

ARMED SERVICES BOARD OF CONTRACT APPEALS

Appeal of -- )  
)  
ASFA Construction Industry and Trade, Inc. ) ASBCA No. 57269  
)  
Under Contract No. 000000-00-0-0000 )

APPEARANCE FOR THE APPELLANT: D. Lee Toedter, Esq.  
Orange Beach, AL

APPEARANCES FOR THE GOVERNMENT: Raymond M. Saunders, Esq.  
Army Chief Trial Attorney  
CPT Edward Ahn, JA  
Trial Attorney

OPINION BY ADMINISTRATIVE JUDGE PAGE  
ON THE GOVERNMENT'S MOTION TO DISMISS  
FOR LACK OF SUBJECT MATTER JURISDICTION

ASFA Construction Industry and Trade, Inc. (ASFA or appellant) appealed from a "deemed denial" of its claim for \$478,476.02 based on an alleged implied-in-fact contract with the Joint Contracting Command-Iraq/Afghanistan (JCC-I/A or the government) to repair and operate an asphalt plant and rock crusher at Logistics Support Area (LSA) Anaconda in Balad, Iraq. The government moved to dismiss the appeal for lack of subject matter jurisdiction, contending that the Board is without jurisdiction as there was neither an express nor an implied-in-fact contract between the parties and the matter sounds in tort. We treat the motion as one for summary judgment. The parties have filed proposed findings of fact which we draw upon below to the extent they are undisputed. We deny the motion.

STATEMENT OF FACTS FOR PURPOSES OF THE MOTION

In 2007, Operation Iraqi Freedom was in the midst of the "Iraqi Surge" campaign phase (answer ¶ 16). At that time, the government owned a rock crusher and an asphalt plant located on the northern part of LSA Anaconda. The equipment was in disrepair, and missing many essential parts and components. (*Id.* ¶ 15; government's proposed findings of fact (GPF) ¶ 2; appellant's proposed findings of fact (APF) ¶ 1)

On 23 August 2007, the JCC-I/A Regional Contracting Center (RCC) issued a request for information (RFI) to companies interested in "constructing a concrete batch plant on LSA Anaconda." Potential contractors were asked to respond by 25 August

2007, regarding their planned approach for the construction and operation of the plant. (R4, tab 1; GPF ¶¶ 1, 4; APF ¶¶ 1, 4) Contracting officer (CO) Chad D. Miller notified potential contractors that they would “be given the opportunity to present their plan” in a one-hour oral presentation on 19 September 2007. Among topics to be addressed regarding the concrete batch plant were equipment, set-up, barrier material, raw materials, labor, delivery and security, quality of concrete work, and financial resources. Potential contractors were told to submit a “read ahead packet” to the government by 14 September 2007. (R4, tab 3)

On 25 August 2007, ASFA responded to the government’s questions (R4, tab 2; GPF ¶ 5). ASFA is a “corporation, organized and operated pursuant to the laws of the Republic of Turkey, with its principal place of business located in Adana, Turkey” (compl. ¶ 3).

As required by the CO, ASFA provided a “read ahead” packet of information prior to giving its presentation (R4, tab 22). ASFA outlined by brand name, model designation, and (where appropriate) capacity of the concrete batch plant, stone crusher plant, mixer trucks, and other pieces of equipment and vehicles that appellant intended to provide (*id.* at 5). ASFA advised the government that “All equipment is ready to be shipped to Anaconda at the ASFA warehouse in Turkey,” and delivery to LSA Anaconda “can be completed within 45 days.” Appellant stated that the “Stone crushing plant and precast concrete elements manufacturing plant can be compl[e]ted within 30 days upon arrival of all the equipment in Anaconda.” (*Id.* at 7)

By memorandum dated 31 October 2007, Lt Col Todd M. Burkhardt, USAF, Chief, RCC-Balad, notified appellant that it had been selected to build a concrete batch plant at Balad Air Base, Iraq:

1. Congratulations! ASFA Group has been selected as the contractor to build a batch plant on Balad Air Base, Iraq. This award is based on your verbal presentation for the construction of a concrete batch plant on Balad Air Base, Iraq.
2. We are currently working with Terrain Management to get the land for the batch plant and rock crushing area. The land space we had was determined to be unsuitable and we are diligently working to get a new area. We will let you know as soon as the land is available.

3. Please acknowledge receipt of this letter in the space provided below and promptly return a signed copy of this letter to the addressed [sic] noted above.
4. We look forward to your company joining our contract support team and anticipate a prosperous working relationship.
5. Refer any questions to [Kimberly.burt@blab.centaf.af.mil](mailto:Kimberly.burt@blab.centaf.af.mil).

(R4, tab 4; answer ¶ 20; GPF ¶ 7). As requested, ASFA on 2 November 2007 acknowledged receipt of this memorandum (R4, tab 4).

An 18 November 2007 e-mail from Capt Karsten E. Lipiec of Terrain Management, LSA Anaconda, entitled "Batchplant Update" advised Maj Aaron P. Magan, Maj Robert J. Berg and others that she had surveyed the "asphalt plant/crusher," noting that "Maj Berg from contracting has offered the ASFA company to clean this up as part of their contract to start a new concrete batch plant here." Capt Lipiec opined that having "ASFA company to clean" up the asphalt plant "as part of their contract to start a new concrete batch plant" was "definitely doable," and offered storage space for equipment. She inquired of Maj Berg, "given this new information, how feasible is it to have ASFA perform this work?" (R4, tab 6)

A 10 December 2007 e-mail from CO Kristopher J. Pondo, Capt, USAF, advised ASFA:

You are allowed to open an asphalt plant on Anaconda. The lot of land will no longer be divided but will be ASFA's for both an asphalt and concrete plant. A letter will soon follow signed by Maj Berg and Lt Col Tyron. For now I am authorizing you to proceed.

(R4, tab 7; answer ¶ 22; GPF ¶ 8; APF ¶ 9)

By a 10 December 2007 memorandum from Lt Col Tyron and Maj Berg, the government notified ASFA that it had been selected to build an asphalt plant in addition to the concrete batch plant:

1. Congratulations! ASFA Group has been selected for as [sic] the contractor to build another batch plant on Balad Air Base, Iraq. This award is based on your verbal presentation

for the construction of an asphalt plant on Balad Air Base, Iraq.

2. We are currently working with Terrain Management to get the land for the batch plant and rock crushing area. The land space we had was determined to be unsuitable and we are diligently working to get a new area. We will let you know as soon as the land is available.

ASFA was asked to acknowledge the "Notice of Award," and told to direct any questions to CO Pondo. (R4, tab 8)

By 18 January 2008, CO Pondo had inspected the site at LSA Anaconda that was to be occupied by appellant, and discovered that both the government-owned rock crusher and asphalt plant were missing necessary parts (answer ¶ 23; APF ¶ 5). His e-mail of that date to other government addressees noted that "someone has been taking essentially stealing parts off of the machine" without the permission of the government or ASFA. Missing items included "computer parts from the asphalt plant, engines, and conveyor belts." CO Pondo made clear that he would ensure that anyone discovered having taken these things would "not do business on this base, in all of Iraq or with the U.S. Government anywhere." (R4, tab 21 at 23)

According to a 28 January 2008 e-mail from CO Pondo to ASFA:

The 20<sup>th</sup> Engineers have said that the program office who owns the rock crusher and asphalt machine will pay for the parts. If we buy the parts we would like you to install them. We are just waiting for the guy to come out to do the assessment to tell us what is needed. It is told to me that the guy will be out here mid February or early March. I will get you in contact with him as soon as I learn more information.

As far as the transfer of property goes, I want to wait till the machine is fully restored after we install the parts. Then we can transfer the rock crusher and asphalt machine over as a solid piece of usable equipment. This transfer will not take place till April timeframe. Please let me know if you have any questions.

Mr. Orcan Fikirdanis replied on behalf of ASFA, thanking CO Pondo for the information. (R4, tab 5 at 2; answer ¶ 24; APF ¶¶ 6, 11, 15)

A chain of e-mails began on 28 January 2008, as CO Pondo wrote Mr. David S. Schwartz, Assistant Product Manager, Team Leader Construction Equipment, SFAE-CSS, to introduce Mr. Fikirdanis:

I would like you to meet Mr. Fikirdanis. He is one of our contractors out here, who will be repairing the Asphalt plant and rock crusher. I told him I would get him in contact with someone who knew a bit about the machines. Any assistance to Mr. Fikirdanis would be helpful to us here at Balad.

(R4, tab 10 at 4-5; answer ¶ 26; APF ¶ 12)

Mr. Schwartz's e-mail reply of 29 January 2008 advised CO Pondo:

I am sending two FSRs [Field Service Representatives] to Balad to inspect the crusher and work with unit [personnel] to order parts to get it fixed. Once parts arrive in country, the FSRs will return and repair the crusher, provide training, and then leave. Where does Mr. Fikirdanis fit into all this and what does he need from me?

(R4, tab 10 at 4)

In response to Mr. Schwartz's query, CO Pondo stated:

The company ASFA group has stated that if we give them the parts necessary for the repairs they would make the repairs themselves. After the machines are fully operable, we are planning to turn them over to the contractor as GFE so they may use them to produce Asphalt and concrete out here on Balad. We would then cut a BPA [Blanket Purchase Agreement] with ASFA at a cheaper price to buy the materials from them.

(*Id.* at 3; answer ¶¶ 27-28; APF ¶ 14)

Mr. Schwartz on 31 January 2008 told CO Pondo that "My contract does not cover anything to do with giving parts to the ASFA group." He advised that his organization was "only working on the crushing plant," and would provide ASFA with training to operate and maintain the crushing plant once the ordered parts were received and installed by the FSRs. Mr. Schwartz told the CO:

I am aware that the 20<sup>th</sup> wishes to turn the plant over to a contractor and we will provide the necessary training so they can operate and maintain the crushing plant.

I believe that we can help with providing what you need to support your BPA with ASFA once the FSRs leave.

(R4, tab 10 at 3; *see also* answer ¶ 29; APF ¶ 13)

Mr. Fikirdanis on 4 February 2008 inquired by e-mail of CO Pondo regarding the “Current status of Asphalt tanks which [have] been taken by PMA [another contractor]. It was spoken to be returned on 29<sup>th</sup>.” Mr. Fikirdanis also asked about “Some form of an agreement for utilization of the Asphalt plant.” CO Pondo replied that he would “get an update from PMA” regarding the tanks, and advised Mr. Fikirdanis the same date that “the agreement will be worked out with Major Berg as he will be taking over the details of this project.” (App. opp’n., attach. 2; APF ¶ 8)

On or about 14 April 2008, Mr. Doug Schmidt, a representative from the rock crusher manufacturer, arrived at the site to prepare a list of missing parts for that piece of equipment. The parties understood that the government would order the missing parts. They had not arrived at the site by June 2008. (R4, tab 13; answer ¶¶ 31-32; APF ¶¶ 23, 28).

At about this time, according to appellant, government representatives told ASFA that the government providing the missing parts for the asphalt plant and rock crusher would take too long, except for the parts at PMA’s jobsite. ASFA was told “if those parts are provided by ASFA Co., it would be easier.” Consequently, ASFA ordered and installed the missing parts for the rock crusher. It also obtained technical advice and ordered parts for the asphalt plant. (R4, tab 12 ¶¶ 6-8)

On 7 July 2008, Mr. Aytekin Aydemir, Contract Manager for ASFA, replied to an inquiry of the same date from Capt Thomas E. Tortorella, USAF, Construction Team Lead/Contracting Officer for the RCC-Balad, which asked: “What is the status of the Rockcrusher? Are you planning to purchase parts for the Rockcrusher.” Mr. Aydemir responded, “Some parts have been provided from Turkey and some have been ordered from USA. All the materials will be loaded at one time when we receive the rest of materials from USA and send it here To Balad.” (R4, tab 11)

On or about 12 September 2008, Maj Jason R. Conde inquired regarding remaining requirements for the asphalt plant to be operational, what its manufacturing capacity would be, and what ASFA’s sales price would be. ASFA replied that it had to

get back the parts which were the government's property at the PMA site, that the capacity would be approximately 1500 tons/day, and the sales price would be approximately \$140-\$150 per ton. (R4, tab 12)

ASFA contends, and the government has not disputed, that the rock crusher was fully repaired by December 2008 (R4, tab 13; answer ¶ 38; APF ¶ 39).

Although a 24 August 2009 e-mail from CO Allen is not in the record (R4, *passim*), that message is cited by appellant as having informed ASFA that the government intended to remove the rock crusher from the site, and this message is referenced in ASFA's reply of 3 September 2009 (R4, tab 13). ASFA referred CO Allen to CO Pondo as a government official familiar with events that had taken place regarding the asphalt plant and rock crusher. ASFA noted that it repaired those items at the government's request, and advised that ASFA would seek compensation for repairs it had made:

#### CONCRETE BATCH PLANT:

....

[ASFA] was told by the contracting officer that a BPA concrete contract would be issued to ASFA but it has not been done so.

#### ASPHALT PLANT AND ROCK CRUSHER:

....

After [the technical representative] prepar[ed] the list of the missing parts of the rock crusher, expected parts had not arrived [at] Anaconda until June 2008. Several verbal communications took place and the government determined that providing these parts would take a long time and ASFA accepted to provide these parts in order to make at least the rock crusher operational. Thus, ASFA provided all necessary parts to repair the crusher and spent approximately \$100K to include purchasing of missing parts, transportation, installation costs and other site expenses. Necessary paperwork regarding to these expenses may be submitted to your office if requested....The rock crusher was fully repaired by December 2008.

... We were also told by the contracting office that a BPA asphalt contract would be followed after correction of the plant which had never been happened. On the other hand, it is understood by ASFA that now, the rock crusher is intended to be removed from our site even though it was given us as a GFE under a mutual agreement.

....

If the GFE equipment will be required to be returned to the government, we will be in a position to request you to compensate all our losses raised from the rock crusher and asphalt plant repairs and other losses by not providing the missing parts of the asphalt plant.

(R4, tab 13; *see also* answer ¶¶ 36-39; APF ¶ 33)

On 17 November 2009, ASFA wrote TSgt Robert E. Powell at RCC-Balad to relate that appellant's site office had been informed that the government was removing the asphalt plant and rock crusher from Balad and that "ASFA will be soon be subject to a demobilization request from the base." Appellant told TSgt Powell:

As it was discussed in multiple occasions with your office in the past, ASFA has been invited by your office and thereafter awarded the rights of the following by separate award letters;

1. To install and operate a company owned concrete batch plant and operate
2. To install and operate existing GFE asphalt plant and rock crusher

(R4, tab 14 at 1; *see also* answer ¶ 40; APF ¶ 41)

ASFA referred TSgt Powell to its prior "discussions with [CO Pondo], the former contracting officer in RCC Balad who had awarded these rights to us" and said that "it was mentioned that a new batch plant would be required to provide a competitive market within the base and an IDIQ type concrete supply contract would be issued to the batch plant owner." Although "the Government selected ASFA for [this] award," the "IDIQ contract has never been issued as it was promised by the Government." (R4, tab 14 at 1)



Appellant told TSgt Powell that:

It was also discussed with the same contracting officer separately that they would select a company to award the asphalt plant operating right based on their technical capabilities and the Government would provide fully functional asphalt batch plant equipment complete with a rock crusher to be installed and operated by the successful contractor. The award would again be followed by an IDIQ type asphalt supply contract. After an evaluation period of the contractors' capabilities, ASFA again has been selected for the award.

*(Id. at 2)*

ASFA reminded TSgt Powell that it was learned during an inspection that the government's asphalt plant and rock crusher were not operational, due to missing major parts. ASFA urged TSgt Powell to verify with CO Pondo that the government had decided that ASFA should undertake the necessary repairs since it would take too long for the government to obtain needed parts and then fix the crusher and plant. ASFA alleged that it was damaged by the government's: failing to provide a functioning rock crusher and asphalt plant and award concrete and asphalt IDIQ contracts to ASFA as promised; ordering appellant to demobilize from the concrete and asphalt batch plants within a short period and without compensation; and depriving ASFA of the opportunity to supply the government and third parties with asphalt, rock and concrete. (R4, tab 14 at 2-3) Appellant asked TSgt Powell to reconsider the government's decision requiring ASFA to demobilize. Appellant told him that while ASFA would "certainly obey all orders" from the government, it would seek compensation for its losses if the government persisted with demolition and removal of the asphalt plant and rock crusher. *(Id. at 3)*

By memorandum dated 20 November 2009, CO MSgt Marvin C. Frazier of RCC-Balad informed ASFA that he was authorizing the government to disassemble and remove the rock crusher and asphalt plant:

1. The purpose of this memorandum is to authorize the 557 ERHS to disassemble and relocate the Government Furnished Property (GFP) located on Joint Base Balad (northend area) as provided to ASFA Group under a partnering agreement in 2007. All equipment associated with the respective rock crusher and asphalt plant is Government property and is hereby authorized [for] disassembly and relocation to the US. All efforts are deemed in the best interests of the US

Government in support of drawdown efforts associated with  
Operation Iraqi Freedom.

(R4, tab 15; answer ¶ 41; APF ¶ 42)

Maj Jack L. Nemceff II, USAF, Commander RCC-Balad, on 27 November 2009 issued a "Notice of Termination of Services (ASFA Group)." The memorandum stated that "no pending contracts (construction and services) remain outstanding and under the purview of the Regional Contracting Center" and any "forthcoming warranty work associated with any construction contracts with subject vendor has been waived." ASFA was told "to vacate all land assignments and terminate all lease agreements with Joint Base Balad, Iraq." CO Nemceff directed any questions on the part of ASFA to CO Frazier. (R4, tab 16)

CO Frazier on 30 November 2009 wrote ASFA regarding its "Claim: Asphalt Batch Plant, Joint Base Balad (JBB)," and said that although he had received ASFA's "claim for materials and equipment purchased in support of [the] subject requirement," he was "unable to proceed with processing your claim" in accordance with Federal Acquisition Regulations (FAR) Part 33 and the Contract Disputes Act (CDA), 41 U.S.C. §§ 7101-7109. He stated that the following were required before the government could evaluate ASFA's claim: the contract number and total amount; a request for a final decision of the contracting officer; and ASFA's certification of a claim exceeding \$100,000. ASFA was told to provide this information to the government by 10 December 2009. (R4, tab 17) Although the record is not entirely clear, it appears the "claim" referred to was the 17 November 2009 letter.

E-mail exchanges between the parties dated 1-10 December 2009 show that ASFA reminded the government that "no contract number was formally assigned to this award." Appellant told the government that its 17 November 2009 submission was not a claim, but rather "a heads up notification of a future claim if the government intends to remove [the] asphalt plant" and required ASFA "to remove the concrete batch plant." (*Id.* at 2) The government declined to extend its stated deadline for denying ASFA's claim beyond 11 December 2009 unless ASFA provided the requested information (*id.* at 3-4).

On 5 December 2009, Col David F. Demartino, USAF, Commander 332d EMSG provided ASFA with a written "Notice to Leave Joint Base Balad." ASFA was told that while the government "appreciate[d] the services your company provided to help improve the facilities and infrastructure at Joint Base Balad and the 332d Air Expeditionary Wing," the base was "undergoing a responsible drawdown that positions the installation for transfer to the government of Iraq." Drawdown activities included "a reduction in overall contractor presence" there, and as a "substantial decrease in new projects is anticipated...now is the time for contractors to depart the installation as their existing

contracts expire and their services are no longer needed.” Col Demartino advised ASFA that “Based upon your company’s pending contract expiration and our responsibility to reduce personnel” at Balad, the government asked that ASFA “make preparations to vacate the base within thirty days of receiving this notification.” Appellant was instructed to leave the work site “cleared and cleaned up in accordance with local real estate policies”; otherwise, any remaining items would “become government property” and expose ASFA to fines for failure to comply. (R4, tab 18; *see also* answer ¶ 43; APF ¶ 44)

ASFA responded to the government in an e-mail dated 9 December 2009, proposed a progress schedule, and advised the CO that “the demobilization activities will start 10<sup>th</sup> of December, 2009 and will be accomplished on 31 May 2010.” Appellant noted that an “important milestone of this schedule” was the anticipated visit by 30 January 2010 of “a technical representative from the manufacturer of [the] concrete batch plant” to “supervise batch plant disassembling and packing tasks.” (R4, tab 19; answer ¶ 44; APF ¶ 45)

The government and ASFA met on 9 January 2010 for a “Follow Up Drawdown Assistance Visit” (R4, tab 20). According to meeting notes, the government was advised that “ASFA has a contractor waiting to take all the scrap metal and various other items,” but needed a “written statement allowing them to exit the base with said material.” The government indicated that it would consider whether ASFA would be given “money for the scrap, batteries, or any of the miscellaneous material.” Certain military equipment was identified on the worksite, and the notes recorded that there was “a massive amount of material that needs to be properly packed and stored” before ASFA “[left] the premises,” in addition to “an extremely large pile of scrap material” that had to be dealt with. A committee was formed to investigate these issues. (*Id.* at 1)

ASFA prepared a “Certified Claim for Equitable Adjustment” dated 8 March 2010 in response to the government’s correspondence of 30 November 2009 advising that additional information was needed (R4, tab 21). Appellant categorized its request as one for an “Equitable Adjustment,” or in the alternative seeking a “Termination for Convenience settlement” and sought a “Grand Total” of \$478,476.02 (*id.* at 2, 31). ASFA’s “Summary of Events” explained that the “US Government awarded a contract to ASFA...to install and operate [an] existing GFE asphalt plant and rock crusher” (*id.* at 1). After the government discovered that these items were missing significant parts and were not in working order, ASFA said that it “was requested to bring these equipments operational” and told by the government that it also “would be issued a base-wide IDIQ asphalt contract.” ASFA contended that, as a result of its efforts, the “GFE Rock Crusher was repaired in full and maintained operational,” and that ASFA had also provided the missing parts needed to make the asphalt plant operational. ASFA said that it had complied with the government’s 20 November 2009 direction to disassemble the rock crusher and asphalt plant. (*Id.* at 2) ASFA sought a contracting officer’s final decision

(*id.* at 3) and Caner Dokuzoglu, Deputy General Manager for ASFA, certified the claim (*id.* at 4). ASFA attached several enclosures including certain correspondence between the parties and supporting documentation for the claim (*id.* at 5-32).

The record does not contain a final decision by the government's contracting officer in response to ASFA's 8 March 2010 claim (R4 file, *passim*).

ASFA's notice of appeal was postmarked 15 June 2010, and its complaint received by the Board on 25 July 2010. Appellant alleges that this appeal "arises out of a 'Constructive Contract' between the Appellant" and the JCC-I/A, and was "filed as a 'Deemed Denial Appeal' based on the Contracting Officer's failure to issue a Final Decision on the Appellant's Request for Equitable Adjustment dated 8 March 2010" (compl. ¶ 2). ASFA states that a "formal Government Firm Fixed Price Contract was never issued by the Government" (*id.* ¶ 5), even after appellant was notified by the government of an award to "'Build [a] Concrete Batch Plant on Balad Air Base, Iraq,'" and for the "repair/operation of a Government owned asphalt plant and Government owned rock crusher" (*id.* at 2, ¶ 6).

#### THE GOVERNMENT'S MOTION TO DISMISS

The government on 8 December 2010 filed a "Motion to Dismiss for Lack of Subject Matter Jurisdiction," contending that the Board lacks jurisdiction as there was neither an express "nor a 'constructive contract' between the Government and Appellant" (gov't mot. at 1). As noted by the government, it is uncontroverted that a "formal Government Firm Fixed Priced Contract" was never issued to ASFA (*id.* at 3, ¶ 12 *citing* compl. ¶ 5). The government asserts that, absent an express contract, the CDA at 41 U.S.C. § 7102(a) allows the Board to take jurisdiction over the appeal only if ASFA can show there was an implied-in-fact contract. It argues that ASFA cannot and has not done so, and moves for dismissal on the grounds that appellant failed "to state any basis, and the record is devoid of any support" for, ASFA's contention that the Board has jurisdiction under the CDA (gov't mot. at 3-4). The government also alleges that "Since no contract ever arose between the parties, it is not surprising that the Appellant's claim sounds in tort," lacks "a colorable contractual basis for relief, and should be dismissed" (*id.* at 4).

As to ASFA's alleged failure to meet its evidentiary burden, the government disputes that appellant has alleged facts sufficient to show that the parties had an implied-in-fact contract, particularly that the parties had a mutual intent to contract or that there was an unambiguous offer and acceptance (gov't reply at 1-2). The government does not deny that it "was indeed aware of Appellant's repair activities," but argues that this is "immaterial to whether there existed a contract" (*id.* at 12). The government goes beyond its position that there was no meeting of minds between the parties, and asserts

that “The conduct of the parties shows not only a lack of mutual assent, but that the Government refused to enter into a contract with Appellant” (*id.* at 7).

The government asserts that appellant “makes no mention that the Government promised to reimburse Appellant for repair costs made to the Government equipment,” and that “At best, Appellant’s self-summoned evidence proves that Appellant, entirely on its own accord, ‘accepted to provide these parts in order to make the [equipment] operational’” (*id.* at 6). The government maintains that it “never offered and never agreed to reimburse Appellant for repair costs incurred” (*id.* at 8); rather, it alleges that appellant’s actions were the result of “a business decision made on its own accord, and therefore the Government received no benefit, but for the prospective production of concrete to occur in the future” (*id.* at 10).

The government interprets the parties’ communications differently than ASFA, and contends that “The only understanding between the Government and Appellant was that Appellant would be permitted to occupy and operate an asphalt plant situated on a portion of LSA Anaconda (now Joint Base Balad)” (gov’t mot. at 1). The government contends that “The only support for the Appellant’s allegation that there existed a contractual relationship” is that “verbal communications took place whereby the Appellant agreed to purchase and install missing parts to the Government equipment located on LSA Anaconda,” and that this is inadequate to establish jurisdiction (*id.* at 3 *citing* R4, tab 13).

Among the government’s legal arguments is that “The fact that the Contracting Officer gave assurances that Appellant would be contingently awarded a contract in the future does not give rise to an implied-in-fact contract” (gov’t reply at 7). According to the government, appellant’s “best case scenario” is that “it undertook repairs to the Government’s equipment pursuant to an understanding that the Government would issue a BPA contract for concrete at a later time,” but that “an implied-in-fact contract does not result from advice of a prospective award by a Government agency” (*id. citing Celtech, Inc.*, ASBCA No. 38219, 89-3 BCA ¶ 22,240 at 111,800).

#### APPELLANT’S OPPOSITION

ASFA opposed the motion in “Appellant’s Reply to Government’s Motion to Dismiss for Lack of Subject Matter Jurisdiction” (app. opp’n). Although ASFA agrees with the government that “there was never a formal ‘express’ contract between” the parties, it asserts that there was an implied-in-fact contract. Appellant asserts that the government ignores important facts from the record, including that “Appellant would be permitted to occupy **and operate** an asphalt plant and crusher facility situated” at LSA Anaconda; that appellant “furnished and installed” the missing parts “with the full knowledge, consent, involvement, and encouragement of the Contracting Officer”; and

that “Appellant was repeatedly promised by the [CO] that an express contract would be prepared and signed as soon as the repairs were complete, to cover the Appellant’s provision of the missing parts, and repair services to repair and replace missing items.” (App. opp’n at 1) (Emphasis in original)

ASFA also filed “Appellant’s Response to Government’s Reply to Appellant’s Response Government Motion to Dismiss for Lack of Subject Matter Jurisdiction” (app. resp.). Appellant contends therein that an implied-in-fact contract is demonstrated by:

[T]he involvement of a considerable number of Government employees and Officers, including the Contracting Officer, who openly acquiesced to, participated in, and knowingly encouraged the Appellant to complete the repair work on the defective Government Furnished Equipment, while at the same time holding out to the Appellant the promise that as soon as the defective equipment was operational and capable of production, an IDIQ BPA contract would then be issued to the Appellant.

(App. resp. at 1)

ASFA challenges the assertion in the government’s reply “that the Government refused to enter into a contractual relationship with Appellant,” as this “assumes facts not in evidence and is a misrepresentation of the actual facts in this case” (app. resp. at 3). Appellant asserts that it “has totally absorbed its preparatory costs of mobilization and site preparation at LSA Anaconda/Balad and is only seeking financial recovery for costs attributable to the repair of the defective Government furnished equipment for which the Government has refused payment” and “has unjustly benefitted by virtue of not issuing the promised IDIQ BPA unit price production output contract.” According to appellant, “The correspondence record clearly suggests that” this allegedly promised contract “was contemplated by the parties to capture, defray, and amortize the Appellant’s cost of repairs to the defective Government furnished equipment.” (*Id.* at 4) ASFA takes exception to the government’s observation that its requirement for asphalt and concrete production ended as of July 2008, noting that the government on 26 June 2009 issued a subsequent solicitation for an IDIQ contract to produce asphalt at LSA Anaconda/Balad for a base plus two option years (*id.*, citing gov’t reply at 3). The appellant argues that its interpretation of proposed facts supports mutuality of intent between the parties (*id.* at 7-13). It alleges that “Appellant’s expenditure of funds in the amount of \$478,476.02 to repair defective Government furnished equipment” qualifies as consideration for the purported contract, particularly where the government “accepted the repairs, and took the repairs (and results thereof) with them when they demobilized the repaired” GFE from LSA Anaconda/Balad in January 2010 (*id.* at 13-14).

ASFA “takes no exception” to the holdings in the cases relied upon by the government including *City of El Centro v. United States*, 922 F.2d 816, 820 (Fed. Cir. 1990), but distinguishes them, arguing that the government directly benefitted from ASFA’s efforts (app. resp. at 14). Appellant states that it does not allege that the government “induce[d] the Appellant into performing the repairs with a pre-formed and undisclosed intent to unjustly benefit the Government,” but that “the parties mutually reached an agreement that the most expeditious manner to accomplish the repairs to the defective Government equipment was through the Appellant (given the fact that the Government did not have its own resources in place or funding available to accomplish the work when it was required).” ASFA relies upon this argument in urging that it is at least entitled to recover to the extent that the government benefitted from its efforts under the theory of *quantum meruit* (app. opp’n at 16). ASFA contends that its actions were undertaken under the “actual authority on the part of the Government Contracting Officer who was the Appellant’s ‘business partner’ in the undertaking” (*id.* at 17).

### DECISION

We treat the government’s motion to dismiss challenging the existence of an implied-in-fact contract as a motion for summary judgment:

“We have treated motions to dismiss, made on the grounds that an alleged contract with the Government did not exist, where we in effect rule on the merits of the appeal, as summary judgment motions.” *Thai Hai*, ASBCA No. 53375, 02-2 BCA ¶ 31,971 at 157,920, *recons. denied*, 03-1 BCA ¶ 32,130, *aff’d*, 83 Fed. Appx. 226 (Fed. Cir. 2003). Treating the motion as one for summary judgment, “[o]ur task is not to resolve factual disputes, but to ascertain whether material disputes of fact—triable issues—are present.” *John C. Grimberg Co.*, ASBCA No. 51693, 99-2 BCA ¶ 30,572 at 150,969.

*Factek, LLC*, ASBCA No. 55345, 07-1 BCA ¶ 33,568 at 166,284. Summary judgment is appropriate where there is no genuine dispute with respect to any material fact and the moving party is entitled to favorable judgment as a matter of law. *Revenge Advanced Composites*, ASBCA No. 57111, 11-1 BCA ¶ 34,698 at 170,883-84, *citing Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 247 (1986) and n.1 (“the 2010 amendment to FED. R. CIV. P. 56 changed the word ‘issue’ in former subdivision (c)(2) to ‘dispute’ in current subdivision (a)”).

The government is correct that the Board's jurisdiction is predicated upon the parties having either an express or an implied-in-fact contract. 41 U.S.C. § 7102(a). An "implied-in-fact contract is one 'founded upon a meeting of the 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.'" *City of Cincinnati v. United States*, 153 F.3d 1375, 1377 (Fed. Cir. 1998) *citing* *Baltimore & Ohio R.R. Co. v. United States*, 261 U.S. 592, 597 (1923) (additional citations omitted). The elements of proof to establish an implied-in-fact contract with the United States government are: (1) mutuality of intent to contract; (2) consideration; (3) lack of ambiguity in unambiguous offer and acceptance; and (4) actual authority on the part of the government representative to bind the government in contract. *City of El Centro v. United States*, 922 F.2d 816, 820 (Fed. Cir. 1990), *cert. denied*, 501 U.S. 1230 (1991).

Having weighed all arguments advanced and considered all facts agreed upon by the parties, we find there are genuine disputes regarding material facts precluding summary judgment and therefore dismissal. The agreed-upon facts show that the government's CO not only allowed but facilitated ASFA's repair of government-owned equipment on a military base under wartime conditions, where security was high and access tightly controlled, then made ASFA disassemble the repaired (at appellant's expense) equipment for relocation to the United States. Triable issues remain, particularly regarding the parties' respective conduct and whether ASFA can recoup its investment in refurbishing the government-owned equipment.

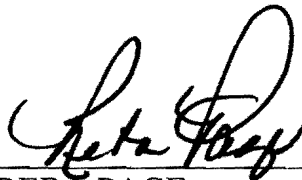
Based upon the record before us, and the parties' agreed upon facts, the Board cannot conclude that there is "no set of facts" that might justify ASFA's claim. Nor are we convinced by the government's legal arguments that it is now entitled to favorable judgment. Its reliance upon *Celtech, Inc.*, ASBCA Nos. 38219-423, 89-3 BCA ¶ 22,240 is unconvincing at this juncture, as the facts there do not sufficiently align with the instant appeal. We are further unpersuaded by the government's argument that the appeal should be dismissed as the Board lacks jurisdiction because ASFA's claim sounds in tort, in that it alleges wrongful conduct. The Board has jurisdiction to decide ASFA's claim that the parties' had an implied-in-fact contract for the contested work at LSA Anaconda.



CONCLUSION

We are mindful that “[t]he uncontroverted facts show that the interaction between the parties occurred at LSA Anaconda, in a combat zone during a time of war, where unstable and unpredictable conditions abound[ed]” (gov’t reply at 12 *citing* APF ¶ 48 and app. opp’n at 16). Acknowledging these difficulties, we hold that further development of the record is warranted as we must examine the parties’ conduct in light of the circumstances. The government’s motion to dismiss is denied.

Dated: 23 June 2011



REBA PAGE  
Administrative Judge  
Armed Services Board  
of Contract Appeals

I concur



MARK N. STEMLER  
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. 57269, Appeal of ASFA Construction Industry and Trade, Inc., rendered in conformance with the Board's Charter.

Dated:

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