ARMED SERVICES BOARD OF CONTRACT APPEALS

Appeal of --	)	
	)	
UniTech Services Group, Inc.	)	ASBCA No. 56482
	)	
Under Contract Nos. N00604-99-M-1600	)	
N00604-99-M-1602	)	
N00604-99-C-1608	)	
N00604-03-P-A549	)	
Predecessor Contracts	)	

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OPINION BY ADMINISTRATIVE JUDGE THOMAS

UniTech Services Group, Inc. (UniTech) seeks recovery of $817,131 for decommissioning and other costs, sometimes referred to as unamortized and stranded costs, arising from the closing of its nuclear laundry facility in Hawaii. The facility provided services to the Navy pursuant to a series of express contracts. UniTech has two alternative theories of recovery. First, it claims recovery under an implied-in-fact contract that allegedly was created by the parties' conduct over some 35 years of uninterrupted performance. Second, it claims recovery under the most recent express contract between the parties, Contract No. N00604-03-P-A549 (contract A549). Jurisdiction arises under the Contract Disputes Act (CDA), 41 U.S.C. §§ 7101-7109. Both entitlement and quantum are before us. We conclude that UniTech has not established a contractual basis for recovery and deny the appeal.

FINDINGS OF FACT

Introduction

1. UniTech was the first nuclear laundry company established in the United States. It provides an array of services for nuclear end-users including laundering services for anti-contamination garments (anti-C's), rental of anti-C's, and sales of

disposable garments. At one time known as Interstate Nuclear Services, the company changed its name to UniTech in 1999, and we use that name throughout for convenience. (App. br., Statement of Facts (SOF) at 7, ¶ 1; gov't br., Responses to Appellant's SOF's (RSOF) at 21-22, ¶ 1)

2. Pearl Harbor Naval Shipyard & Intermediate Maintenance Facility (the Shipyard) provides defueling and other services for nuclear submarines. The Shipyard uses anti-C's, including such garments as coveralls and hoods. In the 1980's and early 1990's the Shipyard had its own purchase division. Since 1995 the Navy's Fleet & Industrial Supply Center, Pearl Harbor, Hawaii (FISCPH), has handled contracting for it. (Tr. 4/632)

3. In 1974, the Atomic Energy Commission granted UniTech a license to operate a nuclear laundry facility in Honolulu, Hawaii. The facility was known as Location 151. It began providing services to the Shipyard shortly after receiving the license.[1] The Shipyard was the facility's only customer throughout its existence. (R4, tab 305 at 686-87; app. br., SOF at 9, ¶ 7; gov't br., RSOF at 22, ¶ 2-15)

4. During the years when UniTech performed nuclear laundry services for the Shipyard, there weren't any other licensees in the State of Hawaii who could perform the services (tr. 1/39). As a practical matter, UniTech was the Shipyard's only supplier for these services.

5. UniTech's last contract with the Navy at Pearl Harbor, contract A549, expired on 31 March 2006. The Shipyard decided at that time to switch from laundered anti-C's to disposable garments. After a period of waiting to see whether or not the Navy would resume the use of laundered anti-C's, UniTech shut-down Location 151. The costs of that shut-down are at issue in this appeal.

Express Contracts From 1974 to the Award of Contract A549 in 2003

6. The record does not contain copies of any contracts between UniTech and the Navy prior to Contract No. N00604-99-M-1600 awarded 8 October 1998 (R4, tab 30). It is undisputed, however, that UniTech provided laundry services for the Shipyard at Location 151 pursuant to a series of successive express contracts from the time it began operation until 31 March 2006 (except for a one-month gap in September 1998), a period of over 30 years (gov't br., RSOF at 24, ¶ 21; R4, tab 322 at 66-67). Insofar as the record indicates, these contracts provided for minimum monthly guaranteed payments to

[1] Appellant contends that laundry services started in 1970, resulting in performance for over 35 years (app. br. at 1-2). While there is some support for a start date of 1970 (*e.g.*, tr. 4/669), we believe 1974 is the better date.

UniTech. They were not requirements contracts as described in Federal Acquisition Regulation 16.503.

7. The record does not contain any information about why UniTech originally decided to provide nuclear laundry services for the Shipyard. We do not know what consideration either UniTech's management or the Shipyard gave to how the costs for shutting down the facility, should the Shipyard no longer need services, would be handled. The record also does not contain any information about what the order of magnitude of costs for shutting down a facility in the 1974-time period would have been. There is also no information as to the profit structure of the contracts prior to 1985.

8. The first contract for which there is any information in the record is Contract No. N00311-85-D-1004, presumably solicited or awarded in 1985. It provided for a base period and four option years and included a minimum monthly guaranteed invoice amount. (R4, tab 201)

9. In 1990, the Shipyard's purchase division issued a solicitation for another five-year contract, Contract No. N00311-90-C-1004. In its response to the solicitation, UniTech stated that "we must again request a monthly minimum guarantee if we are to maintain our Honolulu facility, as the shipyard is our one and only account." It commented that fixed costs for the plant alone would exceed revenue if based on the volume of anti-C's projected by the Shipyard in its solicitation. UniTech provided a list of fixed expenses for 1990 including a provision for decommission in the amount of $5,000. (R4, tabs 201, 230 at last two pages dated 5/4/90)

10. In 1995, the purchase division awarded Contract No. N00311-95-C-1203 with a base year and two option years. Both options were exercised. The contract included a monthly minimum guarantee increased from prior years based on the consumer price index. The period of performance ended on 31 August 1998. Prior to award of the contract, UniTech explained to the Shipyard that its G&A included a provision for decommissioning expense. (R4, tabs 203, 230 at page dated 25 August 1995, *see also* R4, tab 61 at 3 of 3)

11. On 10 December 1997, the contracting officer (CO) sent a memorandum to the Shipyard, Subject: "RENEWAL OF CONTRACT N00311-95-C-1203" with UniTech for laundry services. The CO asked that the Shipyard submit its follow-on requirements. (R4, tab 203) On 7 July 1998, FISCPH issued Solicitation No. N00604-98-R-1002 (solicitation 1002) for a three-year contract. Because a potential offeror other than UniTech had expressed interest in the contract, FISCPH issued the solicitation as one for a requirements contract rather than a contract with a guaranteed minimum payment. As matters developed, only UniTech submitted a proposal in response to solicitation 1002. UniTech proposed a minimum monthly service charge.

(R4, tab 34 at 1 of 90, tabs 206, 236, business clearance memorandum at 4; tr. 4/646) On 21 April 1999, the CO asked UniTech to provide a rationale for that charge. Mr. Victor M. Crusselle, UniTech's Manager, Technical Accounts, with responsibility for sales at the Pearl Harbor location, replied on 27 April 1999:

> The INS [Interstate Nuclear Services] Honolulu facility is operated for the sole use of Pearl Harbor Naval Shipyard and therefore, all fixed costs must be covered by this one contract. Our operating costs continue whether Pearl Harbor Naval Shipyard is shipping laundry or not.... Our license requires that a portion of the revenue be set aside as a provision for decommissioning.... Without the minimum charge, the INS Honolulu facility would be operating at a loss and would be forced to close and decommission the facility.

(R4, tab 225 at 4, ¶ 6.0; tr. 1/27-28) On 14 June 1999, by Amendment No. 0002, FISCPH deleted the requirements clauses from solicitation 1002 and substituted a new Section B providing for minimum monthly charges in accordance with UniTech's proposal (R4, tab 34 at 2, 5 of 7; tr. 3/423). In response to this amendment, Mr. Crusselle confirmed UniTech's pricing on 21 June 1999 and reiterated that:

> The minimum monthly processing charge was instituted several years ago to account for the fact that PHNSY is the only customer for the INS Honolulu facility. This charge is designed to cover fixed and variable overhead costs, provisions for final decommissioning and allow a profit to be made.

(R4, tab 226 at 5) Mr. Crusselle also advised the CO on 30 June 1999:

> NUCLEAR DECOMMISSIONING.
> We are required by law to set aside a fixed amount for future decommissioning expenses. This amount currently is approximately $6,000 per year. This amount will only offset the total cost for final decommissioning. It is expected that the final decommissioning cost will run from $250,000 to $500,000.

(R4, tab 231 at 2 of 4) Asked at the hearing why UniTech only included $6,000 per year in the proposal, when it anticipated expenses of $250,000 to $500,000, Mr. Crusselle testified:

> In an effort to maintain the contract at a[n] acceptable cost level, we only try to recoup a certain portion of what we thought our decommissioning costs would be for the entire year. Basically, we were partnering with the Government and had assumed that over the life span of the facility we would hope to recover—at least recover most of the costs associated with decommissioning the facility.

(Tr. 1/54-55) FISCPH accepted UniTech's proposal and awarded it Contract No. N00604-99-C-1608 (contract 1608) on 30 July 1999, *infra.*

12. Since FISCPH had not awarded a new contract prior to the expiration of the 1995 contract at the end of August 1998, the Shipyard was left without an anti-C contract for the month of September 1998. The Shipyard requested that the contracting office issue a four-month sole source contract to UniTech at a monthly guaranteed price. This request led to the award of Contract No. N00604-99-M-1600, a short-term contract for the period 8 October 1998 through 31 January 1999 for laundering anti-C's at a monthly price of $20,726. During the period when there was no contractual coverage, the Shipyard did not use the laundry. Although UniTech attempted to obtain contractual coverage for September 1998 because of its on-going fixed costs, it did not succeed. (R4, tabs 30, 210, 215; tr. 1/46)

13. Since FISCPH had still not awarded the contract for the next three-year period, on 9 February 1999, FISCPH awarded Contract No. N00604-99-M-1602, a four-month contract for the period 1 February 1999 through 31 May 1999 for laundering anti-C's at a monthly guaranteed price of $21,450. By mutual agreement the contract was extended to 31 July 1999. (R4, tab 32 at 1-2, tab 33)

14. On 30 July 1999, FISCPH and UniTech executed contract 1608 for anti-C laundry services for a base period of one year and two option years, the second of which ended 31 July 2002. The contract provided for minimum monthly prices, increasing from $21,665 in the base year to $23,208 in the second option year. The contractor was required to possess or establish a laundry facility in accordance with Nuclear Regulatory Commission (NRC) regulations located on the island of Oahu. The CO subsequently exercised the options and extended services for periods of two, three and one month(s) to 31 January 2003. (R4, tab 34 at 1 of 4, at 2, 3 of 3, at 12R of 90, tabs 37, 40, 46, 47, 48)

Expectations About the Continuation of the Laundry Service Contracts

15. UniTech's Mr. Robert Krakan, who was plant manager for Location 151 from 1988 until 2007 (R4, tab 322 at 8, 73, 85), assumed that the laundry services contracts would continue more or less indefinitely. Shipyard technical personnel would discuss

with him upcoming laundry requirements that were further out in time than the end of the current express contract. He testified:

> [W]e never really talked in terms of, well, our contract's up in six months, what's going to happen. It was never an issue.
>
> It was a mutual expectation that after this contract was up they're going to do the same thing they always do, and they'll put it out for bid, and we're the most qualified facility with a long history of providing the service, and unless someone could bid below us, that we were going to be the ones who were going to be requested to perform the services.
>
> They depended on us as much as we depended on them. They were our only customer and we were their only service provider.
>
> Q. So it was a, an exclusive relationship?
>
> A. I think so. It was a lot like a marriage.

(R4, tab 322 at 38)

16. To some extent, Shipyard technical personnel shared this expectation. Mr. Cyrus Chun was the contracting officer's representative (COR) on the express contracts from 1988 to 2006. He was responsible for the laundry shipments out of the Shipyard. (Tr. 3/574, 578) He agreed that there was a longstanding uninterrupted relationship between the Shipyard and UniTech, and that renewal of the contracts was in the nature of renewing a driver's license (tr. 4/607-09). Mr. Patrick McDowell, who served as an alternate COR for some of the contracts, and coordinated laundry shipments as far back as 1982, knew that UniTech had been around quite awhile, at least back to the mid-70's (tr. 2/340-41). Mr. Wayne Gushikuma, the nuclear materials manager at the Shipyard from 1997 until 2005 (tr. 3/543-44), also agreed with analogizing the renewal of the contract to renewing a driver's license (tr. 3/569). As we find below, when the idea of discontinuing laundry services was raised internally, both in 2004 and 2006, Mr. Chun raised the question of who would pay decommissioning costs. None of these technical personnel was a contracting officer (tr. 2/340, 3/549, 577).

17. Appellant has not established that any of the government's COs, who changed assignments more frequently than the technical personnel (tr. 1/31), assumed that the relationship with UniTech would necessarily continue. We do not think that references to renewing the prior contract, as a CO began the process for determining whether the

Shipyard desired a new contract for laundry services (*e.g.*, finding 11), establish that "the express, shorter-term contracts were regarded as mere formalities...that...were used as instruments that served to 'renew' the always present, implied-in-fact laundry contract" (app. br. at 39).

Shipyard Consideration of Alternatives to Contracting With UniTech Prior to 2004

18. Prior to award of each of the 1985, 1990, 1995 and 1999 contracts, the Shipyard evaluated whether to continue with the nuclear laundry service contracts as opposed to other options. In 1984 the Shipyard evaluated whether to perform the laundry services itself, and determined that doing so was unacceptable based on the cost for training, actual laundry operations, solid waste disposal, equipment and other factors. In 1990, the Shipyard considered options of using disposable anti-C's and of shipping the anti-C's to Puget Sound Naval Shipyard for laundering. A 17 July 1995 memorandum discussed alternatives to renewal of the UniTech contract and provided updated costs to dispose of the anti-C's and ship them to Puget Sound Naval Shipyard. In 1999, FISCPH noted in the business clearance memorandum for contract 1608 that the Shipyard had "attempted to find other alternatives in lieu of laundering the Anti-Cs to be cost effective." However, as of that time, the other methods were either not feasible or not cost effective. (R4, tab 236 at 19, tab 237, 17 July 1995 memorandum) The Shipyard appears not to have shared these internal deliberations with UniTech (tr. 1/45, 48-49, 55).

19. Sometime in the 2002-to-2003 period, the Puget Sound Naval Shipyard discontinued nuclear laundry services and switched to one-time use and disposal because their volume had dropped. Mr. Crusselle talked to UniTech's technical contacts at the Shipyard, Messrs. Chun and Gushikuma, to see if Pearl Harbor was considering any such action. Messrs. Chun and Gushikuma told them no, definitely not. (Tr. 1/60)

20. Also in this timeframe, on 5 December 2002, Norfolk Naval Shipyard conducted a cost analysis to determine whether it was more cost efficient to use the current method of laundering and re-using anti-C's or to go to a one-time use of the clothing. That Shipyard concluded that it was cheaper to continue with laundering. (R4, tab 76) None of the witnesses at the hearing who were asked about this cost analysis had seen it before, and its relevance to the issues in this appeal is unclear (*see* tr. 1/59, 2/174, 3/539, 570, 4/616).

Contract A549

21. On 9 September 2002, FISCPH issued the solicitation for what proved to be the last of the express contracts, contract A549 (R4, tab 1). In its January 2003 proposal in response to the solicitation, UniTech stated:

2.3.8 Nuclear Facilities Decommissioned

> In addition to our experience in building and renovating facilities, UniTech has also successfully decommissioned four (4) nuclear laundries in the last 10 years. Upon completion of decommissioning activities, each site was surveyed by the appropriate regulatory agencies and approved for unrestricted use. UniTech guarantees that funds will be available to decommission its facilities by establishing Decommissioning Surety Funds for each laundry facility.

(R4, tab 49 at 2-4)

22. On 30 January 2003, FISCPH awarded contract A549 to UniTech to provide laundry services to launder radioactively contaminated anti-C's for the Shipyard. Contract A549 provided for an eight-month base period and two one-year option periods with a minimum monthly charge for each period increasing to $26,420 for the second option period. The contractor was required to possess or establish a laundry facility in accordance with NRC regulations located on the island of Oahu. The Navy exercised both options and extended the final period of performance by six months, resulting in a contract completion date of 31 March 2006. The total cost of the contract including the six-month extension was $982,560. UniTech was paid the full contract price and the contract expired in accordance with its terms. (R4, tab 1 at 1, 3-4, 12, tabs 5, 10, 14, 18; tr. 2/212-13)

23. Shortly after the contract was awarded, Ms. Francine K. Matsuura was assigned to administer the contract as CO (tr. 3/453).

24. On 5 August 2004, a manager in production at the Shipyard sent an email to Mr. Chun's branch asking when the laundry contract ended, stating that "[w]e want to discontinue with launder Anti-Cs." The author of the email did not testify at the hearing, and the record does not give any context for the 5 August 2004 email. Mr. Chun replied the same day that "[u]ntil a satisfactory method or replacement is authorized or put on the table for discussion, the laundry contract will remain as is...." (R4, tab 255; tr. 4/613) He also pointed out that when contracts involving a nuclear facility are ended, "there are huge decommissioning costs that are involved. I'm not sure what it is as those are claimed later by the contractor." (R4, tab 257)

25. No decisions were reached on discontinuing the laundry contract at this time (*see, e.g.*, R4, tab 263).

26. Also during performance of contract A549, Ms. Matsuura sent an email which appellant highlights. On 23 February 2006, Mr. Krakan notified Mr. Chun that he had been diagnosed with liver cancer and would be having surgery, and explained how UniTech would cover performance during his absence. Mr. Chun in turn forwarded the message to Ms. Matsuura, the CO. Ms. Matsuura replied to Mr. Chun: "Thanks for the info...sent him a speedy recovery note. Hmm, must be from the nuclear exposure...what do you think?" The record does not contain any reply to Ms. Matsuura's message. (R4, tab 275)

Solicitation and Proposal for a Contract Subsequent to Contract A549

27. On 28 March 2006, FISCPH issued Solicitation No. N00604-06-T-0313 (solicitation 0313) for anti-C laundry services with an offer due date of 30 March 2006. Solicitation 0313 provided for a six-month base period of 1 April 2006 through 30 September 2006 and two one-year option periods ending on 30 September 2008. It permitted minimum monthly amounts. Like contracts 1608 and A549 it required the contractor to possess or establish a laundry facility in accordance with NRC regulations located on the island of Oahu. The solicitation was sent out prior to FISCPH legal comments due to time constraints. (R4, tab 22 at 1, 5, 10, 28-32, tab 24)

28. On 29 March 2006, UniTech submitted its proposal in response to solicitation 0313. Mr. Richard N. Downard signed the proposal as Manager, Technical Accounts. The proposal was based upon minimum monthly amounts of $27,215 for the base year, $28,030 for the first option year, and $28,870 for the second option year. The proposal included paragraph 2.3.8 Nuclear Facilities Decommissioned, quoted above in connection with the proposal for contract A549. (R4, tab 22 at 1, 28-32, tab 276 at 2-4)

The Shipyard's Decision to Discontinue Use of Laundered Anti-C's and Contacts With UniTech (April – June 2006)

29. On 5 April 2006, FISCPH and Shipyard personnel met to discuss the cost of the nuclear laundry contract and alternatives for cost savings. According to the meeting minutes, in fiscal year 2005, laundry services were used 7 times out of a 12-month period, and UniTech was paid at a rate of $26,420 per month for a total of $317,040 per year. UniTech's March 2006 proposal increased the minimum monthly charge approximately $800 per month for the base year and $815 and $840 per month respectively for the option years. Legal counsel suggested that the solicitation be issued as an indefinite delivery/indefinite quantity contract with delivery orders issued as needed rather than paying the contractor on a monthly basis on a firm fixed-price contract. One of the Shipyard representatives stated that if a contract was not in place when anti-C's needed laundering, disposables would be used. It had been determined that operating costs at Norfolk Naval Shipyard were much lower. It was agreed at the meeting that a

cost analysis needed to be done to determine which would be the most cost efficient, disposables or laundering of anti-C's. (R4, tab 24)

30. By 20 April 2006, UniTech's Mr. Downard began a series of emails and telephone calls asking about the status of the contract. He understood from a conversation with Ms. Matsuura that the contract was "in legal, waiting on signatures for a contract" (tr. 2/177). On 20 April 2006, he wrote Ms. Matsuura:

> I hope things have progressed through your legal department. We have serviced the shipyard for the past 30 years and we didn't change anything in the way we did business, so I don't understand the holdup of awarding the contract.
> Can you give me an update on what is happening.

(R4, tab 287) In a conversation with Mr. Downard, Ms. Matsuura inquired about the possibility of shipping the laundry to California or UniTech's supplying disposable garments. Mr. Downard responded by email on 24 April 2006 that shipping to California was not feasible, and that UniTech "can certainly quote you pricing information on the disposable coveralls we can provide, if that is what is decided you want to do." (R4, tab 288)

31. On 5 May 2006, Mr. Downard emailed Ms. Matsuura stating that he would like to get a contract in place with the Shipyard. He stated that "[i]f we can't get something put together, our corporate office is going to shut our facility down and start the decommissioning process which is irreversible." Ms. Matsuura in turn forwarded the email to the Shipyard, expressing her view that "I think we have a lot more leverage to get a fair and reasonable deal from Unitech if you are still interested in a contract." (R4, tab 289) Mr. Downard thought at this time that Ms. Matsuura "was really trying to help me get this contract in place" (tr. 2/180).

32. On 8 May 2006, Ms. Matsuura emailed Mr. Downard that the Shipyard "is in a very tight financial quandary and at the present time, are trying to figure out how to handle this much needed requirement.... But to give you a heads up, the [Shipyard] is in the process of sending out a purchase order to your firm." Mr. Downard replied the same day rejecting the idea of a purchase order:

> We cannot and will not stay in operation in Hawaii on an as needed basis. We still have monthly bills to pay despite not getting revenue from the shipyard. Unless we get something in place my superiors are in the initial assessment of decommissioning our Honolulu facility. We cannot survive

without a contract in place. Once a decommissioning plan is in place and started it is irreversible.

(R4, tab 290)

33. Meanwhile, on 18 May 2006, Mr. Chun sent an inquiry to Ms. Matsuura about the Shipyard's possible liability for decommissioning costs:

> Logically, I...understand that since we do not have a contract, it makes sense that the Navy will not be responsible for any decommissioning cost for the contractor's facility, however, this does not prevent the contractor from filing a claim against the Navy for decommissioning cost.
>
> But in Reality, if I was the contractor, who built a nuclear laundry facility solely to service the Navy and if a contract was not forthcoming after 20 + years of service no perceive [sic] revenues in the future, I would close the facility. And to further lessen my losses, I would have my corporate lawyers file a claim against the Navy to share or pay all of the decommissioning cost for the facility and depreciation of all machinery / equipment.
>
> ....
>
> Can you ask your Legal Counsel about facility decommissioning cost and compensation for depreciation of equipment / machinery?
>
> ....
>
> The Shipyard Management needs to know what the hidden costs would be for not awarding this contract.

(R4, tab 293) Ms. Matsuura replied that legal counsel did not think UniTech could charge the Shipyard for UniTech's decommissioning charges (R4, tab 294).

34. On 1 June 2006, Mr. Downard inquired again about the status of a contract. Upon Ms. Matsuura inquiring of the Shipyard what response she should make, Mr. Chun replied:

> See you later alligator!
>
> Seriously, the Shipyard will be disposing anti-cs. Currently we are beefing up stock to support this effort. We cannot, at this moment, give a definite "NO" due to the fact that the final say needs to come from Code 105, The Director of Radiological Controls.

(R4, tab 294) Mr. Chun continued that the Director was on leave, and a final decision would have to wait until his return (*id.*).

35. On or about 14 June 2006, the Director approved discontinuance of a contract for laundry services. A 24 June 2006 memorandum from the Shipyard to the Commander, Naval Sea Systems Command, "Subj: DISCONTINUATION OF ANTI-CONTAMINATION CLOTHING LAUNDRY CONTRACT," explained the reasons for the decision. It stated that the Shipyard had determined that the cost of a contract to launder anti-C's exceeded the cost of purchasing new replacement anti-C's and disposing of the used items. According to the memorandum, over the last 18 months, UniTech received only 8 months of laundry work and was paid $475,560. The memorandum estimated that if a contract were awarded for the next 12 months, there would be only three to four laundry shipments. It concluded that it was no longer economically feasible to continue awarding laundry contracts. The memorandum stated that the Shipyard had considered using purchase orders on an as needed basis, but UniTech had stated that was not acceptable. (R4, tab 27)

36. On 27 June 2006, Ms. Matsuura emailed Mr. Downard a letter referencing solicitation 0313 and stating that the government had decided to cancel the solicitation (R4, tabs 28, 298).

37. Mr. Downard emailed Ms. Matsuura asking what the cancellation meant. On 28 June 2006, Ms. Matsuura replied simply that the customer had cancelled the requirement. She forwarded the email to Mr. Chun and others at the Shipyard. Mr. Chun told the other recipients of the email "I've been advised by the contract officer to not give any information to the contractor.... Francine suggested that the only thing we might say that is safe to say is that 'the laundry contract services are no longer cost effective for the government.'" (R4, tab 298)

38. We find that the decision to discontinue nuclear laundry services was made in June 2006, based on such factors as the reduced need for the services, the increased cost of purchasing them at the price UniTech proposed, and the availability of disposable anti-C's, and not prior to the award of contract A549.

Disposal of Anti-C Garments Subsequent to the Expiration of Contract A549

39. Mr. McDowell described the functions relating to disposal of radioactive material at the Shipyard dating back to 1982:

> The shipyard has needs throughout the year or any year to prepare items that are radioactive. Either they have to be sent to another Naval shipyard for use or they may have to go to one of the Naval laboratories for analysis. Or if it's material that is no longer needed by the Navy, it will be disposed of as radioactive waste.

(Tr. 2/335-36) At the time of the hearing in 2010, "the work is essentially the same" (tr. 2/337).

40. In the late 1980's, the Shipyard had two relevant contracts. One was for the land burial of low-level radioactive waste and the other was for nuclear laundry services. (Tr. 2/339)

41. The contract for land burial of low-level radioactive waste was with U.S. Ecology in Richland, Washington, or its predecessor organizations. Mr. McDowell's organization was responsible for getting material packaged and transported to the West Coast for disposal at Richland. In about 2008, the Shipyard entered into an agreement with Puget Sound Naval Shipyard, which had much greater volume, for it to arrange for disposals at Richland, and FISCPH's separate contract with U.S. Ecology was discontinued. (Tr. 2/346, 356-57, 3/557-59)[2]

42. The FISCPH contract for the Shipyard had waste acceptance criteria including pricing for the disposal of different types of items and different radiation dose rates (tr. 2/358).

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[2] Mr. McDowell identified the company as U.S. Ecology. Mr. Gushikuma referred to it as Energy Solutions (tr. 3/557). We accept Mr. McDowell's testimony on this point for present purposes since Mr. Gushikuma left the relevant organization in 2005.

43. Mr. McDowell explained that when the solicitation for the next laundry services contract was cancelled in 2006:

> [T]he shipyard management decided that we were going to do two things: If the garment was considered to be radiologically clean, not contaminated, it would be incinerated locally here [in Hawaii]. If it was deemed to be potentially contaminated or contaminated, then it became part of our low-level radioactive waste matrix.

(Tr. 2/359-60) The contaminated garments were part of the overall low-level waste shipment to U.S. Ecology (tr. 2/360, *see also* at 361).

44. Appellant asserts in its brief that the Shipyard "contracted with Energy Solutions for the receipt and disposal of low-level radioactive waste represented by the one-time-use and disposal of the anti-C's" prior to the execution of contract A549 (app. br., SOF at 21-22, ¶ 36; *see* n.2 *supra*). We find that appellant has not proved that the Shipyard (or FISCPH) so contracted, as opposed to contracting for disposal of low-level radioactive waste in general, as it had done since at least the early 1980's.[3]

Decommissioning of Location 151

45. UniTech did not close down Location 151 immediately. It chose to keep the laundry operational, and try to win back the work. In particular, Mr. Krakan thought the government might change its mind with a new fiscal year. (R4, tab 322 at 72-73)

46. On 16 August 2007, after a new contract did not materialize, UniTech submitted its notice of decommissioning to the NRC. It completed the decommissioning in July 2008 and requested that its NRC license be terminated in September 2008. (R4, tabs 63, 305 at 682, 691)

47. As set forth in its post-hearing brief, UniTech seeks damages of $817,131, as follows:

[3] Appellant requests that the Board draw an adverse inference to that effect because of discovery disputes with the government (app. br. at 21 n.2). We decline to draw such an inference and affirm the ruling of the presiding judge at the hearing accepting the representation of the government with respect to its compliance with appellant's discovery requests as they related to this issue (tr. 4/678).

Appellant's Damages Recap

• Facility Continuation Costs:		$372,360
o Radiation Safety Officer Salary:	158,565	
o Maintenance and Utilities:	6,013	
o Vehicle Depreciation:	7,845	
o Property Rental Expense:	138,185	
o NRC License Fee:	54,800	
o Casualty Insurance:	6,952	
	372,360	
• Decommissioning Cost:		271,714
• Third-Party Nuclear Insurance:		173,057
Total Damages:		**$817,131**

(App. br. at 61-62)

48. We find that UniTech has proved that it incurred costs in the stated amounts for facility continuation costs and decommissioning cost, and that it has reasonably estimated that third-party nuclear insurance for Location 151 will be $173,057 (R4, tabs 315, 316; tr. 2/261-69, 272, 321-322).

Claim and Appeal

49. On 19 February 2008, UniTech submitted a certified claim under the CDA "for the additional costs incurred by it in the performance of nuclear decontamination of protective clothing" for the Shipyard. The principal basis for the claim was breach of an implied-in-fact requirements contract for which it sought damages of $708,100 for decommissioning and other costs plus $450,000 as lost profits. (R4, tab 50)

50. On 30 June 2008, the CO denied the claim, and this timely appeal followed (R4, tab 51).

DECISION

In its post-hearing briefs appellant relies upon two alternative theories of recovery: breach of an implied-in-fact contract and breach of contract A549. We address them in turn.

Implied-in-Fact Contract

Appellant describes its theory of breach of an implied-in-fact contract as follows:

> Appellant's theory of the case with respect to this cause of action is that there developed over a period of more than 35 years an exclusive, mutually dependent relationship between Appellant and the Government and that this relationship, along with Appellant's justifiable reliance on the continuation of this relationship, induced Appellant to incur costs for which it is entitled to recover. This exclusive, mutually dependent relationship giving rise to an overarching implied-in-fact contract is predicated on a series of successively executed, shorter-term express contracts. The implied-in-fact contract was breached by the Government's abrupt departure from launder and re-use of anti-C's to one-time use and disposal after inducing Appellant to believe that the conduct would continue in accordance with the course of conduct without reimbursing Appellant its unamortized and stranded costs caused by this action.

(App. br. at 37-38) The government responds that "[t]here is no evidence that the execution of the express contracts in any way gave rise to the execution of the alleged implied-in-fact contract" (gov't reply br. at 8).

An implied-in-fact contract "must be '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.'" An implied-in-fact contract with the United States also requires that the government representative who entered or ratified the agreement had authority to do so. *Trauma Service Group v. United States*, 104 F.3d 1321, 1326 (Fed. Cir. 1997) (quoting from *Hercules Inc. v. United States*, 516 U.S. 417, 423-24 (1996)). Moreover, "[i]t is well settled that the existence of an express contract precludes the existence of an implied-in-fact contract dealing with the same subject matter, unless the implied contract is entirely unrelated to the express contract. *E.g., Atlas Corp. v. United States*, 895 F.2d 745, 754-55 (Fed. Cir. 1990)." *Schism v. United States*, 316 F.3d 1259, 1278 (Fed. Cir. 2002) (en banc).

We agree with the government that there simply is no evidence of an overarching implied-in-fact contract. There is no evidence at all of the contractual arrangements between the parties prior to 1985. There is no evidence of any understanding, tacit or otherwise prior to that date. There is no evidence of any understanding between the parties as to future decommissioning or any other costs. We cannot assume that the Shipyard's award of a contract for laundry services in 1974 encompassed a commitment ultimately to pay the costs for closing the laundry facility. (Findings 6-8)

The evidence of contractual arrangements between the parties beginning in 1985 is inconsistent with the existence of a separate implied-in-fact contract pursuant to which the government would reimburse appellant for its "unamortized and stranded costs." All of the express contracts, to the extent we have information about them, included monthly minimum guaranteed payments, and those payments included a provision for decommissioning expenses. Thus, for example, prior to award of the 1995 contract, UniTech explained to the Shipyard that its G&A included a provision for decommissioning expense (finding 10). Prior to the award of the last contract, contract A549, UniTech specifically stated that it "successfully decommissioned four (4) nuclear laundries in the last 10 years" and that it "guarantees that funds will be available to decommission its facilities...." It repeated this statement in its proposal for the contract subsequent to contract A549, which was not awarded. (Findings 21, 28) There is no hint in any of these documents that UniTech expected recovery for decommissioning outside of the four corners of the express contracts. Rather, it offered a guarantee that funds were available to cover the costs of decommissioning.

The doctrine that the existence of an express contract precludes the existence of an implied-in-fact contract dealing with the same subject matter is clearly applicable. In *Atlas Corp. v. United States*, cited by the Federal Circuit in *Schism*, plaintiffs or their predecessors in interest had contracts for the production of uranium or thorium. The contracts contained pricing provisions designed so that the contractors could recover their costs, plus a reasonable profit. 895 F.2d at 747. Production operations resulted in a sand-like residue called tailings. Subsequent to completion of the contracts, the long term potential health hazards associated with tailings became more widely recognized, and plaintiffs undertook costly measures to stabilize the tailings piles and to decontaminate the sites. 895 F.2d at 748-49. One of their theories of recovery was implied-in-fact contract. The Court rejected this theory:

> [T]he plaintiffs have admitted that although the contract prices were determined by considering the plaintiffs' costs, the prices were in fact set by the contracts. The stabilization costs are not 'entirely unrelated' to the costs included in the

> contract price. Therefore, there can be no implied agreement to pay costs over and above those prices.

895 F.2d at 755. In this case, the parties were aware of decommissioning costs, and the prices of the express contracts included an amount to cover them. Thus, as in *Atlas*, the claimed costs are not "entirely unrelated" to the costs included in the contract price, and "there can be no implied agreement to pay costs over and above those prices."

Finally, the facts that COs may have referred to successor contracts as renewals, that the parties may have planned for upcoming work that extended beyond the time horizon of the current contract, that some employees may have held an expectancy that successor contracts would be issued, and the Shipyard may have expected UniTech "to be ready, willing, and able to perform without interruption or delay nuclear laundry services under the next contract" (app. br. at 39), do not translate into a commitment by the Shipyard to continue contracting with UniTech in the future or, in the alternative, to pay decommissioning costs outside of the provisions already made for them in the prices of the express contracts.

We conclude that appellant cannot recover on the basis of an overarching implied-in-fact contract.

Contract A549

Appellant describes its theory that the government breached contract A549 as follows:

> The basis for this contention is that the Government had an affirmative duty to disclose to Appellant, both prior to award and during performance of Contract A-549, that it was seriously and actively considering a departure from laundering and reuse to one time use and disposal of the Anti-C's. This failure to disclose that vital information caused Appellant to incur costs that it otherwise would not have incurred and for which it is entitled to recover in this Appeal. Compounding this breach are the improper actions of the Contracting Officer that constitute affirmative misconduct. Appellant is entitled to recover its costs incurred thereby under the following legal theories: (1) breach of the Government's duty of good faith and fair dealing; (2) breach of the Government's duty to disclose superior knowledge; and (3) equitable estoppel.

(App. br. at 49-50)

Appellant has not shown a basis to recover on these theories. Fundamentally, there was no issue with contract A549 itself. Appellant received its bargained-for price. The government paid it $982,560. Over the last 18 months of the contract, the government paid it $475,560 for 8 months of laundry work. (Findings 22, 35) Appellant's claimed damages relate to the government's failure to award a future contract, not to contract A549.

Turning to appellant's specific theories, the covenant of good faith and fair dealing "imposes obligations on both contracting parties that include the duty not to interfere with the other party's performance and not to act so as to destroy the reasonable expectations of the other party regarding the fruits of the contract." *Centex Corp. v. United States*, 395 F.3d 1283, 1304 (Fed. Cir. 2005). There is no showing here that the government interfered with appellant's performance of contract A549 or destroyed its reasonable expectations regarding the fruits of the contract, the price for the work.

The doctrine of superior knowledge:

> [I]s generally applied to situations where (1) a contractor undertakes to perform without vital knowledge of a fact that affects performance costs or duration, (2) the government was aware the contractor had no knowledge of and had no reason to obtain such information, (3) any contract specification supplied misled the contractor or did not put it on notice to inquire, and (4) the government failed to provide the relevant information.

American Ship Bldg. Co. v. United States, 654 F.2d 75, 79 (Ct. Cl. 1981).

Appellant states that the government failed to disclose the following vital information:

> (1) [T]he fact that the Shipyard had entered into a waste disposal contract for contaminated anti-C's in advance of entering into Contract A549; (2) the fact that the Shipyard possessed and utilized a guidance document on when to launder and reuse anti-C's versus one-time use and disposal of those garments; (3) the Shipyard's decision during the performance of Contract A549 that it would be departing from launder and reuse to one-time use and disposal, thereby destroying Appellant's expectancy under the contract; and [(4)] the contracting officer's refusal to timely inform

> Appellant that there would be no follow-on nuclear laundry contract following the conclusion of Contract A549.

(App. br. at 56)

As can be readily seen, none of these items affected the performance costs or duration of contract A549. The government actually extended the duration of contract A549 even though it had little need for anti-C laundry services at that point. Appellant could not reasonably expect that contract A549 would be extended forever. We also note that appellant has not proved that the Shipyard entered into a waste disposal contract for contaminated anti-C's in advance of entering into contract A549 (finding 44). Appellant's fact (2) above apparently relates to the 5 December 2002 Norfolk Naval Shipyard document (*see* app. br. at 52), but appellant has not shown the relevance of this document (finding 20). The Shipyard did not decide to depart from launder and reuse to one-time use and disposal during the performance of contract A549. Rather, that decision was taken during the period from April to June 2006 when the government had award of the next contract under consideration. (Finding 38) Finally, the CO promptly informed appellant that there would be no follow-on nuclear laundry contract once the decision was made (findings 35-36).

Equitable estoppel requires:

> (1) [M]isleading conduct, which may include not only statements and actions but silence and inaction, leading another to reasonably infer that rights will not be asserted against it; (2) reliance upon this conduct; and (3) due to this reliance, material prejudice if the delayed assertion of such rights is permitted.

Mabus v. General Dynamics C4 Systems, Inc., 633 F.3d 1356, 1359 (Fed. Cir. 2011) (quoting *Lincoln Logs Ltd. v. Lincoln Pre-Cut Log Homes, Inc.*, 971 F.2d 732, 734 (Fed. Cir. 1992)). In addition, where equitable estoppel is asserted against the government as here, appellant must show affirmative misconduct as a prerequisite for invoking equitable estoppel. *Rumsfeld v. United Technologies Corp.*, 315 F.3d 1361, 1377 (Fed. Cir. 2003).

With respect to the first element, appellant contends that it had no knowledge that the Shipyard planned on switching to disposable anti-C's. It states that the first indication it received that the Shipyard was considering not renewing a laundry contract was in April 2006. It also states that it had no reason to question the delay in awarding a new contract, since there had been prior occasions when the Shipyard had failed to issue a new contract in a timely manner. (App. br. at 28, ¶ 53, and at 57-58)

With respect to the second and third elements, appellant states that because it kept getting assurances from Ms. Matsuura that a contract was in the works, it continued to keep Location 151 operational. "These expenses continued over the following year with the understanding that UniTech was going to continue doing work for the Navy." It also states it signed a three-year lease for Location 151 in 2005 with the expectation that the laundering contract would be continued as it always had been. (App. br. at 58)

On affirmative misconduct, appellant alleges that Ms. Matsuura misled it and treated it poorly (app. br. at 60). Appellant points to Ms. Matsuura's internal email to Mr. Chun about Mr. Krakan as an example (*id.*, *see* finding 26).

As in the case of the prior two legal theories, appellant has not shown how the complained-of conduct increased its expenses related to contract A549. Essentially, appellant expected that the Shipyard would continue the laundry contract in place, enabling it to earn a profit and avoid decommissioning the facility. Contract A549 did not oblige the government to award a further contract, and there was no breach of contract when it did not.

Appellant exaggerates the evidence as it relates to Ms. Matsuura. Appellant has not established that Ms. Matsuura assured it that it would receive another contract. During the period from 1 April 2006 to 27 June 2006, Ms. Matsuura did give it a heads-up that a purchase order was in the works, but appellant rejected that idea (finding 32). Other than that, there were a series of inconclusive emails and telephone calls. On 27 June 2006, Ms. Matsuura informed appellant that the solicitation was cancelled (finding 36). Appellant has not pointed to any evidence that Ms. Matsuura communicated with it about a possible future contract after that date. We also do not believe that appellant has proved that there was any affirmative misconduct on the part of Ms. Matsuura.

CONCLUSION

For the foregoing reasons, the appeal is denied.

Dated: 22 May 2012

Eunice W. Thomas

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

(Signatures continued)

I concur

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

I concur

PETER D. TING
Administrative Judge
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. 56482, Appeal of UniTech Services Group, Inc., rendered in conformance with the Board's Charter.

Dated:

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