

## **EXPRESS CONTRACT PRECLUDES IMPLIED-IN-FACT CONTRACT DEALING WITH SAME SUBJECT MATTER**

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This blog has discussed both implied-in-fact contracts and express contracts in previous blogs. In a recent appeal at the Armed Services Board of Contract Appeals (“Board”), the Board denied the appeal of two claims, one of which was a delay claim and the other a *quantum meruit* claim for breach of an implied-in-fact contract. *Lucy Mechanicals, Inc., ASBCA No. 63153*, June 4, 2024.

Lucy alleged that the Corps of Engineers breached a task order contract when it failed to deliver certain safety cables, thereby causing it to delay delivery and therefore Lucy had to submit a delay claim to the Corps (i.e. delay based on late Government Furnished Equipment). However, the government and Board pointed to a release signed by Lucy which was never abandoned by the Government. That was Count I of the Appeal, and Lucy lost Count I.

Count II of the appeal was based on Lucy’s quantum meruit theory which was that an implied-in-fact contract existed here because Lucy had to halt performance, demobilize and later return to complete the work. The Board noted that recovery under quantum meruit is typically based on an implied-in-law contract which the Board lacks jurisdiction over. However, an appellant may use quantum merit of damages for an implied-in fact contract, which the Board does have jurisdiction over.

The Board noted that Lucy was pursuing Count I based on an express contract and Count II based on an implied-in-fact contract. The Court of Appeals for the Federal Circuit has explained 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.

The Board held that the contract here required cable removal and replacement at one location. Lucy could not argue that the “supplemental effort” of demobilization and remobilization to perform the removal and replacement at the same location was entirely unrelated to the fixed price contract requiring Lucy to complete the exact same work. The Board therefore dismissed the entire claim

Takeaway. Remember, the existence of an express contract precludes the existence of an implied-in fact contract for the same subject matter, unless the two are entirely unrelated.

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