

## **POTENTIAL IMPLIED-IN-FACT CONTRACT PROVIDES POTENTIAL JURISDICTION FOR BOARD**

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Siemens Government Technologies alleged in its claim that the Army owed it \$2,889,715 for both a written contract and a contract implied-in-fact with the Army Corps of Engineers (“Corps”). The Army moved to dismiss the appeal for lack of jurisdiction, stating it never had a contract with Siemens. *Siemens Gov’t Tech*, ASBCA No. 62806, Sept. 15, 2021.

Siemens alleged that the U.S. Army Engineering and Support Center solicited an indefinite delivery, indefinite quantity (“IDIQ”) contract to improve the energy efficiency of the US Air Force Base in Rheinland-Pfalz, Germany. It further alleged that the Corps selected Siemens to produce plans for various energy savings and conservation measures. It further alleged that Siemens did this work at government direction, incurring \$2,889,715 in the process.

Siemens also states that Construction projects at NATO facilities in Germany may be subject to an administrative agreement known as Auftragsbaugrundsätze 1975 (“ABG-75), a component of the Status of Forces agreement allowing NATO troops to operate on German soil. Article 30 of ABG-75 states that the Government (the Corps) was responsible, in consultation with the German government, for determining whether ABG-75 applied to the Siemens contract. Siemens alleged that the Corps failed to timely inform it that ABG-75 would apply to this contract; failed to timely decide it would not request a waiver of ABG-75, and did not request a waiver. Siemens sought to recover the amount (\$2,889,715) of its costs as a result of the Corps’ failure to cooperate and share superior knowledge regarding ABG-75, and the quantum meruit benefitting the government.

The Contracting Officer’s final decision from which SGT appealed stated:

Siemens is one of the energy contractors within a multiple award task order contract for this [energy] work. Siemens was down-selected under the notice of opportunity issued to multiple task award contractors for [the various work Siemens claims it incurred costs]. No task order was awarded to Siemens at the end of this process.

In its decision, the Board noted that pursuant to 41 U.S.C. § 7105(e)(1)(A) the Board has jurisdiction to decide any appeal *relative to a contract* made by [various DOD agencies]. In order to establish jurisdiction under this provision, an appellant need only make a non-frivolous allegation of the existence of a contract (including an implied-in-fact contract).

Readers should note that an implied-in-fact contract is “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.” The elements of an implied-in-fact contract are the same as for an express contract. It requires proof of “(1) mutuality of intent, (2) consideration, (3) an unambiguous offer and acceptance, and (4) ‘actual authority’ on the part of the government's representative to bind the government in

contract.” *Intellicheck, Inc.*, ASBCA No. 61709, 21-1 B.C.A. ¶ 37887 (June 24, 2021)  
(Citations omitted).

Based upon the facts cited, the Board concluded that Siemens had set forth a non-frivolous allegation of an implied-in-fact contract. Accordingly, the Board denied the Army’s motion to dismiss the case for lack of jurisdiction.

Takeaway. Implied-in-fact contracts are potentially real contracts. Be sure you can document in detail what happened if you allege that an implied-in-fact contract existed.

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