SABBIA CORPORATION

CONTRACT NO. V578P-6141 **VABCA-5557R, 5857**

VA MEDICAL CENTER
HINES, ILLINOIS

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Helen S. Henningsen, Esq., Trial Attorney, Milwaukee, Wisconsin; **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 McMICHAEL

The Appellant, Sabbia Corporation (Sabbia or Contractor), has filed a timely MOTION TO RECONSIDER the Board's decision dismissing VABCA-5557 for lack of jurisdiction. ***Sabbia Corporation*,** VABCA No. 5557, 1998 WL 881274 (December 17,1998), 99-2 BCA ¶ 30,394. In our decision dismissing VABCA-5557, we determined that for all its submissions, the Appellant had never submitted a written claim seeking the payment of money in a sum certain as required by the *Contact Disputes Act of 1978, 41* U.S.C. §§ 601-13 *(CDA).* Based on this deficiency, we concluded that we lacked jurisdiction over VABCA-5557, and dismissed the appeal. In dismissing the appeal we also noted that we lacked authority to grant the Appellant's request for specific performance and injunctive relief, based on the Government's alleged breach of Contract No. V578P-6141.

We left intact VABCA-5857 a second claim centering around whether an implied-in-fact contract existed between the parties and whether the Government was breaching that contract. On January 26, 1999, the Government filed a MOTION FOR SUMMARY JUDGMENT (SJM) in VABCA-5857 asserting that "the undisputed facts in the record demonstrate that there was no implied-in-fact contract," and the "Appellant has not pleaded the requisite elements of an implied-in-fact contract, nor has it demonstrated any facts that would support the existence of an implied-in-fact contract."

The Appellant submitted a RESPONSE (SJM RESPONSE) to the Government's Motion arguing that a Memo to the Record created by the contracting officer "seems to create a very likely inference that the contracting officer had assented to an implied contract to expand the Contract." In deciding these matters, we first turn to the Appellant's MOTION TO RECONSIDER in VABCA-5557 (Recon. Mot.) and then we will address the Government's MOTION FOR SUMMARY JUDGMENT in VABCA-5857.

VABCA-5557: THE MOTION TO RECONSIDER

As we have noted on numerous occasions, the primary purpose of reconsideration is to allow a party to present significant newly discovered evidence or evidence not readily

available at the time of the principal decision. Motions for reconsideration which do not allege newly discovered evidence and which merely repeat arguments which were considered by the Board in reaching its decision are ordinarily denied. ***Sheladia Construction Corporation***, VABCA No. 3313R, 91-3 BCA ¶ 24,325; ***Dawson Construction Company, Inc.,*** VABCA No. 1711, 85-1 BCA ¶ 17,788. We will ordinarily grant a motion for reconsideration only when the movant presents newly discovered evidence or evidence not readily available at the time of the principal decision. ***Nitro Electrical Corporation***, VABCA No. 3777R, 95-2 BCA ¶ 27,672; ***Saturn Construction Co., Inc.***, VABCA No. 2600R, 88-3 BCA ¶ 21,183; ***Sentry Insurance, A Mutual Company,*** VABCA No. 2617R, 92-3 BCA ¶ 25,147.

In its Motion, Appellant makes an attempt to refine the argument it presented to the Board in its original Response to the Motion to Dismiss. Sabbia. asserts that allegation number 15 in its Complaint filed in United States District Court, Northern District of Illinois, Civil Action No. 97C 6497, "does express that the Appellant believed its approximated damages to be $100,000.00." Such an assertion, it is claimed, "clearly would have put the Contracting Officer on sufficient notice as to the 'sum certain' the Appellant was seeking." (Recon. Mot. at 1)

In Count I paragraph 15 of the District Court Complaint the Appellant avers:

> The Plaintiff is aware that money has been set aside in the current (1997) fiscal year for the work to be performed by the Plaintiff at the VA's facility at Hines, Illinois. The Plaintiff believes this amount to be approximately $100,000.00.

We reject the Appellant's contention that this allegation of money set aside for painting work should read to constitute a notice to the contracting officer of a demand seeking the payment of money in a sum certain. The crux of our holding in the principal decision was that, when read together, the November 9th letter and a copy of the District Court complaint which accompanied it satisfied only the first two prongs of the jurisdictional test set forth in ***H. L. Smith v. Dalton***, 49 F.3d 1563 (Fed. Cir. 1995), and constituted a written demand to the contracting officer setting forth the basis of the claim. However, we concluded that these two documents, and the Record as a whole, failed to satisfy the third prong of the ***Dalton*** test that necessitated a demand for a sum certain.

Sabbia never sought money damages in its District Court action. It limited its causes of action there and its subsequent submission to the Contracting Officer to pleas for specific performance and injunctive relief. The fact that the District Court complaint contained a general allegation wherein Sabbia set forth its belief that approximately $100,000 was set aside for work under the Contract, does not a demand or claim make. Indeed, to the extent that Sabbia is now seeking to recover lost *profits* under a breach theory, we presume there would be some *expenses* entailed in performing painting contracts up to an amount of $100,000. In reaching the principal decision, the Board considered all the arguments and facts now advanced by Sabbia in it MOTION. Therefore, in the absence of any newly discovered evidence or any allegation of a material oversight or mistake by the Board other than a disagreement with the principal decision, Sabbia provides no basis

supporting our reconsideration of the principal decision. For the foregoing reasons, the Appellant's MOTION TO RECONSIDER the Board's decision dismissing ***Sabbia Corporation*,** VABCA-5557 is DENIED.

Notwithstanding the foregoing, we reiterate that the dismissal is without prejudice to the submission of a claim that meets the requirements of the *Contract Disputes Act.* The Contractor is referred to our discussion of the procedures involved in submitting such a claim in our original decision in VABCA-5557 at pages 13-14.

VABCA-5857: THE MOTION FOR SUMMARY JUDGMENT.

In our prior decision in ***Sabbia Corporation*,** VABCA No. 5557, 5857, 1998 WL 881274 (December 17,1998), 99-2 BCA ¶ 30,394 we observed that "the Contractor asks us to find that an implied-in-fact contract existed between the parties, that was an expanded and extended version of the original express Contract." (Id at 12) We determined that Sabbia, in its November 9th letter and the District Court complaint, met the jurisdictional requisites to establish our jurisdiction to determine whether an implied-in-fact contract was formed, notwithstanding the absence of a monetary claim.

The Government has responded with a MOTION FOR SUMMARY JUDGMENT. The Record, for purposes of the MOTION, consists of the Government's "Statement of Undisputed Facts", the Appellant's "Response " thereto, as well as the pleadings, the Appeal File (R4, tabs 1-226) and the affidavits of Thomas J. Scheuerell (6/25/98 and 1/22/99) and Harlan Rochon (8/18/98). Our findings are as follows.

On September 28,1995, Contract No. V578P-6141 was negotiated between the Department of Veterans Affairs (VA or Government), the Small Business Administration (SBA), and Sabbia and awarded pursuant to Section 8(a) of the *Small Business Act.* Contract No. V578P-6141 was an "open-ended contract" that required Sabbia to "furnish labor, supervision, materials, tools, equipment and supplies to prepare existing surfaces for painting; and then apply paint to those surfaces as specified," at the Edward Hines Jr. VA Medical Center. (R4, tab 22) The Contract was for one year from date of award and its term was for the "Base Period plus three option years." (R4, tab 22, Section C) The Contract incorporated Federal Acquisition Regulation 52.217-9, OPTION TO EXTEND THE TERM OF THE CONTRACT (MAR 1989) which provided: "(a) The Government may extend the term of this contract by written notice to the Contractor within 14 days; provided, that the Government shall give the Contractor a preliminary written notice of its intent to extend at least 60 days before the contract expires. The preliminary notice does not commit the Government to an extension." (R4, tab 22, Section 1, 52.217-9) Additionally, the Contract had a maximum annual dollar value of $250,000 and each task order had a maximum dollar value of $25,000. *Id.* Upon completion of the first year, on September 30, 1996, June Fitch, the Contracting Officer at Hines exercised the first option year of the Contract and Sabbia began performing the first option year. (R4, tab 107)

Mid-way through the first option year of Contract No. V578P-6141, certain VA facilities were consolidated to form Veterans Integrated Service Network (VISN) 12, Great Lakes Health Care System. The new VISN decided to consolidate and administer its contracting activities out of a centralized center known as the Great Lakes Health Care

System Acquisition Center (GLAC). The GLAC is located in Milwaukee, Wisconsin. In February 1997, Sabbia's Contract at Hines was transferred to the GLAC and, upon transfer, Thomas Scheuerell was appointed Contracting Officer. (R4, tab 205)

Shortly thereafter, on March 7, 1997, a meeting was held between Christine and Dominic Sabbia of Sabbia Corporation and VA representatives Norb Zyk, Rao Vadlamundi, Mike Cunningham, the GLAC's Small Business Utilization Specialist and Contracting Officer Thomas Scheuerell. (R4, tab 145) Contracting Officer Scheuerell created an undated Memo for the Record to memorialize this meeting as follows:

> Sabbia wanted to meet with us to discuss their open-end painting contract (V578P6141) and doing business with the VA. Dominic talk[ed] about their company and we discuss[ed] that the GLAC had just taken over all the contracting for eight VA hospitals the third week of February and the contract had been transfer[ed] to me to administer. We were still in the process of obtaining staff and working with the stations about how we were going to provide them contracting support which is one of the reasons we had come down to Hines to meet the Engineering staff and discuss the transition. Sabbia told us that Bob Conner (SBA Contracting Officer) had approved the current open-end painting contract to be expanded to the other three Chicago area medical centers (North Chicago, Westside and Lakeside). I inform[ed] him that *before I* could modify the contract I had to have a requirement from the Engineers to do so. I had request[ed] a list of projects from the stations for these hospitals and with that list I could *make a decision if the contract* could *be expanded or* a new contract should be written. I express[ed] concern with the $250,000 limit the contract had since that amount was spent the first year and based upon our Engineers requirements we *may wish* to change our bidding schedule to allow for larger task orders and gain some economy of scale and *was not sure if we would be able to modify* the current contract to do so with the current contract dollar limitation. Dominic was pleas[ed] with [the] *possibility [that] we might wish to change* the current $25,000 task order limitation and inform[ed] me that they

> could offer a discount if we wanted to change this and felt that we should proceed to add the other hospitals to the contract and the Engineers will use it and not wait for the project listing. I inform[ed] him that my customer (Engineering) must give me a *request before I can do that* and with the information from stations I *can determine* if we have a require[ment] for an open-end painting contract at the other stations and [then] ask Engineering *if* they wish to meet their painting projects using an open-end painting contract with Sabbia Corporation.

(R4, tab 145) (Emphasis added). The basic content of the foregoing memorandum was attested to in Scheuerell's January 22, 1999 Affidavit.

Immediately following the meeting, on the same day, Christine Sabbia, Sabbia's President, sent a letter to Mike Cunningham, the VA's Small Business Utilization Specialist, expressing her thanks for the meeting and her opinion that "it *would* be in the best interest of the VA and the government to expand our current Open-ended Painting Contract to include the 4 other local VA Medical Centers." (R4, tab 146) (Emphasis added). Christine Sabbia wrote Mike Cunningham again on March 27,1997 to follow up on items discussed at the March 7th meeting:

> I also want to thank you gentlemen for your meeting with Mr. Robert Conner of the SBA. I understand that Mr. Conner is currently *negotiating* with you, and has formally *requested,* that our current painting contract be extended and expanded to include the North Chicago VA Medical Center and any other facilities you deem appropriate *(hopefully* all four Chicago area VA Medical Centers). Could you please forward me the necessary documents?
>
> As per our negotiations, we do agree to extend our, current contract prices at a 3% discount on jobs over $25,000.00 and a 5% discount on jobs over $100,000.00.

(R4, tab 51) (Emphasis added)

On April 4,1997, Christine Sabbia wrote to Tom Cooper, the Technical Review Specialist at the GLAC stating:

> In trying to further develop my business, I have contacted my Contracting Officer,

> Mr. Thomas Scheuerell, and Mr. Mike Cunningham, the SDB Utilization Specialist. We, together with the engineer from Hines, had a sit-down meeting to discuss expanding this current contract to include the other four local Chicago-area VA facilities.
>
> I imagine this could be accomplished in any one of a number of ways. It would involve increasing the current dollar thresholds and the expansion of the current contract that we have in place.
>
> Mr. Robert Conner, Assistant Director of the SBA has also implemented negotiations on our behalf and has formally requested the above to Mr. Cunningham.
>
> * * * *
>
> *In talking to Mr. Scheuerell yesterday, he stated that he wasn't sure if the other facilities would be in need of this type of service or be desirous of it.* After talking to him, I realized that every facility is in need of interior/exterior painting services and also know that the in-house staffs have been dramatically reduced, thereby increasing their need for another source to fulfill these viable requirements. Mr. Scheuerell also anticipates getting a complete listing of all of the VA's requirements on or about April 15,1997.

(R4, tab 152) (Emphasis added).

The next day, April 5,1997, Christine Sabbia wrote to Contracting Officer Scheuerell and Mike Cunningham:

> To Recap: Mr. Conner of the Small Business Administration *is currently negotiating with both of you gentlemen,* and has formally requested that our current SBA 8(a) painting contract be extended and expanded to include the North Chicago VA Medical Center. My *goal* and that of SBA is to include all four Chicago area VA Medical

> Centers. Mr. Robert Conner of the SBA, said it would be a very simple process to comply with the SBA's request and extend and expand my contract. *Hopefully we can extend and expand* this contract quickly and professionally in spite of the great prejudice against the SBA 8(a) program.

(R4, tab 153) (Emphasis added).

The VA held a teleconference on April 21, 1997, between Chief Engineer Terrance Wright, VA Attorney Helen Henningsen, Tom Cooper and Mike Cunningham where they discussed the open-ended contracts that the GLAC was picking up from Hines. Some problems were noted about these contracts, including Sabbia's contract, and the group determined that the contracts needed to be reviewed to determine if money previously appropriated could still be used, and whether the VA should modify the contracts or write new ones. (R4, tab 156)

On May 5, 1997, Christine Sabbia wrote a letter to Robert Conner of the SBA stating:

> I am under the impression that you are *currently negotiating* with both Mr. Tom Scheuerell and Mr. Mike Cunningham of the VA and that you have formally requested that our current SBA 8(a) painting contract be extended and expanded to include the North Chicago VA Medical Center as well as any other area hospital. My goal is to include all four Chicago area VA Medical Centers.

(R4, tab 158) (Emphasis added).

On May 6, 1997, Contracting Officer Scheuerell issued a purchase order for $2,394.53, to perform "'Task Order #7 (Under Option Year One)." This order was for the painting of Room 10341, Outpatient Pharmacy Reception Area at the Hines VA Medical Center. (R4, tab 160) This was the last task order issued under Contract No. V578P-6141.

Appellant had previously written the Administrator of the Small Business Administration on April 8, 1997, requesting assistance in connection with Sabbia's request for increased contracting with the VA. In a May 7,1997 letter to Sabbia, SBA responded noting that 8(a) program officials had recently met with VA officials to review "anticipated 8(a) contract opportunities including the possibility of expanding the existing painting contract for you company and other contract options." Sabbia was advised that if it had "concerns with VA's final decision" it might wish to contact Scott Denniston. (R4, tab 161)

Thereafter, Christine Sabbia wrote to Scott Denniston, Director of VA's Office of Small and Disadvantaged Business Utilization a week later stating: "To refresh you, I

currently have an open-ended painting contract for the Hines, IL facility and *am formally requesting that that contract be expanded* to include the other four Chicago area VA hospitals. The responses I have received thus far basically state that everyone *is awaiting some final decision* to come out of the Milwaukee office." (R4, tab 161) (Emphasis added).

Another teleconference was held on May 15, 1997, between Terrance Wright, Helen Henningsen, Dean Martell, Tom Cooper, Mike Cunningham and SBA representative Bob Conner, where they discussed the deficiencies of several open-ended contracts. Contracting Officer Scheuerell recounted in a Memo for Record:

> I inform[ed] Bob Conner that I was not going to add on the other VA medical facilities (Westside, Lakeside or North Chicago) to [the] Sabbia painting contract because of the problems we have with the contract and adding the stations to the current contract would be beyond the scope of that contract. If the other VA medical centers have a requirement for an open-end contract [then] it would be procured as a new contract. Once I receive the project workload from all these stations I will be able to determine if the need for a new open end painting contract exists. I ask[ed] Mr. Wright to let his engineers know that were not going to issue any further task orders on the open end contracts.

(R4, tab 163)

On June 3, 1997, "breach of contract" was raised for the first time by the Appellant when Christine Sabbia wrote to Contracting Officer Scheuerell and Mike Cunningham about Contract No. V578P-6141: "In [r]egard to your breach of contract . . . ." (R4, tab 165) Sabbia wrote to Bob Conner, about one month later, on July 15, 1997, alleging the VA was breaching Contract No. V578P-6141. (R4, tab 166) On July 24, 1997, the Appellant sent, via facsimile to Contracting Officer Scheuerell and GLAC Manager Martell, a copy of a letter from Christine Sabbia to Contracting Officer Scheuerell and Mike Cunningham bearing the date of March 8, 1997. This letter states *inter alia:*

> Mr. Scheuerell I want to thank you for *agreeing* that you *would* expand my painting contract to include all four Chicago area VA Medical Centers and not bundle my painting contract into a [Job Order Contract], and instead keep my painting contract separate. Could you please forward me the necessary documents?

> This letter is written to confirm that the painting requirement with the [VISN] 12 *will be set aside* as a sole source to Sabbia ....
>
> Also this letter is to confirm that the SBA acknowledges that all 9 hospitals are in SBA region 5 and Sabbia is eligible under the "Local Buy" act of the SBA program for all 9 hospitals.
>
> However, the VA has decided to only work with the Chicago SBA for the 4 Chicago area VA hospitals, thereby splitting this requirement with the Milwaukee SBA.
>
> As per our negotiations, we do agree to extend our current contract prices at a 3% discount on jobs over $25,000.00 and a 5% discount on jobs over $100,000.00. Mr. Scheuerell, *you agreed to this discount* and I am confirming the discount in writing.

(R4, tabs 171-72) (Emphasis added).

Contracting Officer Thomas J. Scheuerell states after reviewing the contract file that the VA's "records indicate" that the above letter, dated four months earlier, was "first received by the Great Lakes Acquisition Center on July 24, 1997 when it was faxed to both Mr. Martell and myself. "Although for purposes of its Summary Judgment Motion, the Government is assuming that the letter was "timely received", Scheuerell's affidavit also states under oath that:

> At no time during the March 7, 1997 meeting did I agree to expand the open-ended painting contract for Hines and at no time did I agree to any specific discounts for increasing any dollar thresholds. Finally, at no time during the March 7, 1997 meeting was there any discussion of extending the term of the contract to four years.

(Scheuerell Aff. 1/22/99) In its Response to the Government's Motion, Appellant has filed no counter-affidavit controverting Scheuerel's statements.

On July 28, 1997, Dominic Sabbia spoke to Contracting Officer Scheuerell about Contract No. V578P-6141. In a Memo for the Record, Contracting Officer Scheuerell recounts, "I told him that we're going to do the F corridor as a separate 8(a) contract with his company and were waiting for Engineering to prepare the specifications. We were not [planning] on issuing any more task orders under the contract due to the problems with the contract and were not going to extend the contract. " (R4, tab 174) In subsequent

letters written during July and August 1997, Christine Sabbia contacted several VA officials and Members of Congress setting forth her interpretation of events and various conclusions, including that she had a "four year contract" that the VA had breached, after "we successfully negotiated a verbal modification." (R4, tabs 176, 181).

A new painting contract, Contract #V69DC-70, was awarded to Sabbia on August 25,1997, using the procedures in Section 8(a) of the *Small Business Act.* As per the earlier conversation, this was a contract to paint the "F corridor" at the Hines VA Medical Center for a total dollar amount of $18,192.82. (Rochon Affidavit) The VA has not issued task orders to Sabbia for painting work at Westside, Lakeside or North Chicago VA Medical Centers. (Scheuerell Affidavit) Sabbia has not performed any painting work at Westside, Lakeside or North Chicago VA Medical Centers, nor has VA issued any individual task orders to Sabbia that have exceeded $25,000.00. (Scheuerell Affidavit)

On September 10, 1997, Contracting Officer Scheuerell wrote to Sabbia that:

> It appears from your numerous correspondence and telephone calls that you are confused on the events that have occurred with this contract. This Open-End Painting contract was awarded for one year on September 28, 1995, with three one year options that the Government may unilaterally exercise. The Government did exercise the first option period and that option expires September 27, 1997. The contract was awarded by the local contracting office at Hines and was transferred to my office during the 3rd week of February 1997 when a consolidation of the VA VISN #12 Great Lakes Health Care System contracting activities occurred.
>
> In response to your request to expand the contract I reviewed the file and noticed that while this painting contract is clearly a construction contract, it was formatted as a service contract and contained a number of clauses normally used in service contracts. After further legal and technical review of the contract it was determined that the contract violated several statutes . . . .
>
> The determination was made that if the VA continue[d] issuing task orders against this contract, the VA would be knowingly and deliberately violating the Davis-Bacon Act and the Miller Act. This is why we

> have stopped issuing task orders. I have indicated our desire to continue to work with your company, however, this requires a new separate contract to specifically paint "F" corridor walls at Hines VA Hospital.
>
> I do feel that I need to clarify a few things that have repeatedly come up in correspondence and discussions. *First of all, the contract was never modified to include additional VA sites, orally or otherwise.* Your proposal for additional sites was seriously considered, however we determined that there was not a need.

(R4, tab 205) (Emphasis added)

The Government asserts that Contract V578P-6141 expired on September 27,1997, without VA exercising the next option year.

Sabbia used the terminology "implied-in-fact contract" for the first time when it filed a civil action in United States District Court, Northern District of Illinois, on September 15, 1997, naming the VA, GLAC Manager Dean Martell, and Contracting Officer Scheuerell as defendants in an action arising "under an implied contract for compensation for property taken by the United States for public use." (R4, tab 211, ¶ 3) The Complaint alleged, among other things, that on March 7, 1997, subsequent to exercising the first option year of the Contract, the Appellant met with Contracting Officer Scheuerell to discuss the progress of the work. At that meeting, according to Sabbia, Scheuerell made representations regarding the continued vitality of the Contract, and "expressed and *gave every assurance* that the VA would expand the Plaintiff's current contract to include three additional VA facilities," specifically, the VAMC's at Lakeside, Westside and North Chicago. (Emphasis added). Sabbia averred that "[b]y virtue of those assurances, Scheuerell induced the Plaintiff to confirm prices for the expansion of the current contract to include the four additional VA facilities," and that "[t]he Plaintiff confirmed its prices, at a sizeable discount, to the VA as a result of those negotiations with Scheuerell at the March 7, 1997 meeting." (R4, tab 211, ¶¶7-12) Whereupon, Sabbia asserted that Contracting Officer Scheuerell "'unilaterally, arbitrarily and without warning" discontinued issuing task orders for work at Hines, Illinois or any of the facilities in the Plaintiff s *expanded* contract. (R4, tab 211, ¶ 15) Sabbia also alleged that the VA attempted to issue task orders within the scope of the Contract to another contractor. (R4, tab 211, ¶14)

Sabbia asked the District Court to:

> Extend the Contract for an additional four years;
>
> Declare that the extended Contract existed between Sabbia and VA that

included four additional VA facilities;

Declare VA to be in violation of Sabbia's rights under the current and extended Contract;

Order VA to complete its obligations under the current and extended Contract; and

Grant other and further relief as it may deem proper.

(R4, tab 211) On November 9, 1997, Sabbia wrote to Contracting Officer Scheuerell and GLAC Manager Martell also alleging "'breach of contract, bad faith, and all other reasons set forth in our letters against the VA in the Court of Claims [sic, Federal District Court]." (R4, tab 214)

On April 4, 1998, Sabbia filed an appeal based on the Contracting Officer's failure to issue a final decision, which we received and docketed as VABCA-5557. When this Board determined that VABCA-5557 contained two separate and distinct causes of action, one based on the express Contract and a second based on an alleged implied-in-fact contract that Sabbia argued was currently in force, we assigned docket number VABCA-5857 to the later claim.

As noted previously VABCA-5557 was dismissed for lack of jurisdiction. But we assumed jurisdiction in VABCA-5857, citing ***Smiths, Inc. of Dothan***, VABCA No. 2198, 85-2 BCA ¶ 18,133. Subsequently, on January 26, 1999, the Government moved for Summary Judgment in VABCA-5857 asserting that "the undisputed facts in the record demonstrate that there was no implied-in-fact contract." Appellant filed a Brief in Response to the Government's Motion but provided no affidavits or other new documentary evidence in support of its position.

DISCUSSION

In seeking. Summary Judgment, the Government contends that "the undisputed facts in the record demonstrate that there was no implied-in-fact contract." Appellant in its Response argues that there is a "genuine and material issue of fact" concerning what transpired at the March 7, 1997 meeting between officials of Sabbia and the VA where, it maintains, an implied-in-fact contract was formed. In support thereof, Appellant argues that Contracting Officer Scheuerell's own Memorandum of that meeting, notwithstanding a "number of ambiguous statements," could, by "reasonable inference", be read to mean that the VA "had assented to the expansion of the contract." Finally, Appellant argues that it would be premature to rule on the Government's Motion until the VA has responded to Sabbia's "'pending Freedom of Information Act request which ultimately could provide additional evidence supporting Appellant's claims."

Our Board rules provide that we may "entertain and rule upon appropriate motions." In so doing we often look for guidance of the Federal Rules of Civil Procedure (FRCP).

Dawson Construction Company Inc. VABCA No. 1867, 85-2 BCA ¶18,290. FRCP 56 (c) provides that summary judgment shall be granted if "there is no genuine issue as to any material fact and . . . the moving party is entitled to judgment as a matter of law." Summary judgment is "properly regarded not as a disfavored procedural shortcut, but rather as an integral part of the Federal Rules as a whole which are designed 'to secure the just speedy and inexpensive determination of every action.'" [Citations omitted] ***Saturn Construction Company***, VABCA No. 3229, 91-3 BCA ¶ 24,151, *aff'd per curiam,* 991 F.2d 810 (Fed. Cir. 1993). *See also* ***Celotex Corp. v. Catrett,*** 477 U.S. 317,322 (1986); *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 247-248 (1986). In a motion for summary judgment, the court noted in ***Mingus Constructors, Inc. v. United States,*** 812 F.2d 1387,1390-91 (Fed. Cir. 1987):

> The moving party bears the burden of establishing the absence of any genuine issue of material fact and all significant doubt over factual issues must be resolved in favor of the party opposing summary judgment. ***United States v. Diebold, Inc***, 369 U.S. 654, 655, 82 S.Ct. 993, 994, 8 L.Ed.2d 176 (1962); ***SRI International v. Matsushita Electric Corp.,*** 775 F.2d 1107,1116 (Fed. Cir. 1985). However, the party opposing summary judgment must show an evidentiary conflict on the record; mere denials or conclusory statements are not sufficient. ***Barmag Barmer Maschinenfabrik AG v. Murata Machinery, Ltd.,*** 731 F.2d 831, 836 (Fed. Cir. 1984).

Thus, in seeking summary judgment, the moving party has the burden to establish both that there is no genuine issue of material fact and that it is entitled to judgment as a matter of law. All inferences as to the existence of a genuine issue of material fact will be drawn in favor of the non-moving party, and any doubt as to the existence of genuine issues of material fact must be resolved in favor of the non-moving party. ***United States v. Diebold,*** 369 U.S. 654 (1962); ***D.L. Auld Company v. Chroma Graphics Corp.***, 714 F.2d 1144 (Fed. Cir. 1983). As the party seeking. summary judgment, the Government has the initial burden of demonstrating that "there is no genuine issue as to any material fact." Federal Rule of Civil Procedure 56(c).

In determining whether there are any facts in dispute that are material to a decision in this appeal, it is appropriate to set forth briefly the elements necessary to establish an implied-in-fact-contract. In *ABC Health Care*, VABCA No. 3462, 93-2 BCA ¶ 25,672, we set forth those requirements as follows:

> An implied-in-fact contract requires a showing of "mutuality of intent to contract, offer and acceptance, consideration and that the officer whose conduct is relied upon had actual authority to contract." ***H.F. Allen Orchards v. United States***, 749 F.2d 1571,1575 (Fed. Cir. 1984).

> Mutuality is inferred "from the conduct of the parties showing in the light of the surrounding circumstances, their tacit understanding." ***Baltimore & Ohio Railroad Co. v. United States*****,** 261 U.S. 592, 597, 43 S. Ct. 425, 426 (1923). A contractor will not be barred from recovery absent a written contract where there are sufficient facts to infer the "meeting of the minds" necessary to establish an implied-in-fact contract. ***Narva Harris Construction Corporation v. United States,*** 574 F.2d 508 (Ct.Cl. 1978)

Accord Integrated Clinical Systems, Inc., VABCA No. 3475 et al., 95-2 BCA ¶ 27,902; ***21st Century Technology*****,** VABCA No.. 3418, 92-1 BCA ¶ 24,445.

Applying those principals to the record before us, we first examine the crucial March 7, 1997 meeting and then events subsequent thereto. We observe initially, that no official of Sabbia who attended the March 7 meeting has provided an affidavit setting forth what transpired there. Thus, we have no statement under oath setting forth details which supports Appellant's general allegation that the parties formed a binding contract. The Government, by contrast, has submitted the un-rebutted affidavit of Contracting Officer Scheuerell who states that "at no time during the March 7, 1999 meeting" did he agree to expand the open-ended contract or agree to any specific discounts for increasing any dollar thresholds. Nor was there was any "discussion of extending the term of the contract to four years."

Ignoring this sworn statement, Appellant's brief concentrates instead on the Contracting Officer's Memorandum of the March 7 meeting which it claims "does indicate that Mr. Scheuerell had assented to the expansion of the Appellant's contract." (SJM Response at 2) This is the "reasonable inference that the Board could draw" from the memo notwithstanding "a number of ambiguous statements" contained therein. In a somewhat curious double negative, Appellant asserts that this "inference" should be drawn because the Contracting Officer "does not state that he did not assent to the expansion of the contract." Instead, the Contracting Officer:

> states that he is looking into whether the current contract should be modified or if a new contract should be employed. In essence, he is confirming his intention to put the implied agreement of the parties into writing.
>
> The "Memo for the Record" he prepared does not say that the parties were merely negotiating. [It] refers to specific actions he was taking to actually expand the contract.

In sum, Appellant neither contradicts the Contracting Officer's affidavit nor does it offer its own description about what transpired on March 7. Instead, it apparently asks the Board to read CO Scheuerell's memo of the meeting in a highly selective way to impeach his sworn statement and create an evidentiary conflict. Construing the meaning of documents is something the Board is frequently called upon to do. But even considering the document in the most favorable light and in isolation from other evidence of record before us we cannot ascribe the meaning urged upon us by the Appellant's Brief. The plain meaning to be derived from the memorandum of the March 7 meeting is that Sabbia advanced a proposal to the VA to expand its painting contract. In response, Contracting Officer Scheuerell indicated that he needed to consult with VA officials to ascertain if they wanted Sabbia's services and to resolve other matters before he "'could make a decision if the contract could be expanded or a new contract should be written."

Of even greater importance, is the fact that this document does not exist in a vacuum but is part of a larger evidentiary record which does not support a finding that there was a meeting of minds on March 7 that resulted in an implied-in-fact contract. In addition to the Contracting Officer's sworn affidavit setting forth what transpired on March 7, Sabbia's president in following up that same day, in a letter to Mike Cunningham, VA's Small Business Utilization Specialist, acknowledged that no agreement had yet been reached when she wrote that "[i]t would be in the best interest of VA and the government to expand our current Open-ended Painting Contract to include the 4 other local VA Medical Centers." Christine Sabbia continued to lobby Mike Cunningham for the expansion when on March 27,1997, she wrote: "I understand that Mr. Conner [of SBA] is currently negotiating with you, and has formally *requested,* that our current painting contract be extended and expanded to include the North Chicago VA Medical Center and any other facilities you deem appropriate *(hopefully* all four Chicago area VA Medical Centers)."

The Small Business Administration, a key party in any 8(a) set aside contract, clearly understood that no agreement had been reached and that the parties were merely discussing the "possibility of expanding the existing painting contract" in a May 7 letter to Sabbia. Indeed, Sabbia manifested the same understanding when, at SBA's suggestion, it subsequently wrote to the Director of VA's Office of Small and Disadvantaged Business on May 13, 1997, "formally requesting that the contract be expanded."

The only other piece of evidence that needs to be considered is a letter from Christine Sabbia, bearing the date of March 8, 1997, which all parties agree was transmitted via facsimile on July 27, 1997 to the Contracting Officer. In this letter Christine Sabbia thanked CO Scheuerell for "agreeing that you would expand my painting contract . . . . " Contracting Officer Scheuerell's sworn affidavit states that VA's records indicate that the letter dated March 8 was first *received* at the Acquisition Center four months later on July 24. However, for purposes of its Motion, the Government does not assert that the letter was not "timely received."

This letter is clearly inconsistent with the rest of Sabbia's correspondence concerning this matter. Appellant is silent on when it first transmitted the letter to the VA and has offered no information or clarification concerning the circumstances surrounding the letter nor explained its relationship to its other correspondence which reflect that no agreement had been reached as negotiations continued. Appellant's Brief is conspicuous

by the absence of any reference to this document at all. It neither argues that it constitutes a material issue of fact nor relies upon it to oppose the Government's Motion for Summary Judgment.

Even drawing all inferences as to the existence of a genuine issue of material fact in favor of the non-moving party, and resolving any doubts as to the existence of genuine issues of material fact in favor of Sabbia, we are compelled to conclude that no implied-in-fact contract was formed on March 7, 1997. As the court noted in *Barmag, Banner Maschienfabrik AG v. Murata Machinery, Ltd.,* 731 F.2d 831, 835-36 (Fed. Cir. 1984:

> With respect to whether there is a genuine issue the court may not simply accept a party's statement that a fact is challenged. ***Union Carbide Corp. v. American Can Co.***, 724 F.2d at 1571. The party opposing the motion must point to an evidentiary conflict created on the record at least by counter statement of fact or facts set forth in detail in a affidavit by a knowledgeable affiant. Mere denials or conclusory statement are insufficient.

As we said in ***Mycor Services, Inc.***, VABCA No. 3537,93-1 BCA ¶ 25,290:

> [G]iven this Appellant's failure to provide credible rebuttal to the sworn affidavit by the CO, we conclude that there is insufficient evidence to raise a genuine issue of material fact. The matter is therefor ripe for decision

See also, ***Saturn Construction Company,*** VABCA No. 3229, 91-3 BCA ¶ 24,151; ***Elmstar Electric Corporation,*** VABCA No. 3385, 91-3 BCA ¶ 24,222; ***Fire Security Systems, Inc.,*** VABCA No. 3086, 90-3 BCA ¶ 23,235.

Extensive negotiations in which the parties demonstrate hope and intent to reach an agreement are not sufficient in themselves to establish an implied-in-fact contract. ***Pacific Gas & Electric* CO. 7). *United States,*** 3 Cl. Ct. 329, 338-39 (1983). As Judge Rader noted in ***Eliel v. United States***, 18 Cl. Ct. 461, 467 (1989):

> Unlike an express contract, which "'speaks for itself and leaves no place for implications," plaintiffs may establish an implied-in-fact contract through inferences drawn from surrounding circumstances or the conduct of the parties. Although circumstantial, proof of an implied-in fact contract must nevertheless *unambiguously* show each element of an express contract. Mere statements of opinion or predictions do not establish that the parties created or

> intended to create a binding agreement.
> [Citations omitted] (Emphasis added)

Finally, we turn to Sabbia's argument that it has a pending Freedom of Information request which "ultimately could provide additional evidence supporting Appellant's claims." Appellant contends that the Board would be remiss in granting a motion for summary judgment against it prior to the review of that evidence." We note first, that no affidavit concerning this matter has been filed with the Board as contemplated by FRCP 56(f). Second, we observe that there has been extensive disclosure of the Government's records concerning this matter as required by Board Rule 4. There is no suggestion as to what evidence Appellant believes would be disclosed pursuant to its FOIA request which would bear on the issue of whether an implied-in-fact contract had been formed. This is insufficient to show the Board how the materials requested would enable Appellant to oppose the Government's summary judgment motion by establishing a genuine issue of material fact. As the Court stated of such requesters in ***Explanar, Inc. v. Marsh***, 11 F.3d 1284, 1292 (5th Cir. 1994):

> They need not know the precise content of the requested discovery, but they do need to give the district court some idea of how the sought-after discovery might reasonably be supposed to create a factual dispute. The mere fleeting mention of a matter without a description of its likely relevance will not suffice . . . .

Given the foregoing we find that the Government has established that there are no material facts in dispute and that it is entitled to judgment as a matter of law.

DECISION

For the forgoing reasons, The Motion for Reconsideration in VABCA-5557R is DENIED and the Government's Motion for Summary Judgment in VABCA-5857, is GRANTED thus denying the appeal of Sabbia Corporation.

DATE: June 30,1999

GUY H. McMICHAEL III
Chief Administrative Judge
Panel Chairman

We Concur:

JAMES K. ROBINSON

RICHARD W. KREMPASKY

Administrative Judge

Administrative Judge