Most of the people reading this blog work in the field of government contracting, in one capacity or another. Some of you are finance/accounting folks, some are contracting folks, some are buyers. Some are program managers. Some of you work for the government and some of you work for contractors. But the single thread that unites the majority of readers is that you all work with contracts—government contracts.

Accordingly, you are used to having a contract to deal with. Most of the time, there is a Request for Proposals (RFP) and a proposal in response to that RFP, and then there is a negotiation and award of a contract. An actual written-and-signed-in-blue-or-black-ink contract. There's even a Uniform Contract Format that is used by the Federal government, just to make sure the standard contract follows a standard structure that the parties both understand.

But what happens if there is no contract?

What happens if there are two parties working together *without a written agreement*?

Can that even be a thing in government contracting?

Yes. Yes, it can.

It's certainly not a best practice. Or even a recommended practice. In fact, we strongly advise against working without a written agreement.

We teach the acronym RTFC: "Read the Foolish Contract," because so few actually do. But if you don't have a written agreement then there's nothing to read, so it's supremely difficult to determine the contracting parties' mutual rights and responsibilities. For example, how do you bill for services rendered without any sort of billing instructions? How do the parties know when the agreed-upon scope of work has been completed? (How do the parties even confirm what the agreed-upon scope of work actually is?) Working without a written agreement is, to put it mildly, a very poor practice that is likely to end in one or more disputes, and possibly in

litigation.

Still, it happens. And it happened to one contractor named Network Documentation & Implementation, Inc. (NDI), who alleged it performed more than $2 million worth of services for the Defense Information Systems Agency (DISA) without a written agreement. Unsurprisingly, the parties found themselves before the Armed Services Board of Contract Appeals (ASBCA), with **a dispute** under contract number "000000-00-0-0000."

Before the ASBCA was the government's motion to dismiss. One of the bases for DISA's motion to dismiss was that NDI failed to allege the elements of an "implied-in-fact" contract. To be clear, the Board can hear appeals involving implied-in-fact contracts. Because they can exist and are a thing in government contracting.

What are the elements of an "implied-in-fact" contract?

According to Judge Witwer, writing for the Board—

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: '(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.'

(Internal citations omitted.)

The dispute involved additional services that NDI alleged were ordered by DISA's Chief Information Officer for Operations. According to NDI, the CIO—who had negotiated prior contracts with which NDI has been involved and who thus had actual or apparent authority to bind the government—requested the NDI perform additional services under a "separate agreement" from the one in which it was currently operating as a subcontractor. According to the complaint, the CIO represented that DISA would compensate NDI for the additional work "at

NDI's standard hourly rates."

Right there we have at least two problems.

1.

Was NDI's prime contractor aware that its customer had requested its subcontractor to provide additional services not associated with the prime contract? Seems awful close to a conflict of interest to us, but obviously we don't have the subcontract in front of us.

2.

What does the phrase "standard hourly rates" even mean? Was the CIO not aware that many contracts are competed and prices are set by contractors based on competitive pressures? Alternatively, what about negotiations? Has no contractor ever in the history of DISA ever offered lower hourly rates in order to secure the contract award? It seems to us that the DISA CIO would have understood those concepts, because (allegedly) he negotiated the prime contract under which NDI had been a subcontractor. So … what did he mean when he (allegedly) said to NDI that it would be compensated at its "standard hourly rates"?

Also, the use of the phrase "standard hourly rates" implies either a labor-hour or T&M contract. Okay. Not our favorite contract type, but okay. Now … what about travel expenses and other ODCs? Was DISA going to reimburse NDI for those non-labor expenses? If so, at what rates? Could NDI rent a limousine to transport its employees to and from the DISA site, and then bill DISA for the limo? If not, why not? What contract term would prevent it? Remember, there was no written agreement, just an alleged implied-in-fact contract.

No matter, because NDI "submitted a copy of its hourly rates" to DISA, which was allegedly reviewed and accepted.

However, one thing NDI did not do was submit any invoices to DISA as the work progressed. Because how could it? It had no contract to reference, no ACRNs to reference, no billing instructions to reference. There was nothing in DFAS' payment systems that would let a billing clerk process payment, even if such a payment request somehow made its way to that clerk's

desk. Nope. NDI didn't bill and the unbilled costs kept mounting up.

According to NDI, DISA promised to pay "in full" when the work had been completed. (As noted above, we wonder how the parties would know when the work had been completed, but let's assume they would.)

After nearly two years, NDI allegedly completed its work and then submitted an invoice to DISA, an invoice that DISA did not pay.

Another five years passed. No, we don't know why.

Nearly five years after submitting its invoice for services provided under its alleged implied-in-fact contract, NDI finally got around to filing a claim for $2.036 million. A DISA contracting officer quickly denied the claim and NDI appealed to the ASBCA. DISA moved to dismiss, arguing, among other things, that there was no agreement.

Judge Witwer denied the motion, writing –

To survive a motion to dismiss for failure to state a claim, the complaint must allege facts plausibly suggesting, not merely consistent with, a showing of entitlement to relief. Here, NDI alleges that a government official with implied actual authority represented that DISA would pay NDI's costs in return for NDI's provision of the additional artificial intelligence services. In particular, NDI alleges that Mr. Norwood, who had previously negotiated the terms of NDI's subcontract on the TEIS II contract and who repeatedly authorized the issuance of Common Access Cards to NDI employees, stated that DISA would compensate NDI at its 'standard hourly rates' for the additional services. NDI relied on that promise and provided the requested services. The government accepted and benefited from NDI's performance. These allegations describe the elements of an implied-in-fact contract. Thus, we reject DISA's argument that the appeal must be dismissed because the complaint does not allege sufficient facts to suggest that an implied-in-fact contract was formed.

Because NDI has satisfied both the jurisdictional claim requirements of the CDA and the

minimum pleading requirements for the pursuit of a claim before this Board, we deny the government's motion to dismiss. Whether a contract was actually formed relates to the merits of the appeal and is not before us at this time

(Internal citations omitted.)

Let's wrap this up with four last points.

If a contractor chooses to accept direction from a person who is not a government contracting officer, then there should be assurance that the individual providing direction has authority to bind the government.

If a contractor chooses to work without a written agreement, then there should be assurance that it will be paid for its services.

If a contractor chooses to work for years without being paid, then there should be assurances that it will be paid in full as soon as the work is completed.

If a contractor chooses to wait five years before asserting its right to payment via a claim, we think that contractor should not accept any more government contracts. If you aren't getting paid and you think you are entitled to payment, you should file a claim quickly—certainly within a few months.