

HEALTHCARE PRACTICE
ENHANCEMENT NETWORK, INC.

CONTRACT NO. None

VABCA-5864

VA MEDICAL CENTER
LOMA LINDA, CALIFORNIA

Jack Paul, Esq., Los Angeles, California, for the Appellant.

Cameron V. Gore, Esq., Trial Attorney; *Philip S. Kauffman, Esq.*, Deputy Assistant General Counsel; and *Phillipa L. Anderson, Esq.*, Assistant General Counsel, Washington, D.C., for the Department of Veterans Affairs.

OPINION BY ADMINISTRATIVE JUDGE PULLARA

This is an appeal by Healthcare Practice Enhancement Network, Inc. (HPEN or Contractor), from the refusal of the Contracting Officer to issue a final decision on a claim under an alleged express contract with the Department of Veterans Affairs (VA or Government). HPEN submitted a claim for payment for services rendered to VA under a written agreement and requested a final decision under the *Contract Disputes Act*.

The written agreement, executed by the Contractor and a VA Chief Fiscal Officer (CFO), provided for HPEN to prepare a financial plan, the price for which was to be determined by the number of hours of HPEN's efforts at the hourly rates specified in the agreement. The agreement also provided for VA to pay

a \$5,000 retainer but established no overall dollar limit. Eventually, the Contractor billed \$87,029.42; VA paid \$48,568.60, leaving the balance of \$38,460.82, now sought by HPEN. When the Contractor failed to receive payment for this outstanding balance, it requested a contracting officer's final decision.

The Contracting Officer took the position that he had no legal authority to issue a final decision because the written agreement relied upon by the Appellant was unauthorized because it was executed with a non-contracting officer who had no authority to commit the Government; and further, the agreement had not been ratified by an authorized person. The Contractor appealed to this Board from the failure of the Contracting Officer to issue a final decision.

The evidentiary record before the Board includes the Appeal File (R4, tabs 1-10), Appellant's Supplement (R4 Supp., tabs 500-503), Government Exhibits (Exh. G-1 through G-5), Appellant Exhibits (Exh. A-1 through A-14), and the transcript of the hearing held in this matter in Loma Linda, California, consisting of Volume I (342 pages)(cited as "tr. 1-342") and Volume II (105 pages)(cited as "tr. II/1-105").

FINDINGS OF FACT

In October 1995, the Veterans Health Administration (VHA) of the Department of Veterans Affairs (VA) restructured both its field and headquarters operations. This restructuring was a major step in effecting a new vision of the nation's largest integrated healthcare system. (*Prescription for Change*, March 1996, Exh. G-5) Along with other VA Medical Centers around the country, the Jerry L. Pettis Memorial Veterans Medical Center at Loma Linda, California (hereinafter referred to as "the Medical Center" or "Loma Linda") underwent what one witness described as: "some radical organizational changes in both our structure, how we carry out our business, and how we care for patients." Previously, as characterized by Anne Gillespie, Loma Linda's Vice President for Patient Care and Administration, VA had been: "a very big bureaucratic, centrally controlled organization, where primary decisions were made in the central office in Washington and trickled down to the field." VA decentralized most decision-making processes to twenty-two localized networks

called VISN's (Veterans Integrated Service Networks). Loma Linda became part of VISN 22, which included Long Beach, Los Angeles, San Diego and Las Vegas, with a VISN Director administering the network in Long Beach. (Tr. 25-26)

Loma Linda restructured by reducing its inpatient wards from 11 to 4, and increasing its outpatient services from 50,000 to 350,000 visits per year. Loma Linda was required to reduce its cost per patient by 30%, increase the number of patients seen by 20%, and get 10% of its revenue from outside alternate revenue streams. (Tr. 26-28) By the Spring of 1997, a Financial Planning Committee, created by Dean Stordahl, Loma Linda's Director, now called the Chief Executive Officer (CEO), had been meeting regularly for several months. The Committee's goal was to create a financial plan that would enable Loma Linda to meet all of the restructuring directives. (Tr. 29-30) Of particular importance was the need to develop a strategic financial plan for the Medical Center. Loma Linda was anticipating a projected shortfall of about \$5,500,000 for the upcoming fiscal year, out of a budget of approximately \$117,000,000. In addition, the CEO was interested in "productivity reviews and different ways of reorganizing ourselves and becoming more efficient." (Tr. 99-102)

VA's Finance Center, located in Austin, Texas, tracks certain information on a monthly basis for all VA facilities across the nation, including: dollars per patient, numbers of doctors and nurses per patient, pharmacy costs, lab costs and radiology costs. However, each facility has the responsibility to determine how to keep within its budget.

The eleven-member Financial Planning Committee was chaired by Ismael Gil, Loma Linda's Chief Fiscal or Financial Officer (CFO). Members included Dean Stordahl, the Medical Center CEO; Anne Gillespie, Vice President for Patient Care and Administration; Bob Ford, Chief of Acquisition & Materiel Management Service (A&MMS), who was also the Contracting Officer (CO) for Loma Linda; and several other heads of departments and doctors. (Exh. A-2; tr. 30) Organizationally, Mr. Ford and Mr. Gil were equals and both reported to

the CEO through Ms. Gillespie. (Organizational Chart, Exh. A-1) Neither Mr. Gil nor Mr. Ford testified at the hearing in this appeal.

At that time, Mr. Ford's position encompassed all of the contracting responsibilities at Loma Linda. (Tr. 24) Mr. Gil had authority to issue purchase orders for \$2,500 (so-called "micro purchase" authority) but was not a "contracting official." (Tr. 123) According to one VA contracting official, Mr. Gil could, on his own, and without the intervention of the procurement staff, spend up to \$2,500 for some things, but not for consulting services, and not for a \$5,000 purchase of any type. (Tr. 324-25)

The CEO pressured Mr. Gil to develop the financial plan and set a completion deadline of the end of June 1997. Mr. Gil was unable to accomplish this on his own and went to the CEO suggesting that he needed help to complete the financial plan. (Tr. 77-79, 102-03)

The CEO and the Financial Planning Committee authorized Mr. Gil to obtain a consultant to assist in developing the plan. Mr. Ford, the Contracting Officer, attended those meetings where the decision to engage a consultant was made. (Tr. 39) At one meeting, the CEO authorized Mr. Gil to spend \$5,000 for assistance in development of the plan. (Tr. 48)

A consultant came to Mr. Gil's attention through a student nurse from UCLA who had been assigned to Loma Linda for a three-month practicum. She was interested in direct clinical care as well as the finances of healthcare and was working with Mr. Gil in the finance office. (Tr. 34-35) After being introduced to the Financial Planning Committee, the student nurse contacted the head of the Health Services Management Program at the UCLA School of Public Health, and obtained a referral to a consultant to assist VA in strategic financial planning. She was referred to Healthcare Practice Enhancement Network, Inc. (HPEN), a diversified, full-service health care management consulting firm based in Los Angeles. Its consulting services ranged across a broad spectrum including strategic planning for health care organizations, mergers and acquisitions,

valuations of sales of medical or health care organizations, managed care, and the training of sales and marketing executives on health care issues. (Tr. 4-6, 193-94)

On May 5, 1997, the student nurse contacted the CEO of HPEN, Richard Sinaiko, regarding Loma Linda's needs, and indicated that a short time frame was involved. She and Loma Linda's CFO, Mr. Gil, were going to be in Long Beach at the VISN headquarters on May 6th, and a meeting was arranged between CFO Gil and Mr. Sinaiko.

Mr. Sinaiko had no previous contracts with the federal government and was not familiar with the process involved in acquiring a federal government contract. He had, however, done work for other "government entities that have very similar kinds of acquisition structures and policies and procedures where, in fact, we operated on the basis of our own engagement letter." (Tr. 220) He'd had contracts with local government organizations, such as Los Angeles County, and with the University of California. (Tr. 221)

At the May 6 meeting, Mr. Gil advised Mr. Sinaiko that he had been charged by the CEO to complete a strategic financial plan and that "they were under a lot of pressure from the newly formed VISN central administration as well as mandates from VA Headquarters in Washington, D.C." Mr. Gil said that VA Loma Linda had been struggling to put a strategic financial plan together, showed Mr. Sinaiko some of their preliminary efforts, and asked if HPEN would be available to help; it was now the first week of May, and they had a deadline of June 30th. One goal was to convert the VA Medical Center's "institutional mentality" from a "command and control" type of environment to one that was entrepreneurial and competitive with the private sector in terms of health care. (Tr. 200-04)

Mr. Sinaiko said that his firm could help and explained to Mr. Gil that "the way we work typically is we sign an engagement letter which outlines our understanding of the tasks of the work being requested," that "because of the

nature of this type of project where it was totally unknown what was, in fact, going to be involved in terms of time and effort, that we quote an hourly rate and we use different levels of professionals at different hourly rates depending on the work that needs to be done.” (Tr. 222)

Mr. Gil indicated that the first phase of the work would be facilitating a series of meetings of the Financial Planning Committee of the Medical Center, and they had already reserved a conference room at the Hilton Hotel in San Bernardino where these meetings would take place. Mr. Sinaiko agreed to be available to facilitate that first meeting the next week, Friday, May 16, 1997. Upon returning to his office on May 6, Mr. Sinaiko drew up HPEN’s standard engagement letter and sent a draft to Mr. Gil. (Tr. 222)

When asked whether he had given Gil an estimate of how much HPEN’s services might cost, Mr. Sinaiko stated, “No, I don’t specifically recollect that I was either asked or volunteered to provide an estimate,” that Mr. Gil did express some concern about what the total cost might be but basically said that the priority was to get this plan done and submitted to VISN 22. (Tr. 222)

The four-page letter of engagement, dated May 8, 1997, and signed by Mr. Sinaiko, was executed by Mr. Gil on May 16, 1997. Among other things, the engagement letter sets forth that HPEN is to provide consulting services to the Medical Center to assist it in preparing and submitting “a strategic and financial plan designed to ensure the long term viability of the organization in an environment of decreasing resources and increasing focus on quality, cost effectiveness and efficiency.” The document “must be submitted to the Department of Veterans Affairs by June 30, 1997.” The plan was to “take into account the current operating parameters for your facility, the current and future economics of health care delivery in the Medical Center’s region and within the VA system” and “must also identify the opportunities available and the steps required to achieve the significant changes in structure, economics and operations that are necessary to achieve the desired shift in focus to

Ambulatory/Primary Care.” The letter goes on to recognize that the Financial Planning Committee was to “oversee the preparation of the Plan” and that, due to the short time frame, “a rather intense and focused process is required.” The letter states that a team of HPEN consultants, led by Richard Sinaiko, would, among other things, “serve as technical and strategic advisors to Medical Center leadership and the Committee” and would “facilitate weekly meetings of the Committee,” “will prepare the agenda, coordinate the development of any required meeting materials, document the meeting for review by Committee members and will follow up on any issues raised during the meeting requiring further clarification or analysis,” “will be available to gather additional required data, perform technical analyses or coordinate the use of Medical Center personnel,” and would “prepare the strategic and financial plan on the Medical Center’s behalf [through] a highly interactive process requiring considerable input and review from the Committee as the document is prepared for submission.” The agreement recognizes that while the scope of the project was limited to the process described above, HPEN was available and “would be very interested in assisting the Medical Center to implement the process to be contemplated by the plan” and that HPEN “would hope to discuss those services as they are identified and implementation of the plan is agreed upon.” With respect to compensation, the letter provides that fees will be based on hourly rates ranging “from \$75 to \$275 per hour, depending on professional billing level, and any and all out-of-pocket costs incurred in connection with this engagement. Out-of-pocket costs include, but are not limited to, such items as travel, meals and lodging if overnight stays are required, report reproduction, mileage, parking and extraordinary handling of mail.” An initial retainer of \$5,000 was “requested at the time you authorize us to proceed. This retainer will be applied to the final billing for the project. Invoices will be sent monthly.” The letter provides that “Should the nature and/or scope of the work change during the project requiring an alteration in the responsibilities or fees, we will discuss

these changes with you prospectively.” The letter provides that “This engagement can be terminated at any time by either party with or without cause.” A team of three primary consultants, including Richard Sinaiko, Emil Gauvreau and Richard Jacoby, would represent HPEN. (R4, tab 1)

On May 16, Mr. Sinaiko and another partner of HPEN, Mr. Emil Gauvreau, met with Mr. Gil and the Committee for some three and a half hours. Sometime during or following the meeting, Mr. Gil signed and dated the engagement letter. (Tr. 194-98) The members of the Committee understood that HPEN would be working with it in a consultant type role to help it develop a strategic financial plan. There were introductions and information furnished by VA as to the way the Medical Center operated. HPEN was unfamiliar with the Medical Center and needed to be furnished a lot of information. VA personnel did most of the talking. HPEN asked for information including all documents referenced during the meeting. A large amount of data was furnished at the following Friday meeting and at subsequent meetings, and through numerous telephone calls between VA and HPEN staff over the following weeks. (Tr. 46-47)

When asked whether in some of the meetings he had occasion to meet Robert Ford, the Contracting Officer, Mr. Sinaiko stated that Mr. Ford identified himself at the very first meeting as Director of Purchasing. Mr. Sinaiko understood that Mr. Ford would be an important part of the planning process, and that Mr. Ford had negotiated the contract between VA Loma Linda Medical Center and the Loma Linda School of Medicine for the operation of the clinic in Victorville. Mr. Ford was also responsible for trying to get contracts to bring TriCare patients over to Loma Linda, which would be a source of external revenue. Mr. Ford raised with HPEN, fairly early, his concern that there were nursing home beds at Loma Linda, but patients were being sent to private, contract nursing homes because it was cheaper. Mr. Sinaiko understood that Mr. Ford was “part of this process in a very significant way.” (Tr. 204-05)

On or about May 21, 1997, HPEN received and deposited two "Branch Pay" checks from VA, each in the amount of \$2,500, each dated May 20, 1997, each indicating an invoice date of May 20, 1997, each referencing "BP Auth. No. 06986," and each citing "C 75440" in the space labeled, "FOR." (Exh. A-12)

By invoice identified as "194 May 31, 1997," HPEN billed Loma Linda VA Medical Center, Attn: Ismael Gil, CFO, in the amount of \$17,137.60, for 98.70 consulting hours and expenses, less two credits of \$2,500 each for "Retainer," for an amount due of \$12,137.60. The invoice was supported by a three-page computer printout which provided a detailed listing of each charge, including dates, employee identification, description of service performed, and the hours or partial hours, in hundredths of an hour. All subsequent invoices were similarly supported in detail. (Exh. A-9)

Debora Romero, an employee in Mr. Gil's office, who functioned sometimes as an auditor and sometimes as a systems and procedures analyst, saw and questioned the initial bill and invoice from HPEN. Her primary responsibility was preparing the Cost Distribution Report (CDR) and making sure that costs were included in the report. Based on the amount of the bill from HPEN, she questioned Mr. Gil, who showed her the letter of engagement and said he was authorizing payment. (Tr. 111-12, 171) She refused to certify the bill for payment. (Tr. 172-73) She testified, "So he did. He certified it. It was taken over to accounting and probably processed there." (Tr. 175-77) When asked why she refused to certify the payment, she stated, "Well, I didn't see a PO for this. I didn't see where this had been approved. . . . As a certifying officer, you're certifying that it is true and correct and that the proper procedures have already been set up to pay the bill. . . . I refused to pay the bill." (Tr. 175-77) When asked whether she reported this to anyone else, she stated that she did not. (Tr. 179-80)

By invoice identified as "194 June 30, 1997," HPEN billed Loma Linda VA Medical Center, Attn: Ismael Gil, CFO, an additional \$31,431.00 for 217.5

consulting hours and expenses. The "Amount Due" reflected on the invoice was \$43,568.60, the sum of current charges of \$31,431.00 and the previous unpaid balance of \$12,137.60. (Exh. A-9)

By invoice identified as "194 July 31, 1997," HPEN billed Loma Linda VA Medical Center, Attn: Ismael Gil, CFO, in the amount of \$5,637.90 for 40.4 consulting hours plus expenses. The "Amount Due" was \$49,388.66, the sum of current charges of \$5,637.90, the unpaid balance of \$43,568.60 and a service charge (late payment or interest charge) of \$182.06. (Exh. A-9) HPEN eventually dropped the service or interest charge portion of its claim. (Tr. 237-38)

HPEN submitted a draft report for VA review sometime in late June 1997. It was reviewed by VA management and returned with suggested edits and corrections. The final written report was submitted on July 17, 1997. (Tr. 207-10) That report contained sixteen pages of text covering Introduction, Methodology, Strategic Financial Plan Key Elements, Strategic Directions, and Conclusions, plus six pages of text in three appendices and twenty-two pages of tables setting forth financial data. (R4, tab 2; R4, Supp., tab 501)

In late August 1997, HPEN received and deposited two U.S. Treasury checks issued from Austin, Texas. One check, in the amount of \$12,137.60, was dated August 25, 1997, and referenced "INV 194 5/31/97." (Exh. A-13) The other check, in the amount of \$31,431.00, was dated August 27, 1997, and referenced "INV 194 JUN 97." (Exh. A-14) By invoice dated August 31, 1997, HPEN billed an additional \$1,344.16 for 13.1 consulting hours plus expenses. (Exh. A-9)

On September 18, 1997, HPEN made a one-hour presentation of their strategic plan at the Medical Center. This was an oral presentation of the written plan, and about 25 or more Loma Linda officials were in attendance, including the Financial Planning Committee, clinical department heads, physicians and others. (Tr. 51-52, 54-57; R4 Supp., tab 500) At the request of VA management, HPEN had deferred making the presentation of its findings and

recommendations until the September 18th date because of summer vacations and the unavailability of key management or department staff until that time. HPEN's presentation basically explained the process, what it had done and how it had done it. Mr. Sinaiko stated that "at the end of it, there [were] actually several people who stood up and applauded, and we commented we hadn't experienced that before." He added that the hospital CEO, Mr. Stordahl, "actually got up and thanked us profusely, acknowledged that we had made major contributions to getting the organization focused on the directions it needed to go, just was very very complimentary and indicated in front of that group that it was his hope that now that we had done this piece of work, we would be continuing to work with the institution in terms of implementation." (Tr. 207-10)

At some point (the time is not clear from the record but may have been following the September 18 HPEN presentation), Gil approached his immediate superior, Ms. Gillespie, and the CEO, Mr. Stordahl, regarding the need for additional funding for HPEN's services. Ms. Gillespie testified that she was still of the understanding that all this was being done for the original \$5,000 figure, or perhaps had been increased to as much as \$7,000. (Tr. 58-59) About this same time, Gil also contacted HPEN requesting that it prepare a plan to perform the implementation phase next. (Tr. 288-89) An engagement letter pertaining to implementation was prepared by HPEN but never signed. (Tr. 302-04) A written agenda for an October 6, 1997 Committee meeting listed numerous activities planned for HPEN to assist in implementation of the financial plan. (Exh. A-8)

In the meantime, by invoices dated September 30, October 31 and November 30, 1997, HPEN billed \$12,738.22 for 78.7 consulting hours plus expenses, \$15,681.44 for 88.8 consulting hours plus expenses, and \$3,059.00 for 16.2 consulting hours plus expenses, respectively. (Exh. A-9) These billings, at least after mid-September, are related to implementation matters and meetings with VA personnel. (Tr. 211-14)

Sometime in late October or early November, CEO Stordahl became aware of “numerous suggestions of malfeasance on the fiscal officer’s part,” and in November, an auditor was brought in from another VA facility to review the records. CFO Gil was put on administrative leave and eventually resigned. (Tr. 159) Mr. Stordahl and Ms. Gillespie both expressed “shock” when they became aware of the amounts paid to HPEN. Mr. Stordahl instructed Ms. Gillespie to call HPEN and tell them to “cease and desist.” He was surprised to learn that HPEN had been billing for travel time and time on telephone calls. (Tr. 105-07) He testified, “we weren’t aware that the fiscal officer had taken this \$5,000, increased the obligation to \$40,000, illegally processed a payment by apparently manually overriding the contract number field so he could get a payment made by our Austin data processing center.” (Tr. 107-08)

Pursuant to Mr. Stordahl’s instructions, Ms. Gillespie called HPEN and was told there was a contract. HPEN faxed her a copy of the letter of engagement. Ms. Gillespie advised HPEN, “We have a problem. We need you to stop all work.” (Tr. 214-15)

By letter dated January 23, 1998, Mr. Sinaiko wrote to Mr. Ford regarding the outstanding balance of nearly \$40,000. Mr. Sinaiko asked to be advised what the next step was in attempting to resolve the matter. (R4, tab 502) On June 15, 1998, Ms. Gillespie responded to what she characterized as HPEN’s “request for final payment.” She advised HPEN that “the letter of ‘engagement’ signed by Mr. Ismael Gil, our Chief Fiscal Officer on May 16, 1997, for consulting services was unauthorized.” She cited Veterans Affairs Acquisition Regulation (VAAR) 801.602 for the proposition that “only Contracting Officers have the authority to execute, award, and administer contracts, purchase orders, and other agreements (including Interagency Agreements) for the expenditure of funds involved in the Acquisition of Personal Property, Supplies and Services.” She also cited VAAR 801.602-3 as stating that “Contracting Officers shall not ratify contractual commitments made by other VA personnel without prior approval.” She

concluded that “based on the foregoing, the VA must deny any further payments against this unauthorized commitment.” (R4, tab 4)

Ms. Gillespie explained at the hearing that “after we consulted with Mr. Ford -- and I believe at this point we had also consulted with our VA Regional Counsel’s office in Los Angeles, because none of us had experienced dealing with anything like this before -- . . . or as I was advised, we couldn’t sign the authorization for final payment because the letter of engagement was illegal. If we would have signed it, it would have been Mr. Stordahl basically saying that he was authorizing that illegal agreement, and he would not do that. . . . I asked Mr. Ford what do we do, and he said that there is a Board of Contract Appeals. We need to -- there’s a way to take this out of our hands, which is what -- we really did not know how to go about ratifying this except we knew if we just signed off on it and ratified it, we also would be doing something illegal. So that’s why I sent the letter.” (Tr. 69-70) Mr. Stordahl testified that Mr. Ford did raise the possibility of ratification with him, but Mr. Stordahl declined to do that. (Tr. 122)

By letter of November 30, 1998, Mr. Sinaiko wrote to Mr. Ford, CO, requesting a contracting officer’s final decision. (R4, tab 9) On December 17, 1998, Mr. Ford replied to Mr. Sinaiko as follows:

Please be advised I can only render “a final decision” on contract issues involving contracts awarded by myself or members of my contracting staff who work within the scope of their authority. The agreement you entered into was executed with a non-contracting officer who had no authority to commit the Government. That is a legal fact notwithstanding that you acted in “good faith.” This agreement was deemed unauthorized and subsequently was not ratified by the “Head” of this facility.

Therefore, I have no legal authority to issue a final decision. Additionally, because this was an

unauthorized agreement, I cannot inform you of your appeal rights.

I would suggest that any further dialogue on this matter should be with our Regional Counsel.

(R4, tab 10)

The appeal of Healthcare Practice Enhancement Network, Inc., from a Contracting Officer's failure to issue a final decision, was duly received and docketed by this Board.

DISCUSSION

The road to hell is paved with good intentions. When Mr. Gil and Mr. Sinaiko executed the letter of engagement on May 16, 1997, both had the best of intentions. Mr. Gil's intention was to produce a financial plan for Loma Linda Medical Center. Mr. Sinaiko's intention was to assist Mr. Gil in producing that plan and to be paid for his firm's efforts. However, neither individual adequately appreciated the difficulties ahead.

Generally, only officially designated contracting officers may bind the Government. Those who deal with Government agents are obliged to investigate and determine for themselves the level of actual contracting authority of the agent with whom they are dealing. *H.F. Allen Orchards v. United States*, 749 F.2d 1571, 1575 (Fed.Cir.1984), *cert. denied*, 474 U.S. 818, 106 S.Ct. 64, 88 L.Ed.2d 52 (1985). The Government is not bound by the acts of its agents that exceed the agent's authority, even though the agent believes himself to have such authority. *See Federal Crop Ins. Corp. v. Merrill*, 332 U.S. 380, 68 S.Ct. 1, 92 L.Ed. 10 (1947); *City of El Centro v. United States*, 922 F.2d 816 (Fed. Cir. 1990).

In the instant case, Mr. Gil was not a contracting officer. He had limited authority to make individual purchases up to \$2,500. The CEO was not a contracting officer, and could not confer contracting authority on Mr. Gil. The CEO merely authorized Mr. Gil to spend up to \$5,000 for financial consulting

services, but Mr. Gil should have sought the assistance of Mr. Ford's office to commit such funds. We conclude that Mr. Gil did not have authority to execute the letter of engagement, a consultant contract which on its face exceeded his \$2,500 purchase authority. Mr. Sinaiko of HPEN was not familiar with federal contracting practices but that did not relieve him of his duty to ascertain Mr. Gil's actual level of authority.

Appellant argues that, by virtue of his position as Loma Linda's CFO, Mr. Gil was vested with authority to obtain the services of a facilitator to assist in creating a strategic financial plan. To the contrary, the duties of finance officers and contracting officers are usually separate in order to preserve the very system of checks and balances that was non-existent in the instant case. See "*Nash & Cibinic Report*," January 2000, ¶ 5, "Implied-In-Fact Contracts: The 'Authority' Stumbling Block." Thus, the position of CFO would not inherently include contracting authority.

Nor are we persuaded by Appellant's argument that authority to bind the Government is generally implied when such authority is considered to be an integral part of the duties assigned to a Government employee, see *Cibinic & Nash, Formation of Government Contracts*, 2nd ed. (1986), at 72; *DOT Systems, Inc.*, DOTCAB No. 1208, 82-2 BCA ¶15,817. (Cases discussed therein typically involve direct representatives of a contracting officer, such as Contracting Officer Technical Representatives (COTR's), or on-site inspectors, but not employees of a finance office.)

Appellant argues that even if a valid express contract did not exist, then the circumstances in this case support a finding of an "implied-in-fact" contract. However, as the Government points out, in the absence of a valid written contract, an implied-in-fact contract may be found only after all the basic elements of a contract are found: mutuality of intent to contract, consideration, lack of ambiguity in offer and acceptance, and, when the United States is a party, the Government representative whose conduct is relied upon must have actual

authority to bind the Government. Here, however, the theory of implied-in-fact contract fails because there was no actual authority. *DeRoo v. United States*, 12 Cl.Ct. 356 (1987); *Prestex v. United States*, 3 Cl.Ct. 373, 377 (1983).

Similarly, Appellant argues that under the theory of equitable estoppel the Government should be estopped from denying that HPEN performed contractual work. However, equitable estoppel cannot “fill the gap resulting from an absence of authority to contract.” *Llamera v. United States*, 15 Cl.Ct. 593, 600 (1988); see also *Hazeltine Corp. v. United States*, 10 Cl.Ct. 417, 440 (1986), *aff’d* 820 F.2d 1190 (Fed.Cir.1987). Even in equitable estoppel cases, plaintiff must prove the actual contracting authority of the official upon whose acts it relied. *Id.*

Finally, Appellant argues that, in the instant case, there was implied ratification by the Contracting Officer of the engagement of Appellant to render services, and that, whether or not the Contracting Officer authorized or delegated to Mr. Gil authority to engage the services of Appellant, the Contracting Officer was an active participant in, and had knowledge of, Appellant’s engagement prior to, during and after such engagement, citing *Parking Co. Of America, Inc.*, GSBCA No. 7654, 87-2 BCA ¶ 19,823, as follows:

Ratification is the adoption of an unauthorized act resulting in the act being given effect as if originally authorized. *Restatement (Second) of Agency* § 82 (1958). In government contracting, representatives’ unauthorized actions may be subsequently ratified by those with authority to bind the Government. If the ratifying government official has actual or constructive knowledge of a representative’s unauthorized act and expressly or impliedly adopts the act, ratification will be found. *Williams v. United States*, 130 Ct.Cl. 435, 127 F.Supp. 617, *cert. denied*, 349 U.S. 938 (1955); *W. Southard Jones, Inc.*, ASBCA No. 6321, 61-2 BCA ¶ 3192.

The Government responds that “HPEN cannot prevail under an express or

implied ratification theory because CO Ford did not intentionally ratify the engagement letter or Gil's payments totaling \$48,568.60 and did not possess any actual or constructive knowledge of the engagement letter or the two payments totaling \$43,568.60 such that he could be deemed to have constructively or impliedly ratified them." It is suggested that "ratification can only be based upon a full knowledge of all the facts upon which the unauthorized action was taken" and that "if there be want of it [knowledge], though such want arises from the neglect of the principal, no ratification can be based upon any act of his." *United States v. Beebe*, 180 U.S. 343, 352 (1901). Moreover, "[r]atification . . . must be based on a demonstrated acceptance of the contract . . . and should be in writing." *State Street Management Corp.*, GSBCA No. 12,274, 94-1 BCA ¶ 26,500 (citing *EWG Associates, Ltd., v. United States*, 231 Ct. Cl. 1028 (1982)).

On the other hand, the Government acknowledges that the General Services Board of Contract Appeals (GSBCA) in *Parking Company Of America* noted that a ratifying official's constructive notice coupled with silence could amount to acquiescence or adoption of an unauthorized act and that the Government's tacit acceptance of benefits could also qualify as ratification.

The Government makes much of the fact that there is no evidence that the CO, the only Loma Linda employee with contracting authority, was either actually aware of, or expressly ratified, Gil's execution of the engagement letter and his payments thereunder. On the other hand, we note, there is no direct evidence that CO Ford had no knowledge of Mr. Gil's arrangement with HPEN. Mr. Ford did not testify in this matter and there is no testimony or document in the record authored by Mr. Ford stating such lack of knowledge. The Government's argument is based solely on supposition and hearsay.

In *Parking Company of America*, the GSBCA held that the General Services Administration ratified the Border Patrol's unauthorized use of excessive parking spaces based on the fact the CO received specific verbal confirmation of the excessive use but failed to take action "to investigate or stop

such use.” In that case, the CO testified that he was actually informed of the excessive use and even wrote a memorandum to himself to call another Border Patrol employee to confirm the excessive use. Based on the CO’s testimony regarding his knowledge of the excessive use, the Board concluded that the CO “had knowledge that the Border Patrol was using more than twenty spaces per day in [A]ppellant’s lot and yet took no action to investigate or stop such use.” As such, the Board found that the CO’s failure to take action constituted ratification of the agreement between the Appellant and the Government.

Similarly, the Court of Claims concluded that a CO ratified an unauthorized agreement allowing a contractor to use the Air Force’s asphalt plant in exchange for paving Air Force base’s roads because the roads “were wholly within the [CO’s] base” and he thereby had constructive knowledge of the agreement. Perhaps most importantly, the Court -- in reaching its decision -- found it factually persuasive that: (1) even though the Air Force employee that entered into the unauthorized agreement lacked proper authority, he had provided a Contracting Officer with a copy of the agreement after the former executed it and the Contracting Officer subsequently failed to repudiate it and (2) the Plaintiff entered into the agreement only after requesting and receiving assurances from the Air Force employee -- which lacked proper authority -- that he could enter into the agreement on the Government’s behalf. *Williams v. United States*, 130 Ct. Cl. 435 (1955).

The Government argues that the instant case is clearly distinguishable from both the *Parking Company of America* and *Williams* cases, asserting that, in the instant case, the CO never received any actual notice from HPEN or co-workers (apparently, VA co-workers, meaning Gil and Romero) that an engagement letter existed, or that HPEN’s services exceeded \$5,000. Thus VA avers, he did not “sit back” and fail to stop HPEN from providing its services pursuant to the Engagement Letter. It asserts that Gil intentionally concealed how he acquired HPEN’s services and how much and in what manner he was

paying for HPEN's services.

We find *Williams* to be quite applicable to the instant case. There the Court of Claims stated:

The roads that were seal coated were wholly within the base where the contracting officer was located. It seems incredible that he did not know all about the agreement and by his inaction ratify it. Certainly he did not repudiate the agreement, and he did not appear as a witness. The plaintiffs carried out their part of the agreement for which the Government received the benefit. We feel that there then arose an implied contract under which the defendant was obligated to pay the value of the services rendered by the plaintiffs.

The *Williams* case has recently been analyzed in relation to four other related cases: *Sociometrics, Inc.*, ASBCA No. 51620, 00-1 BCA ¶ 30,620; *Silverman v. U.S.*, 230 Ct. Cl. 701, 679 F.2d 865 (1982); *City of El Centro v. U.S.*, 922 F.2d 816 (Fed. Cir. 1990), *cert. denied*, 501 U.S. 1230 (1991); and *Janowsky v. U.S.*, 133 F.3d 888 (Fed. Cir. 1998). *Nash & Cibinic Report*, ¶ 5 (Jan. 2000).

Sociometrics involved a contract to provide management and logistical support for Government conferences. The contract contained a base year and four one-year options. The Government exercised the first three options but did not exercise the fourth option. The contractor mistakenly understood that the option had been exercised, proceeded to support that year's conference, and corresponded to that effect with the CO's Representative. The conference was held and was supported by the contractor. The CO refused to pay and issued a final decision holding that the option had not been exercised. The ASBCA held for the contractor by imputing the CO Representative's knowledge to the CO.

The *Nash & Cibinic* article concludes that:

Sociometrics established a ratification by imputing the CO Representative's knowledge to the CO. This case is practically "on all fours" with *Williams v. U.S.*, 130 Ct. Cl. 435, 127 F.Supp. 617, *cert. denied*, 349 U.S. 938 (1955), where the imputed knowledge of the CO and his

implied adoption of the agreement by acquiescence bound the Government. In each of these cases, the contractor was able to identify a specific individual with contracting authority who had a relationship to the project and to the representatives who made the agreement.

Where the contractor is unable to establish such relationships, recovery depends on the concept of “institutional ratification.” In *Silverman v. U.S.*, 230 Ct. Cl. 701, 679 F.2d 865 (1982), 24 GC ¶ 306, a senior official lacking contracting authority promised to pay a subcontractor if the subcontractor turned over hearing transcripts to the Federal Trade Commission. The FTC accepted the transcripts and used them but refused to pay for them. The U.S. Court of Claims held the Government liable under an implied-in-fact contract, finding that “the FTC ratified such promise and was bound by it.”

The contractor’s attempt to invoke the “institutional ratification” rule was rejected, however, by a divided panel of the U.S. Court of Appeals for the Federal Circuit in *City of El Centro v. U.S.*, 922 F.2d 816 (Fed. Cir. 1990), 9 FPD ¶ 173, 33 GC ¶ 41, *cert. denied*, 501 U.S. 1230 (1991). There, the city hospital gave care to aliens injured while fleeing the Border Patrol. A Uniformed Border Patrol Agent preceded the injured aliens to the hospital and, according to the hospital’s representative, the Agent led her to understand “that the Border Patrol would be responsible for the costs of hospitalization.” The Claims Court found that the Agent’s lack of contracting authority was overcome by an “institutional ratification,” citing *Silverman* as binding precedent. In reversing, the Federal Circuit attempted to distinguish *Silverman* on the belief that, in *Silverman*, the senior official was authorized to bind the Government contractually.

* * * *

The only problem is that the Court of Claims in *Silverman* found that the official did *not* have contracting authority. The authority to approve

vouchers is not the same as contracting authority. The system of checks and balances in Government contracting separates the contracting and payment processes.

* * * *

The most recent Federal Circuit decision dealing with the “institutional ratification” doctrine is *Janowsky v. U.S.*, 133 F.3d 888 (Fed. Cir. 1998), 17 FPD ¶ 5, 40 GC ¶ 73. There, Federal Bureau of Investigation officials, without contracting authority, verbally arranged with the plaintiff to use its business as a “sting operation” in return for some sort of indemnification from the Government. In reversing the Court of Federal Claims’ grant of summary judgment for the Government, the Federal Circuit appeared to resurrect the “institutional ratification” doctrine, stating:

El Centro, therefore, denied the hospital’s contract claim because it failed to show that the government received a direct benefit from the implied-in-fact contract. The Court of Federal Claims erred when it dismissed the Janowskys’ implied-in-fact contract claim without considering whether the agency ratified the proposed contract with the Janowskys by allowing the sting operation to continue and by receiving the benefits from it.

We conclude that, in cases in which a Government official, though lacking actual contracting authority, enters into an agreement with a contractor to provide something of value that the Government needs and receives as a benefit, and *either* an authorized CO knew or should have known about it (*Williams*) or the non-authorized Government official who entered the agreement was a senior, or high level, official (*Silverman*), then the Government is liable to compensate the contractor.

In the instant case, we find both *Williams* and *Silverman* to be applicable. Here, there was a written agreement executed by Mr. Gil, the Chief Fiscal

Officer, equating to a labor-hour contract, in which VA agreed to pay for HPEN's hours of effort to produce the financial plan at the agreed upon range of rates. That agreement was institutionally ratified by the actions of the Committee which included the CO as a member. VA sought and received the benefit of HPEN's performance, which substantially conformed to the statement of work in the engagement letter and which, until HPEN sought payment of the unpaid amount, VA accepted with enthusiasm and praise.

Here the CO participated as a member of the Financial Planning Committee in authorizing Mr. Gil to secure a consultant. The CO participated in subsequent meetings and conversations with HPEN, and knew or should have known of the consultant's extensive activities throughout performance of this contract, which went on for months. In addition, we have the most senior officials of Loma Linda participating in these events. Granted, the record does not show that Mr. Ford, Mr. Stordahl, Ms. Gillespie or any other member of the Committee had actual knowledge of the terms of the letter of engagement or the payments thereunder until early November 1997. However, the top officials at Loma Linda were, or should have been aware, that some form of agreement existed and that a high level of activity was being performed under their direction by professional consultants who are normally well paid. We find this to be a clear case of "institutional ratification." We hold that the Contractor is entitled to be paid fairly for its work of producing the financial report.

A different case is presented, however, in connection with the follow-on portion of HPEN's activities. An agreement for implementing the plan was contemplated but never consummated. There is no clear showing that the parties actually reached agreement for HPEN to perform such additional work for VA. Indeed, it is not even clear what the scope of work was to be. Nor do we find that any tangible benefit was received by the Government in the implementation phase. Accordingly, in the absence of an authorized or ratified agreement and a benefit to the Government, we hold that the Contractor is not

due compensation for its efforts relating to implementation of the plan.

Quantum

Compensation is either in accordance with the terms of the agreement, if determinable, or under principles of *quantum meruit*. See *Williams* and *Sociometrics*. Applying the foregoing to the circumstances in the instant case, we find for the Contractor in an amount as discussed below.

Appellant asserts that it conferred substantive benefits upon the Medical Center for which it is entitled to be paid the entire balance of the amounts invoiced under its contract. The Government contends that HPEN's recovery is allowable only under quantum meruit and is limited to the value of the benefit provided to VA as opposed to the \$87,028.60 that HPEN invoiced pursuant to the unauthorized engagement letter. Apparently, when some VA personnel came to realize the actual cost of HPEN's services, the plan did not seem as valuable as first believed. At trial, VA deemed the Strategic Plan extremely deficient, asserting that it merely regurgitated verbal and written information that VA had already provided to HPEN during the previous *twenty-six (26)* meetings and that it failed to provide VAMC Loma Linda with any specific recommendations, implementations or strategies that VA had not already considered prior to HPEN's submission of the Strategic Plan. VA contends that the Strategic Plan was not worth any amount close to the \$87,028.60 that HPEN billed. According to the Government, the Strategic Plan merely validated the strategies that VA had already presented to HPEN, and such validation is worth significantly less than the \$48,568.60 that Gil paid to HPEN and certainly not the basis for additional payments to HPEN. Based on the foregoing, VA contends that HPEN is not entitled to recover an additional \$38,460.00.

Summarizing billings and payments, we find that HPEN billed a total of \$87,029.42, excluding finance charges, which HPEN dropped. HPEN received payments totaling \$48,568.60 for the May and June 1997 invoices. The unpaid balance of \$38,460.82 was for July, August, September, October and November

1997. However, we do not limit our review to the unpaid amount of \$38,460.82. Rather, we will review the entire amount invoiced and determine the appropriate compensation under the terms of the agreement. In doing so, we distinguish between the two phases of work: first, to produce a financial plan and, second, to assist in implementation of the plan.

With respect to producing a financial plan, the contract was not executed for VA by Mr. Gil until the May 16, 1997 meeting with VA's Financial Planning Committee. We note that \$4,312.50 in consulting fees and expenses were charged during the period from May 5, 1997, to May 16, 1997, inclusive. That period preceded the initial meeting with the Committee and the execution of the agreement itself. During that period, HPEN is charging for time in taking the initial telephone calls from Mr. Gil and his student nurse assistant, as well as time for the initial meeting in Long Beach to discuss the project and the first meeting with the Committee. Generally, except in special circumstances not shown here, those costs incurred prior to the actual execution of a contract are not recoverable. See *FAR* § 31.205-32; *Codex Corp. v. U.S.*, 226 Ct.Cl. 693 (1981). We see nothing in the agreement itself permitting payment for precontract costs incurred. Thus, we exclude \$4,312.50 from HPEN's recovery.

Further, the letter of engagement provided that fees would be based on hourly rates ranging "from \$75 to \$275 per hour, depending on professional billing level." A team of three primary consultants, including Richard Sinaiko, Emil Gauvreau and Richard Jacoby, was to represent HPEN. During the course of contract performance, HPEN made a change in the rates charged to VA. Beginning on September 3, 1997, HPEN increased the fee for Emil Gauvreau from \$175 per hour to \$225 per hour. However, we see no provision in the contract for an escalation in rates nor was the agreement ever amended to permit an increase in such rates. Thus, we reject compensation of amounts higher than \$175 per hour for Mr. Gauvreau in September 1997. (As explained below, we exclude all implementation charges invoiced after September 18, 1997, and the

increase is of no consequence after that date.) Accordingly, for the 22.9 hours charged for Mr. Gauvreau from September 3-18, 1997, we are deducting the unsupported \$50 per hour increase, or a total of \$1,145. Based on the foregoing, \$5,457.50 is to be deducted from invoiced charges prior to September 18, 1997.

Turning to the implementation phase, we observe that the letter of engagement, written by HPEN, recognized that, while the scope of the project was limited to the process described therein, i.e., preparation of a strategic financial plan, HPEN was available and “would be very interested in assisting Medical Center to implement the process to be contemplated by the plan” and that HPEN “would hope to discuss those services as they are identified and implementation of the plan is agreed upon.” However, we see no evidence that the implementation phase, as distinguished from the strategic financial plan preparation phase, was ever agreed upon. To the contrary, an engagement letter for the implementation phase was prepared but never executed. Nor do we find evidence that VA received any significant benefit from HPEN’s premature implementation efforts. We conclude that HPEN’s consulting charges against VA after the presentation of the financial plan, which was done in draft in mid-July 1997 and in an oral presentation on September 18, 1997, should have ended at least by the latter date in the absence of an agreement specifically covering the implementation phase. We have calculated those charges to be \$2,160.00, \$15,681.44 and \$3,059.00 for the September, October and November invoices, or a total of \$20,900.44 to be deducted from invoiced charges after September 18, 1997.

Combining the deductions above, we determine that Appellant’s invoiced amount of \$87,029.42 should be reduced by the sum of \$26,357.94 (\$4,312.50, \$20,900.44 and \$1,145.00) to the amount of \$60,671.48, or a balance due of \$12,102.88 (\$60,671.48 less the \$48,568.60 previously paid).

The Government argues that HPEN’S recovery should be limited under *quantum meruit* to the value of the benefit provided to VA as opposed to an

amount determined under the engagement letter. The Government quoted the following:

When delivery of goods or services to the Government is not supported by a valid contract, the supplier may be paid nonetheless to avoid the obvious unfairness that would result if the Government keeps and makes use of the delivered goods or services without making payment for them . . . Payment in such circumstances, on a quantum meruit/quantum valebant basis, may be made if the goods or services could have been the subject of a proper procurement, if the Government received a benefit, and if the supplier acted in good faith. When a supplier is paid on a quantum meruit/quantum valebant basis, the supplier is entitled to the reasonable value of the benefit provided rather than to the price it would have charged if the parties had entered into a valid contract.

United Computer Supplies, GPOBCA No. 26-94 (January 23, 1998), citing *Acumenics Research & Tech.*, B- 224702, B- 224702.2, 88-2 CPD ¶ 15, and *Cities Service Gas Co.*, 500 F.2d 448 (Ct. Cl. 1974).

We agree that HPEN is not entitled to the entire \$38,460 sought but do not find any basis for allowing other than the \$12,102.88 amount we have determined above under the terms of the ratified contract, relative to producing a financial plan. The Government simply has not demonstrated that the benefit to it is any less than that and we are provided no specific alternate amount for the value of the benefit received.

DECISION

Based on the foregoing, the appeal in VABCA-5864 is sustained in part and otherwise denied. Appellant Healthcare Practice Enhancement Network, Inc. is entitled to judgment in the amount of \$12,102.88 plus interest from December 5, 1998, until payment is made, in accordance with the *Contract Disputes Act*.

Date: **April 10, 2001**

MORRIS PULLARA, JR.
Administrative Judge
Panel Chairman

We Concur:

JAMES K. ROBINSON
Administrative Judge

RICHARD W. KREMPASKY
Administrative Judge