180 days. Most of my contracts state 24 months. Because of the underhanded manner in which persons at the MTF have handled this matter, and consistent with industry standards, I am hereby presenting a bill to you for the MTF to cover the placement cost of this nurse. The fee is due immediately, and is non-negotiable.

Appellant then went on to complain about the government's hiring of Ms. Dohogne and asserted:

> The ramifications of the MTF's latest debacle is more undermining to my company than other sleazy tactics which they have previously engaged in because this sends a strong and powerful message that the Federal Government will continue to interfere and undermine my authority to the point that if an employee is dissatisfied with the rules and regulations that the contractor tries to fairly impose, the contract person can jump ship and work directly for the Federal Government and the Federal Government will welcome that person with open harms [sic] and will even assist the contract employee with deceiving the contractor. This is a message that no contractor can go without properly addressing the matter and seeking proper compensation.

(R4, tab 39)

13. Appellant's then counsel wrote the contracting officer with regard to the government's hiring of Ms. Dohogne following her termination by appellant (R4, tab 2). According to the counsel, no placement agency can remain in business if a contract employee is hired directly by a client without notice or compensation. Counsel for appellant alleged that such hirings have a disruptive effect on the relationship between the existing contract employees and of irreparably harming appellant financially. The invoice for compensation is in accordance with industry standards and practices. In a further letter to the government's legal office at Scott Air Force Base, counsel for appellant stated that the fee asserted by appellant in accordance with the custom and practice in the industry was to pay a "conversion fee" when a contract employee is hired directly by a client. (R4, tab 45) Appellant's counsel cited two cases from an Ohio appellate court and from a Texas appellate court in support of appellant's position. Appellant's president also included in her affidavit a statement that the terms and conditions on appellant's Weekly Time Records are standard terms and conditions which all agencies, similar to appellant, "use to protect themselves against clients who decide to directly hire agency personnel." (App. ex. A-2, ¶ 21) No other evidence has been provided to support this assertion.

14. On 10 December 2002, the contracting officer issued his final decision (R4, tab 47). The contracting officer denied the claim in the entire amount on the basis that there was no contractual, regulatory, or statutory authority to support the payment of the fee. The contracting officer further asserted that Ms. Dohogne had quit her job with appellant on 17 May 2002, and had been hired by the government in accordance with all applicable Civil Service regulations on 9 September 2002.

15. We find no evidence of "sleazy tactics" or other bad faith by the government.

DECISION

Although appellant argues some breach of duty of good faith and fair dealing by the government, the only issue before the Board in this appeal is whether or not the contract contained a clause or provision that authorized payment of a placement fee, in the event an employee of appellant left its employ, and was hired by the Department of the Air Force. As with any contractor claim, appellant has the burden of affirmatively proving its entitlement to a placement fee which it asserts in its claim. *Aleutian Constructors, J.V.*, ASBCA No. 49255, 01-1 BCA ¶ 31, 392 at 155,091. This burden of proof "derives from the nature of the specific claims before the Board." *Ahmed S. Al-Zhickrulla Est.*, ASBCA No. 52137, 03-2 BCA ¶ 32,409 at 160,430; *Systems & Computer Information, Inc.*, ASBCA No. 18458, 78-1 BCA ¶ 12,946 at 63,069. In order to prevail, appellant must prove the fundamental facts of liability and damages, that is, the necessary elements of liability, causation, and resultant injury. *Wilner v. United States*, 24 F.3d 1397, 1401 (Fed. Cir. 1994); *Craft Cooling, Inc.*, ASBCA No. 52494, 54127, 06-1 BCA ¶ 33,268 at 164,875. Merely recasting its claim as a claim for breach of contract, with respect to the provisions on the reverse side of the Weekly Time Records, or breach of good faith and fair dealing, without persuasive proof will not change the basic nature of appellant's claim.

Appellant argues that "the contracting officer's final decision errs for failure to recognize the controlling industry custom and trade usage to inform the Air Force's interpretation of its responsibilities under the 8(A) contract." The thrust of appellant's argument here is that there is a long-established principle that the government has the duty to cooperate and not hinder the contractor's performance (citing *George A. Fuller Co. v. United States*, 108 Ct. Cl. 70, 69 F. Supp 409 (1947); *Malone v. United States*, 849 F.2d 1441, 1445 (Fed. Cir. 1988); *Con-Seal, Inc.*, ASBCA No. 41762, 98-1 BCA ¶ 29,501; *Taisei Rotec Corp.*, ASBCA No. 50669, 02-1 BCA ¶ 31,739), and that controlling decisions clearly recognize custom and trade practices as interpreting the obligations of the parties to the contract (citing *Jowett, Inc. v. United States*, 234 F.3d 1365, 1367-68 (Fed. Cir. 2000); *Metric Constructors, Inc. v. NASA*, 169 F.3d 747, 752 (Fed. Cir. 1999)). The nub of appellant's claim in this regard is that from the beginning, the government spent its time "trying to destroy P&C because they don't like her," and:

> When presented with P&C's claim for the conversion of one of its nurses to direct hire, the Contracting Officer did not look at trade custom to determine what the government's responsibilities might be. Instead, the Contracting Officer looked to the contract and, seeing nothing, decided that the government owed P&C nothing for its theft [of Ms. Dohogne].

(App. br. at 22, 23) We agree that the decisions cited by appellant stand for the proposition that the government has a duty of good faith in cooperating with the contractor and not to hinder its performance. However, there is no evidence in the record that the government tried to destroy appellant for any, or for no reason, or that it breached its duty of good faith and cooperation.

Appellant's claim relies principally on invectives against certain government officials, not on any terms in the contract. The contract contains no clause permitting the payment of the placement fee claimed by appellant. There was nothing in the schedule providing for the pricing of what can be construed as a penalty against the government for hiring a former employee of appellant. Moreover, although appellant used a form of timekeeping to track the work hours of its employees assigned to the Scott Air Force Base Medical Treatment Facility, there is no evidence that parties discussed or agreed to incorporate within the terms of the contract the language of the "Terms and Conditions" appearing on the reverse side of the Weekly Time Record.

Finding nothing in the contract on which to base its claim, appellant directs our attention to alleged controlling industry custom and trade usage to inform the Air Force's interpretation of its responsibilities under the 8(A) contract. There is no dispute, we believe, that the law, as cited by appellant, imposes on the government the duty to cooperate and to abstain from hindering the contractor's performance. Applying these principles of law to the hiring of Ms. Dohogne, which is the subject of appellant's claim and this appeal, we have found no evidence in the record, nor has appellant directed our attention to any, that would tend to prove that the government hindered appellant's contract performance with respect to the government's hiring of Ms. Dohogne, or that the government failed to cooperate with appellant in its performance of the contract. Although there is no dispute that the Air Force hired Ms. Dohogne for a nursing position unrelated to her assignment under appellant's contract, effective 9 September 2002, appellant's assertions that the timeline suggested by the government with respect to the hiring of Ms. Dohogne was "much closer in time and much less straightforward than the government suggests," and Ms. Dohogny "probably applied for these jobs while still employee of P&C" are pure speculation without any evidence in the record. (App. br. at 29) Similarly, appellant's sarcastic suggestion that the fact that the government's paperwork prevented Ms. Dohogne from starting work prior to 9 September 2002 has no bearing on the appeal, "[u]nless, of course, the Air Force and Ms. Dohogne conspired to make sure that she did not start work directly for SAFB within two years of her starting work for P&C (September 5, 2000 v. September 9, 2002)," to which appellant adds: "No, this must surely be a coincidence" is inappropriate argument without basis in the record. (App. br. at 29)

In support of its contention that the contracting office failed to look at the trade custom to determine what the government's responsibilities might be, appellant quotes *Jowett, Inc. v. United States, supra,* 234 F.3d at 1368, as follows:

> In interpreting a contract, "[w]e begin with the plain language." *McAbee Constr. Inc. v. United States*, 97 F.3d 1431, 1435 (Fed. Cir. 1996). "We give the words of the agreement their ordinary meaning unless the parties mutually intended and agreed to an alternative meaning." *Harris v. Dep't of Veterans Affairs,* 142 F3d 1463, 1467 (Fed. Cir. 1998). In addition, "[w]e must interpret the contract in a manner that gives meaning to all of its provisions and makes sense." *McAbee*, 97 F.3d at 1435. "In interpreting a contract, a court may accept evidence of trade practice and custom." *Metric Constructors, Inc. v. Nat'l Aeronautics & Space Admin.*, 169 F.3d 747, 752 (Fed. Cir. 1999). However, "a court should accept evidence of trade practice only where a party makes a showing that it relied reasonably on a competing interpretation of the words when it entered into the contract." *Id.* at 752.

The issue in *Jowett, Inc.* was whether, when the contract is clear on its face, extrinsic evidence, *i.e.*, trade practice, should be permitted to aid in the interpretation of the contract. Jowett, Inc. asserted that when the language of the contract does not reflect the industry practice, the contract is ambiguous and consequently the evidence of industry practice is admissible to aid in the interpretation of the contract. The court rejected this, saying:

> This view, in essence, enables industry practice to create an ambiguity, even before the language of the contract is itself analyzed to determine if an ambiguity lies within the four corners of the contract.

(*Id.)* As held by the same court in *McAbee Constr. Inc. v. United States*, 97 F.3d at 1435, cited by the court in *Jowett, Inc.*, above, "the court may not resort to extrinsic evidence to interpret" contract provisions that are clear and unambiguous, and that "[e]xtrinsic evidence will not be received to change the terms of a contract that is clear on its face."

Metric Constructors, Inc. v. NASA, 169 F.3d 747, 753 (Fed. Cir. 1999), cited by the court in *Jowett, Inc. v. United States,* 234 F.3d, *supra* at 1368, is inapposite to appellant's argument. *Metric* involved a question of interpretation of a term, "metallic pipe" in the specifications, which on its face appeared to be clear and unambiguous. Although the court said that "[o]f course, even when accepted, evidence of trade practice

does not trump all other canons of contract interpretation," the court held that the term in the contract specifications was ambiguous when the canons of interpretation pointed to different interpretations and when the application of trade practice and custom asserted by one of the parties deprived the specification at issue of its meaning. Thus, evidence of trade practice and custom illuminated the context for the parties' contract negotiations and agreements.

Appellant does not draw our attention to any provision of the contract which is ambiguous and could be interpreted by the aid of trade practice and custom, or which becomes ambiguous because of some trade practice or custom on which it relied. Rather, appellant attempts to impose on the government and on the contract language a completely new requirement that may, or may not have been in accordance with trade practice or custom, but which was not included or addressed within the terms of its contract with the government. Moreover, appellant does not direct our attention to any language in the contract that may be determined to be ambiguous as a result of the asserted trade practice or custom. Except for the exchange of correspondence between one of appellant's attorneys and the contracting officer, and between appellant's attorney and a government attorney, and appellant's president's unsupported affidavit asserting a trade practice regarding placement fees, there is no persuasive evidence in the record to support a finding that it is a common industry practice or custom to impose on a party to the contract a non-compete provision and placement fee penalty for violation thereof when there is nothing in the contract so providing.

Appellant cites *Polytechnical Consultants, Inc. v. Allsteel, Inc.*, 479 N.E. 1069, 134 Ill. App. 3d 187, 89 Ill. Dec. 63 (1985) and *Fox Associates, Inc. v. Robert Half International, Inc.*, 777 N.E. 603, 334 Ill. App. 3d 90 (2002) for the proposition that "the industry custom is that a fee accrues to the agency which makes the 'first contact' by referring the job candidate, providing the candidate is interviewed and hired for the same or a similar position within one year of the initial referral." (App. br. at 27-28) Appellant also referred to its counsel's letter of 5 December 2002 to the Scott Air Force Base staff attorney in which it cited *Brownlee Services, Inc. v. L. Craig Hallows*, 1989 Ohio App. LEXIS 2442 (Ohio App. 1989) and *Willie v. Donovan and Watkins, Inc.*, 2002 Tex. App. LEXIS 2655 (Tex. App. 2002), for the proposition that the law of various jurisdictions supports the payment of a placement fee based upon the custom and practice in the industry, and that in the absence of an agreement with respect to the amount of the charges, the charges are those that are usual, customary, and reasonable.

As a matter of general practice, we do not follow decisions of state intermediate appellate courts, particularly unpublished decisions, such as *Brownlee Services, Inc. v. L. Craig Hallows*, 1989 Ohio App. LEXIS 2442 (Ohio App. 1989) and *Willie v. Donovan and Watkins, Inc.*, 2002 Tex. App. LEXIS 2655 (Tex. App. 2002). Moreover, as noted in *Willie v. Donovan and Watkins, Inc.*, 2002 Tex. App. LEXIS 2655, "pursuant to the

Texas Rules of Appellate Procedure, unpublished opinions shall not be cited as authority by counsel or by a court."

Notwithstanding, none of these cases are relevant to the facts and the law in the instant appeal. All of the cases were private lawsuits against individuals or employment agencies, and none of them involved a lawsuit or cause of action against the United States under federal law. Each of these decisions relied on the interpretation of specific state law and precedents to support its conclusions. In *Polytechnical Consultants, Inc. v. Allsteel, Inc.*, 479 N.E. 1069, 134 Ill. App. 3d 187, 89 Ill. Dec. 63 (1985), the cause of action was an implied contract were the question under state law was whether plaintiff employment agency had made a referral of a potential employee to the defendant prior to the referral made by another agency, and was, therefore, entitled to a recruitment fee. In *Fox Associates, Inc. v. Robert Half International, Inc.*, 777 N.E. 603, 334 Ill. App. 3d 90, (2002), the primary issue was whether the plaintiff was entitled to recover losses suffered resulting from the alleged fraudulent acts or negligent misrepresentation by the defendant employment agency when the referred employee embezzled $70,688 from the employer before the forgery and embezzlement was discovered. The court held that under state law, the plaintiff employer was barred from tort recovery for purely economic losses even when the plaintiff had no contract remedy. In *Brownlee Services, Inc. v. L. Craig Hallows*, 1989 Ohio App. LEXIS 2442 (Ohio App. 1989), the trial court granted the plaintiff employment placement agency judgment in the amount of $300 as placement fee for an employee on the basis that there existed an implied oral contract between the parties and that the plaintiff was entitled to the fee on the theory of *quantum meruit*, in that it would be unjust for the employer to retain the benefits of the employment agencies services without compensations.

To the extent appellant here seeks recovery on the basis of implied contract on a theory of *quantum meruit*, as recognized in these state court cases cited by appellant, such relief is not available here. The law, in this regard, has been firmly established. Jurisdiction under the Tucker Act, 28 U.S.C. § 1491(a) and the Contract Disputes Act of 1978, 41 U.S.C. § 602(a) extends only to express contracts or implied in fact contracts, entered into by an executive agency, and not to claims on contracts implied in law. *Hercules, Inc. v. United States*, 516 U.S. 417, 423 (1996); *Sutton v. United States*, 256 U.S. 575, 581 (1921); *Barrett Refining Corp. v. United States*, 242 F.3d 1055, 1060 (Fed. Cir. 2001); *Trauma Service Group v. United States*, 104 F.3d 1321, 1336-37 (Fed. Cir. 1997); *Daly & Hannan Dredging Co. v. United States*, 1919 WL 1046 (Ct. Cl. 1919).
In *Hercules, Inc.*, the Court said:

> The distinction between "implied in fact" and "implied in law" and the consequent limitation is well established in our cases. An agreement implied in fact is 'founded upon a

> meeting of minds, which, although not embodied in an express contract, is inferred, as a fact, from conduct of the parties showing, in the light of the surrounding circumstances, their tacit understanding. . . . By contrast, an agreement implied in law is a "fiction of law" where "a promise is imputed to perform a legal duty, as to repay money obtained by fraud or duress."

Hercules, Inc. v. United States, 516 U.S. at 417, 423-24. As stated by our appellate court, "[t]he general requirements for a binding contract with the United States are identical for both express and implied contracts." *Trauma Service Group v. United States*, 104 F.3d at 1325. The party alleging a contract must show a mutual intent to contract including offer, acceptance, and consideration. Moreover,

> A contract with the United States also requires that the Government representative who entered into or ratified the agreement had actual authority to bind the United States. [citation] Anyone entering into an agreement with the Government takes the risk of accurately ascertaining the authority of the agents who purport to act for the Government, and the risk remains with the contractor even when the Government agents themselves may have been unaware of the limitations on their authority.

(*Id.*).

In the instant appeal, there was a contract between appellant and the government, executed in accordance with the Federal Acquisition Regulation, under which appellant was required to provide nursing staff to the Scott Air Force hospital. The contract did not contain or incorporate, either directly or by reference, the "Terms and Conditions" that were printed on the reverse side of appellant's Weekly Time Record. There was no indication on the front side of the Weekly Time Record to the reverse side of that document or to any terms and conditions that might appear on the reverse side. There was no entry on the Weekly Time Record for the contract number or any reference to the contract. There was no evidence in the record that the parties discussed the "Terms and Conditions" contained on the reverse side of the Weekly Time Record in conjunction with the award of the contract. We hold that there is no basis for concluding that there was an implied in fact contract that contained any provision regarding the payment of any placement fee in accordance with the alleged trade practice and custom. Rather, appellant seeks to establish an implied in law contract on the basis of some trade practice or custom, knowledge of which is alleged to be imputed to the government.

Appellant having failed to establish an entitlement to the placement or conversion fee, we hold that the government is not liable to appellant for the fee. Accordingly, we deny the appeal.

Dated: 27 July 2006

ROLLIN A. VAN BROEKHOVEN
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 No. 54124, Appeal of P&C Placement Services, Inc., rendered in conformance with the Board's Charter.

Dated:

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